APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 371 OF 2023 & IA NO. 881 OF 2023
APPEAL NO. 372 OF 2023 & IA NO. 870 OF 2023
APPEAL NO. 373 OF 2023 & IA NO. 874 OF 2023
APPEAL NO. 374 OF 2023 & IA NO. 876 OF 2023
APPEAL NO. 379 OF 2023 & IA NO. 869 OF 2023

Dated: 9th November, 2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member (Electricity)

In the matter of:

APPEAL NO. 371 OF 2023 & IA NO. 881 OF 2023

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007. Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission**
Gujarat International Finance Tec-City,
Gujarat 382355. Respondent No.1

2. **Kaze Energy Limited**
IL & FS Financial Centre, Plot No. C-22,
G-Block, Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051. Respondent No.2

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Srishti Khindaria
Ashabari Basu Thakur

Counsel on record for the Respondent(s) : Parinay Deep Shah
Shikha Ohri
Alisha Gaba For Res2

APPEAL NO. 372 OF 2023 & IA NO. 870 OF 2023

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007. Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission**
   Gujarat International Finance Tec-City,
   Gujarat 382355. Respondent No.1

2. **Ratedi Wind Power Pvt. Ltd.**
   IL & FS Financial Centre, Plot No. C-22,
   G-Block, Bandra Kurla Complex,
   Bandra (E), Mumbai – 400 051. Respondent No.2

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Srishti Khindaria
Ashabari Basu Thakur

Counsel on record for the Respondent(s) : Parinay Deep Shah
Shikha Ohri
Alisha Gaba For Res2

APPEAL NO. 373 OF 2023 & IA NO. 874 OF 2023

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007. Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission**
   Gujarat International Finance Tec-City,
   Gujarat 382355. Respondent No.1

2. **Lalpur Energy Pvt. Ltd.**
   IL & FS Financial Centre, Plot No. C-22,
   G-Block, Bandra Kurla Complex,
   Bandra (E), Mumbai – 400 051. Respondent No.2

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Srishti Khindaria
Ashabari Basu Thakur

Counsel on record for the Respondent(s) : Parinay Deep Shah
Shikha Ohri
Alisha Gaba For Res2

APPEAL NO. 374 OF 2023 & IA NO. 876 OF 2023

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007. Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission**
Gujarat International Finance Tec-City,
Gujarat 382355. Respondent No.1

2. **Tadas Wind Energy Pvt. Ltd.**
IL & FS Financial Centre, Plot No. C-22,
G-Block, Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051. Respondent No.2

Counsel on record for the Appellant(s) : Anand K. Ganesan
Swapna Seshadri
Srishti Khindaria
Ashabari Basu Thakur

Counsel on record for the Respondent(s) : Parinay Deep Shah
Shikha Ohri
Alisha Gaba For Res2

APPEAL NO. 379 OF 2023 & IA NO. 869 OF 2023

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course Circle, Vadodara-390007. Appellant(s)

Versus

1. **Gujarat Electricity Regulatory Commission**

Gujarat International Finance Tec-City,
Gujarat 382355. Respondent No.1

2. **Khandke Wind Energy Pvt. Ltd.**
IL & FS Financial Centre, Plot No. C-22,
G-Block, Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051. Respondent No.2

Counsel on record for the Appellant(s) :	Anand K. Ganesan Swapna Seshadri Srishti Khindaria Ashabari Basu Thakur
Counsel on record for the Respondent(s) :	Parinay Deep Shah Shikha Ohri Alisha Gaba For Res2

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. Gujarat Urja Vikas Nigam Limited ("GUVNL" for short) is in appeal before us aggrieved by the order passed by the first Respondent- Gujarat Electricity Regulatory Commission ("the Commission" for short) in Petition Nos. 1797 of 2019, 1795 of 2019, 1796 of 2019, 1798 of 2019 and 1799 of 2019 filed before it by the second Respondent in these appeals. In the said petitions, the 2nd Respondents herein sought a direction for payment by the appellant, of the invoices raised by them towards supply of electricity in terms of the respective PPAs. A common order was passed by the Commission on 17.01.2023.

2. Learned Senior Counsel on both sides agree that, for the purpose of disposal of all these five appeals, it would suffice to note the facts which arise for consideration in Appeal No. 371 of 2023 which is preferred against the order passed by the Commission in Petition No. 1797 of 2019. This petition (ie Petition No. 1797 of 2019 along with IA No. 2 of 2019)

was dismissed earlier, by the order of the Commission dated 08.07.2019, holding that the Petitioner-Companies (2nd Respondent in all these appeals) were among the companies in the IL&FS group which was the subject matter of proceedings under the Insolvency and Bankruptcy Code, 2016; Company Appeal No. 346 and 347 of 2018 was pending before the NCLAT and was subject to resolution proceedings; GUVNL and its administered Employees PF Trust were also among the parties under the recovery proceedings; and hence, under the provisions of the IBC, it was not proper for the Commission to entertain the petition under Section 86(1)(f) of the Electricity Act, 2003 at this stage. The Commission decided that, pending proceedings before the NCLAT, the present petition was not admissible and maintainable, and therefore the interim relief sought for was also not maintainable at this stage. The Petition and the IA were rejected and disposed of accordingly.

3. Aggrieved thereby, the second Respondent herein filed Appeal No. 50 of 2020 before this Tribunal. In its order, in Appeal No. 50 of 2020 dated 05.04.2022, this Tribunal recorded that a PPA had been entered into in the year 2017 for supply of power for a period of 25 years; the tariff payable was Rs. 4.19 per unit in terms of the generic tariff order; the Petitioner (2nd Respondent herein) had received due payment from the Appellant GUVNL till the month preceding November, 2018; payment thereafter had been stopped; in the meanwhile, there were proceedings before the NCLT and NCLAT concerning Infrastructure Leasing and Financing Services Limited; one of the subsidiaries of IL&FS was ILFS Wind Energy which, in turn, held 51% shares in the Petitioner WPDs (ie the 2nd Respondent in these appeals); proceedings had been taken out against IL&FS before the NCLT under Section 241 and 242 of the Companies Act,2013 corresponding to Sections 397 and 398 of the Companies Act, 1956; a process, similar to the resolution process under

the Insolvency and Bankruptcy Code, was undertaken during the said proceedings; GUVNL was the administrator of the GEB Contributory Provident Fund, and had invested approximately Rupees 180 Crores in the debentures of three companies ie (i) Infrastructure Leasing and Financial Services Limited, (ii) IL&FS Transportation Network Limited and (iii) IL&FS Financial Services Limited during 2010-2017; GUVNL was claiming set off of these amounts from the amounts payable by it to the WPDs; subsequent to decision of the Commission, the SPVs had approached the NCLAT for a direction to GUVNL to make payment of dues, and to implead them for such purposes; thereafter, pursuant to a commercial arrangement between IL&FS Wind Energy with another company named ORIX, the latter had bought the entire shareholding of ILFS Wind Energy in the 2nd Respondent herein, making the said Companies wholly owned subsidiaries of ORIX, Corporation, Japan.

4. This Tribunal, thereafter, recorded the contents of the order of the NCLAT, in IA Nos. 2673, 2674, 2675, 2676 and 2677 dated 23.10.2019, whereby the request of the WPDs, to be permitted to withdraw the application to enable them to move the appropriate forum, was allowed, and the IAs disposed of with liberty to them to move before the appropriate forum. This Tribunal, thereafter, observed that there was a material change in the circumstances by way of subsequent developments necessitating revisit of the petition which was disposed of by order dated 08.07.2019; the WPDs were no longer under the control of any company connected with IL&FS; and, in these circumstances, the question of GUVNL claiming a set off against the dues of the WPDs would be required to be looked at afresh. This Tribunal deemed it appropriate to set aside the impugned order, and remit the case to GERC for a fresh decision making it clear that they had not expressed any opinion in the matter. Thereafter, by the order impugned in these appeals dated 17.01.2023, the

GERC held that GUVNL was liable to make payment towards all invoices, raised in all the petitions, along with late payment surcharge as per the terms of the PPA, and all the petitions were allowed and disposed of. The GERC made it clear that they had dealt with and decided only the limited issue of non-payment of invoices, for supply of power based on the PPAs between the parties, without touching or deciding the rights and liabilities relating to dues of GUVNL ie GEB PF Fund; GUVNL could pursue its claim before the competent forum regarding its dues ie GEB PF money; and if GUVNL brought any such order, by way of equitable set off or otherwise, the same may be effected in accordance with law. Aggrieved thereby, the present batch of appeals. Before taking note of and examining the rival submissions, urged by Learned Senior Counsel on either side, it is useful to take note of the case put forth by the Appellant and the second Respondent (Petitioner before the Commission) herein.

I. CASE OF THE APPELLANT:

5. Appeal No. 371 of 2023 has been filed by Gujarat Urja Vikas Nigam Ltd against the Order passed by the Gujarat Electricity Regulatory Commission, in Petition No. 1797 of 2019 dated 17.01.2023, directing them to pay the amounts to the 2nd Respondent, which were deducted pursuant to a set-off effected by them from the amounts due to the 2nd Respondent under the Power Purchase Agreement ("**PPA**") dated 18.01.2017. The appellant claims that the set off was towards the amounts due from the 2nd Respondent's group, namely the IL&FS group, which was involved in proceedings before the National Company Law Tribunal (NCLT), wherein the entire ILFS group of companies including Respondent No. 2 (as it then was) were considered together as if they were one entity; and the set-off claimed and effected in such proceedings

has been set aside by the Impugned Order, without the State Commission deciding the issue, or even being entitled to decide the issue.

6. The Appellant, a company under the Companies Act, 2013, is a bulk-purchaser of electricity from generating companies for supply to distribution licensees, and for maintaining retail supply of electricity to the consumers, in the State of Gujarat. It is also the holding company of all the distribution licensees in the State of Gujarat. The 2nd Respondent, a company under the Companies Act, 2013, is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003, having established a 48.3 MW wind based generating unit at Jamnagar District in the State of Gujarat. The Appellant and the 2nd Respondent entered into PPA dated 18.01.2017 under which the Appellant agreed to procure the entire capacity from the 48.3 MW generating station. This PPA was amended vide Supplemental PPAs dated 12.07.2017 and 14.09.2017. According to the appellant, the 2nd Respondent was a subsidiary of Infrastructure Leasing and Financial Services Limited (IL & FS), which is one of the principal companies of the IL & FS Group. The IL & FS Group Companies comprised of about 348 companies including the 2nd Respondent herein.

7. The appellant submits that, in the year 2018, proceedings were initiated against IL&FS and its group companies under the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013, because of their inability to meet and service their financial obligations; the NCLT, by its order dated 12.10.2018, refused to grant any moratorium against IL&FS and its group; thereafter, by order dated 15.10.2018 in Company Appeal No. 346 of 2018, the National Company Law Appellate Tribunal (NCLAT) considering all IL&FS and its 348 group companies including Respondent No. 2, and taking into consideration the nature of the case, larger public

interest, economy of the nation and interest of the Company and 348 group companies, granted stay of, among others, (a) institution or continuation of suits or any other proceedings against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and (b) banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS' and its 348 group companies; by order dated 11.02.2019, while placing the group companies in separate lists and appointing a retired judge of the Supreme Court to supervise operation of the resolution process of the IL&FS group companies, the NCLAT expressed its intention to hear the 'Union of India' and the Board of Management of the 'IL&FS' as to how they intended to resolve all the entities particularly "Amber Group Entities" and "Red Group Entities", and they should give a timeframe for such resolution; thereafter a public announcement was issued on 22.05.2019 seeking claims by various persons against the group companies of IL&FS, including Respondent No. 2; and, by virtue of grouping all the 348 companies of the IL&FS group together, the rights and beneficial interest of Respondent No. 2 as a part of the IL&FS group also came to be the subject matter of proceedings before the NCLT and NCLAT, which included the matter of realization of sale of interest which the IL&FS principal company held in Respondent No. 2.

8. It is further stated that the Appellant administers the Gujarat Electricity Board PF Fund and is liable to contribute amount to such fund as may be required to ensure due payment and discharge of all the liabilities of the said fund to employees of the Gujarat Utility including those who had retired from the services of the Gujarat Electricity Utilities;

under the Employees Provident Fund and Miscellaneous Provisions Act, 1952, no exempted PF Trust can book any expenditure or loss; as funding is required to be done by them, the Appellant arranged to deposit the trust fund as a financial creditor with the principal companies in the IL & FS Group, namely, Infrastructure Leading and Financial Services Limited, IL & FS Transportation Network India Limited and IL & FS Financial Services Limited; and, as on 31.05.2019, the following amounts were due and outstanding from the above three companies:

Infrastructure Leasing and Financial Services Limited	Rs. 37,92,45,753/-
IL & FS Transportation Network Limited	Rs. 77,27,47216/-
IL & FS Financial Services Limited	Rs. 66,02,95,117/-

9. It is submitted that a public announcement was issued on 22.05.2019 seeking claims to be filed, by the creditors of the IL&FS Group, with the Claims Management Advisor appointed in respect of entities in the IL&FS Group which included Respondent No. 2; in response thereto, the Appellant, *vide* letter dated 29.05.2019, sent Form CA in the prescribed format stating that the dues payable by the IL & FS Group was required to be equitably set-off against the amounts payable under the PPA to the companies forming part of the IL&FS group, which included Respondent No. 2; the entire amount recovered by GUVNL, by way of set-off, has been transferred by GUVNL to the PF Trust, and it has not retained any money with itself; the PF Trust had also, while filing its claim with the Claims Management Advisor, stated that the entire amounts had been set off by the Appellant; in the meanwhile, Respondent No. 2 filed Petition No. 1799 of 2019 before the State Commission claiming amounts payable by the Appellant under the PPA entered into between the parties;

in reply, the Appellant stated that the issue related to set-off of the amounts due and payable by the IL&FS group, as against the amounts payable by the Appellant to Respondent No. 2; the entire group of 348 companies had been grouped together in the proceedings before the NCLT and NCLAT, and therefore the Appellant was entitled to effect set off of mutual claims against the group; and, by Order dated 08.07.2019, the State Commission dismissed the petition as not maintainable.

10. The appellant states that, pursuant to the order dated 08.07.2019, Respondent No. 2 filed IA No. 2675 of 2019 before the NCLAT seeking impleadment of the Appellant in the said proceedings, and also for directions for payment of the amounts due from the Appellant on the ground that the set-off claimed was erroneous. The 2nd Respondent sought a direction to restrain the appellant from setting off any of the dues payable to it by IL&Fs or any of its group companies, against the amount payable by them to the 2nd Respondent; the said application was contested by the Appellant, on the ground that the set off was effected against the dues payable by the IL&FS group, which were grouped together by the NCLAT; Respondent No. 2 had consciously elected a course of action pursuant to the order passed by the State Commission, and had chosen to pursue its remedy under the provisions of the Companies Act and the IBC, as the issue involved was whether the equitable set off claimed and effected by the Appellant was correct or not; the 2nd Respondent thereafter chose to withdraw its application from the NCLAT contending that, in view of the subsequent development of the Applicant(s) having ceased to be subsidiaries of 'Infrastructure Leasing and Financial Services Ltd.', they be allowed to withdraw the applications to enable them to move the appropriate forum; and the NCLT permitted the said applications to be withdrawn by order dated 23.10.2019, and the

IAs were disposed of with liberty to the Appellant to move before the appropriate forum.

11. The Appellant states that the application was withdrawn on account of the fact that Respondent No. 2 was no longer part of the IL&FS Group; as a consequence, it was thereafter not open to them to re-open issues relating to the period when the 2nd Respondent was part of the IL&FS group, and to contest the equitable set-off that was effected earlier; in October, 2019, the controlling shareholding of the 2nd Respondent was purchased by ORIX, Japan by matching the bids that were invited for purchase of the shares; the said purchase of controlling interest in the 2nd Respondent was with the full knowledge of the financiers of Respondent No. 2, and also the set off that had been undertaken by GUVNL when Respondent No. 2 was part of the IL & FS group; the said purchase of shares, in Respondent No. 2, was pursuant to a public process, wherein ORIX chose to exercise its right to match the highest bidder and procure 100% shareholding in the 2nd Respondent Company; the entire shareholding of Respondent No. 2 was subsequently sold to another group by ORIX; Respondent No. 2 challenged the Order of the State Commission dated 08.07.2019 in Appeal No. 50 of 2020 filed on 09.12.2019, wherein they contended that, since the 2nd Respondent had now ceased to be a part of the IL&FS Group, the issue may be reconsidered by the State Commission on account of the changed circumstances; this Tribunal, by Order dated 05.04.2022, remanded the matter to the State Commission for its consideration in view of the subsequent events, and clarified that it was not expressing any opinion on the merits of the case. Thereafter, the Impugned Order was passed by the State Commission allowing the petition, and directing the Appellant to pay the amounts claimed by the 2nd Respondent, holding that the issue of set

off could not be gone into by the Commission, and the issue had to be pursued by the Appellant before the competent forum.

12. The Appellant submits that the State Commission grossly erred in directing payment of the amounts; having accepted that the set off claimed could not be decided by them; the State Commission should have deferred the entire dispute, including enforcement of the claim by the 2nd Respondent, on the ground that the same cannot be considered in the petition filed under the Electricity Act; the dispute raised by the 2nd Respondent before the competent forum, against the set-off effected by the appellant, was withdrawn; and, in the circumstances, the question of directions being issued against the Appellant, overriding the same does not arise.

13. According to the appellant, the State Commission failed to consider the issue of its jurisdiction to hear the dispute of equitable set-off; they failed to appreciate that the issue was not of payment of monthly invoices by the Appellant, and the dispute was whether payment was made by way of equitable set off between the parties; the said dispute, arising out of the dues payable by the IL&FS group and the issue of set off, was required to be decided; the State Commission, having held that it cannot decide the issue of equitable set off, erroneously directed the appellant to make payment; it failed to appreciate that the 2nd Respondent formed part of the group entities of IL & FS group, and was taken to be part of the group in the proceedings before the NCLT and NCLAT; when the mutual claims of the parties were invited, the Appellant had specifically stated that the claims payable by the IL&FS group were to be set off against the dues payable under the PPA with the 2nd Respondent; any dispute, on this set off effected, could have only been adjudicated in the proceedings before the NCLT/NCLAT; as they had filed an application which was thereafter

withdrawn, it was not open to the 2nd Respondent to raise the issue in proceedings under the Electricity Act; as the set off was effected, any dispute relating thereto was required to be raised by the 2nd Respondent before the court of competent jurisdiction; as set off is allowed to be raised as a defence in a suit for monetary claim, it has to be necessarily decided before any direction for payment can be issued; despite being conscious that it lacked jurisdiction to consider the validity of the claim of set off, the State Commission erred in directing payment by the Appellant, side-stepping their defence, and without deciding the claim of the Respondent No. 2 that the set off was invalid; this prejudices the Appellant in being required to pay to Respondent No 2, but not being able to maintain the legitimate claim of equitable set off; the set off was in relation to the dues payable by the IL&FS group and was effected during the period when Respondent No 2 was a part of the IL&FS Group; the said issue does not arise under the PPA, and was not the subject matter of adjudication by the State Commission; the entire IL & FS group were being considered together by lifting their corporate veil; as NCLT and NCLAT had considered Respondent No.2 and a number of other companies as being part of the IL & FS group, all logical consequences of being treated as one company was to apply; consequently, the Appellant had the right to seek set-off, legal as well as equitable, as a necessary implication; as the same group owed substantial amounts to the GEB Trust funded by the Appellant, there cannot be any claim against the Appellant for monies due to Respondent No. 2, more so when the whole group was being treated together by lifting their corporate veil by the NCLT/NCLAT; the State Commission failed to appreciate that public interest requires the amounts payable by the IL&FS group and the amounts payable to the said group to be set off; and the liberty granted, to approach the appropriate authority at the time of withdrawing the impleading application, did not vest

jurisdiction in the State Commission to adjudicate the issues that arose in the resolution process including whether the set-off effected was valid or not.

14. The Appellant states that there was no dispute over the amounts payable under the PPA or on the invoices raised by Respondent No. 2, and the issue relates only to discharge of the said amount by the Appellant by effecting set off over the amount receivable from the IL&FS Group; the subsequent development of Respondent No. 2, ceasing to be a part of the IL & FS Group, is proof that this issue cannot be raised by Respondent No. 2; the set off of relates to the amounts payable to Respondent No.2 (when it was a part of the IL&FS Group) as against the amounts receivable from the IL&FS Group, and does not arise once Respondent No. 2 ceases to be a part of the IL&FS Group; takeover of Respondent No. 2 by ORIX in October, 2019, was with the full knowledge of their financiers, as also the set off that had been undertaken by the Appellant when Respondent No. 2 was part of the IL&FS group; no set off was undertaken by the Appellant for the amounts payable to Respondent No. 2, for the electricity generated on and from 15.10.2019, when Respondent No. 2 ceased to be a part of the IL&FS group; the NCLT & NCLAT have already lifted the corporate veil, and have held the 348 group companies to be a single entity; and the issue of whether the corporate veil has been lifted, and whether the set-off effected with the IL&FS group is valid etc are issues to be decided by NCLT and not the State Commission.

II. CASE OF THE 2ND RESPONDENT:

15. It is stated, on behalf of the 2nd Respondent., that Petitions were filed before the State Commission to challenge the action of the appellant in withholding its legitimate payment toward the invoices raised for the sale and supply of electricity generated from their Wind Energy Power

Plant; by the Impugned Order, the State Commission directed the appellant to pay the amounts claimed by them under invoices for supply of power based on the PPAs between the parties; the Respondents are generating companies in terms of Section 2(28) of the Electricity Act, 2003, and have set up Wind Energy based power plants; the functions of bulk purchase and bulk supply of electricity (namely trading in electricity) are now vested in the appellant which has the rights, obligations and benefits of the erstwhile Board under the Power Purchase Agreements entered into between the Board and the Generating Companies, including the 2nd Respondent; the 2nd Respondent executed a Power Purchase Agreement dated 18.01.2017 (hereinafter referred to as "PPA") with the appellant; the PPA is to continue to be in force for a period of 25 years from the Commercial Operation Date; the appellant failed to make payment of invoices issued by the 2nd Respondent since November 2018 despite repeated requests; since the appellant held back payments from November 2018 onwards, Bank of Baroda, vide letter dated 13.03.2019, requested them to release payments as regular cash flow is necessary for the Company's ability to meet its debt obligation like interest and instalments, O&M expenses, statutory dues etc, and paucity of funds would lead the 2nd Respondent to default in payment, resulting in deteriorating assets quality and hampering the project as a whole.

16. The 2nd Respondent submits that, aggrieved by the appellant's actions, they filed Petitions in 2019 before the State Commission under Section 86(1)(f) of the Electricity Act seeking directions against the appellant to release payment against their outstanding invoices. By order dated 08.07.2019, the State Commission dismissed the Petition on the ground that it was not maintainable; in the light of this Order, the 2nd Respondent approached the NCLAT, by way of Company Appeals, requesting that the appellant be impleaded to the said Appeal so that their

claim could be agitated before the NCLAT; subsequently, on 26.09.2019, the NCLAT allowed the 2nd Respondent's application to implead the appellant as part of the proceedings before it, and further directed the appellant to return any properties of the Respondent that it had appropriated; the sale of IWEL's shareholding of the 2nd Respondent to ORIX was completed on 15.10.2019 when, after obtaining approval from the NCLT on 28.08.2019 for this sale, the purchase consideration for IWEL's share was paid to it by ORIX; thereafter, the 2nd Respondent was no longer part of the IL&FS Group; accordingly, the 2nd Respondent withdrew its intervention application before the NCLAT on 23.10.2019, which withdrawal was allowed granting them liberty to approach the relevant forum for agitating its claim against the appellant; the Respondent challenged the Order dated 08.07.2019 of the State Commission before this Tribunal by way of an Appeal contending that it had ceased to be a part of the IL&FS Group, and the issue may be reconsidered by the State Commission; by Order dated 05.04.2022, this Tribunal remanded the matter to the State Commission for consideration in view of the subsequent events; an additional affidavit was filed by the 2nd Respondent before the Commission to bring on record the subsequent developments, which constituted a material change in circumstances that had occurred after the Order dated 08.07.2019 was passed by the State Commission; they contended that, in November 2018, the 2nd Respondent had two shareholders - ORIX Corporation Limited and IWEL, holding equity in a ratio of 49:51; although IWEL was one of the indirectly owned subsidiaries of IL&FS, it did not have any direct relationship with the group Companies of IL&FS; in March 2018 and November 2018, ORIX and IWEL entered into a Memorandum of Understanding (MoU) to explore sale of the 2nd Respondent; ORIX entered into said MoUs for the purchase of the balance shareholding of IWEL; the said MoUs were entered into between the parties long before

the dues were approved, and payment of the Respondent was withheld by the appellant; and, pursuant to the said arrangement, ORIX and IWEL agreed on the commercial deals of the said transaction and definitive documents for this sale were entered into on 07.08.2019.

17. The Respondent states that, during the pendency of the Petition before the State Commission, the NCLAT passed order dated 11.02.2019 holding that the 2nd Respondent would fall under the 'Green Entities' category, and they were permitted to service their debt obligations as per the scheduled payment within the 'Resolution Framework' under the supervision of Justice (Retd.) D. K. Jain; in the meanwhile, the Petition filed by the 2nd Respondent, along with the Interlocutory Application, was heard and dismissed by the State Commission, vide Order dated 08.07.2019, holding that it was not admissible and maintainable in view of the pending proceedings before the NCLAT; the Answering 2nd Respondent's Special Purpose Vehicle approached the NCLAT and filed an application seeking intervention in the ongoing proceedings to implead the appellant in those proceedings, and to direct them to make payment of its invoices; and the NCLAT allowed the application, for impleading the appellant in the proceedings, vide order dated 26.09.2019.

18. The 2nd Respondent states that, on an application filed by IL&FS on 09.08.2019, the NCLT passed order dated 28.08.2019 approving sale of 51% of the share capital in the 2nd Respondent SPVs held by IWEL to ORIX, after observing that the ORIX had fulfilled the conditions necessary for purchasing IWEL Shares; the purchase consideration was transferred by ORIX on 15.10.2019; as a result, the Respondent SPV ceased to be a part of the IF&LS Group, and became 100% subsidiaries of ORIX Corporation; from 15.10.2019 onwards, there was no holding of IL&FS in the 2nd Respondent SPVs; consequently, as they ceased to be subjected to the

jurisdiction of the NCLAT, the 2nd Respondents withdrew their applications pending before the NCLAT which, by Order dated 23.10.2019, disposed of the Applications as withdrawn to enable the Applicants to move the appropriate forum; the 2nd Respondent filed an Appeal before this Tribunal, against the order dated 08.07.2019 of the State Commission, placing on record facts relating to the sale of IL&FS shareholding to ORIX etc; this Tribunal, vide Judgment dated 05.04.2022, observing that there were material changes in the circumstances, set aside the impugned order dated 08.07.2019 passed by the State Commission, and remitted the case back for a fresh decision; during the pendency of the Appeal, in the year 2021, 100% shareholding in the 2nd Respondent SPV, amongst others, were transferred to the Greenko group of companies by ORIX for valuable consideration; after considering the submissions and arguments of the both parties, the State Commission allowed the Petition and directed the appellant to pay the amounts claimed by the Respondent under invoices for the supply of power based on the PPAs between the parties.

19. The 2nd Respondent submits that dues can be equitably set off only when the parties in question are the same, and the two transactions are intrinsically connected to each other; an unconnected claim cannot be equitably set off as held by the Supreme Court in ***Union of India v. Karamchand Thapar (2004) 3 SCC 503***; ***Raja Bhupendra Narain Singha Bahadur Vs Maharaj Bahadur Singh & Ors.*** **(1952) SCR 782: AIR 1952 SC 201**; and ***Jitendra Kumar Khan & Ors. Vs. Peerless General Finance and investment Company Limited and others*** **(2013) 8 SCC 769**.

III. CONTENTS OF THE REJOINDER FILED ON BEHALF OF THE APPELLANT

20. According to the Appellant, the reply filed by the 2nd Respondent proceeds on an erroneous premise; the issue that arises is whether the State Commission was justified in directing payment of amounts by way of money transfer to the 2nd Respondent, towards alleged outstanding claim for the power purchase cost when such amounts stand adjusted against the claim of the Appellant for amounts due and payable by the IL&FS group in accordance with law, and cannot be said to be outstanding any longer; the NCLAT had consciously proceeded on the basis that the jurisdiction, under Sections 241 and 242 of the Companies Act, 2013, is much wider than the powers under the Insolvency and Bankruptcy Code, 2016; the entire group companies of IL&FS, comprising of 348 companies including the 2nd Respondent, were to be considered together to maximum monetization and settlement; NCLAT thereby lifted the corporate veil of the limited companies and considered the matter of obligations together; and therefore adopted commonly a resolution process for all the 348 group companies; the issue of mutual set off arose pursuant to the proceedings initiated before the National Company Law Tribunal ("**NCLT**") and the National Company Law Appellate Tribunal ("**NCLAT**") under Sections 241, 242 and other applicable provisions of the Companies Act, 2013 in relation to resolution and re-organisation of the affairs of the entire IL&FS group, of which the 2nd Respondent was a part; the contention that the 2nd Respondent is a legal entity separate from the company which was to pay the dues is misconceived; the corporate veil was lifted in the proceedings before the NCLAT by treating all companies forming part of the IL&FS group together, and a moratorium was declared; in such proceedings, when claims were invited, the claim from IL&FS group companies were made wherein it was specifically stated that the amounts due and payable by the IL&FS group was being set off against the amounts payable under the Power Purchase Agreement ("**PPA**") for the

electricity supplied by the wind generators including the 2nd Respondent; the issue that arose was in relation to the mutual claims and counter-claims of the parties in the proceedings under the Companies Act before the NCLT and NCLAT; there was no dispute on the amounts required to be paid by the IL&FS group to the appellant/GEB Trust, nor was there any dispute on the amounts receivable by the 2nd Respondent from the appellant under the PPA; the only issue was the mutual set off of cross claims; the NCLAT proceeded on the basis that, pending the Resolution process, it could pass interim orders, treating the 348 IL&FS group companies together, as is evident from the order dated 15.10.2018 and 11.02.2019; the proceedings before NCLAT was a Resolution process to avoid winding up; the basis for exercise of power by NCLAT, under Section 242 of the Companies Act, 2013, was that IL&FS group companies were otherwise liable to be wound up, but such winding up would unfairly prejudice the members; the necessary consequence of NCLAT, restraining enforcement of rights by persons dealing with the IL&FS group companies, such as the appellant, was that such persons having cross claims were entitled to adjust the mutual claims against each other and the net amount, if any after such adjustment, was to be considered the money due and payable by one to the other; this is consistent with the principles contained in the Provincial Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1909, and is duly adopted in the proceedings including under the Resolution Process under the Insolvency and Bankruptcy Code, 2016; fully aware of this position, the 2nd Respondent had filed an application before the NCLAT seeking directions for payment by the Appellant, and a declaration that there ought not to be any set off effected by the Appellant; however, the said application was withdrawn by the 2nd Respondent from the NCLAT; the apparent reason given was that they were no longer part of the IL&FS

group; this reason for withdrawal of the application fully supports the case of the Appellant, as the set off was effected only till such time the 2nd Respondent was a part of the IL&FS group; for the electricity generated from the date when the new purchaser took over the 2nd Respondent, by purchase of shareholding, no set off has been effected by the Appellant; much before withdrawal of the Application, the appellant had filed its adjustments claims with NCLAT on 29.05.2019; in accordance with the above, when public announcement, seeking claims of persons against the IL&FS group companies were invited on 22.05.02019, the appellant on 29.05.2019, lodged its claims to set off its claims of payment of dues of the 2nd Respondent; the same was again re-iterated and placed before the Gujarat Electricity Regulatory Commission when the 2nd Respondent filed Petition No. 1797 of 2019 seeking payment of the alleged outstanding power purchase dues; despite the stand taken by the appellant, on mutual claims settled in the manner mentioned above, the Petition filed by the 2nd Respondent before NCLAT was withdrawn and no further claim subsisted thereafter in regard to the matter; after acquisition of shares, in the 2nd Respondent, by the present shareholders, the claim for power purchase dues can only relate to the period after acquisition; and the appellant has duly paid and discharged all such dues after the 2nd Respondent ceased to be a group company of IL&FS.

21. It is stated, on behalf of the Appellant, that the very basis for exercise of powers under Sections 241, 242 etc of the Companies Act, 2013 are for the resolution process for the company/group of companies, which would otherwise be required to be wound up, but such winding up would unfairly prejudice the members and stakeholders; the scope and extent of powers under Sections 241, 242 and other applicable provisions of the Companies Act, 2013 are wider than the powers available under

the Insolvency and Bankruptcy Code ("**IBC**"); the necessary consequences, of any such resolution process proceedings initiated under the IBC or under the Companies Act, including Section 241 or 242 or winding up provisions, is adjusting of mutual claims of the company against a person and the said person's claims against the company, and to treat the net amount after such adjustment to be the money due or payable; this is the principle contained in Section 46 of the Provincial Insolvency Act, 1920, and Section 47 of Presidency Towns Insolvency Act, 1909; and these principles of mutual claims being set off is provided under Section 36(4)(e) of the IBC read with Regulation 26 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

22. It is stated, on behalf of the Appellant, that, in **Swiss Ribbons Pvt Limited & Another -v- UOI & Ors, (2019) 4 SCC 17,** the Supreme Court referred to such adjustments, even in the resolution process, although it may be rare, and held that, in so far as set-off and counter-claim is concerned, a set-off of amounts due from financial creditors is a rarity; usually, financial debts point only in one way—amounts lent have to be repaid; however, it is not as if a legitimate set-off is not to be considered at all; and such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Section 60; the purpose and objective of mutual claims being adjusted, and net amount being taken under the above provision, is clear; it cannot be that, in the liquidation proceedings or resolution, a person who owes money to the company is required to pay the amount to the company but, if he has an ascertained and admitted amount due from the company, the same should be subjected to distribution in order of priority; such a

consideration will be arbitrary, patently erroneous and capricious; cancellation/adjustment of mutual obligations, and consideration of the net amount under such resolution process or liquidation process, are wider than the concept of legal or equitable set off in an ordinary civil proceedings, either under Order 8 Rule 6 or otherwise in other civil proceedings; and this is particularly as the company in question being re-organized, and being vested through the resolution process or through liquidation proceedings, cancelling all the unserviceable dues of the company.

23. The Appellant submits that, in the present case, the following factual aspects are relevant: (a) there cannot be any dispute that the resolution process adopted by NCLAT under Sections 241 and 242 of the Companies Act, 2013 is similar to the resolution process under IBC or liquidation proceedings; NCLAT proceeded, on the basis of the submissions of the Union of India, that Sections 241 and 242 are of wider jurisdiction than under proceedings initiated under IBC; (b) It is the NCLAT which lifted the corporate veil and considered all 348 together and, vide Order dated 15.10.2018, restrained them all from dealing with the assets, and further restrained persons dealing with the companies from enforcing their claim; (c) this was done to monetize, so that the monies are recovered and adjusted effectively considering all Group Companies as one, and not allowing each of the companies or persons dealing with them independently of other companies; (d) the Wind Power Companies, which were classified as Green Companies, were allowed to be transferred to others to maximize the value of the recovery; it was not sold to ORIX Corporation through private negotiations, the offer was publicly sought to know the maximum price at which 100% shares could be sold to a third party; based thereon ORIX Corporation was given the option to purchase 51% shares of IL&FS; the sale and vesting of shares, pursuant to the

above, was under the supervision of Mr. Justice (Retd) D. K Jain; it was specifically mentioned in the Report of Mr. Justice D. K. Jain, and also the NCLAT, that the sale shall be 'free and clear from all encumbrances, liens, security interest and third party claim ; (e) by the time, the above transaction took place, IL&FS, ORIX Corporation and NCLAT were fully aware of the mutuality of claims adjusted by the appellant; the 2nd Respondent, after its 100% shares had been acquired by ORIX Corporation, filed proceedings to withdraw the Application before NCLT for impleadment of the appellant, and for directions for payment of money without giving effect to the adjustment claimed by the appellant; thus, ORIX Corporation and IL&FS accepted the above position; (f) after acquisition by ORIX Corporation and without making any further claim against the appellant, in September/November 2020, ORIX Corporation transferred the majority and controlling shareholding in the 2nd Respondent, and other wind power companies, to Greenko Limited; the 2nd Respondent, under the control of Greenko, cannot set up a better title than it could when it was under the control of IL&FS originally, and thereafter ORIX Corporation; (g) the 2nd Respondent, made the claim in the remand proceedings before the State Commission, overlooking the development when the 2nd Respondent was under IL&FS, and thereafter under ORIX Corporation; there was no reason for the 2nd Respondent under ORIX Corporation to withdraw the proceedings in NCLAT; and. NCLAT proceedings are the appropriate proceedings in regard to the adjustment of the mutuality of the claims set up by the appellant; and (h) NCLAT had given liberty, at the instance of the 2nd Respondent, on the representation that it had ceased to be a subsidiary of IL&FS; the Remand Order of this Tribunal also notes that the 2nd Respondent is no longer a subsidiary of IL&FS; and, accordingly, the subsequent proceedings have to be in light of the 2nd Respondent no longer being a subsidiary of IL&FS.

24. The Appellant submits that they and the Trust Fund have not received any amounts from the IL&FS group pursuant to the resolution proceedings against the investments; the dispute between the parties was not even an issue that arose under the Electricity Act, 2003 for the State Commission to adjudicate upon; the State Commission, in the impugned Order, has held that the issue of set off cannot be decided; having held so, the State Commission has grossly erred in directing payment of the amounts by the Appellant to the 2nd Respondent; the issue of set-off is always a defence in a civil proceeding; and when the State Commission is not the authority to decide on the set-off which was effected in the proceedings under the Companies Act, there was no occasion for the State Commission to direct payment of power purchase dues as done in the Impugned Order.

IV. IMPUGNED ORDER, DATED 17.01.2023, PASSED BY THE GERC:

25. Petition No. 1797 of 2019 was filed by the 2nd Respondent herein, before the Gujarat Electricity Regulatory Commission ("GERC" for short), under Sections 86 (1) (c) and (f) of the Electricity Act, 2003 read with Regulation 80 and 82 of the GERC (Conduct of Business) Regulations, 2004 and the Power Purchase Agreement dated 18.01.2017 executed between them and the appellant herein. In the impugned Order dated 17.01.2023, the GERC observed that the 2nd Respondent had entered into a Power Purchase Agreement (PPA) with the appellant, in the year 2017, committing their entire generation capacity for supply to them for a period of 25 years, the contract between the parties being governed by a generic tariff order where electricity was to be purchased by the appellant from the 2nd Respondent at Rs.4.19 per unit; the 2nd Respondent received the due payments from the appellant till the generation month preceding November 2018, such payments having been thereafter

stopped; this eventually led to the 2nd Respondent approaching the State Commission by Petition No. 1797/2019 seeking directions for payment of the amounts due for the electricity supplied; the said petition was dismissed by the Commission by its order dated 08.07.2019; certain developments were taking place, in the meanwhile, before the National Company Law Tribunal (NCLT) at Mumbai, and in appeal before the National Company Law Appellate Tribunal (NCLAT); such proceedings concerned a company known as Infrastructure Leasing & Financial Services (ILFS); one of the subsidiaries of ILFS was ILFS-Wind Energy (for short 'ILFS-WE'); ILFSWE, in turn, held, at the relevant point of time, 51 per cent stock in the 2nd Respondent; proceedings had been taken out against ILFS before the NCLT, under Sections 241 and 242 of Companies Act, 2013, corresponding to Sections 397 and 398 of the Companies Act, 1956, and a process similar to the resolution process under the Insolvency and Bankruptcy Code was undertaken during the said proceedings; the appellant was the administrator of the GEB Contributory Provident Fund and had made investment to the tune of approximately Rs. 180 crores in three companies viz. ILFS, ILFS Transportation Network India Limited and ILFS Financial Services during 2010-2017; and, by stopping payment of dues of the 2nd Respondent under the PPA, the appellant was claiming a set- off against the money due to them on account of the fact that the 2nd Respondent was under the control of a subsidiary of ILFS.

26. The impugned Order records that, subsequent to the order of the Commission dated 08.07.2019, the 2nd Respondent had approached the NCLAT seeking a direction to the appellant to make payment of dues and to be impleaded for such purposes; on 15.10.2019, pursuant to a commercial arrangement between ILFS-WE and another company named ORIX, the latter (ORIX) bought out the entire shareholding of the former

(ILFS-WE) in the 2nd Respondent, making it a wholly owned subsidiary of ORIX; eventually, NCLAT, by its order dated 23.10.2019, noted the submission urged on behalf of the 2nd Respondent that, in view of the subsequent development as the Applicant(s) had ceased to be subsidiaries of 'Infrastructure Leasing and Financial Services Ltd', they be allowed to withdraw these applications to enable them to move before the appropriate Forum; and, while allowing the prayer, the IAs stood disposed of with liberty to the 2nd Respondent to move before the appropriate Forum.

27. The State Commission then noted the order of this Tribunal dated 08.07.2019,, that there was a material change in the circumstances, by way of subsequent developments, necessitating a revisit of the petition which was disposed of, in that the 2nd Respondent was no longer under the control of any company connected with IL&FS; in these circumstances, the question of GUVNL claiming a set-off against dues of the appellant would be required to be looked at afresh; in this view of the matter, this Tribunal deemed it proper to set aside the impugned order, and remit the case arising out of the petition for fresh decision to the Commission.

28. The Commission then noted the submissions of GUVNL that the Respondents were Companies forming part of IL & FS Group, and were subsidiaries of Infrastructure Leasing and Financial Services Limited (IL & FS), which was one of the principal companies of IL & FS Group; the other principal companies in IL&FS Group included IL & FS Transportation Network India Limited and IL & FS Financial Services Limited; the IL & FS Group Companies comprising of about 348 companies including the 2nd Respondent, were the subject matter of proceedings before the NCLAT; in the circumstances, the assets, rights and other beneficial interest of the Petitioner Companies as per of IL & FS group were also the subject matter of proceedings under NCLT, including the subject matter

of realization by the sale of interest which IL&FS, the principal Company, held in the Respondent Companies; as a result of the proceedings before the NCLT, involving the entire IL&FS Group, the debtors and the creditors of the Companies in IL & FS Group were to be considered in a cumulative and aggregate manner as debts owed by IL&FS Group, as a corporate debtor as a whole, was liable to be set off against the money due to any of the Companies in the IL&FS Group; in view of the special proceedings undertaken for IL&FS group companies as a whole, the consequences of any money due from GUVNL to the 2nd Respondent were liable to be equitably set off against any money due from IL&FS Group Companies to GUVNL; the 2nd Respondent Companies could not therefore be allowed to enforce the claim against GUVNL selectively, and independent of the proceedings with regard to the IL&FS Group; it cannot be that GUVNL is estopped from recovering money from the IL&FS Group, but IL&FS Group can recover from GUVNL; in the present case, the proceedings were against all the companies of the IL & FS Group including the companies which were subsidiaries of such IL & FS Group; this aspect had also been considered by the NCLAT in the earlier proceedings in Company Appeal No. 346 of 2018 by Order dated 15.10.2018, dealing with the Order dated 12.10.2018 passed by NCLT, Bombay wherein it was directed that the five largest creditors should be impleaded as party Respondents to these appeals in the representative capacity of Creditors; taking into consideration the nature of the case, larger public interest, economy of the nation and interest of the Company and 348 group companies, there shall be stay of institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against IL&FS and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; in terms of the above, all the 348 companies of IL & FS Group were considered by NCLAT as a composite unit, and orders

were to be passed in regard to any action against any of the above companies; the Respondent GUVNL was administering the Gujarat Electricity Board PF Fund and was liable to contribute amounts to such fund as may be required to ensure due payment and discharge all liabilities of the above fund to the employees of the Gujarat Utility, including those who had retired from the services of the Gujarat Electricity Utilities; GUVNL had arranged to deposit the trust fund, as a financial creditor, with the principal companies in IL & FS Group, viz. Infrastructure Leasing and Financial Services Limited, IL & FS Transportation Network India Limited and IL & FS Financial Services Limited; as on 31.05.2019, the following amounts were due and outstanding from the above three companies: (a) Infrastructure Leasing and Financial Services Limited - Rs. 37,92,45,753/- (b). IL & FS Transportation Network India Limited - Rs. 77,27,47,316/- (c). IL & FS Financial Services Limited - Rs. 66,02,95,117/-; a Public Announcement was issued on 22.05.2019 calling for claims of creditors of the IL&FS Group to be filed with the Claims Management Advisor appointed in respect of the entities; in the said Public Announcement, the 2nd Respondent was considered as part of the IL&FS Group; therefore, the claim of the 2nd Respondent, that IL&FS had only 51% share in their Companies, was not relevant since clearly they were considered as part of the IL&FS Group, and its claims were being considered as part of the Group; ie n response to the public announcement by IL & FS, inviting details of the amount due from various financial creditors, GUVNL had, vide letter dated 29.05.2019, sent Form CA in the prescribed format in respect of each of the three companies for the amounts due; the IL&FS Group was required to equitably set-off the money due to GUVNL from the above three group companies from any money due to any of the companies in the IL & FS Group from GUVNL including the money claimed by the 2nd Respondent from GUVNL under their respective PPAs; GUVLN

had specifically included the amounts of the 2nd Respondents in the mutual set-off in the form submitted to the Claims Management Advisor for the IL&FS Group entities; the claims of GUVNL, against the IL&FS Group Companies, need to be considered accordingly; GUVNL is entitled to withhold any payment for the electricity generated and supplied by the Respondent against the amounts payable by the IL& FS Group to its financial creditors including GUVNL; and providing for equitable set-off of the money due from IL & FS Group Companies to GUVNL, against the money due from GUVNL to any of the group companies of IL&FS; if the current process to revive IL&FS group is not successful, the IL&FS Group companies may be subjected to the resolution process, and thereafter liquidation process under the Insolvency and Bankruptcy Code; the liquidation process would involve not only the three companies which owe money to GUVNL, but also the 2nd Respondent which is generating and supplying electricity; the liquidation process would also involve set off/netting off of the inter-se money due to IL & FS Group and financial creditors, and the net amount after such set off would be the amount due and payable by IL & FS Group to GUVNL or from GUVNL to the Respondents, as the case may be; in view of these developments relating to IL & FS Group Companies including the Respondents, and non-discharge of the liabilities by the three primary companies of the IL & FS Group to GUVNL at this stage, there cannot be any recovery of the amount claimed in these Petitions; it would be unfair, unjust, unequitable and illegal if GUVNL is required to pay the claims of the Respondents, while the IL & FS Group Companies are not discharging their obligation to pay to GUVNL the amounts due towards the investments made as financial creditors.

29. The Commission then observed that GUVNL had not denied the outstanding amount of any of the invoices, and had not disputed non-

payment; GUVNL had specifically admitted that there was no dispute regarding power generation and its supply to GUVNL, but had taken a stand that the payment towards the invoices issued from November, 2018 to February, 2019 had been withheld by it, and equitable set off was affected; GUVNL had contended that the 2nd Respondent was an SPV of 51:49 shareholding between ILFS Wind Energy India and ORIX (Japan), being subsidiary of ILFS Group; GUVNL had, in its capacity as an administrator of the Gujarat Electricity Board Fund Trust, invested and deposited the GEB PF in (1) Infrastructure Leasing and Financial Services Limited - Rs. 37,92,45,753/- (2). IL & FS Transportation Network India Limited - Rs. 77,27,47,316/-, and (3). IL & FS Financial Services Limited - Rs. 66,02,95,117/- (all are principal companies of the IL & FS Group); GUVNL administers the GEB PF fund and is liable to contribute, from time to time, amounts to such fund as may be required to ensure due payment and discharge liability of the employees of the Gujarat Electricity Utilities; as IL&FS and its group companies were clubbed together by the NCLT/NCLAT, in the proceedings before the said forums, GUNVL has effected equitable set off against the dues payable by IL&FS group towards the GEB PF by not paying the power supply price demanded under the invoices, and no adjustment or set off had been effected by it for the period post 15.10.2019 since the Respondents had ceased to be a part of IL&FS group thereon.

30. The Commission then observed that the Respondents had filed these Petitions for recovery of money for the unpaid invoices issued to GUVNL for Power Supply as per the terms and conditions of the PPAs; against this claim, the only defense raised was of equitable set off effected by GUVNL for its dues of GEB PF fund investment with IL & FS against the Power Supply invoices of the subsidiary companies i.e., the 2nd Respondent; it was also contended by GUVNL that equitable set off

effected against IL & FS Group could not be examined by the Commission; since there was no dispute regarding PPA and the outstanding invoices, it not being the subject matter under the purview of Section 86(1) (f) of the Electricity Act, 2003, the Petitions were not maintainable; against the equitable set off effected by GUVNL, the Respondents had approached NCLAT to implead GUVNL and for challenging the equitable set off; however the Respondents had, subsequently, withdrawn their applications for impleading GUVNL, and challenging the action of withholding of the power supply invoices amount by effecting equitable set off, from NCLAT; therefore, the Respondents could not now claim payment under the power supply invoices as the GUVNL has effected equitable set off against them and which has remained unchallenged; when the shares of IL&FS group were purchased by ORIX Group for valuable consideration in the resolution process pending before NCLT, it is obvious that the purchase was on 'As is where is' basis, and after taking into consideration the existing set off undertaken against the IL&FS group; no contention was even raised by the Respondents that the right to contest the set off, for the past period, was reserved in the sale process; ORIX had purchased the shareholding of IL&FS in the Respondent Companies with full knowledge of the unpaid invoices, and thereafter during the pendency of the proceedings, the entire shareholdings in the Petitioners has been sold to another entity and, therefore, now the Petitioners cannot claim the money set off by way of equitably set off by GUVNL.

31. The Commission noted that the Respondents had counter argued that this act of affecting equitable set off was a unilateral illegal act of GUVNL, and there was no adjudicating order regarding Equitable Set off from any competent forum; the Respondents had to withdraw their applications pending before the NCLAT against GUVNL since, during the pendency of proceedings before the NCLAT, ORIX had purchased 51%

share of IL&FS in the Respondents which had then ceased to be a part of IL&FS Group by appropriate proceedings before the NCLT, and it ceased to be the subject matter of NCLT proceeding; therefore they could not agitate their claims further; as such the Respondents had sought permission from the NCLAT to allow withdrawal of the applications so as to proceed before the appropriate forum i.e. the present Commission for recovery of the dues under the PPAs; the NCLAT disposed of the applications with liberty to move before the appropriate forum; in Appeal No. 50 of 2020, filed by the Respondent Kaze Energy Private Limited against GUVNL; APTEL had remanded the matter to the Commission with a direction to revisit the earlier order by fresh hearing in view of the material change in the circumstances by way of subsequent developments.

32. The Commission held that non-payment of invoices, as per the terms and conditions of the PPAs, had been admitted by GUVNL, and the initial burden of proof regarding non-payment of Power Supply price had been discharged by the Respondents; it was now for GUVNL to establish that it had effected equitable set off of its investment of GEB PF in ILFS Group Companies, against the unpaid invoices of the Respondents; and that it could not be forced to make payment or be held liable to make any payment as claimed in the Petitions; the entire defense of GUVNL was on Equitable Set off effected by it; it was necessary therefore, to look into the concept of equitable set off; 'Set off' was a debtors rights to reduce the amount of a debt by any sum the creditor owed the debtor, the counter balancing sum owed by the creditor; Rule 6 Order 8 of the Code of Civil Procedure dealt with legal set off which must be for an ascertained sum of money, and legally recoverable by the claimant; both the parties must fill the same character in respect of the two claims sought to be set off or adjusted; here GUVNL had claimed to have effected equitable set off; this kind of set off was independent of the provisions of the Code; such

mutual debts and credits or cross demands, to be available for extinction by way of equitable set off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances, as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present, unless he filed a cross-suit of his own; when a plea in the nature of equitable set off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so. **(Union of India v. Karamchand Thapar reported in [(2004) 3 SCC 503]**; in **Jitendra Kumar Khan & Ors. Vs. Peerless General Finance and Investment Company Limited and others[(2013) 8 SCC 769]**, the Supreme Court held that mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances, that such a plea is raised not as a matter of right; thus it is the discretion of the court to entertain and allow such a plea or not, the concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience; the discretion rests with the court to adjudicate upon it, and the said discretion has to be exercised in an equitable manner; thus, equitable set off it based on the principle of equity, justice and good conscience; it is in the discretion of the court to allow or to reject such equitable set off as claimed; only court can grant such equitable set off; the Commission was not examining the validity or legality of equitable set off to GUVNL; the Commission's limited concern was regarding the rights and obligations of the parties to the petitions under Section 86(1) (f) of the Electricity Act, 2003; GUVNL had, while admitting the claim, defended itself of having effected equitable set off against the claim of the 2nd respondent; therefore, it was necessary for the appellant to bring on record any order from a competent forum to show that it had been granted or allowed equitable set off regarding its dues (GEB PF) from IL&FS against the claim of the 2nd Respondents for

power supply under the PPAs; a careful perusal of the pleadings revealed that, initially, GUVNL took a stand that the matter was pending before NCLT and GUVNL had to set off its investment in the IL&FS Group Companies; thereafter, it contended that the claim of set off was pending in the NCLT, and before the Claim Management Advisor; thereafter, GUVNL had taken the stand that equitable set off was affected; the Respondents had rightly submitted that GUVNL had not produced any adjudicating order; the claims made by GUVNL for set off, before the Claim Management Advisor, was rejected, and no appeal seems to have been made against such rejection order; GUVNL had not brought on record anything from which it could be said that any proceeding had been undertaken by GUVNL before the NCLT/NCLAT regarding such set off; therefore, in the absence of any order on record or any reliable material on record, it was difficult to believe that GUVNL had been allowed equitable set off; they were not deciding anything about equitable set off, as claimed by GUVNL, as equitable set off against IL&FS Group by GUVNL was not the subject matter under the PPA under Section 86(1)(f) of the Electricity Act, 2003; the Commission was concerned with the prayers in the Petitions for recovery of money for power supply under the PPAs as per Section 86(1) (f) of the Electricity Act, 2003 and, for this purpose, the Commission had jurisdiction to decide this matter holding that the petitions were maintainable; the contention of GUVNL that it was not a dispute under the PPA under the Act could not be accepted; GUVNL had invested money of 'GEB PF' in three principal companies of IL & FS group; however, set-off was being pleaded for amounts deducted against different subsidiary companies of IL & FS Group; no circumstances or material facts were brought on record to enable the Commission to pierce the corporate veil in the present case; further, there was no material on record or required pleadings to even remotely establish how the claim of GUVNL

could be said to have arisen out of such transaction; in the absence of any factual or legal ground, the Commission could not consider legal set-off as claimed to have been effected by GUVNL; and the stand of GUVNL could not be sustained in law.

33. On the contention regarding non-production of application, Information Memorandum and MOUs (before the NCLT), the Commission opined that no forceful adverse inference could be drawn against the Respondents so as to disallow the present Petitions; the Commission could not presume that the purchase of shareholding of IL&FS, in the Respondent companies by ORIX, was subject to equitable set off or waiver; GUVNL had not claimed any cross demand or any adjustment of its alleged dues from the Respondents; the claim of GUVNL, before the Claim Management Advisor, was dismissed and remained unchallenged; GUVNL did not dispute the non-payment of invoices, and appeared to have withheld the invoice amounts as claimed in the Petitions on its own in a unilateral manner; therefore, as GUVNL had admitted that money was due to the Respondents under the PPAs, but failed to produce any adjudicating order having any effect of equitable set off, the action of GUVNL, in withholding the invoice amounts, appeared to be illegal, and GUVNL was liable to pay the same; since there was no withholding of the payment after 15.10.2019, there was no question of granting of any relief for future Invoices; GUVNL may very well pursue its claim towards the GEB PF investment as per law; and, therefore, they were holding both the issues in the affirmative.

34. After referring to certain clauses of the PPAs, the Commission held that it was clear therefrom that payments under the PPAs were to be made within 30 days, otherwise GUVNL was liable to pay late payment surcharge. The Commission, accordingly, held that GUVNL was liable to

make payment towards all the invoices raised in all these Petitions along with late payment surcharge as per the terms of the PPA. While holding that they had only dealt with and decided on the limited issue of 'Non-payment' of invoices for the supply of power based on the PPAs between the parties, without touching or deciding the rights and liabilities relating to the dues of the GUVNL i.e., GEB PF fund, the Commission made it clear that GUVNL could pursue its claim before the competent forum regarding its dues i.e., GEB PF money and, if GUVNL brought any such order by way of equitable set off or otherwise, the same may be effected in accordance with law.

V. SEQUENCE OF EVENTS:

35. Before examining the rival contentions, urged in this batch of appeals by Learned Senior Counsel on either side, it is useful to note the sequence of relevant events. On 08.07.2019, the State Commission dismissed Petition No. 1797 of 2019, (filed by the 2nd Respondent seeking a similar relief as was granted by the impugned order), holding that it was not admissible in view of the proceedings pending before the NCLAT. On 09.08.2019, Infrastructure Leasing & Financial Services Ltd filed applications before the NCLT seeking approval for the sale of 51% of the share capital, in the Respondent SPVs, held by IL&FS Wind Energy Ltd (IWEL) to ORIX Corporation, Japan (ORIX). On 23.08.2019, the 2nd Respondent filed applications before the NCLAT to implead the appellant as a party to Company Appeal (AT) 346 of 2018, and to direct the appellant to release payment for the invoices raised by the Respondent under the PPAs. The NCLT, vide its order dated 28.08.2019, approved the sale of shares held by IWEL in the 2nd Respondent to ORIX, and directed transfer of such shares free and clear from all encumbrances, liens, security interest and third party claims. On 26.09.2019 the NCLAT,

while allowing Impleadment of the appellant in the respective appeals, further stated that, in compliance with the Order dated 15.10.2018, all assets of Lalpur Wind Energy Pvt. Ltd., Ratedi Wind Power Pvt. Ltd., Tadas Wind Energy Pvt. Ltd. and Khandke Wind Energy Pvt. Ltd should be released. On 15.10.2019, the purchase consideration was transferred by ORIX to IWEL. As a result, the 2nd Respondent ceased to be a part of the IF&LS Group, and became 100% subsidiaries of ORIX.

36. By its Order dated 23.10.2019, the NCLAT allowed withdrawal of the Applications filed by the 2nd Respondent granting them liberty to move before an appropriate forum. On 09.12.2019, the 2nd Respondent-Kaze Energy Limited challenged the earlier Order passed by the State Commission, in Petition 1797 of 2019 dated 08.07.2019, in Appeal No. 50 of 2022 filed before this Tribunal bringing facts, subsequent to 08.07.2019, on record. On 05.04.2022, this Tribunal set aside the order of the State Commission dated 08.07.2019, and remanded the matter back for its consideration in view of the subsequent events, i.e., sale of IWEL's shareholding in the 2nd Respondent to ORIX Corporation, Japan. The impugned order was passed thereafter by the State Commission on 17.01.2023.

VI. RIVAL SUBMISSIONS:

37. Elaborate submissions, both Oral and written, were put forth by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the appellant, and Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Respondent-Wind Power Developers. It is convenient to examine the rival submissions, urged on behalf of Learned Senior Counsel on either side, under different heads.

VII. LEGAL SET OFF/EQUITABLE SET OFF:

38. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that legal set off as per statutory provisions, and/or equitable set off as per settled principles laid down by Courts, is applicable in the present case from 15.10.2018 when the NCLAT passed the interim order; the mutual claims of five WPDs (the Respondent in the present appeals, which were then part of the 349 companies of the IL&FS Group) against the appellant, and the appellant's claims against three IL&FS Group Companies, are required to be adjusted; the set off, claimed by the appellant, is with respect to the moneys due to the Respondent WPDs for supply of electricity during the period November 2018 till 14.10.2019, when indisputably the WPDs were still a part of the 349 IL&FS Group Companies, and were covered by the order of the NCLAT dated 15.10.2018; it is not in dispute that the appellant had duly paid the amounts to the WPDs for supply of electricity till October, 2018, and also for the period after the WPDs ceased to be a part of the IL&FS group; and, as a defence, the appellant had set up its claim against the IL&FS Group Companies as amounts to be adjusted against the claim of the Respondent WPDs.

39. Learned Senior Counsel would submit that the principles of equitable set off have been considered in **(1) Union of India -v- Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others, (2004) 3 SCC 50; (2) Jasraj Inder Singh -v- Hemraj Multanchand, (1977) 2 SCC 155; (3) Jagdish Chander Gupta -v- Kajaria Traders (India) Ltd., AIR 1964 SC 1882; (4) State of Madhya Pradesh -v- Raja Balbhadra Singh, ILR 1964 MP 270; (5) M/s Lakshmichand and Balchand -v- State of Andhra Pradesh, (1987) 1 SCC 19; (6) Bhoganadham Seshaiah -v- Buddhi Veerabhadrayya and Others, AIR 1972 AP 134; (7) Shaukhat Hussain alias Ali Akram and Others -v- Smt. Bhuneshwari Devi (dead) by Ls. and Others, (1972) 2 SCC 731; and (8) Hazari Ram Marwari and Others**

-v- Rai Bahadur Bansidhar Dhandhania and Others, AIR 1936 PC 67; these decisions establish that (i) equitable set off is to be considered not only where the claim arises out of the same transaction, but also when it is so connected in their nature and circumstances that they can be looked upon as part of one transaction as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present; (ii) equitable set off can be considered even if the claims are in different forums; the claim of equitable set off is by way of a defense and adjustment, and needs to be considered by the court before which the equitable set off is raised; and (iii) on general principles supported by rationality.

40. On the other hand, Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Respondent WPDs, would submit that the Appellant has not denied the outstanding amount of any of the invoices; the only defence that the appellant has taken is that they have the right of equitable set-off of the amount allegedly owed to GEB CPF by three IL&FS entities, namely Infrastructure Leasing and Financial Services Limited, IL&FS Transportation Network India Limited, and IL&FS Financial Services Limited (hereinafter referred to as the "**Three IL&FS Entities**"), as against the amount the appellant owed to the Respondent WPDs for the invoices raised from November 2018 to February 2019; the appellant contends that this set-off had occurred prior to 15.10.2019, on which date the Respondent WPDs were taken over by ORIX (and later by Greenko), and ceased to be a part of the IL&FS Group; the law of equitable set-off requires two ingredients to be satisfied: (i) it can only be between the same parties, and (ii) (a) the mutual debts and credits or cross demands must have arisen out of the same transaction, or (b) ought to be so connected in their nature and circumstances so as to make it inequitable for the court to allow the claim before it; the appellant has failed to satisfy both the ingredients of

equitable set-off; the State Commission has, in the impugned order, held that the investment of the appellant, in the Three IL&FS Entities, is a transaction distinct from the invoices due under the PPA between the Respondent WPDs and the appellant; equitable set-off may be available only if the transactions are so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it relegating the defendant to file a cross-suit of his own; the appellant was certainly not in a position to file a cross suit against the Respondent WPDs for recovery of the alleged loss of debenture-value invested in the Three IL&FS Entities; without prejudice to the fact that the parties and transactions are separate, and the possibility of an equitable set-off is eliminated thereby, the appellant, in order to succeed in its claim of equitable set-off, must also prove that it has a legitimate claim against the Three IL&FS Entities, from which it alleges amounts are due to it, which it has not done in any forum; moreover, the appellant could have pursued its claims against these Three IL&FS Entities in an appropriate forum but failed to do so; the remedy of equitable set-off is a practical alternative to a cross-suit; if "A" cannot file a cross-suit against "B", it cannot claim a set-off against "B" either; without adjudication, it cannot even be concluded that the appellant has any valid claim against the Three IL&FS Entities, let alone the Respondent WPDs, who currently have no association with the IL&FS Group; not only has the appellant been unable to prove that the parties are identical for the purposes of set-off, but it has also failed to demonstrate that the claimed set-off pertains to the same transaction, which is a critical requirement for a successful set-off claim; the appellant, as an alleged trustee of GEB CPF, made a market-based decision to invest in the debentures of certain companies that were part of the IL&FS group; most of the investments were made prior to the execution of the PPA and, as such, had no connection with the PPA and the regulated tariff payable thereunder;

the transactions, which the appellant seeks to set-off, belong to completely separate categories; under these circumstances, the appellant's claim of set-off fails to meet the basic criteria for such an action; and the appellant is trying to take cover of its market exposure through a set-off against power purchase invoices, which power purchase has been approved by the State Commission, and its cost passed on in the ARR of the appellant.

41. Reliance is placed, by Sri Sanjay Sen, Learned Senior Counsel, on the following judgements: **(i) *Raja Bhupendra Narain Singha Bahadur Vs. Maharaj Bahadur Singh & Ors.* (1952) SCR 782: AIR 1952 SC 201; (ii) *Union of India v. Karamchand Thapar* (2004) 3 SCC 504; and (iii) *Jitendra Kumar Khan & Ors. Vs. Peerless General Finance and investment Company Limited and others* (2013) 8 SCC 769.**

A. GENERAL PRINCIPLES OF SET OFF:

42. "Set-off" is defined, in ***Black's Law Dictionary (7th Edn., 1999),*** as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counter-balancing sum owed by the creditor. The dictionary quotes **Thomas W. Waterman**, from ***A Treatise on the Law of Set-Off, Recoupment, and Counter Claim,*** as stating: "Set-off" signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand.

43. The general principles of set-off are that a person who is obliged to pay a sum of money to another person, and also has in his hands an amount of money which that other person is entitled to claim from him, then, instead of physically entering into two transactions by exchanging money twice, that

person may utilize the money available in his hands to satisfy the claim due and legally recoverable from such other person to him. This equitable principle has its limitations. While a debtor, making an adjustment or set-off, may have done so on its own volition, the validity of such action can be called in question and decided by a court of law wherein the creditor seeks enforcement of his claim. **(Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504)**.

B. LEGAL SET OFF:

44. Order 8 CPC relates to Written Statement, Set-off and Counter-claim. Rule 6 thereunder requires particulars of set-off to be given in the written statement. Under Order 8 Rule 6(1) CPC, where in a suit for recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off. Order 8 Rule 6(2) CPC relates to the effect of set off, and provides that the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off.

45. Order 8 rule 6 CPC, which deals with legal set-off, requires that the claim sought to be set off should be for an ascertained sum of money and legally recoverable by the claimant. Both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. (**Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504).** Legal set off can be sought, under Order 8 Rule 6

CPC, by a defendant against whom the plaintiff has filed a suit for recovery of money. It is only in such a suit that the defendant is entitled to present a written statement containing the particulars of the debt sought to be set off. Under the said provision, the defendant is entitled to seek set off only of the ascertained sum of money legally recoverable by them from the plaintiff. It is not even clear whether the amount invested by the Appellant, in the debentures of the Three IL & FS Entities, is legally recoverable. As the Appellant has not been able to show how such amounts are legally recoverable from the Respondents in this batch of appeals, the question of their seeking legal set off, of these amounts with the amounts admittedly payable by them to the Respondents, does not arise.

C. EQUITABLE SET OFF:

46. The right of equitable set-off is independent of the provisions of the CPC. Such a relief is granted in the discretion of the court, and cannot be sought as of right. For extinction, by way of equitable set-off, mutual debts and credits or cross-demands must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and deny the defendant the amount he is entitled to recover from the plaintiff, except in cases where he has filed a cross-suit of his own. (**Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504).**

47. A plea, in the nature of equitable set-off, is not available when the cross-demands do not arise out of the same transaction; and a wrongdoer, who has wrongfully withheld monies belonging to another, cannot invoke any principle of equity in his favour and seek to deduct therefrom the amounts which may have fallen due to him. **(*Bhupendra Narain Singha Bahadur* v. *Bahadur Singh* [(1952) 1 SCC 436: AIR**

1952 SC 201; **Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504).**

48. Equitable set off is applicable in cases of natural debits and credits, that is in mutual open and current account cases and in cases where cross decrees arise out of the same transaction or cases where cross demands arise from different sets of connected transactions, as it would be inequitable to permit the decree-holder to recover from the defendant, and drive the judgement-debtor to a cross suit or execution petition. (**Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104).**

49. The difference between legal set off and equitable set off is that, while in the former, the Court is bound to entertain and adjudicate upon the plea when raised, the defence of equitable set off cannot be claimed as a matter of right, and the court has a discretion either to adjudicate upon it or to order it to be dealt with in a separate suit. The discretion to grant equitable set off is a judicial discretion which should be exercised according to settled rules rather than individual fluctuating and unsettled opinion. (**Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104).**

50. The appellant's claim for equitable set off is also unfounded, since the transactions which have given rise to these cross demands are neither connected with each other nor do they arise out of the same transaction.

D. JUDGEMENTS RELIED ON BY LEARNED COUNSEL ON EITHER SIDE:

51. Let us now take note of the judgements which have been relied upon by Learned Senior Counsel on either side. We shall, in the first instance, consider the judgements cited on behalf of the appellant, in support of

their claim that they are entitled to set off the amounts payable by them to the Respondent WPDs with the amounts, allegedly, due to them from the Three IL&FS Entities.

52. (I). In **Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd., (2004) 3 SCC 504,** there were cross-demands between the parties. The Respondent Coal Company was liable to pay royalty on account of sand extracted by it for the purpose of carrying out stowing operations in the coalfields. Such an obligation to pay royalty was contractual and, with respect to the quantified amount of royalty on sand, the Coal Company was a debtor, and the Union of India was the creditor. Out of the net proceeds of excise and customs duties on coal, the Central Government was obliged to disburse a certain amount, to the coal mine owner, for the purpose of grant of stowing material and other assistance for stowing operations. Royalty, on the quantum of sand extracted by the Coal Company for carrying out stowing operations, was to be paid by the Coal Company to the Central Government and, on such payment, the Coal Company was entitled to be reimbursed for the amounts as a constituent of the stowing assistance. Consequently, so long as the Coal Company did not actually pay the amount of royalty, the question of its being reimbursed did not arise.

53. There were certain arrears of royalty payable to it by the Coal Company, and the Central Government sought to enforce recovery, of the amount of royalty due from the Coal Company, by making an adjustment from out of the amount payable by the Central Government to the Coal Company as stowing assistance, consisting of wages and transportation charges, etc. incurred by the Coal Company for carrying out stowing operations.

54. The question which arose for the consideration of the Supreme Court was whether the Central Government could withhold release of stowing assistance, which was its statutory obligation, for the purpose of satisfying its demand of money arising under a contractual obligation (i.e. under the mining lease) incurred by the Coal Company qua it.

55. It is in this context that the Supreme Court held that no statutory provision had been brought to its notice to sustain the claim of the Central Government for such adjustment and satisfaction of cross-demands; they were called upon to decide if such an adjustment was permissible in equity; on general principles, a person who is obliged to pay a sum of money to another person and also has in his hands an amount of money which that other person is entitled to claim from him, then, instead of physically entering into two transactions by exchanging money twice, that person may utilize the money available in his hands to satisfy the claim due and legally recoverable from such other person to him; however, this equitable principle was not one of universal application and had its own limitations; a debtor, making an adjustment or set-off, may have done so on its own volition, nevertheless, the validity of such action shall be called in question and decided by a court of law wherein the creditor would seek enforcement of his claim; what Order 8 rule 6 CPC deals with is legal set-off; the claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant; what is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted; apart from the rule enacted in Order 8 Rule 6 CPC, there exists a right to set-off, called equitable, independent of the provisions of the Code; such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to

allow the claim before it and leave the defendant high and dry for the present, unless he files a cross-suit of his own; and, when a plea in the nature of equitable set-off is raised, it is not done as of right, and the discretion lies with the court to entertain and allow such plea or not to do so.

56. The Supreme Court further held that, in the present case, what the Coal Company had sought to enforce was a statutory obligation of the Union of India; the Coal Mines (Conservation and Development) Act, 1974 had a public purpose and a beneficial object to achieve; and it would not be a sound exercise of discretion on the part of the court to permit set-off or recognize an adjustment made out of court which would have the effect of withholding the release of stowing assistance, and appropriating the amount thereof, for the recovery of dues not arising out of the same transaction. While dismissing the appeal filed by the Union of India, the Supreme Court made it clear that the appellant- Union of India was free to recover arrears of royalty by adopting such other method as may be available under the law.

57. In **Karam Chand Thapar,** the issue involved was whether the Central Government could withhold release of stowing assistance payment, which was its statutory obligation, for satisfying its claim, arising under a mining lease, liable to be discharged by the Coal Company. It is in this context that the Supreme Court held that the Coal Company had sought to enforce a statutory obligation of the Union of India, under the Coal Mines (Conservation and Development) Act, 1974, which had a public purpose and a beneficial object; and the court could not permit set-off which would permit withholding of statutory payment and its appropriation towards recovery of dues not arising out of the same transaction.

58. Like in **Karam Chand Thapar**, the appellant, in the present case, seeks to have the amount payable by it to the Respondents (which are no longer part of the IL&FS group) under the PPAs, set-off from the amounts allegedly due to it from the Three IL&FS Entities (separate and distinct legal entities) which, on the material placed on record, appear to be still part of the proceedings before the NCLAT/NCLT. What is sought to be set-off are dues which are, admittedly, not part of the same transaction, and are not even unrelated dues from the very same company, but sums allegedly due from other companies.

59. The judgement, in **Karam Chand Thapar,** has in fact been relied upon by the Learned Senior Counsel for the respondent WPDs also, and appears to support their case and not that of the appellant. Reliance placed, on behalf of the appellant, on **Karam Chand Thapar,** is therefore of no avail.

60. (II). In **Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155,** the appellant-plaintiff was running two shops, one in Khamgaon and the other in Bombay. The respondent-defendant had dealings with the plaintiff at both places. The plaintiff isolated the transactions which took place in Khamgaon, and brought a suit claiming a sum which represented the net balance due, on the Khamgaon khata, to him from the defendant. The contracting parties were identical, the dealings were similar and on any fair basis either could get from the other the net amount legally due from both the shops together. The defendant, urged in defence, that the demand was untenable since he had deposited six bars of silver with the Khamgaon shop of the plaintiff to be sold through his Bombay branch and, if the sale proceeds thereof were taken into account in the Khamgaon khata, a larger sum would be due to him. This counter-claim was met by the plaintiff in an additional pleading wherein he urged that the sale of

silver bars was a matter for the Bombay shop, and should not be mixed up with the Khamgaon dealings which were the basis of the action.

61. It is in this context that the Supreme Court held that the suit was for a sum due on accounts; the parties were the same; there were two shops belonging to the same owner; the return of income from the two shops, for income tax purposes, was a consolidated one; in short, there was only one person who owned two shops, and it was wrong to construe the situation as if there were two juristic entities or personae; secondly, the defendant, who dealt with the plaintiff in the two shops, was the same person; he had no dual characters to play; the dealings were either in one or in the other shop; they were business dealings between two businessmen, during the same period, and even inter-related to such an extent that sometimes advances were made from one shop and realisations were made in the other shop; in short, an artificial dissection of these transactions could not square up with the reality of the situation; the contention that one contract was one transaction, and a set of contracts need not be necessarily brought up in the same action between the same parties, could not be accepted as the true nature of the action here as it was a suit on accounts for the sum due on striking a balance; that itself was the cause of action; such a suit was not unfamiliar, and such a cause of action may be made up of various minor transactions; viewed at the micro level each may be a single contract, but viewed at the macro level as a suit on accounts, it was a single cause of action; if the present action was one on accounts and, if the various entries in the two shops at Khamgaon and Bombay involved transfusion of funds and goods, there was no reason not to accept that the entirety of accounts in the two shops should be viewed as a composite one as it reduced litigation, it promotes the final financial settlement as between the parties, and it had the stamp of reality; otherwise it would be an odd distortion to grant a decree for the

plaintiff on the strength of the Khamgaon accounts, while he owed the defendant money according to the Bombay accounts; Order 8 Rule 6 CPC dealt with a specific situation and did not prevent the court, where the facts called for a wider relief, from looking into the accounts in both places to do ultimate justice between the parties; procedure was the handmaid and not the mistress of justice; and, in this spirit, the trial court's adjudication could not be faulted.

62. In **Jasraj Inder Singh,** the contracting parties were identical, the dealings were similar, and the suit was for a sum due on accounts; the parties were the same; there were two shops belonging to the same owner; the return of income from the two shops, for income tax purposes, was a consolidated one; there was only one person who owned the two shops; it was not as if there were two juristic entities; the defendant, who dealt with the plaintiff in the two shops, was the same person, and had no dual character to play; the dealings were either in one or in the other shop; they were business dealings between two businessmen during the same period, and were even inter-related to such an extent that sometimes advances were made from one shop and realisations were made in the other shop; the true nature of the action was a suit on accounts, for the sum due, on striking a balance; as a suit on accounts, it was a single cause of action; and there was no reason not to accept that the entirety of accounts in the two shops should be viewed as a composite one.

63. As noted hereinabove, while the appellant admits that it is due the sum, directed by the Commission to be paid to the Respondents, the basis for set off is a nebulous claim of sums allegedly due to the appellant not from the Respondents, but from the Three IL & FS Entities (separate legal entities distinct from the respondent companies), which were once part of the IL & FS Group of companies. The amounts, which the appellant seeks

to set off, are neither part of one transaction nor between the same parties. They are unrelated and independent transactions, that too with separate and distinct legal entities. Reliance placed, on behalf of the appellant, on **Jasraj Inder Singh,** is also misplaced.

64. (III). In **Jagdish Chander Gupta v. Kajaria Traders (India) Ltd., (1964) 8 SCR 50,** the appeal by special leave was directed against an order of the High Court of Bombay holding that the institution of the petition was not barred under Section 69(3) of the Indian Partnership Act, 1932 on the ground that the partnership was not registered.

65. Section 69 (1) of the Indian Partnership Act,1932 stipulated that no suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. Section 69(2) provided that no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. Section 69(3) stipulated that the provisions of sub-sections (1) and (2) shall apply also to a claim of *'set-off'* or *'other proceeding'* to enforce a right arising from a contract, but shall not effect (*a*) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or (*b*) the powers of an official assignee, receiver or court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

66. The Supreme Court held that Section 69 barred certain suits and proceedings as a consequence of non-registration of firms; Sub-section (1) prohibited the institution of a suit between partners inter-se or between partners and the firm for the purpose of enforcing a right arising from a contract or conferred by the Partnership Act unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm; Sub-section (2) similarly prohibits a suit by or on behalf of the firm against a third party for the purpose of enforcing rights arising from a contract unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm; in the third sub-section a claim of *'set-off'* which is in the nature of a counter claim is also similarly barred; then that sub-section bars *"other proceeding"*; the only doubt that had arisen in this case is regarding the meaning to be given to the expression *"other proceeding"*; one way to look at the matter is to give these words their full and natural meaning, and the other way is to cut down that meaning in the light of the words that precede them; and the next question was whether the application under Section 8(2) of the Arbitration Act can be regarded as a proceeding "to enforce a right arising from a contract", and therefore, within the bar of Section 69 of the Indian Partnership Act.

67. On the question whether, by reason of the fact that the words "other proceeding" stand opposed to the words "a claim of set-off", any limitation in their meaning was contemplated, the Supreme Court held that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words; before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted; here the expression *"claim of set-off"* did not disclose a category or a genus; Set-offs are of

two kinds — legal and equitable — and both are already comprehended and it is difficult to think of any right "arising from a contract" which is of the same nature as a claim of set-off and can be raised by a defendant in a suit; it was impossible to think of any proceeding of the nature of a claim of set-off, other than a claim of set-off, which could be raised in a suit such as is described in the second sub-section; the section thinks in terms of (*a*) suits and (*b*) claims of set-off which are in a sense of the nature of suits and (*c*) of other proceedings; the section first provides for exclusion of suits in sub-sections (1) and (2); then it says that the same ban applies to a claim of set-off and other proceeding to enforce a right arising from a contract; it is possible that the draftsman, wishing to make exceptions of different kinds in respect of suits, claims of set-off and other proceedings, grouped suits in sub-sections (1) and (2), set-off and other proceedings in sub-section (3); the words "other proceeding" in sub-section (3) must receive their full meaning untrammelled by the words "a claim of set-off"; the latter words neither intend nor can be construed to cut down the generality of the words "other proceeding"; the sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4).

68. The scope of Section 69(3) of the Indian Partnership Act, which stipulated that the provisions of sub-sections (1) and (2) shall apply also to a *"claim of set-off"* or *"other proceeding"*, was considered in **Jagdish Chander Gupta v. Kajaria Traders (India) Ltd., (1964) 8 SCR 50,** and the Supreme Court held that the words *"other proceeding"* in sub-section (3) must receive their full meaning without being restricted by the words *"a claim of set-off"*, and Sections 69 (1) and (2) also apply to other

proceedings of any kind which can properly be said to be for enforcement of any right arising from contract.

69. It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. (**State of Orissa v. Sudhansu Sekhar Misra; AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).** A stray sentence in **Jagdish Chander Gupta**, "*that the word "proceeding" is not limited to a proceeding in the nature of a suit or a claim of set-off*", cannot be read out of context to contend that set off can be claimed by a person from another with respect to amounts due to him from a third party.

70. (IV). In **State of Madhya Pradesh v. Raja Balbhadra Singh, 1962 SCC OnLine MP 95,** among the questions which arose for consideration of the Division Bench of the Madhya Pradesh High Court was whether the amount was really due and recoverable, and whether the defendant State Government was entitled to adjust it in the dues payable to the plaintiff. The defendant State Government, which had asserted that a sum of Rs. 20,415/11/5 was due by the plaintiff on account of cesses for the Samvat years 1996-2007, did not claim any decree for this amount nor did it plead a set off. The defence was that the plaintiff was not entitled to that sum which he claimed in the suit in as much as the only amount payable to the plaintiff was Rs. 4,206/13/7. The defendant-State was in possession of adequate money to pay itself out of that payable to the plaintiff; and the plea was of adjustment.

71. The Division Bench of the Madhya Pradesh High Court held that, when two persons have certain accounts, and monies are payable by each to the other, they are both entitled to mutual adjustments of the

monies provided they are really due and recoverable; the distinction between payment and adjustment was that payment was made to the creditor, while the adjustment was made by the debtor himself; although it is not called 'payment' in common parlance, yet it undoubtedly partakes the character of payment; at all events, it cannot be called a claim for set off, nor can it be said to be a counter-claim as the defendant does not seek enforcement of his claim; on general principles a person is entitled to pay to himself that amount which is due to him from another if he has in his hand monies belonging to that other, provided that his dues are legally recoverable; and, although that question will be adjudged by the Court of law when it arises, he is not obliged to sue for the recovery of the money which he is already in possession of.

72. The law declared, in **State of Madhya Pradesh v. Raja Balbhadra Singh, 1962 SCC OnLine MP 95**, is that a person is entitled to pay to himself that amount which is due to him from another, if he has in his hand monies belonging to that other, and such an adjustment is neither a claim for set off nor is it a counter-claim. This adjustment is however subject to the dues being legally recoverable, which question can only be adjudged by the Court. It is only where monies belonging to two persons are payable by each to the other, is mutual adjustment of the monies permissible, that too provided the amounts are really due and recoverable. The said judgement has no application to the facts of the present case, as no money is payable by the Respondents to the Appellant, and the set-off sought by the appellant is of monies due by them to the Respondents with the moneys allegedly due to them from the Three IL & FS Entities which are companies with a separate and independent legal entity.

Let us now take note of the judgements, relied on behalf of the appellant, where a claim for set-off was permitted in Execution Proceedings.

73. (I). In **Lakshmichand and Balchand v. State of A.P., (1987) 1 SCC 19,** the appellant was a contractor, who entered into two agreements with the Government of Andhra Pradesh. On the claims raised by the appellant, an award was passed, which was partially decreed. For the realisation of the amount due under the decree, the contractor filed Execution Petition claiming recovery of the decretal amount, and interest in terms of the award up to the date of the execution petition, and towards costs of the execution petition. The State Government filed objections, contending inter alia that a sum of Rs 22,91,332 was recoverable by it from the contractor, and claiming adjustment against the amount due to the contractor under the said decree. It urged that, after adjusting the amount due to the State Government, the balance payable to the contractor would stand reduced to Rs 76,667. The executing court held that the State Government was entitled to set off the amounts claimed by it.

74. The contractor filed a revision petition before the High Court and contended that the State Government was not entitled to claim adjustment in execution proceedings. It was pointed out that the sum of Rs 22,91,332, of which adjustment was sought by the State Government against the amount for which the contractor had taken out execution, consisted of (*a*) an amount of Rs 10,21,800 claimed by the State Government as due to it upon the preparation of the final bill in respect of the contracts covered by the award, and (*b*) an amount of Rs 12,69,532 claimed by the State Government under a separate contract on the ground that the contractor had committed a breach of that contract. The contractor disputed both

claims. He contended that the final bill in respect of the earlier contract had been prepared in his absence, and that he challenged the inclusion of several items in that bill. In regard to the latter amount, he urged that he was not guilty of any breach of contract.

75. The High Court found that, so far as the first claim to adjustment was concerned, the State Government was justified in making it because the arbitration was effected while the work was still in progress and the contract was in the process of execution by the contractor. The second claim to adjustment was made by the State Government under another contract, and the High Court justified that claim by reference to clause 71 of that contract, which permitted the Government to retain or deduct money due under the contract from an amount due to the contractor under any other contract.

76. It was contended on behalf of the appellant, before the Supreme Court, that the State Government was not entitled to a set-off, because a set-off can be claimed only under Order 21 Rule 18 of the Code of Civil Procedure and that provision did not apply in terms to the present case. It was contended, on behalf of the State Government, that the power of the court extended to granting an equitable set-off in appropriate cases, and the High Court was therefore justified in making the order which it did.

77. It is in this context that the Supreme Court held that, in certain cases, the court has the power to allow a set-off even in cases which do not strictly fall within the terms of Order 21 Rule 18 of the Code; the facts before it, however, called for a somewhat different consideration; in regard to the adjustment claimed by the State Government on the first count the High Court was right in holding that the amount claimed by the State Government, as determined on arbitration, was entitled to set-off against the decretal amount claimed by the contractor, and that payment of the

decretal amount was to be subject to such adjustment; in regard to the claim to adjustment on the second count, the claim was founded in the doctrine of equitable set off, but there was no evidence to bring the case within the operation of the doctrine; it was not a case where cross-demands arose out of the same transaction or the demands were so connected in their nature and circumstances that they could be looked upon as part of one transaction; and, in the result, the decision of the High Court, in respect of the adjustment on the second claim, could not be sustained.

78. In the light of the law declared in **Lakshmichand and Balchand,** the appellant's plea of set-off, of the amounts payable by it to the Respondents with the amounts due to it from the Three IL&FS Entities (third party companies), cannot be accepted as such cross-demands neither arose out of the same transaction nor were the demands so connected that they could be looked upon as part of one transaction.

79. (II). In **Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104,** the reference to the Full Bench of the Andhra Pradesh High Court was on the question whether the amendment, by including a new prayer, which was tantamount to a fresh execution petition, could be ordered after 12 years disregarding the provisions of Section 48 of the C.P.C. The respondent obtained a money decree, and sought execution of the said decree. By attachment and sale of a house property of the judgment-debtors, the decree-holder realized a certain amount. The E.P. was dismissed recording part satisfaction of the decree. The judgment-debtor obtained a money decree in another Suit on the basis of accounts of partnership, and thereafter filed a counter in the E.P contending that the decree-holder was to give credit to the said amount decreed against him, and after satisfaction of the present decree now

under execution, some more amount will be due. The decree holder agreed to adjust and set off the decretal amount of the subsequent suit, and the E.P. was then continued for recovery of the balance amount. The Executing court, after a proper enquiry, held that there were no grounds for sending the first judgment-debtor to civil prison for realisation of the balance of the E.P. amount. Aggrieved thereby, the decree-holder preferred an appeal to the A.P. High Court. As the judgment-debtor, in the Suit filed by him, was not awarded interest from the date of the suit to the date of realisation of the amount, but was granted interest only from the date of the decree, he preferred an appeal which was allowed partly decreeing the plaintiff's suit even in regard to the interest from the date of the suit at 5% per annum. Under this modified decree, the judgment debtor became entitled to a further sum than that was adjusted towards the part satisfaction of the decree passed against him. He filed two petitions requesting the court to direct recovery of the E.P. amount, to direct set off of the amount due thereunder, and to record part satisfaction for the amount as may be set off. This claim was resisted contending that if the modified decree passed in appeal was allowed to be set off against the decree in execution, by amendment of the E.P, this amendment would be beyond twelve years from the date of the original decree; such an amendment would amount to a fresh execution petition; and, since it was filed beyond 12 years of the date of the decree, it had to be dismissed.

80. The question which fell for the consideration of the Full Bench was whether the relief claimed, for the purpose of set off of the cross-decree, amounted to a fresh execution petition within the meaning of Sec. 43 C.P.C. It is in this context that the Full Bench held that there was a general and inherent power in the executing court to grant equitable set off; the principle of set off may be defined as the extinction of debts of which two persons are reciprocal debtors to one another, by the credits of which they

are reciprocally creditors to one another; equitable set off was mainly based on the principle of equity, justice and good conscience; the provisions for legal set off did not take away from the parties any right to set off which they had independent of the Code; for example in cases of natural debits and credits, that is in mutual open and current account cases and in cases where cross decrees arise out of the same transaction or cases where cross demands arise from different sets of transactions but are so connected in their nature and circumstances as to make it inequitable that the plaintiff or the decree-holder should recover from the defendant, and the judgement-debtor driven to a cross suit or execution petition; this set off is known as equitable set off; the difference between legal set off and equitable set off was that, while in the former, the court is bound to entertain and adjudicate upon the plea when raised, the defence of equitable set off cannot be claimed as a matter of right, but the court has a discretion to adjudicate upon it in the same suit or execution proceedings or to order it to be dealt with in a separate suit or execution proceedings; equitable set off can be claimed in a case where cross-demands arise out of the same transaction as well as in cases where the cross-demands may not arise out of the same transaction, but they are so connected in the nature or circumstances that it would be inequitable to allow one party to execute his decree driving the other party to separate proceedings of execution; no hard and fast rules could be laid down, nor was it desirable to stipulate in what circumstances, in such cases, equitable set off can be permitted; the granting of equitable set off rests in the discretion of the court; this discretion is a judicial discretion, and the dominant feature of judicial discretion is that it should be exercised according to settled rules rather than individual fluctuating and unsettled opinion; thus where a court thinks that investigation into the claim of equitable set off will cause great delay it may refuse to allow it, or may

order the enquiry to proceed on such terms as it thinks fit; equitable set off cannot be bound down to procedural limitations; since the matter is in the discretion of the court, it may grant equitable set off in a proper case in spite of the fact that no execution petition is independently filed for that purpose; it can grant such a set off if an execution petition is pending, albeit seeking a different mode of executing the decree such as arrest of the judgment-debtor; it is also not relevant that execution petition of a decree which is sought to be set off is or is not filed by the other decree-holder; and even in a case where an independent execution petition, if necessary and if filed for the purpose of claiming set off is time barred; and jurisdiction of the court exists to grant equitable set off if special circumstances permit even in a case where claim for set off is time barred.

81. The Full Bench observed that, in ***Mr. Monibai*** **v.** ***Jethanad*** **[AIR 1958 Sind 31.],** ***Badrinath*** **v.** ***Motti Ram*** **[AIR 1939 Lahore 85.], Adwaita Chandra v. Chittagong Co. [AIR 1925 Cal 102.], Rama Rao v. Venkatramanachar [AIR 1952 Mys 20.], Chinnammal v. Chidambra [AIR 1936 Mad 626.],** ***Bank of Dacca Ltd.*** **v.** ***Gour Gopal Suha*** **[AIR 1936 Cal 409.] and** ***Ramu Sahu*** **v.** ***Thakat Dayal*** **[AIR 1917 Pat 259.],** cross demands had arisen out of a single transaction or were so connected with each other as to attract equitable considerations.

82. The Full Bench held that, in execution proceedings, two cross decrees can be equitably set off because, after the decrees are passed, there is precious little to be enquired into, unlike a claim of set off based on separate transactions in a suit under order VIII Rule 6 CPC; thus, on the execution side, two cross decrees, although arising out of two separate and unconnected transactions, can be permitted to be equitably set off; in a proper case, equitable set off can be permitted, although the decrees may have been the result of unconnected and independent

transactions; and the said position of law gathers support from the decisions in ***Bangaraju v. Kalidindi (A.I.R. 1957 A.P. 403); Narayan v. Krishnarau (AIR 1951 T.C. 76)***.

83. The Full Bench held that the proposition that cross-decrees can be set off only when they are attempted to be executed is not applicable to a case of equitable set off; even without filing any execution petition, the claim under cross decree can be set off and adjusted either (a) by agreement of parties or (b) under orders of court; and this view is supported by the decisions in ***Narayanan* v. *Krishna Rau*** **[A.I.R. 1951 T.C. 78.] and *Hiralal Singh* v. *Ramjiram* [AIR 1919 Pat 312.].**

84. The Full Bench concluded holding that in the instant case of cross demands, although arising out of two separate transactions, circumstances had connected them with each other attracting the principles of equitable set off; the two decrees were so connected with each other, because of the circumstances, that it would be unfair to disallow set off; and, even if the two decrees are considered unconnected, they can be equitably set off.

85. The law declared by the Full Bench of the Andhra Pradesh High Court, in **Bhoganadham Seshaiah v. Buddhi Veerabhadrayya, 1971 SCC OnLine AP 104,** is that, in executing proceedings, two cross decrees can be equitably set off because, after the decrees are passed, there is nothing to be enquired into, unlike a claim of set off in a suit based on separate transactions; and two cross decrees, although arising out of two separate and unconnected transactions, can therefore be permitted to be equitably set off.

86. Unlike in execution proceedings, where two cross decrees can be sought to be equitably set off as the claims have already been adjudicated

by a competent court, the appellant's claim, for amounts due to it from the Three IL & FS Entities, has not even been adjudicated much less has any decree been passed in the appellant's favour by a competent court. Equitable set off is applicable in cases where cross decrees arise out of the same transaction or cases where cross demands arise from different sets of connected transactions. Equitable set off of cross decrees is permissible when the decree holder in one is the judgement-debtor in the other and vice-versa. In the present case the amounts allegedly due to the appellant is not from the Respondent WPDs but from the Three IL & FS Entities, which are independent companies having a separate legal existence, and hold no shares in the Respondent companies. Reliance placed on **Bhoganadham Seshaiah** is therefore misplaced.

87. (III). In **Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731,** the question which arose for consideration before the Supreme Court was whether an Executing court was competent, under Order 21 Rule 29 CPC, to stay the execution petition filed by the decree-holder, which was pending before it, if there was a suit pending before that court filed by the judgment-debtor against the decree-holder.

88. The Supreme Court held that it was obvious, from a mere perusal of Order 21 Rule 29 CPC, that there should be simultaneously two proceedings in one court; one is the proceeding in execution at the instance of the decree-holder against the judgment-debtor, and the other a suit at the instance of the judgment-debtor against the decree-holder; that is a condition under which the court in which the suit is pending may stay the execution before it; it is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such court; the words "such court" means, in the context of Order 21 Rule 29 CPC, the court in which the suit is pending;

in other words, the suit must be one not only pending in that court, but also one against the holder of a decree of that court; Order 21 Rule 29 CPC clearly shows that the power of the court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that court only; if the decree in execution was not passed by it, it had no jurisdiction to stay the execution; since, in the present case, the decree sought to be executed by the Court of Munsif Gaya was not the decree of that court, but the decree of the Subordinate Judge, Gaya exercising Small Cause Court jurisdiction, the Court of the Munsif had no competence under Order 21 Rule 29, to stay the execution of the decree.

89. The law declared, in **Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731,** is that the power of the court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that court only and, if the decree in execution was not passed by it, the Court has no jurisdiction to stay the execution. As the present case does not relate either to execution of a decree or regarding stay of execution proceedings, reliance placed on behalf of the appellant, on **Shaukat Hussain**, is of no avail

90. (IV). In **Hazari Ram Marwari v. Rai Bahadur Bansidhar Dhandhania, 1936 SCC OnLine PC 72,** the question in the appeal was whether there can be a set-off in execution proceedings of two decrees hereunder mentioned. The High Court at Patna had allowed set-off, after the Subordinate Judge of Godda had refused it. The decrees in question were, first, a decree for mesne profits, of which the present appellants took an assignment, and the secondly, a final decree for sale. Both decrees were transferred to the Court of the Subordinate Judge at Godda for execution. The appellants' decree, so far as money was concerned,

was against three of the respondents only. The respondents' decree was in favour of some eighteen members of the same family or families. Moreover, the respondents' decree was against certain persons called Mandal, purchasers from the representatives of Thakur Barham, as well as against these representatives themselves. The presence among the holders of the decree for sale, in addition to the three, of other members of their families, was the objection to the set-off. It is in this context that the Privy Council held that if X has a decree against A, and A and B have a decree against X, it is clear on principle that X cannot insist on a set-off; but if B and A both ask for the set-off, and even if it appears that A incurred the debt to X on behalf of himself and B, then set-off cannot be refused.

91. This judgement of the Privy Council, in **Hazari Ram Marwari v. Rai Bahadur Bansidhar Dhandhania, 1936 SCC OnLine PC 72,** is inapplicable to the case on hand as neither is set off of two decrees sought herein nor is execution of a decree sought in these proceedings.

92. Let us now take note of the judgements relied on behalf of the Respondents in support of their contention that the appellant’s claim for set-off, legal or equitable, is wholly unfounded.

93. (I). In **Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh, (1952) 1 SCC 436,** the plaintiff obtained possession of the lands involved in the suits, and made an application for ascertainment of mesne profits. This was resisted by the defendant, and it was pleaded that the plaintiff was not entitled to interest on mesne profits, that the zamindar was entitled to receive the profits of the disputed lands and that deduction should be made out of the amount of the mesne profits on account of munafa and the amount of chowkidari dues as well as cesses due to him or paid by him. Later, another set of objections was filed by the zamindar claiming deduction out of mesne profits by way of equitable set-

off of the payments made by him subsequent to the date of delivery of possession, as well as for the amount of munafa that became payable to him after that date. After a prolonged enquiry, the trial court decreed the plaintiff's claim for mesne profits after allowing the zamindar the deductions claimed by him up to the date of assessment of mesne profits, but disallowed the amount claimed by way of equitable set-off for the subsequent period. On appeal, the District Judge reversed this decision, and allowed the defendant the amount claimed by him by way of equitable set-off subject, however, to the condition that the dues of the defendant should be deducted from the dues of the plaintiff till the defendant's dues were wiped off. Against the judgment and decrees of the District Judge, the plaintiff preferred appeals to the High Court of Calcutta which, by the judgment under appeal, modified the decrees of the District Judge and disallowed the claim for equitable set-off in its entirety for the subsequent period, and restored the decree of the trial court.

94. Among the points, for decision in the appeals before the Supreme Court, included whether the appellant was entitled to deduct, by way of equitable set-off from the amount of mesne profits, the amounts due to him on account of rent, revenue and cesses for the period subsequent to the dates of delivery of possession. The Supreme Court held that, as regards the amounts due to the appellant by way of rent subsequent to the date of transfer of possession, the claim was unconnected with the subject-matter of the different suits; a plea in the nature of equitable set-off was not available when the cross-demands did not arise out of the same transaction; mesne profits due to the plaintiff related to the period during which the appellant was in wrongful possession of the lands, and the amounts claimed by the defendant related to a period when he was no longer in possession, and had ceased to be a trespasser; no mesne profits could be claimed for that period; the right of the appellant, to

recover additional rent from the plaintiff, arose out of a different cause of action, and independently of the claim for mesne profits; if the patnidar, after having entered into possession, had defaulted in payment of the additional rents due for any period, nothing stood in the way of the appellant from recovering them by appropriate legal proceedings; prolongation of the enquiry, for ascertainment of the mesne profits, cannot support a claim for equitable set-off for the period subsequent to the delivery of possession to the plaintiff; no claim for equitable set-off, against mesne profits during the pendency of the suits, could be made for the sums, deduction of which was now sought, as the amounts had not then accrued due, and his right to them had not yet arisen; the District Judge was in error in holding that the appellant's claim for equitable set-off was in the nature of a cross-demand arising out of the same transaction, and connected in its nature and circumstances; he failed to appreciate that the transaction which led to the plaintiff's demand resulted from the defendant's wrongful act as a trespasser, while the transaction giving rise to the appellant's demand arose out of the relationship of landlord and tenant, and the obligations resulting therefrom; a wrongdoer, who had wrongfully withheld monies belonging to another, could not invoke any principle of equity in his favour, and seek to deduct therefrom the amounts that, during this period, had fallen due to him; there was nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it; such a person could not be helped on any principle of equity to recover amounts, for the recovery of which he could have taken action in due course of law and which, for some unexplained reason, he failed to take; and which claim may have by now become barred by limitation.

95. The Supreme Court further held that the patnidars, under the decree, were entitled to possession of the lands conditional on payment

of the additional rent due for the period they had been out of possession; that condition, having been fulfilled (by adjustment of the appellant's claim against the mesne profits), the decree must be held to have been satisfied, thus completely settling the cross-demands; the landlord's demand for subsequent rent had to be enforced in the ordinary way in the civil court if any default has been committed in the payment of these rents; this claim could not for ever remain linked with the demand for mesne profits for any anterior period; and the result was that the decision of the High Court on this point was maintained.

96. (II). In **Jitendra Kumar Khan v. Peerless General Finance & Investment Co. Ltd., (2013) 8 SCC 769**, the Appellants instituted a Suit in the High Court of Calcutta for a declaration that they were entitled to be paid commissions and other incentives payable to the agents/field officers by the defendants. After filing their written statement, the defendants filed an application for amendment of the written statement which had the effect of grant of a decree for a sum with interest. The said application was opposed by the plaintiffs on the ground that such an amendment was impermissible and, by seeking incorporation of such a plea by way of amendment, the defendants were actually taking recourse to an adroit method of introducing a counter-claim or set-off.

97. In appeal, against the order of the learned Single Judge rejecting the application for amendment, the Division Bench of the Calcutta High Court held that the claim put forth by the defendants could not be treated as a counter claim and set-off as envisaged under the Civil Procedure Code; the provisions of the Limitation Act did not necessarily bar an equitable set-off and the provisions of Order 8 Rule 6 CPC did not do away with the principles of equitable set-off; and, though the amendments were being allowed, if the appellant's set-off were found to be barred by

limitation at trial, in that event they would not be entitled to a decree on their own but only to a wiping off pro-tanto of the plaintiff's claim.

98. On the question whether the claim of equitable set-off was tenable or not, the Supreme Court referred to Order 8 Rule 6 CPC, and observed that certain conditions precedent were to be satisfied for application of the said Rule; two primary conditions were that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum; apart from the aforesaid parameters, there were other parameters to sustain a plea of set-off under this Rule; as far as equitable set-off was concerned, it had been enunciated in *Clark* v. *Ratnavaloo Chetti* [(1865) 2 Mad HCR 296] that the right of set-off existed not only in cases of mutual debits and credits, but also where cross-demands arose out of the same transaction; the said principle had been reiterated by the Calcutta High Court in *G. Chishlom* v. *Gopal Chunder Surma* [ILR (1889) 16 Cal 711]; in *Bhupendra Narain Singha Bahadur* v. *Bahadur Singh* [(1952) 1 SCC 436 : AIR 1952 SC 201], the Supreme Court had opined that a plea, in the nature of equitable set-off, was not available when the cross-demands did not arise out of the same transaction, and were not connected in its nature and circumstances; a wrongdoer, who had wrongfully withheld moneys belonging to another, could not invoke any principles of equity in his favour and seek to deduct therefrom the amounts that had fallen due to him; there was nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it; in *Lakshmichand and Balchand* v. *State of A.P.* [(1987) 1 SCC 19] the Supreme Court had ruled that, when a claim is founded on the doctrine of equitable set-off, all cross-demands were to arise out of the same transaction or the demands were so connected in the nature and circumstances that they could be looked upon as a part of one transaction; in *Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.* [(2004) 3 SCC 504], the Supreme Court had held that Order 8

Rule 6(1) CPC dealt with legal set-off; the claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant; both the parties must fulfil the same character in respect of the two claims sought to be set-off or adjusted; apart from the rule enacted in Order 8 Rule 6 CPC, there existed a right to set-off, called equitable, independent of the provisions of the Code; such mutual debits and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it, and leave the defendant high and dry for the present unless he files a cross-suit of his own; when a plea in the nature of equitable set-off is raised it is not done as of right; and the discretion lies with the court to entertain and allow such plea or not to do so.

99. The Supreme Court, in **Jitendra Kumar Khan v. Peerless General Finance & Investment Co. Ltd., (2013) 8 SCC 769**, then held that it was quite clear that equitable set-off was different than legal set-off; it was independent of the provisions of the Code of Civil Procedure; the mutual debits and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; such a plea is raised not as a matter of right; and it is the discretion of the court to entertain and allow such a plea or not; the concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience; the discretion rests with the court to adjudicate upon it, and the said discretion has to be exercised in an equitable manner; an equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in *Dobson & Barlow Ltd.* v. *Bengal Spg. & Wvg. Co.* [ILR (1897) 21 Bom 126] and *Girdharilal Chaturbhuj* v. *Surajmal Chauthmal Agarwal* [AIR 1940

Nag 177]; the Division Bench of the Calcutta High Court had rightly allowed the amendment on the basis that the claim put forth could be treated as a plea in the nature of equitable set-off, for it had treated the stand taken in the amendment petition to be a demand so connected in the nature and circumstances that they could be looked upon as part of one transaction.

100. As cross-demands between the same parties was not permitted, in **Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh, (1952) 1 SCC 436,** to be equitably set off on the ground that they did not arise out of the same transaction, it does not stand to reason that the appellant's claim for equitable set-off, of the amounts invested by them in the unsecured debentures of the Three IL&FS Entities, against the amounts payable to the Respondents for the power supplied by them to the appellant under the PPAs, should be entertained as not only are they two completely distinct and unconnected transactions, they are also transactions between distinct and different parties.

101. The law declared, in **Jitendra Kumar Khan v. Peerless General Finance & Investment Co. Ltd., (2013) 8 SCC 769**, is that the right of equitable set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. A plea, in the nature of equitable set-off, is not available where the cross-demands do. not arise out of the same transaction and are not connected. When a claim is founded on the doctrine of equitable set-off, all cross-demands should arise out of the same transaction or the demands should be so connected, in the nature and circumstances, that they can be looked upon as a part of one transaction.

102. In the present case, the appellant's cross demand neither arises out of the same transaction nor is their demand so connected, with the

demand made by the Respondent WPDs against them, as to be looked on as part of one transaction. The appellant's claim of equitable set-off is devoid of merit.

VIII. SHOULD THE 2ND RESPONDENT HAVE SOUGHT PAYMENT OF THE AMOUNTS DUE ONLY BEFORE NCLT:

103. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the adjustment claimed, and taken as a defense by the appellant, is valid; firstly it is wrong on the part of Respondent WPDs to claim that the NCLAT is required to adjudicate in favour of the appellant before equitable set off can be claimed by them; secondly, it is also wrong to claim that the decision of the claim advisory officer constitutes an adjudication by the NCLAT or NCLT or by a competent court; in fact, the Respondent WPDs had approached the NCLAT for adjudication of the action taken by the appellant of equitable set off and adjustment, but withdrew their application on the ground that they ceased to be part of the 349 companies of the IL&FS group; in any case, the issue of set-off, relating to the resolution proceedings of the IL&FS group, could have been decided only by the NCLT/NCLAT; and having raised the issue before the court of competent jurisdiction, and thereafter withdrawing the same, the Respondent WPDs are precluded from raising the issue before any other forum including the State Commission.

104. On the other hand, Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Respondents, would submit that the appellant has chosen not to disclose the fact that it had filed its claim for set off before the Claim Management Advisor, who rejected the said claim by proceedings dated 27.06.2019; not only has this rejection order not been placed on record, the appellant has also not challenged it before the NCLT,

and the said rejection has become final; the rejection order was a part of the record before the State Commission; on this issue, the State Commission, in the Impugned Order, has held that the claims made by the appellant for set off before the Claim Management Advisor were rejected, and no appeal seems to have been made against such rejection order; the appellant has not brought on record anything from which it can be said that any proceeding has been undertaken by them before the NCLT/NCLAT regarding such set off; therefore, in the absence of any order or reliable material on record, it is difficult to believe that the appellant has been allowed equitable set off; the appellant has not claimed any cross demand or any adjustment of its alleged dues from the Respondents; the appellant has not disputed non-payment of invoices, and appears to have withheld the invoice amounts unilaterally; the appellant has not challenged the aforesaid finding of fact; the appellant should not be allowed to claim equitable set-off against the respondent; the appellant's assertion that the State Commission lacked jurisdiction over the matter, due to the earlier proceedings before the NCLAT, is without substance; the State Commission's Order dated 8.7.2019 had been set aside and remanded back to the State Commission in view of changed circumstances; the Respondent's applications for impleadment of the appellant, and for directives to them, were withdrawn on 23.10.2019, with the NCLAT expressly granting them liberty to approach the appropriate forum for resolution of their issues; this enabled the respondent to seek redress from the State Commission; a power purchase due, on the basis of an approved PPA, could only be adjudicated before the State Commission, more so after the Respondent had ceased to be a party before the NCLT/NCLAT in the company proceedings concerning the IL&FS group of companies; and it is evident, from the above facts, that the transactions were not so inter-connected in their nature and circumstances as to render it inequitable for

the State Commission to allow the claim of the Respondent without permitting the set-off claim of the appellant.

A. ORDER OF NCLT DATED 12.10.2018:

105. While accepting that no petition under any of the provision of the Insolvency and Bankruptcy Code, 2016 ("IBC" for short) could be preferred by any party, for initiation of `Corporate Insolvency Resolution Process' against `Infrastructure Leasing and Financial Services Limited' (`IL&FS' for short) and its 348 Group Companies, till the Central Government issued an appropriate notification making the provisions applicable to them, the NCLT, in its order in MA 1173/2018 in C.P. No. 3638(MB)/2018 dated 12.10.2018, refused to pass an interim order on the prayer for `Moritorium' made by the Appellant-Union of India, and observed that, otherwise, they appreciated the difficulties which were being faced by IL&FS and its 348 Group Companies.

B. ORDER OF NCLAT DATED 15.10.2018:

106. On an appeal being preferred against the aforesaid order of the NCLT dated 12.10.2018, the National Company Law Appellate Tribunal ("NCLAT" for short), in its order in **Union of India Vs. Infrastructure Leasing and Financial Services Ltd (Order in Company Appeal (AT) Nos. 346 & 347 of 2018 dated 15.10.2018)**, observed that the questions which arose for consideration in these appeals were: (i) whether the Tribunal could pass appropriate orders under Section 241 read with Section 242 of the Companies Act, 2013 for resolution of the problems faced by the Company in a time-bound manner for maximisation of value of assets of the Company, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders and, in case of failure of resolution, pass appropriate order of liquidation; and (ii) whether

the Tribunal, in exercise of the powers conferred under Section 242 (1) (b) read with Section 242 (2)(m) and Section 242(4) of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016, can pass appropriate interim order similar to an order under Section 14 of the Insolvency and Bankruptcy Code, 2016.

107. In this context it is relevant to note that Section 241 of the Companies Act, 2013 relates to the Application to the Tribunal for relief in cases of oppression, etc. Under Section 241(1), any member of a company who complains that (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under Section 244, for an order under this Chapter. Section 241(2) of the Companies Act, 2013 provides that the Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

108. Section 242 of the Companies Act, 2013 relates to the powers of the Tribunal. Section 242(1) stipulates that if, on any application made under

Section 241, the Tribunal is of the opinion (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit. Section 242 (2) provides that, without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for (a) the regulation of conduct of affairs of the company in future; (b) the purchase of shares or interests of any members of the company by other members thereof or by the company; (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital; (d) restrictions on the transfer or allotment of the shares of the company; (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case; (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e). Under the proviso thereto, no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned; (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a

fraudulent preference; (h) removal of the managing director, manager or any of the directors of the company; (i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims; (j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h); (k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct; (l) imposition of costs as may be deemed fit by the Tribunal; (m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made. Under Section 242 (4), the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company‘s affairs upon such terms and conditions as appear to it to be just and equitable.

109. Section 14 of the Insolvency and Bankruptcy Code, 2016 relates to Moratorium. Sub-Section (1) thereof stipulates that, subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:— (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

110. Section 14 (4) of the IBC provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. Under the proviso thereto, where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. Rule 11 of the National Company Law Tribunal Rules, 2016 relates to inherent powers, and stipulates that nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

111. In its interim order dated 15.10.2018, the NCLAT has recognized that the questions which arose for consideration in these appeals included (i) whether the Tribunal could pass appropriate orders under Section 241 read with Section 242 of the Companies Act, 2013 and (ii) whether the Tribunal, in exercise of powers conferred under Section 242 (1) (b) read with Section 242 (2)(m) and Section 242(4) of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016, could pass appropriate interim order similar to an order of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016.

112. It is evidently because these questions were required to be considered in the appeals later, that the order of the NCLAT dated 15.10.2018 does not consider these aspects. After noting the submission

urged on behalf of both the Union of India and IL & FS, that the Tribunal had much wider power under Sections 241 and 242 of the Companies Act, 2013 than the powers vested under the provisions of the Insolvency & Bankruptcy Code, 2016, and taking into consideration the nature of the case, the NCLAT, in its Order dated 15.10.2018, was of the view that the five largest creditors should be also impleaded as party Respondents to the appeals in the representative capacity of Creditors.

113. While posting the appeals `for admission' on 13th November, 2018 the NCLAT, taking into consideration the nature of the case, larger public interest, economy of the nation and interest of the Company and 348 group companies, granted stay of (i) institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against `ILFS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and (ii) any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'ILFS' and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; (iii) the acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations availed by `ILFS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein; (iv) suspension temporarily of the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the `ILFS' and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default; (v) any and all banks, financial institutions from exercising the right to set off or lien

against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the `ILFS' and its 348 group companies. The interim order was to continue until further orders.

C. ORDER OF NCLAT DATED 11.02.2019:

114. In its order, in **Union of India Vs Infrastructure Leasing & Financial Services Ltd. & Ors (Order in Company Appeal (AT) NO. 346 and 347 OF 2018 dated 11.02.2019)**, the NCLAT observed that the Learned Senior Counsel for the 'Union of India', along with the counsel for the 'Infrastructure Leasing & Financial Service Limited' ("IL&FS" for short), had contacted Justice (Retd.) D.K. Jain to seek his consent to supervise the operation of the 'Resolution Process' of the 'IL&FS Group Companies', and to discuss the terms and conditions of his engagement; pursuant to the meeting, Justice (Retd) D.K. Jain had consented; the 'Union of India' had filed a list of '302 IL&FS Group Entities' at Annexure B; the list of 'Indian IL&FS Group Entities' had been shown as Annexure C comprising of 169 entities; another list of 'Overseas IL&FS Group Entities', incorporated outside India comprising 133 entities, was shown as Annexure D; with regard to the 133 entities of the 'IL&FS Group Companies (Offshore) incorporated outside the territorial jurisdiction of India, as shown at Annexure D, prayer was made that these 'Offshore Group Entities' be excluded from the purview of the interim order passed by the NCLAT on 15th October, 2018, though the resolution of the 'Offshore Group Entities' would be subject to the decision of the management of the Board of Directors and supervision of Justice (Retd.) D.K. Jain; taking into consideration the stand taken by the 'Union of India', as agreed by the 'IL&FS', '133 Offshore Group Entities' incorporated out

of India as shown in Annexure D, were being excluded from the purview of the order dated 15th October, 2018; however, the resolution for those 'Offshore Group Entities' may be taken up by the Board of Directors of 'IL&FS' under the supervision of Justice (Retd) D.K. Jain; and the decision as may be taken with regard to the 'Offshore Group Entities', incorporated outside the territorial jurisdiction of India, may be presented before the National Company Law Tribunal, Mumbai Bench, which was hearing the main petition.

115. The NCLAT thereafter observed that, out of '169 Group Entities' incorporated within the territorial jurisdiction of India (Domestic Group Entities) as shown in Annexure C, had been marked as (a) "Green Entities" (b) "Amber Entities" (c) "Red Entities"; the stand of the 'Union of India' in regard of those Entities was that (a) "Green Entities" were Domestic Group Entities which could continue to meet all their payment obligations (both financial and operational) as and when they become due; (b) "Amber Entities" were the Domestic Group Entities which were not able to meet all their obligations (financial and operational), but could meet only operational payment obligations and payment obligations to senior secured financial creditors; and (c) "Red Entities" were Domestic Group Entities which could not meet their payment obligations towards even senior secured financial creditors, as and when such payment obligations became due; the classification of entities into "Green", "Amber" and "Red" had been done by the Resolution Consultant appointed by the New Board of Respondent No.1 based on a 12-month cash flow based solvency test; from the aforesaid list, they found that '22 Group Companies' had been marked as "Green Entities", '10 Group Companies' had been marked as "Amber Entities" and '38 Group Companies' had been marked as "Red Entities"; the remaining 'Indian IL&FS Group Entities', approximately 100 in total, were yet to be

classified; the List of “22 Green Entities” at Annexure E, were as given in the table; and the list of “38 Red Entities” at Annexure G, were shown in the table.

116. After extracting the list of Green, Amber and Red Entities, in three different tables, the NCLAT further observed that, with regard to “22 Green Entities”, a prayer had been made to allow the ‘Board of Directors’ of ‘IL&FS’ to permit all “Green Entities” to service their debt obligations as per the scheduled repayment; and It was also clarified that the resolution of the “Green Entities” would be within the ‘Resolution Framework’ as described in the affidavit dated 25th January, 2019, and subject to supervision of Justice (Retd.) D.K. Jain.

117. Taking into consideration the stand taken by the ‘Union of India’ and ‘IL&FS’, the NCLAT allowed the Board of Directors of ‘IL&FS’ and permitted all “Green Entities”, including the entities which may be declared ‘Green’ out of the 100 entities, to service their debt obligations as per the scheduled repayment, which should be within the ‘Resolution Framework’ as described in the affidavit dated 25th January, 2019, and subject to supervision of Justice (Retd.) D.K. Jain. In so far as the “10 Amber Entities” were concerned, a prayer had been made to permit “Amber Group Entities” to make necessary payments only to maintain and preserve them as a “Going Concern”; and, with regard to “38 Red Entities”, a prayer had been made to permit the “Red Group Entities” to make payments necessary only to maintain and preserve the “Going Concern Status”.

118. The NCLAT opined that they intended to hear the matter with regard to “Amber Group Entities” and “Red Group Entities” on the next date; they also intended to hear the ‘Union of India’, and the Board of Management of ‘IL&FS’, as to how they intended to resolve all the entities

particularly “Amber Group Entities” and “Red Group Entities”; whether they intended to constitute any ‘Committee of Creditors’, as normally done in the case of ‘Corporate Insolvency Resolution Process’; and they should also give a timeframe for such resolution with regard to the aforesaid Group Companies as the interim order passed on 15th October, 2018 could not continue for an indefinite period.

119. The NCLAT noted that the Learned Senior Counsel, appearing on behalf of the ‘Union of India’, had referred to Paragraph 11 of the Affidavit dated 11th February, 2019, and had alleged that certain lenders of the ‘IL&FS Group’ were marking lien on monies, and not making operations and maintenance payment and other payments, including salary, which were essential for maintaining the Companies as a “going concern”. With regard to the aforesaid issue, the NCLAT observed that, while they were not issuing any specific observations at this stage, they were of the view that, if any amount was payable by the lenders to any of the members of the ‘IL&FS Group Companies, they may release it, failing which the NCLAT may pass necessary orders after hearing the parties on the next date.

D. ORDER OF NCLT DATED 28.08.2019:

120. In **Union of India VS Infrastructure Leasing & Financial Services Ltd & Ors (Order in MA 2756/2019 in CP 3638/241-242/2018 dated 28th August 2019** passed under Section 241-242 of the Companies Act, 2013), the National Company Law Tribunal Mumbai Bench (“NCLT” for short) held that MA 2756/2019 had been filed by Infrastructure Leasing and Financial Services Ltd., seeking approval of the sale of the shares of Specified Wind SPVs held by IL&FS Wind Energy Ltd (IWEL) to ORIX, free and clear from all encumbrances, liens, security interest and third party claims upon receipt of the ORIX Revised Bid amount, in compliance

with the terms of the SPA; they contended that, by order dated 01.10.2018 passed by NCLT in CP 3638/2018, the erstwhile Board of RI was superseded by the new Board of those directors who were nominated by the Petitioner and appointed by the NCLT; in the Company Petition, the Petitioner was the Union of India, Ministry of Corporate Affairs, and Respondent Nos. 2 to 8 were the erstwhile Directors of the Applicant company; and the present application was being filed seeking approval from the NCLT to conclude the resolution process for the following seven subsidiaries (subsidiaries of IL&FS); i.e. Lalpur Wind Energy Pvt Ltd., Etesian Urja Ltd, Khandke Wind Energy Pvt Ltd, Ratedi Wind Power Pvt Ltd, Wind Urja India Pvt Ltd, Tadas Wind Energy Pvt Ltd and Kaze Energy Ltd.

121. It was further stated that the Specified Wind SPVs were the subsidiaries of IL&FS Wind Energy Ltd (IWEL) which held 51% shareholding in each of the said seven entities; IWEL was a wholly-owned subsidiary of IL&FS Energy Development Co Ltd (IEDCL) which, in turn, was a subsidiary of the Applicant (91.42% shareholding of the applicant); the balance 49% in each of the Specified SPVs were held by ORIX Corporation (0RIX), a company incorporated under the Laws of Japan; ORIX had purchased 49% shareholding in 5 of the 7 Specified Wind SPVs in March 2016; consequent to and simultaneously upon acquiring 49% shareholding in these five Specified Wind SPVs, shareholders agreements dated March 7, 2016 were executed to govern the inter-se rights and obligations between the shareholders of the specified Wind SPVs; as regards the remaining 2 of the 7 Specified Wind SPVs, ORIX had purchased 49% of their shareholding in March 2018; similarly, shareholders agreements were executed in respect of these 2 Specified Wind SPVs as well on March 30, 2018 (all the shareholder's agreements are collectively referred to as "the SHAs); each of these SHAs were similar

and contemplated certain pre-emptive rights in favour of the other shareholder in the event that a sale of shares was contemplated; before the New Board was appointed by the NCLT, ORIX, IWEL, IEDCL had executed a Memorandum of Understanding dated 30.3.2018 (First MOU) in respect of the Specified Wind SPVs under which the parties thereto had agreed to explore/consider exit strategies from the Specified Wind SPVs, and had superseded any contrary terms in the SHAs; on 15.10.2018, the NCLAT had stayed, amongst others, coercive creditor and other action against the applicant group in larger public interest; pursuant to and in compliance with the 1st October, 2018 order, the new Board had submitted a Progress Report titled as Report on progress and the Way Forward (First Progress Report) to the Petitioner; and the Petitioner, in turn, had filed the First Progress Report with NCLT on 31.10.2018.

122. The order of the NCLT then records that a memorandum of undertaking dated 28.11.2018 (second MOU) was executed by and between ORIX, IEDCL and IWEL in terms of which it was agreed that the process of monetizing the applicant group and ORIX's investments in the Specified Wind SPVs would be modified (from the private bilateral process contemplated in the SHAs read with the First MoU) as follows: (i) the Applicant will issue a public advertisement for soliciting Expressions of Interests (EoI) for purchase of its interests in the Specified Wind SPVs; the parties will proceed to monetize the investments made in each of (i) Wind Urja India Private Limited. (ii) Ratedi Wind Power Private Limited. (iii) Tadas Wind Energy Pvt Ltd. (iv) Lalpur Wind• Ehergy Pvt Ltd. (v) Khandke Wind Energy Pvt Ltd. (vi) Etesian Urja Ltd. and (vii) and Kaze Energy Limited (Collectively referred to "Wind SPVs") in terms of the following process: (a) Infrastructure Leasing and Financial Services Ltd will issue a public Advertisement for soliciting Expressions of Interest for purchase of its interests in the Wind SPVs. Teaser will capture information

on the business; (b) Parties who qualify in their Expressions of Interest and sign the non-disclosure agreement will be provided the Information Memorandum ("IM"); (c) The IM will state: (i) that 100% of the shares (IWEL's 51% and ORIX's 49%) is on sale, subject to terms and conditions being acceptable respectively to the approving authorities for IWEL and ORIX; (ii) the carrying value of the investment made by ORIX based on an aggregated equity value of INR 23,162 million for the Wind SPVs; that ORIX has the option whereby it will purchase IWEL's stake at the highest price binding bid, should such price be less than its carrying value and ORIX chooses not to accept and sell at such price; (d) ORIX will, within 15 Business Days of receipt of the last binding offer, either communicate: (i) its acceptance of the offer along with IWEL; or Its decision to acquire 50% of the share capital of the Wind SPVs held by IWEL at the highest bid price; (e) If ORIX decides to acquire 51% of the share capital of the Wind SPVs held by IWEL under paragraph 1(d)(ii) above, then IWEL and ORIX shall take all actions to transfer IWEL's shareholding to ORIX" (ii) the Information Memorandum that will be issue to applicants, who qualify the EoI, would inter alia prescribe that 100% of the shareholding held by IWEL and ORIX in the Specified Wind SPVs would be offered to prospective bidders; and (ii) ORIX, upon receipt of the last binding offer, would have an option to: (a) accept the offer for sale of 100% shareholding (including 49% owned by ORIX) along with IWEL; or (b) purchase IWEL's stake in each of the Specified Wind SPVs at the highest binding bid price (received pursuant to the publicly solicited bid process), should the bid price for the Specified Wind SPVs be lesser than the carrying value of the Investment made by ORIX based on an aggregated equity value of INR 2316.2 crores.

123. The NCLT further observed that, in line with the objectives and mandate of the New Board and the Second MOU, the applicant issued an advertisement and invitation for expressions of interest (EOI), in terms of

which inter alia a potential controlling stake held by the Applicant Group in the Specified Wind SPVs was offered to prospective bidders; subsequently, further to the objectives and broad options for Resolution of the Applicant Group set out in the First Progress Report, the applicant submitted the Initial Resolution Framework and the addendum Framework to the petitioner (collectively referred to as the "Resolution Framework", which was filed by the Petitioner before the NCLT (vide affidavit dated 15.1.2019).

124. The NCLT further observed that the initial Resolution Framework, and the Addendum Framework Resolution, contemplated a step by step approach to achieve an "Asset Level Resolution" of the Applicant Group; summarily, these steps included (a) inviting EOIs on the basis of suitable eligibility criteria as may be applicable for the investors of a particular business/class of companies of the Applicant Group with regard to the nature of businesses for which such EoI are being invited; (b) following receipt of EOIs from potential investors, a request for proposal (an RFP) will be issued to the eligible applicants (who meet the criteria set out in the EoI) pursuant to which binding financial bids will be sought from the eligible applicants; separately, the eligible applicants will also be provided: (A) access to an Information Memorandum and a data room containing material information relating to the Sale of the company for which offers were being sought from the eligible applicants, and the eligible applicants would be invited to undertake a time-bound, legal and financial due diligence exercise through access to information in a data room to be populated by the company; the eligible applicants should submit their binding financial offers in the form and manner and within the timelines prescribed in the relevant RFP; and the New Board would evaluate such bids for the highest financial bid amount submitted by the bidder, which

would contemplate categorisation of the sale of the Company on the basis of the bid received into Category I Company or Category II Company.

125. The NCLT then observed that a Category I company was a company where the Bidder was willing to assume all liabilities of the Sale Company without any compromise of the debt of such company; the Specified Wind SPVs were all Category I companies since both the bids of GAIL, which was matched by ORIX, proposed no haircut or impairment to the debt of the Specified Wind SPVs; depending on the categorisation of a company as a Category I company or a Category II company, a Creditors' Committee will be formed at the appropriate level; for a Category I company - one Creditors' Committee consisting of all financial creditors of the selling Applicant Group, shareholder(s) of the Sale Company will be required to be constituted; this was so, since the debt of that Category I Company (whether financial or operational) would be assumed by the Highest Bidder (without any impairment); therefore, the financial creditors of the Selling Shareholder(s) will be consulted as positive equity value will be received by the Selling Shareholder(s), which will, in turn, be utilised to settle dues of the creditors of the Selling Shareholders; the decision of the Creditors' Committee (approval/rejection) was to be placed before the New Board for consideration and, if the New Board approved the sale proposal, the same was to be placed before Justice D. K. Jain (Retd) appointed by the NCLAT vide order dated 4.2.2019 and 11.2.2019 to supervise the resolution process; and (g) after approval of Justice D.K. Jain (Retd) is received, an application was to be filed before the NCLT to consummate the transaction/resolution framework.

126. The Order of the NCLT then records that valuation of the fair market value and liquidation value as conducted by the valuers, in respect of each Specified Wind SPV, was detailed in the table; a single bidding process

was followed in the case of Specified Wind SPVs, and eligible Applicants were required to submit their non-financial bid documents and financial bid documents; of the Eligible Applicants, the only bid received was from GAIL(India) Limited ("GAIL") on the bid due date (i.e., March18, 2019); as per GAIL's bid, GAIL assumed all the debt of each of the Specified Wind SPVs, and additionally attributed a positive equity value for the shares of each of the Specified Wind SPVs; since GAIL's bid attributed a positive equity value for the shares of each of the Specified Wind SPVs without proposing any haircut to the debt of any of the Specified wind SPVs (which was approx. INR 3700 Crores), each of the Specified wind SPVs were categorized as Category I companies (as contemplated under the Resolution Framework Reports); GAIL's bid of approximately INR 4,800 crores for 100% of Enterprise Value contemplated; (i) approximately INR 1064 crores as purchase price for 100% shares of the SPVs; and (ii) approximately INR 3,700 crores towards the aggregate debt of the SPVs, without any hair-cut; therefore, as per Gail's bid, the value of IWEL's 51% would be INR 542.64 crores (approx.); GAIL's bid was placed before the IWEL Board for its consideration, and was identified as the highest bid; further, IWEL Board authorised the formation of a "Creditors Committee of IWEL", and submission of the Gail Bid to IWEL's Creditors Committee; since GAIL's bid attributed a positive equity value for the shares of each of the Specified Wind SPVs, without proposing any haircut to the debt of any of the Specified Wind SPVs, each of the Specified wind SPVs were Category I Companies (as contemplated under the Resolution Framework Reports); accordingly, as per the Resolution Framework, a Creditors' committee was constituted comprising of all the "financial Creditors" of IWEL, i.e. the selling Applicant Group Shareholder of the Specified Wind SPVs Viz. IWEL; at the third meeting held on April 17, 2019, the Creditors' Committee of IWEL unanimously approved GAIL's bid and passed a

resolution authorising the sale of the Specified Wind SPVs to ORIX, if ORIX agrees to match GAIL's Bid; after approval of GAIL's bid from the Creditors' Committee of IWEL, in terms of the Second MoU, GAIL's bid was disclosed to ORIX vide intimation letter dated April 18, 2019; subsequently ORIX, by way of its letter dated May 13, 2019, issued to IWEL and IEDCL, confirmed its intention to exercise its right under the Second MoU to acquire 51% of the share capital in each of the Specified Wind SPVs based on the highest bid price (i.e. GAIL's bid amount of INR 1,064 Crores for 100% of the share capital of each of the specified Wind SPVs); on June 7, 2019, IWEL issued a letter to ORIX informing ORIX of (i) the procedural requirements prescribed under India exchange controls laws (including the regulations issued under the Foreign Exchange Management Act, 1999) such as the floor price for the sale of shares of Indian Companies (such as the Specified Wind SPVs); and (ii) Computation of the amounts that would accordingly be required to be paid by ORIX for the purchase of the shares held by IWEL in the Specified Wind SPVs; in response, on June 17, 2019, ORIX issued a letter to IWEL, among others, setting forth: (i) a revision of its offer for the purchase of IWEl's shareholding in the Specified Wind SPVs to INR 592,87,50,000 ("ORIX Revised Bid"); (ii) confirmation that INR 211,57,85,329 as the total outstanding principal and unpaid interest amount (net of withholding tax) of promoter debt up to May 31, 2019, which is due to IEDCL from the relevant Specified Wind SPVs, and (iii) an acknowledge that the said amount will be updated to account for the accrued interest on the closing date, and will be payable by ORIX in accordance with the provisions of the share purchase agreement.

127. The NCLT order also records that thereafter ORIX, vide its letter dated June 28, 2019 and July 5, 2019, confirmed the agreed form of the Share Purchase Agreement (Final SPA), which ORIX would execute with

IWEL, and the specified wind SPVs to conclude the acquisition of 51% shareholding in each Specified Wind SPVs by paying the ORIX Revised Bid to IWEL; on July 1, 2019 the Applicant issued a letter to Justice (Retd) D.K. Jain seeking approval of the sale of 51% (fifty-one per cent) shareholding in each Specified Winds SPV held by IWEL to ORIX, and the Resolution of the Specified Winds SPVs; by letter dated July 15, 2019, Justice (Retd.) D.K. Jain approved sale of the Specified Wind SPVs to ORIX (subject to the conditions 'prescribed therein); on receipt of Mr Justice (Retd) D. K. Jain's approval, the following steps had been taken to consummate the resolution of the Specified Wind SPVs; (a) the applicant had issued a letter of intent dated August 1, 2019 ("Letter of Intern") confirming ORIX as the purchaser of the IWEL's interest in the Specified Wind SPVs; (b) ORIX had submitted on August 5, 2019, assigned acceptance of the Letter of intent (c) ORIX, IWEL and the Specified Wind SPVs had also executed share purchase agreement on 7.8.2019 (SPA) setting out the terms on which the sale of the Specified Wind SPVs was to be concluded; finally, in terms of the Resolution Framework, the present application was filed by the Applicant to seek approval of NCLT to consummate the sale of the Specified Wind SPVs; the Applicant had further contended that the October 15 order passed by the NCLAT had permitted the New Board to preserve value across the Applicant Group,. and work towards a resolution free from the threat of coercive creditors and other action in a fair and transparent manner; by the February 11 Order, the NCLAT recorded that the Specified Wind SPVs were inter-alia classified as "Green" Entities and that the resolution of the "Green" entities would be conducted within the Resolution Framework; accordingly, the New board had conducted the resolution process of the Specified Wind SPVs with the intent of maximising value for all stakeholders involved; the applicant had further stated that the Applicant Group comprised 302 Group

Companies (169 Domestic Companies and 133 Offshore Group Companies); the aggregate fund based debt outstanding of the Applicant Group as of October 8, 2018, was approx INR 94,246 Crores; of this aggregate fund-based outstanding debt, the outstanding fund based debt of the Specified Wind SPVs was INR 3,700 Crores; given that ORIX had agreed to assume the debt of the Specified Wind SPVs and attributed a positive equity value to the specified wind SPVs, a resolution of the Specified Wind SPVs would be a step towards the resolution of the aggregate outstanding debt of the Applicant Group; and the applicant had stated that it -was in larger public interest, and in the interests of justice, that the NCLT approves the sale of 51% of the shareholding of each Specified Wind SPVs to ORIX and pass necessary directions to facilitate/consummate the said resolution on the terms as contemplated under the SPA.

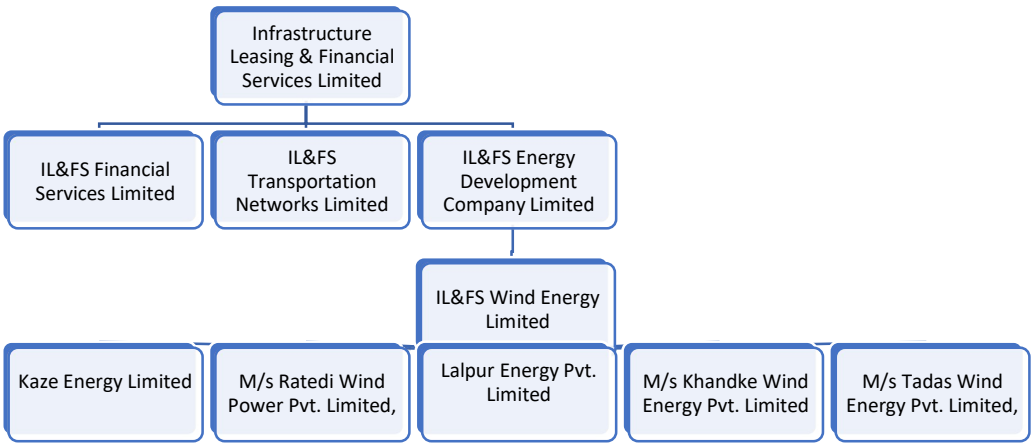
128. The NCLT then observed that it was clear that the entire process, as per the directions of NCLAT, was done in compliance of the order dated 11.2.2019 of the NCLAT in Company Appeal No.346/2018 and, in accordance with the same, the entire process was approved by Justice D. K. Jain (Retd). In the circumstances, NCLT allowed MA 2756/2019 and approved the sale of shares held by IL&FS Wind Energy Ltd in Lalpur Wind Energy Pvt Ltd., Etesian Urja Ltd, Khandke Wind Energy Pvt Ltd, Ratedi Wind Power Pvt Ltd, Wind Urja India Pvt Ltd, Tadas Wind Energy Pvt Ltd and Kaze Energy Ltd. to ORIX Corporation, and directed transfer of such shares by IWEL to ORIX free and clear from all encumbrances, liens, security interest and third party claims upon: (a) ORIX Corporation making payment of Rs.5,928,750,000 in the manner as set out in the Share Purchase Agreement (SPA) dated 7.8.2019 entered into between IWEL and ORIX; and (b) ORIX making payment of Rs.2,11,57,85,329 (along

with interest accruing till the date of repayment) to IL&FS Energy development Corporation Ltd in the matter as contemplated in the SPA.

129. The NCLT granted IWEL and ORIX liberty to implement and give effect to the terms of the SPA, and directed that the payment due to IWEL and IEDCL under the SPA be credited into a designated escrow account to be intimated by IWEL and IEDCL (as the case may be); such funds to be maintained as interest-bearing fixed deposit; and clarify that such funds, when deposited into the relevant bank accounts or maintained as fixed deposits should not be adjusted or set off against any other dues; and the distribution of such amounts, paid to IWEL and IEDCL, will be subject to further orders of the NCLT.

130. It is useful, in this context, to take note of the chart furnished, on behalf of the Appellant, in support of their claim that the Three IL&FS Entities and the Respondent WPDs formed part of the IL&FS group of companies.

CHART FILED ON BEHALF OF THE APPELLANT



131. The afore-extracted chart shows that Infrastructure Leasing and Financial Services Limited was the holding company which had, among others, three subsidiaries ie (1) IL&FS Financial Services Limited (2) IL&FS Transportation Network Limited and (3) IL&FS Energy

Development Company Limited. IL&FS Wind Energy Limited was a subsidiary of IL&FS Energy Development Company Limited. All the five WPDs, respondents in this batch of appeals, were, prior to transfer of their shares pursuant to the order of the NCLT, subsidiaries of IL&FS Wind Energy Limited which, in turn, was a subsidiary of IEDCL which, in turn, was the subsidiary of Infrastructure Leasing and Financial Services Limited - the holding company. It does also appear that not even one of the Three IL&FS Entities, whose debentures the Appellant had subscribed to, held any shares in the Respondent WPDs.

132. The Respondents were hitherto held to form part of the IL&FS group of companies only because IL&FS Wind Energy Limited held 51% of their share capital, while the remaining 49% share capital was held by ORIX Corporation, a Japanese company unrelated to the IL&FS group. The appellant seeks to set-off amounts, due to companies which were hitherto a subsidiary of a subsidiary of a subsidiary of the holding company, with amounts allegedly due to it from unconnected subsidiaries of the same holding company, as well as the holding company, all of whom are independent companies with a distinct and separate legal identity. Set off of amounts arising from completely unconnected transactions, that too with different and distinct legal entities largely unconnected with each other, is impermissible.

133. The Order of the NCLAT dated 11.02.2019 records the stand of the Union of India that Green Entities were domestic group entities which could continue to meet all their payment obligations (both financial and operational) as and when they become due; and “Red Entities” were domestic group entities which could not meet their payment obligations towards even senior secured financial creditors, as and when such payment obligations became due. While all the wind power generators -

respondents in this batch of appeals, were amongst the Green Entities, the Three IL&FS Entities, whose debentures the PF Trust has subscribed to, were amongst the Red Entities. While allowing the Board of Directors to permit the Green Entities to service their debt obligations as per the schedule of repayment within the resolution framework and subject to supervision of Justice (Retd.) D.K. Jain, the NCLAT expressed its intention to hear the matter on the next date, and ascertain how the Union of India and the Board of Management of IL&FS intended to resolve issues relating to Amber and Red Entities. The NCLAT directed them to indicate a time frame for such resolution, pointing out that the interim order dated 15.10.2018 could not continue indefinitely.

134. It is evident, therefore, that NCLAT had itself classified the IL&FS Group companies into three distinct categories, and did not treat them as one homogenous group, much less as one single entity. Further, the intention of NCLAT, as is evident from its order itself, was only to resolve issues relating to Red and Amber Entities, and to permit the applicant IL&FS to sell the share of their subsidiaries in the Green entities at the highest bid price. The aforesaid interim orders passed by the NCLT/NCLAT were in the purported exercise of jurisdiction under Sections 241 and 242 of the Companies Act, 2013 which is akin to Sections 397 and 398 of the Companies Act,1956 relating to oppression and mismanagement. The said orders do not even indicate, much less specifically state, that the NCLT/NCLAT intended to lift the corporate veil to ascertain whether the Respondent WPDs and the Three IL&FS Entities were in fact one and the same.

135. It is because all the five Respondent WPDs were green entities, that the NCLT, in its order dated 28.08.2019, permitted sale of shares in these WPDs, held by IWEL, to ORIX Corporation, since the debt of these WPDs

would be assumed by the bidder without any impairment; positive equity value would be received by the selling shareholders; and it could, in turn, be utilised for settlement of the dues of the creditors of the selling shareholders (ie IWEL and IEDCL). Even before 15.10.2018, the shareholders of the Respondent WPDs (ie ORIX and IWEL) along with IEDCL (the holding company of IWEL) had sought to transfer the 51% shareholding of IWEL in the Respondent SPDs at the best possible price, as all of them were solvent entities, and the proceeds from such transfer could be used by IWEL and IEDCL to meet their financial obligations. The fortuitous circumstance of their being included in the proceedings before the NCLT/NCLAT, for some time from 15.10.2018 before they became wholly owned subsidiaries of ORIX Corporation, Japan, cannot be understood to mean that they, and other companies in the IL&FS Group, are one and the same and, therefore, the dues from the Three IL&FS Entities should be permitted to be set off with the dues payable to the Respondent WPDs.

E. CLAIMS SUBMITTED BY PF TRUST FUND TO THE CLAIMS MANAGEMENT ADVISOR:

136. Section 3(5)(a) of the Insolvency and Bankruptcy Code, 2016, defines “claim” to mean a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. Section 3(8) defines “corporate debtor” to mean a corporate person who owes a debt to any person. Section 3(10) defines “creditor” to mean any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder. Section 3(11) defines “debt” to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Section 5(7) defines “financial creditor” to mean any person to whom a financial debt

is owed and includes a person to whom such debt has been legally assigned or transferred to. Section 5(8)(c) defines “financial debt’ to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money, and includes any amount raised pursuant to, among others, debentures.

137. Since the Appellant had subscribed to the unsecured debentures of three companies ie (1) Infrastructure Leasing & Financial Services Limited, (2) IL&FS Transportation Networks India Limited, and (3) IL & FS Financial Services Limited, such debentures would fall under Section 5(8)(c) of IBC, 2016 and would thereby constitute a financial debt, and the Appellant a financial creditor under Section 5(7) of IBC.

138. Chapter IV of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 apply to the corporate insolvency resolution process. Chapter IV of the 2016 Regulations relates to proof of claims. Regulation 8 thereunder relates to claims by financial creditors. Regulation 8(1) stipulates that a person, claiming to be a financial creditor of the corporate debtor, shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule. Under the proviso thereto, such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

139. Regulation 8(2) provides that the existence of debt, due to the financial creditor, may be proved on the basis of (a) the records available with an information utility, if any, or (b) other relevant documents, including (i) a financial contract supported by financial statements as evidence of the debt, (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor, (iii) financial statements showing that the debt

has not been repaid, or (iv) an order oof a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

140. Regulation 10 relates to substantiation of claims, and thereunder the interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim. Regulation 12 relates to submission of proof of claims. Regulation 13(1) stipulates that the interim resolution professional, or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. Regulation 13(2)(d) requires the list of creditors to be filed with the Adjudicating Authority.

141. Form C in the Schedule is required to be submitted by the financial creditor to the Interim Resolution Professional/Resolution Professional and is required to contain, among others, the total amount of the claim, details of the documents by reference to which the debt can be substantiated, and details of any credit or mutual debts or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim.

142. In Form CA, Submission of Claim by Financial Creditors in a Class (under Regulation 8A of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) dated 29.05.2019, the Trustees of GEB's CP Fund Trust submitted to the Claims Management Advisor, Infrastructure Leasing & Financial Services Ltd, proof of claim as on 15-10-2018, declaring that M/s. IL&FS Transportation

Networks India Ltd., the corporate debtor was, at the insolvency commencement date - being the 15th day of October, 2018, actually indebted to their GEB's CP Fund Trust for a sum of Rs. 35,90,84,932/-; in respect of the said sum or any part thereof, neither the Secretary, nor any person, by his order, to his knowledge or belief, for his use, had or received any manner of satisfaction or security whatsoever; he was not a related party of the corporate debtor, as defined under Section 5(24) of the Code; and he was eligible to give voting instruction to the authorized representative by virtue of proviso to Section 21 (2) of the Code.

143. Annexure B thereto states that the corporate debtor i.e. M/s. Infrastructure Leasing & Financial Services Ltd mentioned above was a part of the IL&FS Group, and the entire group had been subjected to proceedings; the group consisted of various Companies including 7 Wind Power Generating Companies, namely M/s. Khandke Wind Energy Private Ltd., M/s. Lalpur Wind Energy Private Ltd., Mis. Mahidad Wind Energy Private Ltd., M/s. Ratedi Wind Power Private Ltd., M/s. Sipla Wind Energy Limited, M/s. Maas Wind Energy Private Limited and M/s. Kaze Energy Ltd; M/s. Gujarat Urja Vikas Nigam Ltd (GUVNL), which administers the above Financial Creditor Ms. GEB's CP Fund Trust and is responsible for funding the Trust for the benefit of the employees, is procuring Wind Power Generated by the above 7 Wind Power Companies of IL&FS Group under the PPAs executed between GUVNL and the said Wind Power Companies; the amount becoming due from GUVNL to the above 7 Wind Power companies, being recovered by the IL&FS, as a whole is liable to be equitably set off against the money due to M/s. GEB's CP Fund Trust from the above corporate debtor forming part of the IL&FS Group; as on date, the total amount withheld by GUVNL (due from December'18) to the above 7 Wind Power Companies aggregated to Rs.76,42,38,470/- whereas the amount due from the above mentioned corporate debtor and

another two Corporates forming part of the IL&FS Group is in aggregate, as on 15th October, 2018, of Rs. 171,55,58,571/-; GUVNL may be permitted to appropriate the above amount withheld by GUVNL against the payment to be made by IL&FS to M/s. GEB's CP Fund Trust in terms of the financial obligation of the three IL&FS Group Companies, namely, M/s. IL& FS Transportation Network Ltd., M/s. Infrastructure Leasing & Financial Services Ltd. and M/s. IL&FS Financial Services Ltd.

144. By his e-mail dated 27.06.2019, the Claims Management Advisor informed the Appellant that, with regard to the claims filed by the Trustees of GEB's CP Fund Trust, in separate Form CAs, against Infrastructure Leasing & Financial Services Limited, IL&FS Transportation Networks India Limited and IL & FS Financial Services Limited, in relation to the debentures issued by such entities, they were in the process of verifying such claims; however in the Form CAs, in the column for mutual debt, they noted that the Appellant had attached Annexure B, and had suggested a set off of the amounts due to seven separate IL&FS entities from Gujarat Urja Vikas Nigam Limited, being the administrator of GEB, against the amounts due under the claim; and, from the documents provided, they found no legal basis for such a set off; and were, accordingly, not recognising or admitting such a set off.

145. As noted hereinabove, Section 3(10) defines a creditor to mean any person to whom a debt is owed and includes a financial creditor, and Section 3(8) defines a corporator debtor to mean a corporate person who owes a debt to any person. The information required to be furnished in Form C, as proof of claim by a Financial Creditor, is the mutual dealings between them and the corporate debtor which, in the present case, are (1) Infrastructure Leasing & Financial Services Limited, (2) IL&FS Transportation Networks India Limited, and (3) IL & FS Financial Services

Limited whose unsecured debentures the Appellant/PF Trust had subscribed to. It is for this reason that their claim for set-off, against the amounts due and payable to the Respondents, was rejected by the Resolution Professional, vide e-mail dated 27.06.2019.

F.

146. In **Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17**, on which reliance is placed on behalf of the appellant, the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016 ("the Code") were under challenge. Among them included a challenge to the legislative scheme contained in Section 7 of the IBC, on the ground that there was no real difference between financial creditors and operational creditors; both types of creditors would give either money in terms of loans or money's worth in terms of goods and services; there was no intelligible differentia between the two types of creditors, regard being had to the object sought to be achieved by the Code, namely insolvency resolution, and if that is not possible, then ultimately liquidation; such classification was not only discriminatory, but also manifestly arbitrary, as under Sections 8 and 9 of the Code, an operational debtor is not only given notice of default, but is entitled to dispute the genuineness of the claim; however, in the case of a financial debtor, no notice is given and the financial debtor is not entitled to dispute the claim of the financial creditor; it is enough that a default as defined occurs, after which, even if the claim is disputed and even if there be a set-off and counterclaim, yet the Code gets triggered at the behest of a financial creditor, without the corporate debtor being able to justify the fact that a genuine dispute is raised, which ought to be left for adjudication before ordinary courts and/or tribunals.

147. On the other hand the submission put forth on behalf of the Union or India was that, under Section 7(5) of the Code, the adjudicating authority, on being "satisfied" that there is a default, has to issue notice to the corporate debtor, hear the corporate debtor, and then adjudicate upon the same; the reason why disputes raised by financial debtors are not gone into at the stage of triggering the Code is because the evidence of financial debts are contained in the documents of information utilities, banks and financial institutions; disputes, which may be raised, can be raised at the stage of filing of claims once the resolution process is underway; also, by the very nature of financial debts, set-off and counterclaims by financial debtors are very rare and, in any case, wholly independent of the loan that has been granted to them.

148. On set-off or counter-claim qua financial debts, the Supreme Court .observed that a set-off of amounts due from financial creditors is a rarity; usually, financial debts point only in one way—amounts lent have to be repaid; however, it is not as if a legitimate set-off is not to be considered at all; such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Section 60; Section 60 relates to Adjudicating authority for corporate persons; Section 60(5)(c) stipulates that, notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code; equally counter-claims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which

interdicts the corporate debtor from pursuing such counterclaims in other judicial fora; Form C, under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, deals with submission of claims by financial creditors; in terms thereof, the financial creditor submits his claim in respect of the corporate insolvency resolution process of the corporate debtor; among the details he is required to submit, are the details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim; the trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements; it is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code, and a change in approach has been brought about; legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default"; and the said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation; a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor; it is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due; and, when this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

149. In the light of the law declared by the Supreme Court, in **Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17**, a legitimate claim for set-off can be considered at the stage of filing of proof of claims, during the resolution process, by the resolution professional, and his decision is

subject to challenge before the adjudicating authority ie NCLT under Section 60 of the IBC. In the present case, the appellant's claim for set-off was considered and rejected by the Claims Management Advisor (ie the Resolution Professional) by his e-mail dated 27.06.2019. No material has been placed on record to show that the appellant has challenged the said rejection before the NCLT. As the decision of the Claims Management Advisor, vide e-mail dated 27.06.2019, appears to have attained finality, the question, whether the appellant can agitate the very same issue all over again before the GERC and thereafter before this Tribunal, is not free from doubt.

150. The NCLT/NCLAT exercised jurisdiction over the Respondent WPDs on the basis that they were part of the IL&FS group of companies. The Respondent WPDs had filed a petition to implead the Appellant as a party to the proceedings before the NCLAT/NCLT, and to direct them to pay the amounts due and payable for supply of power in terms of the PPA, when it was a subsidiary of IWEL, and was therefore considered as part of the IL&FS group of companies. After transfer of the 51% shareholding of IWEL to Orix Corporation, Japan, the Respondent WPDs ceased to be a subsidiary of IWEL, and to remain part of the IL&FS group of companies. They had, thereafter, sought permission of the NCLAT/NCLT to withdraw these applications with liberty to avail their other remedies, evidently because the NCL/NCLAT ceased to exercise jurisdiction over them on their ceasing to remain part of the IL&FS group of companies, and it was only the State Commission which could exercise jurisdiction to adjudicate their claim for recovery of the monies due to them from the appellant, as both of them were regulated entities under the Electricity Act.

151. Further, a claim for set-off is a defence in a suit or proceedings instituted by the plaintiff, and does not disable the defendant, where they

cannot claim set-off in such suit or proceedings, from instituting an independent suit or proceeding for recovery of the money, if any, due to them. As the Three IL&FS Entities are not regulated entities under the Electricity Act, the State Commission lacked jurisdiction to entertain or adjudicate a claim against them. That does not disable the appellant from approaching the competent authority for recovery of its dues from the Three IL&FS Entities, which they did by submitting their claim before the Claims Management Advisor. While their claim for set-off was no doubt rejected, their claim for recovery of their dues from the Three IL&FS Entities appears to be still pending before the authorities under the Insolvency & Bankruptcy Code.

152. The appellant's contention that the issue of set-off could have been decided only by the NCLT/NCLAT, and the Respondent WPDs are precluded from raising the issue before the State Commission, does not therefore merit acceptance. Viewed from any angle, the State Commission was justified in refusing to entertain such a claim for set off.

IX. FAILURE TO CONSIDER SET OFF: ITS EFFECT:

153. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the appellant claimed set off and adjustment as a defense in the Petition filed by the WPDs, before the State Commission, for recovery of money; the Impugned Order passed by the State Commission has not considered set off; and the Appeal filed by the appellant is that the set off claimed by them ought to have been considered as an adjustment against the claim made by the WPDs.

154. On the other hand, Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Respondents, would submit that the Respondent had filed Petitions, under Section 86(1)(f) of the Electricity

Act, 2003, to recover its dues pending against the invoices raised for the sale and supply of electricity generated from the respondent Wind Energy Power Plants under the PPA; by the Impugned Order, the State Commission allowed the Petition, and directed the appellant to pay the amounts claimed by the Respondent; the appellant had received the renewable energy generated by the respondent, and had sold the same to distribution licensees/consumers in the State of Gujarat; in the impugned order, the State Commission has rightly observed that the appellant has not provided any adjudication order that proves any effect of equitable set-off, and has not shown that any adjudicatory body has determined that the Three IL&FS Entities owe any amount to the appellant; while resolving disputes between the appellant and the respondent, under Section 86(1)(f) of the Electricity Act, the State Commission could not have adjudicated disputes between the appellant and the Three IL&FS Entities; and since the Three IL&FS Entities, where the alleged investment had been made by the PF Trust, cannot be made parties in regulatory proceedings under the Electricity Act, 2003, the question of the State Commission considering such set off does not arise.

A. SECTION 86 (1) (F) ELECTRICITY ACT, 2003: ITS SCOPE:

155. This Tribunal exercises appellate jurisdiction over orders passed by the State Commission, and it is its bounden duty to ensure that the State Commission, in passing orders, exercises its powers strictly in accordance with the statutory provisions contained in the Electricity Act, 2003. **(T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53)**. After the Electricity Act, 2003 came into force, with effect from 10-06-2003, disputes between licensees and generating companies cannot be adjudicated by anyone other than the State Commission or the arbitrator nominated by it. The State Commission has

jurisdiction to adjudicate disputes not only between licensees and generating companies, but also between two licensees. As the State Commission has the power to adjudicate such disputes, it cannot relegate parties to approach a Civil Court for adjudication of such disputes. **(Global Energy Private Limited v. Maharashtra Electricity Regulatory Commission, 2018 SCC OnLine APTEL 102; Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82; T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53; Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755).**

156. Section 86(1)(f) of the Electricity Act confers power on the State Commission only to adjudicate disputes between licensees and generating companies or between two licensees. As its adjudicatory functions are limited to matter prescribed in Section 86(1)(f), the State Commission cannot adjudicate disputes relating to grievances of individual consumers **(Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd., (2007) 8 SCC 381),** or disputes between licensees and consumers which are provided open access under Section 42 of the Electricity Act. **(Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd., (2019) 17 SCC 82).**

157. Since the jurisdiction, which the State Commission exercises under Section 86(1)(f) of the Electricity Act, is confined to disputes inter-se between licensees or between licensees and generators, it is only if set off is claimed by a licensee for amounts payable by it to the generators, with the amounts payable, if any, by the generators to it, can such a claim for set off be examined by the State Commission. As the Three IL & FS Entities are not entities regulated under the Electricity Act, they are not amenable to the jurisdiction of the State Commission under Section

86(1)(f) thereof. The State Commission was, therefore, justified in refusing to entertain the claim of set off of the dues payable by the Appellant to the Respondents with the amounts which the Appellant claims is due to them from the Three IL&FS Entities (i.e those who are neither parties to the proceedings before the Commission nor are they entities amenable to the jurisdiction of the State Commission).

X. PROVISIONS OF INSOLVENCY ACTS RELATING TO SET-OFF:

158. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the basic principles, with regard to set off, is in terms of the provisions of Section 47 of the Presidency Towns Insolvency, 1909 (and Section 46 of the Provincial Insolvency Act, 1920); and the State Commission erred in not considering the appellant's claim for set-off.

159. Section 47 of the Presidency Towns Insolvency Act, 1909 relates to mutual dealings and set- off and, thereunder, where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set- off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively. Under the proviso thereto, a person shall not be entitled under this Section to claim the benefits of any set- off against the property of an insolvent in any case where he had, at the time of giving credit to the insolvent, notice of the presentation of any insolvency petition by or against him.

160. The provision for set-off, in Section 47 of the Presidency Towns Insolvency Act, 1909, would be attracted only in cases where there are

mutual dealings between an insolvent and a creditor who has either proved or is claiming to prove a debt under the said Act. On such a claim being proved by a creditor, an account is required to be taken of the amount due from one party to the other, in respect of such mutual dealings, and the sums due from one of the parties is required to be set-off against the sum due from the other, and only the balance can be claimed or paid.

161. Section 46 of the Provincial Insolvency Act, 1920 also relates to mutual dealings and set-off and, thereunder, where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively.

162. Section 46 of the Provincial Insolvency Act, 1920 is more or less identical to Section 47 of the Presidency- Towns Insolvency Act, 1909. Both the aforesaid provisions are attracted only where amounts are due from a debtor to a creditor and vice versa. In the present case, while the Appellant admits that sums are due from them to the Respondents under the respective PPAs, what is sought to be set-off by them is not any sum due to the Appellant from the Respondents, but sums allegedly due to the Appellant from three other companies (distinct legal entities). Such a claim for set-off is founded merely on the ground that these three companies form part of the IL&FS group of companies, to which group the Respondent companies hitherto belonged.

163. Section 36 of the Insolvency and Bankruptcy code, relates to Liquidation estate. Under Sub-Section (1) thereof, for the purposes of

liquidation, the liquidator shall form an estate of the assets mentioned in sub-section *(3)*, which will be called the liquidation estate in relation to the corporate debtor. Sub-Section (4)(e) thereof stipulates that the following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation ie any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

164. Among the amounts which are not to be included in the liquidation estate assets, and are not to be used for recovery in liquidation, are assets which can be subject to set-off on account of mutual dealings between a corporate debtor and a creditor. This stipulation in Section 36(4)(e) of the Insolvency and Bankruptcy Code would again apply only to such assets which can be subject to set-off on account of mutual dealings between the corporate debtor and any creditor, and not to set off of unrelated transactions between unrelated parties.

XI. LIFTING THE CORPORATE VEIL:

165. Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, by virtue of the order passed by NCLAT, in Company Appeal (AT) No. 347 of 2016 dated 15.10.2018, the holding company, ie Infrastructure Leasing and Financial Services Limited (IL&FS), and 348 group companies namely their subsidiaries/affiliates, were considered together for the purposes of monetization and resolution of their problems in a time bound manner, to maximise the value of their assets, to promote entrepreneurship, availability of credit and to balance the interests of stakeholders if there was failure to pass appropriate orders on liquidation; NCLAT proceeded on the basis that the powers under Sections 241 & 242 of the Companies Act, 2013, were much wider than the powers vested under the Insolvency and Bankruptcy Code, 2016; not

merely the ultimate holding company i.e., IL&FS, but each of the 349 companies, including the companies which owed monies to GUVNL and the five WPDs, were subjected to the above process; treating all the 349 companies as one, injunction, stay and other directions were passed by NCLAT in the order dated 15.10.2018, including restraint on proceedings against any of the 348 group companies; in these circumstances, by virtue of the Order dated 15.10.2018, the corporate veil and independent constitution of the 349 corporate entities of IL&FS Group was pierced, for the purposes mentioned in the said order dated 15.10.2018, in public interest; the very purpose of the Order dated 15.10.2018 and the proceedings thereafter, considering IL&FS and 348 companies as one entity, was to maximize the value of the assets; this is clearly akin to re-organization; considering all the companies together would necessarily involve mutual adjustments of the claims of the IL&FS Group as a whole, vis-à-vis the creditors; in view of the decision taken by NCLAT, to consider 349 Companies commonly for maximization of value, it cannot be the case of the five WPDs that they have no connection with the Three IL&FS Entities to whom the appellant lent money, which it is entitled to recover; the corporate veil of all the 349 companies got pierced on 15.10.2018, and remained so till 14.10.2019; Infrastructure Leasing and Financial Services Limited is the Holding Company, under which there are subsidiaries including IL&FS Financial Services Limited, IL&FS Transportation Network India Limited and IL&FS Financial Services Limited (which are direct), and then step-down subsidiaries, IL&FS Wind Energy Limited, and then further step-down subsidiaries, including WPDs - Respondent No. 2 in each of the Appeals; and, under Section 2(87) of the Companies Act, 2013, subsidiaries of subsidiaries are also subsidiaries of the Holding Company.

166. Reliance is placed by the Learned Senior Counsel on **(1) State of U.P. vs Renusagar Power Co : (1988) 4 SCC 59; (2) CCE vs J Foundation: (2015) 17 SCC 576; (3) State of Rajasthan vs Gotan Lime Stone Khanij Udyog (p) Ltd: (2016) 4 SCC 469; (4) Commissioner of Income-tax, Madras vs Sri Meenakshi Mills Ltd: AIR 1967 SC 819; (5) Subhra Mukherjee vs Bharat Coking Coal Ltd: (2000) 3 SCC 312; (6) Jawahar Mills Ltd vs Sha Mulchand and Co : (1949) 62 LW 635 (Madras); (7) Bhatia Industries -v- Asian Natural Resources, 2016 SCC Online Bom 10695**; and **(8) Delhi Airport Metro Express Private Limited -v- Delhi Metro Rail Corporation Limited, 2023 SCC Online Del 1619.**

167. On the other hand Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Respondent Generators, would submit that the appellant has put forth these submissions only to create a wrong and misleading narrative; the appellant erroneously contends that the NCLAT had lifted the corporate veil and considered all companies connected to IL&FS together; the NCLAT has, in its order dated 11.02.2019, itself segregated the IL&FS group of companies under three distinct heads- Red, Amber and Green; keeping in view their financial conditions, these companies were to be treated separately in a manner that protected the interests of the secured creditors; in the present case, one of the companies of IL&FS, i.e. IL&FS Wind Energy Limited (hereinafter referred to as "**IWEL**"), owned 51% share in the Respondent WPDs; the remaining 49% was owned and controlled by ORIX Corporation, Japan (a foreign investor); in terms of the protocol agreed in the company proceedings, IWEL sold its shareholding of 51%, in the respondent companies, to ORIX - the existing 49% shareholder; in its Order dated 28.08.2019, the NCLT recorded and approved the said transfer of shares by IWEL to ORIX, and confirmed that the same would be free from all encumbrances, liens, security interest and third party

claims; hence the question of lifting the corporate veil, either before the NCLAT or otherwise, does not arise; this transfer of shares has attained finality, there being no challenge thereto; from 15.10.2019 onwards, the respondent was no longer a company where any part of its share capital was owned or controlled by any company of the IL&FS group; post approval of share transfer and payment of transfer price, in terms of the order of NCLT dated 28.8.2019, the Respondent WPDs are no longer part of the company proceedings before the NCLAT/NCLT, concerning the IL&FS group of companies; even when IWEL held a majority stake in the Respondent SPVs, there was no direct connection or linkage between the Respondent and the Three IL&FS Entities where GEB funds were invested; the appellant has also not explained how it and GEB CPF can be considered identical entities; in any event, the Three IL&FS Entities (where the alleged investments are said to have been made) were not those which owned shares of the Respondent; as a consequence of a court-approved transfer, IWEL ceased to be a shareholder of the Respondent after 15.10.2019; there is therefore no question of now piercing the veil to make out a case against a non-shareholder; since the appellant cannot initiate a cross-suit to recover any dues from the respondent, it also cannot seek a set-off by invoking the doctrine of lifting of an alleged corporate veil; and the judgments relied upon on behalf of the appellant, regarding lifting of the corporate veil, have no application to the present facts.

A. COMPANY HAS A LEGAL IDENTITY DISTINCT FROM ITS SHAREHOLDERS:

168. In ***Salomon* v. *Salomon & Co. Ltd.*** **[1897 AC 22 : (1895-99) All ER Rep 33]** the House of Lords had observed that the company is at law a different person altogether from the subscribers; and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the

profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by that Act.

169. A company, registered under the Companies Act, is a legal person, separate and distinct from its individual members and the property of the company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit. **(*Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 1 SCC 125; *Rustom Cavasjee Cooper* v. *Union of India* [(1970) 1 SCC 248)**

170. An incorporated company has a separate existence and the law recognises it as a juristic person, separate and distinct from its members. **(*Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 1 SCC 125; *Heavy Engineering Mazdoor Union* v. *State of Bihar*: (1969) 1 SCC 765**). In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. ***(Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 1 SCC 125; *A.P.S.R.T.C.* v. *ITO* : AIR 1964 SC 1486; *Tamlin* v. *Hannaford* [1950 KB 18 : (1949) 2 All ER 327 (CA))**. Where Companies are incorporated, under the Companies Act for a lawful purpose, their property is their own and is vested in them. (***Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 1 SCC 125).**

B. SUBSIDIARIES ARE ALSO SEPARATE LEGAL ENTITIES:

171. Section 2(87) of the Companies Act, 2013 defines “Subsidiary company” or “subsidiary”, in relation to any other company (that is to say

the holding company), to mean a company in which the holding company – (i) controls the composition of the Board of Directors; or (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies. Under the proviso thereto, such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed. Under the Explanation thereto, for the purposes of this clause, (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company; (b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors; (c) the expression "company" includes any body corporate; and (d) "layer" in relation to a holding company means its subsidiary or subsidiaries"

172. In the light of the wide definition of a "subsidiary", and as IWEL hitherto held 51% of its share capital, the Respondent WPDs were subsidiaries of IWEL. The Three IL & FS Entities, whose debentures the appellant had subscribed to, are also subsidiaries of the ultimate holding company ie Infrastructure Leasing & Financial Services Ltd. No material has however been placed before us, by the appellant, to establish that the Respondent WPDs are subsidiaries of the Three IL & FS Entities also.

173. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. The assets of the subsidiary are not those of the parent

unless it is acting as an agent. Even though a subsidiary may normally comply with the request of a parent company, it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for the parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. ***(Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613)**

174. The question, whether the parent company has the "power" over the subsidiary, depends on the facts of each case. For instance, in the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals, their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. ***(Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613)**

175. The Directors of the subsidiary under their articles are the managers of the companies. If new Directors are appointed even at the request of the parent company, and even if such Directors are removable by the parent company, such Directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholders' influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) Directors. They cannot be reduced to puppets. ***(Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613).**

176. Courts do lift up a corner of the veil sometimes, but that does not mean that they alter the legal position between the companies. The decisive criterion, in obliterating the distinction between a holding company and its subsidiary, is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive Directors. ***(Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613)**

C. LIFTING THE CORPORATE VEIL:

177. The concept of a distinct corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. (***Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622).**

178. The proposition that a company is a distinct juristic person, as held in ***Salomon* v. *Salomon and Co.* [1897 AC 22 : (1895-99) All ER Rep 33 : 66 LJ Ch 35 (HL)]** , has been re-visited by the application of doctrine of lifting the corporate veil in revenue and taxation matters. (***Dal Chand and Sons* v. *CIT* : (1944) 12 ITR 458 (Lah); *Juggilal Kamlapat* v. *CIT* : AIR 1969 SC 932; and *Kapila Hingorani (I) v. State of Bihar*, [(2003) 6 SCC 1)].** Normally, Courts disregard the separate legal entity of a company where the company was formed or used to facilitate evasion of legal obligations (**State of U.P. v. Renusagar Power Co., (1988) 4 SCC 59).** The corporate veil can be pierced when the corporate personality is found to be opposed to justice, convenience and interest of the revenue

or workmen or against public interest. (***CIT* v. *Sri Meenakshi Mills Ltd:* AIR 1967 SC 819, *Workmen* v. *Associated Rubber Industry Ltd :*(1985) 4 SCC 114; *New Horizons Ltd.* v. *Union of India*: (1995) 1 SCC 478; *State of U.P.* v. *Renusagar Power Co:* (1988) 4 SCC 59; *Hussainbhai* v. *Alath Factory Thezhilali Union* [(1978) 4 SCC 257]; *Secy., H.S.E.B.* v. *Suresh*: [(1999) 3 SCC 601]; and *Kapila Hingorani (I) v. State of Bihar*, [(2003) 6 SCC 1)].** Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would lift the veil and look into the realities so as to identify the persons who are guilty and liable therefor. (***Kapila Hingorani (I) v. State of Bihar*, (2003) 6 SCC 1; *State of U.P.* v. *Renusagar Power Co.* [(1988) 4 SCC 59)].**

179. The corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Generally and broadly speaking, the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc. **(*LIC v. Escorts Ltd.*, (1986) 1 SCC 264)**

180. Pennington in his ***Company Law* (4th Edn.)** states:

> "……*Four inroads have been made by the law on the principle of the separate legal personality of companies. By far the most extensive of these has been made by legislation*

imposing taxation. The government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text hooks on corporation tax, income tax, capital gains tax and capital transfer tax.

The other inroad on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the courts implying in certain cases that a company is an agent or trustee for its members."

181. In ***Pennington's Company Law*****, 4th Edn.**, it is stated that, as a general rule, a corporation will be looked upon as a legal entity and an exception can be made *"when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime",* in which case, *"the law will regard the corporation as an association of persons".* (***Western Coalfields Ltd. v. Special Area Development Authority*****, (1982) 1 SCC 125).**

182. Courts have recognised several exceptions to the rule of a Corporation as a distinct legal entity, one of which is "when the corporate personality is being blatantly used as a cloak for fraud or improper

conduct". (**Gower: *Modern Company Law* — 4th Edn. (1979) at p. 137). Pennington (*Company Law* — 5th Edn. 1985 at p. 53)** also states that "where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by the law", the court will disregard the corporate veil. **S. Ottolenghi**, in his article **"*From peeping behind the Corporate Veil, to ignoring it completely*"**, says that the concept of 'piercing the veil' in the United States is much more developed than in the UK; the motto is that 'when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons'. **(1990) 53 *Modern Law Review* 338). Professor L. Maurice Wormser,** in his article **"*Piercing the veil of corporate entity*" [published in (1912) XII *Columbia Law Review* 496]** stated that the nearest approximation to the general rule, where the concept of corporate entity should be ignored and the veil drawn aside, is that, when the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.

183. In **Palmer's *Company Law* - Part II of Vol. I,** it is stated that courts have shown themselves willing to 'lifting the veil' where the device of incorporation is used for some illegal or improper purpose. For instance, where a vendor of land sought to avoid the action for specific performance by transferring the land in breach of contract to a company he had formed for the purpose, the court treated the company as a mere 'sham' and made an order for specific performance against both the vendor and the company. **(*Delhi Development Authority v. Skipper Construction Co.***

(P) Ltd.*, (1996) 4 SCC 622).** Where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation. **(*TELCO* v. *State of Bihar* [(1964) 6 SCR 885 : AIR 1965 SC 40; *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, [(1996) 4 SCC 622)].** The classes of cases, where lifting the veil is permissible, must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected. (LIC* v. *Escorts Ltd.* [(1986) 1 SCC 264 : AIR 1986 SC 1370)].**

184. Bearing these aspects in mind, let us now consider the judgements relied, on behalf of the appellant, under this head.

D. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

185. (I). The U.P. Electricity (Duty) Act, 1952 sought to levy a duty on the consumption of electrical energy in the State of Uttar Pradesh. In **State of U.P. v. Renusagar Power Co., (1988) 4 SCC 59,** the appeal by special leave was filed by the State of Uttar Pradesh. Among the four respondents in the appeal were Renusagar Power Company Ltd, and Hindustan Aluminium Corporation Ltd. Renusagar Power Co. Ltd was a wholly owned subsidiary of Hindustan Aluminium Corporation Ltd.

186. The Supreme Court noted that all steps for the expansion of the power plant of Renusagar, so as to match the power requirement of Hindalco's expansion, were taken by Hindalco even though Renusagar had been incorporated; applications for all the necessary sanctions and permissions were made by Hindalco; permissions and sanctions were first intimated to Hindalco even though Renusagar was in existence; changes

in the sanctions and/or permissions granted were obtained by Hindalco and *not by Renusagar;* the expansion of the power plant in Renusagar *was to exactly match the requirements of Hindalco for the production of aluminium;* the expansion of the power plant in Renusagar was part and parcel of the expansion of the aluminium plant of Hindalco; Hindalco consumed about 255 MW power out of which 250 MW comes from Renusagar and 5 MW by way of main supply and 15 MW by way of emergency supply are made by the Board; all steps to set up the power plant in Renusagar and its further expansion were taken by Hindalco; the power plant was set up by Hindalco through the agency of Renusagar (100 per cent subsidiary and wholly owned and controlled by Hindalco) to avoid complications in the event of takeover by the State/Board; all the borrowing of Renusagar were arranged and guaranteed by Hindalco; there was only one transmission line going out of Renusagar and the same went to Hindalco; Renusagar could supply power only to Hindalco; Renusagar generated power only to the extent required by Hindalco; Hindalco had complete control over Renusagar including its day-to-day operations; the agreement between Renusagar and Hindalco indicated that this was not a normal sale-purchase agreement between two independent persons at arm's length; the price of electricity was determined according to the cash needs of Renusagar; and this covenant showed complete control of Hindalco over Renusagar**.** It was also emphasized, on behalf of Hindalco, that the power plants at Renusagar were set up as part and parcel of the aluminium expansion scheme of Hindalco and the only object and purpose of the power plants in Renusagar was to supply power to suit the needs of Hindalco.

187. It is in this context that the Supreme Court observed that the various documents and letters placed and referred to, indicated that all persons and authorities dealing and conversant with this matter had consistently

treated Renusagar as own source of generation of Hindalco; it was also the case of the State that Renusagar was the own source of generation of Hindalco; and since, by its amendment in 1952, the legislature had shown an intention to levy duty on own source of generation, Hindalco was not entitled to exemption as Renusagar must be regarded as alter ego of Hindalco i.e. own source of generation of Hindalco within the meaning of Section 3(1)(*c*) of the Duty Act.

188. While reiterating that, in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible, its frontiers were unlimited, and its horizons were expanding, the Supreme Court cautioned that it must, however, depend primarily on the realities of the situation; in the present case, Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium; the model of setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take-over of the power station by the State or the Electricity Board; all the steps, for establishing and expanding the power station, were taken by Hindalco; Renusagar was a wholly owned subsidiary of Hindalco, and was completely controlled by Hindalco; even the day-to-day affairs of Renusagar were controlled by Hindalco; whenever felt necessary, the State or the Board had themselves lifted the corporate veil and had treated Renusagar and Hindalco as one concern, and the generation in Renusagar as the own source of generation of Hindalco; in the impugned order, the profits of Renusagar had been treated as the profits of Hindalco; and the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis.

189. The observations of the Supreme Court, in **State of U.P. v. Renusagar Power Co., (1988) 4 SCC 59,** that the frontiers of the doctrine of lifting of the corporate veil were unlimited and its horizons were expanding, were made with the caution that application of this doctrine must depend primarily on the realities of the situation, and after noting that all steps for expansion of the Renusagar power plant were taken by Hindalco even though Renusagar had been incorporated, so as to match the power requirement of Hindalco's expansion; applications for all necessary sanctions and permissions were made by Hindalco; changes in the sanctions and/or permissions granted were obtained by Hindalco and *not by Renusagar;* the expansion of the power plant in Renusagar *was to* exactly match the requirements of Hindalco for the production of aluminium; Hindalco consumed about 255 MW power out of which 250 MW came from Renusagar; all steps to set up the power plant in Renusagar and its further expansion were taken by Hindalco; Renusagar was a 100 per cent subsidiary and wholly owned and controlled by Hindalco; all the borrowing of Renusagar were arranged and guaranteed by Hindalco; Renusagar generated power only to the extent required by Hindalco; Hindalco had complete control over Renusagar including its day-to-day operations; the price of electricity was determined according to the cash needs of Renusagar; and even the day-to-day affairs of Renusagar were controlled by Hindalco.

190. It is in such circumstances that the Supreme Court, in **Renusagar Power Co,** held that the corporate veil should be lifted, and Hindalco and Renusagar should be treated as one concern. Unlike in the aforesaid judgement, it is not even the case of the appellant that the Three IL&FS Entities, whose debentures the appellant had subscribed to, exercised any form of control, much less complete control, over the Respondent WPDs. The Respondent WPDs were not even wholly owned subsidiaries

of IWEL. It also appears that the Three IL&FS Entities held no shares in the Respondent WPDs. The only justification for their claim that the corporate viel should be lifted is the interim order passed by the NCLAT on 15.10.2018 granting stay of proceedings against the entire IL&FS group, including the Three IL&FS Entities and the Respondent WPDs. Even if the corporate veil is lifted, no material is placed to show how these Three IL&FS Entities and the Respondent WPDs can be treated as one single entity, justifying the appellant's claim for set-off.

191. (II). In **CCE v. 'J' Foundation, (2015) 17 SCC 576,** the appeals were preferred by the Commissioner of Central Excise, Mumbai-V against five respondents and the names of these respondents were (1) M/s 'J' Foundation, (2) M/s 'J' Traders (3) M/s Janata Glass Works (4) M/s Haldyn Glass Works, and (5) M/s Tarvin Trading and Investment (P) Ltd. The dispute pertained to the transaction value that was to be arrived at in respect of the goods which were exigible to excise duty and were cleared by M/s Haldyn Glass Works (hereinafter referred to as M/s Haldyn); these goods were supplied to M/s J Foundation, M/s J Traders and M/s Janata Glass Works and to the fourth respondent M/s Tarvin Trading and Investment (P) Ltd. M/s Haldyn was the joint venture of two groups known as Shetty Group and Mehta Group who were having shareholding of 52% and 48% respectively in M/s Haldyn. The Revenue found that the aforesaid four firms/companies, to which goods were supplied by M/s Haldyn, were the firms of Mehta Group and Shetty Group respectively. M/s Tarvin Trading and Investment (P) Ltd was a private limited company in which Shakuntala Shetty and Vinita Shetty, wife and daughter respectively of N.D. Shetty, were Directors. The other firms belonged to Mehta Group which were all partnership firms in which family members of Mehta Group were the partners. The investigation revealed that the goods were supplied to these firms at much lesser price than the price which was

charged from the other buyers; on this basis, the Revenue held that M/s Haldyn and the aforesaid four purchasers of the goods were related persons with mutual interest in each other, and there was price manipulations; this resulted in issuance of show-cause notice proposing dated 7-2-1989 wherein it was proposed to revise the declared assessable value in case of the supplies made to these concerns by M/s Haldyn.

192. It is in this context that the Supreme Court held that, what emerged from the record was that, as far as M/s Haldyn was concerned, it was owned by the Shetty Group and the Mehta Group who subscribed to 52% and 48% shares respectively in the said company; on the other hand, M/s Tarvin, one of the purchasers, was wholly owned by the Shetty Group, and the other three firms were wholly owned by Mehta Group; its earlier judgment in **CCE v. ITEC (P) Ltd. [CCE v. ITEC (P) Ltd., (2002) 7 SCC 473)** squarely applied to the facts of the present case as it was held therein that where two companies/firms, etc belonged to the same group then the test of mutuality was established and satisfied; in a sense, the Court had torn the corporate veil thereby pointing out that such family concerns would be beneficiaries in the affairs of each other; the CESTAT was not right in holding that there was no mutuality of interest and, therefore, supplier on the one hand and the purchaser on the other hand were not related persons; price manipulation, i.e. sale of goods by M/s Haldyn to the aforesaid purchasers at a depressed price, had been established on the basis of a plethora of evidence tendered by the Revenue which had been discussed in detail in the order of the Commissioner; in a nutshell, it could be discerned from the said material that, while the goods of a particular description were sold by M/s Haldyn to outsiders at Rs 1200 per thousand bottles (200 ml Brute Amber Bottles), these were sold to M/s J Foundation at only Rs 840 per thousand bottles; after purchasing the

bottles from M/s Haldyn at Rs 840 per thousand bottles, M/s J Foundation had sold the same to M/s Swift Chemicals Ltd. at Rs 1550 per thousand bottles; likewise another product were sold by M/s Haldyn to M/s J Traders at Rs 1120 per thousand whereas these very bottles were sold to M/s Janata Glass Works at Rs 1785 to Rs 1850 per thousand, who further sold goods to the ultimate customers; and, therefore, the ingredients of price manipulations also stand satisfied. The order of CESTAT was, accordingly, set aside.

193. The corporate veil was lifted by the Supreme Court, in **CCE v. 'J' Foundation, (2015) 17 SCC 576,** as M/s Haldyn was owned by the Shetty Group and the Mehta Group who had subscribed to 52% and 48% of the share capital respectively in the said company; M/s Tarvin, one of the purchasers, was wholly owned by the Shetty Group, and the other three firms were wholly owned by Mehta Group; such family concerns were beneficiaries in the affairs of each other, and price manipulation had also been established. Not only was the entire shareholding in M/s Haldyn held by two family groups, price manipulation, by sale of products to the group firms, was also established. The Corporate veil was lifted to establish mutuality of interest. None of the tests, applied in the aforesaid case, are even alleged much less established in the case on hand.

194. (III). In **CIT v. Sri Meenakshi Mills Ltd., 1966 SCC OnLine SC 41,** all the three respondents (ie "the assessee companies") were public limited companies engaged in the manufacture and sale of yarn at Madurai. Each of the assessee Companies had a branch at Pudukottai engaged in the production and sale of cotton yarn. The sale-proceeds of the branches were periodically deposited in the branch of Madurai Bank Ltd. at Pudukottai either in the current accounts or fixed deposits which earned interest. The Bank was incorporated with Thyagaraja Chettiar as

founder Director, the Head Office being at Madurai. Out of 15,000 shares of this Bank, 14,766 were held by Thyagaraja Chettiar, his two sons and the three assessee Companies. All the three assessee Companies borrowed moneys from the Madurai branch of the bank on the security of the fixed deposits made by their branches with the Pudukottai branch of the Bank. The loans granted to the assessee Companies were far in excess of the available profits at Pudukottai. In the assessment proceedings of the assessee Companies for the various years under dispute, the Income Tax Officer was of the view that the borrowings, on the security of the fixed deposits made at Pudukottai, amounted to constructive remittances of the profits by the branches of the assessee Companies to their Head Office in India within the meaning of Section 4 of the Indian Income Tax Act, 1922 Accordingly he included the entire profits of the assessee Companies including the interest receipts from the Pudukottai branches in the assessment of the assessee Companies, since the overdrafts availed by the assessee Companies far exceeded the available profits.

195. Having examined the findings of the Appellate Tribunal, the Supreme Court opined that the entire transactions formed part of a basic arrangement or scheme between the creditor and the debtor that the money should be brought into India after it was taken by the borrower outside the taxable territory; and the Income Tax Authorities were right in holding that the entire interest earned on fixed deposits was taxable.

196. It was contended, before the Supreme Court, that, even if Thyagaraja Chettiar - a Director of the assessee Companies – knew, in his capacity as Director of Madurai Bank, that money placed in fixed deposit by the assessee Companies would be transferred to the taxable territory, that knowledge cannot be imputed to the assessee Companies,

and so it cannot be said that the transfer was part of an integral arrangement of the loan transaction.

197. It is in answer thereto, that the Supreme Court observed that the Appellate Tribunal had found that the transfer of funds from Pudukottai to Madurai was made as part of the basic arrangement between the Bank and the assessee Companies, and that Thyagaraja Chettiar, who was the moving figure both in the Bank and in each of the assessee Companies, had knowledge of this arrangement; it is well established that, in a matter of this description, the Income Tax Authorities are entitled to pierce the veil of corporate entity and to look at the reality of the transaction; it is true that, from the juristic point of view, the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members; but, in certain exceptional cases, the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal façade; and the Court has the power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligations.

198. The law declared by the Supreme Court, in **Sri Meenakshi Mills Ltd,** is that, while a company is a legal personality distinct from its members and is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members, the Court is entitled to lift the veil of the corporate entity, pay regard to the economic realities behind the legal façade, and disregard the corporate entity if it is used for tax evasion or to circumvent tax obligations. No such allegation of tax evasion or circumvention of tax obligations have even been levelled against the Respondent WPDs in the case on hand.

199. (IV). In **Jawahar Mills Ltd. v. Sha Mulchand and Co., Ltd., 1949 SCC OnLine Mad 82,** the appeal before the Division Bench of the Madras High Court, arose under Section 38 of the Indian Companies Act, to rectify the register. The prayer in the application, filed by the liquidators of the respondent-company which had been ordered to be wound up, was that the share register of the appellant should be rectified by restoring the name of the respondent to the said register in respect of 5000 shares. The respondent company, which was the managing agent of the appellant till they resigned, held 5000 ordinary shares of Rs. 10 each in the appellant in respect of which Rs. 5 was paid by that date. The respondent company owed to the appellant, a sum of Rs. 25,804-12-1 on the date of resignation of the managing agency which sum included the allotment money of Rs. 15,000 in respect of the shares.

200. The respondent company was a private limited company with only two members, T.V.T. Govindarajulu Chetty and K.N. Sundara Ayyar. On 20-2-1941 the directors of the appellant resolved that notice should be issued to the respondent informing them that they were in arrears of calls to the extent of Rs. 25,000, the said amount should be paid at the registered office of the appellant on or before 31st March 1941, and failure to pay the said amount on or before the due date, would result in the shares being forfeited. As the amount was not paid, the directors of the appellant company passed a resolution forfeiting the shares.

201. By an order of the Assistant Registrar of Companies dated 28th August 1941, the respondent was struck off the register on the ground that the company ceased to function and had become defunct. Govindarajulu Chetti was adjudicated insolvent on the 23rd January 1940 and, under the provisions of the Companies Act, his office as director was thereby vacated in law though in fact he was conducting himself as if he continued

as the managing director notwithstanding his bankruptcy. After the shares were forfeited, the appellant company, by the resolution of its directors of 16-11-1941, re-allotted the forfeited shares to various persons some of whom transferred the shares to others. By notice dated 26th April 1941, the appellant demanded the respondent company to pay the sum of Rs. 25,804-12-1, the balance due to them as per accounts. The notice was issued to Govindarajulu Chetti and Sundara Ayyar. In reply, Sundara Ayyar wrote on 7th May 1941 repudiating his personal liability for the amount and alleging that the company alone was liable, and that Govindarajulu Chetti was in possession of the accounts and the records of the company and was the person who really represented the company.

202. As the appellant did not receive any payment, they filed O.P. No. 10 of 1942 for restoration of the respondent company to the register and for winding up. As there was default also in the payment of income-tax, the Income-tax authorities also filed O.P. No. 11 of 1942 for a similar relief. To both these petitions Sundara Ayyar was made a party; Govindarajulu Chetti was represented by the Official Receiver of Salem as he was on that date an insolvent. The petitions were opposed but were not allowed to be tried. O.P. No. 10 of 1942 was settled by Sundara Ayyar by paying a sum of Rs. 11,000 to the appellant company in full settlement of all their claims against the respondent company. Leave was granted by an order dated 2nd April 1942 for the withdrawal of the petition. O.P. No. 11 of 1942 was also settled by paying the income-tax due to the income-tax authorities and on the 25th June 1942, the petition was disposed of by recording the settlement.

203. Having successfully prevented restoration of the company and settled the large claim of the appellant for Rs. 11,000, Sundara Ayyer instituted on the 27th June 1942, two days after the order in O.P. No. 11

of 1942, a suit against the appellant and one Palaniappa, who was a partner of the firm which succeeded as the managing agent of the appellant, after the respondent company resigned on the 30th June 1939. On the 29th June 1939, an agreement was entered into between Sundara Ayyar and Govindarajulu Chetti on the one hand and Palaniappa on the other, where under it was agreed by Sundara Ayyar and Govindarajulu Chetti that the 5000 shares should be transferred to Palaniappa, and that Palaniappa should pay the further calls due in respect of those shares to the appellant.

204. In the said suit, Sundara Ayyar sought a declaration that the forfeiture of the shares by the appellant was illegal and inoperative, and for a mandatory injunction directing them to restore the name of the respondent-company in the register. There was also an alternative claim for damages against the appellant which was the first defendant and the fourth defendant Palaniappa, for a sum of Rs. 25,000. In the plaint it was claimed that, by reason of the default of Palaniappa in not carrying out the terms of that arrangement, the shares were forfeited and they were, therefore, entitled to claim damages. This suit was dismissed on the ground that Sundara Ayyar was not entitled to maintain the suit as the respondent company ceased to exist, and the shares were held by the respondent company in its corporate character, and not by Sundara Ayyar in his individual capacity. Against this decision Sundara Ayyar preferred an appeal which was also dismissed against the appellant, on 12th February 1945, on the ground that, as the company was not restored in the register, Sundara Ayyar was not entitled to claim any relief in respect of the forfeited shares.

205. In between the dismissal of the suit in 1943 and the disposal of the appeal in 1945, Sundara Ayyar filed O.P. No. 199 of 1944 on the Original

Side on the 21st August 1944 to revive the company and to wind it up. Four days after the disposal of the appeal, the learned Judge. who made the order under appeal, also dealt with O.P. No. 199 of 1944 and passed an order directing restoration to the register of the respondent, and its winding up, mainly on the ground that the question of the validity of the forfeiture of shares had to be considered in a proper proceeding after the restoration of the company.

206. After this order was made, the liquidator with the permission of the Court filed the application under Section 38 of the Companies Act for rectification. The application for rectification of the Register, out of which the appeal arose before the Division Bench, was filed on 5th March, 1946 wherein it was contended that the forfeiture was invalid, and the register of the company should be rectified by restoring the name of the respondent company in respect of the 5000 shares.

207. On the question whether the Company was affected by the conduct of its shareholders in view of the doctrine in *Salomon's case*, which refused to identify a company with its controlling shareholders, the Division Bench held that the tendency of modern decisions in England was to “lift the veil of corporate personality” and disregard the corporate form; in other words, the curtain of the juristic personality of the corporation is lifted and the conduct of individuals behind the mask of juristic person is considered; for various purposes, the corporate existence of the company is ignored, e.g., where the corporate form is used to evade income-tax; a recent instance of the application of this principle of piercing the viel of corporate personality was *Smith, Stone and Knight* v. *Birmingham Corporation*, in which it was decided that the possession of a subsidiary company was really on behalf of the parent company which was entitled to compensation under the Land Clauses

Consolidation Act (1845) S. 121; It was stated in that case that it was a question of fact in each case, and those cases indicated that the question was whether the subsidiary was carrying on the business as the company's business or as its own; and it was too late in the day to still adhere to the strict formalism of *Salomon's case*, while the corporate personality was utilised to play a game of hide and seek. Disagreeing with the learned Single Judge, the Division Bench held that, by reason of the long delay which caused prejudice to the appellant, the respondent company should not be granted the relief claimed.

208. The law declared by the Division Bench of the Madras High Court, in **Jawahar Mills Ltd. v. Sha Mulchand and Co., Ltd., 1949 SCC OnLine Mad 82,**, is that the curtain of the juristic personality of the corporation is lifted and the conduct of individuals behind the mask of juristic person is considered for various purposes; the corporate existence of the company is ignored, e.g., where the corporate form is used to evade income-tax; it is a question of fact in each case whether the subsidiary is carrying on business as the company's business or as its own; and the strict formalism of *Salomon's case* cannot be adhered to when the corporate personality is utilised to play a game of hide and seek.

209. No allegation of evasion of income-tax or that the Respondent WPDs as subsidiaries were carrying on business of the holding company or even that the corporate personality is utilised to play a game of hide and seek, are made against the Respondent WPDs herein requiring lifting of its corporate veil.

210 (V). In **State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P) Ltd., (2016) 4 SCC 469,** among the questions which arose for consideration before the Supreme Court, was whether, looking at the

substance of the transaction in question, an illegal transfer of mining lease was involved; and whether transformation of partnership into a company and transfer of lease rights to such company, though apparently valid and permitted, had to be seen with the next transaction of transfer of the entire shareholding to a third company for a price thereby avoiding declaration of real transaction of sale of mining lease which was not permissible.

211. The respondent Gotan Limestone Khanji Udhyog (GLKU), a partnership firm, held a mining lease for mining limestone. The said lessee applied for transfer of the lease in favour of Respondent 1 herein, M/s Gotan Limestone Khanji Udhyog (P) Ltd. (GLKUPL). The application stated that the lessee was a partnership firm, and wished to transfer the lease to a private limited company which was a mere change of form of its own business by converting itself from a partnership firm into a private limited company; the partners of the firm and Directors of the company were the same; and, on transfer, no illegal benefit, price or premium was taken from the transferee. The transfer was allowed. After seeking the said permission, the newly formed private limited company, instead of operating the mining lease itself, sold its entire shareholding to another company allegedly for Rs 160 crores which is alleged to be the sale price of the mining lease. A show-cause notice was issued to Respondent 1 proposing to cancel the transfer order on the ground that, contrary to the statement made in the application for transfer that the partners of the partnership firm will be the Directors of the private limited company, the Directors of the private limited company, who were partners of the firm, were replaced by new Directors on 6-8-2012 and the private limited company was listed as subsidiary of Ultra Tech Cement Ltd. Co. (UTCL) with the Bombay Stock Exchange; and this development showed that the transfer was secured by a conspiracy and in circumvention of the Rules.

Thereafter an order was passed rescinding and declaring void the earlier order.

212. It is in this context that the Supreme Court held that, in the present case, there were two transactions; viewed separately, there may be nothing wrong with either or both, but if the real nature of the transaction is seen, the illegality was patent; in the first transaction of transfer of lease from the firm to the company, with the permission of the competent authority, the only disclosure made, while seeking permission for transfer, was of transforming the partnership business into a private limited company, with the same partners as Directors, without there being any financial consideration for the transfer, and without there being any third party; there was perhaps nothing wrong in such transfer by itself; in the second transaction, the entire shareholding was transferred for a share price, and control of the mining lease was acquired by the holding company without any apparent price for the lease; technically lease rights were not sold, only shares were sold; no permission for transfer of leasehold rights may therefore be required; the combined effect and real substance of the two transactions were however different; the partnership firm holding leasehold rights had successfully transferred the said rights to a third party, for consideration in the form of share price, which was nothing but the price for sale of mining lease which was not allowed and for which no permission had been granted; thus, if these facts were disclosed to the competent authority, permission for transfer of mining rights for financial consideration could not be allowed; Mining rights belong to the State and not to the lessee, and the lessee has no right to profiteer by trading such rights; the lessee can either operate the mine or surrender or transfer only with the permission of the authority as legally required; and, in the present case, the lessee had achieved indirectly what

could not be achieved directly by concealing the real nature of the transaction.

213. The Supreme Court then opined that the principle of lifting the corporate veil, as an exception to the distinct corporate personality of a company or its members, is well recognised not only to unravel tax evasion **[*CIT* v. *Sri Meenakshi Mills Ltd.*, AIR 1967 SC 819 : [(1967) 1 SCR 934],** but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation **[*Workmen* v. *Associated Rubber Industry Ltd.*, [(1985) 4 SCC 114 : 1985 SCC (L&S) 957];** and it is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. **(*LIC* v. *Escorts Ltd.*, [(1986) 1 SCC 264] which refers to *Palmer's Company Law* (23rd Edn.), and *Pennington Company Law* (4th Edn.) followed in *New Horizons Ltd.* v. *Union of India*, [(1995) 1 SCC 478)].**

214. After referring to ***State of U.P.* v. *Renusagar Power Co.* [*State of U.P.* v. *Renusagar Power Co.*, [(1988) 4 SCC 59],** and ***DDA* v. *Skipper Construction Co. (P) Ltd.*, [(1996) 4 SCC 622],** the Supreme Court held that the doctrine of lifting the veil can be invoked if the public interest so requires or if there is allegation of violation of the law by using the device of a corporate entity; in the present case, the corporate entity has been used to conceal the real transaction of transfer of mining lease to a third party, for consideration without statutory consent, by terming it as two separate transactions—the first of transforming a partnership into a

company and the second of sale of entire shareholding to another company; the real transaction was the sale of mining lease which was not legally permitted; and the doctrine of lifting the veil had to be applied to give effect to the law which is sought to be circumvented.

215. The Supreme Court further held that, once the real transaction is found to be different from the apparent transactions, the court can look to the real transaction; while discerning the true nature of the entire transaction, the court has not to merely see the form of the transaction which is of sale of shares but also the substance which is the private sale of mining rights avoiding the legal bar against transfer of sale rights circumventing the mandatory consent of the competent authority; consent of the competent authority was not a formality, and transfer without consent was void; the minerals vest in the State and mining lease can be operated strictly within the statutory framework; there was nothing to rebut the allegation that receipt of Rs 160 crores, styled as investment in shares, was nothing but the sale price of the lease; since, mining rights vest in the State, the State has to regulate transfer of such rights in the best interest of the people; no lessee can trade mining rights by adopting a device of forming a private limited company, and transfer of entire shareholding only with a view to sell the mining rights for private profit as has happened in the present case; the lessee privately and unauthorisedly cannot sell its rights for consideration and profiteer from rights which belong to the State; the general principle, that sale of shares by itself is not sale of assets, is subject to the doctrine of piercing of corporate veil wherever necessary to give effect to the policy of law; in the present case, this principle clearly applies as transfer of shares to cover up the real transaction which is sale of mining lease for consideration without the previous consent of competent authority, as statutorily required; and the statutory requirement was sought to be overcome with the plea that it was a transaction merely

of transfer of shareholding when, on the face of it, the transaction was clearly that of sale of the mining lease.

216. In **State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P) Ltd., (2016) 4 SCC 469**, the corporate entity was used to conceal the real transaction of transfer of mining lease to a third party, for consideration without statutory consent, by terming it as two separate transactions—the first of transforming a partnership into a company and the second of sale of entire shareholding to another company; the real transaction was the sale of mining lease which was not legally permitted; the real transaction was found to be different from the apparent transaction requiring the court to look into the real transaction which was the private sale of mining rights avoiding the legal bar against transfer of sale rights, and circumventing the mandatory consent of the competent authority; and the doctrine of lifting the veil was applied to give effect to the law which was sought to be circumvented.

217. It is in this context that the Supreme Court held that the principle of lifting the corporate veil, as an exception to the distinct corporate personality of a company or its members, is recognised to unravel tax evasion, protection of public interest, where the corporate entity is used to evade legal obligations or to avoid welfare legislation, or where there is an allegation of violation of the law by using the device of a corporate entity; and the classes of cases where lifting the veil is permissible would necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of an element of the public interest, the effect on parties who may be affected, etc.

218. In the present case, there is no allegation of tax evasion, or avoiding legal obligation or welfare legislation, or that the device of the distinct

corporate entity of the Respondent WPDs was being used to violate or circumvent the law.

219. (VI). In **Subhra Mukherjee v. Bharat Coking Coal Ltd., (2000) 3 SCC 312,** the suit property was owned by M/s Nichitpur Coal Company Private Limited (hereinafter referred to as "the Company"), which was registered under the Indian Companies Act. By a resolution of the Board of Directors of the Company, it was resolved to sell the suit property to the appellants for a consideration of Rs 5000. However, the appellants paid Rs 7000 to one of the Directors under receipt. An agreement to sell the suit property to the appellants for Rs 7000 (Rs 5000 as consideration of the bungalow and Rs 2000 as price of the land) was executed by the Company. Thereafter, the Company executed the sale deed in their favour.

220. The Coal Mines (Nationalisation) Act, 1973 (for short "the Act") came into force on 1-5-1973 and from that date the right, title and interest of the owners in relation to the coal mines specified in the Schedule appended to the Act (the said Company is mentioned at Serial No. 133 of the Schedule) vested in the Central Government. Thereafter under the order of the Central Government, the vested properties stood transferred to and vested in the government company named M/s Bharat Coking Coal Ltd. (for short "BCCL").

221. As the appellants did not hand over possession of the suit property to BCCL, in terms of the provisions of the Act, BCCL initiated proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (for short "the PP Act") for their eviction from the suit property. The appellants filed a suit against BCCL for declaration of their rights in, title to and interest over the suit property. The suit was resisted by BCCL, inter alia, on the ground that with effect from the appointed date the suit

property vested in it and that the alleged sale transaction in favour of the appellants was sham, collusive, without any consideration and was brought into existence to avoid the effect of vesting of the suit property under the Act. It was also stated that the appellants were the wives of the Directors of the Company, who were real brothers.

222. The trial court held that the appellants had no title to the suit property and were, therefore, not entitled to any relief and thus dismissed the suit. This order was reversed in appeal, which order was affirmed in the second appeal. The Supreme Court set aside the order of the High Court and remitted the matter for a decision on two points, the first of which was whether the transaction in question was a bona fide and genuine one or is a sham, bogus and fictitious transaction as held by the trial court. After remand, the High Court restored the judgment of the trial court holding that the transaction of sale between the appellants and the Company was sham and bogus and was entered into to avoid the vesting of the suit property in the Central Government under Section 3(1) of the Act.

223. It is in this context that the Supreme Court held that it was rightly commented by the High Court that the agreement for sale of the suit property was not a registered document; it recited that the suit property would be sold for Rs 7000, even though the consideration of Rs 7000 was paid prior thereto, and neither the agreement nor the sale deed was in terms of the resolution; and two other aspects, which had weighed with the High Court, were (1) the transaction of sale was between the husbands and the wives, and (2) they had no independent source of income.

224. The contention, urged on behalf of the appellants, was that undue emphasis was given to the fact that the Directors of the Company were brothers and the appellants were their wives; and the Company was a

separate legal entity which was independent of its Directors and shareholders as held in *Salomon* v. *Salomon* [1897 AC 22 (HL)]. The Supreme Court held that the principle laid down in *Salomon case* [1897 AC 22 (HL)] more than a century ago in 1897 by the House of Lords, was that the company was at law a different person altogether from the subscribers who had limited liability; this was the foundation of a joint stock company, and a basic incidence of incorporation both under English law and Indian law; lifting the veil of incorporation was permissible under statutes and decisions of the courts; to look at the realities of the situation, and to know the real state of affairs behind the facade of the principle of corporate personality, courts have pierced the veil of incorporation; where a transaction of sale of its immovable property by a company, in favour of the wives of the Directors, is alleged to be sham and collusive, as in the instant case, the court will be justified in piercing the veil of incorporation to ascertain the true nature of the transaction as to who were the real parties to the sale, whether it was genuine and bona fide, or whether it was between the husbands and the wives behind the facade of separate entity of the company; there could be no dispute that a person, who attacks a transaction as sham, bogus and fictitious, must prove the same; the circumstances of the case and the intrinsic evidence on record clearly pointed out that the transaction was not bona fide and genuine; it was unnecessary, therefore, for the court to find out whether the respondent had led any evidence to show that the transaction was a sham, bogus or fictitious; it could not be said that the High Court erred in taking the view that the sale, in favour of the appellants, was neither bona fide nor genuine and conferred no right on them; the suit property remained the property of the Company; and, therefore, it vested in the Central Government under Section 3(1) of the Act.

225. The law declared by the Supreme Court, in **Subhra Mukherjee v. Bharat Coking Coal Ltd., (2000) 3 SCC 312,** is that the veil of incorporation can be pierced to look at the realities of the situation, and to know the real state of affairs behind the facade of the principle of corporate personality; while a person, who attacks a transaction as sham, bogus and fictitious, must prove the same, the court will be justified in piercing the veil of incorporation, where a transaction is alleged to be sham and collusive, to ascertain the true nature of the transaction as to whether it was genuine and bona fide.

226. It is not even contended before us, by the appellant, that the transactions between them and the Respondent WPDs, or between them and the Three IL&FS Entities, is a sham, bogus or fictitious.

227. (VII). In **Bhatia Industries & Infrastructure Limited vs Asian Natural Resources (India) Limited: 2016 SCC OnLine Bom 10695**, the Division Bench of the Bomay High Court held that the doctrine of piercing or removing corporate veil is applicable not only in the case of holding and subsidiary companies, or in the case of tax evasion, but can be equally applied in execution proceedings; the doctrine has been referred to also in cases: (1) where "two separate corporate entities are functioning as if they are in partnership with one company as an alter-ego of the other company, where one company is bound hand and foot by the other, (2) where "parent company's management has steering influence on the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors, (3) where the company is the creature of the group and the mask which is held before its face in an attempt to avoid recognition by the eye of equity or is a mere cloak or sham and in truth the business was being carried on by one person and not by the company as a separate entity, and (4)

where two companies are inextricably inter-linked corporate entities; and the corporate veil can be lifted in cases where the Court, from the material on record, comes to the conclusion that the Judgment Debtor is trying to defeat the execution of the Award which is passed against him.

228. On the question whether the learned Single Judge was justified in lifting the corporate veil in this case, and in coming to the conclusion that BIIL and BIL was a single economic entity, the Division Bench of the Bombay High Court observed that Respondent No. 2-Vitol S.A. ("Vitol") had obtained a London arbitral award against Asian Natural Resources (India) Ltd. (Formerly Bhatia International Limited)("BIL") for a sum of US$ 68,435,250.00 towards damages for breach of the Master Agreement together with interest thereon and legal costs; Respondent No. 2 had filed execution proceedings, and had filed an application seeking an order of precept under Section 46 of the Code of Civil Procedure, 1908, seeking attachment of 54,300 MT of coal at the Tuticorin Port at Tamil Nadu; an application was made by Sharp Corporation Limited objecting to the attachment levied under the Judges Order; the said application was heard by the learned Single Judge who held that 34,300 MT of coal was under the ownership of Sharp, and the remaining cargo was under the ownership of the appellants/BIIL; she directed Respondent No. 2-Vitol to issue notice to BIIL inviting them to object to the attachment/extending the precept with respect to the remaining 34,300 MT of cargo; after giving an opportunity to BIIL and BIL of being heard, the Learned Single Judge, after going through the exercise of piercing veil of two companies and other group companies known as Bhatia Group, came to the conclusion that BIIL and BIL was a single entity; in the application filed for attachment / extending the precept with respect to remaining coal, Respondent No. 2 narrated the circumstances and facts which, according to them, disclosed that BILL and BIL were in fact a single entity; the learned

Single Judge accepted the contention of Respondent No. 2-Vitol, and held that BIIL was indeed an alter-ego of BIL, and they were one single unit and therefore, though the property was in the name of BIIL, it was in fact the property of BIL, and could be attached and sold in execution; the learned Single Judge observed that the two companies viz. BILL and BIL were not two separate legal entities but were actually the same, and were trading under different names through the same person in the same goods and businesses; the website of the companies indicated that BIIL and BIL were two of the companies in the group which was essentially trading under the name Bhatia; secondly, she noted that the Director of the group was Surinder Singh Bhatia who was a whole time Director of BIIL from 2009, and was originally appointed Director in BIIL on 08/07/1993; he had resigned on 22/09/2014, exactly a week after the award was allowed to be enforced as a decree by this Court, and three weeks after the AGM of BIIL was held appointing him as the Managing Director of the Company for five years; the explanatory note to the Resolution, that was appended to the notice for convening AGM on 05/07/2014, showed that he was a top level corporate executive, and his directorship in other Bhatia Group companies included in BIL, the judgment debtor; the learned Single Judge also noted that he was a Director of BIL from 2004, and had ceased to be a Director from 27/08/2014, a few days before the execution application was being filed, and he ceased to be the Director of other Bhatia Group companies viz. Bhatia Coke and Energy Ltd, and Bhatia Washery Ltd.

229. The Division Bench observed that the learned Single Judge had then noted the Articles of Association of BIIL and BIL in which Surinder Singh Bhatia had been one of the first Directors, and also the subscriber to the Memorandum of Association of the company; other members of his family viz his brothers Gurvinder Singh Bhatia and Manjeet Singh Bhatia

were also Directors in both the companies and subscribers to the Memorandum of Association of the companies; the Bhatia Group companies were listed on the Bombay Stock Exchange; a report was made by the Bombay Stock Exchange upon disclosure made by BIIL which was one of the Bhatia Group companies as BIL; and the report made a reference to BIIL as Bhatia Group Companies amongst others.

230. The learned Single Judge had then relied on the report given by the Credit Rating Institute viz ICRA, and had noted that the report stated that BIIL was a "part of the stronger promoter group i.e. BIL; the report stated, on the basis of statistical data, that BIIL had high dependence on BIL's management decision for its operation; after examining the financial statement, contained in the balance-sheet of the two companies, the coal purchased by BIL in the financial year 2013-14, inter-corporate deposits taken and given by BIIL and other related concerns of BIL, she has observed that the report was signed on 19/07/2014 by Surinder Singh Bhatia as Director of BIL; the financial report of BIIL for the year 2013-14 showed the related party disclosures; the first name of the related party was Surinder Singh Bhatia as the key management personnel followed by the other brothers and other family members of Bhatia family; the registered office of both the companies was at BCC house at Indore; there was a common E-mail Id of all the companies; there was a common logo of Bhatia Group and the Group was having common employees and common key personnel of their common relatives; and the Bhatia Group was also shown to be having huge property and assets interchangeably, which followed as a matter of corollary from their common post address and business office. On the basis of this material, the learned Single Judge had observed that BIIL and BIL was one single economic entity which was being managed by Surinder Singh Bhatia and his close relatives. The Division Bench concurred with the view taken by the learned

Single Judge, holding that the learned Single Judge had considered all the circumstances which indicate that Mr. Surinder Singh Bhatia and the members of his family had created several corporate bodies and they were controlled by Mr.S.S. Bhatia and his family, and therefore the learned Single Judge had rightly come to the conclusion that they had to be treated as one single entity as they were being used as cloaks behind which Mr. Surinder Singh Bhatia and his family were using the devise of incorporation as a ploy adopted for preventing execution of the international award which was passed against BIL and in favour of Respondent No. 2 Vitol.

231. None of the tests laid down by the Division Bench of the Bombay High Court, in **Bhatia Industries & Infrastructure Limited vs Asian Natural Resources (India) Limited: [2016 SCC OnLine Bom 10695]**, for the doctrine of piercing or removing the corporate veil to be applied, is satisfied in the case on hand. There is no allegation, in this batch of appeals, of tax evasion, or that the Three IL&FS Entities, whose debentures the PF Trust had subscribed to, were an alter-ego of the Respondent WPDs, or that the Respondent WPDs were bound hand and foot by the Three IL&FS Entities, or that the management of the Three IL&FS Entities had such a steering influence on the Respondent WPDs core activities that the Respondent WPDs could no longer be regarded to perform those activities on the authority of its own executive directors, or that the mask of a distinct corporate personality of the Respondent WPDs was a mere cloak or sham and, in truth, the business was actually being carried on by the Three IL&FS Entities, or that the Respondent WPDs were trying to defeat execution of the Award passed against them.

232. (VIII). In **Delhi Airport Metro Express Private Limited vs Delhi Metro Rail Corporation Ltd: 2023 SCC OnLine Del 1619**, the execution petition before the Delhi High Court related to an award dated 11.05.2017. The challenge under Section 34 of the Arbitration & Conciliation Act, 1996, which was mounted by the Delhi Metro Rail Corporation, came to be dismissed on 06.03.2018. DMRC preferred an intra-court appeal which came to be partly allowed by the Division Bench by its judgement dated 15.01.2019. Aggrieved thereby, the Execution Petitioner preferred a special leave petition before the Supreme Court which was allowed by judgement dated 09.09.2021. The review petition, preferred thereagainst by DMRC, was dismissed on 23.11.2021. The Execution Petition as well as the objections came up for consideration thereafter, and orders dated 10.03.2022 and 20.06.2022 were passed by the Delhi High Court, on the Execution Petition, ruling on the question of interest as well as the liability of the DMRC to make payments in terms of the final award which was rendered, as well as on the objections raised by the DMRC with respect to computation of interest and the ambit of Section 89 of the Metro Railways (operation & maintenance) Act, 2002.

233. The Delhi High Court proceeded to frame operative directions requiring the DMRC to liquidate the liability flowing from the award from out of the 'total DMRC funds', 'total project funds' and 'total other funds'. It permitted DMRC to set apart a sum of Rs. 514 crores and Rs.114 crores for the payment of salaries etc. The challenge to the said order was negatived by the Supreme Court on 05.05.2022. However, as even by 20.06.2022 the award remained unsatisfied, the Delhi High Court granted time to DMRC to ensure payment of the outstanding amount to the decree holder on or before 05.08.2022. Thereafter the Supreme Court, in its Order dated 14.12.2022, directed the Delhi High Court to proceed further

with the execution of the award expeditiously, and take the same to its logical end in accordance with law within three months.

234. It is in this context that the Delhi High Court held that, undoubtedly, both the Union Ministry and GNCTD were the principal shareholders of the DMRC; the DMRC must necessarily be recognised as being a mere alter ego of those two shareholders; the two sovereign entities exercise control over the DMRC by virtue of the composition of its Board; it is their equity and debt contributions which enables the DMRC to carry out its functions and discharge its statutory obligations; both by virtue of the capital invested in the corporation, as well as the control vested and exercised by them over its affairs, the Union Ministry and the GNCTD must be recognised in law as being in absolute control and the directing mind; they cannot hide behind the veil of corporate personality especially when it comes to the discharge of binding obligations owed by the DMRC; in any case public policy demands that the veil be lifted and they be commanded to take appropriate steps to enable the DMRC to meet the obligations flowing from the award; in the facts of the present case, the rendering of the Award and its executability against DMRC cannot possibly be questioned; the provisions of the Act and its constitution clearly revealed and pointed to its being controlled entirely by its principal shareholders, GNCTD and the Union Ministry; the two shareholders were not mere individuals having a business interest in a corporate venture, but sovereign governments in their own right; Governments cannot shirk from their liability to abide by binding judgments, decrees and awards; if such a situation were permitted to hold, the very structure of the adjudicatory and judicial system would falter and crumble; neither the GNCTD nor the Union Ministry had disputed the liabilities that flowed from the Award; apart from the pendency of a curative petition before the Supreme Court, the Award, had, for all practical purposes, attained finality; in any case,

the orders passed, on the present execution petition, operated and bound both the GNCTD as well as the Union Ministry; and the circumstances of the present case clearly mandated and warranted the corporate veil being lifted and torn apart, and for the Court recognising the GNCTD as well as the Union Ministry being in complete and total control of the affairs of the DMRC.

235. The Delhi High issued directions to both the Union of India as well as the GNCTD for ensuring that the liabilities, flowing from the Award, were duly discharged. The Union Ministry and the GNCTD were directed to consider the request of DMRC for sovereign guarantees/subordinate debt enabling it to liquidate its liabilities under the award; if permission was accorded, it should proceed to deposit the entire amount payable under the award along with up to date interest within one month; if they declined the request, the Union Ministry should forthwith repatriate all moneys received by it from DMRC post 10.03.2022; upon its receipt, DMRC should transfer to the escrow account the total amount payable under the award along with interest; and, in case of failure of compliance with the directions, the entire amount standing to the credit of the DMRC funds as on date was to stand attached.

236. The Delhi Metro Rail Corporation (DMRC) was a mere alter ego of the Union Ministry and GNCTD who were its principal shareholders; the two sovereign entities exercised control over the DMRC by virtue of the composition of its Board; it was their equity and debt contributions which enabled DMRC to carry out its functions and discharge its statutory obligations; the constitution of DMRC revealed to its being controlled entirely by its principal shareholders, GNCTD and the Union Ministry; the two shareholders were not mere individuals having a business interest in a corporate venture, but sovereign governments in their own right; both

by virtue of the capital invested in the corporation, as well in view of the control exercised by them over the affairs of the DMRC, the Union Ministry and the GNCTD must be recognised in law as being in absolute control and the directing mind; they cannot hide behind the veil of corporate personality especially when it comes to the discharge of binding obligations owed by the DMRC; public policy demanded that the veil be lifted and they be commanded to take appropriate steps to enable the DMRC to meet the obligations flowing from the award; Governments could not shirk from their liability to abide by binding judgments, decrees and awards; neither the GNCTD nor the Union Ministry had disputed the liabilities that flowed from the Award; and the circumstances of the present case clearly mandated and warranted the corporate veil being lifted and torn apart, and for the Court recognising the GNCTD as well as the Union Ministry being in complete and total control of the affairs of the DMRC.

237. In the present case, it is not even alleged that, on the corporate veil of the Respondent WPDs being lifted, it would disclose the Three IL&FS Entities to be the puppeteers who run the Respondent WPDs. Even if any such allegation had been made and established, which the appellant has not, the Respondent WPDs, as subsidiaries, could not have been made responsible for the liabilities of the Three IL&FS Entities in whose debentures the appellant had invested a part of the PF Trust Fund.

238. It is evident, therefore, that the tests laid down in the aforesaid Judgements of the Supreme Court and High Courts, for lifting the corporate veil is not satisfied in the case on hand.

E. THE DOCTRINE OF LIFTING THE CORPORATE VEIL IS INAPPLICABLE TO THE CASE ON HAND:

239. As noted hereinabove, Courts disregard the concept of a separate legal entity where the company was formed or used to facilitate evasion

of legal obligations (**State of U.P. v. Renusagar Power Co., (1988) 4 SCC 59);** the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workmen or against public interest; (***CIT* v. *Sri Meenakshi Mills Ltd:* AIR 1967 SC 819, *Workmen* v. *Associated Rubber Industry Ltd :*(1985) 4 SCC 114; *New Horizons Ltd.* v. *Union of India*: (1995) 1 SCC 478; *State of U.P.* v. *Renusagar Power Co:* (1988) 4 SCC 59; *Hussainbhai* v. *Alath Factory Thezhilali Union* [(1978) 4 SCC 257; and *Secy., H.S.E.B.* v. *Suresh*: (1999) 3 SCC 601);** a corporate entity is abused for an unjust and inequitable purpose (***Kapila Hingorani (I) v. State of Bihar*, (2003) 6 SCC 10**); where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are so inextricably connected as to be, in reality, part of one concern; where the company has been formed to evade obligations imposed by the law; where the company is an agent or trustee for its members (**Pennington** in his ***Company Law* (4th Edn);** when the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime (***Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 1 SCC 125);** when the corporate personality is being blatantly used as a cloak for fraud or improper conduct (**Gower: *Modern Company Law* — 4th Edn. (1979);** when the concept of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime; where the device of incorporation is used for some illegal or improper purpose **(*Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622);** and where fraud is intended to be prevented, or trading with an enemy is sought to be defeated **(*TELCO* v. *State of Bihar* [(1964) 6 SCR 885 : AIR 1965 SC**

40; *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622).

240. In such cases, the courts will draw aside the web of entity, and the corporate company will be regarded as an association of live, up-and-doing, men and women shareholders, to do justice between real persons (**Professor L. Maurice Wormser,** in his article **"*Piercing the veil of corporate entity*" [published in (1912) XII *Columbia Law Review* 496).**

241. The question whether the corporate veil should be lifted would necessarily depend on the relevant statutory provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc. **(*LIC v. Escorts Ltd.*, (1986) 1 SCC 264).** In such cases, the Court would lift the veil and look into the realities so as to identify the persons who are guilty and liable therefor. (***Kapila Hingorani (I) v. State of Bihar*, (2003) 6 SCC 1; *State of U.P.* v. *Renusagar Power Co.* [(1988) 4 SCC 59).**

242. The doctrine of lifting the corporate veil has, ordinarily, been applied only in cases where the entire share capital of the subsidiaries are held by the holding company and, in addition, the holding company exercises complete control over the subsidiaries which merely follow the directions of the former. None of the orders passed either by NCLT or the NCLAT, which form part of the record before us, even state that either the NCLAT or the NCLT had applied the doctrine of lifting the corporate veil or that it had found, as a fact, that the Respondent WPDs and the Three IL&FS Entities were, in reality, one and the same.

243. It needs no reiteration that a Company, incorporated under the Companies Act, is an independent legal entity distinct from that of its shareholders. What was transferred by IWEL to ORIX Corporation Japan

was its 51% share-holding in the Respondent WPDs. The change in the shareholding notwithstanding, the Respondent WPDs continued to remain the very same legal entity they were prior to the transfer of shares. Consequently, the dues which the Respondent WPDs were entitled to recover from the Appellant, during the period 15.10.2018 till 14.10.2019, continued to remain their dues which they were entitled to recover even thereafter, by way of the petition filed before the State Commission.

244. The interim order passed by the NCLAT on 15.10.2018, granting the stay of institution or continuation of suits or other proceedings against any of the group companies etc, cannot be understood as NCLAT having lifted the corporate veil of each of the group companies or to have treated all of them as one. Not only is the order dated 15.10.2018 an interlocutory order, there is not even a reference therein to NCLAT having lifted the corporate veil or to have held that all the group companies were, in reality, one and the same. The very fact that the Respondent WPDs were permitted to be disassociated from the IL&FS Group, while the NCLAT/NCLT continued even thereafter to monitor the Three IL&FS Entities, along with other red category entities, also goes to show that the NCLAT/NCLT did not consider the Respondent WPDs as part of, or to be integrally connected with, the Three IL&FS Entities.

245. Except in cases where subsidiaries are created or used as a sham, or where the parent company's management is found to exercise such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directions ***(Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613),** the distinction between the holding company and its subsidiary, as independent corporate legal entities, cannot be ignored. In the present case, even before they became wholly owned subsidiaries of Orix Corporation,

Japan, IWEL only held 51% of the share capital of each of the Respondent WPDs and, even prior to when the NCLAT passed the interim order on 15.10.2018, the other 49% share capital was held by Orix Corporation, Japan.

246. Other than the interim Order of NCLAT dated 15.10.2018, and the subsequent interlocutory orders passed both by NCLAT/NCLT till the 51% share capital of the Respondent-WPDs, hitherto held by IWEL, was transferred to Orix Corporation, Japan, no other material has been placed on record to justify the inference that the Three IL&FS Entities and the Respondent WPDs were, in reality, one and the same. As noted earlier, the interim orders passed by NCLAT/NCLT do not justify any such inference, as not only was the classification suggested by the Union of India, treating the Respondent WPDs as green entities and the Three IL&FS Entities as red entities, accepted by the NCLAT, transfer of the 51% shareholding of IWEL was permitted which resulted in the Respondent WPDs no longer remaining subsidiaries of IWEL.

247. It is evident, therefore, that the doctrine of lifting the corporate veil is inapplicable in the facts of the present case. Even if the doctrine is applied, and the veil is lifted, it is clear that the Three IL&FS Entities do not lurk behind the cloak of the Respondent WPDs independent corporate legal existence. The contentions urged, on behalf of the appellant, under this head also necessitate rejection.

XII. CONCLUSION:

248. Viewed from any angle, the appellant's claim for set off of the amounts payable by it to the Respondent WPDs, with the amounts invested by it in the unsecured debentures of the Three IL&FS Entities, is wholly unjustified. The Appellant's contention that, on the corporate veil

being lifted, the Respondent WPDs and the Three IL&FS Entities would be found to be one and the same, justifying their claim for set-off, is also not tenable. We are satisfied, therefore, that the impugned Order passed by the State Commission does not necessitate interference. All the Appeals fail and are, accordingly, dismissed. Consequently, pending IAs, if any, shall stand disposed of.

Pronounced in the open court on this the **9th day of November, 2023**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~