

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2020

DELIVERED ON : 19.03.2020

CORAM:

**THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA**

**W.P.No.1926 of 2020
and WMP.No.2253 of 2020**

Shaji Purushothaman

..

Petitioner

Vs.

- 1.Union of India,
through Ministry of Corporate Affairs,
A-Wing, Shastri Bhavan,
Rajendra Prasad Road,
New Delhi-110 001.
- 2.Registrar of National Company Law Tribunal,
Chennai, Corporate Bhavan (UTI Building),
3rd Floor, No.29 Rajaji Salai,
Chennai-600 021.
- 3.S.Rajendran,
Resolution Professional of Empee Distilleries Limited.
No.188/87, 2nd floor, Evlappan Mansion,
Habibullah Road, (Near Kodambakkam Rly Stn.)
T.Nagar, Chennai-600 017.
- 4.Union Bank of India,
Rep. by its AGM, Mr.Renjith Swaminathan,
Industrial Finance Bank,
Union Bank Bhawan, 1st Floor,
139, Broadway, Chennai-600 108.

5. Andhra Bank,
Rep. by its AGM, Mr.V.Gurusubramaniam,
Andhra Bank, Mount Road Branch,
95, Anna Salai, Mount Road,
Chennai-600 002.
6. IFCI Factors Limited,
Rep. by its VP, Mr.V.S.Ramesh Babu,
2nd Floor, 142, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.
7. SBI Global Factors Limited,
Rep. by its VC-Mumbai, Mr.Vishal Varma,
6th Floor, Metropolitan Building,
Sandra-Kurla Complex, Bandra (E),
Mumbai-400 051.
8. IDBI Trusteeship Services Limited,
Rep. by its SVP (EAAA) (VC-Mumbai)
Mr.Navin Sambtani Asian Building,
Ground Floor, 17, R.Kamani Marg,
Ballard Estate, Mumbai-400 001.
9. Edelweiss Asset Reconstruction Company Limited,
Rep. by its SVP (VC-Mumbai),
Ms.Nivedita Shetty, Edelweiss House,
Off CST Road, Kalina,
Mumbai-400 098.
10. M/s.SNJ Distilleries Pvt. Ltd.
Rep. by its Director,
Ms.Geetha Jayamurugan.
Old No.47, New No.99,
Canal Bank Nagar, CIT Nagar,
Nandanam, Chennai-600 035.

.. Respondents

(R10 impleaded as per order dated 30.01.2020
made in WMP.No.2637 of 2020)

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records of the common order dated 20.01.2020 and made available on 27.01.2020 passed by the learned National Company Law Tribunal, Chennai in MA/780/2019 and MA/1250/2019 of CP/280/IB/2018 and quash the same as illegal and non-est in law.

For Petitioner : Mrs.Vibhadatta Makhija, Senior Counsel
for Mr.Karuppaiah Meyappan and
M/s.R.Ramanlal

For Respondents : Mr.K.Ramanamoorthy,
Central Govt. Standing Counsel for R1 & R2

Mr.P.S.Raman, Senior Counsel
for Ms.M.Savitha Devi for R3

Mr.AR.L.Sundaresan, Senior Counsel
for Ms.Harshini J. for R8 and R9

Mr.P.H.Aravind Pandian, Senior Counsel
for Mr.Avinash Krishnan Ravi for R10

Mr.J.Harikrishnan for R5

ORDER

M.SATHYANARAYANAN, J.

The petitioner, who claims to be the suspended Managing Director of M/s.Empee Distilleries Limited, came forward to file this writ petition by making a challenge to the common order passed by the National Company Law Tribunal, Chennai dated 20.01.2020 made in MA/780/2019 and MA/1250/2019 of CP/280/IB/2018.

2. The petitioner, in the affidavit filed in support of this writ petition, would aver among other things that a petition in CP/280/IB/2018 under Section 7 of the Insolvency and Bankruptcy Code, 2016 [in short “IBC”] was filed by the 4th respondent, namely Union Bank of India (petitioning creditor) before the National Company Law Tribunal [in short “NCLT”] at Chennai. The petitioner would state that pendency of the said petition, a sum of Rs.50 lakhs was paid to the 4th respondent on 27.08.2018 and a further sum of Rs.50 lakhs was paid on 19.09.2018 and thereby reducing the total outstanding due with accumulated interest to a sum of Rs.9,18,20,789/- and it was also followed by very many requests to the 4th respondent to restructure the said debt.

3. NCLT, Chennai, vide order dated 01.11.2018 in CP/280/IB/2018 had initiated Corporate Insolvency Resolution Process in respect of the said company and moratorium was declared and an Interim Resolution Professional [IRP] was appointed and some orders were also passed. The said order, which was the subject matter before the National Company Law Appellate Tribunal [in short “NCLAT”] at New Delhi was also upheld, vide orders dated 29.03.2019 and 15.04.2019 respectively in CA(AT)(Insolv.)Nos.690/2018 and 742/2018 and Review Application

Nos.07/2019 and 08/2019. The petitioner, challenging the legality of the said order, filed Special Leave Petition, which was entertained and converted as Civil Appeal and vide order dated 14.06.2019 in Civil Appeal Diary No.20571 of 2019, taking note of the submission that the petitioner is ready and willing to clear the outstanding dues of the secured creditor / 4th respondent herein within a period of 15 days, time has been granted and accordingly, liberty was granted to move the NCLT within a period of two weeks from the date of the order in terms of the said request with a further direction to NCLT to consider and decide the same expeditiously in accordance with law.

4. The petitioner, in pursuant to the said liberty, had sent a communication as well as E-mail dated 23.07.2019 and the petitioning creditor has also confirmed that the dues as on 24.07.2019 was Rs.12,65,00,000/-. The petitioner has also issued a Bankers Pay Order dated 23.07.2019 for the said sum in favour of the 4th respondent towards full and final settlement and so also the two other financial creditors, namely the respondents 6 and 7. The petitioner, in the light of the said settlement, filed an application before the Adjudicating Authority, namely NCLT, Chennai for setting aside the order initiating Corporate Insolvency

Process against M/s.Empee Distilleries Limited dated 01.11.2018 and the said application was dismissed by the NCLT, Chennai, vide order dated 29.07.2019 holding that consent of 90% of the Committee of Creditors [in short “COC”] ought to have been received for withdrawing the petition in terms of Section 12A of IBC.

5. The petitioner would further state that in the interregnum, a Resolution Plan of a 3rd party had allegedly been approved by the COC consisting of 3 creditors and despite the entire claims having been settled by the petitioner, they continued to attend the meetings convened by COC in their capacity as secured financial creditors of M/s.Empee Distilleries Limited. The 3rd respondent – Resolution Process (RP) filed an application before the NCLT, Chennai in MA/780/2019, praying for approval of the Resolution Plan submitted by the 3rd party, namely the 10th respondent.

6. The order of NCLT, Chennai dated 29.07.2019 referred to supra was put to challenge by way of appeal before the NCLAT and vide order dated 06.09.2019 made in CA(AT)(Insolvency) No.921 of 2019, liberty was granted to the petitioner to move an application under Section 12A of IBC for settling the claims of all the creditors including guarantors, and NCLAT

also taken note of the fact as to the settlement of claims of some financial creditors.

7. In the appeal filed by the petitioner in C.A.No.7581 / 2019, the Hon'ble Supreme Court of India had initially granted an order of Status Quo on 04.10.2019 and subsequently, the appeal came to be dismissed, vide order dated 18.10.2019 by extended the time granted by NCLAT for a period of two weeks from 18.10.2019. The petitioner, along with M/s.Empee Holdings Limited, had submitted a Settlement Plan to the 4th respondent on 30.10.2019 in terms of Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

8. It is the claim of the petitioner that the Settlement Plan submitted by him is much better than the Resolution Plan already approved by the COC for the reason that a sum of Rs.513.51 Crores was sought to be paid vide the said plan, as against Rs.475.04 Crores proposed to be paid by the 3rd respondent. The petitioner also expressed grievance that despite the 4th respondent having received the Settlement Plan of the petitioner and M/s.Empee Holdings Limited, had refused to submit the same before RP in

Form FA and that apart, the 4th respondent having accepted and encashed the Demand Draft for a sum of Rs.12,65 Crores, had also refused to provide Bank Guarantee as requested by the petitioner for a sum of Rs.10.79 Crores towards the estimated cost of Corporate Insolvency in terms of Regulation 30A. The 4th respondent has also acknowledged the receipt of Rs.12.65 Crores and also indicated that it is towards full and final settlement.

9. The petitioner has sent a communication to the 3rd respondent on 02.11.2019 as well as to the 4th respondent seeking certain clarifications as to the methodology adopted in adjusting the amount paid by him and it was rejected and the 11th COC Meeting went ahead on 04.11.2019. Therefore, the petitioner was constrained to file the application in MA/780/2019 under Section 60(5) of IBC and prayed for appropriate direction directing the 4th respondent to submit the relevant Form FA so as to enable COC to consider the Settlement Plan mooted out by the petitioner and M/s.Empee Holdings Limited in terms of the order of the NCLAT dated 06.09.2019.

10. COC, in their 11th meeting, took a view that no Form FA was submitted by the petitioning creditor and therefore, the item for considering the Settlement Plan mooted out by the petitioner and M/s.Empee Holdings

Limited have not been put for voting and according to the petitioner, the 4th respondent alone is to be blamed.

11. The 4th respondent, made a turn around and vide communication dated 04.11.2019 has informed the petitioner that a sum of Rs.12.65 Crores received from them has been kept in Security Deposit amount. The petitioner, in this regard, has filed W.P.No.34664 of 2019 and during the course of hearing, an undertaking was given by the 4th respondent that they would refund the sum of Rs.12.65 Crores to the petitioner. The applications in MA/780/2019 and MA/1250/2019 were taken up together and argued at length on 19.11.2019 and the NCLT, Chennai had reserved orders in both the applications on that date. Written submissions were also filed by the petitioner.

12. The petitioner would further state that the Bench which heard both the applications consisted of Mr.B.S.V..Prakash Kumar (Member Judicial) and Mr.S.Vijayaraghavan (Member Technical). The 1st respondent, vide notification in S.O.72(E) dated 08.01.2020 had notified that Mr.B.S.V. Prakash Kumar, being the seniormost member of NCLT shall act as President, NCLT in terms of Section 415 of the Companies Act,

2013 for a period of 3 years with effect from 05.01.2020 or until a regular President is appointed or until further orders, whichever is earlier. Accordingly, the Principal Bench of NCLT, New Delhi was reconstituted, which include Mr.B.S.V..Prakash Kumar as Acting President and Mr.S.K.Mohapatra as Member Technical.

13. The petitioner has also invited the attention of this Court to the various notification issued by NCLT at New Delhi and stated that, vide order dated 07.01.2020 signed by the Registrar of NCLT, Principal Bench at NCLT, New Delhi was reconstituted comprising of Mr.B.S.V. Prakash Kumar (Member Judicial) and Ms.Sumita Purkayasthya (Member Technical) with effect from 20.01.2010, in partial modification of the order dated 05.01.2020. It is the specific case of the petitioner that on 20.01.2020, the Cause List of Court No.II of NCLT, Chennai had comprised of 31 items that were to be heard by a Special Bench of Mr.R.Varadharajan (Member Judicial) and S.Vijayaraghavan (Member Technical). The petitioner to the shock and surprise became aware of the fact that at about 06.15 p.m. on 21.01.2020, Mr.B.S.V. Prakash Kumar and Mr.S.Vijayaraghavan had commenced sitting and the Cause List was affixed as to the constitution of the Bench and pronouncement of orders, which

include MA/780/2019 and MA1250/2019, which was heard along with the same, was not shown in the Cause List. However, common order came to be passed on 20.01.2020 in allowing MA/780/2019 and dismissing MA/1250/2019.

14. The petitioner obtained the certified copy of the order dated 25.01.2020 after repeating requests and after going through the order, became aware of the passing of the common order and challenging the same, present writ petition is filed.

15. Mrs.Vibhadatta Makhija, learned Senior Counsel assisted by Mr.Karuppaiah Meyyappan made the following submissions:

- ✓ Rule 150 of the National Company Law Tribunal Rules, 2016 [in short “NCLT Rules”] speaks about pronouncement of order by any one member of the Bench and admittedly, in the Cause List dated 20.01.2020, notification as to the pronouncement of orders in MA/780/2019 alone was listed with the name of the 3rd respondent and the listing of MP/1250/2019 filed by the petitioner have not been included.
- ✓ Attention of this Court was invited to Part IX of NCLT Rules, more particularly Rule 89, which speaks about preparation and publication of daily cause list and a submission was made that the said Rule have

not at all been complied with and in light of the fact that there was no prior publication in the website as to the pronouncement of orders in MA/1250/2019 and even on the date of pronouncement of the order on 20.01.2020, common order came to be pronounced beyond office hours and an additional Cause List came into being subsequently and on account of the adoption of such dubious procedure, the petitioner has been put to grave prejudice and irreparable loss.

- ✓ In terms of Rule 150 of the NCLT Rules, the Tribunal, after hearing the applicant and respondent, shall make and pronounce an order either at once or, as soon as thereafter as may be practicable but not later than thirty days from the final hearing and as per Sub-Rule (4) of Rule 152, if the order cannot be signed by reason of death, retirement or resignation or for any other reason by anyone of the Members of the Bench who heard the case, it shall be deemed to have been released from part-heard and listed afresh for hearing.
- ✓ In the light of the fact that the Cause List as to the pronouncement of the orders in MA/1250/2019 have not been pre-published or uploaded in the website coupled with the fact that in the Additional Cause List there was no indication as to the pronouncement of the orders in MA/1250/2019 and in the Cause List neither the name of the applicant nor his Counsel has been indicated and that the orders came to be pronounced nearly two months from the date of reserving orders and therefore, prayed for setting aside the common order dated 20.01.2020 with a further direction for listing and hearing of the matter afresh.

- ✓ Attention of this Court was also invited to various notifications issued by the Registrar of NCLT, Principal Bench, New Delhi and a submission was made that as per the order dated 17.01.2020, a Special Bench of NCLT, Chennai was constituted on 20.01.2020 to pronounce the orders reserved by the Bench comprising of Mr.B.S.V. Prakash Kumar, Member (Judicial) and Mr.S.Vijayaraghavan, Member (Technical), in modification of the earlier order dated 05.01.2020 and an yet another order came into being on the very same day and the Registrar of NCLT, Principal Bench at NCLT, Delhi has passed an order that the Acting President Mr.B.S.V. Prakash Kumar was on tour on 20.01.2020 and therefore, reconstituted a Special Bench at New Delhi and even in the said notification, it has not been made clear as to the place on which the Acting President went on tour.
- ✓ Attention of this Court was also invited to the order dated 17.01.2020 passed by the Registrar of NCLT, Principal Bench of NCLT, New Delhi as to the re-constitution of Principal Bench at New Delhi with a coram of Mr.B.S.V. Prakash Kumar as Acting President and Ms.Sumita Purkayastha, Member (Technical) on 20.01.2020 and made a submission that in terms of the notification, Mr.B.S.V. Prakash Kumar, who form part of the Bench as to the pronouncement of orders in MA/780/2019 was suppose to sit at New Delhi on 20.01.2020 and if it is so, the Bench consisting of the said Member as well as Member Technical would not have passed orders before NCLT at Chennai on the same day and even assuming that the Bench

has sat on that day, admittedly, there was no prior notification as to the sitting of the said Bench for pronouncement of the said common order.

- ✓ It is also submitted by the learned Senior Counsel appearing for the petitioner that with regard to the pronouncement of other orders, there was a prior notification and only in respect of pronouncement of common orders in MA/780/2019 and MA/1250/2019, there was complete non-adherence to the above cited Rules and it is for the 2nd respondent to give proper explanation and from the counter affidavit of the 2nd respondent, it became evident that the relevant NCLT Rules have not been adhered to at all.
- ✓ The learned Senior Counsel appearing for the petitioner also made an attempt to argue on the merits of the matter and however, this Court was not inclined to entertain to consider the said submission for the reason that it is concerned with rather called upon to answer the issue as to the prejudice caused to the petitioner on account of the alleged non-compliance of the procedure contemplated by the NCLT Rules.

WEB COPY

The learned counsel appearing for the petitioner, in support of his submissions, has placed heavy reliance upon the Division Bench decision of the Bombay High Court in *Kamal K.Singh v. Union of India and Others* [2019 SCC OnLine Bom 5609] and also the judgments in *Pushpa Singh v.*

Union of India and Others [2019 SCC OnLine Bom 2385] and

Arcelormittal India Private Limited v. Satish Kumar Gupta and Others
[(2019) 2 SCC 1].

16. Mr.K.Ramanamoorthy, learned Central Government Standing Counsel appearing for the 2nd respondent has drawn the attention of this Court to the affidavit of the 2nd respondent and the typed set of documents and would submit that on 07.01.2020, four orders were passed by the Registrar, NCLT, New Delhi under directions from the Acting President, which include constitution of a Special Bench for NCLT, Chennai, Court II for pronouncements of orders, comprising of Mr.B.S.V. Prakash Kumar, Acting President and Mr.S.Vijayaraghavan, Member (Technical) for 20.01.2020 only and the two orders for reconstitution of bench i.e., Sl.Nos.(i) and (ii) were published in the website and the other two orders in Sl.Nos.(iii) and (iv) were not published in the website and it cannot be construed as infraction of exercise of powers of the Acting President under Section 419(3) of the Companies Act, 2013. The 2nd respondent, in meeting out the allegations of the petitioner, in para 9 of the affidavit would state that on 20.01.2020, orders were pronounced in 9 cases including MA/780/2019 and MA/1250/2019 and for the said pronouncement, Cause List was displayed on 20.01.2020 at 10 a.m. in the Notice Board at the

NCLT, Chennai and it is further averred that the Registry of NCLT, Chennai was unable to display the Cause List as well as on the Notice Board on the previous day as 19.01.2020 was a Sunday (Holiday) and owing to the same, the Registry was unable to upload the Cause List in the website and it cannot be construed as neither wilful nor wanton. The learned Standing Counsel appearing for the 2nd respondent further pointed out that when the orders were pronounced on 20.01.2020, attendance sheets have been signed by number of counsels, who were present in the Court for pronouncement, only after seeing the Cause List on the Notice Board and in para 11 of the counter affidavit, a submission has been made that the common order passed in MA/780/2019 and MA/1250/2019 came to be pronounced in the open Court right in the presence of parties and as such, it cannot be stated that pronouncement of orders in MA/1250/2019 was not made known to the applicant and also undertook that the Registry of NCLT, Chennai will strive to perform it's obligations under the Act with great diligence.

WEB COPY

17. Mr.P.S.Raman, learned Senior Counsel appearing for the 3rd respondent – Resolution Professional (RP) would submit that the 3rd respondent is in possession, management and control of all the assets of the corporate Debtor from the date he took charge as RP and he was informed

by his counsel as to the pronouncement of orders in MA/780/2019 filed by him under Section 31 for approval of the Resolution Plan and he was further informed that the Bench consisting of Mr.B.S.V. Prakash Kumar, Member (Judicial) and Mr.R.Vijayaraghavan, Member (Technical) sat around 4.45p.m, as the previous bench sitting in Court No.II did not rise until 4.45p.m. It is also brought to the knowledge of this Court by the learned Senior Counsel appearing for the 3rd respondent that pursuant to the Resolution Plan, the 10th respondent has brought in Rs.134.78 Crores as stipulated in the Resolution Plan and Rs.15.90 Crores towards the difference in payment of Tax and all amounts as stipulated in the Resolution Plan and payment of operational creditors have been done in accordance with the terms of the Resolution Plan and about 33% of the dues to the financial creditors have been paid and also made a submission that the Promoters / Corporate Debtors did not provide for any solution, despite opportunities granted by the NCLAT and the Hon'ble Supreme Court of India.

WEB COPY

18. The learned Senior Counsel appearing for the 3rd respondent on the legal plea made a submission that the relevant statutory rules relied on by the learned Senior Counsel appearing for the petitioner can be construed only as directory in nature, in the absence of any indication as to the result

of such non-compliance and would further add that the petitioner has also not been prejudiced for the reason that he became aware of the order within a short span of time and the remedy open to him is to avail appeal remedy before the NCLAT, New Delhi. The learned Senior Counsel appearing for the 3rd respondent, in support of his submissions, has placed reliance upon the following decisions:

- 
- (i) Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur [(1965) 1 SCR 970: AIR 1965 SC 895]**
- (ii) Sharif-Ud-Din v. Abdul Gani Lone [(1980) 1 SCC 403]**
- (iii) Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Others [(2003) 2 SCC 111]**
- (iv) P.T.Rajan v. T.P.M.Sahir and Others [(2003) 2 SCC 498]**
- (v) M/s.Hyundai Motor India Ltd. v. Union of India, Ministry of Finance and Others [2014 SCC OnLine Mad 12157]**

19. Mr.P.H.Arvind Pandian, learned Senior Counsel appearing for the 10th respondent apart from adopting the arguments of the learned Senior

<http://www.judis.nic.in> Counsel appearing for the 3rd respondent as to the directory nature of the

relevant statutory rules, would submit that even for the sake of arguments, the Registry of NCLT, Chennai do not follow the rules in letter and spirit, still the petitioner cannot termed to be an aggrieved person for the reason that the alleged non-compliance of the rules do not result in any serious prejudice or loss to the petitioner and would further add that the 10th respondent also espoused *bonafide* by complying with the terms of the Resolution Plan and despite the petitioner has been shown indulgence to come out with a workable solution by means of the orders passed by the NCLAT and the Hon'ble Supreme Court, he failed to avail the benevolence shown and the only intention of the petitioner is to protract the proceedings and prays for dismissal of the writ petition with exemplary costs.

20. Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the respondents 8 and 9 would submit that even for the sake of arguments the petitioner has been put on notice before pronouncement of the orders on 20.01.2020, no prejudice has been caused for the reason that he became aware of the common order passed within a short span of time and the remedy open to the petitioner is to file an appeal before the NCLAT. It is further contended by the learned Senior Counsel appearing for the respondents 8 and 9 that the petitioner is said to have been aggrieved only

when the period of limitation expired on account of unawareness of the order and in this case, it is not so and also supported the plea of the 3rd respondent that time limit prescribed for pronouncing orders are only directory in nature.

21. In response to the same, the learned Senior Counsel appearing for the petitioner would submit that non-following of certain provisions of NCLT Rules would vitiate the impugned order as the said Rules are mandatory in nature. It is submitted by the learned Senior Counsel appearing for the petitioner that Section 12A of the IBC have not been followed and there exist manifest error of Law and therefore, it can be set right by this Court by issuing a Writ of Certiorari. It is further submitted by the learned Senior Counsel appearing for the petitioner that NCLT Rules came to be framed in exercise of the powers conferred under Section 469 of the Companies Act, 2013 and therefore, Rules 89, 150 to 153 of NCLT Rules are mandatory and from the materials placed, it is seen that the Tribunal had failed to adhere to the same and as such, the impugned common order stand vitiated and it is to be set aside. The learned Senior Counsel appearing for the petitioner would further add that the Tribunal did not record any reasons as to the belated pronouncement of the orders and in

the light of various orders passed by the Registrar, NCLT, New Delhi as to the special sitting of the concerned Bench and that the same was not uploaded either in the website or in the Notice Board and that apart, Member Judicial also had a sitting at New Delhi on the same day on 20.01.2020 i.e., on the date of pronouncement of the impugned orders and therefore, has no jurisdiction to pronounce the order at all. The learned Senior Counsel appearing for the petitioner has also placed reliance upon the decision in *Anil Rai v. State of Bihar [(2001) 7 SCC 318]* as to the adherence of the time line prescribed for pronouncement of the orders.

22. This Court paid it's best attention and anxious consideration to the rival submissions and also perused and analysed the entire materials placed as well as the decisions relied on by the respective learned Senior Counsel appearing for the parties. सत्यमेव जयते

23. At the outset, this Court is not inclined to go into the merits of the impugned orders for the reason that the grounds urged by the petitioner can be decided only by the Appellate Forum, as it is an efficacious and alternative remedy available.

24. The sole question arises for consideration is “*Whether non-adherence to Rules 89, 150 to 153 of NCLT Rules, 2016 would vitiate the impugned order?*”

25. *Part IX of NCLT Rules* deals with *Cause List* and it is relevant to extract **Rule 89**:

“89. Preparation and publication of daily cause list –

(1) The Registry shall prepare and publish on the notice board of the Registry before the closing of working hours on each working day the cause list for the next working day and subject to the directions of the President, listing of cases in the daily cause list shall be in the following order or priority, unless otherwise ordered by the concerned Bench, namely:-

- (a) cases for pronouncement of orders ;*
 - (b) cases for clarification ;*
 - (c) cases for admission ;*
 - (d) cases for orders or directions;*
 - (e) part-heard cases, latest part-heard having precedence ;*
- and*
- (f) cases posted as per numerical order or as directed by the Bench.*

(2) The title of the daily cause list shall consist of the number of the appeal or petition, the day, date and time of the court sitting, court hall number and the coram indicating the names of the President, Judicial Member and Technical Member constituting the Bench,

(3) Against the number of each case lists in the daily cause list, the following shall be shown, namely:-

(a) names of the legal practitioners appearing for both sides and setting out in brackets the rank of the parties whom they represent ;

(b) names of the parties, if unrepresented, with their ranks in brackets.

(4) The objections and special directions, if any, of the Registry shall be briefly indicated in the daily cause list in remarks column, whenever compliance is required.”

सत्यमेव जयते

26. A perusal of the affidavit of the second respondent dated 13.02.2020 would read that on account of the retirement of Justice M.M.Kumar (Judge Retd., High Court of Karnataka) as the President of NCLT on 04.01.2020, Mr.B.S.V.Prakash Kumar, Member (Judicial), being the seniormost member of NCLT, was appointed as Acting President of NCLT in terms of powers conferred upon the Central Government under

Section 415 of the Companies Act, 2013, vide Gazette Notification dated 03.01.2020 and the said member assumed charge on 05.01.2020 as the Acting President of NCLT, Principal Bench at New Delhi.

27. The Registrar of NCLT, Principal Bench, New Delhi has passed an order dated 17.01.2020 in exercise of powers conferred under Section 419 of the Companies Act, 2013 in and by which reconstituted the Benches at New Delhi for the purpose of exercising and discharging the functions assigned by the Statute(s) and in partial modification of the order dated 05.01.2020 and the following Benches came to be reconstituted and it is relevant to extract the same:

Principal Bench at NCLT, New Delhi – Court No.1

- 1.Shri B.S.V. Prakash Kumar, Acting President.
- 2.Ms.Sumita Purkayastha, Member (Technical).

NCLT, Division Bench at New Delhi – Court No.111

- 1.Shri Ch.Mohd.Sharief Tariq, Member (Judicial),
- 2.Smt. Saroj Rajware, Member (Technical).

The very same official has passed an order dated 17.01.2020 stating that there shall be a Special Bench for NCLT, Chennai on 20.01.2020 for pronouncement of orders at Court No.II, reserved by the Bench comprising

of Mr.B.S.V.Prakash Kumar, Member (Judicial) and Mr.S.Vijayaraghavan, Member (Technical) and the said order is in modification of the order dated 25.07.2019 for 20.01.2020 only and it was issued with the approval of the Hon'ble Acting President of NCLT.

28. In para 5 of the 2nd respondent's affidavit dated 13.02.2020, it is averred that on 17.01.2020, four orders were passed by the Registrar, NCLT, under directions from the Acting President and orders in Sl.Nos.(iii) and (iv) pertain to Constitution of Special Bench for Court I, Principal Bench at New Delhi comprising of Mr.Mohd Sharif Tariq, Member (Judicial) and Ms.Saroj Rajware, Member (Technicla) on 20.01.2020 and on account of the fact that the Acting President was on tour and one of the members, namely Ms.Sumita Purkayasthya was on leave, the order has been passed for constitution of Special Bench at NCLT, Chennai for Court No.2 for pronouncement of orders comprising Mr.B.S.V.Prakash Kumar (Former Judicial Member) and Mr.S.Vijayaraghavan, Member (Technical) on 20.01.2020.

29. It is stated by the 2nd respondent in para 7 of the affidavit that out of the above cited four orders, Sl.Nos.(i) and (ii) as to the Reconstitution of

Benches for Court No.I, NCLT, Principal Bench and Court No.II, NCLT, Chennai Bench, were published in the website and however, two other orders in Sl.Nos.(iii) and (iv) were not published in the website and the reason for non-publication of the pronouncement of the orders in the website is stated in Para 9, wherein it is averred that on 20.01.2020, orders were pronounced in 9 cases including MA/780/2019 and MA/1250/2019 (common order) and for that purpose, cause list was displayed on 20.01.2020 at 10.a.m in the Notice Board at NCLT, Chennai Bench. It is further stated in the 2nd respondent affidavit that the Registrar, NCLT, was unable to display the Cause List as well as in the Notice Board on the previous day on 19.01.2020 as it happen to be a Sunday (Holiday) and on account of the said reason, Cause List was unable to uploaded in the website.

30. In para 10 it is averred by the 2nd respondent that the Coram for pronouncing the orders on 20.01.2020 has been clearly depicted in the Cause List and thereby giving notice to the Bench having been constituted to all parties concerned. It is further stated that the Acting President Mr.B.S.V.Prakash Kumar (Former Judicial Member, Chennai Bench) is the Administrative Authority responsible for constituting Special Bench and

therefore, the said Bench was competent to pronounce orders on 20.01.2020. In para 11, it is averred by the 2nd respondent that the Registrar of NCLT, Chennai ought to have published all the four orders passed on 17.01.2020 and however, orders mentioned in Sl.Nos.(i) and (ii) alone have been uploaded and Sl.Nos.(iii) and (iv) have not been uploaded in the website despite the same having been made available on 17.01.2020 itself. The 2nd respondent also took a stand that non-mentioning of MA/1250/2019 in the Cause List is neither wilful nor wanton and that the common order in MA/780/2019 and MA/1250/2019 was pronounced in the open Court right in the presence of parties.

31. The learned Senior Counsel appearing for the petitioner has placed heavy reliance on the Division Bench judgment of the Bombay High Court in ***Kamal K.Singh v. Union of India [2019 SCC OnLine Bom 5609]***. A perusal of the facts of the said case would disclose among other things that the action of the 5th respondent therein in taking charge / possession of the registered office of the 6th respondent on the basis of an order passed by the NCLT, Mumbai was put to challenge and it was contended among other things that the Insolvency Petition/Proceedings were not listed for pronouncement of the order on 22.10.2019 before the concerned Bench and

that part, Judicial Member was expected to demit office as a member of the NCLT, as he was appointed as a member of the NCLAT, vide notification dated 15.10.2019. As regards pronouncement of the orders, additional Cause List dated 26.10.2019 was uploaded and it pertains to only one item and it was further alleged that on 22.10.2019, the Bench of the Judicial Member and Technical Member did not conduct any adjudicatory business and the order has been put in communication without the same having been pronounced. It was the stand of the petitioner therein that the said order has been passed in violation of the principles of natural justice and the procedure established by law, more particularly Rules 150 to 153 of the NCLT Rules, 2016. The Division Bench of Bombay High Court, on facts, found that NCLT, Bombay heard the matter and reserved orders and the members were aware of the fact that one of them, namely Mr.V.P.Singh (Judicial Member) was promoted as Member of NCLAT, New Delhi and therefore, he was expected to take charge shortly and after the said notification, there was no hurry to pass the order without adhering to the special rules of procedure. The Division Bench of Bombay High Court, in the above cited judgment, in Paras 50, 56, 59 to 61 has dealt with the rule position and in paras 72 and 75 observed as follows:

“72. Therefore, by sub-rule (1) of Rule 89, the Registry is required to prepare and publish on the notice board of the

Registry before the closing of working hours on each working day the cause list for the next working day and subject to the directions of the President, listing of cases in the daily cause list shall be in the order of priority, unless otherwise ordered by the concerned Bench. Ultimately, the requirement of this nature and to be followed by a court, particularly a substitute for a Civil and Company Court means that people and litigants should know when orders are to be pronounced in cases which have been already heard. Therefore, the broad heads which have to be enumerated in the daily cause list ensure that litigants, parties and equally the public at large know that the cases have been listed for that purpose and with that object. In cases in which arguments are concluded and judgments are ready for pronouncement, then, the pronouncement has to be done after notifying to the parties in advance the date of such pronouncement. The rule makers did not desire or contemplate dispensation of the requirement of pronouncement at all. If dispensation of that was contemplated, then, possibly, there would not have been guidance provided by rules such as Rules 89 and 90. By Rule 90, there is a further assurance that if by reason of declaration of holiday or for any other unforeseen reason, the Bench does not function for the day, the daily cause list for that day shall, unless otherwise directed, be treated as the daily cause list for the next working day in addition to the cases already posted for that day. Now that information technology is introduced, particularly for listing of cases, then, all the more with the advances therein, the rule makers desired that there should be complete transparency, fair and just treatment to litigants and parties. Nobody should carry an impression that the case has been heard behind their back or that they have been taken up without any intimation or knowledge to the party or litigant and disposed of. Therefore, when cases are preponed or postponed, litigants have to be informed. They may have engaged advocates, but such transparency, faith, consistency, credibility and sanctity of judicial acts and proceedings is maintained. Everything in relation to judicial proceedings, therefore, is covered in the broad and wider concept of dispensation of justice. Ultimately, courts are endowed with the duty to render justice. If courts and tribunals exercising judicial functions are chosen by the

legislature to render justice to litigants, then, all the more they cannot be expected to work in a closed door fashion. Judicial proceedings have to be open to public.

75. Even if one goes by ordinary meaning of these words, they do not convey one and the same thing. The word pronouncement means to declare formally or officially. The word communication means making known or sharing or imparting. In legal and judicial parlance, particularly as per the Advance Law Lexicon to pronounce means to utter formally, officially or solemnly, to declare or affirm, as pronounce a judgment or order. A declaration authoritatively or by way of a judgment is understood as pronouncement. We do not think that pronouncement is a formality, as is suggested before us. We hasten to clarify that we do not intend to be exhaustive and in every fact situation or circumstances judicial orders would not be declared as illegal or not binding merely because there is a minor deviation or departure or non-adherence to procedural rules. Ultimately, no general rule can be laid down. However, when Part XIX of the NCLT Rules, 2016 titled as "Disposal of Cases and Pronouncement of Orders" contains Rules 146 to 162 and particularly Rules 150 to 152 specifically on the point of subject of pronouncement, then, they cannot be ignored totally and in all situations, particularly on broad consideration of expediency. The expediency that is demonstrated in the present case is disturbing. If there was a hearing held in the month of August, 2019 and that was the last one, the remainder of the months of August and September were available for the Members of the Bench to prepare and pronounce their order. There was no great hurry in rushing and pronouncing the order when the Member (Judicial) knew that he was due for promotion or that he has been intimated about the promotion and that there was a notification issued promoting him. The stage or the date from issuance of such notification till the date of taking charge is the period utilised in this case to prepare the final judgment or order. However, there was no great urgency in then dispensing with the requirement of pronouncement of the judgment kept it in the file and communicating it later on. On a date prior to taking charge as a Member of the NCLAT, by a

prior notice or intimation to both parties, the order could have been pronounced. It could have been pronounced in the Chambers as well. However, in this case, there is no evidence of pronouncement at all.”

In para 79, the Division Bench of Bombay High Court has dealt with Rules 150 and 151 of the NCLT Rules, 2016 and the purport of the said Rule in para 80 and in para 84 has dealt with Justice Delivery System and concluded that the writ petition challenging the order of the NCLT, Bombay is maintainable and after making observations as to the nature and concept of the Tribunals, has set aside the impugned order on the ground that it is nullity and directed that the application is to be decided afresh in accordance with law.

32. The judgment of the Division Bench of Bombay High Court in ***Pushpa Shan v. Union of India and Others [2019 SCC OnLine Bom 2385]*** (cited supra) has no application to the case on hand for the reason that in respect of the order passed by NCLT, Bombay, which was the subject matter of challenge, the other Member had neither given concurrence with his reasoning on conclusion nor had he signed the transcript of the purported judgment/order dated 28.08.2018.

33. In the case on hand, the fact remains that the Member (Judicial) and Member (Technical) heard the arguments in MA/780/2019 and MA/1250/2019 by sitting together at Chennai and pronounced orders on 20.01.2020.

34. In *Anil Rai v. State of Bihar [(2001) 7 SCC 318]* relied on by the learned Senior Counsel appearing for the petitioner, the issue relating to delay in pronouncing judgments by High Court came up for consideration and after placing reliance upon the judgment in *R.C.Sharma v. Union of India [(1976) 3 SCC 574]*, in paragraph 45, had extracted the relevant portion of the said judgment and it is relevant to quote the same:

“45. Sethi, J. has enumerated them succinctly as follows:

(i) The Chief Justices of the High Courts may issue appropriate directions to the Registry that in a case where the judgment is reserved and is pronounced later, a column be added in the judgment where, on the first page, after the cause-title, date of reserving the judgment and date of pronouncing it be separately mentioned by the Court Officer concerned.

(ii) That Chief Justices of the High Courts, on their administrative side, should direct the Court Officers/Readers of the various Benches in the High Courts to furnish every month the list of cases in the matters where the judgments reserved are not pronounced within the period of that month.

(iii) On noticing that after conclusion of the arguments the judgment is not pronounced within a period of two months the Chief Justice concerned shall draw the attention of the Bench

concerned to the pending matter. The Chief Justice may also see the desirability of circulating the statement of such cases in which the judgments have not been pronounced within a period of six weeks from the date of conclusion of the arguments amongst the Judges of the High Court for their information. Such communication be conveyed as confidential and in a sealed cover.

(iv) Where a judgment is not pronounced within three months from the date of reserving judgment, any of the parties in the case is permitted to file an application in the High Court with a prayer for early judgment. Such application, as and when filed, shall be listed before the Bench concerned within two days excluding the intervening holidays.

(v) If the judgment, for any reason, is not pronounced within a period of six months, any of the parties of the said lis shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other Bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit in the circumstances.”

It is also relevant to extract Para 46 of the said judgment:

“46. I have chosen to reiterate the above instructions in this separate judgment only for providing added emphasis to them. I make it clear that if the Chief Justice of a High Court thinks that more effective measures can be evolved by him for slashing down the interval between conclusion of arguments and delivery of judgment in that particular court, it is open to him to do so as a substitute for the measures suggested by us hereinbefore. But until such measures are evolved by the Chief Justice of the High Court concerned, we expect that the measures suggested above would hold the field. I may also mention that the above-enumerated measures are intended to remain only until such time as Parliament would enact measures to deal with this problem.”

35. In *Arcelormittal India Private Limited v. Satish Kumar Gupta and Others [(2019) 2 SCC 1]* relied on by the learned Senior Counsel appearing for the petitioner, in para 84 it was observed among other things that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit prescribed. The said judgment also deals with the time limit for completion of Insolvency Resolution Process and as such, it has no application to the case on hand.

36. The defence put forward on behalf of the contesting respondents / private respondents is that there was substantial compliance of the relevant statutory rules and the rules are only directory in nature.

37. In *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur [AIR 1965 SC 895]*, the Hon'ble Supreme Court of India while dealing with Rules 131 (2) and 131(3) of the U.P. Municipalities Act, 1916, formulated the following 3 questions for consideration:

(i) *Is the publication as provided in Section 13(3) mandatory or directory?*

(ii) *Was the publication in this case strictly in accordance with the manner provided in Section 94(3)? and*

(iii) *If the publication was not strictly in accordance with the manner provided in Section 94 (3) is the defect curable under Section 135(3)?*

In para 8 of the said judgment, the Hon'ble Supreme Court of India had dealt with the general question whether a particular provision of the Statute which on the face of it appears mandatory is merely directory or not? and it is relevant to extract para 8 of the said judgment:

“8. The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word “shall” as in the present case — is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.”

In para 9, the judgments rendered by the Hon'ble Apex Court in *State of U.P. v. Manbodhan Lal Srivastava [(1958) SCR 533]*, wherein the observations of the Judicial Committee of the Privy Council in *Montreal*

Street Railway Company v. Normandin [(1917) LR, AC 170] were extracted and it is relevant to extract the following observations made in para 9:

“9...Thus this Court approximated Article 320(3)(c) to a statutory provision like the one which came up for consideration in Montreal Street Railway Company case [(1917) LR, AC 170] and held that if the article were construed as mandatory, it would cause serious general inconvenience, and injustice to persons who had no control over those entrusted with the duty. That decision was clearly based on the special facts in that case dealing with appointments and dismissals of public servants and the duty of the Government to consult the Public Service Commission in that behalf and cannot and should not be extended to cases based on a different set of facts. As the Judicial Committee itself pointed out the question whether provisions in a statute are directory or mandatory cannot be decided by laying down a general rule and in every case the object of the statute must be looked at. That case therefore in the circumstances if of little assistance to the respondent, except insofar as it lays down the principle that no general rule can be laid down for determining the question whether a provision in a statute is directory or mandatory, and that every case will have to be judged on the basis of the object of the statute concerned.”

38. In ***Sharif-ud-Din v. Abdul Gani Lone [(1980) 1 SCC 403]***, the issue as to the mandatory requirement of Section 81(3) of the Jammu and Kashmir Representation of the People Act, 1957 came up for consideration and in para 9, the Hon'ble Apex Court had dealt with the mandatory rule and directory rule and it is relevant to extract para 9 of the said judgment:

“9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word “shall” while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.”

On the facts of the case, it was held that Section 89(3) of the Jammu and

Kashmir Representation of the People Act, 1957 is mandatory and non-compliance of the same would result in dismissal of the Election Petition under Section 94 of the said Act.

39. In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Others [(2003) 2 SCC 111]*, Section 21 of the Gujarat Town Planning and Urban Development Act, 1976 was considered and in paras 43 to 45, the issue relating to the consequence of non-compliance have been considered and it is relevant to extract para 43 to 45 of the said judgment:

“43. In *Sutherland's Statutory Construction*, 3rd Edn., Vol. 3, at p. 102 the law is stated as follows:

“... unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered a limitation of the power of the officer”.

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

“As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.”

44. In *Dattatraya Moreshwar v. State of Bombay* [AIR 1952 SC 181] it was held as under: (AIR p. 185, para 7)

“[G]enerally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.”

45. In *Craies on Statute Law*, 8th Edn., at p. 262, it is stated thus:

“... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.’ ... that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.”

The Hon'ble Apex Court, as to the interpretation of Section 21 of the Gujarat Town Planning and Urban Development Act, 1976 found that Section 21 is to meet the changed situation and contingencies which might not have been contemplated while preparing the first final development plan.

purport and object of preparation of an electoral roll especially with regard to the timeline came up for consideration and it was held that “*Where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. Furthermore, a provision in a statute which is procedural in nature although employs the word “shall” may not be held to be mandatory if thereby no prejudice is caused*”. [Paras 48 to 50]

41. In ***Pesara Pushpamala Reddy v. G.Veeraswamy and Others [(2011) 4 SCC 306]***, relied on by the learned Senior Counsel appearing for the 3rd respondent, non-compliance of the procedure viz-a viz vitiating of the proceedings also came up for consideration and in para 31, after considering the judgment in ***State Bank of Patiala v. S.K.Sharma [(1996) 3 SCC 364]***, wherein para 33 of the said judgment has been extracted and it reads as follows:

“33. (3) In the case of violation of a procedural provision, the position is this; procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/ employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice.”

42. Similar view has been taken in *M/s.Hyundai Motors India Ltd. v. Union of India [(2016) 1 CTC 308]* and it is relevant to extract the following portions of the said judgment:

“56. Generally, time limits prescribed, especially in subordinate legislation, can be taken only to be directory and not mandatory. Otherwise, a subordinate legislation may even destroy the Parent legislation, by default.

57. In *Raza Buland Sugar Co. Ltd. v. The Municipal Board [AIR 1965 SC 895]*, a Constitution Bench of the Supreme Court held that the question whether a particular provision is mandatory or directory, cannot be resolved by laying down any general rule and that it would depend upon the facts of each case. The Court has to consider the purpose for which the provision had been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting therefrom when the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject as well as other considerations which may arise on the facts of a particular case, including the language of the provision. The said decision of the Constitution Bench was followed in *Salem Advocate Bar v. Union of India [(2005) 6 SCC 344]*. While doing so, the Supreme Court pointed out therein that our laws on procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their back, that proceedings that affect their lives and properties should not continue in their absence and that they should not be precluded from participating in them.

58. In *Sharif-Ud-Din v. Abdul Gani Lone [(1980) 1 SCC 403 : AIR 1980 SC 303]*, the Supreme Court indicated that the question whether a provision of law is mandatory or not depends upon its language, the context in which it is enacted and its object. The Court made an important observation, which will resolve the problem for us and hence it is extracted as

follows:—

“In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one.”

59. Therefore, it is clear that if the condition imposed by the provision of law to do a certain thing within a time frame is upon an authority (such as the Designated Authority in this case) and the consequences of the failure of that authority to comply with the condition, is to fall upon someone else (such as the persons in the domestic market) who have no control over the authority which is to perform the duty, then the provision of law cannot be construed as mandatory, but only directory.

63. Another simple test to determine whether a time limit stipulated in a rule is directory or mandatory, is to see whether there is any indication in the Rule itself about the consequences of non compliance with the same. If a statutory provision contains a prescription and also stipulates the consequences of non compliance with the condition, it would normally be taken to be mandatory. If the consequences of non compliance are not indicated, then, the provision has to be seen only as directory.”

WEB COPY

43. NCLT Rules, 2016 came to be framed in exercise of powers conferred under Section 469 of the Companies Act by the Central Government.

44. Now coming to the issue as to the non-uploading of the information relating to pronouncement of the orders made in MA/780/2019 and MA/1250/2019 either in the website or in the Cause List, it is stated by the 2nd respondent that the said information could not be uploaded in the website on the previous day on 19.01.2020 as it happens to be a Sunday (Holiday) and however, took a stand that the common order in the said applications were pronounced in the open Court and also seems to be apologetic by stating in para 11 that non-mentioning of the information as to the pronouncement of the orders in MA/1250/2019 in the Cause List is neither wilful nor wanton.

45. A perusal of the Cause List dated 20.01.2020 with regard to the pronouncement of the orders by the Bench having coram of Mr.B.S.V.Prakash Kumar, Acting President, Former Member (Judicial) and Mr.Vijayaraghavan, Member (Technical) in Court Hall -II, NCLT, Chennai Bench would disclose that Sl.No.7 is MA/780/2019 in CP/280/IN/2018 and in that case, the name of the petitioner, namely Mr.S.Rajendran (RP)/3rd respondent alone has been stated and in the column pertaining to name of the respondent as well as Advocate name, no names have been stated and there was no indication as to the pronouncement of the orders in

MA/1250/2019. Thus, there appears to be a lapse on the part of the 2nd respondent for which they took a stand that it cannot be construed as neither wilful nor wanton.

46. A perusal of the impugned order would disclose that reasons were assigned for allowing of MA/780/2019 filed by the 3rd respondent and dismissal of MA/1250/2019 filed by the petitioner and however, this Court is not inclined to go into the merits or demerits of the said order and it has also expressed so.

47. A perusal of the orders dated 17.01.2020 passed by the Registrar, NCLT, Principal Bench, New Delhi would disclose that a Special Bench at NCLT, Chennai will sit on 20.01.2020 for pronouncement of the reserved orders by Mr.B.S.V.Prakash Kumar, Member (Judicial) [Acting President of NCLT, New Delhi] and Mr.Vijayaraghavan, Member (Technical) and the said constitution of the Bench is having legal sanctity and it was passed under Section 419(3) of the Companies Act, 2013.

48. ***Rule 151 (1) of the NCLT Rules, 2016*** says that ***any Member of the Bench may pronounce the order for and on behalf of the Bench.*** Sub-

Rule (4) of Rule 152 says that *if the order cannot be signed by reason of death, retirement or resignation or for any other reason by anyone of the Members of the Bench who heard the case, it shall be deemed to have been released from part-heard and listed afresh for hearing.* Such a situation has not arisen in this case for the reason that both Members of the Bench heard together and reserved orders and only pronounced orders by way of Special Sitting on 20.01.2020 at NCLT, Chennai.

49. **Sub-Rule (1) of Rule 150** says that *the Tribunal, after hearing the applicant and respondent, shall make and pronounce an order either at once or as soon as thereafter as may be practicable but not later than thirty days from the final hearing.* **Rule 153** speaks about **Enlargement of Time** and as per the said Rule, in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed or under these rules or granted by the Tribunal have expired. In the case on hand, the timeline have not been adhered to.

50. In para 5 of the affidavit of the 3rd respondent, it is stated that after the dismissal of the appeal by the Hon'ble Supreme Court on 18.10.2019, the Ex-Directors / Promoters failed to provide Settlement Plan under

Section 12A of IBC and the said fact was recorded in the Minutes of the Meeting of COC dated 04.11.2019. The Ex-Director filed an application in MA/1250/2019 in MA/780/IB/2019 in CP/280/IB/2019 challenging the consideration of the Settlement Plan by COC on various grounds and the NCLT, Chennai reheard the entire resolution plan along with MA/1250/IB/2019 and reserved orders on 19.11.2019 and a mention was made by the learned counsel appearing for the 3rd respondent on 06.01.2020 by way of reminder as to the pronouncement of the orders and the Bench assured that orders would be pronounced immediately after the Pongal Holidays and accordingly, orders were pronounced approving the Resolution Plan on 20.01.2020.

51. In *Balwant Singh and Others v. Anand Kumar Sharma and Others [(2003) 3 SCC 433]*, a particular portion of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 as to the mandate cast upon a tenant to remit rent within time line and the mandatory nature of the said rule came up for consideration and it is relevant to extract the following portion of the same judgment:

“7. Yet there is another aspect of the matter which cannot be lost sight of. It is a well-settled principle that if a thing is required to be done by a private person within a specified time, the same would ordinarily be mandatory but

when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified. In *Sutherland's Statutory Construction*, 3rd Edn., Vol. 3, at p. 107, it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

“As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.”

52. In the light of the ratio laid down in the above cited pronouncements, this Court is of the considered view that though Rule 89 of the NCLT Rules have not been complied with by the 2nd respondent, the fact remains that after the pronouncements of the impugned common order on 20.01.2020, certified copy of the said order was furnished to the learned counsel for the petitioner on 27.01.2020 i.e., within 7 days from the date of pronouncement of the order.

53. *Section 30 of IBC* speaks about *Submission of Resolution Plan* and *Section 31* speaks about *Approval of Resolution Plan*. *Section 61* speaks about *Appeals and Appellate Authority* and *Sub-Section (1) of Section 61* says that “*Notwithstanding anything to the contrary contained under the Companies Act, 2013, any person aggrieved by the order of the Adjudicating Authority under this Part may prefer an appeal to the NCLAT*”. *Sub-Section (2) of Section 61* says that *the appeal shall be filed within 30 days before the NCLAT* and *Sub-Section (3) of Section 61* says that an *appeal against an order approving a resolution plan under Section 31 may be filed on five grounds*.

54. The petitioner got the certified copy of the order within 7 days from the date of pronouncement of the common order dated 20.01.2020 i.e., within the timeline contemplated under Section Sub-Section (2) of Section 61 of IBC and as such, it cannot be said that he has been put to serious prejudice on account of non-uploading of the information relating to pronouncement of the orders on 20.01.2020 and non indication of the same in the Cause List.

55. Now coming to the mandatory nature of NCLT Rules, 2016, more

particularly Rules 150 and 153, in the light of the settled legal position that consequences that may arise on account of the non-adherence to the time line/procedure have not been indicated in the said Rules, it can be considered to be only directory.

56. The Division Bench judgment of the Bombay High Court in *Kamal K.Singh v. Union of India [2019 SCC OnLine 5609]* is distinguishable for the reason that the legal position as laid down by the Hon'ble Apex Court in the various pronouncements as to the directory/mandatory nature of Statutory Rules have not been dealt with in the said judgment. It is a settled legal dictum that ***“when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified”***. Admittedly, the consequences that may emanate as to the non-adherence/infraction of the Rules have not been indicated in the Statutory Rules. Hence, the impugned common order cannot be set aside on that ground.

57. This Court has entertained the writ petition on 27.01.2020 only on

that issue and finds the grounds put forward by the petitioner in this regard, lack merit. It is once again made clear that this Court have not gone into the merits or otherwise of the impugned common order, as it is for the petitioner to workout his remedy by making a challenge to the said order before the competent forum in accordance with law. It is also be observed at this juncture that the second respondent shall be careful and not to give any room for emanation of such complaints in future.

58. In the result, **this Writ Petition is dismissed, subject to above observations.** Consequently, the interim orders granted in WMP.No.2253 of 2020 shall stand vacated and consequently, WMP.No.2253 of 2020 is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

[M.S.N., J.] [R.H., J.]

19.03.2020

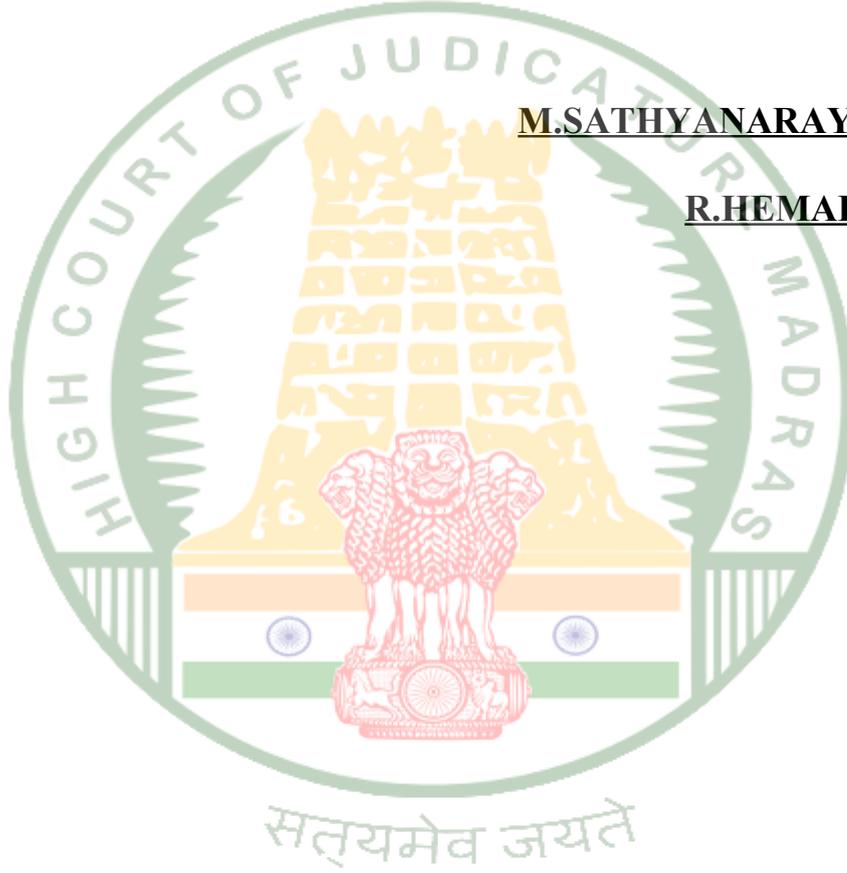
Index : No
Internet : Yes
Jvm

WEB COPY

1.Union of India,
through Ministry of Corporate Affairs,
A-Wing, Shastri Bhavan,
Rajendra Prasad Road, New Delhi-110 001.

<http://www.judis.nic.in> 2.Registrar of National Company Law Tribunal,

Chennai, Corporate Bhavan (UTI Building),
3rd Floor, No.29 Rajaji Salai,
Chennai-600 021.



M.SATHYANARAYANAN, J.,
and
R.HEMALATHA, J.

Jvm

Order in
W.P.No.1926 of 2020

WEB COPY