NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

I.A. No. 2196 of 2020

in

Company Appeal (AT) No. 346 of 2018

IN THE MATTER OF:

Infrastructure Leasing & Financial Services Ltd.
IL&FS Financial Centre,
Plot C22, G Block,
Bandra Kurla Complex,
Bandra East, Mumbai - 400051 **...Applicant**

Versus

1. HDFC Bank Ltd.,
Legal and Secretarial Department,
Plot No. 31,
B Wing, 1st Floor,
Shivaji Marg, Najafgarh Industrial Area,
Moti Nagar, New Delhi 110015

2. Housing Development Financial Corporation Ltd.,
The Capital Court,
Munirka, Olof Palme Marg,
Outer Ring Road,
New Delhi 110067 **...Proposed Respondents**

with

I.A. No. 2262-2263, 2264-2266 of 2020

IN

Company Appeal (AT) No. 346 of 2018

IN THE MATTER OF:

Housing Development Financial Corporation Ltd.,
Raman House, H.T. Parekh Marg,
169, Backbay Reclamation,
Churchgate, Mumbai 400020 **...Applicant**

Versus

Infrastructure Leasing & Financial Services Ltd.
IL&FS Financial Centre,
Plot C22, G Block,
Bandra Kurla Complex,

Bandra East, Mumbai - 400051 **... Respondent**

with

I.A. No. 2330-2331, 2332-2333 of 2020

in

Company Appeal (AT) No. 346 of 2018

IN THE MATTER OF:

HDFC Bank Ltd.,
Legal and Secretarial Department,
Plot No. 31,
B Wing, 1st Floor,
Shivaji Marg, Najafgarh Industrial Area,
Moti Nagar, New Delhi 110015 **...Applicant**

Versus

Infrastructure Leasing & Financial Services Ltd.
IL&FS Financial Centre,
Plot C22, G Block,
Bandra Kurla Complex,
Bandra East, Mumbai - 400051 **... Respondent**

For Appellant / Applicant: Mr. Ramji Srinivasan, Sr. Advocate with Mr. Kuber Dewan, Ms. Neeharika Aggarwal, Ms. Trisha Raychaudhuri, Ms. Rajshree Chaudhary, Advocates 2 Company Appeal (AT) No. 346 & 347 of 2018 in I.A. Nos. 2196, 2262, 2264, 2330, 2331, 2332, 2333, 2966 of 2020, 2505 of 2021, 557, 645 of 2022

Mr. Sanjay Shorey, Director Legal & Prosecution, MCA,

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Raunak Dhillon, Mr. Abhijeet Das, Mr. Adarsh Saxena, Mr. Vikash Kumar Jha, Mr. Shubhankar Jain, Ms. Isha Malik, Mr. Nihaad Dewan, Mr. Ritu Vishwakarma, Ms. Drishti Das, Advocates Mr. Abhirup Dasgupta, Mr. Ishaan Duggal, Ms. Bhawana Sharma, Advocates for Tata Power Consolidated Provident Fund and Pramerica Life Insurance.

Mr. Sanjay Kapur, Ms. Megha Karnwal, Mr. Arjun Bhatia, Advocates for SBI

Mr. Puneet Taneja, Ms. Laxmi Kumar, Mr. Manmohan Singh Narula, Advocates for GAIL, Intervenors

Mr. Rajiv S Roy and Avrojyoti Chatterjee, Advocates for UCO Bank
Mr.Vishnu Sharma and Anupama Sharma, Advocate for Noida Authority, Intervenor
Mr. Atul Sharma, Mr. Abhishek Sharma, Ms. Ashly Cherian and Ms. Harshita Agarwal, Advocates for CDTE and DTEL in I.A. No. 59 and 1958 of 2021
Mr. Sidharth Sethi, Ms. Tanya Tiwari, Mr. Avinash Das, Advocates for PTC India FSL, Intervenor
Mr. Amit Tyagi and Shubhangi Tiwari, Advocates for Sapient Consulting EPF and TLG India Pvt. Ltd. EPF

For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. R. Sudhinder, Mr. Sandeep Singhi, Mr. Udit Mendiratta, Mr. Krishnava Dutt, Mr. Gaurav Mathur, Ms. Ekta Bhasin, Ms. Aastha Trivedi, Ms. Diksha Advocates for Applicants in I.A. No. 2262, 2264, 2966, 2196 of 2020 & 2505 of 2021.
Ms. Meenakshi Arora, Sr. Advocate with Mr. Divyansh Khurana, Applicant in I.A. No. 517 of 2022
Mr. Chetan Mittal, Sr. Advocate with Mr. Aabhas Kshetarpal, Mr. Rajesh Goel, Mr. Jatin Kumar, Mr. Udit Garg, Mr. Himanshu Gupta, Advocates for Applicants in I.A No. 1982 of 2021
Mr. Rakesh Tiwari (RD, Western Region) and Ms. Wamika Trehan (Intervenor for Aditya Birla Finance Limited) Advocates.
Mr. Nakul Dewan, Sr. Advocate with Mr. Pranaya Goyal, Mr. Sameer Pandit, Ms. Neelu Mohan, Mr. Chiranjivi Sharma, Mr. Dharav Shah, Ms. Sarrah Khambbati, Mr. Madhav Ved, Advocates in I.A. No. 2330-2333 of 2020 for HDFC

J U D G E M E N T

Ashok Bhushan, J:

1. All these Applications are arising from common facts and issues and have been heard together and are being disposed of by this Common order. Before we notice the prayers in the Applications above named, it is relevant

to capture certain background facts which have necessitated filing up above applications:

i. On October 1, 2018, Hon'ble National Company Law Tribunal, Mumbai Bench passed an order in Petition No. 3638 (M.B.) of 2018, filed by the Union of India ("UoI") through Ministry of Corporate Affairs under Sections 241 and 242 of the Companies Act, 2013, whereby the existing board of directors of the IL&FS was superseded and a new board of directors was appointed to take charge of the affairs.

ii. Subsequently, vide its order dated October 12, 2018, the Hon'ble National Company Law Tribunal, Mumbai Bench declined the UoI's prayer for grant interim relief in the nature of moratorium, akin to a moratorium under Section 14 of the IBC, in respect of the IL&FS and its 348 group companies. Being aggrieved by this order, the present appeals were filed before this Hon'ble Tribunal.

iii. Thereafter, the October 15, 2018 Order was passed by this Hon'ble Tribunal in respect of the present appeals, which, inter-alia, stayed: (i) the institution or continuation of suits or any other proceedings against the IL&FS or its 348 group companies, before any court/ tribunal/ arbitration panel/arbitration authority; (ii) any action to foreclose, recover or enforce any security interest created over the assets of the IL&FS or those of its 348 group companies; and (iii) the acceleration, premature withdrawal or other withdrawal,

invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations availed by the IL&FS and its 348 group companies.

iv. The March 12 Judgment by this Hon'ble Tribunal affirmed the October 15 Order and also upheld the jurisdiction of Hon'ble Tribunal to pass interim orders, akin to orders declaring moratorium under Section 14 of the IBC, under Sections 241 to 242 of the Companies Act, 2013.

v. Infrastructure Leasing & Finance Services Limited (hereinafter referred to as '**Borrower**') approached the Housing Development Finance Corporation Limited (hereinafter referred to as '**Lender**') with request to avail Financial Assistance. By Sanction Letter dated 22nd June, 2018, the Lender sanctioned a financial facility of Rs. 400 Crores to the Borrower. On 25th June, 2018, a Master Facility Agreement was entered between Borrower and Lender for amount of Rs. 400 Crores. The Master Facility Agreement contemplated opening of a separate Escrow Account with Housing Development Finance Corporation Bank Limited (hereinafter referred to as '**Escrow Bank'**). Along with Facility Agreement, Assignment Agreement dated 25th June, 2018 was also executed between the Borrower and Lender. The Assignment Agreement contemplated that it has been agreed that the authorised indebtedness incurred by the Borrower in

terms of the Facility Agreement by way of the Facility together with the interest thereon shall be payable from the gross income and revenue to be derived from the operation of the Business Centre Services Agreements//Lease/Leave and License Agreement/s as more particularly detailed in the Schedule –I.

vi. All the receivables derived/to be derived from the operation of the Borrower's Contracts, sufficient portion of which, to pay the principal and interest as and when the same shall become due in terms of the said Facility Agreement was assigned and pledged and was to be set aside for that purpose on the same day a Power of Attorney by way of Security Interest was also executed between the Borrower and Lender.

2. We shall hereinafter notice the relevant part of the Facility Agreement, Assignment Agreement and Power of Attorney while discussing the submissions of Learned Counsel for the parties:

3. Events after the Order dated 15th October, 2018 passed in the Appeal:

i. After the Order dated 15th October, 2018, Borrower informed the Escrow Bank about the Interim Order dated 15th October, 2018 by an Email Dated 16.10.2018. On 19.10.2018, Lender instructed the Escrow Bank to transfer monthly instalment from Escrow Account to Lender's Account. On 23.10.2018, Borrower informed the Lender about the Interim Order dated 15.10.2018 stating that Interim Order restrained the Lender from appropriating the Borrower's Account with Escrow Bank.

Borrower called upon the Lender by Letter dated 27.10.2018 to reverse the debit of Rs. 6.24 Crores and credit the amount back into the Account of the Borrower. The Lender responded to Borrower's Letter stating that receivable in respect of the secured property were assigned by the Borrower in favour of the Lender and therefore secured property ceased to be the asset of IL&FS.

ii. On 04.01.2019, Borrower called upon the Lender to reverse the amount which were debited by the Escrow Bank in the Escrow Accounts. By the Order dated 04.02.2019 passed in this Appeal, this Tribunal directed the Union of India and IL&FS to approach Hon'ble Justice (Retd.) D.K. Jain for consent and discuss the terms and conditions to supervise the operation of Resolution Process.

iii. Ministry of Corporate Affairs filed an Affidavit dated 07.08.2019 in the Appeal stating that certain banks were still debiting amounts from IL&FS group entities classified as Amber and Red without authorization from the Board and such debits were in contravention of the Order dated 15.10.2018. Direction was sought to restrain Banks and Financial Institutions from debiting the accounts of the Applicant and its group entities and/or appropriating the funds held in the said accounts without authorization of IL&FS and the relevant group entities; and further return/refund/release such amounts that have been debited.

iv. This Tribunal on 08.08.2019 passed following Order:

".....If any of the Bank/ Financial Institution has debited any amount in violation of order of this Appellate Tribunal dated 15th October, 2018, it will be open to Union of India/ILFS to bring the same to the notice of Hon'ble Justice Shri D. K. Jain for appropriate orders and also intimate the Bank/ Financial Institution that it may amount to contempt of court.

xxx xxx xxx

Post these appeals 'for orders on 5th September, 2019 at 3:00 PM on the top of the list."

v. After Order of this Tribunal dated 08th August, 2019, Borrowers sent a Letter dated 22.08.2019 to Hon'ble Justice (Retd.) D.K. Jain to pass appropriate Order. Representation was made by Borrower on 28.08.2019. Letter dated 03.09.2019 was sent by the Lender reiterating that monies in the escrow account were exclusive property of the Lender and Borrower does not have any claim of the ownership. Escrow Bank wrote on 04.09.2019 to Borrower that Escrow Bank had acted in terms of Escrow Agreement and was obliged to hold the money lying in trust for the purpose for which it was received i.e. for the benefit of the Lender. Hon'ble Justice (Retd.) D.K. Jain issued show-cause notice dated 30.09.2019 to the Lender. Notice was also issued to the Escrow Bank on 10.10.2019. Escrow Bank on 23.10.2019 wrote to Hon'ble Justice (Retd.) D.K. Jain stating

that receivables stood assigned in favour of the Lender and monies received were not the asset of the Borrower. Hon'ble Justice (Retd.) D.K. Jain granted personal hearing to the parties. On 12th May, 2020, Hon'ble Justice (Retd.) D.K. Jain recommended the Escrow Bank and Lender to maintain status quo in Escrow Account till a final view is taken on the Application filed by the Borrower. Escrow Bank stopped debiting any amount from the Escrow Account and informed the Borrower and Lender of the same. On 03rd July, 2020, final order was passed by the Hon'ble Justice (Retd.) D.K. Jain holding that the acts of the Lender and Escrow Bank in debiting the amount from the Escrow Account are violation of the Orders passed by the NCLAT. Lender and Escrow Bank were accordingly directed to purge themselves within two weeks.

4. Now, we proceed to notice the prayers in different I.As filed by the Applicants as noted above.

i. **I.A. No. 2262-2263 of 2020**

I.A. No. 2262-2263 of 2020 was filed by the Lender praying for following reliefs:

> *"In view of the facts and circumstances of the case, the Applicant most humbly prays that this Hon'ble Tribunal be pleased to:*

(i) quash and set aside the Impugned Order dated May 12, 2020 passed by Hon ble Mr. Justice D.K. Jain (Retd.) to the present Application; and

(ii) pass an ad interim order staying the operation of the Impugned Order dated May 12, 2020 passed by Hon'ble Mr. Justice D.K. Jain (Retd.) during the pendency and disposal of the present application;

(iii) pass any such other order/ judgment, as this Hon'ble Tribunal may deem fit, in the given facts and circumstances of the present case, in favor of the Applicant."

ii. **I.A. No. 2264-2266 of 2020**

I.A. No. 2264-2266 of 2020 was filed by the Lender praying for following reliefs:

"In view of the facts and circumstances of the case, the Applicant most humbly prays that this Honble Tribunal be pleased to:

(i) Quash and set aside the aforesaid impugned order dated July 3, 2020 passed by Hon ble Mr. Justice D.K. Jain (Retd.) and annexed at Annexure A/l to the present Application;

(ii) Pass an ad interim order granting stay of operation of the impugned order till the final disposal of the present application;

(iii) Pass Such further or other Order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

iii. **I.A. No. 2196 of 2020**

I.A. No. 2196 of 2020 has been filed by IL&FS and Ors. and following prayers have been made:

"In view of the aforesaid and in wider public interest, it is most respectfully prayed that this Hon'ble Tribunal may be pleased to:

a) Direct Respondent No. 1/Escrow Bank and/or Respondent No.2/Lender to forthwith release/refund/reverse the amounts debited till date, i.e. Rs. 112.79,18,348 (Rupees One Hundred Twelve Crore Seventy Nine Lakh Eighteen Thousand Three Hundred Forty Eight), from the accounts of the Applicant/IL&FS towards debt service payments in violation of the October 15 Order passed by this Hon'ble Tribunal, as affirmed vide the Judgement passed by this Hon'ble Tribunal on March 12, 2020 and in compliance with the order passed by Hon'ble (Retd.) D.K. Jain on July 3, 2020;

b) Direct the Respondent No. 1/Escrow Bank and the Respondent No.2/ Lender to comply with Order dated July 3, 2020 passed by Hon'ble Justice (Retd.) D.K. Jain, in exercise of the powers granted to him by this Hon'ble Tribunal vide order dated August 8, 2019 of this Hon'ble Tribunal;

c) Restrain Respondent No. 1/Escrow Bank from making any debits from the Escrow Account of the Applicant/IL&FS, other than for making any going concern payments in compliance with the orders passed by this Hon'ble Tribunal;

d) Direct the Respondent No.1/Escrow Bank and the Respondent No.2/ Lender to comply with order dated May 29, 2019 of this Hon'ble Tribunal requiring the banks to release funds to ensure that the Applicant/IL&FS is able to meet 'going concern' payments;

e) pass such other or further order(s) directions(s) as this Hon'ble Tribunal may deem just, necessary and expedient in the interest of justice and in the facts and circumstances of the case"

iv. **I.A. No. 2330-2331 of 2020 and I.A. No. 2332-2333 of 2020**

The above I.As have been filed by the HDFS Bank Limited. In I.A. No. 2330 of 2020, the HDFS Bank Limited prayed for following reliefs:

"In light of the facts and circumstances narrated above, it is most humbly prayed that this Hon'ble Tribunal be pleased to:-

a. *Set aside the Order dated 3rd July, 2020 passed by Hon'ble Mr. Justice (Retd.) D.K. Jain; and*

b. Hold and declare that the Applicant is not in contempt or violation of the Order dated 15.10.2018 passed by this Hon'ble Tribunal;

c. Grant all other just and equitable reliefs for the effective adjudication of the subject matter involved in the present application and for its implementation."

In I.A. No. 2332 of 2020, the HDFS Bank Limited has prayed for setting aside the Order dated 12th May, 2020 of Hon'ble Justice (Retd.) D.K. Jain directing to maintain Status quo. After the Order dated 12th May, 2020, the Escrow Bank stopped debiting any amount from the Escrow Account and informed the Lender and Borrower accordingly.

5. The parties have filed their Replies as well as Rejoinders in the aforesaid Applications. All the Applications raises common issues of facts and law which need to be considered together. It shall be sufficient to consider pleadings, Reply and Rejoinder filed in I.A. No. 2196 of 2020 which contains the pleas of all three parties i.e. 'Borrower', 'Lender' and 'Escrow Bank' which shall be sufficient to decide all the above noted Applications.

6. We thus proceed to note the submissions made by Learned Counsel for the parties in I.A. No. 2196 of 2020.

7. Mr. Ramji Srinivasan, Sr. Advocate has made submissions on behalf of IL&FS Limited (Borrower). Mr. Ramji Srinivasan submits that the Facility Agreement dated 25th June, 2018 and other Agreements executed on 25th June, 2018 clearly indicates that the Facility advanced to the Borrower was

loan repayable within 96 months. The Security Interest was created by the Borrower and the receivables were nothing but security for repayment of the Loan. The Escrow Account was created in the Escrow Bank to facilitate the repayment of principal and interest as per the repayments schedule. There was no transfer of title in the receivables from Borrower to Lender. The receivables deposited in the Escrow Bank were the assets of the Borrower which were deposited in the Escrow Bank as Security for the repayment of the loan of Rs. 400 Crores. Till 15.10.2018, the Escrow Account was debiting the amount as per Escrow Agreement but after the Interim Order dated 15.10.2018 the Escrow Bank was not entitled to debit any amount from the Escrow Bank to the Lender's Account which was prohibited by Interim Order dated 15.10.2018 passed by this Tribunal in the present Appeal. The Borrower gave security for repayment of loan by assigning the lease rental to the extent of principal and interest payable per month. The Facility Agreement and all the Agreements clearly depicted relationship of the Borrower and the Lender, the Assignment Agreement, cannot be read in violation. The Escrow Bank is holding amount in the Account as a trustee and Power of Attorney Agreement executed on 25th June, 2018 was by way of Security Interest. Repayment was secured by receivables and additional to other security. Assignment of receivables is only security and not transfer. It is submitted that detailed written submissions were filed before Hon'ble Mr. Justice (Retd.) D.K. Jain by the parties and after considering each and every submission, the Order dated 03rd July, 2020 was passed by Hon'ble Mr. Justice (Retd.) D.K. Jain. The Order dated 3rd July, 2020 was passed by Hon'ble Mr. Justice (Red.) D.K. Jain after considering all the

submissions raised by the Lender, borrower and Escrow Bank and after examining the principal and facility agreement and all other Agreements and attendant circumstances. Under the Order dated 3rd July, 2020, the Lender and Escrow Bank are obliged to return the amount debited i.e. Rs. 112,79,18,348/- crores.

8. Mr. Arun Kathpalia, Sr. Advocate appearing for HDFC Limited (Lender) refuting the submissions of Learned Sr. Counsel for the Applicant submitted that mere perusal of the transaction documents makes it clear that the Facility extended to Borrower is Lease Rental Discounting (LRD) Loan Transaction which is materially different from a traditional loan transaction. An LRD loan transaction involves assignment/sale of the rent receivables by the Landlord to the Financing Entity at a discounted value as per transaction documents. A certain component of lease rentals arising from the use of the TIFC Property i.e. sufficient for repayment of the facility, has been irrevocably assigned in favour of the Lender till repayment of the said Facility. Clause 5(c) of Schedule I of the Facility Agreement recognizes that the assigned receivables are the exclusive property of the HDFS Limited. The assigned receivables are clearly the property of the HDFS Limited. The Borrower has no right/title or interest in the monies/receivables/ amount deposited in the Escrow Account. The relief of release/refund/reversal of amounts debited from the Escrow Account stating that the same is in line with the Order dated 3rd July, 2020 issued by Hon'ble Justice (Retd.) D.K. Jain, is misplaced since the same has not attained finality and still under scrutiny by this Tribunal in the I.A.s filed by the Lender. It is submitted that neither October, 15 Order nor March, 12

Judgment prohibit the Licensees of the TIFC property to deposit monthly lease rent in the Escrow Account, nor the Orders held that Lender is disentitled from utilising the assigned receivables. The transaction in question is in no manner prohibited by Order dated 15.10.2018. Order dated 15.10.2018 was restricted to the assets of the IL&FS and the assigned receivables not being the assets of the Applicant, were outside the purview of the Order dated 15.10.2018. Hon'ble Justice (Retd.) D.K. Jain in Order dated 3rd July, 2020 has unduly enlarged the scope of 15.10.2018 order. The Hon'ble Committee did not consider that action of distribution of the rentals/receivables being a property of the Lender from the Escrow Account is in no manner in violation of any direction of 15th October, 2018 Order. The Borrower is not entitled for any reliefs as claimed in I.A. No. 2196 of 2020.

9. The Escrow Agreement specifically provides that any deposit made in the Escrow Account shall be irrevocable as per the Escrow Agreement. Neither Borrower nor Lender have any access to Escrow Fund. Mr. Arun Kathpalia elaborating the submissions stated that there is a complete and absolute transfer of ownership of certain portion of the rent receivables by Respondent No. 1 in favour of the Lender which was sufficient to pay the principal and interest as and when became due in terms of the Facility Agreement. What was assigned is not the entire rent receivables but only a portion of the same sufficient to cover the principal and interest, rest of the portion has not been assigned and which is continuing to be owned by Respondent No. 1 (IL&FS). The Borrower thus continued to have right/title and interest in the residual receivables which was also secured.

10. Mr. Nakul Dewan, Sr. Advocate appearing for the HDFS Bank Limited (Escrow Bank) submitted that action and act of debiting of the Escrow Account was not in breach of Order dated 15.10.2018. As an Escrow Agent, the Bank is merely providing the services to the parties to the Escrow Agreement. He submits that recovery/enforcement of security interest is an issue entirely between Borrower and Lender. The Escrow Agent is bound to act as per the Escrow Agreement unless specifically restrained by a Court. Mr. Dewan further submits that Interim Moratorium did not restrain the Escrow Agent from performing its obligation under respective Escrow Agreement. The Escrow Bank is not party to the Facility Agreement. Irrevocable Power has been given by the Borrower to the Lender. I was not lender of the Borrower and the name of the HDFC Bank was wrongly mentioned in the list which was submitted by the Affidavit of Ministry of Corporate Affairs as Lender of IL&FS. No money/financial facility was advanced by the Escrow Bank to the Lender. Order dated 15.10.2018 never directed any Escrow Agent. No contempt has been committed by the Escrow Bank. There is no occasion to purge the contempt by the Escrow Bank.

11. Mr. Ramji Srinivasan, Sr. Advocate in rejoinder reiterated that the present is not the case of any debt purchase. Each part of the Agreement is a loan agreement. In the present case charge was registered. The Agreement required payment of principal and interest. Mr. Ramji Srinivasan has referred to conclusion accorded by Hon'ble Mr. Justice (Retd.) D.K. Jain and placed reliance on the said conclusion.

12. Learned Counsel for the parties have placed reliance on various judgements. Mr. Kathpalia has also placed reliance on few English Judgments and other Judgments which shall be referred to by considering the submissions in this Appeal.

13. We have heard Learned Counsel for the parties and perused the record.

14. The issue in these Applications is as to whether the action of Escrow Bank and the Lender debiting the amounts from the Escrow Account is in breach of interim order dated 15.10.2018 passed in Company Appeal (AT) No. 346 of 2018. For answering the above, following two issues need consideration:-

(i) Whether IL&FS has any claim whatsoever on the receivables which are the subject matter of an Assignment Agreement in favour of the Lender deposited in the Escrow Account?

(ii) Whether by debiting the money so assigned from the Escrow Account even after 15.10.2018, can Lender and Escrow Bank be said to have violated the order dated 15.10.2018?

15. For answering the above issues, we need to notice the real nature of the 'transaction documents' entered between the parties on 25.06.2018. We need to thus notice the certain relevant parts of the transaction documents throwing light on the issues which have arisen for consideration in these Applications. The 'Housing Development Finance Corporation Limited' (Lender) by Sanction Letter dated 22.06.2018 sanctioned an amount of

Rs.400 Crores for a term of 96 months repayable by IL&FS from the cash flows to be assigned to the HDFC from the commercial premises being let out on leave and license rental payments. Clauses 6 and 7 of the letter provides as follows:-

6.	Repayment	Financial Facility will be repaid by you from the cash flows to be assigned to HDFC from the commercial premises being let out by you on leave and license/ rental basis to tenant of the said commercial premises. Indicative repayment scheduled attached as Annexure-1.
7	Security	1. Mortgage of The IL&FS Financial Centre situated at Plot No.22, G Block, Bandra Kurla Complex, Bandra East, Mumbai- 400051 admeasuring 372.537 sq. ft. 2. Assignment of receivables from the IL&FS

16. After the aforesaid sanction, lender and borrower entered into a 'Master Facility Agreement' on 25.06.2018. Clause 2 of the Agreement innovates various definitions. Clause 2(l) defines "Due Date", clause 2(aa) defines 'repayment', clause 2(cc) defines 'security' and clause 2 (ee) defines 'secured property' which are to the following effect:-

> *"**2. DEFINITIONS***
>
> *(l) **"Due Date"** shall mean such dates on which any amount including principal, interest or other charges in respect of the Facility is payable to fall due in terms of this Agreement and/ or other transaction documents.*
>
> *(aa) **"Repayment"** shall mean payment obligation of the Borrower on the Due Date/s in terms of this*

Agreement as more particularly described in the ***Schedule-II****.*

(cc) ***"Security"*** *shall have the meaning as described in Clause-8 of this Agreement and also described in the* ***Schedule-III****.*

(ee) ***"Secured Property"*** *shall mean the immovable property, including all accretions, incidents arising there from offered to secure the repayment of the Facility as, principal security, collateral and/or additional security, more particularly described in the* ***Schedule-III.****"*

17. The Agreement contemplated borrower entering into Escrow Agreement on such terms as agreed by the lender. The power was to give irrevocable instructions to Escrow Bank. Clause 8 of the Agreement deals with the 'security interest'. Clause 8(8.1) is as follows:-

*"**8. SECURITY INTEREST- DESCRIPTION/ CREATION/ PERFECTION***

8.1. The Borrower create Security Interest in such form and manner as instructed by Lender on the asset/ property more particularly described in ***Schedule-III*** *to this Agreement as the principal Security for securing the repayment of the Facility.*

The Borrower hereby unconditionally and irrevocably undertakes and confirms to create security interest on the said Secured Property in favour of the Lender and perfect the security

creation as mentioned herein above in favour of the Lender in such form and manner as may be deem fit by Lender within 6 months from the date of first disbursement of the Facility. The Company further undertakes and confirms to open an Escrow Account within 30 days of the first disbursement of the Facility for the assignment of receivables arising/ accruing from the TIFC Property and creating charge on the said Escrow Account in manner and form as made be deem fit by Lender."

18. Clause 13 of the Agreement provided for 'Assignment/Transfer'. Clause 13 (13.1) is as follows:-

"***13. <u>ASSIGNMENT/ TRANSFER</u>***

13.1. The Borrower shall not assign or transfer all or any of its rights, benefits or obligations under the Facility Agreement and the Transaction Documents without the approval of Lender. Lender may, at any time, assign or transfer all or any of its rights, benefits and obligations under the Facility Agreement and the Transaction Documents. Notwithstanding any such assignment or transfer, the Borrower shall, unless otherwise notified by Lender, continue to make all payments under the Facility Agreement to Lender and all such payments when made to Lender shall constitute a discharge to the Borrower from its liabilities only to the extent of such payments."

19. Clause 15 covered 'Event of Default'. Clause 15.2 deals with 'Consequence of Default and remedies'. Schedule-1 of the Agreement provides for 'Special Conditions for Rental Discounting. 'Receivables' is defined in Clause 1 in following words:-

> *"**Receivables"** shall mean and include gross income and revenue derived from the operation of Client's Contracts and shall include Deferred Receivables as stated in Appendix-1."*

20. Clause 4 of Schedule-1 of the Agreement deals with 'Borrower's Contracts Specific Covenants'. Clause 4(c) provides:-

> *"c) The Borrower shall not alter, change or modify the terms of the Borrower's Contracts in so far as it relates to such terms which would have an adverse effect or impact on the Receivables and/ or which shall otherwise detrimentally effect the Lender's interest in the Secured Property and income thereof."*

21. Clause 5 of Schedule-1 deals with 'Security and Repayment Specific Covenants'. Clause 5(a), (b) & (c) are as follows:-

> *"**5. SECURITY AND REPAYMENT SPECIFIC COVENANTS***
>
> *a) The Borrower agrees that the Facility shall be secured by exclusive security interest on the Receivables in such mode and manner as deemed fit and desired by the Lender.*

b) The Borrower shall, on execution of this Facility Agreement, assign the Receivables in favour of the Lender on such terms as would be entered into between the Borrower and the Lender and pursuant thereto shall execute a Power of Attorney and Assignment and Management Agreement in line with the draft enclosed herewith in Appendix-3 to the Special Conditions.

c) The Borrower agrees that the Receivables shall be exclusive property of the Lender for the purpose of secured repayment of the Facility and as such the Borrower will not make any further borrowing on the strength of the Receivables as being Borrower's Property."

22. An 'Escrow Account Agreement' was also entered between the lender and the borrower on the same date under which borrower has to open an Escrow Account with the Escrow Bank. Clause (C) of the Escrow Account Agreement provided:-

"(C) The Borrower has agreed that, the payments to be collected/ received by the Borrower from the clients of Business Service Centre/ License/Lessee of various Units/ properties (hereinafter referred to as "the said Units") built and/or to be built and leased/ to be leased on the Secured Property detailed in Schedule B hereunder (hereinafter called "the said Property") for/against which the Facility granted/ to be granted by Lender as per the Offer Letter and Facility Agreement, shall be credited to the said Escrow Account (hereinafter referred to as "the Receivables") and the Lender shall on satisfaction of the condition as described in Item No.6 of Schedule A hereunder, adjust all the amounts to be paid by the Borrower to the Lender under the Facility Agreement, from time to time, out of the amounts credited in the said Escrow Account, and permit the transfer in the Designated account of the Borrower opened with the Escrow Bank,

the amount as mentioned in Item No.7 of Schedule A out of the remaining balance in the said Escrow Account after such adjustment as agreed hereunder."

23. Clause-3 of the Escrow Account Agreement provides 'Bank's Covenants' which reads as follows:-

*"**3. BANK'S COVENANTS:***

(a) The Escrow Bank hereby agrees to act as such and to accept all monies to be delivered to or held in the Escrow Account, pursuant to the terms and conditions of this agreement. This Escrow Bank shall hold and safeguard the Escrow Account, during the terms of this Agreement and shall hold all cash in the Escrow Account, at the request of the Borrower and to safeguard the repayment of the Facility and for the benefit of the Borrower and the Lender in accordance with the terms mentioned herein.

(b) The Escrow Bank shall not be required to verify and ensure that the money(ies) deposited is the Receivables and all money(ies) deposited at any time in any quantum should be treated as the Receivables.

(c) The Escrow Bank agreed that during the currency of the term of this Agreement as may be amended from time to time, the Escrow Bank shall ensure that the Escrow Account is operated and maintained as per the terms set out herein and shall not permit any deviation, without the written consent of the Lender.

(d) The Escrow Bank agrees that all money(ies) received by it under this Agreement shall, until

transferred in accordance with this Agreement, be held in trust for the purposes for which they were received, and shall be segregated from other accounts of the constituents of the Escrow Bank and from the funds and Property of the Escrow Bank, in accordance with the banking law and practice.

(e) The Bank shall transfer such amounts to the account of the Borrower which are in excess of the minimum balance required to be maintained in the Escrow Account in accordance with the terms stated herein."

24. Clause 4(b) deals with 'Operation and Maintenance'. Clause 4(a), (c) and (e) provides as follows:-

"4. <u>OPERATION AND MAINTENANCE</u>

(a) The Borrower agrees that, the payments to be collected/ received by the Borrower from the Business Service Centre/ Licensee/ lessee of various Units/properties built and/or to be built and leased/to be leased on the Property which is more particularly described in Schedule of the said Facility Agreement (hereinafter called "the said Property") for/against which the Facility granted/ to be granted by Lender as per the Offer Letter and Facility Agreement, shall be credited to the said Escrow Account (hereinafter referred to as "the Receivables") and the Lender shall on satisfaction of the condition(s) as described in Item No.6 of Schedule A hereunder, adjust all the amounts to be paid by the

Borrower to the Lender under the Facility Agreement, from time to time, out of the amounts credited in the said Escrow Account, and transfer to the Designated Account of the Borrower, the amount as mentioned in Item No.7 of Schedule A out of the remaining balance in the said Escrow Account after keeping the minimum balance in the Escrow Account.

(c) The Lender shall be entitled to instruct the Escrow Bank from time to time to transfer amounts from the Escrow Account including as stated hereinabove. The Lender shall appropriate these monies towards the repayment of the Facility, as and when the same is due and payable in full together with all other amounts payable under the Facility Agreement.

(e) The Borrower hereby irrevocably authorizes the Escrow Bank to pay and to transfer the money(ies) received in the Escrow Account to the Lender as per the terms and conditions agreed in the Offer Letter, Facility Agreement and this Agreement as may be applicable from time to time."

25. An 'Assignment and Administration Agreement' was also entered on the same date i.e. 25.06.2018 with lender and borrower. 'Assignment and Administration Agreement' provided for assignment of the receivables by the borrower to lender. Clause 3 is as follows:-

"3. It has been agreed that the authorised indebtedness incurred by the Borrower in terms of the

Facility Agreement by way of the Facility together with the interest thereon shall be payable from the gross income and revenue to be derived from the operation of the Business Centre Services Agreements/ Lease/ Leave and License Agreement/s as more particularly detailed in the Schedule-1 ("Borrower's Contracts") to this Agreement (hereinafter referred to as "Receivables").

xxx xxx xxx

1. ***Assignment and Pledge of Receivables***

All the Receivables derived/ to be derived from the operation of the Borrower's Contracts, sufficient portion of which, to pay the principal and interest as and when the same shall become due in terms of the said Facility Agreement, is hereby assigned and pledged and shall be set aside for that purpose and this Assignment and Pledge shall extend to and include any assessments that may be levied pursuant to Clause 4(a) hereof."

26. A Power of Attorney was also executed by the borrower on 25.06.2018. By the Power of Attorney, the borrower had irrevocably nominated, constituted and appointed HDFC as the true and lawful attorney on behalf of the borrower.

27. A perusal of the relevant conditions of transaction documents, as noticed above, makes it clear that a facility of Rs.400 Crores was advanced by the lender to the borrower payable in 96 months with tentative repayment schedule. The amount of interest component and principal

component payable on each month has been provided in Schedule 2 of the Agreement. The immovable property of the borrower i.e. 'IL&FS Financial Centre, Plot-No. 22, G Block, Bandra Kurla Complex, Bandra East, Mumbai was mortgaged as security to the facility. All the right, title and interest of the borrower in the receivables in respect of the TIFC Property was assigned to the lender. All receivables were to be deposited by the tenants of the IL&FS in the Escrow Account which Escrow Account was to be operated by the Escrow Bank on the irrevocable instructions issued by the borrower to the lender.

28. Now we may recapitulate prohibition which was imposed by the impugned order dated 15.10.2018. Following are the exact words by which this Tribunal on 15.10.2018 imposed prohibition:-

> *"Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of*
>
> *(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and*
>
> *(ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'IL&FS' and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by 'IL&FS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

(iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the 'IL&FS' and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default.

(v) Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS' and its 348 group companies.

The interim order will continue until further orders and not be applicable to any petition under Article 226 of the Constitution of India before any Hon'ble High Court or under any jurisdiction of the Hon'ble Supreme Court."

29. We need to proceed to examine the nature of prohibition as imposed by above noted directions (i) to (v) and to find out as to under which prohibition the acts complained of by the IL&FS can fall.

30. The prohibition (i) was with regard to the institution or continuation of suits or any other proceedings by any party or person against IL&FS and its group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority. The present is not a case where any suit or any other proceedings have been instituted by the lender or Escrow Bank, hence, the present is not a case which can be covered by prohibition (i).

31. The prohibition (ii) provides any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'IL&FS' and its group companies. The thrust of the submission of Counsel for IL&FS is that the debiting of the Escrow Account by the lenders falls under prohibition (ii). Whether present is a case where lender has foreclose, recover or enforce any security interest created over the assets of the IL&FS is the question which has to be answered. The crux of the submission of Shri Ramji Srinivasan, Learned Senior Counsel is that the receivables deposited in the Escrow Account are the assets of the IL&FS and its security interest created over the assets of the IL&FS which having recovered by the lenders in breach of the order dated 15.10.2018. The above submission can be divided in two parts:-

(i) Firstly, whether the receivables deposited in the Escrow Account are the assets of the IL&FS? and;

(ii) Whether by deposit of receivables in the Escrow Account, a security interest is created over the assets of the IL&FS which has been enforced by the lender?

32. Coming to the first part of the submission that the deposits of receivables in Escrow Account are the assets of the IL&FS, we need to turn to the relevant conditions of the transaction documents and various agreements entered between the parties to find out the answer. 'Receivables' have been defined under Schedule-1 of the Agreement under the heading 'Special Conditions for Rental Discounting'. The 'receivables' have been defined to mean and include gross income and revenue derived from the operation of Client's Contracts and shall include Deferred Receivables as stated in Appendix-1 of the Schedule-1. The Schedule-1 contains details of occupant/ tenants of the IL&FS Financial Service Centre with total payments of rental per month. All receivables have been assigned by Assignment and Administration Agreement dated 25.06.2018 by the borrower in favour of the lender which was set aside for the purposes of payment of principal and interest as and when same becomes due.

33. Learned Counsel for both the parties has addressed elaborate submission on the nature and character of the 'Assignment' as used in the Assignment Agreement between the parties. The 'Assignment' has been defined in the Black Law Dictionary, is as follows:-

> *"**ASSIGNMENT.** A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. Bostrom v. Bostrom, 60 N.D. 792, 236 N.W. 732, 734. It includes transfers of all kinds of property, Higgins v. Monckton, 28 Cal.App.2d 723, 83 P.2D 516, 519. But is ordinarily limited to transfers of choses in action and to rights in or connected with property, as distinguished from the*

particular item of property. In re Beffa's Estate, 54 Cal. App. 186, 201 P. 616, 617. It is generally appropriate to the transfer of equitable interest. Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 228, 114 Misc. 590."

34. The term 'assignment' also came to be considered by different Courts. The Calcutta High Court in ***"Saregama Ltd. vs. The New Digital Media and Ors.-(2018) 1 WBLR (Cal) 329"*** has noticed the concept of 'assignment' in paragraphs 122 to 126:-

*"**122.** In English law, an absolute assignment need not necessarily be equivalent to a sale out and out; it may be only an equitable assignment. [Bence v Shearman 47 WR 350: (1898) 2 Ch 582; Brand v London Rubber Co. (1904) 1 KB 387].*

***123.** In India, absolute assignment means a transfer of the entire interest of the assignor.*

***124.** In Black's Law Dictionary, 6th Edition the "Assignment" means the act of transferring to another all or part of one's property, interest, or rights. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all kinds of property (Higgins v. Monckton, 28 Cal.App.2d 723, 83 P.2d 516, 519), including negotiable instruments.*

***125.** "Assignment" means the transfer of the claim, right or property to another. [The Commissioner of Gift Tax, Madras v N.S. Getty Chettiar, AIR 1971 SC 2410:*

(1971) 2 SCC 741: (1971) 82 ITR 99: (1972) 1 SCR 736].

126. *"Assignment" is defined as a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It is defined as the transfer by a party of all rights to some kind of property usually intangible property such as rights in a lease, mortgage, agreement of sale of partnership. [Gopal Saran v Satyanarayan AIR 1989 SC 1141: (1989) 3 SCC 56: JT 1989 (Supp) SC 21: (1989) 1 SCR 767]."*

35. The judgment of the Hon'ble Supreme Court in ***"Gopal Saran vs. Satyanarayana- (1989) 3 SCC 56"*** has quoted with approval the meaning as given in Black's Law Dictionary. In paragraph 10 of the judgment, following has been observed by the Hon'ble Supreme Court:-

*"**10.** On the facts found, it cannot be said or even argued that there was any assignment by the tenant, "Assignment", it has been stated in Black's Law Dictionary, Special Deluxe Ed., p. 106, "is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein". It has further been stated as "The transfer by a party of all its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or partner- ship." It has to be examined whether there was sub-letting or otherwise parting with possession in terms of Sec. 13(1)(e) of the Act."*

36. The Andhra Pradesh High Court in ***"The Managing Director and Ors. vs. The Official Liquidator, High Court of A.P., Hyderabad and Ors.- 2012 (6) ALD 630"*** in paragraph 18 has also noticed the distinction between the 'security' and 'assignment'. In paragraph 18, following has been observed:-

> *"**18.** A clear distinction has been drawn in common law, between a security and an assignment. (Ashby Warner and Co. v. Simmons 1 (1938) 8 CC 111, The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations. (Chitty on Contracts 30th Edition- Para 19-078 Page 1362). Where contractual rights are assigned, the extent of those rights are defined by the original contract, (Chitty on Contracts: 30th Edition Para 19-079, Page 1363), i.e., the contract between the CFIs and the Company pursuant to which the loan facilities were granted. An assignment of a debt is not invalid even if the necessary for litigation to recover it is contemplated. Provided that there is a bona fide debt, it does not become unassignable merely because the debtor chooses to dispute it. Suing on an assigned debt is not contrary to public policy even if the assignor retains an interest. (Comdex International Ltd. v. Bank of Zambia 2 (1998) QB 22"*

37. The expression "security" has already been defined in Black Law Dictionary to the following effect:-

> *"**SECURITY.** Protection; assurance; indemnification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien etc., given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. The name is also some-times given to one who becomes surety or guarantor for another. Bissinger & Co. v. Massachusetts Bonding & Ins. Co. 83 Or. 288, 163 P.592, 593."*

38. In general law, the security is given by a debtor to the creditor to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. Explaining the expression 'security', the Hon'ble Supreme Court in ***"V.K. Ashokan and Ors. Vs. Asstt. Excise Commnr, and Ors.- (2009) 14 SCC 85"*** , in paragraph 38, following was held:-

> *".....The term `security' signifies that which makes secure or certain. It makes the money more assured in its payment or more readily recoverable as distinguished from, as for example, a mere I.O.U., which is only evidence of a debt, and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. [See Chetumal Bulchand vs. Noorbhoy Jafferji (AIR 1928 Sind 89)]. It is a word of general import signifying an assurance."*

39. Shri Ramji Srinivasan, Learned Senior Counsel's submission is that by assignment of receivables only a security interest was created in favour of the lender and by debiting the Escrow Account, security interest has been enforced by the lender which is clear breach of order dated 15.10.2018. We need also to notice that after deposit of the receivables in the Escrow Account whether the borrower has any right or interest in the said amount which has been assigned for repayment of facility. We have noticed the Clause 4.8 of the Master Facility Agreement by which the borrower gives irrevocable instructions to the Bank. We have already extracted Clause 5(c) of the Schedule-1 'Special Conditions for Rental Discounting' which clearly provides that the receivables shall be exclusive property of the lender for the purpose of secured repayment of the secured facility. When the receivables are exclusive property of the lender, the borrower cannot deal with the said property which has been deposited in the Escrow Account. The Escrow Account, as per the Escrow Account Agreement, is to be operated by Escrow Bank under the instructions of lender. The borrower is specifically prohibited to issue any cheque or draft on the Escrow Account. Escrow Bank under the Escrow Agreement is obliged to follow the instructions given by the lender. Further, Clause 3 of the Assignment and Administration Agreement, as extracted above, clearly contemplates that sufficient portion of receivables to pay the principal and interest is assigned and set aside for that purpose, the transaction documents thus, clearly indicate that insofar as the amount receivables deposited in the Escrow Account which are sufficient to pay the principal and interest are concerned, they are assigned

to the lender and cannot be dealt with the borrower in any manner. The submission of the Counsel for the IL&FS cannot be accepted that the above part of the receivables which is assigned, only creates a security interest in favour of the lender which can be enforced by lender to realise its security. The present is not a case where lender has enforced any security interest created in their favour nor is a case where they have exercised any right given to them consequent to an event of default. Assigned receivables are as per transaction documents, noted above, are lender's property which on instructions given by the lender to the Escrow Bank is transferred to the account of lender. It is however, clear that only part of receivables which is sufficient to pay the principal and interest is assigned. Any amount deposited in the Escrow Account out of receivables which is in excess of principal and interest is not part of assignment and can be transferred back to the borrower and that part of the amount which is in excess of principal and interest can be said to be part of security which can also be enforced by lender in an eventuality.

40. Shri Ramji Srinivasan, Learned Senior Counsel has also laid emphasis on the charge created pursuant to Sections 77, 78, 79 and 384 of the Companies Act, 2013. The type of charge as per Form No.CHG-1 is "assignment of receivables through Escrow Account". When we look into the relevant clauses of 'Master Facility Agreement' and other parts of the facility Agreement, it is clear that the registration of charge can be said to be limited only in respect of residual receivables over which IL&FS continued to have right, title and interest. Clause 8.1 of the Master Facility Agreement provides for 'security interest'. The charge cannot be construed over that part of the

receivables which has been assigned in presenti by the borrower to the lender by Assignment Agreement dated 25.06.2018. We are of the view that transaction documents have to be read holistically in order to ascertain the true meaning and the intent of transaction entered between the parties. Schedule-1 'Special Conditions for rental discounting' clauses 3(c), 5(b), 5(c) and 5(h) clearly proves that the receivables have been assigned to lender and that borrower has no right or interest remaining in the receivables so assigned. The fact that the receivables become payable in future makes no difference as the assignment in favour of borrower is in presenti. The Power of Attorney also ensures that neither a borrower nor any of its judgment creditors can have access or recourse to the receivables, which can only be dealt with by the instructions of lender. Even an ordinary Escrow Agreement, judgment creditors or the entity itself, cannot have its access/ recourse to the monies lying in the Escrow Account, the escrow being an arrangement whereby the money has to be transferred upon satisfaction of pre-determined conditions, with the beneficial interest vesting in the beneficiary of the escrow. We may in this context refer to a judgment of Court of Appeals for the Eighth Circuit reported in 744 F.2d 621 in the matter of ***"Arthur D. and Patricia Newcomb, Debtors. Thomas J. Carlson, Trustee, Appellee vs. Farmers Home Administration, Appellant"***. Dealing with the nature of an Escrow Account, in paragraphs 7, 14 & 16 of the judgment, following has been observed:-

> *"7. The courts below analyzed this case under Count II and ignored Counts I and III. This was the correct approach. Count I is inapposite because the*

escrow involved in this case is something more than an executory contract. It is not clear that the parties could have entered into a valid contract under which the United States promised not to levy on Arthur Newcomb's property in exchange for Newcomb's promise to pay the judgment if and when this court affirmed. Such a contract might lack consideration from Newcomb under the principle that the performance of a legal duty is not consideration. See Restatement (Second) of Contracts, Sec. 73 (1981). However, even assuming that such a contract could have been made, an escrow is something more than a contract--it is a method of conveying property. See generally, 28 Am.Jur.2d Escrow Sec. 1 (1966); 30A C.J.S. Escrows Sec. 1 (1965). When property is delivered in escrow the depositor loses control over it and an interest in the property passes to the ultimate grantee under the escrow agreement. See Forest Hills Construction Co. v. City of Florissant, 562 S.W.2d 322 (Mo.1978); 28 Am.Jur.2d Escrow Secs. 8, 10 (1966); 30A C.J.S. Escrows Sec. 9 (1965); Annot., 141 A.L.R. 1432 (1942). Further, an "executory contract" that can be rejected in bankruptcy is a contract on which performance remains due on both sides at the time of the bankruptcy petition. 2 J. Lewittes, H. Miller, P. Murphy, J. Samet & W. Stern, Collier on Bankruptcy, p 365.02 (15th ed. 1984) [hereinafter cited as Collier on Bankruptcy]. In this case, all that remained to be done at the time of the bankruptcy petition was for the escrow agent to turn the funds over to the United States.

14. The issue of what interests in escrowed property are transferred at what point in time is a

complex issue under Missouri law. At least for some purposes, it is said that "legal title" to escrowed property is transferred only when the condition of the escrow is met. Morris v. Davis, 334 Mo. 411, 66 S.W.2d 883 (1933) (rule that legal title remains with the depositor until the condition of an escrow is met applied to defeat wrongful delivery by escrow agent and sale to third party with knowledge of the escrow); 28 Am.Jur.2d Escrow Sec. 10 (1966); 30A C.J.S. Escrows Sec. 9 (1965); Annot., 15 A.L.R.2d 870 (1951); Annot., 141 A.L.R. 1432 (1942). For other purposes, it is recognized that some interest in escrowed property is transferred to the ultimate grantee under the escrow at the creation of the escrow. Forest Hills Construction Co. v. City of Florissant, 562 S.W.2d 322 (Mo.1978) (ultimate grantee entitled to dividends earned by escrow account before condition was met where escrow agreement made no provision for dividends). The interest transferred at the creation of an escrow is generally referred to as an "equitable interest." See 28 Am.Jur.2d Escrow Sec. 10 (1966); 30A C.J.S. Escrows Sec. 9 (1965); Annot., 141 A.L.R. 1432 (1942). Finally, it has been held that the transfer of "legal title" that occurs when conditions of an escrow are met can relate back to the creation of the escrow when equity so requires. See Donnelly v. Robinson, 406 S.W.2d 595 (Mo.1966) (transfer of realty by life tenant and remaindermen via escrow related back to creation of escrow to preserve right of life tenant to compensation where life tenant died between creation of escrow and fulfillment of condition); 30A C.J.S. Escrows Sec. 13b (1965); Annot., 117 A.L.R. 61 (1938).

> *16. U.S.C. § 101(40). This definition is broad enough to include both the transfer that occurs when an escrow is created and the transfer that occurs when the condition of an escrow is met. Thus the issue becomes which of these two "transfers" is controlling in this case. In analyzing this issue, we look to the real substance of the interests transferred, not to whether those interests are referred to as "legal title" or "equitable interest."*

41. From the above, we arrive at inescapable conclusion that insofar as that part of the receivables deposited in the Escrow Account which is sufficient to meet the principal and interest which has been assigned by the borrower to lender, no proprietary interest continues with the borrower nor borrower can exercise any right over that part of the Escrow Account which is assigned. The borrower may have right and interest on the residual of deposits which is an excess of principal and interest for which security interest is created in favour of the lender which Escrow Bank is permitted to transfer to the borrower. The submission of Shri Ramji Srinivasan, Learned Senior Counsel that there is no assignment of the receivables but there is only the creation of security interest in the receivables cannot be accepted. There being express assignment of lease rental which is sufficient to meet the principal and interest, the assignment has to be accepted as assignment in favour of the lender. Use of word 'pledge' in Assignment Agreement does not take away the nature of the transaction documents which is assignment of receivables. In this context, we may refer to judgment of Court of Appeal for the Sixth Circuit in ***"Re: Town Centre Flats"*** where also the loan was

secured with the mortgage and agreement to assign rent to the creditors. The fact has been noticed in paragraph 1. A in following words:-

> ***"I. BACKGROUND***
>
> ***A. Factual History***
>
> *The parties do not dispute the underlying facts. Debtor Town Center Flats, LLC owns a 53-unit residential complex in Shelby Township, Michigan. Town Center financed construction of the building with a $5.3 million loan from KeyBank that was later assigned to ECP Commercial II LLC. The loan was secured with a mortgage and an agreement to assign rents to the creditor in the event of default. In the agreement to assign rents, Town Center "irrevocably, absolutely and unconditionally [agreed to] transfer, sell, assign, pledge and convey to Assignee, its successors and assigns, all of the right, title and interest of [Town Center] in . . . income of every nature of and from the Project, including, without limitation, minimum rents [and] additional rents…" The agreement purported to be a "present, absolute and executed grant of the powers herein granted to Assignee," while simultaneously granting a license to Town Center to collect and retain rents until an event of default, at which point the license would "automatically terminate without notice to [Town Center]." Rents from the residential complex are Town Center's only source of income.*
>
> *On December 31, 2013, Town Center defaulted on its obligation to repay the loan. On December 22, 2014, ECP sent a notice of default and a request for the payment of rents to all known tenants of the Town Center property. The notice complied with the terms of*

the agreement and with Mich. Comp. Laws § 554.231, which allows creditors to collect rents directly from tenants of certain mortgaged properties. The following day, ECP recorded the notice documents in Macomb County, Michigan, completing the last step required by the statute to make the assignment of rents binding against both Town Center and the tenants of the property.

On January 23, 2015, ECP filed a complaint in the Circuit Court for Macomb County alleging breach of contract, initiating foreclosure on the mortgage, and requesting appointment of a receiver to take possession of the Town Center property. Approximately one week later on January 31, 2015, Town Center filed for Chapter 11 bankruptcy relief. At the time Town Center filed its petition, Town Center owed ECP $5,329,329 plus attorney's fees and costs. The parties have reached an interim agreement to allow Town Center to continue to collect rents from the tenants of the complex, with $15,000 per month used to pay down the debt to ECP and the remainder of the rents used for authorized expenses."

42. In the Agreement, word 'pledge' was also mentioned. However, the Court read it assignment i.e. transfer of ownership. The Court also held that language that the assignment is 'security' does not foreclose or ownership transfer. Dealing with the 'Assignment of Rents, following has been observed by the Court:

*"**1. Assignment of Rents***

Michigan courts generally discuss assignments of rents under § 554.231 as ownership transfers. The Michigan Supreme Court held that this statute puts the assignee "in the shoes of the mortgagor until the debt is paid, with all his rights to the rents and profits as long as he, under the general law of mortgages, could enjoy them." Smith, 106 N.W.2d at 520 (quoting Sloman, 233 N.W. at 220). In 1994, the Michigan Court of Appeals held that a prior-perfected interest in assigned rents had priority over an interest held by a judgment creditor who sought to garnish rents. Otis Elevator Co. v. Mid-America Realty Investors, 522 N.W.2d 732, 733 (Mich. Ct. App. 1994). The judgment creditor "could not garnish rents because [the assignor] no longer had an interest in the rents." Id. Once an assignee has: 1) entered into an agreement to assign rents; 2) recorded that agreement; and 3) default has occurred, then the assignee's rights "are perfected and binding against the assignor" and the assignor "no longer ha[s] a valid property interest in the rents." Id. at 734. The assignor has the legal right to collect the rents directly from tenants once notice of the default has been filed in the county's register and served on the tenants. Mich. Comp. Laws §§ 554.231, 554.232. Michigan courts have generally treated the assignment of rents as a transfer of ownership once the agreement has been completed and recorded and a default has occurred. See Otis Elevator, 522 N.W.2d at 733 (stating "once [the assignee] recorded the mortgage and the mortgagor's default, the

*assignment of rents was valid and enforceable as between the mortgagor . . . and the mortgagee."). Otis Elevator implies that this should be regarded as a transfer of all rights in the rents. 522 N.W.2d at 733 (finding that the assignor "no longer had an interest in the rents."). A more recent decision of the Michigan Court of Appeals confirmed that the assignor loses "any right to collect the rents" after the assignee has perfected its rights following an event of default. Ashley Livonia A&P, L.L.C. v. Great Atl. & Pac. Tea Co., Inc., No. 319288, 2015 WL 3757546, at *5 (Mich. Ct. App. June 16, 2015) (per curiam). We therefore predict, under Erie v. Tompkins, that the Michigan Supreme Court would treat a completed assignment of rents as a transfer of ownership.*

Town Center argues that the title and language of the Michigan statute make it clear that only a security interest, not an ownership interest, is assigned under this law. (Appellant Br., App. R. 11, p. 28-29) Section 554.231 is titled "Assignment of Rents to Accrue as Additional Mortgage Security"2 and the body of the statute says "it shall be lawful to assign the rents . . . as security in addition to the property described in [the] mortgage." Town Center would have us read the statute as expressing the Michigan legislature's intention to allow only transfers of security interests, and not ownership, based on its language authorizing assignments "as security in addition to the property." Mich. Comp. Laws § 554.231. Town Center reasons that the statute allows only for a security interest in the assigned rents, so any attempt to transfer

ownership of the rents is blocked by the default rule that an assignment of rents is unenforceable.

Language that the assignment is "as security," however, does not foreclose an ownership transfer. For example, a deed of trust transfers a deed—which is commonly thought of as an ownership transfer—to a trustee to hold as security for obligations associated with a mortgage on the property. See Sloman, 233 N.W. at 218-19 (discussing respective rights of the mortgagor, trustee, and purchaser). And Michigan courts have consistently read § 554.231 as allowing for assignments of rents to be transfers of ownership once the statutory steps for perfection have been completed. We follow their lead in interpreting the language of § 554.231 as allowing for ownership interests to be transferred with an assignment of rents.

In the agreement at issue in this case, Town Center used broad language to "irrevocably, absolutely and unconditionally" transfer its right in a "present, absolute and executed assignment of the Rents and of the Leases" from the Town Center property. The only fair reading of this language is that Town Center assigned the rents to the maximum extent permitted by Michigan law. Because we hold that Mich. Comp. Laws § 554.231 allows for an ownership transfer in these circumstances, we find that Town Center did transfer ownership in the assigned rents to ECP before the bankruptcy petition was filed in this case. The broad language of

the agreement evidences an intention to transfer ownership."

43. The order dated 15.10.2018 does not negate the Assignment Agreement nor it purport to take away the property right of lenders in the lease rental receivables. However, we are also clear in mind that insofar as the amount of receivables deposited in the Escrow Account which is in excess of principal and interest, on the said amount the right is still retained by the borrower and in event, any amount in excess to the said principal and interest has been transferred to or debited in the lender's account that need to be reversed, of course, after adjusting the shortfall in debiting any interest or principal of any earlier months.

44. We find substance in the submission of Shri Nakul Dewan, Learned Senior Counsel appearing for the Escrow Bank that Escrow Bank cannot be held to have committed the contempt of the order dated 15.10.2018 nor there is any question of purging the contempt by Escrow Bank since the Escrow Bank has only followed its Escrow Agreement, and acted on instructions of lender which it was obliged to do as per Escrow Agreement.

45. There is one more reason due to which we are satisfied that present is not a case of committing of any contempt either by the Escrow Bank or by the lender. There being debatable and rival issues raised by the parties in its pleadings filed before Hon'ble Mr. Justice (Retd.) D.K.Jain's Committee and there being serious issues pertaining to interpretation of the various clauses of transaction documents, no occasion arises to impute any wilful and deliberate disobedience on the part of the Escrow Bank or the lender. The

lender was claiming debiting of an amount assigned to it as per Agreement which it claimed on the basis of transaction documents. We are satisfied that there is no question of any wilful disobedience of the interim order dated 15.10.2018, hence, there was no occasion for purging the contempt either by lender or Escrow Bank. We having come to the conclusion that the lender has right to instruct the Escrow Bank to debit the amount sufficient to cover interest and principal deposited in the Escrow Account out of the receivables, no direction can be issued to reverse the said amount to the borrower. As observed above, however, in case the amount debited are in excess of amount sufficient to cover principal and interest and also after adjusting any shortfall the said amount needs to be reversed by the borrower since that amount cannot be said to be part of the amount assigned to the lender.

46. In view of the foregoing discussions, we dispose of all the above Applications with following directions:-

(i) The prayer of Applicant- IL&FS seeking direction to lender to reverse the amount of Rs. 112,79,18,348/- from the accounts of the IL&FS towards debt service payments, is refused subject to following:-

(i) The part of receivables in excess of payment of interest and principal payable which was assigned to the lender after adjusting any shortfall in the amount payable need to be reversed to the borrower.

(ii) The Escrow Bank shall re-visit all its debits after 15.10.2018 to find out as to whether any amount in excess to

the amount payable to cover principal and interest subject to adjustment any shortfall in earlier payment have been debited; and in event, any excess amount has been debited, the same shall be reversed to borrower which exercise shall be completed within the period of one month from today with due intimation in writing to the IL&FS.

(iii) All Applications being I.A No. 2196 of 2020; I.A No. 2262-2263, 2264-2266 of 2020 and I.A No. 2330-2331, 2332-2333 of 2020 are disposed of accordingly.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

[Shreesha Merla]
Member (Technical)

New Delhi

13th May, 2022

Anjali