Ambit of 29A of IBC – Decoding ArcelorMittal v Satish Kumar Gupta

- **Contributed by CA Sri Harsha & CS Phanindra**

The recent judgment of the apex court in the case of ArcelorMittal India Private Limited vs Satish Kumar Gupta and Others has revealed the true ambit and intent of Section 29A of Insolvency and Bankruptcy Code, 2016 (IBC). Section 29A has been introduced with effect from 23.11.17 to restrict persons who are not eligible to become resolution applicants.

Before proceeding to decode the apex court judgment, it is important to understand the intention of introduction of Section 29A into statue book. The intention can be understood from the following words of the Honourable Finance and Minister of Corporate Affairs while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which is reproduced as under:

The core and soul of this new Ordinance is really Clause 5, which is Section 29A of the Original Bill. I may just explain that once a company goes into resolution process, then applications would be invited with regard to potential resolution proposals as far the company is concerned or enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Clause 29A introduces those who are not eligible to apply. For instance, there is a clause with regard to an undischarged insolvent who is not eligible to apply, a person who has been disqualified under the Companies Act as a director cannot apply and a person who is prohibited under the SEBI Act cannot apply. So, these are statutory disqualifications. And there is also a disqualification in Clause (C) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not object of this particular Act. So Clause 5 has been brought in with that purpose in mind.

The statement of Objects and Reasons of the aforesaid Bill lays down:

2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.

With the above background, let us proceed now to decode the judgment of apex court. The facts of the case are as under:

1. Essar Steel India Limited (ESIL) is the corporate debtor owing approx. Rs 45,000 Crores to various financial creditors. State Bank of India and Standard Chartered Bank has filed application before National Company Law Tribunal (NCLT) under Section 7 of IBC.
2. Shri Satish Kumar Gupta was appointed as Interim Resolution Professional and consequently approved as Resolution Professional (RP). Consequently, RP has published expression of interest (EOI) seeking resolution applicants for revival of ESIL.

3. Pursuant to advertisement, ArcelorMittal India Private Limited (AMIPL) submitted EOI. Simultaneously, RP has also received another EOI from Numetal Limited (Numetal). Meanwhile, the Committee of Creditors (CoC) has requested NCLT for an extension of 90 days to complete the corporate insolvency resolution process, for which NCLT conceded.

4. Numetal being apprehended that the RP may declare them as ineligible, has filed an application (first application) before NCLT, stating that NCLT shall hold them as eligible resolution applicant. However, RP has held that both AMIPL and Numetal are ineligible to be resolution applicants in light of Section 29A of IBC (the reasons for rejection are discussed at appropriate place in this article).

5. Consequent to such order of RP, both AMIPL and Numetal has appealed before NCLT challenging the order of RP. At the same time, RP has published another advertisement seeking EOIs as he found AMIPL and Numetal to be ineligible. In reply to such advertisement, resolution plans were submitted by AMIPL, Numetal and Vedanta Resources Limited (Vedanta).

6. However, NCLT has passed an order stating that the fresh bids shall not be opened until the first application filed by Numetal is disposed by NCLT. NCLT vide its order has stated that RP has obtained a legal opinion and shared the same with CoC and in light of such opinion has concluded that both the parties AMIPL and Numetal are ineligible and on other hand Numetal has obtained legal opinion wherein it was stated that there was no ineligibility under Section 29A on them and accordingly they were eligible and in light of conflicting opinions, the RP's order confirming that both the applicants were ineligible in terms of Section 29A is not a case of patent illegality or arbitrariness and NCLT at this stage is not expected to substitute its view and conclusion of RP.

7. NCLT has remanded the matter to CoC by stating that RP ought to have placed both the resolution plans to CoC with his comments on eligibility of both resolution applicants for consideration of CoC for the purpose of affording the opportunity to resolution applicants before declaring them ineligible and since such procedure is not followed, only to reconsider on such ground alone.

8. Both AMIPL and Numetal has appealed against the order of NCLT before NCLAT. Meanwhile, the CoC has taken up the matter on directions of NCLT and held that both the parties shall be eligible as resolution applicants only if they make payments of the overdue amounts of the connected persons in terms of Section 29A.

9. NCLAT has heard both the resolution applicants and held on various reasons that Numetal is eligible as resolution applicant in terms of application filed during the extended period by CoC, but not eligible as resolution applicant in terms of first application since as on such date

it suffers from ineligibility under Section 29A. In the same order, NCLAT has held that AMIPL shall also be eligible resolution applicant if they pay the overdue amount of connected persons in terms of Section 29A.

10. Against such orders of NCLAT, both the applicants have appealed before the apex court to decide the ambit of Section 29A and consequently their eligibility or ineligibility.

Question before Apex Court:

The questions before apex court for consideration are - whether the lifting of corporate veil as done by RP along with CoC is permissible for the purpose of Section 29A of IBC? and whether is there any method apart from payment of NPAs to become eligible as a resolution applicant?

Before examining the answers provided by apex court, let us list down the reasons for ineligibility at various stages as pointed out by relevant authorities:

Stage	AMIPL	Numetal
RP	1. In the resolution plan, it was mentioned that Arcelor Mittal Netherlands BV (AM Netherlands) is a connected person to AMIPL. 2. AM Netherlands has been disclosed as 'promoter' of Uttam Galva Steels Limited (UG) by virtue of its 29.05% of shareholding in UG in 2009. 3. UG's account was classified as NPA on 31st March 2016 by Canara Bank and Punjab National Bank (which classification continued for more than 1 year till 2nd Aug 2017) 4. AM Netherlands have sold its share in UG to other promoters of UG on 7th Feb 2018. AM Netherlands consequently applied to SEBI and BSE for declassifying them from the 'Promoter Group' which did not happen as on the date of AMIPL applying as resolution applicant 5. Accordingly, AMIPL has been held as ineligible in terms of Section 29A(c) and his resolution plan is rejected by RP.	1. As on the date of EOI by Numetal, it relied on Essar Communications Limited (ECL), one of its shareholders to comply with the eligibility requirement relating to its 'Tangible Net Worth (TNW)'. 2. As on the plan submission date, Numetal relied on Crinium Bay, its shareholder to comply with TNW. 3. Numetal is a newly incorporated JV between Aurora Enterprises, Crinium Bay, Indo International Limited and Tyazhpromexport. 4. Since Numetal has at all stages relied on its shareholders to comply with eligibility requirements relating to submission of a resolution plan in respect of CD, for the purposes of ensuring compliance with Section 29A, RP has considered each of the shareholders of Numetal as JV partners to be acting jointly for purposes of submission of resolution plan. 5. Whilst considering the eligibility of shareholders of Numetal, since Aurora Enterprises is held completely by Rewant Ruia and RP thought to examine in light of 29A all Rewant Ruia, Crinium Bay, Indo

		International Limited and Tyazhpromexport. 6. RP further in light of Regulation 2(q) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, a person is deemed to be acting in concert with amongst others , which includes father of such person. Therefore, in relation to resolution plan in respect of CD (which contemplates the acquisition of ESIL by Numetal by way of a merger of ESIL with a wholly owned subsidiary of Numetal), Rewant Ruia is deemed to be acting in concert with his father Ravi Ruia. 7. As on the plan submission date, Ravi Ruia (who Rewant Ruia is deemed to be acting in concert) was promoter of ESIL whose account was classified as NPA for more than 1 year and Ravi Ruia has executed a guarantee in favour of SBI and CIRP application filed by SBI has been admitted by NCLT. 8. In light of all the above, Rewant Ruia who is acting jointly with other shareholders of Numetal is ineligible under 29A, since as on the date of submission of plan, Numetal (which is nothing but an incorporated joint venture investment vehicle through which its shareholders are submitting resolution plan) and was not eligible under 29A.
NCLT (while disposing the first application filed by Numetal)	6. The date on which a person stands disqualified would be the date of commencement of CIRP of ESIL and on such date, AMIPL is disqualified in view of the fact that it is connected persons of AM Netherlands and LN Mittal are disqualified as they have an account of corporate debtor under their management or control or of whom they are a promoter classified as NPA	-

	and at least one year has lapsed from date of such classification till the date of commencement of CIRP of CD. 7. The said disqualification starts from the date of commencement of CIRP and only way to remedied in the manner provided in proviso to 29A (c) read with proviso to Section 30(4) and no other manner. The disqualification cannot be relived by merely ceasing to be promoter or by selling shares in the companies whose accounts are NPA such as UG or KSS Petron. 8. On perusal of record it is found that connected person of AMIPL are the promoter of KSS Petron, which has been NPA for more than one year and CIRP has been initiated against the KSS Petron. 9. NCLT also has pursued the minutes of CoC, wherein it was opined by Cyril Amarchand Mangaldas that AM Netherlands exercised positive control over UG and merely divesting the shareholding prior to submission of resolution plan, could not remove the disqualification under 29A(c) unless cured by payment. 10. It is an admitted position that AM Netherlands is an indirect 100% subsidiary of ArcelorMittal Societe Anonyme (AMSA). On the other hand, AMIPL is also an indirect subsidiary of AMSA. Accordingly, AMSA, is a promoter, in management and in control of AMIPL and AM Netherlands is a subsidiary of AMSA in view of which AM Netherlands and AMIPL becomes connected persons and such connected person has a NPA through UG and accordingly AMIPL is ineligible to be a resolution applicant. 11. It is an admitted position that LN Mittal is controlling AMIPL being an indirect subsidiary of AMSA. Accordingly, LN Mittal/AMSA is a promoter in	

	management and in control of AMIPL and LN Mittal is also in management and control of KSS Global BV and KSS Petron, which is a 100% subsidiary of KSS Global BV. Since KSS Petron has an NPA and KSS Petron being connected person to AMIPL, cannot be eligible as resolution applicant.	
CoC (on remand by NCLT)	12. We reiterate that AMIPL is an ineligible resolution applicant under 29A(c), who acting in concert with AM Netherlands (promoter of UG and connected person of AMIPL) and AM Group in attempting to avoid their obligations to make payment under proviso to 29A(c) with reference to UG and KSS Petron. Their unwillingness to make payment in UG or KSS Petron is an avoidance device. 13. In case of UG, AM Netherlands arranged for sale of its shareholding for a nominal value prior to resolution plan is evidence of the fact that AMIPL is in concert with AM Netherlands and such action is manifestation of passage of 29A. As promoter of UG and as member of AM Group, they should have made payments of overdue amounts to its lenders of UG. 14. The same conduct of AM Group acting through Fraselli and KSS Global in terminating in SHA in KSS Global, the holding company of KSS Petron, a device to avoid payment of overdue amounts to lenders of KSS Petron. 15. Hence CoC has opined that payment of such overdue amounts pertaining to UG and KSS Petron shall make AMIPL eligible for filing resolution application and accordingly given extra time to comply such payment and re apply.	9. Numetal and AEL are related as an associate company, on account of the fact that AEL (alias Rewant Ruia) has significant influence over Numetal pursuant to its control of at least 20% of total voting power of Numetal. Since an associate company is considered as a related party to a resolution applicant where such resolution applicant and other persons are acting jointly or in concert, Numetal is clearly said to be acting jointly and in concert with AEL. This in turn means Numetal is acting in concert with Rewant Ruia and hence Ravi Ruia, the promoter and guarantor of ESIL. This inflicts a disability and ineligibility upon Numetal/its consortium and constituent shareholders. 10. Thereby CoC has held that Numetal shall be eligible to be a resolution applicant only if it clears the dues of connected persons which have NPAs and extended certain time for such payment.
NCLAT	16. The question for consideration is whether the action of transferring shares in UG and KSS Petron will make AMIPL eligible to be resolution applicant. NCLAT stated that the only way to become eligible is to clear all the overdues and not just by transferring the shares to another company to	11. As on the date of submission of 1st Resolution Plan was submitted by Numetal, it had four shareholders – crinium bay (40%), Indo (25.1%), TPE (9.9%) and AEL (25%). 12. Admittedly, Rewant Ruia is 100% shareholder of AEL and AEL has

	escape the provisions of 29A(c). Once the stigma of 'classification of account as NPA' has been labelled on the promoter, the only way to cure is to by making the overdue good and no other way is prescribed under IBC. 17. AMIPL depositing the overdue amounts of UG and KSS Petron amounting to Rs 7,000 Crores in its own current account will not make eligible as resolution applicant. A conditional offer to pay the overdues amount cannot be accepted till it is complied with proviso to 29A(c). 18. NCLAT has held that AMIPL is also eligible for the benefit of 2nd proviso to Section 30(4) and accordingly asked AMIPL to make payment of overdue amounts to make them eligible as resolution applicant.	25% shareholding in Numetal. Rewant being son of Ravi, who is the promoter of CD, NCLAT has held that AEL is related party and comes within the meaning of 'person in concert' in terms of Regulation 2(1)(q). In view of the above, NCLAT has held that at the time of submission of 1st resolution plan, AEL being one of the shareholders of Numetal, the resolution plan stands ineligible. 13. At the time of filing of 2nd resolution plan, the shareholding of Numetal has undergone change and consists of 3 shareholders - crinium bay (40%), Indo (34.1%), TPE (25.9%). NCLAT has held that as on the date of filing 2nd resolution plan, AEL is not shareholder of Numetal and accordingly Numetal is eligible to submit a resolution plan.
Arguments before Apex Court	**For AMIPL:** 19. AMIPL has argued that Section 29A disqualifies a person who has an account of a corporate debtor under the management or control of such person, or of whom such person is a promoter, which account was declared as NPA. The further condition is that one year should have elapsed from the date of such declaration till the date of commencement of CIRP of corporate debtor. 20. Hence, the ineligibility under 29A is in relation to submission of resolution plan and not the date of filing EOIs. The amendment in Section 29A in June 18 making clear that the date shall be the date of submission of resolution application is only clarificatory in nature and hence it has to be taken as retrospective effect. 21. AMIPL argued that since the sale of shares by AM Netherlands in UG was made in 2009, AM Netherlands ceased to be a promoter in UG prior to	**For Numetal:** 14. Numetal has argued that Numetal was a company and therefore separate person in law from its shareholders. Numetal stated on date of submission of 1st resolution plan, AEL held only 25%, which would be below the figure of 26% mentioned in the request for proposal wherein 'control' has been defined more than 26%. 15. In any case, when the 2nd resolution plan was submitted, there was no shareholding in Numetal by AEL and other companies were the shareholders. 16. Numetal has argued that it cannot be described as joint venture of shareholders since joint venture is a contractual agreement whereby two or more parties undertake economic activity which is subject to joint control, which is missing in the Numetal's case as shareholder in the company is distinct from the

	submission of resolution plan and hence resolution plan is not hit by 29A(c). 22. As far as KSS Petron is concerned, AMIPL argued that, Fraseli Investments Sarl is a company owned by Mittal Investments Sarl which in turn is owned and controlled by LN Mittal Group, promoter of AMIPL. Fraseli holds 32.22% in KSS Global, which in turn held 100% in KSS Petron. 23. The SHA between Fraseli and KSS Global permitted Fraseli to appoint 2 out of 6 nominee directors in KSS Global and provide for an affirmative vote in certain aspects of KSS Global. AMIPL argued that if the definition of 'control' vide Section 2(27) of Companies Act, 2013 is considered, the relationship with KSS Global with KSS Petron would not constitute 'control' over the wholly owned subsidiary in India. In any case, the entire shareholding of Fraseli in KSS Global is sold off to promoters of KSS Global 3 days prior to resolution plan and accordingly AMIPL is not required to pay off the debts of UG or KSS Petron to become eligible. **<u>Against Numetal:</u>** 24. AMIPL argued that Numetal was incorporated before submission of resolution plan by Mr Rewant Ruia son of Mr Ravi Ruia (promoter of ESIL), with the specific objective of trying to acquire ESIL. 25. At the time of incorporation, the entire shareholding of Numetal is held by AEL, whereas AEL's entire shareholding is held by Aurora Holding Limited (AHL). AHL's entire shareholding was held by Mr Rewant Ruia, former director of ESIL. 26. Few weeks before 29A was introduced, AEL transferred 26.1% shares in Numetal to one Essar Communications Limited (ECL), a group company of corporate debtor. Mr Rewant Ruia settled an irrevocable discretionary trust, called 'Crescent Trust', which	company itself. 17. Numetal stated that as per 29A(c), a person together with any other person acting jointly or in concert, has to have an account of corporate debtor under its management or control, or of whom such person is a promoter which is classified as NPA. 18. Numetal argued that Mr Rewant Ruia would not fall under any of categories as mentioned in 29A since he does not satisfy definitions of 'control', 'promoter', 'manager' and managing director' as laid down in Companies Act, 2013. 19. Numetal has argued that even though Rewant Ruia is son of Ravi Ruia, who is a promoter of ESIL and though he may be deemed to 'a person acting in concert' as per Section 2(1)(q) of SAST Regulations, yet he cannot be considered as 'connected person' as per 29A(j), which expression includes 'promoter' or 'management' or 'control', which Rewant Ruia fails to satisfy and accordingly not a 'connected person' in terms of 29A(j). 20. Numetal also stated that the earnest money was not withdrawn by AEL because the matter was sub judice and not for any other interest in Numetal by AEL. **<u>Against AMIPL:</u>** 21. Numetal submitted that even on literal reading of 29A(c) would make it clear that in the case of UG, AM Netherlands, which is admittedly a LN Mittal Group company, was directly covered under 29A(c), as it has shown as 'Promoter'.

	purchased the shares of AHL at par value. 27. Accordingly, when Numetal submitted its EOI, it had two shareholders – AEL (73.9%) and ECL (26.1%). At the time of announcement that code will be amended, AEL transferred 13.9% and ECL 26.9% shareholding in Numetal to Crinium Bay Holdings Limited (Crinium Bay), a 100% indirect subsidiary of VTB Bank, the majority of such shares of VTB bank are held by Russian Government. 28. Subsequent to this, AEL transferred 25.1% of shareholding in Numetal to 'Indo International Trading FZCO' (Indo), a Dubai company, and 9.9% shareholding to JSC VO Tyazhpromexport (TPE), a Russian company. 29. AEL was left only with 25% of shareholding in Numetal and consequently divested to Crinium Bay, TPE and Indo to make AEL's holding 'Nil'. 30. AMIPL argued that an important fact was that an amount of Rs 500 Crores was given by AEL to Numetal so that it could deposit the requisite earnest money that had to be made with resolution plan furnished by Numetal. This amount, that was admittedly furnished by AEL, continues to remain with RP and has till date not withdrawn by AEL, showing that Rewant Ruia continues to be vitally interested and linked with resolution plan of Numetal, even after complete exit of AEL from Numetal. Hence, Numetal is ineligible, whereas the NCLAT has held them to be eligible.	22. Numetal stated that getting out of UG by paying a price of Rs 1 per share when the market value as on dated was Rs 19.5 per share is a fraudulent transaction only to pass muster under 29A. 23. Further, insofar as KSS Petron is concerned, it is clear that Fraseli 's holding of 32.22% in KSS Global would certainly amount to 'de facto' control, if not 'de jure' control, of KSS Petron, its wholly owned subsidiary, as defined under Section 2(27) of Companies Act, 13. The transfer of Fraseli 's before submission of resolution plan is again dubious and fraudulent act squarely hit by 29A. 24. Numetal has argued that Shri Pramod Mittal, brother of Shri LN Mittal, is a connected person, which would trigger 29A(j).

Observations of Apex Court:

1. The apex court on combined reading of 29A at various stages namely at Insolvency & Bankruptcy Code (Amendment) Ordinance, 2017, Insolvency & Bankruptcy Code (Amendment) Act, 2017, Insolvency & Bankruptcy Code (Second Amendment) Act, 2018 (snapshot of relevant provisions is laid beneath the para), Honourable Finance Minister's speech and Statement of Objects and Reasons of the Bill has stated that a purposive reading

of Section 29A depending upon the text and context, in which it was enacted, shall guide the interpretation of 29A and the clauses which requires attention are (c), (f), (i) and (j).

IBC (Amendment) Ordinance, 17	IBC (Amendment) Act, 17	IBC (Second Amendment) Act, 18
A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly with such person, or any person who is promoter or in management or control of such person – *(c) whose account is classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and period of one year or more has lapsed from the date of such classification and who has failed to make payments of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of resolution plan*	*A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly* ***or in concert with such person*** *-* ~~*with such person, or any person who is promoter or in management or control of such person –*~~ *(c)* ~~*whose*~~ ***has an account, or account of corporate debtor under the management or control of such person or of whom such person is a promoter,*** ~~*is*~~ *classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and* ***at least*** *period of one year* ~~*or more*~~ *has lapsed from the date of such classification* ~~*and who has failed to make payments of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of resolution plan*~~ ***till the date of commencement of corporate insolvency resolution process of the corporate debtor***	*A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person-* *(c)* ***at the time of submission of resolution plan*** *has an account, or account of corporate debtor under the management or control of such person or of whom such person is a promoter,* ~~*is*~~ *classified as non-performing asset in accordance with guidelines of Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least period of one year has lapsed from the date of such classification till the date of commencement of corporate insolvency resolution process of the corporate debtor*

2. The apex court on observation that the 'person acting in concert' which appear in opening line of IBC (Amendment) Act, 17 are absent in IBC (Amendment) Ordinance, 17, which signifies that the amendment act is of wider import than the amendment ordinance, evidencing an intention to rope in all persons who may be acting in concert with the person submitting a resolution plan.

3. The apex court also stated that the opening lines of 29A of the Amendment Act refer to de facto (existing or holding a specified position in fact but not necessarily by legal right) as

opposed to de jure (existing or holding a specified position by legal right) positions of persons mentioned therein. The apex court stated that this is a typical instance of a 'see through provision', so that one is able to arrive at persons who are actually in 'control', whether jointly or in concert with other persons. A literal interpretation would obviously not permit a tearing of the corporate veil when it comes to 'person' whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such provision as Section 29A, alone governs.

4. The apex court stated that it is well settled that a shareholder is a separate legal entity from the company in which he holds shares which is generally true. But when it comes to a corporate vehicle that is set up for purpose of submission of resolution plan, ***it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such case, the principle laid down in Salomon v. A Salomon and Co Ltd [1897] AC 22 will not apply.*** This is for the reason that it assumes importance in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for purpose of submission of resolution plan.

5. The apex court after making reference to Salomon, relied on Life Insurance Corporation of India v. Escorts Limited & Others [1986] 1 SCC 264 wherein it was stated vide Para 90 that 'Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. The apex court also relied on verdicts in case of Union of India v. ABN Amro Bank and Others [2013] 16 SCC 490 and Balwant Rai Saluja & Anr etc v. Air India Ltd & Ors [2014] 9 SCC 407 which relied on Life Insurance Corporation of India v. Escorts Limited & Others [1986] 1 SCC 264. Finally placing reliance on Delhi Development Authority v. Skipper Construction Company (P) Ltd & Another [1996] 4 SCC 622 the court held vide Para 24 as 'where the protection of public interest is of paramount importance or where the company has been formed to evade obligations imposed by the law, the court will disregard the veil'.

6. The apex court by placing reliance on the above judgments and leading commentaries has concluded that, where a statute itself lifts the corporate veil or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, ***the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole'.***

7. Then the apex court proceeded to examine the phrase 'persons acting in concert' as defined at various times in SAST Regulations and finally concluded that the language in such regulations is widely used, that any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company, is included. The apex court observing the sub-clause (2) of (q) of SAST Regulations stated that a deeming fiction is enacted, by which a presumption is raised in the categories mentioned, that a person falling within one category is deemed to be acting in concert with another person mentioned in the same category, unless the contrary is established. The corporate veil is not merely torn but left in tatters by sub-clauses (i) to (iv) of Regulation 2(1)(q)(2) of SAST Regulations.

8. The sub-clause (v) of Regulation 2(1)(q)(2) deals with father and son, brothers, etc and also referred to the definition of 'associate' in the explanation to Regulation 2(1)(q)(2), which subsumes not merely immediate relatives but other forms in which a person can be associated with another – which includes the form of trust, partnership firm and HUF. ***The apex court has stated that what is of great importance is that wherever persons act jointly or in concert with the 'person' who submits a resolution plan, all such persons are covered by Section 29A.***

9. The presumption created by the provision [Regulation 2(1)(q)(2)], the apex court has held that the deeming provision is left open to rebuttal as indicated by the words 'unless the contrary is established'. Finally, the apex court held that when a person is or is not acting in concert would depend upon the facts of each case by placing reliance on Daiichi Sankyo Company Limited v. Jayaram Chigurupati & Others [2010] 7 SCC 449.

10. Examining the date from which 29A(c) is applicable, the apex court stated that Numetal has argued that date shall be the date of commencement of corporate insolvency resolution process and as per AMIPL is the date on which submission of resolution plan was and not at any anterior stage. The apex court has brushed away the argument of Numetal by making reference to the provision of 29A(c) which used the phrase 'a person shall not be eligible to submit a resolution plan…' and concluded that the ineligibility attaches on the date of submission of resolution plan and not on the date of commencement of corporate insolvency resolution process. The apex court has also made an observation that 29A (c) uses the expression 'has', whereas (d) and (g) uses the expression 'has been' by concluding that (c) is dealing at present and whereas (d) and (g) are dealing with anterior point.

11. Hence, the apex court held that the ineligibility to submit a resolution plan attaches if any person, as is referred to in opening lines of 29A, either itself has an account, or is a promoter of, or in the management or in control of, a corporate debtor which has an account, which account has been classified as non-performing asset, for a period at least one year from the date of such classification till the date of commencement of the corporate insolvency resolution process. For the purpose of applying this sub-section, any one of the three things, which are disjunctive, needs to be established:
    a. The corporate debtor may be under the management of person referred in 29A
    b. The corporate debtor may be a person under the control of such person or
    c. The corporate debtor may be a person of whom such person is a promoter

12. The expression 'management' would refer to the de jure management of corporate debtor. The de jure management of a corporate debtor would ordinarily vest in Board of Directors, and would include, in accord with definitions of 'manger', 'managing director' and 'officer' as defined in Companies Act, 2013. The apex court has analysed the definition of 'control' as per Section 2(27) of Companies Act, wherein it stated that the said definition has two parts. The first part deals with de jure control and second part deals with de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be 'in control'. ***Thus expression 'control' in 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. 'Control' here,***

as contrasted with the management, means de facto control of actual management or policy decisions that can be or are in fact taken.

13. Section 29A(c) speaks of a corporate debtor '*under the management or control of such* person'. The expression 'under' would seem to suggest positive or proactive control, as opposed to mere negative or reactive control. This becomes even clearer when sub-clause (g) of 29A is read, wherein the expression used is 'in the management or control of a corporate debtor'. Under sub-clause (g), only a person who is in positive control of a corporate debtor can take the proactive decisions mentioned in sub-clause (g), such as entering into preferential, undervalued or fraudulent transactions. It is thus clear that in the expression 'management or control', the two words take colour from each other, in which case the principle of noscitur a sociis must also be held to apply. Thus viewed, what is referred in sub-clauses (c) and (g) is de jure or de facto proactive or positive control and not mere negative control.

14. Then apex court has made an analysis of the definition of 'promoter' as per 2(69) of Companies Act. The apex court stated that sub-clause (a) of definition of 'promoter' refers to de jure position, whereas sub-clauses (b) and (c) speak of de facto position. Under sub-clause (b), so long as the person has 'control' over the affairs of a company, directly or indirectly, in any manner he could be said to be a promoter of such company.

15. The interpretation of 29A(c) is now has become clear. Any person who wishes to submit a resolution plan, if he or it does so acting jointly, or in concert with other persons, which person or other persons happens to either manage or control or be promoters of corporate debtor, which is classified as NPA and whose debts have been not paid off for a period of at least one year before commencement of CIRP, becomes ineligible to submit a resolution plan.

16. Since Section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plans is made, do not come back in some other form to regain control of the company without first paying off its debts.

17. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to avoid the consequences of proviso. For this purpose, despite the fact that the relevant time of submission of resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred in 29A are, in substance, seeking to avoid the consequences of proviso to sub-clause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of resolution plan, the affairs of the persons referred to in 29A are so arranged, as to avoid paying off the debts of NPA concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both for purposes of sub-clause (c), as well as larger objective sought to be achieved by the said sub-clause in public interest, will be defeated.

18. When we come to sub-clause (j), a 'connected person' is defined as meaning the three categories of person mentioned in the three sub-clauses therein. The first sub-clause of

Explanation 1 again takes us back to the same three definitions of 'promoter', 'management' and 'control' of the resolution applicant. Under sub-clause (ii), again, a 'connected person' is a person who is either the promoter, or in management or control, of business of the corporate debtor during implementation of resolution plan. And under sub-clause (iii), holding companies, subsidiary companies and associate companies as defined under Companies Act, 13 or related persons referred to in clauses (1) and 92) also become connect persons and then proceed to examine the resolution plans submitted by Numetal and AMIPL.

Scrutiny of Resolution Plan of Numetal:

19. The apex court analysed the resolution plan of Numetal. Numetal was incorporated in Mauritius, expressly for purposes of submission of resolution plan qua ESIL. Two other companies AHL and AEL were also incorporated on the same day in Mauritius. Mr Rewant Ruia son of Mr Ravi Ruia held the entire share capital of AHK, which in turn held the entire shareholding of AEL, which in turn held the entire share capital of Numetal. It can be concluded that Mr Rewant Ruia being the son of Mr Ravi Ruia, would be deemed to be a person acting in concert with corporate debtor, being covered by Regulation 2(1)(q)(v) of SAST Regulations.

20. AEL transferred its shareholding of 26.1% in Numetal to ECL, which is ultimately owned by Virgo Trust and Triton Trust. The beneficiaries of which are companies owned by Mr Ravi Ruia, his brother Mr Shashikant Ruia and their immediate family members. Mr Rewant Ruia also settled an irrevocable and discretionary trust called 'Crescent Trust' and settled the entire share capital of AHL into the trust, at a par value of 10,000 USD. The beneficiaries of this trust were general charities, as well as entities owned by Mr Shashikant Ruia and entities owned by Mr Rewant Ruia himself.

21. Mr Rewant Ruia settled 'Prisma Trust' another irrevocable and discretionary trust, whose beneficiaries are 'general charities' and one 'Solis Enterprises Limited', a company incorporated in Bermuda, whose share capital is held by Mr Rewant Ruia. The important observation that apex court made was that Mr Rewant Ruia was the ultimate natural person who held the beneficial interest in AEL through Prisma Trust through Solis Enterprises Limited. Numetal vide its resolution plan filed an affidavit wherein the Trustee of Prisma submitted that the trustee confirms that AEL or Rewant Ruia neither nor will, following the implementation of resolution plan, be a promoter or have control or have any management rights in resolution applicant or ESIL or resultant company upon completion of its merger.

22. The RP after looking at this affidavit has correctly observed that the statement of such nature would not have been made by a truly independent trustee of a discretionary trust, which demonstrates that the trustee was under the complete control of Mr Rewant Ruia, which indicates that Prisma Trust is one of smokescreen in the chain of control, which would conceal the fact that the actual control over AEL is by none other than Mr Rewant Ruia himself.

23. 'Curiouser and Curiouser' was the expression of Alice, in Alice in Wonderland. The apex court referred the entire gamut of companies of Numetal as Wonderland and stated that the trustee of Prisma Trust acquired 100% of shareholding of AAHL for a par value of 10,000 UDS from the trustees of Crescent Trust. On the same day, merely one day before the ordinance

was brought into force, ECL transferred its shareholding of 26.1% of share capital of Numetal to Crinium Bay, an indirect wholly owned subsidiary of VTB Bank, whose shares are held by Russian Government. AEL also transferred 13.9% of shares of Numetal to Crinium Bay, thus making the stake of Crinium Bay 40%. On the same date, AEL also transferred shares representing 25.1% of Numetal to Indo and 9.9% to TPE as on the date of submission of 1st resolution plan. From the above, it is evident that Mr Rewant Ruia, who is the ultimate beneficiary in the chain of control of the trusts which in turn controlled AEL, was very much on the scene, holding through AEL 25% of shareholding of Numetal.

24. The apex court after observing the portion of resolution plan wherein Numetal has demonstrated its financial, technical and other strengths on the basis of its shareholders has held that, Numetal itself was a newly incorporated entity, with no financial or experience of its own, it therefore relied entirely on the credentials of each of its constituent shareholders. This itself shows Numetal itself revealed in its resolution plan that its corporate veil should be lifted, for without lifting this veil, none of parameters of the request for proposal can be satisfied. It is thus clear that the four shareholders of Numetal were persons 'acting jointly' within the meaning of 29A.
25. Hence, considering the 1st resolution plan submitted by Numetal, there is no doubt, AEL was held by Prisma Trust, whose ultimate beneficiary is Mr Rewant Ruia and this would show that NPA declared over a year before the date of commencement of CIRP of ESIL would render Numetal ineligible to submit a resolution plan. The only manner in which Numetal can succeed in submission of resolution plan is to first pay off the debts of ESIL and other corporate debtors of Ruia group of companies, which were declared as NPAs prior to aforesaid period of one year, before submitting its resolution plan.

26. If the 2nd resolution plan of Numetal is considered, then AEL is not in the picture since AEL walked out from Numetal and hence it can be considered as Mr Rewant Ruia has disappeared from the scene. The apex court has held that Rs 500 crores that has been deposited towards earnest money continues to remain deposited by AEL even after its exist as shareholder from Numetal and further having regard to the reasonably proximate state of affairs before submission of resolution plan, beginning with Numetal's initial corporate structure and continuing with the changes made till date, it is evident that the object of all transactions that have taken place after 29A came into force is undoubtedly to avoid application of 29A(c) and its proviso and stated '***We therefore hold that, whether the first or second resolution plan is taken into account, both would clearly be hit by Section 29A(c), as the looming presence of Shri Rewant Ruia has been found all along, from the date of incorporation of Numetal, till the date of submission of second resolution plan.'***

Scrutiny of Resolution Plan of AMIPL:

27. So far as the UG is concerned, the corporate structure is as follows – AMSA is a listed company in Luxemburg. This company is the ultimate parent company of resolution applicant, through its wholly owned subsidiary AMBD, a company incorporated in Luxemburg., which in turn holds 100% of shares in Oakey Holding BV, a company incorporated in Netherlands, which in turn holds 99.99% shares in AMIPL, a company incorporated in India. AMNLBV is a company incorporated in Netherlands and is a 100% subsidiary of AMSA. It is the group company of Shri LN Mittal that held 29.05% of shareholding in UG.

28. A Co-Promotion Agreement was entered in 2009, between AM Netherlands and UG. As per the said agreement AM Netherlands was entitled to nominate one half of the independent directors on board of UG, the other half being nominated by other promoter group. The Co-Promotion agreement, therefore, not only names AM Netherlands as the foreign promoter of UG, but also makes it clear that UG would be jointly managed and controlled by foreign and Indian promoters. Pursuant to this Co-Promotion agreement, AM Netherlands issued a letter of offer to acquire 25.76% of share capital of UG. In this letter, it was disclosed to public at large that AM Netherlands becoming a promoter of UG, with significant affirmative voting rights. On a subsequent date, a Non-Disposal Undertaking was provided by AM Netherlands, as promoter of UG, to the lender banks of UG, which included State Bank of India. In the year 2016, Canara Bank and Punjab National Bank declared UG accounts as NPA. In all annual returns of UG, the AM Netherlands have been shown as 'Promoter' group. The argument of AMIPL that it has not exercised its voting rights would not help them as that makes no difference to the de jure position of AM Netherlands being a 'promoter'.

29. A few days before submission of 1st resolution plan, the entire shareholding in UG is sold by way of off market sale, to a company of Indian Promoters namely 'Sainath Trading Company Private Limited' for a price of Rs 1 per share, when the market value of share is Rs 19.5 and purchase price was Rs 120 per share. The aforesaid sale of shares was done without making an open offer on the basis that it was an inter se transfer of shares between promoters, and therefore exempt from such requirement.

30. It is absolutely clear that Shri LN Mittal, who is the ultimate shareholder of AMIPL is directly the shareholder of AM Netherlands as well, which is an LN Mittal Group Company. When the corporate veil of the various companies aforementioned is pierced, both AMIPL and AM Netherlands are found to be managed and controlled by Shri LN Mittal and therefore persons deemed to be acting in concert as per Regulation 2(1)(q)(2)(i) of SAST Regulations.

31. AM Netherlands is a promoter of UG is clear from the abovementioned facts, being expressly stated as such in UG's annual returns. The reasonably proximate facts prior to submission of both resolution plans by AMIPL would show that there is no doubt whatsoever that AM Netherlands shares in UG were sold only in order to get out of the ineligibility mentioned by 29A(c) and consequently the proviso thereto and hence the resolution applicant is ineligible.

32. Insofar as the transaction with regard to KSS Petron is concerned, the facts are as follows- In 2011, Fraseli, an entity registered and incorporated in Luxemburg, which is managed and controlled by Shri LN Mittal, held 32.22% of the shareholding of KSS Global, a company domiciled in the Netherlands. On 19.5.2011, by a SHA was entered into between KSS Holding, KSS Infra EALQ, Fraseli and KSS Global, the first three companies were each given a right to appoint an equal number of directors on the board of directors of KSS Global, which in turn held 100% of the share capital of KSS Petron, a company incorporated in India. Fraseli was also granted affirmative voting rights on decisions regarding certain specified matters, both at the board and the shareholder level, in respect of KSS Global and all companies controlled by it, which would include KSS Petron. The account of KSS Petron has become NPA in 2015. As in case of UG, Fraseli divested its shareholding in KSS Petron, three days before AMIPL submitted its 1st resolution plan.

33. From the above, it is evident that there can be no doubt whatsoever that Fraseli, being a company managed and controlled by LN Mittal, holding 1/3rd shares in KSS Global, which in turn held 100% share capital of KSS Petron, was in joint control of KSS Petron, if the corporate veil of all these companies is disregarded. Hence, the resolution application submitted by AMIPL suffers from ineligibility in the same lines as held for UG.