

(2020) 07 DEL CK 0008

In the Delhi High Court

Case No : Original Miscellaneous Petition (I)(COMM) No. 135, 136, 137 Of 2020,
Miscellaneous Application No. 4847, 4848, 4849 Of 2020

Khoobsurat Infra Pvt Ltd. & Ors

APPELLANT

Vs

IDBI Trusteeship Services Ltd And Anr

RESPONDENT

Date of Decision : 03-07-2020

Acts Referred:

Specific Relief Act, 1963 — Section 41(b)
Indian Contract Act, 1872 — Section 176

Citation : (2020) 07 DEL CK 0008

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Harish Salve, Parag Tripathi, Vijay Aggarwal, Tarun Singla, Naman Joshi, Shailesh Pandey, Neeraj Kishan Kaul, Dr Birendra Saraf, Vikram Trivedi, Jai Sanklecha, Sunil Tilok Chandani, Sachin Chandarana, Ramchandra Madan, Deepak Joshi, Jagdeep Sharma

Final Decision : Dismissed

Judgement

“

V. Kameswar Rao, J",,,

I.A. 4847/2020 in OMP(I)(COMM) 135/2020,,

I.A. 4848/2020 in OMP(I)(COMM) 136/2020,,

I.A. 4849/2020 in OMP(I)(COMM) 137/2020,,

Exemptions allowed subject to all just exceptions.,,

Applications stand disposed of.,,

OMP(I)(COMM) 135/2020,,

OMP(I)(COMM) 136/2020,,

OMP(I)(COMM) 137/2020,,

1. The challenge in these petitions is to a Pledge Invocation Notice (â??Pledge Invocation Noticeâ?? for short) dated June 12, 2020 issued to the",,

petitioners herein and additionally Corporate Guarantee Notice (â??Corporate Guarantee Noticeâ?? for short) dated June 12, 2020 issued to the",,

petitioners in OMP (I) COMM 136/2020 and in OMP (I) COMM 137/2020.,,

2. The facts and the issue which falls for consideration in all these three petitions being similar, they are being disposed by this common order.",,

3. The Prayers made in the petition are the following:,,

OMP (I) (COMM) 135/2020,,

â??In view of the facts and circumstances as stated above, it is most respectfully prayed that this Honâ??ble Court may be pleased to:",,

A. Restrain the Respondent No.1 from acting on the Pledge Invocation Notice against the Petitioner, including from invoking the pledge and",,

/ or selling the pledged shares in open market, during the pendency of the present Petition and / or conclusion of arbitration proceedings.",,

B. Order costs of the present proceedings in favour of the petitioner.,,

C. Pass any such or further orders as may be deemed fit by this Honâ??ble Court in the facts and circumstances of the present case.â??,,

4. OMP (I) (COMM) 136/2020,,

â??In view of the facts and circumstances as stated above, it is most respectfully prayed that this Honâ??ble Court may be pleased to:",,

A. Restrain the Respondent No.1 from acting on the Pledge Invocation Notice against the Petitioner, including from invoking the pledge and",,

/ or selling the pledged shares in open market, during the pendency of the present petition and / or conclusion of arbitration proceedings;",,

B. Restrain the Respondent No.1 from acting on the Corporate Guarantee Notice against the Petitioner during the pendency of the present,,

Petition and / or conclusion of arbitration proceedings;,,

C. Grant ad-interim reliefs in terms of Prayer A and B above;,,

D. Order costs of the present proceedings in favour of the petitioner;,,

E. Pass any such other or further orders as may be deemed fit by this Honâ??ble Court in the facts and circumstances of the present,,

case.â??,,

5. OMP (I) (COMM) 137/2020,,

â??In view of the facts and circumstances as stated above, it is most respectfully prayed that this Honâ??ble Court may be pleased to:",,

A. Restrain the Respondent No.1 from acting on the Pledge Invocation Notice against the Petitioner, including from invoking the pledge and",,,

/ or selling the pledged shares in open market, during the pendency of the present petition and / or conclusion of arbitration proceedings;",,

B. Restrain the Respondent No.1 from acting on the Corporate Guarantee Notice against the Petitioner during the pendency of the present,,

Petition and / or conclusion of arbitration proceedings;,,

C. Grant ad-interim reliefs in terms of Prayer A and B above;,,

D. Order costs of the present proceedings in favour of the petitioner;,,

E. Pass any such other or further orders as may be deemed fit by this Honâ??ble Court in the facts and circumstances of the present,,

case.â??"

6. The facts as noted from the petitions are, the respondent No.2 ESSEL Infra Projects Ltd. issued non-convertible debentures aggregating to a",,,

principal amount 4,25,00,00,000/-which were subscribed by certain identified debenture holders for whom the respondent No.1 is the debenture trustee",,,

in terms of Debenture Trust Deed dated May 22, 2015 (â??DTDâ??", for short). The broad structure of the transactions is as follows:",,

Name of Obligor,Description,Underlying Obligation

Respondent No.2,Issued the Debentures,Debentures

Khoobsurat Infra Pvt. Ltd.,Pledgor,"60,28,000 shares of Respondent

No.2

Cyquator Media Services Pvt. Ltd.,Pledgor and Corporate Guarantor,"43,47,500 shares of Zee

Entertainment Enterprises Ltd.

[hereinafter â??ZEELâ??)

Direct Media Distribution Ventures

Pvt. Ltd.",Pledgor and Corporate Guarantor,"6,25,11,000 shares of Dish TV India

Ltd. [hereinafter â??DTILâ??"

equity in various projects (ii) discharge previous borrowings and (iii) for general

corporate purposes; the respondent No.2 company proposed to issue,,
and allot 425 (Four Hundred and Twenty Five) rated unlisted redeemable, non-convertible debentures bearing zero coupon of Rs.1 Crore each of the",,,
aggregate nominal value of Rs.425 Crores for cash at par in dematerialized form on a private placement basis in two series, i.e., Series-1 (200",,,
debentures) and Series-II (225 debentures) to certain identified debenture holders.,,,

15. The said debentures were proposed to be issued on the broad terms and conditions set out in the information memorandums dated May 22, 2015",,,
and June 23, 2015 respectively. One of the terms of the issue of the said debentures was that all payments and obligations pertaining to the said",,,
debentures were to be secured by way of inter alia an (i) irrevocable, unconditional corporate guarantee and (ii) an exclusive first ranking pledge over",,,

6,25,11,000 fully paid up equity shares of Dish TV by direct media Distribution Ventures Pvt. Ltd. and ZEEL by Cyquator Media Services Pvt. Ltd. in",,,

favour of respondent No.1.,,,

16. According to respondent No.1, it was appointed by respondent No.2 as the debenture trustee for the benefit of the debenture holders and to hold",,,

the security created to secure the payments and other obligations of respondent No.2 in relation to the said debentures on the terms and conditions",,,

more particularly set out in the DTD executed between respondent No. 1 and 2. The petitioners were confirming parties to the said DTD. In terms of,,

the said DTD the tenure of the said debentures was to end on May 22, 2020 and the respondent was inter alia obliged to the debentures holders the",,,

principal amount, redemption premium and default interests (if any) on the maturity of the said debentures in the manner provided therein.",,,

17. It is stated that simultaneously with the execution of the DTD, in order to secure all the payments and obligations in relation to the said debentures",,,

petitioners herein executed the following documents:,,

(i) The pledge agreements whereby Direct Media and Cyquatar Media created a first ranking exclusive pledge over 6,25,11,000 and 73,56,500 fully",,,

paid up equity shares of Dish TV and ZEEL in favour of respondent No.1.,,,

(ii) An irrevocable Power of Attorney appointing respondent No.2 as attorney to deal with the pledged shares of Dish TV and ZEEL.,,,

(iii) Corporate Guarantee irrevocably and unconditionally guaranteeing the obligations of respondent No.2 under the said DTD in favour of respondent,,
No.1.,,

18. Pursuant thereto and relying on the representation and assurances of respondent No.2, Franklin Templeton Asset Management India Pvt. Ltd.",,

(Debenture Holders) subscribed to the said debentures against the payment of Rs.425,00,00,000. The respondent No.2 accordingly allotted on private",,

placement the said debentures in favour of respondent No.1 on behalf and for the benefit of debentures holders, on May 22, 2015 and June 24, 2015",,

respectively.,,

19. In and around 2019, the ESSEL Group faced severe liquidity crunch which seriously jeopardize the ability of respondent No.2 to meet its payment",,

obligations under the DTD. In particular, the price of the equity shares of Dish TV and ZEEL pledged as security towards the payment obligations",,

under the DTD substantially dropped thereby breaching the security cover to as low as 0.7x, the outstanding obligations as against the required 1x of",,

the outstanding obligations, seriously, prejudicing the rights and interests of the debenture holders inter alia under the pledge agreements.",,

20. With a view to ensure that the matters do not precipitate further and that the security made available for the said debentures are not enforced,,

immediately, respondent No.2 entered into discussions with the debenture holders. At these meetings it was principally agreed that the respondent",,

No.2 would facilitate the sale of promoters stake in ZEEL to inter alia meet certain identified borrowings. As part of this arrangement it was also,,

agreed that Mr. Subhash Chandra would provide personal guarantee for guaranteeing the payment obligations in relation to the said debentures on an,,

irrevocable and unconditional basis. The understandings arrived at in the said meeting was recorded in a letter dated February 3, 2019 signed by the",,

representatives of respondent No.2 and the debenture holders.,,

21. Around the same time the DTD was amended by virtue of Supplemental and Amended Debenture Trust Deed executed on February 1, 2019.",,

Under the terms of the Supplemental and Amended Debenture Trust Deed, 60,28,000 shares of respondent No.2 were agreed to be pledged by the",,

petitioner to secure the said debentures issued by respondent No. 2 in favour of respondent No.1 for the benefit of the debenture holders. Accordingly",,

petitioner executed a Share Pledge Agreement dated February 1, 2019 in favour of respondent No.1.",,,

22. In the meanwhile, to set out in detail the precise terms and conditions of the understanding recorded in the letter dated February 3, 2019 inter alia",,,

respondent No.2 and the petitioner executed a deed dated June 25, 2019 in favour of respondent No.1 for the benefit of the debenture holders. In",,,

terms of the said deed, respondent No.2 and the petitioner acknowledged the outstanding amounts under the DTD and agreed to complete the sale of",,,

promoters's stake in ZEEL shares and payments of outstanding dues on or before September 30, 2019. A mechanism was formulated whereby the",,,

promoters's shares and pledged shares of ZEEL shall be tendered by the lenders at their discretion and sold to the investors in exchange of the",,,

consideration which shall be utilized by the lenders to reduce the outstanding obligations. In the event respondent No.2 / petitioner failed to comply",,,

with its obligations, under the deed or any of the other financing documents, the respondent No.1 was entitled to commence the enforcement of the",,,

security interest, notwithstanding anything contrary in the financing documents.",,,

23. It is the case of the respondent No.1 that the said documents did not contain any arbitration clause.,,,

24. In or around September, 2019, in furtherance to the said deed respondent No.2 requested respondent No.1 for release of 30,09,000 ZEEL shares",,,

pledged as security in favour of respondent No.1 for the benefit of debenture holders for strategic sales. The share price of ZEEL continued its down",,,

trend from January, 2019. The respondent No.2 in the month of September, 2019 redeemed 74 of the 425 said debentures against the payments of",,,

amounts towards the principal redemption premium etc. on September 10, 2019 to respondent No.1 aggregating to Rs.119,91,31,523/-.",,,

25. In or around November, 2019, the respondent No.2 proposed to conduct another round of stake sale in equity shares of ZEEL. A request was",,,

made to tender additional 43,47,500 shares of ZEEL which constituted the balance pledged securities available with the respondent No.1. However, in",,,

view of the fact that within a span of a month, the share price of ZEEL fell from Rs.400 to Rs.304 constituting 25% fall in share price to ZEEL and",,,

with no security available at the hands of respondent No.1 to secure the balance outstanding obligations, the creditors of respondent No.2 including the",,,

debenture holders retaining no control over the price outcome of such sale, it decided not to participate in the proposed sale transaction. According to",,,

respondent No.1, the debenture holders were under no legal obligation to participate in the proposed stake sale and it was ultimately a commercial",,,

decision keeping in mind the interest of the stake holders which includes retail investors.,,,

26. It is stated by respondent No.1 that in the meantime, the price of pledged shares further dropped compromising the security interest of the",,,

debenture holders. Seeing no immediate resolution and the date of maturity of the said debentures approaching the debenture holders were constrained,,,

to address a letter to respondent No. 2 on April 15, 2020 and requested for (i) a confirmation from the personal guarantor to comply with Clause 7.1.",,,

of the Personal Guarantee which records that the personal guarantor shall not dispose of any of its material assets including shareholding in the,,,

promoter company directly or indirectly without obtaining prior written consent of respondent No.1 and (ii) provide a list of unencumbered assets,,,

evidencing ability to discharge obligations of the Personal Guarantor under the Personal Guarantee. In response, respondent No.2 vide letter dated",,,

May 4, 2020 addressed to the debenture holders, admitted the decline in security cover due to fall in share price of the pledged shares and its failure to",,,

carry out the proposed sale. However, respondent no2. sought to avoid its obligations by seeking to excuse its performance under the said deed due to",,,

the outbreak of COVID-19. Vide the said letter the respondent No.2 sought further time to fulfil its commitments. Thereafter on May 11, 2020,",,,

respondent No.2 addressed another letter to the debenture holders recording that they are in active discussions with prospective investors to generate,,,

additional liquidity in a manner that the said debentures issued to debenture holders or the pledged securities would be bought by investors upon,,,

payment of mutually acceptable consideration. In the meantime, respondent No.2 requested the debenture holders not to precipitate any action with",,,

respect to pledged securities. However, no concrete proposal was put forth by the respondent No.2 and further time of 10 days was sought from the",,,

debenture holders to enable respondent No.2 to procure a concrete proposal.,,,

27. On May 19, 2020, respondent No.2 addressed another letter to the debenture holders citing excuse of nation-wide lockdown as delaying the",,,

process of sale of the pledged shares. Once again, a request was made to avoid precipitating any action towards sale of pledged securities. In spite of",,,
being aware of date of maturity of the said debentures approaching, respondent No.2 without providing neither any definitive time lines for sale or any",,,
concrete proposal of how it plans to raise additional liquidity to redeem the said debentures sought time till June 30, 2020 for facilitating placement of",,,
the said debentures / securities. Meanwhile as per the terms of issue the said debentures fell due for redemption on May 22, 2020. However, the",,,
respondent No.2 failed and neglected to pay debenture holders the principal amount, redemption premium and default interest on the said debentures in",,,
terms of its obligations under the DTD. Accordingly, the respondent No.1 was constrained to issue Pledge Invocation Notice to the petitioners and",,,
Corporate Guarantee Notice to petitioners in OMP (I) (COMM) 136/2020 and OMP (I) COMM 137/2020.,,,

SUBMISSIONS ON BEHALF OF THE PETITIONERS,,

28. Mr. Harish Salve, learned Sr. Counsel would submit that there is no denying the fact that presently unprecedented troubled times are looming over",,,
every aspect of lives due to the COVID-19 pandemic. The stock markets are not immune and those have not only been operating at historically lower,,
points but they are extremely volatile in current times. In these circumstances, the respondent No.1 has been insisting to dump 43,47,500/- and",,,
6,25,11,000/- shares of ZEEL and Dish TV respectively, being oblivious to the extraordinary volatility in the stock market.",,,
29. He stated that the entire thrust of the respondent No.1 during the course of arguments has been regarding absolute right of the respondent No.1 to,,
sell the pledged shares and invoke corporate guarantee issued by the petitioners in its favour.,,
30. He stated, the petitioners are not joining issues with the respondent No. 1 in so far as the latter's rights as a pawnee or its entitlements under",,,
the subject-matter contracts are concerned. However, it is settled law that financial institutions, such as respondent No. 1 and the debenture holders",,,
herein, owe a duty to act fairly and in good faith.",,,
31. Mr. Salve stated that RBI and SEBI vide their Circulars have made relaxations qua defaults during the lockdown on account of the unprecedented,,
situation and RBI has even infused Rs. 50,000 Crores of liquidity for the

exclusive use of mutual funds. The submission made has been that while the",,,
RBI and SEBI circulars do not ipso jure cover the situation of the petitioners
herein, they are the closest indicators of regulatory leanings during the",,,
pandemic situation of COVID-19.,,,

32. According to Mr. Salve, respondent No. 1 admittedly has valued its recovery
prospects at Rs.92 Crores in a communication dated May 22, 2020.",,,

Today the share prices of ZEEL and Dish TV have recovered and the recovery
figure is higher. This was after the stock market tanked 12,000 points",,,

approximately between February 28, 2020 and March 23, 2020 on account of the
COVID-19 pandemic induced fire sale, which caused the price of",,,

ZEEL shares to crash to Rs. 122/- on March 23, 2020 and Dish TV shares to
crash to Rs. 4.90/- on March 23, 2020. This reflected steep declines",,,

from Rs. 239.30/- and Rs.8.30/- on February 28, 2020 respectively. If the
Petitioner is granted some time and permitted to arrange a stake sale by",,,

private placement, it can generate even higher returns than those that would be
received by sale of shares in open market which will have the effect",,,

of beating down the share price and will lead to sub-optimal recovery and public
loss which will cause detriment to the mutual fund unit holders at the",,,

end of the tunnel. According to him, the respondent No. 1 in its reply admits that
the respondent No. 1 is obligated to cause the shares pledged with it",,,

in a fair and reasonable manner. The fairness and reasonableness of any sale in
recovery matters is ultimately a function of maximizing recovery.,,,

Respondent No. 1 cannot claim that its commercial determination can entitle to
say sell the shares at the presently depressed prices. That would ipso,,,

facto not be a fair sale and prejudice the petitioners.,,,

33. He stated the respondent No. 1 initially challenged the existence of an
arbitration clause and thus maintainability of the present Petition. The same,,,

is prima facie wrong inasmuch as the Share Pledge Agreements and the Deeds of
Guarantee both contain arbitration clauses. He stated the,,,

respondent No. 1 seeks to rely on a Deed of Expanding Letter Agreement dated
July 25, 2019. But the said document itself in Clause 1.2(f) refers to",,,

harmonious construction of the document with other financing documents (Share
Pledge Agreement and Deed of Guarantee) and nowhere does it,,,

supersede the arbitration clauses. I may state here that during the hearing, Dr.
Saraf has given up the said contention at this stage.",,,

34. He stated that any act qua shares of Dish TV which result in change of equity structure requires prior approval of the Ministry of Information &,,

Broadcasting. Respondent No. 1 contends by analogy in its further reply dated June 24, 2020 that Yes Bank has invoked a pledge as well. However,",,

Yes Bank, invoked the pledge itself illegally and upon being put to notice has not acted qua the shares of Dish TV. The equity structure of Dish TV",,,

will change if the pledge is allowed to be invoked by the respondent No. 1 without prior approval of the Ministry of Information & Broadcasting,,

inasmuch as the pledged shares constitute approximately 3.39% of the equity of Dish TV, i.e. more than 1%, and a matter of disclosure unlike any",,,

small on-market transactions as sought to be projected by the Respondent No. 1.,,,

35. Mr. Parag Tripathi, also for one petitioner stated that the petitioner only seeks the indulgence of this Court to the extent that the pledged shares are",,,

sold by the respondent No. 1 in consultation with the petitioner through private placement and not simply dumped in the stock market as that would,,

tank the share price of the respective companies causing a set-back from which it would be impossible to recover. The previous stake sales conducted,,

by the petitioner through private placements during 2019 show that it was able to sell the shares of ZEEL for around Rs.400 per share, whereas the",,,

market price at that time was around Rs. 360 per share. The petitioners seek a time period of 4 to 6 weeks for finding a buyer and selling the shares,,

through private placement.,,,

36. Meanwhile, the interests of the respondent No.1 are also safeguarded insofar as the pledged shares are already lying with Respondent No.1, so",,,

there is no possibility of creation of third-party rights without its scrutiny and approval.,,,

37. According to Mr. Tripathi, commercial contracts giving way to the practical difficulties faced in the present unprecedented scenario on account of",,,

COVID-19 is no longer res integra as the High Court of Bombay in Rural Fairprice Wholesale Ltd. and Anr. v. IDBI Trusteeship Services Ltd. And,,

Ors., Commercial Suit (L) 307/2020 vide order dated March 30, 2020 has granted reliefs qua the Respondent No. 1 itself when pledge qua shares of",,,

Future Retail Ltd. was being invoked. Relevant portion from the order dated March 30, 2020 is extracted hereinbelow:",,,

3.The learned Senior counsel for the plaintiffssubmits that as per Debenture Trust Deed, the defendants are fully secured. He",,,

relies on clause No.6 i.e. Security and Security Providers of the said Trust Deed.,,,

.....,,

6. It is to be noted that when Debenture Trust Deed was executed, market value of the shares were Rs.350 per share and because of",,,

COVID-19, share market has collapsed and per share comes below Rs.100.",,,

7. Considering the present situation of market and COVID-19, I am of the opinion that plaintiffs are required ad-interim protection till next",,,

date.â?,,

38. The order was assailed before the Supreme Court in UBS AG London Branch v. Rural Fairprice Wholesale Ltd., S.L.P. (Civil) Diary No.",,,

10943/2020 and the Supreme Court declined to interfere in the order dated April 17, 2020.",,,

39. According to him, the Order dated March 30, 2020 has been in force for almost three months. The argument of the respondent No. 1 to distinguish",,,

the judgment above from the facts of the present case is that the debentures in that case had not matured unlike the present case, which with respect",,,

is not the relevant factor to distinguish the purpose and portion relied upon by the petitioners.,,,

40. The debenture holders themselves on April 23, 2020 issued a public communication stating:",,,

â?In light of the severe market dislocation and illiquidity caused by the COVID-19 pandemic, this decision has been taken in order to",,,

protect value for investors via a managed sale of the portfolio.â? This is also the Petitionerâ??s case. What is good for the goose is good,,

for the gander â?" by letting the prices normalize further and selling shares by private treaty to an identified buyer, all concerned",,,

including the mutual fund holders, would recovery optimally.",,,

41. Mr. Tripathi stated that in the past, the petitioners as well as the respondent No. 2 organized stake sales to retire debt, including prematurely.",,,

Respondent No. 1 participated in Stake Sale - I and received Rs. 120.36 Crores (share price of ZEEL @ Rs. 400 when market price was Rs. 360).,,

Despite requests, they refused to participate in Stake Sale - II. Had they participated they would have received a further Rs. 130.56 Crores (share",,,

price of ZEEL @ Rs. 304). Other banks, mutual funds, and financial institutions came forwards and received aggregate proceeds of Rs. 4,772.42",,,

Crores. In support of his submissions, Mr. Tripathi has relied upon the Judgements in the cases of Mardia Chemicals Ltd. v. Union of India, (2004) 4",,,

SCC 311; Anant Raj Ltd. v. Yes Bank Ltd., W.P. (C) Urgent 5/2020 dated April 4, 2020; Shakuntala Welfare & Educational Society v. Punjab &",,,

Sindh Bank, W.P. (C) 2959/2020 dated April 13, 2020. Similarly, High Court of Bombay has granted reliefs in Transcon Iconia Pvt. Ltd. & Ors. v.",,,

ICICI Bank & Ors., W.P. LD-VC No. 30/2020 on April 11, 2020.",,,

42. It is also stated that the respondent No. 1 argued at length of its rights in law and under the agreement on account of pledge and guarantee and,,

relied on judgments in Bank of Bihar Ltd. v. Damodar Prasad and Ors., AIR 1969 SC 297; Bank of Maharashtra v. Racmann Auto (P) Ltd., AIR",,,

1991 Del 278; National Securities Clearing Corporation Ltd. v. Prime Broking Company (India) Ltd., (2016) 4 CompLJ 219 (Bom); Reliance Project",,,

Ventures and Management Pvt. Ltd. and Ors. v. ECL Finance Ltd. and Ors., Commercial Suit (L) No. 191/2019 (High Court of Bombay); and",,,

Infrastructure Leasing and Financial Services Ltd. v. BPL Ltd., (2015) 3 SCC 363; without pointing out how any of these precedents apply to anÂ",,,

emergency pandemic situation like the present where market forces have been upended on fear and panic selling on account of COVID- 19. The only,,

relevant law cited has been the one cited by the Petitioners in Rural Fairprice Wholesale Ltd (supra) on which the respondent No. 1 had no answer,,

except to suggest that the law cannot mould itself to practical realities. The same is also incorrect inasmuch as the Supreme Court of India has held in,,

Union of India v. D.M. Revri & Co., (1977) 1 SCR 483, that the courts must view the prevailing circumstances even while interpreting contracts.",,,

43. In their written submissions, the petitioners have made the following prayer:",,,

Considering the prevailing circumstances, the petitioners are only seeking 6 weeksâ?? time for the market conditions to recover to achieve optimal",,,

recovery for the Debenture Holders as well as the Petitioners not to mention the mutual fund holders. To safeguard respondent No. 1, the",,,

petitionersâ?? board are willing to undertake to guarantee at least Rs. 92 Crores as sale proceeds, i.e. the exact value ascribed by the Debenture",,,

Holders in its communication dated May 22, 2020.",,,

44. On the other hand, the respondent No.1 through Dr. Birendra Saraf, learned Sr. Counsel has during the course of arguments stated without",,,

prejudice to the contention that there is no binding arbitration agreements, the issue be kept open and it should not be construed that they have waived",,,

this contention.,,,

45. According to Mr. Kaul (for respondent No.1 in one petition) the petitioner has admittedly not contested the factum of default under the financing,,

documents or the entitlement of respondent No. 1 to enforce its security in terms of the security documents.,,,

46. According to Mr. Kaul, the submission of Mr. Salve and Mr. Tripathi are based on incorrect legal premises and mere surmises and conjectures.",,,

He submitted that there is no legal obligation upon the pledgee to sell the pledged shares at the instance of the pledgor. The pledgee is entitled, in its",,,

unfettered discretion to retain the pledged shares as collateral security and bring a suit for recovery. Respondent No. 1 was not legally compelled to,,

participate in the stake sale of the pledged shares organized by the pledgor in November 2019. Furthermore, even assuming respondent No. 1 had",,,

participated in such sale, as per the petitioners own showing, the sale would have only generated an amount of approximately Rs. 130.56 crore, leaving",,,

an outstanding of approximately Rs. 221 Crores together with interest/redemption premium. Pertinently, this aspect has not contested during",,,

arguments, thereby admitting that the factum of stake sale was only evidence of the petitioner's ability to garner a higher than market price.",,,

47. As regards the petitioners objection to the invocation of the pledge during the COVID-19 pandemic it is submitted by Mr. Kaul (i) that under law it,,

is respondent No.1's sole discretion, once default is committed/continuing, to invoke and thereafter sell the pledged shares; and the petitioner has",,,

no right to restrain respondent No. 1 from doing so; and (ii) Notwithstanding anything in the instant case, the admitted defaults bear no co-relation to",,,

the pandemic, given that the financial precariousness of the borrower group, pre-dates the onset of the pandemic, and that the bogey of the pandemic",,,

has been raised by the petitioner only to deny respondent No. 1 the exercise of its legitimate rights. Respondent No. 1 submits that it is in the interest,,

of the debenture holder and more importantly retail investors holding units in the

debenture holder that it be permitted to exercise its valid and,,
legitimate rights.,,

48. According to him, under law it is a settled position that no pledgor can decide when and how the pledgee should exercise its rights to sell. Section",,,

176 of the Indian Contract Act, 1872 (â??Indian Contract Actâ??. for short) makes it clear that it is the discretion of the pledgee to sell the pledged",,,

shares in case the pledgor makes default. He stated the petitioner cannot compel or restrain respondent No. 1 from exercising its power of sale of the,,

pledged shares in order to discharge any debt. He submitted that petitioner has no right under law to restrain respondent No.1 from invoking the share,,
pledge.,,

49. According to Mr. Kaul without prejudice, in the case of sale of a listed pledged shares, the price of the share is determined on the exchange and",,,

cannot be called into question by the pledgor. He stated the respondent No. 1 is acting on behalf of a secured lender, and unlike an equity participant, a",,,

secured lender does not agree to partake in expected or unexpected market risks and in fact secures itself against any potential market risk.,,

Accordingly, financing documents typically do not contain any force majeure type provisions. By seeking to restrain respondent No. 1 from exercising",,,

its lawful rights under the Pledge Agreements, the petitioner is seeking to overturn this fundamental premise which forms the bedrock of secured",,,

lending transactions in the country.,,

50. According to Mr. Kaul, the reliance placed on the judgment of the Honâ??ble Supreme Court of India in *Mardia Chemicals* (supra) to argue that",,,

the lender has a â??duty to act fairly and in good faithâ?? while enforcing its rights under the Share Pledge agreement is misplaced. The decision in,,

Mardia Chemicals (supra) was rendered in context of a challenge to the SARFAESI Act, 2002 and was relevant to the issue of lenders liability.",,,

Furthermore, the ad-interim order passed by the Bombay High Court in *Rural Fair Price Wholesale Ltd* (supra) is readily distinguishable. In the said",,,

order, it was recorded that the defendant therein was otherwise fully secured. Furthermore, the said order was passed in the aftermath of the",,,

imposition of the lockdown when the pledged share prices had fallen on account of the lockdown. In the instant case the fall in pledged share prices",,,

admittedly pre-date the lockdown. Moreover, unlike in the facts of the order of

the Bombay High Court, in the instant case, admittedly the default is on",,,
account of the debentures having matured for repayment.,,,

51. He submitted, the petitioner has admitted that the RBI and SEBI circulars relied upon by it do not ipso jure bar the invocation of the pledge.",,,

According to him, where the relevant regulatory authorities, in their subjective opinion, felt that the COVIDâ??19 situation required certain relaxations",,,

etc., appropriate circulars were issued. The omission of any relevant regulatory authority to restrict the rights of pledgee of shares to invoke and sell",,,

pledged shares is deliberate and instructive.,,,

52. He stated, across the pleadings as well as the oral submissions, the petitioners have made out no case for restraining respondent No. 1 from",,,

invoking the Corporate Guarantee, which in any case is a relief barred by Section 41(b) of the Specific Relief Act 1963.",,,

53. An order injuncting respondent No. 1 from invoking the Corporate Guarantee would tantamount to an order of restraint from accessing legal,,

remedy which respondent No. 1 is entitled to, in terms of the Transaction Documents as well as the law of the land.",,,

54. He stated unlike a Bank Guarantee where the Guarantee amount is capable of being immediately withdrawn, a Corporate Guarantee must be",,,

enforced in Court. Thus, there is no demonstrable urgency in the present matter to call for an injunction if at all, as all the objections of the petitioner",,,

can be made at the time when respondent No. 1 seeks to enforce its Corporate Guarantee.,,,

55. He stated underlying Debenture Holderâ??s (Mutual Fundâ??s) rating is already downgraded as its liquidity is directly impacted on account of,,

default by Respondent No. 2 in redeeming the Debentures.,,,

56. Debentures constitute a component of the Net Asset Value (â??NAVâ?? for short) of a Mutual Fund. This NAV is the price at which,,

subscribers purchase and sell units. An injunction would cause the NAV to fall as a result of respondent No. 2â??s failure to redeem the debentures,,

and respondent No. 1â??s inability to secure the pledged securities.,,,

57. The reduction of the NAV will directly impact the subscribers of these Mutual Funds, which includes public funds.",,,

58. In these times of crisis when access to funds is already scarce, the common man will be forced to dip into his investments such as mutual funds. If",,,

a relief as is sought is granted it will directly impact the unit holders who will face a devaluation of their investments.,,

59. He stated, the petitioners as Pledgers / Guarantors became liable to pay in terms of the DTD, the Share Pledge Agreements and the Corporate",,,

Guarantees, immediately on respondent No. 2's failure to redeem the debentures.",,,

60. The sole ground the petitioner relies upon is the possibility of the shares being sold at a lower value. However, mere economic hardship cannot be",,,

a ground for relief, for the only obligation upon the pledgee is to ensure that shares are sold at a fair price. In view of the aforesaid arguments, the",,,

present petition deserves to be dismissed with cost.,,

61. Dr. Birendra Saraf, Sr. Counsel (for respondent 1 in one petition) stated that the Petitioner has not contested the factum of default under the",,,

financing documents. The petitioner has also not contested that under the contract and in law, respondent No. 1, as a pledgee, has the right to enforce",,,

its security and the unfettered discretion to sell the pledged shares to recover their dues. According to him, the Petitioner has restricted itself to",,,

contending that (i) in view of the extraordinary circumstance of the outbreak of COVID-19 and its effect on market conditions, any attempt to invoke",,,

and sell the pledged shares of Dish TV by respondent No. 1 would not be a fair or reasonable exercise of respondent No. 1's rights; (ii),,,

that the invocation and sale of the pledged shares of Dish TV, without prior approval of the Ministry of Information & Broadcasting, would be illegal",,,

and void in as much as they are contrary to the terms of license issued to Dish TV for providing direct to home broadcasting services in India; and (iii),,,

it be permitted to have the pledged shares sold through private treaty which would allow more value to be derived rather than having respondent No. 1,,

sell the same in the open market.,,

62. He stated, while on one hand the petitioner accepts that respondent No. 1 as pledgee has the unfettered right to sell the shares, in effect the",,,

petitioner by seeking the restraint is in fact seeking to govern when the pledged shares should be sold and at what price. The petitioners' case is,,

contrary to the contract and based on incorrect legal premises and mere surmises and conjectures.,,

63. According to Dr. Saraf, contractually, in terms of the Pledge Agreements, it is

evident, that (i) the petitioners have covenanted to repay the",,,
outstanding amounts under the transaction documents, and until such payment,
secure the same through the share pledge (ii) on the occurrence of",,,
default, which is admitted, respondent No. 1 is entitled to enforce the pledge
without intervention of the court or consent of the petitioner at a public or",,,
private sale for cash, upon credit or future delivery; (iii) the decision of
respondent No. 1 in respect of the number/amount of pledged shares to be sold",,,
or disposed off are final and binding on the petitioner and (iv) respondent No. 1
is entitled while exercising such power of sale, to sell the pledged",,,
shares to any person and at any price which it in its absolute discretion
considers to be the best obtainable in the circumstances to discharge",,,
the outstanding amounts. He stated, the petitioners have not controverted the
aforesaid provisions or the interpretation placed on them. According to",,,
him, in the opening part of Clause 6.1 of the Pledge Agreements the petitioner
has clearly accepted that the rights including to enforce the pledge is",,,
reasonable",,,

64. He stated even legally, it is settled law that no pledgor can decide when and
how the pledgee should exercise its rights to sell. Section 176 of the",,,
Indian Contract Act makes it clear that it is the discretion of the pledgee to sell
the pledged shares in case the pledgor makes default. He relied on the",,,
Judgment of the Bombay High Court in Prime Broking (supra), wherein it was
held that the pledgors rights are only (i) in case pledgee exercises the",,,
power of sale, to insist that it should be honestly and properly done and the sale
proceeds applied to the debt; (ii) in case the pledgee did not exercise",,,
the power of sale then the pledgor can redeem the pledge on the payment of the
debt or such part of it that has remained unpaid; and (iii) in case the",,,
same was improperly exercised, to get the damages caused thereby. It is
therefore submitted that petitioner has no right under law or contract to",,,
restrain respondent No.1 from invoking the pledge on the specious ground that
market prices are depressed due to COVID-19. By doing so, the",,,
petitioners are seeking to do precisely what it is prohibited from doing both
under the contract and in law.,,,

65. Dr. Saraf stated, fairness and reasonableness pertain to the propriety
of the sale process, namely that the sale of pledged shares is",,,
honestly and properly done and that the sale proceeds are applied to

the debtâ???. By the Pledge Invocation Notice, respondent No. 1 has",,, invoked the pledge. The exact time and quantity and the tranches in which the shares would be sold is something that respondent No. 1, as legally and",,, contractually entitled would decide considering all factors. He stated, respondent No. 1 is most interested in getting a good price for the shares which",,, would reduce their debt. Respondent No. 1 is an entity operating in the securities market and is equally interested in maximizing the recovery. The,, petitionersâ?? entire case is built on a mere conjecture that respondent No. 1 would proceed to dump the pledged shares at once in the open market,, causing the share price to tank. There is no basis for such apprehension. In any case and strictly without prejudice, even assuming without admitting",,, that such prospective sale is â??improperlyâ?? conducted, the only remedy available to the pledgor under law is damages.",,

66. In any case, it is not as though even at the price at which the petitioner was suggesting to sell the ZEEL shares in November 2019, the entire debt",,, would have been written off. Even if the sale was done at that price, respondent No. 1 would still have had a substantial outstanding due. When sued",,, for the balance, at the highest, if proved that there was an improper sale, it may be contended that the outstanding dues stand reduced. The sale of the",,, entirety of the shares cannot be prevented in any case. He stated, the petitioner is not entitled to restrain respondent No. 1 from invoking the pledge.",,

67. He stated, without prejudice, it is the petitionersâ?? own case in rejoinder that the price of Dish TV shares as on February 28, 2020 immediately",,, prior to the initiation of lockdown was Rs. 8.30/-per share (total value of Dish TV pledged shares Rs. 52 Crore). On the petitionersâ?? own,, disclosure that the price of Dish TV shares as on June 23, 2020 was Rs. 9.10/-per share (total value of Dish TV pledged shares Rs. 56.8 Crores).",,,

Thus, the entire basis of the present petitions i.e. enforcing the pledge during COVID-19 would result in sub-optimal recovery from Dish TV shares",,, (less than 50% of market value, as alleged) does not stand. He stated, if any restraint is placed on respondent No. 1â??s right to sell and the share",,, prices fall, irretrievable prejudice would be caused to the respondent No. 1.",,

68. He stated, Mr. Tripathi has placed reliance on the judgment of the Supreme Court of India in Mardia Chemicals (supra) to argue that the lender",,, has a â??duty to act fairly and in good faithâ? while enforcing its rights under the

Share Pledge. The reliance is misplaced. The decision in *Mardia*,
 Chemicals (supra) was rendered in context of a challenge to the SARFAESI Act, 2002 and was relevant to the issue of lenders liability. Furthermore,
 the ad-interim order passed by the Bombay High Court in *Rural Fair Price* (supra) is readily distinguishable. It is an ad-interim order decided in the facts of that case which is neither a precedent nor even of persuasive value.

69. He stated Mr. Salve's contention that the invocation of the pledge of Dish TV shares, without prior approval of the Ministry of I&B, is illegal and void, as it is in the nature of an afterthought and devoid of any merit. The petitioner itself never believed that there was any such embargo and in the Pledge Agreements expressly represented and covenanted to respondent No. 1 that Dish TV shares are freely transferable and importantly, are not and will not be subject to any lock-in period or restrictions under any law, regulation or orders of any court or other authority.

70. He stated as per the license condition any change in equity structure of the Licensee Company as well as amendment to the shareholders' agreement wherever applicable,....shall be carried out only in consultation and with prior approval of the Licensor. It is submitted that the reliance on this condition is entirely misplaced. The terms equity structure in this condition is a reference to the authorized and paid up share capital of the licensee company. This is apparent from the use of the term equity structure of equity capital to refer to the authorized share capital and paid up share capital in the guidelines. Furthermore, in the license conditions the term equity structure is used in contradistinction to the term equity holding pattern. The equity holding pattern in the case of a listed traded company such as Dish TV would change daily. Accordingly, interpreting alteration of equity structure to mean changes in equity holding pattern would lead to an absurdity and would be opposed to the nature of traded public securities which are freely transferable. The contention of the petitioner stands defeated by the very fact that being listed on the stock exchange the shares are being traded freely every day.

71. Even assuming without admitting that changes in equity shareholding pattern of Dish TV would require approval under the license conditions, this by and of itself, would not affect the right and entitlement of respondent No. 1 to

invoke the pledge of Dish TV shares under the Pledge Agreements,",,
and does not entitle the Petitioner to any injunction.,,

72. Having heard the learned Sr. Counsels for the parties and perused the record, at the outset I may state here that on the plea on behalf of",,,
respondent No.1 that there is no binding arbitration agreement, it is agreed between the parties through their counsels during the arguments that the",,,
said contention be kept open to be decided at the appropriate stage. Their statements are taken on record and the issue is left open.,,

73. On merits, the submission of Mr. Salve and Mr. Tripathi can be summed up as under:",,,

i. The petitioners are not joining issue with respondent No.1 in so far as rights of pawnee or its entitlement under the subject contracts.,,

ii. In the unprecedented times because of COVID-19, the stock markets are not only operating at historically lower points but they are extremely",,,
volatile.,,

iii. The financial institutions like the respondent No.1 and debenture holders owe a duty to act fairly and in good faith.,,

iv. RBI and SEBI vide their Circulars have made relaxations qua defaults during lockdown and RBI has infused Rs.50,000 Crores of liquidity for",,,
exclusive use of mutual funds.,,

v. The petitioners be granted some time for the market conditions to recover to achieve optimal recovery for the debenture holders / petitioners.,,

vi. The previous stake sales conducted by the petitioners through private placements during 2019 shows that it was able to sell the shares of ZEEL for,,
around Rs.400 whereas the market price at that time was Rs.360/-.,,

vii. The case of the petitioners is covered by the order passed by Bombay High Court in Ruler Fairprice Wholesale Ltd. (supra), which order has been",,,
upheld by the Supreme Court.,,

viii. Invocation of pledge of DTIL shares without prior approval of Ministry of Information and Broadcasting is illegal and void.,,

74. From the above, it is clear that Mr. Salve and Mr. Tripathi in their submissions have not challenged the rights of the respondent No.1 as a pawnee",,,

or its entitlement under the various contracts. If that be so, the judgments relied up by Mr. Kaul in the case of Bank of Bihar Ltd. (Supra); Bank of",,,

Maharashtra (Supra); National Securities Clearing Corporation Ltd. (Supra); Reliance Project Ventures and Management Pvt. Ltd. and Ors. (Supra),,

and Infrastructure Leasing and Financial Services Ltd. (Supra) in support of his contention that (i) as per Section 176 of the Indian Contract Act, the",,

discretion is with the pawnee to either sell the pledged goods after issuing notice to the pawner or prefer a suit for recovery by retaining the goods as,,

co-lateral (ii) the pledger cannot decide when and how and pledgee should exercise its right to sell (iii) if the pledgee exercises its discretion or does,,

not exercise the discretion, no blame can be put on the pledgee, are not contested.",,

75. According to Mr. Salve and Mr. Tripathi, the precedence as have been referred to by Mr. Kaul may not be applicable to an emergency pandemic",,

situation like the present one, where the market forces have been upended on fear and panic selling on account of COVID-19, more so by relying",,

upon the order of the Bombay High Court in the case of Ruler Fairprice Wholesale Ltd. (Supra) which has been upheld by the Supreme Court. This,,

submission looks appealing on a first blush but on a deeper consideration it is noted that downward trend in the share values is seen in the year 2019,,

itself when the ZEEL shares fell to Rs.304/- per share in November, 2019 and Rs. 239.30/- on February 28, 2020. Further, it is the petitionersâ??",,

own case that share value of Dish TV as on June 23, 2020 has gone up to Rs.9.10 paise per share which is more than Rs.8.30 per share as existed on",,

February 28, 2020 i.e. before COVID-19. That apart the submission of Mr. Kaul and Dr. Saraf that the debentures have attained maturity on May 22",,

2020 and the respondent No.1 is obliged to debenture holders, the principal amount, redemption premium and default interest (if any) on the maturity, is",,

appealing.,,

76. Further, the reliance placed on the Bombay High Court order in Ruler Fairprice Wholesale Ltd. (Supra) is totally misplaced, as the said order was",,

passed immediately after lockdown on March 30, 2020 and it was the conclusion of the Court that the defendant therein was fully secured. That apart",,

it is not the case therein that the debentures have attained maturity as in the case in hand.,,

77. The submission of Mr. Salve that respondent No.1 and debenture holders owe a duty to act fairly and in good faith cannot be disputed. In other,,

words, they are required to act in good faith which can only be seen on the following parameters:",,,

i. The sale of pledged shares is honestly and properly done.,,,

ii. The sale proceeds are applied to debt.,,

iii. As held by the Bombay High Court in National Security Clearing Corporation Ltd. (Supra) that pledger right is only in case the sale is not properly,, exercised, to get damages.",,,

78. That apart, when absolute discretion lies in law and under the subject contracts with pawnee to sell the shares when it likes and as it likes, surely,",,

this Court cannot substitute that discretion with its own discretion. In other words, the exercise of discretion by respondent No.1 is not justiciable.",,,

Further the Court would not like to exercise such a discretion when it does not have the expertise and necessary wherewithal as that of the,,

respondent No.1.,,,

79. The reliance placed by Mr. Tripathi on the judgment of the Supreme Court in Mardia Chemicals (Supra) is also misplaced. The said judgment was,,

in the context of a challenge to the SARFAESI Act, 2002 and was relevant to lenders liability and the facts were not similar to this petition.",,,

80. In so far as the submissions of Mr. Salve by referring to the circulars issued by the RBI and SEBI that moratorium has been declared on all loans,,

becoming due during COVID-19 and granted relaxation credit rating during COVID-19 are concerned, the same are not appealing. I agree with the",,,

submission of Mr. Kaul that RBI / SEBI being regulatory authorities, they in their subjective satisfaction felt that COVID-19 situation required certain",,,

relaxations etc., appropriate circulars have been issued and there is no circular by SEBI to restrict the rights of pledgee of shares to invoke and sell",,,

pledged shares is deliberate and instructive. Further, when the debentures have reached maturity on May 22, 2020, on respondent No.2's failure to",,,

redeem the debentures, surely the petitioners as pledgors / guarantors become liable to pay in terms of debenture trust deed, the share pledged",,,

agreements and corporate guarantee and any default by petitioners / guarantor, the respondent No.1 is within its right to enforce the pledge which",,,

cannot be postponed, otherwise, it will set a precedent contrary to what has been agreed between the parties.",,,

81. Even the plea of Mr. Salve that the invocation of pledge of Dish TV shares

without prior approval of Ministry of Information and Broadcasting is,,
 illegal and void by primarily relying on Article 1.7 at Page 203 of the petitioner's documents in OMP (I) (COMM) 136/2020, which is part of the,,
 guidelines for obtaining license for providing DTH broadcasting services in India. The stipulation reads as under:,,
 "Any change in the equity structure of the Licensee Company as well as amendment to shareholders agreement, wherever applicable",,,
 shall only be carried out in consultation and with prior approval of Licensor.",,,
 82. On the other hand, Dr. Saraf has stated that the permission to be sought is primarily for foreign equity participation. That apart, it was his,,
 submission that Clause 3 at Page 195 of the petitioner's documents in OMP (I) (COMM) 136/2020 defines structure of equity capital to mean (i),,
 authorized share capital, and (ii) paid up share capital of the licensed company. He stated that the term "equity structure" is used to",,
 contradistinction to the term "equity holding pattern". According to Dr. Saraf, the equity holding pattern in the case of a listed company would",,
 change daily. That apart, if the plea of Mr. Saraf is accepted, the same shall be against the nature of traded public securities which are freely",,
 transferrable. He stated that shares are listed on the stock exchange and are being traded freely every day.,,
 83. I am in agreement with the submissions of Dr. Saraf. Firstly, no such stipulation exists in the pledged agreements. The plea is clearly an",,
 afterthought only to wriggle out from the liability. Rather it is represented in the agreement that the Dish TV shares are freely transferrable without,,
 any restriction under any law, regulation or orders of any authority. It is not the case of the petitioner that such an approval was taken by it when it",,
 bought the shares / at time of allotment. That apart, the shares are being freely traded in the stock market.",,
 84. In so far as the judgments relied upon Mr. Tripathi in the case of Anant Raj Ltd. (Supra); Shakuntala Welfare & Educational Society (supra) and,,
 Transcon Iconia Pvt. Ltd. & Ors. (supra) are concerned, the same relate to the applicability of the circulars issued by the Reserve Bank of India",,
 granting moratorium in view of COVID-19, the benefits of which have been given in favour of the petitioners therein. Suffice would it be to state, in",,
 view of my conclusion in paragraph 80 above with regard to the plea advanced

by Mr. Salve by relying on the circulars issued by the RBI and SEBI, I",,,
am of the view that the judgments are clearly distinguishable on facts.,,

85. Even the reliance placed by Mr. Tripathi on the Judgment of the Supreme Court in the case of UOI v. D.M. Revri & Co. (supra) that the Courts,,

must view the prevailing circumstances, while interpreting contracts, shall not be applicable to the facts of this case, firstly, the terms of the contract",,,

have not been disputed by Mr. Salve and Mr. Tripathi, so the interpretation, is a non-issue. Secondly, when the regulator has not issued any circulars",,,

to meet the eventuality of COVID-19, surely this Court, cannot read into the contracts, a clause akin to force majeure, for postponing the obligations",,,

under the contracts.,,

86. In view of my conclusion above, the prayers as sought for by the petitioners cannot be granted.",,,

The petitions are dismissed.,,