**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**MUMBAI BENCH**
**C.P 593 & CP 1085 /I&BP/NCLT/MAH/2017**

**Under Section 9 of IBC, 2016**

In the matter of

Shobha Limited. .... Operational Creditor/Applicant
&
Sadashiv Lazman Jogalekar .. Operational Creditor/Applicant

vs.

Pancard Clubs Ltd .... Corporate Debtor/Respondent.

**Order delivered on 29.7.2017**

Coram: Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Operational Creditor: Mr. Shyam Kapadia, Ms. Faiza A. Dhanani and Ms. Pooja Kane, Advocates, i/b Dhruve Liladhar & Co.

For the Corporate Debtor: Mr. Pradeep Sancheti, Sr. Counsel, Mr. Roopesh R. Jaiswal, Advocate i/b Jaiswal and Associates, Dr. Nilesh V B Pawaskar.

*Per **B. S. V. Prakash Kumar, Member (Judicial)***

***COMMON ORDER***

***CP 593/2017***

It is a Company Petition filed u/s 9 of The Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor, namely Pan Card Clubs Ltd. on the ground since this Corporate Debtor defaulted in making payment of ₹6,25,42,007.04, this petitioner, namely M/s. Shobha Limited sought for initiation of Insolvency Resolution Process against this Corporate Debtor.

**Brief facts of the case:**

1. It is a case of the Operational Creditor that this Operational Creditor entered into an Agreement dated 1.11.2012 with the Corporate Debtor agreeing for RCC construction of additional three floors and extension of the existing floors and allied development work at its club at Baner known as Pan Card Club Ltd,Baner, for a contract price of ₹10,81,31,099. Thereafter, further Agreements have been entered into 18.12.2013, 18.3.2013, 30.4.2013, 19.6.2013, 23.9.2013 to do projects at Baner as well as in Durgapur West Bengal, since construction had been taken up, the Operational Creditor, in terms of the Agreement entered into, raised invoices on the Corporate Debtor from time to time as regards both the projects.

2. When the Corporate Debtor fails to make payments, as per Clause 6.2 of the General Conditions of the Contract (GCC) in respect to Pune project, the amount admissible will become due after 15th working day on the day of presentation of each bill by the contractor to the engineer. In respect to civil works in West Bengal project as per Clause 2 of the GCC, the payments for 70% of the total amount claimed in invoices will become due after 15 days of the presentation of the bill and for the balance 30% certified amount will become due after 10 days after submission of each individual invoice. As per Clause 2 of GCC, for the electrical and plumbing contract in West Bengal, 65% of payments will become due upon supply of materials, 20% will become due on successful installation at site and 10% will become due on successful commissioning and remaining 5% after handing over of the project. The invoices that have not been paid for the project in Pune are produced along with this Petition as Annexure 11A, the invoices, for which payment have not been done for the project in West Bengal, are produced collectively as Annexure 11B.

3. On 29.6.2016, this Corporate Debtor admitted the debt of ₹1,26,91,809 and 73,24,160 aggregating to ₹2,00,15,969 as regards work at Baner, Pune by endorsing the ledger extracts and furnishing the same to the Operational Creditor. Since payment has not been made, on 11.8.2016, the Operational Creditor issued notice u/s 434 of the

Companies Act, 1956 for the work done at Baner, Pune, on which, the Corporate Debtor on 29.6.2016 admitted and acknowledged the debt as ₹2,84,48,027. As regards work at Durgapur, West Bengal, the debtor endorsed the ledger extracts admitting the debt. When no payment was made as regards the second project also, the Operational Creditor, on 16.8.2016, issued another notice u/s 434 of the Companies Act, 1956 in respect of work at Durgapur, West Bengal.

4. Thereafter, on 25.1.2017, this Operational Creditor issued notice to this Corporate Debtor u/s 8 of the Insolvency & Bankruptcy Code, 2016, and it was received by the Debtor on 30.1.2017, wherein the amount claimed to be in default is ₹6,25,42,007.04 as on 19.1.2017. Since this Operational Creditor could not file a certificate along with earlier Company Petition, the Creditor withdrew the same and has filed this petition along with Certificate as required under the law.

5. To which the Corporate Debtor filed a long reply stating that this Debtor has issued a reply notice regarding the claim of the dispute amount saying rather the debtor is required to recover amount of ₹20crores and above from this Petitioner. Since the Petitioner could not provide the work as agreed between them, the Debtor initiated Arbitration Proceedings under Section 11(4) of the Arbitration & Conciliation Act, 1996 before Hon'ble High Court. Therefore, the debtor says there is an existence of dispute with regard to the invoices, hence denies the allegation of liability of ₹6,25,42,007.04. The Debtor Counsel submits that since the Corporate Debtor initiated Arbitration proceedings before filing this case and there being no prior section 8 notice to this second application, this Petition is liable to be dismissed on the ground that dispute in respect to this claim has been in existence even before filing this case.

6. Before going into the dispute in between this Creditor and Debtor, we must reveal an interesting thing happened before issuing notices u/s 434 of the Companies Act 1956 and before filing of this petition as well, which in fact has come to the notice of this Bench while hearing their respective submissions. On perusal of the documents filed along with this Company Petition, we have noticed Annexure-19 to the petition reflecting a public notice issued by SEBI revealing an order passed by SEBI, thereafter SAT upholding the SEBI order against the debtor Company for having collected huge

money from the public in the name of Holiday Plans. The debtor counsel after making all submissions on merits, submitted that this case is fit to pass orders under section 9 of the Code, he might be right, if this case is taken on standalone basis without looking into SEBI order dated 29.2.2016.

7. When we have gone through the order dated 29.2.2016 passed by SEBI, it appears that this company along with its group companies engaged in the business of owning, developing and operating hotels, clubs and resorts across India by offering different Holiday Plans, when it came to the notice of SEBI, it had passed an exparte interim order dated 31.7.2014 alleging that the Schemes launched and operated by the promoters of this Debtor Company are in the nature of Collective Investment Scheme (CIS) as per Section 11AA of the SEBI Act identifying that the debtor company and its directors were operating CISs without registration as required u/s 12 (1B) of the SEBI Act Regulation 3 of CIS Regulations. On appeal of the said Interim Order, Securities Appellate Tribunal (SAT) set aside the interim order directing SEBI to pass appropriate order on merits. Therefore, it is clear that SEBI passed the detailed order on 29.2.2016 rather indicting this Debtor Company stating that it had launched CIS without registering itself as Collective Investment Management Company (CIMC), thereby violated Regulation 3 of CIS Regulations.

8. Reading the order dated 29.2.2016, it appears that SEBI has come to a conclusion that it is like a Ponzi scheme. Ponzi schemes require an initial investment and promise well-above-average returns with no risk. The modus operandi in Ponzi scheme is the operator generates returns to investors through money paid by new investors rather than from the legitimate business activities, this can be either an individual or a corporations grab the attention of new investors by offering short term returns either abnormally high or unusually consistent returns and the Company that engaged in Ponzi scheme focuses all their energy in attracting new clients in making investments. Schemes perhaps vary from one to another, the bottom line in these kinds of schemes is, **(1)** high investment returns with little or no risk and overly consistent returns (promising to generate regular positive returns regardless of overall market conditions), (2) unregistered investments and **u**nlicensed sellers (not registered with Regulating Authorities (here it is SEBI)), (3) **s**ecretive and/or complex strategies (investments not

understandable easily, most of the times, investors cannot get information - Thumb Rule Approach), issues with paperwork (no clarity), difficulty in receiving payments (difficulty in cashing out investment, in some cases, investors are encouraged to roll over their investments for further high returns). Most of us, at one or other point of time in life come across of an experience, agents working vigorously on projects like this on high commission basis to get more victims in the market.

9. By going through this Scheme, SEBI held that this Scheme is squarely falling within Section 11AA (2) of the SEBI Act because the Company was operating investment plans through its Holiday Plans which it offers to the public. Holidays Plan Certificate confirmations are issued to individual investors to purchase Holiday Plans. It is being held that during the Financial Years 2002-03 to 2013-14, ***this debtor company raised a sum of ₹7034.67crores from a total of 51,55,516 investors in 20 schemes under various Holiday Plans,*** room nights are awarded by notice no.1 to investors to purchase Holiday plans and if the investors desire, the room nights can be rented out or surrendered to notice no.1. SEBI by seeing the balance sheet since 2001-02 to 2013-14, it has noticed, ***this company has a share capital of only ₹50,12,012***. It is observed from the above factual situation that the money pooled from the investors are utilised for acquiring assets including hotels and resorts with the money of the investors in response to the holiday plans offered by notice no.1. SEBI further held that the company pools the money from customers and utilises for schemes and other related business activities including for paying the **surrender value** to the customers who surrendered the room nights. We could not detail out everything that has been said in the order saying surrender value will not be as high as this debtor company offering, but fact of the matter is, if it is booking hotels or resorts for future utility, it, in fact, will be returned after discounting such as tax and other happenings. It is said by SEBI, not by us. ***That the Company has not disputed the surrender value being part of the Schemes saying that only 3-4 percent of its customers availed the room nights under the schemes and the majority of the customers surrender the room nights and entitled for the surrender value.*** It is being said that this company ***offers interest ranging from 5.37% to 14.87%, by this, it can definitely be said that the customers had made the contribution to the schemes of the company with a view to receiving benefits/profits/income from such schemes or arrangements. It is also said that this investment forming part of***

***scheme or arrangement is not identifiable and in fact investors do not have any day-to-day control over the management or operations or schemes of arrangements, indeed the company has control over the contributions and the schemes,*** **but whereas the company is not registered with SEBI to offer CIS and the activities/Scheme that are exempted under Section 11AA (3) of the SEBI Act.** Therefore, it is deemed as Collective Investment Schemes, not Holiday Schemes. SEBI has also referred an appeal decided by SAT in between ***Royal Twinkle Star Club Pvt Ltd &Ors Vs. SEBI, Rose Valley Hotels and Entertainment Ltd and Ors*** (Order dated June 25, 2015by Guwahati High Court) and a decision by the Hon'ble Supreme Court in the matter of ***PGF Ltd Vs. Union of India (MANU/SC/0247/2013)*** and also ***Alchemist Infra Realty Ltd and Ors Vs. SEBI (2013(2013 SCC online SAT 50)*** to say that the Schemes floated by this Corporate Debtor company are nothing but Collective Investment Schemes without any registration from SEBI, therefore, directed this Debtor company and its directors that

- they ***shall abstain from collecting any money*** from the investors or launch or carry out any CISs including the scheme which have been identified as a Collective Investment Schemes in the SEBI order,

- they ***shall wind up the existing Collective Investment Scheme*** and ***refund through Bank Demand Draft*** or Pay order the money collected by the company under the Scheme with returns which are due to its investors as per the terms of offers within a period of three months and to file acknowledgment of receipt of funds by the investors,

- they ***shall not alienate or dispose or sell any of the assets of the company*** except for the purpose of making refunds to its investors as directed above and

- they ***shall provide full inventory of all their assets*** and properties and details of all their bank accounts, demat accounts and holding of shares/securities, if held in physical form,

- they ***shall not access the securities market prohibiting this corporate debtor as well as its directors from buying, selling or otherwise dealing in securities market for a period of 4 years,***

- company **should wind up CIS** and all the monies mobilised through such schemes are refunded to its investors.

Finally, SEBI made a reference to the State Government/Local Police ***to register civil/criminal case against the company, its promoters, its directors and its managers/persons in charge of the business and scheme for offences of fraud cheating, criminal breach of trust and misappropriation of public funds, with a*** reference ***to Ministry of Corporate Affairs to initiate the process of winding up of the company.***

10. On passing such an order on 29.2.2016, when this company and its directors filed an appeal, above this, SAT on 12.5.2017 upheld the order passed by SEBI.

11. After going through the lengthy orders of SEBI and SAT, it is clear that though company has a little share capital and with a little credit facility, raised more than ₹7000crores from the investors through Holiday Plans akin to the Collective Investment Scheme falling within the ambit of Section 11AA of SEBI Act, when any Scheme is proposed falls within Section 11AA of SEBI Act, such company has to get registration from SEBI, but whereas this debtor Company without obtaining any registration from SEBI, continued this illegal business from 2001-02 to 2013-14 raising above ₹7000crores by illegally entering into agreements with the investors. On verification of the history, it is evident that public protested against this company in 2013-14 for recovery of their money. One must read the order of SEBI to understand the situation as to why section 238 overriding effect will not come into operation.

12. On seeing the present petition filed by the Operational Creditor, it seems there was no correspondence between this Creditor and the Corporate Debtor in between 2013 and 2016 except giving a notice in the year 2016 u/s 434 of the Companies Act, 1956. We don't say that Operational Creditor shall remain corresponding with the Corporate Debtor until this proceeding is initiated but if the present case is set against

the background of SEBI orders, then an inference could also be drawn that an effort has been made to take out the Company as well as the investment already frozen by SEBI from the claws of SEBI. Of course, we are not proceeding on the premise that since no correspondence from 2013 to 2016 between the petitioner and the corporate debtor, this petition is liable to be dismissed, it can't be so.

13. Now the point for determination is having SEBI order passed against the debtor company, whether this Petition u/s 9 can be admitted or not?

14. If we go through ***Section 238*** of the ***Insolvency & Bankruptcy Code***, 2016, we find non-obstante clause ***saying "the provisions of this Code shall have effect not withstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."***

15. The essentials in this section are as below:

1. The provisions of this Code will have overriding effect.

2. This overriding effect will be over other laws, not over the provisions of this Code (*notwithstanding anything in any other law* occurring in a section of the law with overriding provision cannot be construed to take away the effect of any provision of the Act in which that section appears)

3. Finally to apply this overriding effect, the provision of other law or any instrument governed by other law shall be inconsistent to this provision of this Code, then deductive reasoning can be, as long as other law or jurisdiction under other law is not inconsistent with this Code, section 238 cannot be invoked, because triggering point for application of this section is inconsistency of other law with this Code.

4. Another notable point is, it has not been said that ***"notwithstanding anything contained in any other law for the time being in force"*** therefore, this section 238 only speaks of the law inconsistent to the operation of this Code, not a blanket overriding effect.

Before going into the effect of non obstante clause u/s 238 against SEBI order, we believe it is pertinent to look into some of the findings given by constitutional courts to find out what effect non obstante clause will have upon other laws.

16. In ***Kishorebhai Khamanchand Goyal vs. State of Gujarat (2003) 12 SCC 274,*** the Supreme Court has laid down a test in order to determine inconsistency between two statutes:

> *" There is a presumption against repeal by implication. The reason is that the legislature while enacting a law is presumed to have complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. Besides when the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle of expressio unius personae vel rei est exclusion alterius. (The express intention of one person or thing is the exclusion of another.) The continuance of existing legislation, in the absence of an express provision of repeal being presumed, the burden to show that there has been repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, repeal will not be inferred. The necessary questions to be asked are:*
>
> ***(1) Whether there is direct conflict between the two provisions.***
>
> ***(2) Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law.***
>
> ***(3) Whether the two laws occupy the same field."***

17. In this regard, Justice V. R Krishna Iyer stated in ***LIC v. D J Bahadur (1981) 1 SCC 315*** as follows:

> ***"In determining whether a statute is a special or general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with fine points of law. In law, we have a cosmos of relativity not absolutes- so too in life".***

18. In the backdrop of these legal propositions, if you see the test given in ***Kishorebhai (Supra),*** there is no conflict between SEBI Act and Insolvency and Bankruptcy Code because SEBI deals with investor protection issues whereas Bankruptcy code deals with creditor issues. The jural relationship between the parties is also different. In SEBI, it is between the investors and the company, whereas in I&B Code, it is between the creditors and the debtor, therefore, we don't find any subject matter conflict in between the two statutes.

19. To emphasise this, we must say that overriding effect in a law is not meant for punching exercise that takes place in Boxing Ring to knock out each other and courts are not like referee in the Ring, the legislature, while bringing in a non-obstante clause, always knows existence of other laws, if at all it wants to have complete overriding effect, either repeal the other conflicting provision or at least expressly mention the provision upon which overriding effect is to be given, otherwise every time whenever this overriding effect is to apply, we have to go back to the test already laid down by Apex Court in ***Kishorebhai Khamanchand Goyal case supra.*** It is not a combative sport to give a treat to the people liking it – knock out is not the spirit underlying in any overriding provision; it comes into operation to do surgical attacks on the areas identified by the legislature in the objects of the enactment having overriding effect, here in this case – to maximise the value of asset and pay off the creditors, so that money again will come into circulation to do more good, it does not mean to knock off ***51,55,516*** gullible victims paid more than seven thousand crores of rupees believing the papers, not having any recognition under law.

20. If we closely observe Section 238 of the Code, it is evident that overriding effect u/s 238 will have over other laws, only when the other laws are inconsistent with the Insolvency and Bankruptcy Code, since SEBI Act has been dealing with investor protection issues, not with creditor and debtor issues, though Section 238 has exhaustive mode in respect of the subject matter of creditor and debtor issues, it has no overlapping or overriding effect over investor protection issues dealt with under SEBI Act. Therefore, though the legislature intendment is exhaustive, it can't be called as replacing the mandate under SEBI Act therefore, as to points (1-3) of ***Kishorebhai***

***(Supra)***, we don't find any inconsistency or conflict between the two statutes, since it has already been observed that these two laws are occupying different fields not the same field, there cannot be any occasion to presume that I & B Code has come into existence to replace SEBI jurisdiction. If for any reason, the jurisdiction under I&B Code is stretched out ignoring these fine points, it will truncate the jurisdiction conferred upon SEBI to deal with a subject altogether deferent from creditor and debtor issues. Moreover, even if it is in respect to Acts on the same subject matter, then also overriding effect will be limited to the extent of inconsistency, not beyond.

21. The statutory scheme in both the Acts is in complete variance with each other therefore, if this Code is taken to the places that do not belong to, it is like a bull in china shop, breaking the backs of all other statutes laid out to apply to the objects meant for. Looking at non-obstante clause in one enactment, we cannot play fast and loose, one cannot trample over other laws working for the objectives enunciated under the respective enactment, more specially, when law with non-obstante clause making baby steps, it is the duty of the court to apply it in such a way that it does not bulldoze the areas not of its concern. So, overriding effect of a provision of this code will rein in only when the operation of other provision is inconsistent with the operation of the provision of the Code.

22. A doubt may come to anybody as to why a thought to come to the mind of NCLT about the validity of the SEBI order when section 14 of the Code suspends all other pending proceedings – admission of petition declaring moratorium will suspend any suit or proceeding pending before any other court. If at all any such doubt comes, our answer is that such doubt has to come only when Adjudicating Authority comes to opinion that this case is fit to be admitted under either section 7, 9 or 10 of the Code, otherwise not, because moratorium is only a sequitur to admission, when admission order itself not given, where is the occasion to come to section 14? When Bench comes to determination that SEBI order holds field on different connotation, then, when this Bench is of the opinion that the subject matter before this Bench modifies the rights and obligations over an asset upon which already SEBI order in action, then to our wisdom, no order could be passed invoking section 238 jurisdictions to nullify SEBI order. Our point is, the case before SEBI is a case involving fraud by the debtor entering into

agreements not recognised by law and raised funds for an amount of more than ₹ 7000 crores, thereby this Code has no overriding effect over the order passed by SEBI, hence the jurisdiction under this Code will not come into operation to nullify the order passed by SEBI, henceforth, no order can be passed in this case in conflict to the order come into existence from SEBI to direct the interest of 51,55,516 victims.

23. ***A non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary*** **provisions.**

24. We believe it is apt to place the principles enunciated in Chapter 9 of 'Maxwell on the Interpretation of Statutes' are to the same effect:

*"A later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favored by the courts.....If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done..... If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later..... Wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so, is specially declared." (Emphasis supplied)*

25. Overriding effect of a provision of this code will rein in only when the operation of other provision is inconsistent with the operation of the provision of the Code. Under the Scheme of modern legislation, non-obstante clause has a contextual and limited application. The Honorable supreme court held in **Jik Industries Ltd. & Ors v. Amarlal V. Jumani & Anr (2012 (3) SCC 255**) as follows:

> *"48. The insertion of a non-obstante clause is a well known legislative device and in olden times it had the effect of* ***non obstante aliquo statuto in contrarium*** *(notwithstanding any statute to the contrary).*
>
> *49. Under the Stuart reign in England the Judges then sitting in Westminster Hall accepted that the statutes were overridden by the process but this device of judicial surrender did not last long. On the device of non-obstante clause, William Blackstone in his Commentaries on the Laws of England (Oxford: The Claredon Press, 1st Edn. 1765-1769) observed that the devise was "...effectually demolished by the Bill of Rights at the revolution, and abdicated Westminster Hall when James II abdicated the Kingdom" (See Bennion on Statutory Interpretation, 5th Edition, Section 48).*

*50. Under the Scheme of modern legislation, non-obstante clause has a contextual and limited application.*

*51. The impact of a `non-obstante clause' on the concerned act was considered by this Court in many cases and it was held that the same must be kept measured by the legislative policy and it has to be limited to the extent it is intended by the Parliament and not beyond that. [See ICICI Bank Ltd. vs. Sidco Leathers Ltd. and Ors. - (2006) 10 SCC 452 para 37 at page 466]"*

26. To make it complete to understand nuances in application of non-obstante clause, we have to see a finding given by Honorable Supreme Court in ***Harshad Govardhan Sondagar v. International Assets Reconstruction Co Ltd and others (2014) 6 SCC Page-1*** dealing with a situation saying possessory rights of lessee will remain protected regardless of the overriding effect under section 35 of SARFASI Act, the basic logic behind this ratio is, though the asset governed by section 65 –A of the Transfer of Property Act and SARFASI Act is one and the same, the operation of law being on different fields, it is being said harmonious construction is to be given, not otherwise, because by the time section 13 (2) of SARFASI notice was given asset is in the possession of the lessee by virtue of lease come into existence even before mortgage under SARFASI come into existence, not in the possession of lessor/borrower.

27. Though the ratio is not on section 238 of the Code, the point to be considered in the above case is the property may be common, but when operation of law is different on different rights and liabilities, then non-obstante clause will not work.

28. The asset is same, there it is the funds of the debtor company that has made SEBI pass an order, and here it is the creditor who wants an order on the same funds from a different angle.

29. In the case supra also, the asset is the same, but operation of law on different subject matters – one, in relation to lessor and lessee rights, - another creditor and debtor relation. So the point for consideration, though different laws applying on the same property (having value), when operation fields are different, jural relationships are different, then there can't be any inconsistency in operation of laws. In the given matter, before SEBI, it is in respect to illegal business running without Registration Certificate and cheating gullible victims, at the most it may be coined as relation in between investor and the company, and here it is on jural relationship in between creditor and debtor, which is entirely on different footing. Perhaps, for this reason only, Apex Court and trend in English Law also reflect that the use of non-obstante clause shall remain contextual.

30. In view of the reasons above, without going into the merits on the claim made by the petitioner, this petition is hereby dismissed without costs with liberty to the petitioner to proceed if any other remedy is available.

**CP 1085/2017**

31. This Petitioner, namely **Sadashiv Lazman Jogalekar,** filed this application u/s 9 against the same Corporate Debtor stating that this Operational Creditor invested ₹90,000, obtained a receipt for an amount of ₹90,000 invested in Corporate Debtor Company thereafter a surrender value payment certificate has been issued by the Corporate Debtor, for that amount not being paid, this Petitioner issued notice u/s 8 of the Insolvency & Bankruptcy Code, 2016 making a claim for an amount of ₹1,23,480 plus interest @ 18% from 30.6.2016 till 15.5.2017 for total amount of ₹1,43,853.

32. This Operational Creditor is none other than but one of the investors for whom SEBI has passed an order on 29.2.2016 against the Corporate Debtor for refund of the money invested by the victims (investors) including this investor by making an observation that the Corporate Debtor illegally collected funds from various investors like this investor who has filed this case before this Bench.

33. The reason for passing common order in these two company petitions is that most of the discussion made in the above Petition is also applicable in this case and the debtor in both the cases is common.

34. As to this Petitioner is concerned, first of all there is no jural relationship in between this Petitioner and the Corporate Debtor because the contract purported to have been entered between this Petitioner and the Corporate Debtor is not recognised by any law, indeed there is a prohibition under SEBI Act to collect funds as mentioned under Section 11AA of the SEBI Act unless and until license for CIS has been granted by the SEBI. When a legal Agreement is not in force, then a relationship in between them cannot be called as jural relationship unless it is recognised by Law, here it has to be recognised by SEBI. That has never been given recognition, indeed SEBI in a definite terms said the debtor company is prohibited from doing such business. Therefore, the relationship in between the Petitioner and the Corporate Debtor cannot even be called as a relationship in between the investor and the company. Even otherwise also,

assuming the relationship in between the company and the petitioner as jural relationship, then also it will be a relationship between the investor and the company, not a relation of creditor and the debtor.

35. The basic foundation attracting to either operational debt or financial debt is, that an enforceable agreement is an essential requisite; if it is not there, it can't be called as a debt.

36. For this limited purpose, let us examine what the definition for operational debt is?

*"Operational Debt" means a claim in respect of the provisions of the goods or services including employment or a debt in respect of the repayment of dues arising* ***under any law for time being in force*** *and payable to the Central Government, any state Government or any Local Authority.*

If you decipher this definition, the essentials are :-

1. That debt must be in relation to goods or services.
2. It must arise from under any law for time being in force, means it shall be recognised by a law.

37. Here in the present case, it is designed as collective investment scheme falling under Section 11AA of the SEBI Act but whereas to do such business, no permission has been taken from the SEBI. Therefore even if is to be taken as Operational Creditor, since there is no lawful agreement recognisable by SEBI creating jural relationship in between the petitioner and the company, this relationship between the petitioner and the corporate debtor can't be considered either as relation in between the investor and the company or as relation in between the creditor and debtor, whereby we hereby hold that this Petitioner is not entitled to file this Petition as Creditor before this Bench.

38. In respect to overriding effect of Section 238 of the Code, since it has been already discussed in the case above, the same is applicable to this case also.

39. In view of the reasons above mentioned, this Petition is also hereby dismissed without costs.

40. The Order is pronounced on 20.7.2017 and delivered on 29.7.2017.

41. The Registry is hereby directed to communicate this order to the Operational Creditor, Corporate Debtor and SEBI, within seven days from the date order is made available.

**V. NALLASENAPATHY**
Member (Technical)

**B.S.V. PRAKASH KUMAR**
Member (Judicial)