BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA 1306/2018 in CP No. 02/2018, CP No. 01/2018, CP No. 543/2018, CP No. 507/2018, CP No. 509/2018, CP No. 511/2018, CP No. 508/2018, CP No. 512/2018, CP No. 510/2018, CP No. 528/2018, CP No. 563/2018, CP No. 560/2018, CP No. 562/2018, CP No. 559/2018, CP No. 564/2018

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MA 1416/2018 in CP No. 02/2018

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MA 393/2019 & MA 115/2019 in CP No. 543/2018

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MA 1574/2019 in CP No. 01/2018

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MA 774 /2019 in CP No. 543/2018

&

MA 778/2019 in CP No. 559/2018

&

MA 1583/2018 IN CP No. 559/2018

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

In the Applications of

A. State Bank Of India
.....Applicant in MA 1306/2018

&

B. Mr. Venugopal Dhoot
.....Applicant in MA 1416/2018

v.

1. Videocon Industries Limited
2. Videocon Telecommunications Limited
3. KAIL Ltd.
4. Evans Fraser & Co. (India) Ltd.
5. Millennium Appliances (India) Ltd.
6. Applicomp India Ltd.
7. Electroworld Digital Solutions Ltd.
8. Techno Kart India Ltd.
9. Trend Electronics Ltd.
10. Century appliances Ltd.
11. Techno Electronics Ltd.
12. Value Industries Ltd.
13. PE Electronics Ltd.
14. CE India Ltd.

15. Sky Appliances Ltd.

….Respondents

C. MA 393/2019 & MA 115/2019 in CP No. 543/2018

Infotel Business Solution Ltd.
….Applicant
V.
i. Mr. Mahender Khandelwal
….Resolution Professional of KAIL

ii. State Bank of India
….Financial Creditor

In the matter of

Cool Tech Appliances Pvt. Ltd
V.
KAIL (Through Mahender Khandelwal)

D. MA 1574/2019 in CP No. 01/2018

ATC Telecom Infrastructure Private Limited ……Applicant

In the matter of

State Bank of India
V.
Videocon Telecommunications Ltd.

E. MA 774 /2019 in CP No. 543/2018

Kitchen Appliances Trinamool Workers Union ……Applicant

In the matter of

Cool Tech Appliances Pvt. Ltd
V.
KAIL (Through Mahender Khandelwal)

F. MA 778/2019 in CP No. 559/2018

Shri Vinayak Engineering & Shri Vinayak Industries
……Applicant

In the matter of

State Bank of India
v.
M/s Trend Electronics

G. MA 1583/2018 in CP No. 559/2018

Marathwada Industrial & General Workers Union

….Applicant

In the matter of

State Bank of India
v.
M/s Trend Electronics

Date of Pronouncement: 08.08.2019

Coram: Hon'ble M.K. Shrawat, Member (J)

For the Applicants/Respondents :

Sr. Adv. Mr. Ravi Kadam a/w Mr. Madhav V. Kanoria a/w Ms. Naveena Varghese a/w Ms. Saloni Kapadia i/b Cyril Amarchand Mangaldas for SBI.

Sr. Adv. Mr. Pradeep Sancheti a/w Mr. Vishal S. Shiyan, for Infotel Business Solutions Ltd.

Sr. Adv. Mr. Gaurav Joshi a/w Rishabh Jaisani i/b Shardul Amarchand Mangaldas & Co., for RP of KAIL Ltd.

Mr. Simil Purohit, for Marathwada Industrial & General Workers Union of Trend Electronics Ltd.

Mr. Ankit Lohia a/w Disha Kunder i/b Lodha Legal, for ATC Telecom Infrastructure Private Limited

Per: M. K. Shrawat, Member (J)

ORDER

1. There are as many as 15 applications, some are in favour of the 'Consolidation' and some are opposing the 'Consolidation' of insolvency process of the Videocon group Companies, therefore, a summary at the outset shall be useful to deal all of them in this combined order. It is also worth to mention at the beginning itself that the facts and circumstances as narrated in these applications are conjoint and linked with each other, therefore, a common order is passed herein below. A bird eyed view of the applications under consideration is as under:
    a. MA 1306/2018 in CP No.02/2018, CP No. 01/2018, CP No. 543/2018, CP No. 507/2018, CP No. 509/2018, CP No. 511/2018, CP No. 508/2018, CP No. 512/2018, CP No. 510/2018, CP No. 528/2018, CP No. 563/2018, CP No. 560/2018, CP No. 562/2018, CP No. 559/2018, CP No. 564/2018 (a common application applicable to all main petitions of various Corporate Debtors). This

application is filed by SBI seeking consolidation of Corporate Insolvency Resolution Processes for 15 Corporate Debtor (Videocon group companies).

b. MA 1416/2018 in CP No. 02/2018 filed by Venugopal Dhoot (ex-director of the group) seeking consolidation.

c. MA 115/2019 & MA 393/2018 in CP No. 543/2018 filed by Infotel Business Solution Ltd., the Financial Creditor of KAIL Ltd., for intervening in the applications for consolidation and for opposing the consolidation respectively.

d. MA No. 1574/2019 in CP No. 01/2018 filed by ATC Telecom Infrastructure Private Limited, filed by the Operational Creditor of Videocon Telecommunications Ltd. (VTL), for opposing the consolidation.

e. MA No. 778/2019 in CP No. 559/2018 filed by Shri Vinayak Engineering & Shri Vinayak Industries, the Operational Creditors of M/s Trend Electronics, for opposing the consolidation.

f. MA No. 774/2019 in CP No. 543/2018 filed by Kitchen Appliances Trinamool Workers Union, Labour Union of M/s KAIL Ltd., for opposing the consolidation.

g. MA No. 1583/2018 in CP No. 559/2018 filed by Marathwada Industrial & General Workers Union, the Labour Union of M/s Trend Electronics Ltd., for opposing the consolidation.

A) <u>Brief Background of the Group Companies</u> :-

2. It is worth to note that most of these companies, (collectively referred to as **"Corporate Debtors"** and individually "Corporate Debtor") were proceeded against by the SBI U/s 7 of the Insolvency & Bankruptcy Code, 2016 (**I&B Code**) and in the case of other few companies, operational creditors have filed insolvency petitions u/s 9 of the I&B Code. The table showing the status of **section 7 proceedings** under Insolvency Code of the Corporate Debtor is given hereunder:

S.No.	Name of Videocon Group Company	Status Before NCLT	Court Room No.	Date Of Order	Name of IRP/RP
1.	VTL	Admitted	I	11.06.2018	Anuj Jain
2.	Electro World	Admitted	I	30.08.2018	Avil Menezes
3.	Value Industries	Admitted	I	30.08.2018	Dushyant Dave
4.	Evans Fraser	Admitted	I	30.08.2018	Avil Menezes

5.	CE India	Admitted	III	14.09.2018	Mahender Khandelwal
6.	VIL	Admitted	II	06.06.2018	Anuj Jain
7.	Trend Electronics	Admitted	II	25.09.2018	Dushyant Dawe
8.	Applicomp	Admitted	II	25.09.2018	Avil Menezes
9.	Techno Kart	Admitted	II	25.09.2018	Divyesh Desai
10.	Century Appliances	Admitted	II	25.09.2018	Dushyant Dave
11.	KAIL	Admitted	III	08.06.2018	Mahender Khandelwal
12.	Millennium Appliances	Admitted	III	31.08.2018	Avil Menezes
13.	SKY Appliances	Admitted	III	31.08.2018	Mahender Khandelwal
14.	PE Electronics	Admitted	III	31.08.2018	Divyesh Desai
15.	Techno Electronics	Admitted	III	31.08.2018	Divyesh Desai

3. Mr. Venugopal N. Dhoot, ex-director/promoter had filed an application (CA/1022(PB)/2018) before the **Principal Bench, NCLT New Delhi** praying that all the matters relating to the Corporate Debtors must be heard by one and the same court of Mumbai Bench of NCLT. Likewise, another application was filed by the State Bank of India before the Principal Bench seeking the same reliefs as were sought in the said Application i.e. consolidation of CIRPs of all the Corporate Debtors. The Hon'ble Principal Bench disposed of both the applications vide a common order dated 24.10.2018. In the said Order dated **24.10.2018,** the Hon'ble Principal Bench has transferred all matters where CIRP commenced of the Corporate Debtors to this Bench as it will, *inter alia*, serve the basic purpose of tagging of all matters to avoid conflicting orders, if any, in the connected matters . In the same order, while dealing with the reliefs prayed for by State Bank of India in its application, the **Principal Bench held as follows:-**

> *" This order shall dispose of CA No. 1022(PB)2018 and 1094(PB)/2018. The prayer made in the first application is to issue directions for hearing of all Videocon matters by the one and same Bench of Adjudicating Authority-NCLT, Mumbai. The applicant has made averments that Videocon Group of Companies have many group*

companies against whom the CIR process has been initiated. The details of the aforesaid companies have been listed in a table which is noticed as under:-

Sr. No.	***Company Petition***
1)	*Videocon Industries Ltd.-(IB) No. 2 of 2018 (Bench No. II, NCLT, Mumbai)*
2)	*Millennium Appliances India Limited—(IB) No. 509 of 2018 (Bench No. III, NCLT, Mumbai)*
3J	*PE Electronics Limited - (IB) No. 528 of 2O18 (Bench No. III, NCLT, Mumbai)*
4)	*Sky Appliances Limited – (IB) No. 563 of 2018 (Bench No. III, NCLT, Mumbai)s*
5)	*Techno Electronics Limited - (IB) No. 512 of 2018 (Bench No. III, NCLT, Mumbai)*
6J	*Evans Fraser and Co. (India) Limited – (IB) No. 508 of 2018 (Bench No. I, NCLT, Mumbai]*
7)	*Electroworld Digital Solutions Limited - (IB) No. 511 of 2018 (Bench No. I, NCLT, Mumbai)*
8)	*Value Industries Limited (IB) No. 560 of 2018 (Bench No. I, NCLT, Mumbai)*
9)	*Applicomp (India) Limited - (IB) No. 507 of TO18 (Bench No. II, NCLT, Mumbai)*
10)	*Trend Electronics Limited - (IB) No. 559 of 2018 (Bench No. II, NCLT, Mumbai)*
11)	*Techno Kart India Limited - (IB) No. 510 of 2018 (Bench No. II, NCLT, Mumbai)*
12)	*Century Appliances Limited - (IB) No. 562 of 2018 (Bench No. II, NCLT, Mumbai)*
13)	*Kail Ltd. - (IB] No. 543 of 2018 (Bench No. III, NCLT, Mumbai)*

Furthermore, the petitioning creditor has also filed a Petition under Section 7 in this Hon'b1e Tribunal against 14th Company CE India Limited, a Mortgagor of the Loan, being C.P. (IB) No. 564 of 2018, which company owns and mortgaged "Videocon and other Brands/Assets".

2. On perusal of the aforesaid table alongwith para would show that the first lead matter namely Videocon Industry Limited being CP No. (IB)-02(MB)/2018 is posted for hearing before Bench 2 which is headed by Hon'ble Mr. M.K Sehrawat, Member (Judicial). Likewise, 5 other matters are also pending before the same Bench. It has also pointed out already that another petition namely Videocon Telecommunication Limited being CP No. (IB)—0 1(MB) /2018 is also pending consideration before another Bench. The prayer made in the application is that all these matters shown in the table, para underneath the table and CP No. (IB)— 01(MB)/2018 be listed before one Bench.

3. In the second application, the prayer made is for consolidation of all these petitions and issue further directions to treat the Corporate Insolvency Resolution Process as one in respect of all the Videocon group of companies.

4. Notice of the applications to the non—applicant. Notice accepted by the learned counsel for non—applicants.

5. We have heard the learned counsel for the parties, there appears to be consensus amongst the counsels for all the parties that all the petition be placed before one bench. Accordingly, we find that the lead case and majority of the matters are posted before Bench headed by the Hon'ble M.K. Sehrawat, Member (Judicial). Therefore, it will serve the basic

purpose of avoiding conflicting order and facilitating the hearing if the matters are posted before the aforesaid bench. Accordingly, we direct that the matter be posted before the aforesaid bench. The Registry of NCLT, Mumbai is directed to take steps and place the matters before the aforesaid Bench.

6. The other request that all the petitions be treated as part of one Corporate Insolvency Resolution process cannot be taken up by us and any such request however shall left open to be decided by the Adjudicating Authority-NCLT Mumbai".

7. The applications stand disposed of. "

4. Following the directions of the Hon'ble Principal Bench, the cases of all Mumbai Benches were transferred by the registry to one Bench, now ceased of the matter, taking up the issue of consolidation collectively in this judgement. All the applications shall be dealt with on merits independently hereafter.

B) M.A. 1306/2018

5. This **Application No. 1306/2018** is filed on 30.10.2018 by State Bank of India (SBI) to seek an order for the **'Consolidation'** of the Corporate Insolvency Resolution Process ("**CIRP"**) of (1) Videocon Industries Ltd. (VIL), (2) Videocon Telecommunications Limited (VTL), (3) KAIL Ltd. (KAIL), (4) Evans Fraser & Co. (India) Ltd. (Evans Fraser), (5) Millennium Appliances (India) Ltd. (Millennium Appliances), (6) Applicomp India Ltd. (Applicomp), (7) Electroworld Digital Solutions Ltd. (Electroworld), (8) Techno Kart India Ltd. (Techno Kart), (9) Trend Electronics Ltd. (Trend Electronics), (10) Century Appliances Ltd. (Century Appliances), (11) Techno Electronics Ltd. (Techno Electronics), (12) Value Industries Ltd. (Value Industries), (13) PE Electronics Ltd. (PE Electronics), (14) CE India Ltd. (CE India), and (15) Sky Appliances Ltd. (Sky Appliances). Each of these Companies were promoted by Dhoot Family and thus form part of the Videocon group of companies.

(5A) The list of creditors of these companies is given below:

i. Dena Bank
ii. State Bank of India
iii. Allahabad Bank
iv. IDBI Bank
v. Indian Overseas Bank
vi. Jammu & Kashmir Bank
vii. Bank of Maharashtra
viii. Bank of Baroda
ix. United Bank of India

x. Canara Bank
xi. Syndicate Bank
xii. Infotel Business Solution Ltd.
xiii. UCO Bank
xiv. ICICI Bank
xv. Corporation Bank
xvi. IFCI
xvii. Central Bank of India
xviii. Punjab National Bank
xix. Andhra Bank
xx. Vijaya Bank

6. Hence, the SBI, pursuant to the order dated 24.10.2018 passed by the Hon'ble Principal Bench, NCLT, New Delhi, has filed this Application seeking the following reliefs:

"….

*(a) Order and direct **substantive consolidation of the Corporate Debtors** into a **single proceedings** solely for the purposes of CIRP in accordance with the provisions of the Code, including but not limited to the acceptance, confirmation and all other actions with respect to the resolution plan for the Corporate Debtors and any and all amendments or modifications thereto, in such consolidated proceedings.*

*(b) Order and direct that solely for the purpose of the consolidated proceedings, **all assets and liabilities of the Corporate Debtors are merged** and are deemed to be the assets and liabilities of all the Corporate Debtors on a consolidates basis;*

(c) Order and direct that solely for the purpose of the consolidated proceedings that all obligations and debts due or owing to or from any Corporate Debtor from or to any other Corporate Debtor are eliminated;

*(d) Order and direct that solely for the purpose of the consolidated proceedings, any obligations of any Corporate Debtor an **all guarantees** thereof executed by one or more of the other Corporate Debtors are deemed **to be one obligations of all the Corporate Debtors** on a consolidated basis;*

(e) That each and every claim filed in the individual proceedings of any of the Corporate Debtors is deemed filed against all the Corporate Debtors in the consolidated proceedings;

*(f) That the appointment of a **single common Resolution professional** who will carry on the duties and perform the functions of a Resolution Professional in accordance with provisions of the Code for the consolidated proceeding;*

*(g) That a **common COC may be constituted** for all the Corporate Debtors so that the decision making process in relation to the CIRP may be done in an efficient manner and to diminish the scope of any conflicting decision;*

*(h) That September 25, 2018 shall be considered as the **common insolvency commencement date** for all the corporate debtors and therefore, the maximum period during which CIRP has to be completed in accordance with section 12 of the Code shall be computed from September, 25, 2018;*

*(i) That a comprehensive **Resolution Plan** dealing with all or a collection of the Corporate Debtors based on relevant factors including without limitation commonality of business may be formulated and approved by the COC and put up for approval before this Tribunal for its approval in accordance with the provisions of the Code."*

7. **Background of the Corporate Debtors**

The Videocon Group Companies are engaged in different types of businesses, for instance,

a. **VIL** is engaged in manufacturing, assembling and distribution of comprehensive range of consumer electronic and home appliances. VIL is the licensee of "Videocon Trademark"
b. **VTL** is provided telecom services in six circles across India. It is engaged in the business of Telecommunication and is the subsidiary of Electroworld.
c. **Value Industries** is manufacturing consumer electronic and home appliances.
d. **Trend Electronics** is manufacturing set-top boxes, Colour Televisions, DVD Players Etc in Aurangabad.
e. **Techno Kart** owns India's Largest Electronics Retail chain and is involved in organised retailing of consumer electronics, home appliances and IT products.
f. **KAIL** is engaged in manufacturing and trading various consumer electronic goods and home appliances in Kolkata.
g. **Applicomp** is involved in manufacturing consumer electronic goods and home appliances in Bangalore;
h. **SKY Appliances** is manufacturing all sorts of consumer electronics and home appliances in Gujarat .
i. **Techno Electronics** is manufacturing Electrical and Electronic Appliances at Uttarakhand.
j. **Millennium Appliances** is manufacturing and trading consumer electronic goods and home appliances at Telangana.
k. **Century Appliances** is manufacturing and trading consumer electronic goods and home appliances at Maharashtra.
l. **Evans Fraser** is an investment Vehicle/Real Estate Arm for the Videocon Group of Companies.
m. **PE Electronics** brings together two premium brands Philips and Electrolux, under exclusive brand licensee agreements, which complement each other as a single entity and PE Electronics Markets and Trade in the products of the aforesaid brands.
n. **Electroworld** holds the interest in the Telecom arm of VIL.
o. **CE India** owns that Videocon Brand, Goodwill, trademark and patents.

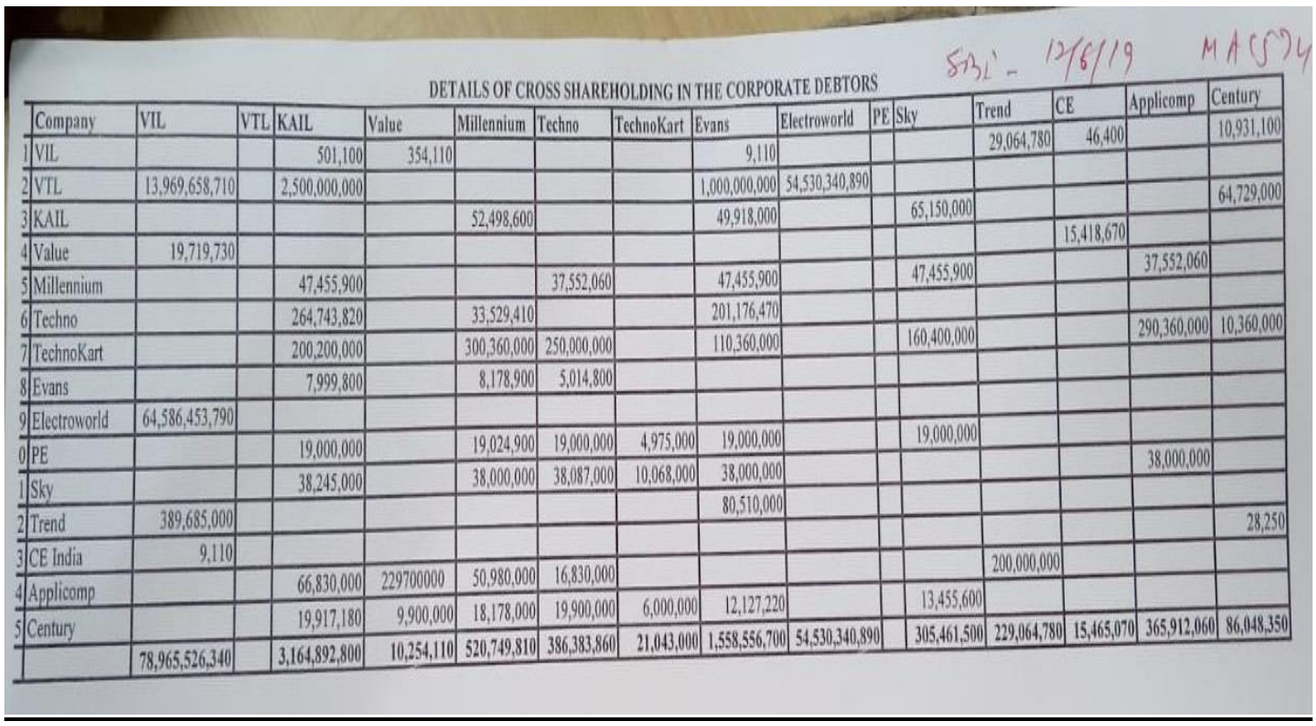
8. It is submitted by the Ld. counsel for Applicant in MA No. 1306 of 2018 that the business activities of each of the Corporate Debtors are **inextricably interlinked and intertwined.** There is tremendous **interdependent** amongst each of the Corporate Debtor. It is pleaded that pursuant to **Rupee Term Loan Agreement dated August 8, 2012 (RTL Agreement)** a consortium of banks and financial institutions led by the Applicant had agreed to grant a rupee terms loan to VIL, KAIL, Electroworld, Value Industries, Evans Fraser, Millennium Appliances, PE Electronics, Techno Electronics, Trend Electronics, Applicomp, Techno Kart, Sky Appliances and Century Appliances (**RTL Obligors**) under an "obligator" structure. The Rupee term loans under the RTL Agreement were to be utilized for the purposes of refinancing of existing Rupee debt of the RTL obligators, funding the capital expenditure in relation to the Ravva field and the capital expenditure in relation to the consumer electronics and home appliances business of the RTL Obligators and such other end users as permitted by the facility agreement under the RTL agreement.
9. One of the constituent of the RTL is CE India. CE India, pursuant to indenture of mortgage dated March 20, 2013, created charge by way of mortgage over, *inter alia*, the Videocon brand, goodwill, trademarks and patents to secure the Rupee Term Loan facility granted to the RTL obligors pursuant to the RTL Agreement.
10. Another constituent of the agreement was Videocon Telecommunications Ltd. (VTL), which had availed of Rupee Term Loan facility from certain lenders including SBI pursuant to the terms and conditions of **Rupee Facility Agreement dated May 31, 2010, as amended by the Agreement of Modification to the Rupee Facility Agreement dated August, 30, 2010 (collectively the "VTL Agreement").**
11. Some of the Corporate Debtors have also availed working capital facilities, most of which have been guaranteed by VIL.
12. Due to 'defaults' in the accounts of the Corporate Debtor, a "**Joint Lenders' Forum"** (JLF) of the lenders of the RTL obligors and the lenders of VTL was constituted in accordance with RBI guidelines. Pursuant to the decision taken as part of the collective-action-plan by the combined JLF in its meeting held on June 04th 2016, it was decided to release proceeds received by VTL upon sale of Unified Access Services Licenses from the relevant escrow account and utilize the amount for servicing existing debt of VTL and the RTL obligors.
13. The lenders/banks have also agreed that security available to the lenders under the RTL Agreement will be shared on *pari-passu* basis with the lenders under the VTL agreement and further, the security available to the lenders under the VTL Agreement will be shared on *pari-passu* basis with lenders under the RTL Agreement.
14. VTL agreed by way of a Confirmation Agreement dated June 20, 2016 that it shall be deemed to be "Co-obligor" under the RTL Agreement. The RTL obligors agreed that

each of the RTL obligors shall be deemed to be a "Co-obligor" under the VTL Agreement.

15. It is further noticed that on account of **'inter-linkage' and 'interdependence' in** business and operations of the Corporate Debtors, they used to prepare **'consolidated financial statements'** so as to give the overall financial position of the **RTL obligors as a whole for the benefit of the various stake holders.**
16. The lenders and other stake-holders of RTL obligors dealt with the **RTL obligors a 'single-economic-unit' as per the 'consolidated financial statements'.**

SUBMISSIONS OF SBI FOR SUBSTANTIVE CONSOLIDATION OF CIRP OF THE CORPORATE DEBTORS

17. The Ld. Counsel for SBI Mr. Ravi Kadam submits that since the Corporate Debtors have been running their business and operations as if they were a single entity and a single economic unit and all the lendings have been done on such basis, therefore, the entire line of credit by Banks and financial institutions to the Corporate Debtors was extended relying upon their unity in business and operations. So the loans were extended with the understanding that the Corporate Debtors will be '**jointly and severally'** liable for the obligation owed to the lenders.
18. The Corporate Debtors have availed financial assistance from Banks under the RTL agreement and the VTL Agreement wherein each of the Corporate Debtors are jointly and severally liable for all the financial obligations under the agreements as if each of them were 'Principal Borrower'. Further, CE India, which houses the valuable "Videocon" Brand under which the operations of the other Corporate Debtors was being carried on, is a co-obligor for the loans under the RTL agreement by virtue of the indenture of mortgage dated March 20, 2013 (discussed *supra*).
19. It is further submitted that the RTL obligors prepared **consolidated financial statements for the fifteen months period ended March, 31, 2017** so as to present the consolidated position of assets and liabilities of the RTL obligors with a view to present the RTL obligors as a single-economic-unit. These financial statements elaborately discussed the impact of VTL's liabilities over the assets and financial conditions of the RTL obligors, thereby clearly bringing out the absolute 'interdependence' of the Corporate Debtors on each other.
20. It is also submitted that the **shareholding pattern** of the Corporate Debtors, as available on the website of MCA, clearly shows the **unity of interest and ownership** between the Corporate Debtors. The assets and business functions of the Corporate Debtor are ***'intricately intertwined***'. The shareholding Pattern is co-mingled due to cross holdings by the group companies. Therefore, to demonstrate the cross **shareholding pattern** of the Corporate Debtors, chart is reproduced below**:-**



DETAILS OF CROSS SHAREHOLDING IN THE CORPORATE DEBTORS

	Company	VIL	VTL	KAIL	Value	Millennium	Techno	TechnoKart	Evans	Electroworld	PE	Sky	Trend	CE	Applicomp	Century
1	VIL			501,100	354,110				9,110				29,064,780	46,400		10,931,100
2	VTL	13,969,658,710		2,500,000,000					1,000,000,000	54,530,340,890						64,729,000
3	KAIL					52,498,600			49,918,000			65,150,000		15,418,670		
4	Value	19,719,730													37,552,060	
5	Millennium			47,455,900			37,552,060		47,455,900			47,455,900				
6	Techno			264,743,820		33,529,410			201,176,470						290,360,000	10,360,000
7	TechnoKart			200,200,000		300,360,000	250,000,000		110,360,000			160,400,000				
8	Evans			7,999,800		8,178,900	5,014,800									
9	Electroworld	64,586,453,790														
0	PE			19,000,000		19,024,900	19,000,000	4,975,000	19,000,000			19,000,000				
1	Sky			38,245,000		38,000,000	38,087,000	10,068,000	38,000,000						38,000,000	
2	Trend	389,685,000							80,510,000							28,250
3	CE India	9,110											200,000,000			
4	Applicomp			66,830,000	229700000	50,980,000	16,830,000									
5	Century			19,917,180	9,900,000	18,178,000	19,900,000	6,000,000	12,127,220			13,455,600				
		78,965,526,340		3,164,892,800	10,254,110	520,749,810	386,383,860	21,043,000	1,558,556,700	54,530,340,890		305,461,500	229,064,780	15,465,070	365,912,060	86,048,350

21. The claims of the lenders arising out of the **RTL Agreement** and the **VTL Agreement** both respectively dated 08.08.2012 and 30.08.2010 against each of the Corporate Debtor on account of the obligor/Co-obligor structure (which is in excess of Rs.20,000 Crores) is required to be resolved in case of each Corporate Debtor as each **Corporate Debtor jointly and severally** liable to pay the outstanding amounts under the RTL Agreement and the VTL Agreement. Consequently, based on the claims filed by the lenders against the Corporate Debtors, the total debt that will have to be resolved in the absence of the substantive consolidation of the CIRP of the Corporate Debtors will be a huge sum. However, the total principal amount of debt that has been granted is approximately Rs.20,000/- Crores under the RTL Agreement and the VTL Agreement. It is the apprehension of SBI that on account of interdependence in business and operations of some of the Corporate Debtors on each other, **few of the Corporate Debtors may not be able to get any resolution plans,** much less, Resolution Plans dealing with the entire claims of all the creditors of such Corporate Debtors. For instance, the Corporate Debtors which have manufacturing facilities and assets may get Resolution Plans, but the Corporate Debtor which have either trading or investment as business may not. Further, the Corporate Debtor having trading or investment business do not have substantial assets in comparison to manufacturing units having land, building & machinery as tangible assets. Therefore, they may not get stand alone Resolution Plans unless they are clubbed together and offered as a group with other Corporate Debtor having manufacturing operations or holding substantial assets. This may result into automatic liquidation for such Corporate Debtor for which no Resolution Plan is submitted.

22. The object of the Code is resolution and rehabilitation of the Corporate Debtors as going concern as opposed to liquidation. It is believed that if a substantive consolidation of the Corporate Debtor takes place, the assets of all or a group of the Corporate Debtors will be able to be offered to a Resolution Applicant under a comprehensive Resolution Plan. This may result in realisation of best value for each of the Corporate Debtors, which in turn will benefit the stake holders of the Corporate Debtors.

23. The Ld. Senior Counsel for SBI submits that the **assets and liabilities** of the Corporate Debtors are completely **knotted into each other** that if separated, shall be prohibitive and prejudiced to the interest of all creditors. It is submitted that if Corporate Debtors are allowed to be resolved independently of each other pursuant to the provisions of the Code, then such resolution may not yield maximum value for the respective Corporate Debtors and that result shall be detrimental to the interest of the secured creditor and other stake holders of the Corporate Debtors.

24. Importantly, it is further submitted that in the **US Bankruptcy Laws** there have been instances wherein substantive consolidation have been supported. There are precedents where Bankruptcy Courts have consolidated proceedings along with assets and liabilities of different debtor companies by exercising their equity jurisdiction. The presence of one or more of the following criteria are considered for **'substantive consolidation'**:

    a. The degree of difficulty in segregating and ascertaining individual assets and liabilities;
    b. presence or absence of consolidated financial statements;
    c. the profitability of consolidation at a single physical location;
    d. the commingling of assets and business functions;
    e. the unity of interests and ownership between the various corporate entities;
    f. the existence of parent and inter corporate guarantees on loans; and
    g. the transfer of assets of without formal observance of corporate formalities.

25. The Ld. Counsel for the SBI has suggested some of the ways in which substantive consolidation of CIRP of the Corporate Debtors may be achieved, given below;

    a. By pooling together the assets of all the Corporate Debtors;
    b. By appointing a common Resolution Professional for all the Corporate Debtors;
    c. By constituting a common COC for all the Corporate Debtors;
    d. By commonizing the Insolvency commencement date for calculating the maximum period available for completing the CIRP. The Counsel suggests the 25th September 2018 as the date of CIRP commencement;

26. The Ld. Counsel for the SBI finally argues that **lack of substantive consolidation** may **result in lesser value** being derived for the Corporate Debtors which are expected to receive Resolution Plans, thereby traversing the object of the Code i.e. maximisation of the value of the assets of the Corporate Debtor. The potential benefit of the substantive consolidation during CIRP may far outweigh any potential harm to interested parties.

26.1 The gist of the arguments tendered by Sr. Adv. Mr. Kadam was that a majority of the common lenders of 15 Videocon Group companies had agreed that the consolidation of the CIRPs of these companies was necessary, as it would be in the best interests of the 15 Videocon Group companies, as well as all the stakeholders for the following reasons:

(a) The 15 Videocon Group companies are interdependent on each other in terms of their business activities. It was appraised that the businesses included manufacturing of various consumer electronics goods spread across companies, which were sold under *inter alia* the 'Videocon' brand, which was owned by CE India Limited, a group company, and sold through the retail arm, Techno Kart India Limited, which is another group company. There are other instances of interdependency such as one company leasing its land to another group company to carry on manufacturing.

(b) The major loans taken by the companies follows a obligor/co-obligor structure, wherein each company is 'jointly and severally liable' to repay the entire amounts.

(c) The committees of creditors are more or less common.

(d) The lenders have been treating these companies as a single economic unit, even from the time of granting the loans.

(e) The Videocon Group companies themselves have been filing common and consolidated financial statements.

(f) There is extensive cross-shareholding.

(g) Multiple expressions of interest were floated in each company, however, no interest is shown by any resolution applicant so far in any of the companies.

(h) If there is no resolution, the 15 Videocon Group companies will go into automatic liquidation, which is against the objectives of the IBC, namely maximization of value and resolution. Reliance was placed on the judgement of the Hon'ble NCLAT in *Binani Industries Limited v. Bank of Baroda & Anr.* Company Appeal (AT) (Insolvency) No. 82 of 2018, and Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr.* v. *Union of India & Ors.* (2019 SCC Online SC 73).

(i) There is precedent of group Insolvency and consolidation under UNCITRAL model law, USA, Germany and European Union.

C) MA No. 1416/2018

27. Another **Application MA 1416/2018** is filed by the promoter of the Videocon group of companies Mr. Venugopal Dhoot seeking the similar relief of '**Consolidation'** of

CIRP i.e. commencement of Insolvency Process under Insolvency Code of all the group companies of Videocon which are undergoing insolvency.

28. Mr. Venugopal Dhoot is **a guarantor, shareholder and also the ex-managing Director/Chairman of the Videocon Group of Companies.** The relief sought in this application is similar as was in the previous application MA 1306/2018 i.e. for the **'substantive consolidation'** of the CIRP of the above stated 15 Corporate Debtors for a successful resolution and restructuring of Videocon Group of Companies. The facts of this case and arguments supporting the consolidation of CIRP of the Corporate Debtor in this application are no different than as stated in MA 1306/2018 (*supra*). Hence both these applications can be disposed of cumulatively.

ARGUMENTS AGAINST THE CONSOLIDATION

D) MA No. 393/2019

29. This application is filed on 24.01.2019 by **Infotel Business Solution Private** Ltd (hereinafter referred to as "Infotel") Limited against (i) Mr. Mahender Khandelwal, the **Resolution Professional (RP) of KAIL Limited** and (ii) the State Bank of India, in the matter of M/s Cool Tech Appliances Private Limited Vs M/s Kail Limited (CP 543/2018). To make it clear, there was a Petition by M/s Cool Tech Appliances Pvt. Ltd. (Operational Creditor) Vs KAIL Limited, (Corporate Debtor) filed U/s 9 of I & B Code , stood **Admitted vide order dated 08.06.2018** and **Mr. Mahender Khandelwal was appointed as Insolvency Resolution Professional (IRP).** He was confirmed as KAIL's RP at the first COC meeting held on 13.07.2018.

30. As far as the status of this Applicant is concerned, Infotel is the '**financial creditor**' of KAIL Limited whose claim stated to be for a huge amount of Rs. 450/- Crores, undisputedly accepted by the RP. It is also worth to place on record that SBI is also the 'financial creditor' of KAIL (Corporate Debtor), against whom CIRP commenced. This application is filed under Section 60(5) of the IBC, inter alia, aggrieved by the actions of the RP in:

- verifying and accepting claims of various entities as "financial creditors" to KAIL, who have not lent money to KAIL but to its group companies;
- thereby committing an error in constitution of the COC;
- failing to provide to the applicant certain important documents in relation to KAIL.

31. The result of the aforesaid action of the R.P. in this Application, Infotel has raised following prayers:

A. *To declare that the Applicant has a 40.21% share/voting right in the meetings / proceedings of CoC of KAIL Ltd.*
B. *To order and direct that the purported "co-obligor" obligations are not enforceable in law.*
C. *To set aside the decision of RP to classify the financial institutions listed under the purported "co-obligor structure" as qualifying for a voting share in CoC of KAIL Ltd.*

32. The Ld. Counsel for Infotel submits that vide email dated 12th July 2018, the RP circulated a presentation for the first COC meeting categorising claims received by him under two heads.

(i) Claims admitted under the 'primary lending' availed by KAIL where lenders lent money to KAIL--- the claims admitted under this head amounted to an aggregate of INR 1,119.39 Crores, of which the Infotel's percentage of share was 40.21% and;

(ii) Claims admitted under a "co-obligor structure", where although the money was not lent to KAIL but to certain other group companies, KAIL assumed an obligation to repay such loans as a co-obligor--- the aggregate claims under this head amounted to INR 21,100 Crores, of which the Infotel's percentage of share was reduced to 2.1%.

33. So, the grievance of the Applicant is that the RP had aggregated the 'financial debt' of KAIL to include those loans which were availed by its group companies in respect of which KAIL was a "co-obligor". Due to this structure **KAIL's over all financial debt was increased to INR 21,100 Crores,** whereby the Infotel's voting percentage is reduced merely to 2.13% as against 40.21% if the loan of INR 1,119 Crores is considered as the actual debt of KAIL Limited.

34. One of the grievance of Infotel in this application is that the RP has not served them proper documents of the loan agreements despite repeated requests of Infotel to verify the same. It is stated that Infotel has not been given an opportunity to review corporate resolutions/decisions of KAIL to ascertain whether KAIL has adhered to legal requirements under the Companies Act before resuming such a large financial liability under the Co-obligor structure.

35. The Ld. Counsel for Infotel states that the RP must be held duty bound to share the **RTL Agreement** with Infotel specially since the Infotel's substantive legal rights are being prejudicially affected by an interpretation of the RTL Agreement. The Ld. Counsel for the Infotel states that this interpretation of RTL Agreement of obligor/co-obligor structure of the Corporate Debtors is misconceived and Infotel is thus challenging the consolidation because there is no provision under IBC which enables

the same, especially when such a consolidation is going to adversely affect the Infotel's rights as a financial creditor of KAIL.

36. The Ld. Counsel for Infotel further submits that the claims filed by the Creditors under the purported co-obligor claims must not be allowed to be accepted by the RP (simultaneously with the RP of the borrower company to whom such amounts were lent), as they are not a part of the primary borrowing of KAIL. In this context it is submitted that it is imperative to look at the substance of the transactions undertaken in terms of the RTL Agreement whereby money has been lent by the lenders only to a few of the group companies, but all the other companies (such as KAIL) have also been made co-borrower for the entire amount when, as a matter of fact, they have not been disbursed any debt/money from such lenders. For example, the Central Bank of India has not lent any money to KAIL and yet its claim of INR 3068 Crores has been accepted by the RP of KAIL as a financial debt under the co-obligor structure and thus given a voting share of 14.5% in the COC. It is further stated that the justification given by the RP is that each co-obligor is also a primary borrower under the RTL Agreement having a clause of joint as well as independent liability.

36.1 **Arguments made against consolidation by Senior Counsel Mr. Pradeep Sancheti**

Mr. Sancheti argued that substantive consolidation as proposed by the applicant is not envisaged in the IBC or the regulations made thereunder, and hence, the reliefs sought by the applicant does not stand. He added that even in the Report of the Insolvency Law Committee, which was published in March, 2018, though there were discussions on the need for provisions pertaining to group insolvency, however, it was suggested by the committee that it may be too soon for the introduction of the group insolvency regime in India.

He added that substantive consolidation of CIRPs of the 15 Videocon Group companies will be prejudicial to the interests of all creditors of each of these companies. Further, upon the enquiring if consolidation of the CIRPs of the companies would be better in respect of verification of claims, process etc., Mr. Sancheti stated that creditors like Infotel would be facing discriminatory treatment and inequity, because if the assets are pooled, then the voting share of the creditors, not part of the common loan agreements, would come down, and this would impact the decision making process during the CIRP.

37. **Hence the Infotel prays that its share be considered as 40.21% in the COC meetings of KAIL Limited and direct that "co-obligor"**

obligations be declared un-enforceable in law. Thus, in a way it is pleaded that the separate applications filed by SBI against each Co-obligors independently by itself was a wrong approach of SBI as a Financial Creditor due to the reason that the insolvency code do not prescribe such approach i.e. when the assets are common against whom a common loan was granted which was put in black and white by RTL Agreement **, the proposal of consolidation is not justifiable.**

REPLY OF SBI TO MA 393/2019

38. The Ld. Counsel for the SBI submits that the question regarding the legal validity and enforceability of the obligor/co-obligor structure that has been entered into between the Financial Creditor including the SBI and the Corporate Debtors is no longer ***res-integra*** since the validity of the (i) RTL Agreement, (ii) Rupee Facility Agreement and the (iii) Confirmation Agreement have already been upheld by all the three benches of this Mumbai Tribunal at the time of admission of section 7 applications filed by respective financial creditors.
39. In the matter of SBI Vs. Applicomp Private Limited (CP (IB) No. 507/2018), SBI vs Trend Electronics Limited (CP (IB) No. 559/2018), SBI Vs Century Appliances Limited (CP (IB) No. 562/2018) and SBI Vs Techno Kart India Limited (CP (IB) No. 510/2018), it was held that the obligation of the obligor/co-obligor under the RTL Agreement constitutes a valid financial debt under the Code. It was further noted:

> *"7.8 It is also worth to place on record the dictionary meaning of the word Co-obligor. The legal meaning envisaged that "**one who is bound together with one or more others to fulfil an obligation. He may be jointly or severally bound."** It is also worth to place on record the legal meaning of 'contract of guarantee' provided by section 126 of the Indian Contract Act, 1872 and it reads as 'A contract to perform the promise, or discharge the liability, of a third person in case of his default is contract of guarantee.*
>
> *7.9 **In light of the above definitions/meaning it is noticed that, since the debtor/co-obligor is a co-obligor to the VIL he is bound to fulfil an obligation of the VIL. Further, VIL is not a third party to the debtor/co-obligor thus jointly be called as 'Guarantor' to the principal debtor/co-obligor.***

40. In support of the demand of consolidation, cited the Hon'ble Supreme Court's decision wherein quoted the importance of the admission of insolvency in the matter of ***Innoventive Industries Ltd. v. ICICI Bank Ltd., 920180 1 SCC 407,*** it was held that***:***

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the

application. ***It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due****.* ***A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete,*** *in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.*

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium

order passed by the authority under Section 14 shall cease to have effect. ***The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of***

another 90 days or else the chopper comes down and the liquidation process begins." (Emphasis Supplied)

41. Hence, the Ld. Counsel for SBI submits, in the light of the above verdict, since NCLT Mumbai Benches have already considered the legal validity and enforceability of the RTL Agreement and the "obligor/co-obligor structure", Infotel has no locus to challenge the same. The amounts lent by SBI to KAIL under the RTL Agreement and the Confirmation Agreement fall under the category of "financial debt" under section 5(8) of the I&B Code. Therefore, the physical disbursement of amount to KAIL is not necessary to come within the meaning of "financial debt". In other words, to constitute a financial debt, actual disbursement of money is not a condition precedent. Under both the conditions, whether a loan has actually been disbursed or whether taken up a liability as obligor/Co-obligor, either way, to be treated as a financial debt. As held in ***Dr. B.V.S. Lakshmi v. Geometrix Laser Solutions Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 38 of 2017], order dated 22.12.2017,*** that :

> "….*To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'…."*

42. This issue is also explained in the matter of ***Barlow & Ors. V Polly Peck International Finance Ltd. & Anr. [1996 B.C.C. 486], Order dated 06.12.1995,*** by the Chancery Court, it was held that:

> *'The rule against double proof is highly technical in some facets of its application, but ultimately it is based on what the court regards as justice between all the creditors'……*
>
> *"……It is therefore convenient to set out some very elementary rules as to suretyship, shorn of complications arising from the provision of security or from the Ellis v Emmanuel distinction. In what follows C is the principal creditor, D the principal debtor, and S the surety (and all are companies).*
>
> *(1) So long as any money remains due under the guaranteed loan, C can proceed against either D of (after any requisite notice) S.*
>
> *(2) If D and S are both wound up, C can prove in both liquidations and hope to receive a dividend in both, subject to not recovering in all more than 100p in the €.*
>
> *(3) S's liquidator can prove in D's liquidation (under an express or implied right of indemnity) only if S has paid C in full (so that C drops out of the matter and S stands in its place).*
>
> (4) *As a corollary of (3) above, S's liquidator cannot prove in D's liquidation in any way that is in competition with C; though S has a contingent claim against D (in the event of C being paid off by S) S may not make that claim if it has not in fact paid off C."*

43. The **Ld. Counsel for the SBI has tendered certain English case laws on the issue of consolidation of CIRPs of the group companies. The list of the same is given herein below:**

a. Continental Vending Machine Corp. vs. Irving L. Wharton' in United States Court of Appeals, Second Circuit decided on June 5, 1975 .

b. Vecco Construction Industires ,INC and others; decided June 9,1980

c. Auto-Train Corporation , Inc. Florida Corporation ; decided on Jan.30,1987

d. Donut Queen Ltd. Debtor ; In re BAPAJO Ltd. Debtor order dated August 3, 1984

e. Food Fair Inc. Debtor ; Unites States Bankruptcy Court , S.D. New York (bankruptcy no. 78 B 1765); order dated March 18, 1981

f. **Donut Queen Ltd. Debtor ; In re BAPAJO Ltd. Debtor order dated August 3, 1984.**

These case laws will be further dealt with in detail in the succeeding paragraphs.

44. It is further submitted that pursuant to the RTL Agreement, a consortium of banks and financial institutions including SBI had agreed to grant 'Rupee Terms Loans' to the Videocon Group as obligors as well as under an obligor/co-obligor structure. The Rupee Term Loans under the RTL Agreement were to be utilised for the purposes of refinancing of existing rupee debt of the RTL obligors, funding the capital expenditure in relation to the Ravva Field and the capital expenditure in relation to the consumer electronics and home appliances business of the RTL obligors and such other end users as permitted by the facility agent under the RTL Agreement. Recital C of the RTL Agreement states that:

> " *The Rupee Term loan has been sanctioned by the lenders* ***for the purposes of refinancing of existing Rupee debt of the obligors, funding the capital expenditure in relation to the consumer electronics and home appliances business of the obligors*** *and such other end uses permitted by the Facility Agent". (Emphasis Supplied).*

45. Further, Mr. Madhav V. Kanoria further argued that as per clause 2.3 of the RTL Agreement by dealing with the obligations of the obligor, it is stated that

> *"VIL and each of VAIL, TEL, NRIL, KAL, AIL, SAL, TechEL, MAIL, CAL, EFCIL, PEL and VEIL are referred to as Co-obligors and collectively as obligors.*
>
> ***Each obligor/Co-obligor shall be liable to the secured parties on a joint and several basis for all the obligations and liabilities of all***

obligors/co-obligors. VIL shall be liable for all the obligations and liabilities of the other obligor/co-obligor as an obligor and as an Obligor's agent.

The liability of the Obligors to the secured parties shall not be discharged until and unless the Obligors have paid or discharged the outstandings owed to the Facility Agent, the lenders or the onshore security trustee and the offshore security trustee under the financing documents to the satisfaction of the lenders*. For the avoidance of doubt, notwithstanding that the obligors may have paid all amounts due to any lender under the financial documents, the obligors shall remain liable to such lender, if as a result of any sharing arrangement between the lenders that has been notified to the Obligors under the Financing Documents, such lender is obliged to share the payments made by the Obligors with the other lenders, and consequently, the obligations owing to such Lender under the Financing documents are still owing and/or un-discharged". (Emphasis Supplied)*

Clause 2.4 of the RTL agreement: Utilisation of the proceeds

(i) the obligors hereby agree that the proceeds of the Rupee Term Loan shall be utilized for the following purposes:

(a) Capital expenditure in relation to the Ravva Field and the capital expenditure in relation to the consumer electronics and home appliances business of the obligors, for an amount not exceeding Rs.684 Crores incurred or to be incurred by the Obligors between the current year 2012 and till 2014;

(b) Refinancing of existing Rupee Loans listed in part A of schedule 9 for an amount not exceeding Rs.19,511 Crores; and

(c) Such other end use as may be permitted by the lenders in writing.

(ii) Without prejudice to the obligations of the Obligor to so apply such proceeds, ***the lenders shall not be under any obligation to monitor the purpose for such proceeds have been utilized…..****"* (Emphasis Supplied).

46. It is further submitted that KAIL has been disclosing the fact of the RTL Agreement in its standalone financial statements, starting from the financial statements for the period 01.07.2012 to 30.06.2013. The relevant extract from the said financial statements is as follows:

"The company along with 12 other affiliates/entities (collectively referred to as "Obligors" and individually referred to as "Borrower") executed facility

agreement with consortium of existing domestic rupee term lenders, in the obligor/co-obligor structure, wherein all the Rupee Term Loans of the obligors are pooled together...."

These accounts have been approved by the Board of Directors and shareholders of KAIL and have already been filed with the ROC.

47. In 2016, pursuant to the Confirmation Agreement, RTL obligors including KAIL assumed all obligations of VTL towards its lenders in respect of the Rupee Facility Agreement whereas VTL assumed all obligations of the RTL obligors towards their lenders in respect of the RTL Agreement. Clause 2.1 of the Confirmation Agreement dated 20.06.2016 provides as follows:

"Confirmation of obligors and VTL

The obligor hereby covenant and agree with the lenders that with effect on and from the date hereof, they shall perform all duties and obligations of the borrower under the Rupee Facility Agreement ***as if each of the obligors had been an original party to the Rupee Facility Agreement as a Co-obligor with VTL and be bound by and comply with all the obligations expressed to be assumed by it as a co-obligor under the Rupee Facility Agreement****." (Emphasis Supplied).*

48. Hence the Ld. Counsel for the SBI submits that the contention of the Infotel that the Obligor/Co-obligor structure of the RTL and VTL agreements is not enforceable in law, should be out rightly rejected.

49. The next rebuttal for Ld. Counsel for SBI is that the inter-linkage and interdependence of the Corporate Debtors is to such an extent that the creditors of the Corporate Debtor have dealt with the Corporate Debtors as if the Corporate Debtors are a 'single economic unit'. The Corporate Debtors used to prepare consolidated financial statements which clearly show that the lenders and other stake holders of RTL obligors with the RTL obligors were declared as single economic unit. Paragraph 2 of auditor's "Report on Agreed upon procedures assignment related to consolidated Statements of Assets and Liabilities and the **Statement of Profit & Loss** of the specified companies of the Videocon Group" dated 15.09.2017 provides as follows:

"2. *Our engagement was undertaken in accordance with the Standard on related services (SRS) 4400. "Engagements to Perform agreed upon procedures regarding Financial Information", issued by the Institute of Chartered Accountants of India. These Consolidated Financial Statements of the Group has been prepared by the VIL and the procedures were performed to enable you to evaluate and analyze the financial position of the group. These statements are intended to* ***present financial information about the group as a single economic entity*** *to show the economic resources controlled by the Group, the obligations of the Group and results of the Group achieved with its resources."*

Further Note 33 of the Notes forming part of the financial statements are as follows:

*" **The Companies in the group executed Facility Agreement with the consortium of existing domestic rupee term lenders (RTL Lenders), under the obligor/co-obligor structure, where all the Rupee Term Loans of the Obligors are pooled together**.....*

*..... It has been agreed between the RTL lenders and VTL lenders to share the security available to the RTL lenders under the RTL Agreement (including receivables from each of the Obligors) with the VTL Lenders under the VTL facility agreements (including receivables from VTL) on a reciprocal first pari passu basis. **Thus VTL is also inducted as a co-obligor in the said facility agreement with the Consortium of RTL lenders**.*

***As per the said facility agreement each of the company in the group is co-obligor and each company is contingently liable in respect of outstanding balance of Rupee Term Loans of VTL as on 31.03.2017 of Rs. 2,468.34 Crore (As at 31st December, 2015 Rs.3,047.36 Crore)**."* (Emphasis Supplied)

50. Hence, the Ld. Counsel for SBI further submits that being a third party in respect of the RTL agreement and Confirmation Agreement, it is not open to Infotel to question the commercial wisdom of KAIL and other lenders about the validity of the RTL Agreement and Confirmation Agreement, as the same is already upheld in the admission order of this Tribunal in the aforesaid matters. Neither the I&B Code nor the rules and Regulations made therein draw a distinction between Primary and Secondary borrowings of Corporate Debtor as now pleaded by Infotel in its application. Infact, Infotel's own letter to the RP of KAIL dated 15.10.2018 reveals that the obligation of KAIL under the RTL Agreement is a "primary" obligation of KAIL. The letter reads as follows:

"……

(4) Based on the extracts of the Rupee Term Loan Agreement shared by you, we understand that each obligor/co-obligor has undertaken to be liable on a joint and several basis for all the obligations and liabilities of all other obligors/co-obligors. We note that such liability of each obligor for the borrowings of other co-obligors is not linked to any default and that such liability is absolute and primary from the date of execution of the Rupee Term Loan Agreement and independent of any default in payment by such co-obligors.

……

(7) In the present instance, the obligation of KAIL to discharge the debt on behalf of the co-obligors who have borrowed the money from the lenders is joint and co-terminus with the borrower/co-obligors. Such an arrangement is therefore not

within the nature of guarantee as it is not linked to default by the borrower/co-obligor". (Emphasis Supplied).

51. Therefore, the obligors (including KAIL) have joint and several liability under the agreements and such obligation is in the nature of **"joint promisor"** under section 43 of the Indian Contract Act, 1872 and for argument sake may not be in the nature of "guarantee" under section 126 of the said act. In the matter of ***B. R. Nagendra Iyer & Ors. V. R.V. Subburamchari & Anr. [AIR 1935 Mad 1055]***, it was held that:

> *"The question is, does a demand upon one of several joint and several promisors act as a demand upon the others? I can see absolutely no warrant for such a proposition as one of law. The promisee has his cause of action against all the joint promisors. He can, if he chooses, file a suit impleading all the joint and several promisors as co-defendants or he can file a suit against any one of them and obtain judgement against him. But unless that judgment is satisfied it does not operate as a bar to his claim against the other joint promisors and he has his right of action against them. This means, that not only the suit against one joint promisor, but any step taken in the suit cannot in any way affect the rights against the other promisors and that a demand upon a joint promisor cannot be deemed to be a demand upon any of the other joint promisors. For this reason the proof of the debt in the insolvency of the other joint promisor in no way affected the rights against defendant 1 and time did not commence to run until the plaintiffs made demand upon him."* (Emphasis Supplied)

52. It is further submitted that SBI has maintained a common account for the RTL Obligors viz, the account under the name **"Videocon Industries Ltd. and 12 Group Companies"** bearing number "32669037910", and thus it is substantiated that SBI acted in the presumption that each individual obligor would be liable for the repayment of the entire debt amount.

53. The Ld. Counsel for SBI has relied on the judgement passed by Hon'ble NCLAT in Company Appeal (AT)(Insolvency) 304/2017 in the matter of ***Export Import Bank of India Vs Resolution Professional of JEKPL Private Limited,*** Order dated 14.08.2013, wherein it was held that:

> *"21. From the cross checking of the respective deeds of JEPL and JEKPL, we find that **both are liable jointly and severally as 'Principal Debtor'** for the EXIM Bank. Thus, the 'Corporate Counter Guarantee' in question in respect of due performance and discharge of obligations and liabilities of JEPL to EXIM Bank essentially comes within the ambit of its 'supplementary/additional guarantee.....*
>
> *57. Admittedly, JEKPL has given the 'Counter-Indemnity Obligation by way of Guarantee (Corporate Guarantee) and thereby it falls within clause*

H of Section 5 Sub Section 8. Such 'Counter-Indemnity Obligation' in respect of Counter Guarantee has been given by JEKPL as the EXIM Bank disbursed the debt against the consideration for the time value of money in favour of the Principal Borrower (JENV)."

54. Further reliance has been placed on the judgement of NCLAT in Company Appeal (AT)(Insolvency) No.169 of 2017 in the matter of ***Edelweiss Asset Reconstruction Company Limited Vs Synergies Dooray Automative Limited & Others,*** Order dated 14.12.2018, wherein it was held that:

*"66. On perusal of above **three assignments agreements,** it is clear those documents are duly executed with the concerned authorities and they are not questioned by any party to those proceedings. Appellant herein, being similarly situated like thereof 'Synergies Castings Limited' and 'Millennium Finance Limited', do not have locus standi to question the veracity of those documents on mere apprehension or allegation of malafides or fraudulent etc. Admittedly, the appellant is not a party to those agreements. It is tenable to raise apprehensions before the Adjudicating Authority to adjudicate. The Courts usually adjudicate issue basing on cause of action arisen in a particular case. The Adjudicating Authority cannot enter into roving enquiry on mere apprehension, baseless allegations.*

67. .....As long as the assignment agreement deeds are valid and legally enforceable, the appellant has no locus standi to question its object, modus operandi"

55. Moreover, in the matter of ***Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprises Limited***, in Company Appeal (AT)(Insolvency) 346/2018, **dated 08.01.2019**, while quoting the Hon'ble Supreme Court in the matter of "Bank of Bihar v. Damodar Prasad and Anr.− (1969) 1 SCR 620", the NCLAT observed as follows:

"22. In "Bank of Bihar v. Damodar Prasad and Anr.− (1969) 1 SCR 620" the Hon'ble Supreme Court held:

"3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of

demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is coextensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.

4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor". In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.

5. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji the Judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties presented applications for the imprisonment of the sureties before levying execution against the principals. The Judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C.J., and Melvill, J. agreed with this opinion and observed- "This court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

In the same order the NCLAT while giving its own observations held:

"32. There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate

Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company"

The aforesaid order was challenged before the Hon'ble Supreme Court and is sub-judice. The Hon'ble Supreme Court vide order dated 01.02.2019 stayed the operation of the afore quoted decision of NCLAT.

56. **Non-joinder of necessary parties :** The SBI states that Infotel is seeking for declaration of the obligations of KAIL under the RTL Agreement and the Confirmation Agreement as "not enforceable in law" and further to set aside the admission of claims of financial creditors listed under the "co-obligor structure" **without making the banks and financial institutions a party to the litigation.** That will be adversely affected by the said reliefs prayed for **as parties t**o the Application. Hence, the Application suffers from the vice of Non-joinder of necessary parties and deserves to be dismissed *in limine*.

E) MA No. 115/2019 (held infructous on 01.07.2019)

57. This application is filed on 16.01.2019 by **Infotel** seeking its impleadment as a party in all the Miscellaneous Applications and Applications filed before this Tribunal seeking consolidation of KAIL Limited with any other Videocon group company. The impleadment is sought for the reasons stated in MA 393 of 2018. For the sake of repetition, the Applicant is concerned about its 40.21% share in the CoC meeting, which will be reduced to about 2% if the application for consolidation is allowed. Since the issue raised in this Application stood merged in the main Misc. Application No.393 of 2019, therefore this M.A. 115/2018 needs no independent adjudication, hence dismissed as redundant.

F) MA No. 1583/2018

58. This application is filed on 11.12.2018 by Marathwada Industrial & General Workers Union, the Labour Union of M/s Trend Electronics Ltd., seeking intervention in MA 1306 of 2018 (filed by SBI for consolidation) as the interest of the labours, workers, members etc. of Trend Electronics shall be adversely affected if the consolidation applications are allowed.

59. It is stated that the Applicant union has around 700 members who are working in Trend electronics. **Trend Electronics is public limited company listed on the stock exchange.** By order dated 25.09.2018 in CP No. 559 of 2018 passed by this Bench, Trend Electronics was referred for Corporate Insolvency Resolution Process under the provisions of I&B Code. Mr. Dushyant Dave was appointed as IRP who was later on approved as RP by the CoC of Trend Electronics.

60. It is stated that out of the 15 group companies, only three i.e. i) Videocon Industries Ltd., ii) Value Industries Ltd., and iii) Trend Electronics Ltd., are listed companies. M/s Trend Electronics is a going concern and is in the business of manufacturing and selling the **dish antenna and set top box** which are made mandatory pursuant to the compulsory digitalisation by Ministry of Information and Broadcasting.

61. It is stated that Trend Electronics is an independent legal entity and is not dependent on the businesses of other group companies. The **employees of Trend Electronics are not the employees of other 14 companies** and their bread and butter come from the operation of Trend electronics. Trend electronics is self sufficient, its products are in demand and its business is also not dependent on the other group companies. It is capable to maintain itself as a going concern on its own.

62. It is stated that if the consolidation is allowed then the dues of employees will not be able to be paid despite Trend Electronics being fully able to pay its dues in case of its independent resolution/liquidation. It would be an unnecessary burden on Trend Electronics to pay the dues of other workers of other entities from its revenues in case the consolidation is allowed. Hence, the applicant herein prays that consolidation of the CIRP of Trend Electronics with other group companies shall not be allowed.

62.1 **Arguments made against consolidation by Mr. Simil Purohit**

Mr. Purohit submitted that consolidation of the CIRPs of the 15 Videocon Group companies will adversely affect the workers, and that since there are no provisions which allow for consolidation under the IBC or the regulations made thereunder, the NCLT does not have the power to pass such orders.

He added that each of the companies filed separate financial statements, and hence consolidation in such a scenario will not be fruitful.

G) MA No. 778/2019

63. This application is filed on 22.02.2019 by Shri Vinayak Engineering & Shri Vinayak Industries, who are the Operational Creditors of M/s Trend Electronics and have lodged their claims with the IRP on 09.10.2018 and 07.10.2018 respectively. This application is also filed for intervention in applications for consolidation of CIRPs of 15 Videocon group companies.

64. As stated above, Trend Electronics is a listed public limited Company. Trend Electronics being an independent entity and in the eyes of law, its operational Creditors, assets, operations are all independent and cannot be merged with the other companies. Hence, the Applicants are seeking that the Corporate Insolvency Resolution Process of Trend Electronics be not consolidated with Corporate Insolvency Resolution Process of other companies.

H) MA No. 774/2019

65. This application is filed on 21.02.2019 by Kitchen Appliances Trinamool Workers Union, Labour Union of M/s KAIL Ltd. having 185 members trained to work in consumer electronic/appliances. The applicant seeks intervention in applications relating to consolidation of CIRPs of 15 Videocon group companies.

66. M/s KAIL Ltd. is in the business of manufacturing and selling TV, LCD, LED TV and Marketing of Kitchen Appliances. It is submitted that the annual turnover of KAIL Ltd. is more than ₹400 Crores and it is only due to the financial crunches faced by the Group Company, M/s KAIL Ltd. has been dragged in Insolvency and Bankruptcy Code proceedings. Otherwise, M/s KAIL Ltd. is able to do business and is independently capable to be maintained itself as a going concern.

67. It is stated that if a common resolution plan is called for all the 15 Videocon group companies, M/s KAIL Ltd. which have a good asset value will be treated at par with the other companies which have lesser asset value. M/s KAIL Ltd. is a separate independent entity and the employees of all the 15 Videocon group companies cannot be treated as belonging to one Company. Hence, by this application the Applicant seeks that CIRP of M/s KAIL Ltd. should not be consolidated with the CIRPs of other group companies.

I) MA No. 1574/2019

68. This application has been filed on 24.04.2019 by **ATC Telecom Infrastructure Pvt. Ltd,** an 'Operational Creditor' having dues more than 10% of the total dues of Videocon Telecommunications Ltd. (VTL). The **Applicant opposes the consolidation of CIRP** of the Videocon group Companies through this Application.

69. The Applicant is a registered **"Telecom Infrastructure Service Provider"** with the Department of Telecommunications which provides infrastructure for the licensees of DOT including cellular mobile telephone operators on Pan India basis.

70. The Applicant submits that if the CIRP of Videocon Group Companies is not consolidated then the likelihood of some other company having business similar to that of VTL, acquiring its asset on standalone basis, will be more than that if the consolidation is allowed. The basic intent of the Code i.e. maximization of value of assets of the Corporate Debtor will be hindered and the very purpose of the statute would be defeated.

71. The Applicant further states that the proposed consolidation will adversely impact the rights of the Applicant as an operational creditor of one of the group companies where it accounts for more than 10% of total dues and therefore got the right to attend CoC meetings. In the event the debt of all the group companies is consolidated, the Applicant's right to attend the CoC meetings will be lost because of reduction of share below 10% in the consolidated debt.

72. The Applicant further relies on the judgement of Hon'ble NCLAT in the matter of ***Binani Industries Ltd & Ors. Vs. Bank of Baroda & Ors.*** , Order dated 14.11.2018, wherein similar treatment was held to be given to both the operational as well as financial creditors:

> *"48. If the 'Operational Creditors' are ignored and provided with 'liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of the 'I&B Code', then in such case no creditor will supply the goods or render services on credit to any 'Corporate Debtor'. All those who will supply goods and provide services, will ask for advance payment for such supply of goods or to render services which will be against the basic principle of the 'I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasizing on maximization of the assets of the 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or the 'Operational Creditor', such plan can be held to be against the provisions of the 'I&B Code'."*

73. The Ld. Counsel has cited the judgement of Hon'ble Supreme Court in the matter of ***63 Moons Technologies Ltd****. (formerly known as Financial Technologies India Ltd. (FTIL) & Ors. V. Union of India & Ors. [Civil Appeal No. 4476 of 2019]*, Order dated 30.04.2019 to assert the proposition that Section 396 of the Companies Act, 2013 i.e. "*Power of Central Government to provide for amalgamation of companies in public interest"* should not be misconstrued to lead to arbitrary and unreasonable results. The

judgement says that if the Central Government has exercised its power under section 396 of the Companies Act, 2013, the compromise or arrangement are not outside the scope of judicial review. And the same is applicable in insolvency context also, pleaded by the Counsel. In this case, Hon'ble Bombay High Court had approved the Central Government's order of merger of a debt ridden 100% subsidiary of a listed entity into the holding company. The Hon'ble Supreme Court had set aside the Hon'ble High Court's order in appeal as the order was ultra vires section 396 of Companies Act, 1956 and violative of Article 14 of the Constitution of India for certain reasons stated therein. It is stated that in a situation where Insolvency Code is silent on a particular aspect (such as the present issue in hand, **first of it's kind) ,** whether the consolidation of CIRP of the Corporate Debtors is beneficial to all the stakeholders or not ?, the Companies Act, being a wider legislation, can be referred to and a skin can be given by the Adjudicating Authority to the skeleton legislation which is I&B Code. When the question arises that consolidation of CIRPs of the Corporate Debtors is causing prejudice to one or more of the stakeholders or is not aiming at achieving the object of the Code, that question can be over-ruled by the Adjudicating Authority. The Applicant further argues that though the creditors of the Videocon group companies have dealt with the group as a single economic entity but they have always relied upon their separate identity in extending credit or providing services. If this consolidation is allowed, the fundamental concept of 'separate legal entity' will be frustrated.

73.1 **Arguments made by Mr. Ankit Lohia on behalf of ATC Telecom**

Mr. Ankit Lohia stated that the claim amount of ATC was more than 10% of the debt of Videocon Telecommunications Limited, and hence it is an operational creditor, who will be affected by the consolidation of the 15 Videocon group companies. He further stated that the proposed consolidation would affect operational creditors of individual companies and that the treatment of the 15 companies as a 'single economic entity' would lead to an 'effective merger', and that the substance of the transaction was to be considered.

In light of this, he referred to the case of *63 Moons Technologies Ltd*. v. *Union of India & Ors.* (Supreme Court) dealing with *inter alia*, the powers of the Central Government under Section 396 to provide for amalgamation in public interest. Further, he added that the powers under Companies Act pertaining to amalgamations and mergers cannot be incorporated into the regime of the IBC and

that the NCLT has no powers to grant such an order, since there are no provisions pertaining to consolidation under the IBC or the regulations made thereunder.

He also added that the telecom business of Videocon Telecommunications Limited has no interdependency with the business of the other group companies, and hence, consolidation was not necessary, and that the same was being floated only to secure the interests of the banks.

74. It is further contended that consolidation will neither benefit the creditors nor the group companies because the financial affairs of all the group companies are completely separate, hence can be handled by separate CIRP proceedings.

J) <u>Findings:-</u>

75. A philosophical opening remark, before addressing this interesting issue as emerged out of the discussion made herein above, is that if in life an attempt is made to avoid a crucial situation either by ignoring or deferring it, this is experienced that, that very situation or problem resurface so fast so that it compels to deal urgently leaving no scope for avoidance or any more deferment. Thus leaves no alternative but to tackle the 'bull by the horns'. Reason for making this observation at the very start of the Findings arose because of an observation made in the **"Report of The Insolvency Law Committee" dated 26th March 2018"** on Page 83 a part of Annexure II- [Summary Response to Comments] at Sr. No. 17 given as under:

> *"It was noted that the treatment of group companies within insolvency laws is a complicated subject. The current system of insolvency law is new, and it may be too soon to introduce a complex subject, like the present issue. The UNCITRAL Legislative Guide on Insolvency Law also provides that the treatment of group companies is a very complex subject in relation to insolvency law and has multiple different approaches in different jurisdictions. Since lifting of the corporate veil in insolvency may affect corporate debtor entities significantly, this issue may be dealt with in the long-term once the present system is well established."*

76. At that point of time the Hon'ble Members of the Insolvency Law Committee have thought that the mechanism of combining Insolvency proceedings in respect of associate or holding companies was **'too soon to introduce'** , but the jurisprudence on Insolvency Code developed very fast in last 3 years , as witnessed by all of us, that this problem of 'Consolidation' has also cropped sooner than expected in this Group of cases, so pressing that it cannot be avoided or deferred . No option is available to this Bench to declare that in the absence of any specific provisions in the I & B Code 2016 issue of 'Consolidation' is premature so be not dealt with. Nonetheless, I cannot hold that in the absence of Law, the question of Consolidation need not to be addressed. I

am aware that this approach shall not be appreciated being against the natural justice. Equity demands to give a verdict on an issue raised by the litigants before a court of law, but definitely within the four corners of the Law without transgressing the jurisdiction as prevalent currently. It goes without saying that the decision hereinbelow is going to be based upon the merits of this case; supported by case-laws pronounced in the past and evidence on record. Undoubtedly the treatment of 'group companies' for the Insolvency purpose is a complex subject, as appropriately observed in the 'Report'. That lifting of corporate veil for Insolvency purpose may affect Corporate Debtor's entity significantly , but considering the **high stakes of the stakeholders** and the lengthy arguments raised by various parties demanding a verdict urgently on the issue of ' Consolidation' , no choice is left but to take the call, although with due care that not to exceed the jurisdiction enshrined in the Insolvency Code.

77. A preliminary question arises that under what circumstances an order of 'Consolidation' can be demanded or *suo-moto* be passed by a court / tribunal. Answer is that when the promoters/ directors of a company diversify the business in various field by creating several independent entities , call it subsidiaries, having cross share-holding with the constitution of common directors and at some point of time the Group gets financially stressed due to default in repayment of debt , at that juncture a right recourse is required to be adopted. **That is why, in my humble opinion, the right recourse shall be to examine the necessity of 'Consolidation'.**

78. Before arriving at any conclusion on ' Consolidation' , the existence of certain ingredients are necessary to be examined, viz ; (1) Common control, (2) Common directors, (3) Common assets, (4) Common liabilities, (5) Inter-dependence, (6) Inter-lacing of finance, (7) Pooling of resources, (8) Co-existence for survival , (9) intricate link of subsidiaries 10) inter-twined of accounts, 11) inter-looping of debts, 12) singleness of economics of units, 13) cross shareholding, 14) Inter dependence due to intertwined consolidated accounts, 15) Common pooling of resources, etc. This is not an exhaustive list and cannot be. These are the elementary governing factors, *prima-facie* to activate the process of 'consolidation'. At first glance the existence of these rudimentary points are required to be seen to examine whether in a particular case the question of 'consolidation' is worth consideration or not? It is also necessary to put it on record at this juncture when entering to start the investigation that it is a cumbersome exercise which require time and patience. Whether the case in hand can fit into these basic criterion is to be scrutinised in the following paragraphs.

79. The reason to venture into this cumbersome exercise is based upon the **principles laid down by judicial authorities , mostly by U.K./ U.S.A.** courts.

a) In the case of **'Continental Vending Machine Corp. vs. Irving L. Wharton' in United States Court of Appeals, Second Circuit decided on June 5, 1975** (517F, Docket 74-2233) certain observation made therein are throwing light on the issue of 'consolidation' proceedings in following words, with due permission, as interpreted by me:

An appeal was filed by a secured creditor James Talcott INC (Talcott), involving Continental Vending Machine Corporation (Continental) and its subsidiary, Continental Apco (Apco). The secured creditor (Talcott) objected an approved Plan of reorganisation of two debtor companies, which was the plan called for consolidation of proceedings. In the said plan, it was proposed to treat the properties of the two debtors on the basis of merger or consolidation of the said two entities. It was also provided that no secured creditors' claim shall be elevated as a result of consolidation. The Court has thrown a question whether the consolidation was "fair and equitable" as proposed in the reorganization plan. It has also been questioned whether to disregard corporate lines so as to consolidate the entities and to pool the assets and liabilities for the purposes of dealing with unsecured claims as well. The grievance of the secured creditor was that to do so, its claim would get effected. The Appellate Court had agreed with the decision of the district Court that the amended plan was "fair and equitable" since priority was given in respect of certain specific assets pledged in connection with loans granted by the secured creditors, both by parent and subsidiary corporations.

Apco was principally the "sales arm" for the Continental which was manufacturer of vending machines. Talcott had financed each entities and in lieu mortgage of machines and other devices were kept as security, covering their respective indebtedness. It is worth to draw attention that although the security agreement with the said two entities had not contained cross collateralization agreement i.e. no provision allowing Talcott to set off the obligation of one corporation against the collateral which it held to secure the debts of the related corporation entities, nor there was any guarantee by either Apco or by Continental of each other's indebtedness.

A major point was under consideration, that due to improvement of some creditors' position was in a way inherent in a consolidation, it would be unfair and inequitable to permit such unsecured creditors to improve their position, but to deny the secured creditors such improvement.

The second major point for adjudication was that the security agreements had given Talcott (secured creditor) a lien for "any and all obligations no matter how and when arising and whether under this or any agreement or otherwise…" applied to permit the Apco lien to cover the Continental's deficit. An observation on facts was made

that Talcott had no lien on the Apco's surplus for the Continental's deficiency under any of its security agreements. Nonetheless, validity of a lien does not depend upon the existence of a contemporaneous debt. Coming to the point of question of consolidation, an observation was that the power to consolidate is one arising out of equity, enabling a bankruptcy court to disregard separate corporate entities, to pierce the corporate veil in order to reach assets for the satisfaction of debts of a related corporation. A contrary argument of the appellant was that "what is sauce for the goose is sauce for the gander", it would however swallow the sauce by improving a status from that of a unsecured creditor of Continental to that of a secured creditor of Apco. A finding was given that Talcott as a secured creditor in both, parent and subsidiary, its lien in no way would diminish. The lien property transferred by virtue of inter-corporate dealings would not in the end prejudice Talcott, which would obtain under the amended plan exactly what was bargained. To quote "*we have made it very plain that because consolidation in bankruptcy is "a measure vitally affecting substantive rights," the inequities it involves must be heavily outweighed by practical considerations such as the accounting difficulties (and expense) which may occur where the interrelationships of the corporate group are highly complex, or perhaps untraceable…. Thus there is nothing to say for the proposition that in the exercise of the bankruptcy court's equity powers……. it cannot treat unsecured claims as consolidated and secured claims as not…"*

Finally, it was ruled that the reorganization plan was recognised being fair and equitable. Interestingly there was a dissent by the Hon'ble Circuit Judge. But on the facts, however on principle of consolidation while discussing the necessity for substantive consolidation, it is observed that intertwined dealings of the debtors had not given any indication that the impugned consolidation was used solely for the benefit of one type of creditors. As per my understanding, on reading this judgement, a legal proposition can be laid down that if the consolidation leads to unfairness only then obviously not to be approved.

And finally following the precedent of Cl. Chemical Bank NewYork Trust Company V. Kheel 369F.2d. 845 (2 Cir.1966) ; approved the motion of 'consolidation'.

b) In the case of **Vecco Construction Industries, INC and others; decided June 9,1980** (Bankruptcy No. 79-224-A United States Bankruptcy Court E.D. Virginia):

The debtor Vecco Construction Industries (Vecco) had filed a petition for relief against the four subsidiaries seeking consolidation of their respective petitions with that of Vecco. The four subsidiary corporations were wholly owned by Vecco. Facts

have stated that Vecco held the stock in its own name, dealing in construction business. The entities were having consolidated financial reports and the individual statements as well as operation of accounts were also consolidated into one account. As per the facts, Vecco had acquired all the assets of its subsidiaries as well as assumed the liabilities. The entities i.e. Vecco and subsidiaries were having identical directors and also utilising the same office space. They were also having common administrative employees. There was a common consolidated account through which all receipts and disbursements were made. There were inter company transactions through the accounts. The debtor subsidiaries have sought approval of the Court for the consolidation of their applications into the petition filed by Vecco. There stand was that the consolidation was essential to ensure the development and implementation of a meaningful "plan of arrangement". **The question was that should the court approve the debtor's application, all claims filed in the separate proceedings of each company, to the extent valid, would be considered a claim in the consolidated proceeding.**

Almost identical was the situation that, quote "*due to the organizational make-up evidenced by the now common-place multi-tiered corporations in existence today, substantive consolidation of a parent corporation and its subsidiaries has been increasingly utilized as a mechanism to deal with corporations coming within the purview of the Act. This relatively recent development has been given judicial effect without the benefit of statutory authority or approval by way of rule of procedure. Rather, courts which have allowed substantive consolidation have done so based upon equitable principles"* unquote.

So a ruling was given that, quote *"it is clear that bankruptcy courts have the power to consolidate proceedings as well as consolidating the assets and liabilities of the debtors before the court…….This power arises from the court's equity jurisdiction. It is well established that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity"* unquote.

An argument was that on the interaction of the corporate group, the result is economic benefit to creditors in a consolidation proceedings. Because of the identical creditors or corporate dealings, the transactions sometimes so thinly veiled that creditors tended to rely upon the group for payment, rather than a single corporation. What is best for the general secured and unsecured creditors is to be examined. An observation was made that there was liberal trend in allowing consolidation of proceedings, is a result of judicial recognition of inter-related corporate structure with subsidiary corporations functioning under one corporate umbrella for the purposes of business planning. While considering the issue of consolidation, it was advised that a Court must be cognizant of the fact that the

consolidation is a measure nothing but for protecting substantive rights and if there is a possibility of unfair treatment, the demand of consolidation could be questioned. In determining whether it was proper to allow consolidation of proceedings, a yardstick is to measure the protection of substantive rights of the stakeholders. Consolidation is sometimes also felt necessary because of difficulty in segregating the inter-twined business accounts or operations. Consolidation was stated to be approved because of difficulty in ascertaining individual assets and liabilities as well as because of presence of consolidated financial statements or consolidated profitability or interdependence on ownership between the various corporate entities, existence of inter-corporate guarantees on loans. **The extent to which assets of the corporate entities are found to be hopelessly commingled must necessarily be decided on a case-by-case basis.** The continued profitability of corporate entities operating on a consolidated basis was seen as an important consideration in allowing consolidation. An another aspect advocating the consolidation was that where there existed a **unity of interests**, **common ownership,** could be a **good basis for consolidation** especially if adhered to separation of accounts or separation of corporate entities resulting into injustice to a bankrupt's creditors. While many of the considerations are laid down in several decisions but a substantial reason is required to be examined that on consolidation the realization of asset would not get any adverse effect and that the consolidation would ensure a fair treatment to all creditors and that a consolidation would save administrative expense to conduct CIRP proceedings.

c) In the case of **Auto-Train Corporation, Inc. Florida Corporation ; decided on Jan.30,1987 &** as amended March 19,1987 (810 F.2nd 271(D.C. Cir. 1987) has proposed certain steps before ordering consolidation. Briefly narrating the issue before the respected Circuit Judge of US Court of Appeals, District of Columbia Circuit on invocation of Bankruptcy Code, a trustee was appointed. The so appointed Trustee filed a motion to consolidate the assets and liabilities of the entities. The bankruptcy court conducted a hearing on the motion and issued an order consolidating Railway Services Corporation Entity into Auto Train Corporation's Estate, effective *nunc pro tunc*. Armed with the consolidation order, the Trustee brought a proceeding in Bankruptcy Court to recover the payment. It was contested and the trustee made an appeal. Keeping the other issues aside, this Bench of NCLT has preferred to extract and discusss some of the relevant portions, wherein a legal ratio was laid down, revolving around the issue of consolidation. An observation was made that every entity is likely to have a different **debt-to-asset ratio,** consolidation invariably redistributes wealth among the creditors of the

various entities. According to the Circuit Court, the problem of consolidation sometimes compounded by the fact that liabilities of consolidated entities, inter-se are extinguished by consolidation. Therefore, it was propounded that, "*Before ordering consolidation, a Court must conduct a searching inquiry to ensure that consolidation yields benefits offsetting the harm it inflicts on objecting parties"*.

A general view has also been expressed that the policy must be equality of distribution among creditors of the debtor. Any creditor that receives a greater payment than others of his class is required to disgorge so that all may share as per the ratio. It has also been quoted that to claim their "*Pound of flesh"* a rule is to follow equality in distribution. A Court is to pass an order of consolidation when it is satisfied that consolidation would yield benefit greater than inflicting any harm. However, in that case, the Court was of the view that the consolidation has not granted benefit therefore, held that the lower court had erred in consolidating Railway Services Corporation Entity into Auto Train Corporation's Estate.

d) In the case of **Food Fair Inc. Debtor ; United States Bankruptcy Court , S.D. New York (bankruptcy no. 78 B 1765); order dated March 18, 1981,** facts, in short were that certain entities (stated to be 17) (the debtors), each one of them filed a petition for an arrangement. The Court had authorised "*procedural consolidation and joint administration"*. The issue before the Hon'ble Court was that should it be "*substantatively consolidated"* so that a single plan of arrangement of assets and liabilities be carried out. The debtors have filed a notice of motion which was duly served upon all the creditors who have filed their claims to the representatives of the consolidated creditors' committee. According to an observation, consolidation in bankruptcy is not merely an instrument of procedural convenience, but a measure which vitally affects substantive rights. **By an order of consolidation, the separate proceedings merge into a single proceeding as well as merging all assets and liabilities.** The need for substantive consolidation is a direct result of proliferation of an entity. The court went on to summarize the factors to be weighed in determining whether the motion to consolidate should be granted by the bankruptcy court under its equity power. It has long been recognized that, as no statutory authority grants the court the authority to disregard separate corporate structures and create a single estate for the benefit of creditors, the power to consolidate must derive from the general equity jurisdiction of a court of bankruptcy. **The Court has culled out seven elements to be evaluated:**

i. The presence or absence of consolidated financial statements,
ii. The unity of interests and ownership between the various corporate entities,
iii. The existence of parent and inter-corporate guarantees on loans,

iv. The degree of difficulty in segregating and ascertaining individual assets and liability,

v. The transfer of assets without formal observance of corporate formalities,

vi. The commingling of assets and business functions,

vii. The profitability of consolidation at a single physical location.

Therefore, unity of ownership is one of the factors for passing an order for consolidation, the same is to be examined. Finally, a key factor for granting substantive consolidation of all the debtors is required to yield an equitable treatment of creditors without any undue prejudice. By consolidating separate proceedings, results into pooling of assets of a debtor to provide a common fund for the payment of all claims. It is required **to balance all the conflicting interests** with a motive to achieve rehabilitation of debtor. The Court has captioned all those debtors as "*consolidated debtors"*. Granting consolidation, it was ordered as under: Quote

"(a) All assets and liabilities of the debtors and debtors in possession are merged and are deemed to be the assets and liabilities of the Consolidated Debtors;

(b) All obligations and debts due or owing to or from any debtor from or to any other debtor are eliminated: and all cross-corporate guarantees of the debtors are eliminated and are deemed to be of no force and effect: and any claim or portion thereof filed or to be filed by any creditor based upon such a guarantee is void and of no force and effect;

(c) Any obligation of any debtor and all guarantees thereof executed by one or more of the other debtors are deemed to be one obligation of the Consolidated Debtors;

(d) Any claims filed or to be filed in connection with any such obligation and such guarantees are deemed to be one claim against the Consolidated Debtors;

(e) Each and every claim filed in the individual proceedings of any of the debtors is deemed filed against the Consolidated Debtors in the Consolidated proceedings;

(f) The debtors' filing of the Plan is ratified and approved, and the Consolidated debtors are authorised to take all lawful action in connection with the plan and any and all amendments or modifications thereto;

(g) In the event of a termination of the Consolidated proceedings for any reason other than by reason of the confirmation of a plan in the Consolidated Proceedings, subject to further order of this court, this

order of substantive consolidation shall, without further order of this court, be of no further force and effect and the Consolidated proceedings shall be deconsolidated for all future proceedings;

(h) In the further event that any of the debtors is adjudicated bankrupt, this order of substantive consolidation shall, without further order of this court, be deemed amended so as to exclude such debtor from the Consolidated Proceedings, and this order shall be deemed to have no further application as to such debtor and the future proceedings with respect to such debtor shall be deemed deconsolidated" unquote. These parameters have duly been taken into consideration while considering the issue of 'Consolidation' by this Bench.

e) In the case of **Donut Queen Ltd. Debtor ; In re BAPAJO Ltd. Debtor order dated August 3, 1984** (Bankruptcy nos. 882-81848-18) has discussed the issue related to co-guarantors. An entity Dunkin Donuts, a creditor of "Donut Queen" had moved for a substantive consolidation of the cases. Donut Queen (a debtor) had filed a voluntary petition for reorganisation. Subsequent to the filing of their respective petition, both companies ceased business operations. The said two companies have filed separate plans for reorganization and disclosure statements. Although Dunkin Donut initially was a creditor of only Donut Queen, however, filed proof of claim against both entities i.e. Donut Queen and BAPAJO, *inter-alia* moved a motion to consolidate a judicial determination that its claim against Donut Queen itself affords the right to recover against BAPAJO assets as well. Dunkin Donuts (creditor) alleged that the affairs of the said two separate legal entities of the debtor so entangled that consolidation is necessary to protect the rights of creditors. **Factors warrant consolidation were argued and summarised as under:**

1. *A unity of ownership and interest exists between these debtors as Gloria Morrison is the sole stockholder and president of both companies.*
2. *Donut Queen and Bapajo were co-guarantors of a loan made by LIT to Westbury Donuts, a third corporation which shares are solely held by Gloria Morrison.*
3. *The debtors failed on occasion to observe the formalities of corporate separateness. For example, no corporate resolutions were recorded by Bapajo regarding its guarantor relationship with donut Queen .*

Opposing the motion for consolidation, it was asserted that those entities were consistently treated as two separate entities and that the financial affairs have indicated the fact of separate financial data. It had also been contended that consolidation would not be equitable to all creditors. According to an observation in the judgement, quote "*Recent cases have succinctly stated the proposition that a determination of whether*

or not consolidation is necessary hinges on a balancing of the equities favouring consolidation against the equities favouring continued debtor separateness" unquote. Further, quote "*As can thus be expected, the parties seeking consolidation bears the burden of proof to demonstrate that any prejudice resulting from consolidation is outweighed by the greater prejudice posed by the continued separation of the estates……. A necessary corollary of this proposition is that it is incumbent upon the party seeking consolidation to demonstrate that it would be prejudiced if the estates were to remain as separate."* In this line of thought, many factors have been considered in determining a motion for consolidation. Discussing the facts, it was noticed that "Donut Queen" and Bapajo does not maintain consolidated financial accounts. An accountant had testified that he prepared separate financial statements for each company, including separate books of accounts. It has also been testified that neither of the said two entities have ever paid expenses incurred by the other. Quote "*Dunkin Donuts* (the creditor) *has not demonstrated the existence of a commingling of assets and business functions by the debtors in their business operations. As noted above, Donut Queen and Bapajo were established with different corporate purposes. The evidence adduced before this court indicates that the two debtors have held separate assets, and that they have incurred separate liabilities with essentially different groups of creditors"* unquote.

Even the guarantees were not of such character as to mandate consolidation. Most significantly, the creditor had failed to adduce any evidence that it treated the debtors as a unified entity. Finally, it was held as under:

Quote "*To reiterate, a party seeking the consolidation of two distinct debtors must carry the burden of demonstrating that the equities favouring such an order must outweigh those militating towards debtor separateness. Dunkin' Donuts has not met this burden. It has failed to adduce substantial evidence of an interrelationship between the debtors. Moreover, under the facts of this case, this court finds that Dunkin' Donuts took no steps to ascertain the financial creditworthiness of Donut Queen and did not in its course of dealing treat Dnut Queen and Bapajo as one entity. It would be manifestly inequitable to grant to Dunkin' Donuts the right to assert its claim against Bapajo, when, on review of the record, Dunkin' Donuts had no reasonable expectation of recovering from it sums owed by Donut Queen.*

Accordingly, the motion for consolidation is denied" Unquote.

80. Henceforward ***Summum bonum ,*** is that the UK / USA courts have dealt with the process of consolidation along with the jurisdiction of the Authority by pronouncing that equity and fairness ought to be a yardstick by lifting the corporate veil. Consolidation is to be utilized as a mechanism to maximise the value of financially stressed group of companies. Economic benefit ought to be the sole

purpose and for that a preliminary searching enquiry is suggested which would yield benefit to stakeholders by off-setting any harm, if inflicted, if not consolidated. On due reading of all these judgements, one proposition of law emerges that the motion of 'consolidation' depends upon the facts and circumstances of each debtor/debtors. **It is appropriate and suitable to give a ruling at this occasion that there is no single yardstick or measurement on the basis of which a motion of consolidation can or cannot be approved.** With humility, this Bench herein below sets-out a list of examples, based upon reading the history of 'group insolvency', so that the presence of them can lead to a decisive conclusion of triggering of 'consolidation' of Insolvency process. Undisputedly, and also laid down by the courts, before ordering consolidation, a preliminary searching inquiry be ensured that whether consolidation yields benefits to stakeholders by offsetting the harm if not consolidated. Areas of inquisition and our finding on the facts of this case are :-

i) **Common Control** : These companies are promoted by Dhoot Family.

ii) **Common directors** : The family members of V.N. Dhoot are directors in all the Videocon group companies.

iii) **Common assets** : There are many instances of interdependency between the group companies and the assets are common to such an extent that, for instance, one company has leased its land to another group company to carry on manufacturing.

iv) **Common liabilities :** The clauses of the VTL and RTL Agreements have demonstrated that "***all guarantees*** *thereof executed by one or more of the other Corporate Debtors are deemed* ***to be one obligations of all the Corporate Debtors.*** *"The company along with 12 other affiliates/entities (collectively referred to as "Obligors" and individually referred to as "Borrower") executed facility agreement with consortium of existing domestic rupee term lenders, in the obligor/co-obligor structure, wherein all the Rupee Term Loans of the obligors are pooled together...."* .

v) **Inter-dependence** : Some corporate debtors are engaged in manufacturing, assembling and distribution of comprehensive range of consumer electronic and home appliances. Also manufacturing set top boxes, Colour Televisions, DVD Players Etc. by some Units/subsidiaries in Aurangabad. This is stated to be India's Largest Electronics Retail chain. The uniqueness stated to be that all are marketed under single license of "Videocon Trademark".

vi) **Inter-lacing of finance :** Pursuant to the RTL Agreement, a consortium of banks and financial institutions including SBI had agreed to grant 'Rupee Terms Loans' to the RTL obligors under an obligor/co-obligor structure. The Rupee Term Loans under the RTL Agreement were to be utilised for the purposes of refinancing of existing rupee debt of the RTL obligors, funding the capital expenditure in relation to the 'Ravva Field' and the capital expenditure in relation to the consumer electronics and home appliances

business of the RTL obligors and such other end users as permitted by the facility agent under the RTL Agreement. Recital C of the RTL Agreement states that:

" *The Rupee Term loan has been sanctioned by the lenders* ***for the purposes of refinancing of existing Rupee debt of the obligors, funding the capital expenditure in relation to the consumer electronics and home appliances business of the obligors*** *and such other end uses permitted by the Facility Agent". (Emphasis Supplied).*

vii) **Pooling of resources** : Facts and evidences have demonstrated that there was common pooling of human resources, liaising and funding. Undisputedly, the directors are common using their contacts and relationship to run all the subsidiaries for which common office staff, accountants, and other human resources are mobilised to manage the affairs collectively. Further, common arrangement of capital/funds is an accepted position in Videocon group.

viii) **Co-existence for survival** : An interlinked chain of business operations is also evident in this group case. Electronic gadgets/home appliances are manufactured by a unit. However, distribution and market chain is controlled by another entity. Interdependence upon each other is a unique feature visible in Videocon group.

ix) **Intricate link of subsidiaries** : Consolidated accounts, pooling of resources, commingling of assets and business functions are the examples of intricate link among subsidiaries.

x) **Inter-twined accounts** : The consolidated accounts of 15 months is one of the evidence to demonstrate that on demand by the lenders, all the subsidiaries have prepared a common position of their assets and liabilities, thereafter, prepared consolidated accounts, stated to be duly approved by an auditor.

xi) **Inter-looping of debts :** On perusal of the agreements, it is evidenced that the clauses have made a provision of securing the debts owed by subsidiaries of Videocon group. For example, Clause 2.4 of the RTL Agreement states about the Utilisation of the proceeds i.e. :

> *"(i) the obligors hereby agree that the proceeds of the Rupee Term Loan shall be utilized for the following purposes:*
>
> *(a) Capital expenditure in relation to the Ravva Field and the capital expenditure in relation to the consumer electronics and home appliances business of the obligors, for an amount not exceeding Rs.684 Crores incurred or to be incurred by the Obligors between the current year 2012 and till 2014;*
>
> *(b) Refinancing of existing Rupee Loans listed in part A of schedule 9 for an amount not exceeding Rs.19,511 Crores; and*
>
> *(c) Such other end use as may be permitted by the lenders in writing. "*

xii) **Singleness of economics of units** : The group is known by its brand name "Videocon". Therefore, the entire economics of the group revolve around this brand name either for the purposes of procuring raw material or finally selling the appliances manufactured. The group as a whole is therefore, has a common economic feature to sustain and promote the business operations.

xiii) **Common Financial Creditors** : As per two Agreements viz. RTL & VTL the lenders are members of 'consortium of banks' which is common for all. Because the impugned Insolvency Petitions were filed by SBI for itself and also on behalf of the said Joint Lenders Forum, already listed above, the names of all the banks forming consortium thus substantiate the fact that the financial creditors are common for the 15 debtor entities.

xiv) **Common group of Corporate Debtors :** As per the said two agreements the Debtors are combined together for the purpose of availing various loan facility. Therefore, this is a case where all the Debtors are independently as well as jointly liable for the repayment of loans facilities availed.

81. One of the argument favouring consolidation in this case is based upon the fact that on calling the 'expression of interest' there was no positive response. In such a scenario where no resolution applicants are interested, the companies will go into automatic liquidation. The argument was that the assets of each companies are validly charged to secure the loans, and the secured creditors will be protected even if the companies go into liquidation, however, the liquidation route may affect the rights of the other stakeholders. Thus, the consolidation route is going to be more beneficial to all the stakeholders , comparing the liquidation route. At this juncture it is worth to devote few more lines that group companies have been created within the parameters of law as a **' special purpose vehicle'** hardly holding independent valuable assets but burdened with liability, Which may cause disadvantage if segregated. But after consolidation all the liabilities pooled together can be satisfied up to large extent against the value of common pooled assets, which are otherwise in control of a single entity . In this group Licenses , Good-will, Permits, Trade-marks etc. are valuable but scattered all over the group entities. One more valuable asset is ' Oil & Gas field' acquired through joint venture and duly taken as a valuable property by the banks while granting loan. So all are to be consolidate which shall create a high value cumulative asset, going attract an equally high value Resolution Plan. Singly it is a far sight. Therefore apart from all other reasons inter-alia, the existence of Reeva oil-field in the common pool of assets is a good reason for propounding ' Consolidation'.

82. **Decisively,** the above discussion has deciphered cases of this group into two categories. Rather it is absolutely necessary to place my view with humility that if at all a question of ' Group Insolvency' is to be answered in such type of group of cases, then in that situation, a blanket view is not possible to declare that the entire Group is fit to be CONSOLIDATED simply being connected or controlled by common management. Although, these two factors are necessary for determination of 'consolidation', but not the only basis. Over and above, each unit or subsidiary is to be examined on its merits, that whether all the parameters are being satisfied or not. These parameters in fact are the 'factors' to distinguish the units in two categories, precisely as under :-

a. A category/ classification of those cases can be made where the business operations are so dove-tailed that their management, deployment of staff, production of goods, distribution system, arrangement of funds, loan facilities etc. are so intricately interlinked that segregation may result in an unviable solution. Over and above, most important is that if segregated, the possibility of restructuring or the option of maximisation of value of assets become so bleak which shall overweigh the consolidation.

b. The other category/ classification can be of such group cases where the accounts are interlinked and due to the existence of debt agreement, the liabilities have become common but assets are identifiable. Hence, on segregation the independent structure of each unit shall survive which shall also result into viable profitable restructuring proposals. Therefore, in this category of cases, although for the limited purpose of signing of certain documents through which loan facilities might have been commonly availed but that can be segregated so that the assets and liabilities are identifiable separately thus facilitating a good investor.

83. While discussing bankruptcy law in US, we have noticed that under certain circumstances, consolidation request can be denied. A view was expressed that determination for consolidation hinges on a balancing of the equities favouring consolidation against the equities favouring continued debtor separateness. If the consolidation is not equitable or more disadvantageous to stakeholders, the request for consolidation denied. Therefore, the burden is on the party objecting consolidation to demonstrate that prejudice be posed if consolidation be granted. Although in all 15 cases, the accounts are inter-mingled and due to the existence of agreements, there is a relationship of obligor and/or co-obligors among all these entities. But it is necessary to further ascertain the position of advantage or disadvantage qua the stakeholders. In other words, if an entity is self-serving, self-dependent and self-sustainable, a view can be taken for not granting consolidation. This Bench has therefore, gone further in detail to examine the financial position of each such entities, albeit having inter-

connected accounts. However, noticed that for the purposes of carrying on the business they are not inter-dependent. The cases for which this Bench is of the view that **consolidation is neither beneficial nor advisable are listed below** after due diligence remarks :

a. **KAIL Ltd.** : An application u/s 9 against the Corporate Debtor KAIL Ltd. was submitted by an Operational Creditor Cooltech Appliances, which was admitted vide an order of 08.06.2018. KAIL is engaged in the business of manufacturing and trading various consumer electronic goods and home appliances, such as washing machines, air conditioners, air coolers, television and other electric appliances. Manufacturing facilities are stated to be located in West Bengal. This entity has annual turnover of more than Rs. 400 Crore and had been allegedly dragged into the common debts, thus facing insolvency proceedings. This company has nearly 350 workers in a factory which is undisputedly owned by the Company. In one of the applications submitted by Workers Union (MA 774 of 2019), certain facts have narrated to demonstrate the independent functioning of the Company and capability to operate on its own. The consolidation of the accounts, in a way, demonstrating unfair and unjust treatment to the stakeholders other than the financial creditors. The monetary interest of the employees and the workers is to maintain segregation of this company from the group. As this company is self sufficient, its products are in demand all over the country and its business is also not dependent on the other 14 group companies, this company is capable of maintaining itself as a going concern on its own. Also, keeping in view the interests of the employees and workers of this company, it is seen that this company would be in a better position to pay the dues if kept out of consolidation. It is seen that Infotel (a financial creditor of KAIL Ltd.) has also sought for keeping this company out of consolidation, due to the reason that its own share as a financial creditor would be reduced if the consolidation is allowed. I hereby clarify that this company is kept out of consolidation due to the reason that it can function independently and not because the share of financial creditor would be reduced. Hence, **MA 393/2019 of Infotel** is hereby **rejected** being a self-serving demand not in line with the provisions of the Code. But the **CIRP proceedings of KAIL Ltd. shall run independently, by denying 'Consolidation'.**

b. **Trend Electronics Ltd.:** This company is in the business of manufacturing and selling the dish antenna and Set-Top box which are mandatory pursuant to the compulsory digitalization by Ministry of Information and Broadcasting. Set-Top Boxes being in great demand in the country, this company is able to

do business despite being referred to CIRP and is independently capable of maintaining itself as a going concern. Its business is not dependent on the other 14 companies. If this company shares a common CIRP with other companies, there would be a common resolution plan and this company, which has a good asset value would be treated at par with the other companies, which may be detrimental to this company's resolution plan, as and when received. I, therefore hold that **CIRP proceedings of M/s Trend Electronics shall run independently and 'Consolidation' is denied.**

84. As far as **MA No. 1574 of 2018** filed by ATC Telecom Infrastructure Pvt. Ltd. is concerned, Videocon Telecommunications Ltd. (VTL) cannot be allowed to stand outside the CIRP. This application is filed by an operational creditor with a sole concern that the share of the operational creditor would be reduced if the CIRP of VTL is consolidated with that of other companies. It is hereby held that this is not a reason enough to keep this company out of consolidation keeping in view the financial position of this company. The judgement of the Apex Court, tendered by the Ld. Counsel in this application, i.e. 63 Moons Technologies (*supra*) has no relevance in the insolvency arena as the same was in respect of mergers under the Companies Act. As against that, presently having a completely different issue in hand. What is adjudicated here is the consolidation of CIRPs of the Corporate Debtors and not the consolidation / merger of all the group companies. Hence, **MA 1574 of 2018 is hereby rejected.**

85. The consequence of the above decision is that out of the 15 entities, CIRPs of 13 entities namely:

1. Videocon Industries Limited
2. Videocon Telecommunications Limited
3. Evans Fraser & Co. (India) Ltd.
4. Millennium Appliances (India) Ltd.
5. Applicomp India Ltd.
6. Electroworld Digital Solutions Ltd.
7. Techno Kart India Ltd.
8. Century appliances Ltd.
9. Techno Electronics Ltd.
10. Value Industries Ltd.
11. PE Electronics Ltd.
12. CE India Ltd.
13. Sky Appliances Ltd.

are directed to be 'Consolidated'.

86. **<u>Appointment of IRPs :</u>**

(i) In these consolidated cases, while admitting the petition, name of **Mr. Mahendra Khandelwal, having registration No. IBBI/IPA-002/IP-N00446/2017-2018/11275 is largely been approved.** He is directed to take over the process of insolvency henceforth and complete expeditiously. Fortnightly reports of progress is expected to be furnished by the said appointed RP before this Bench.

(ii) As far as the CIRP of **M/s KAIL Ltd**. is concerned, what we have noticed that in some cases while admitting the respective petitions a name was approved of **Mr. Avil Menezes having registration No. IBBI/IPA-001/IP-P00017/2016-2017/10041**. Therefore he is appointed as IRP. His consent is already on record in those cases . Mr. Avil Menezes IRP , he is directed to act upon without wasting a single day and report the progress fortnightly.

(iii) In respect of the appointment of IRP in the case of **M/s Trend Electronics** Ltd., while admitting the petitions of the group a name of IRP **Mr. Divyesh Desai having registration No. IBBI/IPA-001/IP-P00169/2017-2018/10338** has appeared and approved in few cases. Therefore, he is appointed for this Petition as IRP and directed to act upon immediately and report the progress fortnightly.

87. The appointed IRP is hereby directed that in case of the 13 Corporate Debtors, listed above, consolidation is now approved, therefore, on the basis of the consolidated Balance Sheet of the group drawn as on 31.03.2017, directed to be updated as on 31.03.2018 and thereupon Information Memorandum is to be prepared at an early date, so that urgently Expression of Interest can be invited.

88. In cases of M/s KAIL Ltd and M/s Trend electronics Ltd., these two Corporate Debtors have been kept out of consolidation, therefore, their respective independent Balance Sheet should be made the basis for preparation of Information Memorandum as on 31.03.2018. As far as the question of liabilities of the consortium of banks is concerned , those are to be ascertained independently and for that a simple calculation method i.e. proportionate to the value of assets of these two Corporate Debtors, be computed for preparation of Information memorandum. The RP being a professional and expert of preparation of Statement of Accounts, hence, hereby given a liberty to adopt any other method through which the nexus between the liabilities of the Financial Creditors be established with the assets of the debtor company so that the asset-liabilities evaluation be precisely computed. It is expected that after ascertainment of true and correct picture of assets and liabilities of these two Corporate Debtors and on advertisement of EoI, some legitimate and serious Resolution Applicants may appear with a Resolution plan.

89. **Commencement of CIRP period :** The directions as listed above are to be carried out as well as to be completed within the period of 180 days as prescribed under Sec. 12 of the statute. However, from the date of admission of several

applications/petitions filed by Financial Creditors, the period cannot be calculated on account of the fact that an order was pronounced on 05.10.2018 (MA 1092/2018 in CP 02/IBC/NCLT/MB/2018) wherein the insolvency process had been directed to be deferred temporarily as per below:

> *"In the light of the afore discussed matrix of law and facts, I am of the conscientious view that the Ld. IRP be hereby directed to defer temporarily the CIRP proceedings and wait for the directions of the Hon'ble Principle Bench, expected to be pronounced within 10 days' time, informed by the Ld. Counsel. Since the above-mentioned advertisement has fixed cut-off date today i.e. 5th October, 2018, hence, directed to receive the Resolution Plan, if any, but not to be processed further till the outcome of the awaited order. To be more safe, IRP is directed to revert back and inform this Bench immediately without a delay of single day on receiving such an information. The Applicant is duty bound to contact the Ld. IRP immediately on receiving the directions of the Hon'ble Principle Bench."*

90. On account of the complexity of the issue of consolidation, further in past few months several petitions, one after another, have been filed by the creditors either demanding the consolidation or in some cases objecting the consolidation. Long arguments took place which ended in the month of June 2019. During the pendency of those applications, as an interregnum arrangement, this Court has thought it appropriate not to initiate insolvency process and to exclude the period of litigation for the purpose of computation of 180 days. It is, therefore, directed that from the date of admission of respective Petitions upto the date of this order, the period for computation of 180 days be excluded. This decision is taken under exceptional circumstances of these group case. On account of direction of Consolidation Order, a fresh approach for completion of CIRP is required to be adopted by the IRPs, now appointed, namely Mr. Mahender Khandelwal, Mr. Avil Menzes and Mr. Divyesh Desai .Therefore, for the purpose of calculation of 180 days as prescribed U/s 12 of I&B Code the corporate insolvency resolution process should be completed within 180 days form the date of this order. Registry is directed to upload on the site immediately to reach for public domain, which shall construe due knowledge of passing of the order, nonetheless, on demand directed to issue certified copy urgently as per NCLT Rules.

SD/-

Dated : 08.08.2019 **M. K. SHRAWAT**
MEMBER (JUDICIAL)

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