IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2592 OF 2021

1. Satyanarayan Bankatlal Malu
S/o Bankatlal Malu, Age : 68 years, Individual, Indian inhabitant.

2. Ramesh Satyanarayan Malu
S/o Satyanarayan Malu, Age : 41 years, Individual, Indian inhabitant,

Having address of both Petitioners :
at 1186, Radha Niwas, Bhawsar Chowk, Gandhubagh, CA Road, Nagpur – 440 002. **} PETITIONERS**

Versus

1. Insolvency and Bankruptcy Board of India,
a Statutory body having its address at 7th Floor, Mayur Bhavan, Shankar Market, Cannaught Circus, New Delhi – 110 001.

2. State of Maharashtra **} RESPONDENTS**

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Mr. Amir Arsiwala a/w. Mr. Piyush Deshpande a/w. Mr. Farzeen Pardiwala, Advocate for the Petitioners.

Mr. Pankaj Vijayan a/w. Mr. Mohammed Varawala, Advocate for Respondent no.1.

Mr. Y.M. Nakhawa, APP for State-Respondent no.2.

* * *

CORAM : SANDEEP K. SHINDE

RESERVED ON : 4th DECEMBER, 2021.

PRONOUNCED ON : 14th FEBRUARY, 2022.

JUDGMENT :

1. Rule.

2. Rule made returnable forthwith. Heard. finally with the consent of the parties.

3. This petition under Article 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1973 assails the order, “Issue Process”, under SectionIssue Process”, under Section, under Section

73(a) and Section 235A of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “Issue Process”, under Sectionthe I.B. Code”, under Section) passed by the Additional Sessions Judge, 58th Court, Mumbai in Special Case No. 853/2020, on a Complaint filed by the Insolvency and Bankruptcy Board of India, a statutory body established under the I.B. Code.

4. Presently, only ground, on which impugned order has been challenged is that, the learned Additional Sessions Judge does not have jurisdiction to entertain the complaint filed by the respondents. As such other grounds of challenge are expressly kept open.

5. Mr. Amir Arsiwala, learned Counsel for the Petitioner submitted that in terms of Section 236 of I.B. Code, the Special Court, established under the Companies Act, 2013 is empowered to try the offences under the I.B. Code. He submitted, Section 435 of the Companies Act empowers, the Central Government to establish Special Courts for speedy trial of the offences under the Companies Act. Mr. Arsiwala

submitted that under Section 236 of I.B. Code, the Special Court shall be deemed to be a Court of Session and person conducting the prosecution shall be, 'deemed' to be a Public Prosecutor. Mr. Arsiwala submitted Section 236 of the I.B.

Code came into effect on 1st December, 2016, whereafter Section 435 of Companies Act was amended by way of

Companies Amendment Act 2017 with effect from 7th May, 2018, and in that sense amendment of 2017 was consequential. Mr. Arsiwala submitted Section 435 of the Companies Act, 2013 was amended twice; firstly in 2015 and thereafter in 2017. He submitted that originally enacted Section 435 empowered the Central Government to establish Special Courts, for the speedy trial of offences, only under the Companies Act and the Judge holding office of the Sessions Judge or Additional Sessions Judge was qualified to be appointed as a Judge of Special Court. Mr. Arsiwala argued that in 2015, Section 435

of Companies Act was amended with effect from 29th May, 2015. By this amendment Special Court/s, established by the Central Government consisting of the Judge holding office

of Sessions Judge was empowered to try, offences only under the Companies Act, which were punishable with imprisonment of two years or more AND other offences under the Companies Act, punishable with imprisonment less than two years, were triable by Court of Metropolitan Magistrate or Judicial Magistrate First Class. Mr. Arsiwala further submitted in 2018 i.e. after I.B. Code came into force,

Section 435 of the Companies Act was again amended on 7th May, 2018 to make it compatible with the object of Section

236 of I.B. Code i.e. “Issue Process”, under Sectionspeedy trial of offences”, under Section. Mr. Arsiwala submitted that by 2018 amendment, for the first time, Central Government is empowered to establish/ designate two classes of Courts as Special Courts; (i) one, Special Court consist of Judge holding office as a Sessions Judge or Additional Sessions Judge and (ii) second Special Court consist of Metropolitan Magistrate or Judicial Magistrate First Class. He submitted a Judge holding the office as a Sessions Judge or Assistant Sessions Judge under clause (a) of subsection (2) of Section 435 of the Companies Act is

empowered and invested with the jurisdiction to try offences under the Companies Act, punishable with imprisonment of two years or more. Whereas, Special Court consist of Metropolitan Magistrate or Judicial Magistrate First Class in terms of clause (b) of subsection (2) of Section 435 of the Companies Act is invested with the powers and jurisdiction to try offences, other than the offences under the Companies Act. To put it differently, Mr. Arsiwala would submit that the expression, “Issue Process”, under Sectionin case of other offences”, under Section used in clause (b) of Section 435 (2), in contradiction to expression, “Issue Process”, under Sectionunder this Act”, under Section in clause (a) of subsection (2) of Section 435 would mean, that the Special Courts consist of metropolitan Magistrate or Judicial Magistrate First Class are invested with the jurisdiction to try offences under the other Acts and the offences under the Companies Act, punishable with imprisonment not more than two years. Submission is that before I.B. Code came into effect, Special Courts comprising of Sessions or Additional Sessions Judge were established to try offences under the Companies Act, which were

punishable with imprisonment with two years or more. As such only one class of Special Court was established i.e. Court comprising of Judge holding office of Sessions or Additional Sessions Judge. However, after I.B. Code came into effect, legislature in its wisdom, to avoid burden of cases on Special Court consisting of Sessions Judge or Additional Sessions Judge but for the speedy trial of offences under the I.B. Code, created another class of Courts i.e. Court consist of Metropolitan Magistrate or Judicial Magistrate First Class as a “Issue Process”, under SectionSpecial Court”, under Section, which by fiction of law shall be ‘deem to be’ Court of Session. Mr. Arsiwala would therefore submit that the offences under the I.B. Code are triable by the Special Court consist of Metropolitan Magistrate or Judicial Magistrate First Class and not by a Court consist of Judge holding office as a Sessions Judge or Additional Sessions Judge. Mr. Arsiwala submitted, that the complaint instituted by the Insolvency and Bankruptcy Board of India against the Petitioners, for the offences under the I.B. Code, could not have been entertained by the learned

Sessions Judge for want of jurisdiction and therefore the order, “Issue Process”, under Sectionissue process”, under Section, passed against the Petitioners was without jurisdiction. Mr. Arsiwala submitted, yet there is another reason as to why Special Courts consist of Metropolitan Magistrate or Judicial Magistrate First Class shall have jurisdiction to try offences under the I.B. Code. He submitted at a time, Section 236 and 237 of the I.B. Code

came into effect i.e. on 1st December, 2016. He submitted that in terms of Section 237 of I.B. Code proceedings, orders and judgments of Special Courts, trying offences under the I.B. Code shall be deemed to be proceedings of Court of Session, amenable to Appellate and Revisional jurisdiction of the High Court. Submission is that Courts consist of Metropolitan Magistrate or Judicial Magistrate First Class trying offences under the I.B. Code have been upgraded to Court of Sessions by deeming fiction. Mr. Arsiwala submitted by enacting Section 236 and 237 of I.B. Code at a time, followed by the amendment to Section 435 of the Companies Act, the legislature clearly intended, that for the

speedy trial of the offences under the I.B. Code, the Court consists of Metropolitan Magistrate or Judicial Magistrate First Class would be Special Court and it shall be deemed to be a Court of Session. Mr. Amir Arsiwala, learned Counsel for the Petitioners, would lay emphasis on expression “Issue Process”, under Sectionunder this Act”, under Section, to contend that clause (a) of sub-section (2) of Section 435 and clause (b) thereof, creates distinct Special Courts and their jurisdiction being well defined, it neither over-laps each other, nor it can be determined qua quantum of punishment for the offences to be tried. On these grounds, Mr. Arsiwala would contend that the complaint instituted by the Insolvency and Bankruptcy Board of India for the offences punishable under the I.B. Code could not have been

entertained by the Sessions Judge 58th Court and therefore the order ‘issuing process’ under Section 73(a) and Section 235A of the I.B. Code was without jurisdiction.

6. Mr. Pankaj Vijayan, learned Counsel appearing for the Respondents, would contend that plain reading of

Section 435 of the Companies Act, as amended by Act of 2017, does not admit the interpretation, as sought to be placed by the Petitioners. Mr. Pankaj Vijayan submitted that harmonious construction of provision of Section 236 of the I.B. Code and amended Section 435 of Companies Act, leads to conclude that the Additional Sessions Judge, alone has a jurisdiction to entertain the complaint, since offence referred therein, is punishable with imprisonment for more than three years.

7. So as to appreciate the contentions of respective Counsels, it would be appropriate to read and understand, purport of Section 236 and 237 of I.B. Code and amended provision of Section 435 of the Companies Act, 2013.

8. Section 236 of the I.B. Code empowers the Central Government or Board to file complaint against a person/s, having contravened, one of the penal provisions of the I.B. Code with, the “Issue Process”, under SectionSpecial Court”, under Section, constituted or established under the provisions of the Companies Act, 2013. Section 236

of the I.B. Code came into force on 1st December, 2016 and it reads as under :

(emphasis supplied)

"236. Trial of offences by Special Court.

(1)Notwithstanding anything in the Code of Criminal Procedure, 1973 offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorized by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial.

. Thus, notable aspects of this provision are;

(i) the offences under the I.B. Code are to be tried by the 'Special Court', established under the Companies Act.

(ii) the provision of the Code of Criminal Procedure, 1973 (Cr.P.C), shall govern and regulate the proceedings before the Special Court.

(iii) the Special Court shall be 'deemed to be a Court of Sessions', AND the person conducting prosecution before the Special Court shall be deemed to be a public prosecutor.

. At a time, on 1 st December, 2016, Section 237 of I.B. Code came into force. It reads as follows; (emphasis supplied)

"237. Appeal and revision

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

. It is significant to note that in view of Section 237 of I.B. Code, Special Court trying the offences under the I.B. Code shall, 'deem to be a Session Court' and proceedings and orders of the Special Court shall be amenable to Appellate and Revisional jurisdiction of the High Court. Therefore, Court other than Court of Session (i.e. a Court of Judicial Magistrate, First Class and Court of Metropolitan Magistrate) if established as a Special Court for trying the offences under the I.B. Code, it shall be deem Session Court and judgments and orders of such Special Court would be amenable to jurisdiction of the High Court under Chapter-XXIX and XXX of the Cr.P.C.

9. It is petitioner's case that, the learned Additional Sessions Judge, 58th Court in which respondents filed a complaint, was not a "Issue Process", under SectionSpecial Court", under Section, for trying the offences under the I.B. Code, in terms of Section 236 thereof. To butress the arguments petitioners would rely on provisions of

Section 435 of the Companies Act, 2013; (i) originally enacted; (ii) amended in 2015; (iii) amended in 2017 :

(I) originally enacted

"435(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

(II). Through Companies (Amendment) Act, 2015, which came into effect from 29.05.2015, this Section was amended to reads as below :

"435(1)The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more, by notification, establish or designate as many Special Courts as may be necessary.

Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

(III) Section 435 was amended, by way of Companies (Amendment) Act, 2017 w.e.f. 7.05.2018. It reads as follows :

"435. Establishment of Special Courts

(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, by notification establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of-

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of

offences punishable under this Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences.

who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the Judge to be appointed is working."

10. Thus, it is noticeable, that the Companies Act (17th amendment) which came into effect from 7th May, 2018, for the first time, seeks to establish two different classes of a Special Court; (a) a Single Judge holding office as Session Judge or Additional Sessions Judge and (b) Metropolitan Magistrate or Judicial Magistrate First Class; who shall be appointed by the Central Government with concurrence of the Chief Justice of the High Court within whose jurisdiction, the Judge to be appointed is working. Original Section 435 of Companies Act, empowered Central Government to establish and designate Special Court for speedy trial of offences exclusively under the Companies

Act and the Special Court would consist of Single Judge holding office of Sessions Judge or an Additional Sessions Judge. Section 435 amended by Companies (amendment)

Act, 2015 came into effect on 29th May, 2015. This amendment empowered Central Government to establish and designate Special Court for speedy trial of offences only under the Companies Act prescribing punishment of imprisonment of two years or more, comprising of Sessions Judge or Additional Sessions Judge. That being so, offences under the Companies Act punishable with imprisonment for less than two years, Courts of Metropolitan Magistrate or Judicial Magistrate First Class were empowered, to try such offences, but this class of Courts were not Special Courts. After I.B. Code came into effect, on 1st December, 2016, once again

Companies Act was amended with effect from 7th May, 2018. By this amendment, for the first time legislature designate the Court of Metropolitan Magistrate and Judicial Magistrate First Class as Special Courts to try the offences, “Issue Process”, under Sectionin the case of other offences”, under Section.

11. The question is, which of these two classes of Special Courts, created by Companies Act (amendment) 2017, is empowered to try the offences under the I.B. Code.

12. It can be noticed that under Section 435 of the Companies Act, Special Court, comprising of Sessions Judge or Additional Sessions Judge, was in place since 2013 and it retained its jurisdiction to try the offences under the Companies Act. Amendment of 2017, for the first time brought into existence and empowered Central Government, to establish Court comprising of Metropolitan Magistrate or Judicial Magistrate First Class, as “Issue Process”, under SectionSpecial Court”, under Section, after I.B. Court came into force. Why for this another class of Court was created? The object to create another class of Special Court was to speed up the trial of offences under the I.B. Code. If that was not a object as contended by the Respondent, the question is, why for Central Government has been empowered to designate Court of Metropolitan

Magistrate or Judicial Magistrate First Class as Special Court under Section 435 of the Companies Act? Answer is simple. It is after Section 236 of I.B. Code, came into force Section 435 of the Companies Act was amended (17th amendment Act) on 7th May, 2018 and another class of Court (Metropolitan Magistrate and Judicial Magistrate First Class) have been created as Special Courts for speedy trial in offences under the I.B. Code. Therefore, keeping in mind, the said object, legislature thought it fit, not to burden a Special Court comprising of Sessions Judge or Additional Sessions Judge with the trials, also under I.B. Code. If trials in offences under I.B. Code were also to be tried by the Special Court comprising of Sessions Judge or Additional Sessions Judge, it would frustate to object of the speedy trial for which, the Special Courts have been established. This underlined object is visible from clause (a) and (b) of subsection (2) of Section 435 of Companies Act as amended, for quick reference let me reproduce the relevant provisions of Section 435.

435. Establishment of Special Courts

(1) The Central Government may, for the purpose of providing speedy trial of 1[offences under this Act, except under section 452 by notification], establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of -

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under the Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,

who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.]

. The plain reading of clause (a) of subsection (2) of Section 435 of the Companies Act in no uncertain terms implies or suggests that the Special Court consists of Judge holding office as a Sessions Judge is empowered to try the offences “Issue Process”, under Sectionunder this Act”, under Section. (emphasized). The phrase ‘under this Act’, only means the offences committed under the Companies Act. Therefore, the offences other than the Companies Act cannot be tried by the Special Court established under clause (a) of subsection 2 of Section 435. While on the contrary, Special Court consists of

Metropolitan Magistrate or Judicial Magistrate First Class proposed in clause (b) is invested with jurisdiction to try the “Issue Process”, under Sectioncase of other offences”, under Section. (emphasized). The phrase “Issue Process”, under Sectionother offences”, under Section, means offences under other Acts, than Companies Act and the offences under the Companies Act punishable with imprisonment less than two years.

13. Therefore, the omission of the phrase “Issue Process”, under Sectionunder this Act”, under Section in section 435 (2) (b) and its inclusion in section 435 (2) (a) of CA 2013 must be treated to be a deliberate one. It would follow that the clear mandate of the legislature is that the “Issue Process”, under SectionSpecial Court”, under Section comprising of a Sessions Judge or Additional Sessions Judge [i.e. 435 (2) (a)] is only to try offences under the CA 2013 itself which carry a punishment of imprisonment of two years or more. However, it is clear that “Issue Process”, under SectionSpecial Court”, under Section comprising of a Metropolitan Magistrate or Judicial Magistrate First Class is to try “Issue Process”, under Section**other offences**”, under Section. The phrase “Issue Process”, under Sectionother offences”, under Section contained in section 435 (2) (b), in contradistinction to section 435 (2) (a) of CA 2013, would

include (1) offences under the I.B. Code, and (2) offences under the CA 2013 but carrying punishment of imprisonment of less than two years. Mr. Arsiwala has correctly argued that provisions of law which curtail the general jurisdiction of criminal courts must be interpreted strictly. He relied on the judgment in the case of **Sachida Nand Singh Vs. State of Bihar** (1998) 2 SCC 493 it was held as below :

"Issue Process", under Section**Even if the clause is capable of two interpretations we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the Court must normally receive strict interpretation unless the statute or the context requires otherwise (Abdul Waheed Khan Vs. Bhawani [AIR 1966 SC 1718 : (1966) 3 SCR 617].**", under Section

14. It may also be noted that Section 236 (3) of the I.B. Code creates a deeming fiction that the Special Court trying offences under I.B. Code shall be

"Issue Process", under Sectiondeemed to be Court of

Sessions", under Section. If the intention of the legislature was that offences under I.B. Code are to be tried by the Sessions Court, then this subsection would have been unnecessary. According to the Petitioners, this is an indication as to the true and proper interpretation of Section 435 of the Companies Act, 2013 and Section 436 of I.B. Code. Thus for all the above reasons, the impugned proceedings have been instituted by the Respondents (Complainant) in the Court of Addtional Sessions Judge, were not sustainable for want of jurisdiction. As a consequence order, 'issue process' passed by the learned Additional Sessions Judge against the Petitioners, in a complaint by the Respondents/Board was without jurisdiction and therefore not sustainable equally. It is therefore to be held that Special Court "Issue Process", under Sectionwhich is to try offences under the I.B. Code is the Special Court established under Section 435 (2) (b) of the Companies Act, 2013 which consists of Metropolitan Magistrate or Judicial Magistrate First Class. The Petition is therefore allowed in terms of prayer clause (a).

15. As a result proceedings being Special Case No. 853/2020 instituted in the Court of Additional Sessions Judge, 58th Court, Mumbai are quashed and set aside. Rule is made absolute in the aforesaid terms.

16. At the request of the Counsel for the Respondent No.1, operation of this order is stayed for a period of four weeks from today.

(SANDEEP K. SHINDE)

MOHAMMAD NAJEEB MOHAMMAD QAYYUM

Digitally signed by MOHAMMAD NAJEEB MOHAMMAD QAYYUM
Date: 2022.02.14 15:52:19 +0530

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