NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

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Company Appeal (AT) (Insolvency) No. 995 of 2019
&
I.A. No.179 of 2020

[Arising out of Impugned Order dated September 4, 2019, passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition (I.B.) No. 349/K.B./2017]

IN THE MATTER OF:

S.S. Natural Resources Private Limited
Through Mr Gobindram Chandgiram Agarwal
Authorised Signatory
Having its Registered Office at:
2nd Floor, SS Chambers
5 Chittaranjan Avenue
Kolkata - 700072 **...Appellant**

Versus

1. **Ramsarup Industries Limited**
   Through the Resolution Professional
   Mr Kshitiz Chhawchharia
   Having its registered office at:
   Hastings Chamber,
   2nd Floor, Room No.1,
   7C, Kiran Shankar Roy Road
   Kolkata – 700 001 **...Respondent No.1**

2. **Kshitiz Chhawchharia**
   Resolution Professional of
   Ramsarup Industries Limited
   Having his office at:
   C/o B Chhawchharia & Co
   8A & B, Satyam Towers
   3, Alipore Road, Kolkata – 700027 **...Respondent No.2**

3. **Monitoring Agency of Ramsarup**
   Industries Limited
   Through its Chairman, Kshitiz Chhawchharia
   Having its office at:
   C/o B Chhawchharia & Co
   8A & B, Satyam Towers
   3, Alipore Road, Kolkata – 700027 **...Respondent No.3**

4. West Bengal Industrial Development Corporation
Registered Office:
Protiti 23 Abanindranath Thakur Sarani
Kolkata – 700017
Through its Managing Director ...Respondent No.4

5. Asset Reconstruction Company of India Ltd
Registered office at:
The Ruby, 10th Floor,
29, Senapati Bapat Marg, Dadar (West)
Mumbai – 400028
Through its Managing Director ...Respondent No.5

Present:

For Appellant : Mr Sumant Batra, Mr Sanjay Bhatt, Ms Niharika Sharma, Mr Abhirup Das Gupta and Mr Rahul Mendiratta, Advocates.

For Respondent : Mr Darpan Wadhwa, Sr Advocate with Ms Smiriti Churiwal, Advocates for CoC (R-5)
Mr Rony O. John, Mr Deep Roy, Advocates for R-1
Mr RN Ghosh, Advocates for Impleadment
Mr Krishnendu Datta Sr Advocate with Mr Vikram Mehta, Mr Debolina Roy, Advocates for R-4
Mr Dinkar Singh, Advocate for ARCL
Mr Mahendra Ralhan, Advocate.
Mr Utsav Mukherjee and Mr Jaivir Sidhant, Advocates for CoC

With

Company Appeal (AT) (Insolvency) No. 988 of 2019

IN THE MATTER OF:

Pegasus Assets Reconstruction Pvt Ltd
(Financial Creditor)
Office at:
Free Press House, 55-56
5th Floor, Nariman Point
Mumbai – 400021 ...Appellant

Versus

1. Kshitiz Chhawchharia
Resolution Professional

Office at:
8A & B, Satyam Towers
3, Alipore Road, Kolkata – 700027 **...Respondent No.1**

2. Ramsarup Industries Limited
(Corporate Debtor)
8A & B, Satyam Towers
3, Alipore Road, Kolkata – 700027 **...Respondent No.2**

3. Asset Reconstruction Company
(India) Limited
Registered office at:
The Ruby, 10th Floor,
29, Senapati Bapat Marg, Dadar (West)
P.O.& P.S. Dadar (West)
City and District, Mumbai – 400028

Also at:
Regional office at Room No. A-11
8th Floor, Chatterjee International Centre
33A, Jawaharlal Nehru Road **...Respondent No.3**
Kolkata – 700071

Present:

For Appellant : Mr Atul Sharma, Mr Shashank Kumar, Mr Sugam Seth, Mr Amit Singh Chadha, Advocates.

For Respondent : Mr Rony O. John and Mr Deep Roy, Advocates for R-1
Mr Sumant Batra, Mr Sanjay Bhatt (Resolution Applicant), Ms Niharika, Mr Mahendra Ralhan and Mr Rahul Mendiratta, Advocates.
Mr Dinkar Singh, Advocate for (ARCL)

With

Company Appeal (AT) (Insolvency) No. 1039 of 2019

IN THE MATTER OF:

1. Aashish Jhunjhunwala
S/o Sri Ambika Prasad Jhunjhunwala
Residing at: 10/4, Alipore Park Place
Kolkata – 700027 **...Appellant No.1**

2. Imtihan Commercial Private Limited
A Company incorporated within the

**Meaning of the Companies Act, 2013
and having its registered office at
7C, Kiran Shankar Roy Road
Hastings Chamber, 2nd Floor, Room No.1,
Kolkata – 700 001 ...Appellant No.2**

3. **N R Mercantile Private Limited
7C, Kiran Shankar Roy Road
"Hastings Chambers", 2nd Floor,
Room No.1, Kolkata – 700 001 ...Appellant No.3**

4. **Ramsarup Investment Limited
7C, Kiran Shankar Roy Road
"Hastings Chambers", 2nd Floor, Room No.1,
Kolkata – 700 001 ...Appellant No.4**

5. **Ramsarup Projects Private Limited
7C, Kiran Shankar Roy Road
"Hastings Chambers", 2nd Floor, Room No.1,
Kolkata – 700 001 ...Appellant No.4**

Versus

1. **Kshitiz Chhawchharia
Resolution Professional of
Ramsarup Industries Limited
Having his Office at:
C/o B. Chhawchharia & Co.
8A & 8B, Satyam Towers
3, Alipore Road, Kolkata – 700027 ...Respondent No.1**

2. **S.S. Naturals Resources Private Ltd
Having its Office at:
SS Chambers, 5, C R Avenue
2ndFloor, Kolkata - 700072 ...Respondent No.2**

3. **M/s Asset Reconstruction
Company (India) Ltd
Having its registered office at:
The Ruby, 10th Floor,
29, Senapati Bapat Marg, Dadar (W)
Mumbai – 400028 ...Respondent No.3**

4. **Committee of Creditors of
Ramsarup Industries Limited
Through their Advocate Vidhi Partners
Having their office at:**

F-13, First Floor, Jangpura Extn.
New Delhi – 110014 **...Respondent No.4**

Present:

For Appellant : **Mr Zeeshan Haque and Mr Ashish Jhunjhunwala, Advocates.**

For Respondent : **Mr Rony O. John and Mr Deep Roy, Advocates for R-1**
Mr Sumant Batra, Mr Sanjay Bhatt, Ms Niharika, and Mr Rahul Mendiratta, Advocates for R-2
Mr Mahendra Rolhan, Advocate.
Mr Dinkar Singh, Advocate for (ARCL)

With

Company Appeal (AT) (Insolvency) No. 1124 of 2019

IN THE MATTER OF:

Aashish Jhunjhunwala
S/o Sri Ambika Prasad Jhunjhunwala
Residing at: 10/4, Alipore Park Place
Kolkata – 700027 **...Appellant**

Versus

1. **Kshitiz Chhawchharia**
   Resolution Professional of
   Ramsarup Industries Limited
   Having his Office at:
   C/o B. Chhawchharia & Co.
   8A & 8B, Satyam Towers
   3, Alipore Road, Kolkata – 700027 **...Respondent No.1**

2. **Committee of Creditors of**
   Ramsarup Industries Limited
   Through their Advocate Vidhi Partners
   Having their office at:
   F-13, First Floor, Jangpura Extn.
   New Delhi – 110014 **...Respondent No.2**

3. **S.S. Naturals Resources Pvt Ltd**
   Having its Office at:
   S S Chambers, 5, C R Avenue, 2nd Floor
   Kolkata - 700072 **...Respondent No.3**

Present:

For Appellant : Mr Zeeshan Haque and Mr Ashish Jhunjhunwala, Advocates.

For Respondent : Mr Rony O. John and Mr Deep Roy, Advocates for R-1
Mr Sumant Batra, Mr Sanjay Bhatt, Ms Niharika, and Mr Rahul Mendiratta, Advocates for R-2
Mr Mahendra Rolhan, Advocate.
Mr Dinkar Singh, Advocate for (ARCL)

With

Company Appeal (AT) (Insolvency) No. 1125 of 2019

IN THE MATTER OF:

Vanguard Credit & Holdings Private Limited
A company incorporated within the meaning
of the Companies Act, 2013
Having its Registered Office at:
7C, Kiran Shankar Roy Road
Hastings Chamber, 2nd Floor, Room No.1,
Kolkata – 700 001 ...Appellant

Versus

1. **Kshitiz Chhawchharia**
   Resolution Professional of
   Ramsarup Industries Limited
   Having his Office at:
   C/o B Chhawchharia & Co.
   8A & 8B, Satyam Towers
   3, Alipore Road, Kolkata – 700027 ...Respondent No.1

2. **S.S. Naturals Resources Private Ltd**
   Having its Office at:
   S S Chambers, 5, C R Avenue, 2nd Floor
   Kolkata - 700072 ...Respondent No.2

3. **M/s Asset Reconstruction**
   Company (India) Ltd
   Having its registered office at:
   The Ruby, 10th Floor,
   29, Senapati Bapat Marg, Dadar (W)
   Mumbai – 400028 ...Respondent No.3

4. **Committee of Creditors of**
   Ramsarup Industries Limited
   Through their Advocate Vidhi Partners

Having their office at:
F-13, First Floor, Jangpura Extn.
New Delhi – 110014 ...Respondent No.4

Present:

For Appellant : Mr Zeeshan Haque and Mr Ashish Jhunjhunwala, Advocates.

For Respondent : Mr Rony O. John and Mr Deep Roy, Advocates for R-1
Mr Abhirup Dasgupta, Advocate for R-2
Ms Smriti Churiwal, Mr Utsav Mukherjee and Mr Jaivir Sidhant, Advocates for R-4 CoC
Mr Mahendra Ralhan, Advocate.
Mr Dinkar Singh, Advocate for (ARCL)

With

Company Appeal (AT) (Insolvency) No. 1159 of 2019

IN THE MATTER OF:

Orissa Metaliks Private Limited
A company within the meaning of the
Companies Act, 2013
Having its Registered office at:
1, Garstin Place, "Orbit House."
3rd Floor, Room No. 3B, Kolkata – 700 001
(Through its Authorised Representative
Mr Kadam Singh) ...Appellant

Versus

1. **Mr Kshitiz Chhawchharia**
   Resolution Professional of
   Ramsarup Industries Limited
   Having its Office at:
   C/o B Chhawchharia & Co.
   8A & 8B, Satyam Towers
   3, Alipore Road, Kolkata – 700027 ...Respondent No.1

2. **S.S. Natural Resources Private Limited**
   A company Registered under the
   Companies Act, 1956
   Having its Registered Office at:
   S S Chambers, 5, C R Avenue, 2nd Floor
   Kolkata – 700072 ...Respondent No.2

Present:

For Appellant : Mr Abharajit Mitra, Sr. Advocate with
Mr RN Ghose, Mr Santanu Ghose and
Ms Urmila Chakraborty, Advocates.

For Respondent : Mr Rony O. John and Mr Deep Roy,
Advocates for R-1
Mr Dinkar Singh, Advocate for (ARCL)
Mr Sanjay Bhatt, Mr Sanjay Bhatt, Ms Niharika,
Ms Sumant Batra and Mr Rahul Mendiratta,
Advocates.

With

Company Appeal (AT) (Insolvency) No. 1242 of 2019

IN THE MATTER OF:

Indian Renewable Energy
Development Agency Ltd
A company within the meaning of the
Companies Act, 1956
Having its registered office at:
Core 4A, East Court, 1st Floor
Indian Habitat Centre, Lodhi Road ...Appellant
New Delhi – 110003
Versus

1. **M/s Ramswarup Industries Limited**
A company within the meaning
of the Companies Act, 1956
Having its registered office at:
7C, Kiran Shankar Roy Road
Hastings Chamber,
2nd Floor, Room No.1,
Kolkata – 700 001 ...Respondent No.1

2. **Sri Kshitiz Chhawchharia**
The Resolution Professional
C/o B Chhawchharia & Co.
7 A&B, Satyam Towers
3, Alipore Road, Kolkata – 700027 ...Respondent No.2

3. **S S Natural Resources Pvt Ltd**
A company within the meaning
of the Companies Act, 1956
Having its Registered Office at:

S S Chambers, 5, C R Avenue, 2nd Floor
Kolkata, West Bengal– 700072 ...Respondent No.3

4. Suzlon Global Services Ltd
Left-Wing, Level' O', Aqua Lounge
Suzlon One Earth
Opp. Magarpatta City
Hadapssar, Pune – 411028 ...Respondent No.4

Present:

For Appellant : Ms Varsha Banerjee, Advocate

For Respondent : Mr Rony O. John and Mr Deep Roy,
Advocates for R-1
Mr Sumant Batra, Mr Sanjay Bhatt, Ms Niharika,
and Mr Rahul Mendiratta, Advocates for R-2
Mr Mahendra Rolhan, Advocate.
Mr Dinkar Singh, Advocate for (ARCL)

With

Company Appeal (AT) (Insolvency) No. 468 of 2020

IN THE MATTER OF:

Edelweiss Finvest Private Limited
Having its registered office at:
02nd Floor, M B Towers
Plot No. 5, Road No.2
Banjara Hills, Hyderabad – 500 034 ...Appellant

Versus

1. Mr Kshitiz Chhawchharia
Having Registration No.
IBBI/IPA-001/IP-P00358/2017-18/10616B
10A, Alipore Park Place, Kolkata – 700027
Resolution Professional for ...Non-Applicant/
Ramswarup Industries Limited Respondent

2. Ramswarup Industries Limited
Having its office at:
7C, Kiran Shankar Roy Road
Hastings Chambers, 2nd Floor,
Room No.1, Kolkata – 700 001 ...Corporate Debtor

Present:

For Appellant	**:**	**Mr Shatadru Chakraborty, Ms Sonia Dube, Ms Kanchan Yadav and Ms Surbhi Anand, Advocates.**
For Respondent	**:**	**Mr Rony O. John and Mr Deep Roy, Advocates for R-1 Ms Smriti Churiwal, Advocates for R-2(CoC) Mr Utsav Mukherjee & Mr Jaivir Sidhant, for CoC Mr Sumant Batra, Mr Sanjay Bhatt, Ms Niharika, and Mr Rahul Mendiratta, Advocates for R-3**

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These eight Appeals emanate from the common Order dated September 4, 2019, passed by the Adjudicating Authority/National Company Law Tribunal, in Company Petition (I.B.) No.349/K.B./2017, Kolkata Bench, Kolkata, whereby the Adjudicating Authority has approved the Resolution Plan submitted by S S Natural Resources Private Limited (in short 'SSN') under Section 31of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code'). Their original status in Company Petition represents the Parties in all these appeals for the sake of convenience.

Civil Appeal (AT) (Ins.) No. 995 of 2019

2. The brief facts of the case are as follows:

The Appellant in this Appeal is the Successful Resolution Applicant whose Plan is approved by the Adjudicating Authority by the Impugned Order. Appellant has challenged the impugned Order only to the extent of not allowing the terms contemplated in Clause 15.15.5 of the Resolution Plan, thus making the entire Plan unviable and unfeasible.

3. The Appellant contends that the Adjudicating Authority has while purportedly approving the Resolution Plan dated March 11, 2019, submitted by the Appellant under Section 31(1) of the Code, unilaterally made certain modifications to the Plan and increased the outflow of the Appellant beyond the sum of ₹400 Crore offered by the Appellant in the Plan, without the consent of the Appellant/Resolution Applicant.

4. The Appellant has, in Clause 15 of the Plan, as a part of the additional terms of the Plan, inter-alia, transfer of the lease of 315 acres of land lying in Kharagpur, granted by West Bengal Industrial Development Corporation (in short 'WBIDC') to Ramsarup Loh Udyog, a unit of the Corporate Debtor, to the Respondent No.1 Ramsarup Industries Limited being the Corporate Debtor, without the payment of any fee, consideration or premium or arrears of lease rent or penalty or interest. However, the Adjudicating Authority has in its impugned Order failed to sanction the same. Consequent to the refusal of the Adjudicating Authority to sanction this term, the Appellant will have to incur an additional sum of ₹40 Crores towards transfer charges as well as arrear lease rents, penalty and interest, which shall result in the increase in the outflow of the Appellant/Successful Resolution Applicant, from ₹400 crores (being the maximum sum the Appellant had agreed to pay under the approved Plan) to beyond ₹440 crores, thus rendering the Plan unviable and unfeasible.

5. The Appellant has taken the ground as follows:

- The Adjudicating Authority is not authorised to modify the Plan by imposing additional financial obligation other than what has accepted by the Appellant in the Plan.

- The Adjudicating Authority has materially changed and altered the Resolution Plan, which was duly approved by the 'CoC' by refusing to sanction the conditions in Clause 15.15, i.e. a mandatory part of the Plan. This resulted in an increase in significant financial costs, which has adversely affected the plan's very basis and substratum, affecting the feasibility and viability of the Plan, making it incapable of being implemented.

- The Adjudicating Authority has no power to unilaterally modify or change the Plan without the Appellant's approval.

- The Adjudicating Authority has failed to notice Clause 11 of the Plan, which clearly states that if the Plan is approved with variation, the 'SSN' shall be bound by the Plan only if the variation is acceptable in the Plan.

6. The Appellant further contended that the 'CoC' in the commercial wisdom approved the Resolution Plan. However, while approving the Resolution Plan, the Adjudicating Authority modified the core commercial terms of the Resolution Plan, making the same commercially unviable and unworkable for the Appellant. It is submitted that the modifications made are contrary to express assumptions made by the Appellant in the Resolution Plan

and against the CoC's commercial decision. It is further contended that the Hon'ble Supreme Court in case of K. Sashidhar v Indian Overseas Bank (2019) 12 SCC 150 has settled the law that the Adjudicating Authority's discretion is limited to the extent of satisfaction that the Resolution Plan meets the requirements specified in Section 30(2) of the I&B Code. Such commercial considerations are outside the scope of judicial review. If there is a contravention of the provision of Section 30(2) of I&B Code, including a decision on the Resolution Applicant's eligibility under Section 29 A, then such Plan would be subject to judicial scrutiny. Therefore it is a settled position that the action taken by the 'CoC' with respect to approval/rejection of Resolution Plan is supreme, and the Adjudicating Authority has no jurisdiction to interfere with the commercial decision taken by the 'CoC'. Therefore, the Adjudicating Authority's decision for modification of Resolution Plan is contrary to the law laid down by Hon'ble Supreme Court in the above-mentioned case.

7. The Learned Counsel for the Appellant also emphasised Clause 11 of the Resolution Plan, which reads as under;

> *"not withstanding anything contained in this resolution plan, no part of the resolution plan shall become effective or enforceable until either (i) the resolution plan is approved by the COC and the Adjudicating Authority in its entirety; or (ii) if approved by the adjudicating authority with any variance, then in the form and substance acceptable to the COC and the Resolution Applicant".*

Therefore, on account of the Resolution Plan's modifications, while approving the same vide impugned Order, the Appellant cannot be forced to implement the same on account of non-satisfaction of the above condition precedent.

8. The Learned Counsel for the Appellant also argued that the Covid 19 global pandemic had added further to the Appellant's woes. Due to the ongoing pandemic, India's Government imposed a nationwide Lockdown by suspending all sorts of economic and commercial activities from March 21, 2020, which still exist in some areas. Considering that the Covid 19 has caused a substantial drop in overall market valuation, the Resolution Plan has become unfeasible and unviable.

9. The Appellants also seek to bring on record subsequent events, including the Force Majure Clause's invocation under the Resolution Plan by way of an additional affidavit. In the wake of invocation of the Force Majure Clause, the Appellant prays that the impugned Order approving the Resolution Plan be set aside as the Appellant has since withdrawn the Resolution Plan due to subsequent events which have made the Resolution Plan financially, economically and operationally unviable for the reasons beyond the control of the Appellant.

10. In reply to the above, Resolution Professional contends that the Appeal is solely premised on the ground that a waiver sought from the Adjudicating Authority in its Resolution Plan has not been granted. The 'SSN' had sought

transfer of the lease of the land of about 315 acres lying in Kharagpur to 'Ramsarup Industries Ltd'. The 'SSN' has contended that the Adjudicating Authority has not sanctioned the waiver on transfer about payment of any fee, consideration, premium, arrears of lease rent or penalty or interest; therefore, the Resolution Plan has purportedly become unviable and unfeasible.

11. As per Clause 15.3, Clause 15.12 and Clause 15.14 (vi) (g) of the Resolution Plan, if the waiver sought are not granted or the assumptions made are not true, it will not have a bearing on the successful implementation of the Resolution Plan. The 'CoC' has approved the Resolution Plan, fully aware of these clauses in the Resolution Plan. The Adjudicating Authority has not in any manner mandated or directed 'SSN' to make payments of the transfer fee, consideration, premium, arrears of lease rent, penalties, interest, or any other payment to 'WBIDC'.

12. The Adjudicating Authority as noted in its Order that "*any exemption for payment would be dealt with by the respective authorities if applied for. With the above observations, we are not inclined to approve the waiver as prayed for in the Plan. It is left open for determination by the appropriate authorities if applied for the waiver/exemption as prayed for in the plan*".
(verbatim copy)

13. As per Clause 15.3 of the Resolution Plan, the Resolution Applicant has given an undertaking that;

> "*if the approvals, extinguishment and waiver sought under Annexure 3 are not granted, it will not in any way jeopardise the implementation of the Resolution Plan, and the resolution applicant shall remain responsible for such implementation of the Resolution Plan."*

14. The Resolution Professional further contends that the Learned Counsel appearing for the Resolution Applicant was asked about the possibility of increasing the distribution percentage offered to the Operational Creditors other than workmen's dues. It was then submitted that the Resolution Applicant is unwilling to carry and modify the Plan. The waiver asked for if not granted; the Resolution Applicant may withdraw from implementing the Plan.

15. It is further submitted that there is no transfer requirement to the Corporate Debtor, as the lease is already in favour of the Corporate Debtor. Hence the need for payment of any transfer fee does not arise. It is pertinent to note that the appointed date of Ramsarup Loh Udyog's merger with the Corporate Debtor is April 1, 2007. The lease over the Kharagpur land has been granted in favour of the Corporate Debtor vide indenture of sub-lease executed on September 13, 2009,i.e after the merger. Therefore, when providing the lease, the Corporate Debtor was the legal entity, and Ramsarup Loh Udyog was merely its unit.

16. The Resolution Professional further contends that there is no requirement for payment of any arrears of lease rent, penalty interest to West

Bengal Industrial Development Corporation by 'SSN' because no claim has been submitted by 'WBIDC' about arrears of lease rentals, interest or premium, for a period before the commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor. As per the Resolution Plan, such amounts will be written off in full and shall be deemed to be permanently extinguished by the Order approving the Resolution Plan. The 'SSN' or the Corporate Debtor at no point in time be directly or indirectly held responsible or liable about it.

17. It is further contended that it is neither established nor borne out from the records that 'SSN' is required to pay an amount higher than ₹ 400 crores. The alleged assumption of an amount higher than ₹ 400 crores is based on presumptions only. Therefore, after the Resolution Plan's approval, the alleged payment is not required to be made as claimed of 'SSN.

18. The Resolution Professional further contends the transfer of Kharagpur land to the Corporate Debtor under Clause 15.15 of the Resolution Plan is not a mandatory condition of the Resolution Plan and are covered under the approvals, extinguishment and waiver sought under Annexure 3 of the Resolution Plan. The following items of Annexure 3 cover the extinguishments sought by Appellant in Clause 15.15;

> Item 11- "*waiver of any dues of what so ever nature towards the Railways, water authorities or any such infrastructure provider and waiver of all statutory liabilities as the liquidation value is nil.*"

> Item 17-"*specific waiver of transaction costs related to implementation of the resolution plan including but not limited to any incidence of a stamp duty, ROC fees, income tax, any statutory levy,* ***renewal charges****, etc. The resolution plan envisages increase in the authorised capital for the implementation. The ROC fees towards the same shall be a specifically waived.*"
>
> *Item 19-"permitting waiver of all liabilities arising out of implementation of the transactions is contemplated in the resolution plan and instructing the relevant authorities concerned accordingly."*
>
> *Item 21-"directions from adjudicating authority to the relevant parties concerned to ensure continuity of critical infrastructure contracts/arrangements."*

19. The Resolution Professional further submitted that the Adjudicating Authority has approved the Resolution Plan and has merely directed 'SSN' to seek waivers, if necessary, from the relevant authorities. The Adjudicating Authority has not unilaterally altered the Resolution Plan. The 'SSN' had sought certain waivers, approvals, and extinguishment in its Resolution Plan. Instead of approving or rejecting the same, the Adjudicating Authority stated that they might be sought by 'SSN' from the relevant authorities. Therefore, it cannot be concluded that the Adjudicating Authority has unilaterally altered or modified the Resolution Plan.

20. It is pertinent to mention that as per the terms of the approved Resolution Plan Monitoring Agency was constituted. After that 1st Meeting of the Monitoring Agency took place on September 13, 2019.

21. The Learned Counsel for Respondent No. 5 'WBIDC' submitted that the Appeal is misconceived and premature. The Appellant has neither any actual cause of action nor is aggrieved by the impugned Order in any manner. The Appeal is entirely premised on the Appellant's apprehension that it may have to incur additional expenses provided it has to comply with the statutory obligation under the Resolution Plan.

22. The Learned Counsel for 'CoC' contended that the waiver from payment of transfer fees, penalties and arrears are payable under sub-lease deed, as the sublease right of the Kharagpur land ("the land in question") was granted by the 'WBIDC' to one unit of the Corporate Debtor namely Ramsarup Loh Udyog, which was merged with the Respondent No. 1 way back on September 18, 2008. Therefore, there cannot be any requirement of payment of any transfer fees as contended in the absence of any transfer. Accordingly, the objections raised by the Appellants are untenable. The Lease Deed entered into between the 'WBIDC' and the Corporate Debtor's unit does not contemplate any transfer fees. 'WBIDC', being a member of the Committee of Creditors, was aware of all terms and conditions in the Plan and had therefore voted in favour of the Plan. Accordingly, it is now estopped from claiming what it has already waived in the Plan, which has even received the Adjudicating Authority's approval.

23. The Learned Counsel for the Committee of Creditor's contended that the claim of 'WBIDC' has only been raised pursuant to the filing of the captioned Appeal and includes the following components;

- Transfer fee payable at the rate of 10% of the subleased market value, which it estimates to be around ₹ 9.23 crore.

- ₹ 22.07 Lac, payable towards the outstanding arrears of subleased rent in respect of the subleased property.

- ₹ 33.37 lakhs payable towards interest at the rate of 12% per annum on the outstanding arrears of subleased rent.

- ₹ 4.85 crores payable on account of land revenue and cess in respect of the said property to the District Land and Land Reforms Officer, Government of West Bengal, subject to the Government's confirmation.

24. It is pertinent to mention that the above-mentioned claims from 'WBIDC' are an afterthought as the same was raised after the Appellant apprehended transfer fees payable to be the tune of ₹ 40 crores. It is also important to mention that 'WBIDC', being a Financial Creditor, has not raised any of the claims mentioned above before the Resolution Professional or the Adjudicating Authority. In fact, 'WBIDC' voted in favour of the Resolution Plan without any comment about such claims as stated hereinabove. The same is an afterthought, quantified and submitted only in its Written Submission dated 29 July 2020, and these were never placed before the Resolution

Professional. Further, 'WBIDC' had only placed its claim before the 'CoC' regarding security charges, which has been approved. Considering the above, it is clear that WBIDC's claim is an afterthought and barred by estoppel, waiver and acquiescence. No subsequent claims are to be considered after the Adjudicating Authority has approved the Resolution Plan. The Appellant's contentions that the claims of 'WBIDC' are an afterthought should be disregarded in its entirety.

25. The Insolvency and Bankruptcy Code, 2016 has been enacted to facilitate the reorganisation based on an entirely different premise. It is enacted to facilitate the reorganisation and Resolution Process of a company in distress. It empowers creditors, represented by a 'CoC', to rescue a company through resolution when the company experiences a serious threat to its continuity. For this purpose, the 'CoC', in its commercial wisdom, can accept any payments against its outstanding liability to ensure resolution of the Corporate Debtor in accordance with the judgement of the Hon'ble Supreme Court in case of Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta 2019 SCC Online SC 1478. Further, after it received the approval of the 'CoC' and the Adjudicating Authority, the entire process of Resolution Plan is to offer a fresh slate, on which the restructuring of the Corporate Debtor can be carried out. Reliance in this regard is placed on the judgement of this Tribunal in case of State of Haryana versus Uttam Strips Ltd in Company Appeal (AT) (Insolvency) No. 319 of 2020 wherein it is observed that the Successful Resolution Applicant is not to be burdened with

undecided claims at the stage of implementation of the Resolution Plan. Further, it is observed that;

> "*A successful Resolution Applicant is to be provided by the company free from past liabilities. It has been rightly understood that a successful Resolution Applicant cannot be saddled with past liabilities indefinitely. Such an Act will make it impossible for the successful Resolution Applicant to run the business of the Corporate Debtor effectively. In fact, saddling a Resolution Applicant with past claims will defeat the entire purpose and mechanism set out under the Code.*"

26. Thus in view of the above, the Appellant or 'WBIDC' cannot be permitted to disturb the Resolution Process on the basis of mere apprehensions of the additional cost of erroneous and subsequent claims, which are an afterthought as the same could be against the object of the I&B Code, 2016. Therefore, the principle laid down in the above-mentioned case, which has been relied upon by the Appellant and 'WBIDC', does not find a place in the premise discussed above and is thus not applicable to the facts of the case.

27. Respondent No. 4 'WBIDC' further contended that Clause 15.15.5 of the Resolution Plan is not a mandatory condition. It has to be read along with the other conditions of the Resolution Plan. Particularly, Clause 9(iv), Clause 15.3, Clause 17 and 19 of the Resolution Plan could apply to the sub-lease transfer with respect to the Kharagpur land. A combined reading of these clauses could make it clear that the Appellant had approached 'WBIDC' concerning the transfer of sub-lease and could apply for a waiver of the

transfer fee and lease rent. But 'WBIDC' was not obliged to grant such waiver. In the event 'WBIDC' refused to grant the transfer fee's waiver, lease rent, even then, the Appellant was bound to execute the Resolution Plan. Furthermore, the outstanding in respect of the land revenue and cess in respect of the Kharagpur land is due and payable to District Land and Land Reforms Officer, Government of West Bengal and not to 'WBIDC', thus 'WBIDC' has no authority to waive the same.

28. It is further contended that 'WBIDC' considers the change of majority shareholding and Directors of the lessee is an event of a transfer of the lease/sub-lease. As such, the transfer fee becomes payable upon such an occurrence. In terms of the Resolution Plan, the measure shareholding and Directors of the Corporate Debtor's, i.e. Ramsarup Industries Private Limited, will change. This constitutes a transfer of the lease/sub-lease of the Kharagpur land, and the transfer fee is chargeable. It is further contended that the present Appeal lacks merit and is liable to be dismissed, to the extent that it pertains to the findings against 'WBIDC'.

Conclusion

29. Successful Resolution Applicant S S Natural Resources Private Limited (In short, 'SSN') has challenged the impugned Order mainly on the ground that a waiver sought from the Adjudicating Authority in its Resolution Plan has not been granted. The Resolution Applicant has sought to transfer 315 acres of land lying in Kharagpur to Ramsarup Industries Ltd. The Appellant has contended that such transfer has been sought without the payment of

any fee, consideration, premium, arrears of lease rent, penalty interest, and as the Adjudicating Authority has not sanctioned the same, the Resolution Plan has purportedly become unviable and unfeasible for 'SSN'.

30. As per Clause 15.3, Clause 15.12 and Clause 15.14 (iv) (g) of the Resolution Plan, if the waivers sought are not granted, or the assumptions made are not true, it will not have a bearing on the successful implementation of the Resolution Plan. The 'CoC' has approved the Resolution Plan, fully aware of these Clauses in the Resolution Plan. Further, the Adjudicating Authority has not in any manner mandated or directed 'SSN' to make payment of transfer fee, consideration, premium, arrears of lease rent, penalties, interest or any other payment to 'WBIDC'.

31. It is pertinent to mention that the Adjudicating Authority in its Order has specified that "*any exemption for payment could be dealt with by the respective authorities if applied for. With the above observations, we are not inclined to approve the waiver as prayed for in the Plan. It is left open for the determination by the appropriate authorities if applied for the waiver/exemption as prayed for in the Plan."*

32. The Adjudicating Authority has based its Order on Clause 15.3 of the Resolution Plan. Adjudicating Authority has merely directed 'SSN' to seek waivers, if necessary, from the relevant authorities. The Adjudicating Authority has not unilaterally altered the Resolution Plan. The 'SSN' had sought certain waivers, approvals and extinguishment in its Resolution Plan.

The Adjudicating Authority has, instead of itself approving or rejecting the same, stated that they might be sought by 'SSN' from the relevant authorities. This cannot in any manner be construed to imply that the Adjudicating Authority has unilaterally altered or modified the Resolution Plan.

33. As per Clause 15.3 of the approved Resolution Plan, if the approval, extinguishment, and wavier sought are not granted, it will not jeopardise the Resolution Plan. The Resolution Applicant shall remain responsible for its implementation.

34. In the instant case, the Adjudicating Authority, instead of approving or rejecting waivers, approvals and extinguishment sought in the Resolution Plan, has only directed the Resolution Applicant to seek such waivers, approvals and extinguishment from relevant authorities. Therefore, it cannot be concluded that the Adjudicating Authority has unilaterally altered or modified the Resolution Plan. Thus, the Appellants contend that the Adjudicating Authority has unilaterally altered the plan duly approved by the 'CoC', without the Resolution Applicant's consent is without any basis. Therefore, the Appellants contend that by not granting the waiver, the Adjudicating Authority has interfered in the 'CoC' commercial decision is misconceived.

35. Further, the Adjudicating Authority has not in any manner mandated or directed 'SSN' to make payments of the transfer fee, consideration, premium, arrears of lease rent, penalties, interest or any other payment to

'WBIDC'. The 'CoC' has approved the Resolution Plan, fully aware of Clause 15.3, Clause 15.12 and Clause 15.14 (VI)(g). The Resolution Plan explicitly states that if waivers are not granted or the assumptions made are not true, it will not have a bearing on the Resolution Plan's successful implementation.

36. Regarding the objection of the Appellant in context with a transfer fee of Kharagpur land, it is important to mention the Ramsarup Loh Udyog is merged with the Corporate Debtor on the appointed date, i.e. 01 April 2007. The lease over the Kharagpur land has been granted in favour of the Corporate Debtor vide indenture of sub-lease, which was executed on 13 September 2009, after the merger. Therefore, when providing the lease, the Corporate Debtor was the legal entity, and Ramsarup Loh Udyog was merely its unit. The Successful Resolution Applicant 'SSN's allegations that it has to pay an amount higher than ₹400 crores is neither established nor borne out from the records. No calculations or facts have been provided to establish that amount higher than ₹400 crores are required to implement the Resolution Plan.

37. It is also important to mention that the Order dated 25 September 2019, passed by this Tribunal, has stayed the impugned Order's operation so far relating to the payment of the amount excess of ₹ 400 crores. Therefore, the Resolution Plan itself leaves a buffer for certain payments. The Appellant has prematurely and erroneously acted, based on presumptions and made arbitrary calculations in the captioned Appeal with the sole aim of evading its obligations under the approved Resolution Plan and has not paid a single

penny on the pretext of the Order dated 25 September 2019 without there being any stay on the payments up to ₹ 400 crores.

38. Appellant further contended that due to Covid 19 pandemic impact, there is a substantial drop in overall market valuation. Therefore, the Resolution Plan has become unfeasible and unviable. It is further contended that the Force Majure Clause is being invoked. In the circumstances, the Resolution Plan has been withdrawn by the Appellant because subsequent events have made the Resolution Plan financially, economically and operationally unviable for reasons beyond the Appellant's control.

39. It is pertinent to mention that the impugned order relating to the Resolution Plan's approval is dated 04 September 2019. Covid 19 lockdown started from 15 March 2020 onwards. After approval of the Resolution Plan, Monitoring Agency was constituted from the date of approval of the Resolution Plan. Clause 13.1 (i) of the Resolution Plan states that "upon approval of the Resolution Plan, it shall be deemed that the Adjudicating Authority has approved the constitution of the Monitoring Agency in the manner specified in the Resolution Plan". It is pertinent to note that the first meeting of the Monitoring Agency held on 13 September 2019. It is also submitted on behalf of the Committee of Creditors that the Appellant has not attended any of the five meetings conveyed by the Monitoring Committee within 20 days from the date of approval of the Resolution Plan. It appears that the Successful Resolution Applicant 'SSN' does not want to implement the Plan. Therefore, the Appellant has not participated in the Monitoring Agency meetings. After

that, this Appeal is filed to avoid anticipated action on refusal to implement the Approved Plan.

40. In the circumstances as discussed above, we believe that Appeal sans merit and deserves to be dismissed.

Civil Appeal (AT) (Ins.) No.1039 of 2019

41. The Appellants being aggrieved by the Order dated September 4, 2019, in Company Application CA (IB) No. 461/KB/2090, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, in Company Petition No. 349/KB/2017 has filed this Appeal.

42. The Appellant contends that the Adjudicating Authority by the Impugned Order has allowed and approved the Resolution Plan despite the fact that the total payment to the creditors of the Corporate Debtor under the Resolution Plan is ₹ 364.5 Crores, which is far less and below the liquidation value of the Corporate Debtor, which is ₹ 614 crores and the Resolution Plan has been approved despite the fact that there is no maximisation of the assets of the corporate debtor to satisfy the debts of the all the stakeholders concerned.

43. The Appellant contends that the Adjudicating Authority has failed to appreciate that the Resolution Plan is conditional and contingent in as much as the Applicant has sought for a direction to the effect that upon the Resolution Plan getting sanctioned, the land in Durgapur and Kalyani would be transferred in the name of Resolution Applicant which cannot be allowed.

44. It is further contended that the Adjudicating Authority has failed to consider that there cannot be any discrimination between the same groups such as Financial Creditors or Operational Creditors and Operational Creditors must get the same treatment as Financial Creditors otherwise; such Resolution Plan ought to be rejected so that the Operational Creditors rights are safeguarded.

45. The Appellant contended that the Adjudicating Authority has failed to appreciate that the Resolution Applicant had sought a waiver of penalty and arrears of lease rent and interest on arrears and a waiver on payment of transfer fee and all such amounts from the West Bengal Industrial Development Corporation. However, such a waiver could not be granted at the time of approval of the Resolution Plan. As such, the Resolution Applicant is statutorily bound to make payment of transfer fees to the West Bengal Industrial Development Corporation under the relevant West Bengal Industrial Development Corporation's Regulations as well as the local laws of West Bengal. The Resolution Applicant is a separate legal entity to whom the Kharagpur land is proposed to be transferred. As such, the Resolution Applicant cannot ask for waivers in respect of payment of transfer fee, and thus, the Resolution Plan ought to be modified or set aside.

46. It is further contended that the Adjudicating Authority has failed to appreciate that the entire 'CIRP' is illegal since the Process Adviser of the Resolution Professional, namely Grant Thornton, had an

employee/consultant Mr Anup Krishnan who was also a Director of the Group Company of the Resolution Applicant whose Plan has been approved by the Adjudicating Authority.

47. The Appellant further contends that the Adjudicating Authority has failed to appreciate that assignment of financial assistance granted by Phoenix ARC Private Limited to ARCIL at the fag end of the Corporate Insolvency Resolution Process dehors the mandatory provisions of Section 28 of the Insolvency & Bankruptcy Code, 2016 and no approval of the Committee of Creditors was taken at the time of assignment of debt which vitiated the entire CIRP.

48. The Appellant further contends that the Adjudicating Authority has failed to appreciate that the Resolution Applicant is disqualified under Section 29 A of the Insolvency and Bankruptcy Code, 2016, for which the Resolution Applicant could not have submitted a Resolution Plan for the Corporate Debtor.

49. In reply to the above, the Counsel for the 'CoC' contends that in the instant case 'CIRP' initiated on January 8, 2018, and has now reached a stage where the Resolution Plan has been approved by the Adjudicating Authority based on the 'CoC' approval with a vote share of 74.41%.

50. As per the approved Resolution Plan, the upfront payment is ₹ 364.5 crores less than the liquidation value of the Corporate Debtor, which is ₹614 crores. The Resolution Plan could not have been approved given the

judgement of this Tribunal in Maharashtra Seamless Ltd v Padmnabhan Venkatesh, Company Appeal (AT) (Insolvency) No. 1 to 8 of 2019.

51. However the aforesaid judgement has been overruled by the Hon'ble Supreme Court in case of *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*, (*2020) 11 SCC 467 : 2020 SCC OnLine SC 67 at page 487* wherein it is held that;

> ***"28. No provision in the Code or Regulations has been brought to our notice under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*** *This point has been dealt with in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531]. We have quoted above the relevant passages from this judgment.*
>
> ***29.*** *It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the adjudicating authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the Order of the adjudicating authority in approving the resolution plan.*
>
> ***30.*** *The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we*

feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531], the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the Order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront."

(Emphasis supplied)

52. This Tribunal, in the case of *Standard Chartered Bank v Satish Kumar Gupta, RP of Essar Steel and Others 2019 SCC online NCLAT 388,* has observed that "*it is important to note that the commercial decisions are not amenable to precise mathematical formula. It is not that a 'Corporate Debtor' is viable, or a resolution plan is viable and feasible, while the realisations for "Financial Creditor" under the plan exceeds 'liquidation value' of the 'Corporate Debtor'.*"

53. The commercial decision of the Committee of Creditors is non-justiciable. Whether a relevant Resolution Plan is feasible, viable, and

maximising the Corporate Debtors value is a commercial decision. It is to be made by the Committee of Creditors by applying their commercial wisdom, and such a decision is non-justiciable.

54. Hon'ble Supreme Court in case of *K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257 at page 183* has held that;

> ***"52.*** *As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code****. There is an***

intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

53. *In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to CoC to evaluate the various possibilities and make a decision. It has been observed thus:*

"The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in

proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

59. *In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection."*

55. Further, the Hon'ble Supreme Court in *Swiss Ribbons Private Limited vs Union of India (2019) 4 SCC 17* has held that ;

"Since the financial creditors of the in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since these detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan"

56. This Tribunal in case of *Standard Chartered Bank vs Satish Kumar Gupta, RP of Essar steel (supra)* has observed that;

160.*The 'I&B Code' provides for 'Corporate Insolvency Resolution Process' for reorganisation of 'Corporate Debtors'. It separates commercial aspects from judicial aspects and empowers and facilitates the 'Committee of Creditors' to take commercial decisions in a 'Corporate Insolvency Resolution Process'. The commercial decisions of the 'Committee of Creditors' are not ordinarily open to any analysis, evaluation or judicial review by the Adjudicating Authority or the Appellate Authority and hence not justiciable."*

57. It is contended by the Appellant that the Resolution Plan purportedly discriminates within the Financial Creditors and the Operational Creditors. While approving the Plan, the Adjudicating Authority did not direct the West Bengal Industrial Development Corporation to waive any penalty arrears of lease rent or any interest on the arrears. Hence, the Resolution Plan was

contingent upon such conditions. Therefore the conditional Resolution Plan could not have been approved by the Adjudicating Authority.

58. It is pertinent to mention that the distinction can be made with creditors that are not similarly situated. Financial Creditors and Operational Creditors must be given roughly the same treatment. Further, there is no bar in making distinctions between the creditors who do not belong to the same class and can be treated differently. The creditors who do not belong to the same class are not similarly situated are treated differently. Judicial precedents make it clear that the Resolution Plan must not discriminate among creditors who are similarly situated and that the creditors must be given roughly the same treatment.

59. Hon'ble Supreme Court in case of *Essar Steel India Ltd. Committee of Creditors vs. Satish Kumar Gupta, (2020) 8 SCC 531 : 2019 SCC OnLine SC 1478 at page 606* held that;

> ***"88.*** *By reading para 77 (of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum*

payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

89. *Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17], most financial creditors are secured creditors, whose security interests must be protected in Order that they do not*

go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]. Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims."

60. It is also important to mention that distinction between creditors on the basis of security interest is permitted under Section 30 (4) of the Insolvency and Bankruptcy Code, 2016, which reads as under;

"*the Committee of Creditors may approve a resolution plan by a vote of not less than 66%, of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the*

security interest of a secured creditor and such other requirements as may be specified by the board."

61. Undisputedly, the Appellant is the Promoter and Guarantor of the Corporate Debtor. The Resolution Plan offers ₹ 670.50 crores, higher than the liquidation value that is ₹ 610.29 crores. As per the approved Resolution Plan, the Resolution Applicant is to infuse a sum of ₹ 670.50 crores to revive the Company, which had stopped this operation a decade ago. Pertinently, the Resolution Plan has also made provisions for the payment to workers even when the liquidation value receivable by the Operational Creditors has been calculated to be nil. Moreover, the Resolution Plan also makes provision for the payment of ₹ 3.5 crores to the Operational Creditors. Pertinently the Hon'ble Supreme Court's judgment in Maharashtra Seamless (2020 SCC Online SC 67) held that the Adjudicating Authority under the Code should cede ground to the commercial wisdom of the Committee of Creditors rather than assess the Resolution Plan on the basis of quantitative analysis. Hon'ble Supreme Court has further held that the Adjudicating Authority cannot interfere on merits with the commercial wisdom of the Committee of Creditors. It is also apposite to the Hon'ble Supreme Court's recent order passed in *State Bank of India vs Accord life Spec Private Limited,2020 SCC online SC page 554*, reiterating the above position held;

> **"2.** *The impugned judgment dated 13.11.2019 has remitted the matter to the NCLT after a finding that under Section 30(2) of the Insolvency and Bankruptcy Code together with the principle of maximization of assets of the corporate debtor, a*

resolution plan which is lesser than liquidation value cannot be accepted.

3. *As a matter of law, this judgment has to be set aside in view of our recent judgment dated 22.01.2020 in Civil Appeal No. 4242 of 2019 entitled Maharashtra Seamless Limited v. Padmanabhan Venkatesh in which this Court has categorically held as under:*

> *"26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted about the relevant passages from this judgment."*

62. The Resolution Plan proposes that the Financial Creditors get 5.8% of the admitted claim amounting to ₹ 5853 crores; the said Plan also contemplates the payment of ₹ 10.5 crores to the Operational Creditor, which amounts to 4.68% of the admitted claim amount of ₹ 224.05 crores. The workman's payment is 90% of the admitted claim, and the statutory authorities have been offered ₹ 3 crores. Thus the total claim of the Operational Creditor inclusive of statutory authorities would come to 5.82%.

63. In the light of the aforesaid, it is clear that the Resolution Plan give similar treatment to the operational creditor even when the liquidation amount to the Operational Creditors has been calculated to nil.

64. The Appellant has contended that the Resolution Plan is conditional. Respondent No. 2 will have to expend money towards the transfer charges and arrears of lease rent, penalty, and interest to West Bengal Industrial Development Corporation. Respondent No. 2 is statutorily bound to do so. The aforesaid contention of the Appellant shows that it is only interested in the Corporate Debtor and not in its revival under the Corporate Insolvency Resolution Process, which is the real intention of the Code. The Counsel for the 'CoC' submits that no transfer fees are payable to 'WBIDC' because Ramsarup Loh Udyog is only a unit of the Corporate Debtor. It was a separate company till September 2008, but it has since then merged with the Corporate Debtor prior to the execution of the said sub-lease dated September 3, 2009.

65. It is pertinent to mention that 'WBIDC' had not raised any claim or penalty or arrears of rent concerning Kharagpur land before the Resolution Professional or before the Adjudicating Authority. Thus it cannot raise any further claims after the approval of the Resolution Plan. The only claim of security charges has been approved in the Resolution Plan.

66. It is further contended that the Appellant has no locus to raise the present issue as Resolution Applicant purportedly sought such waiver in the Resolution Plan, which the 'CoC' in all its wisdom has approved with 74.41% of majority. Therefore, the same has also been approved by the Adjudicating Authority.

67. The Learned Counsel for the 'CoC' further submitted that the object and reason of the Code make it clear that the Corporate Debtor's liquidation is the last resort, and every endeavour shall be made to revive a Company. Further, the maximisation of the Corporate Debtor's value of assets does not necessarily mean and referred to the maximum upfront recovery of dues to the creditor. On many occasions, short-term reduction to pay out the creditors can lead to much better Asset Performance and eventful maximisation of assets' corporate debtor value. Hon'ble Supreme Court in case of Committee of Creditors of Essar Steel India Ltd (supra) has held that it is only the commercial wisdom of the 'CoC' that shall decide upon the feasibility and viability of the Resolution Plan and hence it is up to the 'CoC' to decide whether the upfront payment is to be more or less than the liquidation value.

68. In K. Sashidhar (supra), it is held that the Adjudicating Authority, while approving the Resolution Plan, is only required to satisfy itself that the Resolution Plan meets the requirements specified in Section 30(2) and can do nothing more nothing less.

69. Hon'ble Supreme Court in case of *Arcelormittal India (P) Ltd. vs. Satish Kumar Gupta*, (2019) 2 SCC 1 : 2018 SCC OnLine SC 1733 at page 88 has held that;

> ***"84.*** *If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the adjudicating authority, this determination can be challenged before the appellate authority under Section*

61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such Order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time-limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the adjudicating authority. The non obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

83. *It is the Committee of Creditors which will approve or disapprove a resolution plan, given the statutory parameters of Section 30. Under Regulation 39 of the CIRP Regulations, sub-regulation (3) thereof provides:*

> *"**39. (3)** The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:*
>
> *Provided that the committee shall record the reasons for approving or rejecting a resolution plan."*

This Regulation shows that the disapproval of the Committee of Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution plan is ineligible under Section 29-A, is not final. ***The adjudicating authority, acting quasi-judicially, can determine whether the resolution plan is violative of the provisions of any law, including Section 29-A of the Code, after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the adjudicating authority to the appellate authority under Section 61."***

70. Hon'ble Supreme Court in case of *Swiss Ribbons Private Limited vs Union of India (2019)4 SCC 17* has held that; the Financial Creditors are in the business of money lending, Banks and Financial Institutions are best equipped to assess viability and feasibility of the business of the Corporate Debtor, and since Financial Creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of the Resolution Plan.

71. The Appellant contended that the Adjudicating Authority failed to notice that the entire 'CIRP' has been conducted illegally from the very inception since the Process Adviser for the Resolution Professional, namely Grant Thornton, has a consultant Mr Anup Krishna, who was also a Director of the group company of the Resolution Applicant, whose Plan has been approved by the Learned Adjudicating Authority by the Impugned Order dated September 4, 2019. In its reply affidavit in the instant Appeal, the Resolution

Professional has admitted the fact that Mr Anoop Krishna was appointed as Additional Independent Director of Shayam Metallics and Energy India Ltd under a letter of appointment dated February 18, 2019, for a tenure of 5 years. Mr Anoop Krishna continued in the said Shayam Sel and Energy Ltd office from April 18, 2019, till September 5, 2019. It is contended that 'CIRP' was manifestly illegal and void ab initio, and the entire process of selecting the Successful Resolution Applicant was vitiated by fraud. Since fraud vitiates all transactions, the entire process has to be set aside, and fresh Resolution Plans should be called for. It is alleged that the Successful Resolution Applicant was favoured and there was a bias towards the Successful Resolution Applicant for which a Resolution Plan with such a low bid amount has been accepted and approved by the 'CoC' and the Resolution Professional.

72. In reply to the above objection, Learned Counsel for the Committee of Creditors submits that there is no conflict of interest just because Mr Anoop Krishna is a consultant of Grant Thornton India. It is pertinent to note that this issue was not brought up by the Appellants before the Adjudicating Authority. But it was raised by Srei Multiple Asset Investment Trust Vision India Fund.

73. It is stated that Mr Anoop Krishna is not an employee of Grant Thornton India but is merely a Grant Thornton India consultant. However, Mr Anoop Krishna is a consultant of Grant Thornton (who backed the advisers to the Resolution Professional). He had no role in the Corporate Debtor's Corporate

Insolvency Resolution Process of the Corporate Debtor and was not a part of the Resolution Professional team of 'Grant Thornton India.

74. There has been no interaction or communication between the Resolution Professional and Mr Anoop Krishna in relation to the 'CIRP' of the Corporate Debtor. Mr Anoop Krishna became a director of the group company of the Resolution Applicant. The process of selecting the Successful Resolution Applicant had been conducted fairly and transparently. All three outbidding processes that were conducted, where open processes, were conducted in the presence of Members of the Committee of Creditors and Resolution Applicants. In each process, multiple rounds of outbidding took place and each participating Resolution Applicant was given the same opportunity to outbid the other Resolution Applicant's. Therefore it was not possible for any single Resolution Applicant to influence the outbidding process.

75. It is essential to point out that the Appellant is the Promoter and Guarantor of the Corporate Debtor. He has been involved in the Corporate Insolvency Resolution Process. Still, he never raised such an objection before the Adjudicating Authority. The Adjudicating Authority in paragraph 50 of the impugned Order has taken note of the fact that the Appellant had deliberately circulated among the financial creditors, misinformation regarding the security interests, erroneous computation and suppression of facts pertaining to the actual position of charges over the assets of the corporate debtor which were not within the knowledge of financial creditors. The learned Adjudicating

Authority further went forward to hold that not only was there is no concealment of facts on the part of the resolution professional, but the Appellant had suppressed material facts pertaining to the corporate debtor. The Appellant has not come with clean hands, and the present appeal is only a desperate attempt to jeopardise the entire resolution process. The adjudicating authority further noted in his Order that;

> *"the overall conduct of the applicant in filing multiple applications cannot be considered as with genuine object to get the relief as prayed for, with object to protract the matter..... If this kind of approach is not prevented, it would air a wrong message to the similarly situated directors of the corporate debtor company*".

76. Therefore, in view of the, it appears that instant appeal is a mala fide attempt on the part of the Appellant to disturb the Resolution Process, and the same cannot be sustained. In the circumstances as stated above, we believe that the Appeal sans merit and deserves to be dismissed.

Civil Appeal (AT) (Ins.) No.1242 of 2019

77. The Appellant, being aggrieved by the Resolution Plan's approval, has filed this appeal on the ground that the Adjudicating Authority has erred in holding that the Respondent No.1 Corporate Debtor is the owner of the Wind Mill Project at Dhule, Maharashtra.

78. The Appellant contends that the above finding is beyond the Adjudicating Authority's jurisdiction under the Insolvency & Bankruptcy Code, 2016. The Appellant is seeking deletion of Wind Mill Project's name from the Resolution Plan as an asset of the Corporate Debtor. The ownership of the

same is the subject matter of proceedings before the Court of appropriate jurisdiction and the same is pending before the Debt Recovery Tribunal, Mumbai.

79. The Appellant contends that the impugned Order suffers from patent illegality to the extent it failed to note that the Wind Mill Project at Dhule, Maharashtra, is to transferred to the third party. In view of the fact that the Appellant having exercised its right on April 7, 2017, under Section 13(4)(a) of the Securitisation and the Reconstruction of Financial Assets Act, 2002 and Enforcement of Security Interest Act, 2002. The Impugned Order has been passed in complete disregard of the material facts and documents placed on record.

80. The Appellant further contends that the Adjudicating Authority has approved the Resolution Plan of Respondent No. 3, which wrongly includes the Wind Mill Project, the title of which had already passed in favour of the third party as of April 7, 2017. Section 18(1) explains that the term 'assets' does not include the third party's assets and the Corporate Debtor's possession under a contractual arrangement. The Wind Mill Project was secured asset of the Appellant, upon the wilful default of the Corporate Debtor, auctioned the same in terms of Section 13(4) of SARFAESI Act, 2002 and the title thereof was transferred in the name of a third party as on April 7, 2017, i.e. before the commencement of 'CIRP'. Therefore the Impugned Order has also been passed in violation of the provisions of the Code.

81. Further, Class VII of the Resolution Plan envisages all litigations against the Respondent No.1 Corporate Debtor, existing before or after the effective date, which may adversely affect the Respondent No. 1 Corporate Debtor, shall be deemed to have been withdrawn ,once the Adjudicating Authority approves the Resolution Plan. The Impugned Order not only wrongly declares the 'Wind Mill Project' as an asset of Respondent No.1, Corporate Debtor, but the ramification of approving the Resolution Plan without deleting the said asset, despite the issue pending before the DRAT, ranks direct prejudice to the Appellant.

82. The Appellant further contends that Clause VII aims to circumvent the proceedings as pending before the insolvency commencement date and closes the Appellant's rights and the subsequent purchasers right in the garb of the approved Resolution Plan. The provisions of Clause VII of the approved Resolution Plan ought to have been deleted by the Adjudicating Authority as the Appellant stand to lose its legitimate and admitted claim and its right to recover the same under the law, leaving the Appellant effectively remediless.

83. The Appellant contends that the Adjudicating Authority erred in dismissing the Application filed under Section 60(5) of the I&B Code. The Adjudicating Authority has failed to take note of the fact that the 'Wind Mill Project' at Dhule, Maharashtra was hypothecated by Respondent No.1/Corporate Debtor, against the grant of the loan of ₹ 12.48 crores in favour of the Appellant, by executing the Deed of Hypothecation dated July 20, 2005. The charge was duly registered with the Registrar of Companies on

August 5, 2005. The Respondent Corporate Debtor having defaulted in repayment of the loan amounts thus constrained the Appellant to proceed in terms of Section 13(4) of the SARFAESI Act, 2002, resulting in the sale of the secured asset, i.e. the Wind Mill at Dhule, Maharashtra on March 24, 2017, to one Suzlon Global Services Ltd for a sum of ₹ 5.15 crores and the said certificate was accordingly issued on April 7, 2017. The Impugned Order fails to deal with these material facts and dishonestly proceeds to declare the Wind Mill Project to be the asset of the Corporate Debtor when as a matter of fact, the Respondent No.1 Corporate Debtor was not in possession and use of the said Wind Mill on the date of commencement of 'CIRP'.

84. In reply to the above, the Resolution Professional contends that the issues raised by Appellant herein 'Indian Renewable Energy Development Agency Ltd' (in short 'IREDA') is that the 'Wind Mill' asset has been sold and cannot be made part of the resolution process of Ramsarup Industries Ltd. The RP submits that the matter is sub-judice before the 'DRAT', and accordingly, the Resolution Applicant has been made aware of the same. The Resolution Applicant has provided its bid, keeping in mind that the asset's title is subject to the proceedings.

85. It is submitted that the Debt Recovery Tribunal, Aurangabad stayed the sale of Wind Mill asset, stating that it was not conducted by the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. The Appeal is currently pending before the Debt Recovery Appellate Tribunal. Given the Appeal's pendency, it is clear

that the issue about the sale of Wind Mill asset of the Corporate Debtor has not attained finality and is sub-judice. The said valuable assets were included in the list of assets of the Corporate Debtor in its Corporate Insolvency Resolution Process.

86. The Information Memorandum of the Corporate Debtor provided to all the Resolution Applicants and Members of the 'CoC' has mentioned the Appeal's pendency before Debt Recovery Appellate Tribunal. Therefore, it is clear that all Resolution Applicants have been made aware of the Appeal's pendency. Successful Resolution Applicant is to be bound by order of the Appeal, which may either confirm or set aside the sale of Wind Mill asset.

87. The Adjudicating Authority has also mentioned the above things in its Order and stated that the Corporate Debtor's right to hold the 'Wind Mill' asset is not affected unless the Debt Recovery Appellate Tribunal reverses it. Thus it is clear that the Adjudicating Authority has neither exceeded its jurisdiction nor has determined the title of the property but has merely taken note of the facts at hand in passing the impugned Order.

88. In the circumstances as discussed above, we find no merit in the Appeal; hence deserves to be dismissed.

Civil Appeal (AT) (Ins.) No.1159 of 2019

89. The present Appeal is filed against the Resolution Plan's approval because of the Appellant's Application CA (I.B.) No.497/K.B./2019 under Section 29A read with Section 60(5) of the Insolvency and Bankruptcy Code,

2016 challenging the eligibility of 'S.S. Natural Resources Private Limited' a Successful Resolution Applicant (from now on referred to as the H-1 Bidder) to submit a Resolution Plan regarding Ramsarup Industries Ltd (from now on referred to as the Corporate Debtor) was rejected.

90. The Appellant (Orissa Metallics Private Limited) was the H-2 bidder and submitted a bid for a total sum of ₹ 1014.99 crores with an upfront payment of ₹ 281.90 Capex and working capital of ₹ 733.09 crores. Despite being much above the Corporate Debtor's liquidation value, such Plan of the Appellant, i.e. ₹ 610.29 crores, was not accepted. The CoC accepted the Resolution Plan of the H-1 bidder for a total bid amount of ₹ 670.50 crores solely on the ground that H-1's upfront payment of ₹ 351 crore is higher than the upfront payment of ₹ 281.90 crores. However, while rejecting the H-2's Resolution Plan, they conceded that the upfront payment proposed by the H-1 bidder and their contribution by Capex and working capital should be taken into consideration. This amount to gross discrimination between the H-1 and H-2 bidder, which has assumed even greater significance as it has come to light in the course of hearing of Company Application No. 1092 and 1093 of 2019 that the person associated with the M/S Grant Thornton LLP engaged by the RP as Process Adviser is a Director of Shyam Ferro Limited, an associate concern of H-1.

91. It is further contended that the H-1 bidder is ineligible to submit any Resolution Plan about the Corporate Debtor. The H-1 bidder is a Special-Purpose Vehicle of Shyam Group, as would be evident from the Approved

Resolution Plan. H-1, Shayam Emco Infrastructure Ltd, Shyam Sel and Power Ltd, Emco Power Ltd, Emco Ltd are all Companies under the Shyam Group. They are directly or indirectly owned, controlled and managed by the promoter group. The key managerial persons and shareholders of H-1, Emco Ltd, have defaulted in repaying bank loan and interest thereon. As such, its accounts with several banks have become NPA as of March 31, 2017. Hence, H-1 became ineligible to submit a Resolution Plan regarding the Corporate Debtor under Section 29 A (c) and (j) of the I&B Code. Shyam Group ostensibly controls Shyam Ferro Alloys Ltd and BRG Irony Steel Private Limited, which is now in liquidation, by common shareholding and key managerial person's. The account of 'BRG Iron And Steel Private Limited' was also classified as NPA by UCO Bank on March 31, 2018. Shyam Ferro Ltd and BRG Iron & Steel Private Limited have common shareholders. On this ground also, H-1 is disqualified from being a Resolution Applicant under Section 29 A of the I&B Code.

92. The Appellant further contends that Clause 15.3 of the Approved Resolution Plan of H-1 bidder is only a part of the waiver and extinguishments of the claim through the Resolution Plan. There are other inbuilt waivers and extinguishment's into the said Resolution Plan. Upon approval of the Resolution Plan by the Impugned Order dated September 4, 2019, those other waivers are deemed to have been allowed. However, such waiver and extinguishment's could not have been allowed.

93. Appellant further contends that during the hearing before the Adjudicating Authority, the Learned Counsel appearing on behalf of the H-1 bidder submitted that the H-1 is unwilling to vary and modify its Plan. Further, if the waiver is not granted, the actual bidder may withdraw from implementing the said Plan. Such submission was recorded in the Impugned Order. Given the undertaking recorded in Clause 15.3 of the said Plan, the Learned Adjudicating Authority has rejected such an offer. The Appellant has prayed that the H-1 bidder should be declared as ineligible to submit its Resolution Plan in respect of the Corporate Debtor.

94. The Learned Counsel for the Appellant further placed reliance on the Hon'ble Supreme Court's judgment in Embassy Property Developer's Private Limited v State of Karnataka and others, reported in 2019 SCC online SC 1542, wherein it is held that whenever the Corporate Debtor has to exercise a right that falls outside the purview of the I&B Code, especially in the realm of public law, they cannot, through the Resolution Professional, take a bypass and go there before NCLT for the enforcement of such a right.

95. The Appellant has filed additional written submission stating that waivers sought for in the Resolution Plan by the H-1 bidder were not granted by the Adjudicating Authority. The actual bidder now wants to resile and withdraw from the implementation of the Resolution Plan. The Resolution Applicant whose Resolution Plan stands approved cannot be permitted to alter this position to the detriment of various stakeholders after pushing out all potential rivals during the bidding process. This is fraught with disastrous

consequences for the Corporate Debtor, which may be pushed into liquidation as the 'CIRP' period may by then be over, thereby setting at nought all possibilities of Insolvency Resolution Process of the Corporate Debtor, more so when it is a going concern. This apart, there is no express provision in the I&B Code, allowing a successful Resolution Applicant to stage a U-turn and frustrate the entire exercise of the Corporate Insolvency Resolution Process. To date, H-1 has not taken any steps for the implementation of the approved Resolution Plan. The Resolution Plan incorporates contractual terms, binding the H-1. As such, the H-1 is estopped from wrigging out of the liability incurred under the approved Resolution Plan, and the principles of estoppel by conduct would apply to it.

96. The value of the assets of the Corporate Debtor is bound to have depleted because of the passage of time consumed in the Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stakeholders in a state of devastation.

97. In reply to the above the Resolution Professional submits that he has followed all necessary procedure to check the eligibility of 'S.S. Natural Resources Ltd' (in short 'SSN') under Section 29 A of the I&B Code. The 'SSN' has submitted an affidavit stating that it is eligible to submit a Resolution Plan under Section 29 A of the Code as required under Section 30(1) of the Code. The 'CoC' also discussed the matter and checked the Resolution Applicant 'SSN' eligibility under Section 29 A of the Code.

98. The Appellant contends that the Successful Resolution Applicant 'SSN' is ineligible under Section 29 A of the Code. Because one of the 'SSN' Group Companies, namely Shyam Ferro Alloys Ltd, has a shareholder that is also a shareholder in a Non-Performing Asset entity, namely 'BRG Iron and Steel Co Private Limited', and therefore SSN is ineligible. It is also pleaded that some of 'SSN' shareholders are also shareholders in an entity, namely Shyam Emco Infrastructure Ltd and Emco Power Ltd (a subsidiary of an NPA company, namely Emco Ltd), and therefore 'SSN' is ineligible.

99. The Resolution Professional submits that Shyam Ferro Alloys is not an NPA and does not have an investment in a company that is an NPA. Neither Shyam Emco Infrastructure Ltd nor Emco Power Ltd is NPA, and they do not have an Investment in a Company that is NPA. By merely having a group Company (which is not an NPA entity), which has shareholders that are also shareholders in an NPA entity, does not in any way disqualify Resolution Applicant 'SSN'. Further by merely having shareholders in a non-NPA company, along with a shareholder that is not an NPA entity but a subsidiary of an NPA entity, does not in any way disqualify 'SSN'.

100. We have considered the argument advanced by both parties. We find that a Shyam Ferro is not an NPA and does not have an investment in a company that is an NPA. Neither Shyam Emco Infrastructure Ltd nor Emco Power Ltd is NPA. They do not have an investment in an NPA company. By merely having a group company, which has shareholders, who are also

shareholders in an NPA entity, does not disqualify the Successful Resolution Applicant 'SSN'.

101. Therefore eligibility criteria under Section 29 A of the Code are not violated, and 'SSN' is eligible under Section 29 A of the Code to submit a Resolution Plan for the Corporate Debtor.

102. Based on the above discussion, we are of the considered opinion that the Adjudicating Authority's finding that the Successful Resolution Applicant 'SSN' is not disqualified under Section 29 A of the Code to submit a Resolution Plan needs no interference from this Appellate Tribunal. Other issues which have been raised here are also discussed in Company Appeal (AT) ((Ins.) No. 995 of 2019 S.S. Natural Resources Private Limited v Ramsarup Industries Ltd is also part of this order.

103. In the circumstances, we believe that the Appeal sans merit and deserves to be dismissed.

Civil Appeal (AT) (Ins.) No. 468 of 2020

104. The Applicant files the instant Appeal on being aggrieved by the rejection of I.A. No. 877/K.B./2019. The only ground for rejection of the Application is that the Committee of Creditors had already approved the Resolution Plan. The Appellant had not submitted its claim before the Resolution Professional within the time stipulated by the Code.

105. The Appellant further contends that Hon'ble Supreme Court vide order dated May 6, 2019, had interalia directed as follows;

> *"Taking into consideration the peculiar facts and circumstances of the case, the Appellant, with the consent of all the respondents, is permitted to participate in the resolution process which is going on before the National company law tribunal, Kolkata in C.P. (I.B.) No. 349/K.B./2017."*

In pursuance of the above Order, the Applicant had moved the Application before the Adjudicating Authority, but by the impugned Order, the Adjudicating Authority rejected it.

106. The Appellant has assailed the Impugned Order on the basis that the direction passed by the Hon'ble Supreme Court on May 6, 2019, in the peculiar facts and circumstances of the case in exercise of extraordinary jurisdiction under Article 142 of the Constitution of India read with its power as Appellate Court under Section 62 of the Insolvency and Bankruptcy Code, 2016 is binding on the Adjudicating Authority and all the parties appearing before it. The directions were passed by the Hon'ble Supreme Court post-approval of Resolution Plan by the Committee of Creditors, and the Hon'ble Supreme Court was informed about these developments. This explains why the Hon'ble Supreme Court order dated May 6, 2019, was passed in peculiar circumstances and with all the parties' consent.

107. The Hon'ble Supreme Court direction of participation would be rendered utterly meaningless if the Appellant were not permitted to submit

its claim before the Resolution Professional. As a Financial Creditor, there was nothing else, that the Appellant could achieve by participating in the proceedings before the NCLT, except for a consideration of its claim.

108. In reply to the above Learned Counsel representing 'CoC' submits that the Appellant never filed its claim with the Resolution Professional from the admission order till date. The present appeal filed by the Appellant forms a part of the second round of litigation between the same parties before this Tribunal on the same set of facts, which has been dealt with vide judgement dated December 14, 2018, of this Tribunal, which went up to the Hon'ble Supreme Court and had accordingly, attained finality on May 6, 2019.

109. It is further submitted that the appeal is barred by limitation as prescribed under the Code. The Impugned Order was available on September 4, 2019, itself. However, the present Appeal was preferred only on February 24, 2020, beyond the Limitation period of 45 days (30+15 days).

110. The Appellant on September 25, 2019, after a lapse of 51 days from September 4, 2019, preferred SLP before the Hon'ble Supreme Court, challenging the Order dated September 4, 2019. The Appellant was well aware that the limitation to file an Appeal before this Tribunal had already expired. By Order dated February 3, 2020, the SLP mentioned above came to be withdrawn by the Appellant with the liberty to participate in the 'CIRP'. The said Order neither condones any delay nor extends the statutory limit for filing such Appeal. It also does not extend any benefit under Section 14 of the

Limitation Act, 1963. The simply liberty granted by the Hon'ble Supreme Court has to be read within the contours and time prescribed under the Code. Accordingly, the present Appeal and an Application for Condonation of Delay have been filed beyond the limitation period prescribed under the Code and ought to be rejected outright.

111. It is pertinent to mention that Appellant was aware of the Adjudicating Authority's admission order since its inception, i.e. January 8, 2018. Even after knowledge of the admission of the petition, the Appellant intentionally avoided filing any claim before the Resolution Professional.

112. It is further submitted by the Counsel of the 'CoC' that the Hon'ble Supreme Court had been informed that the 'CIRP' period has already expired and that the Successful Resolution Plan had been approved by the 'CoC' and accordingly, the Civil Appeal had become infructuous. Given the same, the Hon'ble Supreme Court granted the Appellant liberty to participate in the Corporate Insolvency Resolution Process.

113. In reply to the above, the Resolution Professional submitted that this appeal preferred by the Appellant is liable to be dismissed for being time-barred. While granting the liberty to file the Appeal before this Appellate Tribunal, the Hon'ble Supreme Court did not pass any direction overriding the statutory limitation prescribed in Section 61 of the Code. Hon'ble Supreme Court in Suman Devi v Manisha Devi (2018) 9 SCC 808 laid down the law that "the grant of liberty" to pursue an alternative remedy "cannot obviate the

bar of limitation", especially when the remedy is governed by a "complete code" was under the Insolvency and Bankruptcy Code, 2016. Further, the Appellant's SLP before the Hon'ble Supreme Court was filed on 25 October 2090, i.e. beyond the maximum period of 45 days prescribed for filing an Appeal before this Appellate Tribunal. The Appellant had preferred to file an SLP before the Hon'ble Supreme Court only after the limitation period under Section 61 of the I&B Code had already expired.

114. The Appellant is claiming to be a Financial Creditor of the Corporate Debtor for a claim amount of ₹ 76,327,919. However, the Appellant had not filed its claim in the 'CIRP' of the Corporate Debtor extracting the grounds of the pending challenge to the admission of the Section 10 petition before the NCLAT and the Hon'ble Supreme Court. However, even after the adverse order passed by the Adjudicating Authority and the NCLAT, the Appellant did not submit its claim before the Resolution Professional. Moreover, there was no reason for the Appellant not to file a claim to ensure that the claim amount is officially registered as part of the 'CIRP' of the Corporate Debtor. Even if the claim of the Appellant back to be admitted at this juncture in its entirety, the admission of the total claim amount would provide them with an approximate voting share of 0.136% in the 'CoC' of the Corporate Debtor. The Corporate Debtor's Resolution Plan was approved by a vote of 74.41% of the 'CoC'. In such a scenario, even if the 'CoC' of the Corporate Debtor was to be reconstituted, the Appellant's voting share and vote could not create a significant difference to the Resolution Plan's approval.

115. The Appellant has placed reliance on the Participation Order in preferring this appeal, praying that its claim to be admitted and 'CoC' to be reconstituted for fresh voting on the Resolution Plan with the revised voting shares. It is submitted that the Hon'ble Supreme Court was conscious that the 'CoC' has already approved the Resolution Plan of the Corporate Debtor, provided the Appellant with the liberty to raise the issue of its claim before the Adjudicating Authority. However, the Appellant has made an entirely incorrect and destructive interpretation of the Participation Order to exceed the permission provided to it by the Hon'ble Supreme Court. Rather than merely arguing and requesting for consideration of the claim, the requests regarding the stay of the proceedings and the Constitution of the 'CoC' is genuinely disruptive and against the basic tenets of the Code.

116. The Resolution Professional further submitted that he has always acted within the four corners of the law. The consent before the Hon'ble Supreme Court was about the 'Participation in the proceeding before the Adjudicating Authority'. In this context, Resolution Professional stated that he is willing to consider and verify the Appellant's claim if so directed by the Hon'ble Supreme Court. At no point it is represented that the 'CoC' of the Corporate Debtor should be reconstituted and the Resolution Plan be once more put to the vote before the 'CoC'. Further, such consent, as indicated by the Appellant, may not be within the Resolution Professional's powers under the Code.

117. We have heard the arguments of the Learned Counsel for the parties and perused the record. It is submitted that while passing the order dated 6th

May 2019, the Hon'ble Supreme Court had been informed that the 'CIRP' had already expired. The Resolution Plan had been approved by the 'CoC', and accordingly, the Civil Appeal had become infructuous. Given the same, the Hon'ble Supreme Court granted the Appellant the liberty to participate in the Resolution Process before the Adjudicating Authority and disposed of the Civil Appeal.

118. It is pertinent to mention that the Hon'ble Supreme Court in case of *Committee of Creditors of Essar Steel India Ltd vs Satish Kumar Gupta 2019 SCC online SC 1478* has held that all claims must be submitted to and decided by the Resolution Professional so that a Prospective Resolution Applicant knows exactly what is to be paid so that it may then take over and run the business of the Corporate Debtor.

119. In the light of the above judgement, the Appellant's claim could not have been admitted as the Resolution Plan had already been approved by the 'CoC'. In the present case, the 'CIRP' already expired before any claim being submitted by the Appellant. Even assuming the Appellant's claim has been accepted by the Adjudicating Authority, the whole 'CIRP' period of approximately 15 to 16 months, and the final Resolution Plan approved by the 'CoC' by the majority of 74.41% would have been jeopardised. It is contended on behalf of the 'CoC' that the Hon'ble Supreme Court's order dated 6th May 2019 had been passed before the judgment above. Therefore, the said order should be read along with the judgement mentioned above and the provisions laid down in the Code.

120. Further, the Hon'ble Supreme Court in the case of K. Sashidhar (supra) has held that the 'CoC's commercial wisdom is Paramount and that any inquiry into an "approved" Resolution Plan is extremely limited. The said judgement has further been reiterated and upheld by the Hon'ble Supreme Court in the Essar Steel case (supra). Hence, the approved Resolution Plan cannot be rejected on the grounds, as mentioned earlier, raised in this Appeal.

121. By its order dated May 6, 2019, the Hon'ble Supreme Court merely granted the Appellant the opportunity to represent its case before the Adjudicating Authority, at the stage at which the matter was at then, i.e. at the stage of approval of the Resolution Plan. The Appellant now seeks to interpret the said Order of Hon'ble Supreme Court completely contrary to the Code and seeks to circumvent the objectives and provisions laid down in the Code.

122. It is obvious that the Hon'ble Supreme Court was fully aware and mindful of the Resolution Process stage and the adherence to the Code's timelines, and the stage of submission of the claims under the Code. The Appellant has sought to intentionally misinterpret the order to imply that the Hon'ble Supreme Court had permitted it to file its claim. The Appellant has further tried to mislead this Appellate Tribunal by stating that the order has been passed under Article 142 of the Constitution of India, i.e. in the exercise of extraordinary jurisdiction. No such recording is present in the order. The Appellant has attempted to make its case without the Hon'ble Supreme Court stating so in the order. The Appellant is now seeking to turn back the clock

on the entire Resolution Process and jeopardise the Successful Resolution Plan approved by the 'CoC'.

123. The 'CoC' took considerable time and efforts to finalise and approve the Resolution Plan with a 74.41% vote share. The 'COC' has taken approximately one year and three months on the Resolution Process of the Corporate Debtor and could approve the corporate debtor's final Resolution Plan. The Appellant is now seeking to turn back the clock in the garb of the Hon'ble Supreme Court's order by misinterpreting it, which is not sustainable. The appellant wants to cover up its shortcomings. There is a hiatus on the Appellant part for not filing its claim with the Resolution Professional within the prescribed timelines. Appellant is now seeking to turn back the clock of the entire resolution process spanning a period of approximately 15 to 16 months, jeopardising the successful Resolution Plan involving a debt of about ₹ 6,000 crores, which has been approved of 74.41% of the voting share. It will further jeopardise the claims of the various Financial Creditors and Operational Creditors of Respondent No. 1 Corporate Debtor.

124. In the circumstances stated above, we find that the Appeal sans merit and deserve to be dismissed.

Civil Appeal (AT) (Ins.) No. 1124 of 2019

125. The Appellant being aggrieved by the Impugned Order dated September 4, 2019, in Company Application No. 1039/K.B./2019 under Section 60(5) of the I&B Code, 2016, in CP (IB) No.349/KB/2017 has filed this Appeal.

126. By Order dated September 4, 2019, the Adjudicating Authority had rejected the Appellant/Financial Creditor's claim even though the Resolution Applicant had earlier admitted such claim to the tune of ₹ 16,30,86,151/- (Sixteen Crores Thirty Lakh Eighty-six Thousand One Hundred and Fifty-One only). The Appellant contends that it had granted unsecured loan/Financial Assistance to the tune of ₹ 29,56,01,279/- (Twenty-Nine Crore Fifty-Six Lakh One Thousand Two Hundred and Seventy-Nine only)to the Corporate Debtor. The above loan is consistently acknowledged in the annual reports of the Corporate Debtor.

127. The Appellant filed Form 'C' under Regulation 8 of 'CIRP' Regulation of 2016 with all supporting documents that included the copy of Annual Accounts/Balance Sheet/Financial Statements to the Corporate Debtor. By its e-mail communication dated March 7, 2019, the Resolution Professional has partially admitted the claim of the Appellant while a substantial portion of the same was rejected without providing any reason. On May 22, 2019, the Resolution Professional informed the Appellant that its claim was dismissed entirely. After that, the Appellant had filed an Application under Section 60(5) of the Code before the Adjudicating Authority, challenging the Resolution Professional's decision against illegally and unlawfully rejecting the Appellant's claim. The Appellant contends that the Resolution Professional had no power to adjudicate and reject the claim submitted by him. Therefore, the Resolution Professional order was challenged before the Adjudicating

Authority, but that Application was rejected without assigning any reason. Thus the Appellant was compelled to file this Appeal.

128. The Learned Adjudicating Authority has stated in its order that;

> *"Only production of financial statement itself cannot be held that all the requirements for substantiating the claim has been fulfilled on the side of the Applicants. It has come out in evidence that the Applicant Mr Aashish Jhunjhunwala, was asked to provide the document evidencing the contract for the loans in support of the amount shown in the financial statement evidencing that such amount was actually drawn by the Corporate Debtor and further evidence proving that, that fund has not been paid back to the related parties. No valid explanation is forthcoming as to non-production of the above said documents asked for from the Applicants here in this case in hand. There are various correspondence by way e-mail referred to us on the side of the Applicants. None of the e-mails referred to us enabled us to hold that the Applicants have meted out the requirement in order to see that the claim of the Applicants has been substantiated as alleged on the side of the Applicants. ……. That being so, non-admission of the claim of the Applicants found not in violation of any of the provisions of the Code and Regulation and therefore, none of the Applications deserves consideration. Accordingly, the Applications are liable to be dismissed."*
>
> *(Verbatim Copy)*

129. We have heard the arguments of the Learned Counsel for the parties and perused the records.

130. The Learned Counsel for the Appellant argued that the Appellant had granted unsecured loans / financial assistants to the tune of ₹29,56,01,279/- to the Corporate Debtor. This fact has been consistently acknowledged in the annual report of the Corporate Debtor. It appears from e-mails dated February 04, 2019, and February 15, 2019, that Banks Statements and Annual Reports of the Corporate Debtor were duly received and accepted by the Resolution Professional. The Appellant had also filed Form 'C' under Regulation 8 of CIRP Regulations on 23 February 2019, along with supporting documents. By an e-mail communication dated 07 March 2019, the Resolution Professional partially admitted the Appellant's claim and stated that a part of the claim being accepted, while a substantial portion of the same was rejected on 22 May 2019. Subsequently, the Resolution Professional informed the Appellant that his claim has not been accepted and is completely dismissed.

131. It is contended on behalf of the Appellant that the Resolution Professional does not have jurisdiction and Adjudicating power to reduce or reject the claim filed by a Financial Creditor. But in the instant case, the Resolution Professional has, without any jurisdiction arbitrarily, illegally and unlawfully first proceeded to reduce the claim of the Appellant and, after having partially admitted the same initially, by e-mail dated 07 March 2019, proceeded to reject the entire claim of the Appellant. Although all necessary documentation in support of the claim for the monies actually given/transferred to the Corporate Debtor had been furnished.

132. The Learned Counsel for the Appellant placed reliance on this Appellate Tribunal's judgment in the case of ***Prasad Gempex Vs. Star Agro Marine Exports Pvt Ltd in Company Appeal No. 291 of 2018*** wherein it is held that;

…

"8. The power of 'Resolution Professional' also fell for consideration before the Hon'ble Supreme Court in 'Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India &Ors. – Writ Petition (Civil) No. 99 of 2018'. In the said judgment dated 25th January, 2019, the Hon'ble Supreme Court held that 'Resolution Professional' has no adjudicatory power. The 'Resolution Professional' has to vet and verify the claims made and ultimately determine the amount of each claim. As opposed to this, the 'Liquidator' in the Liquidation proceedings under the I&B Code has to consolidate and verify the claims and either admit or reject such claims under Sections 38 to 40 of the Code.

9. In the present case, it is informed that the 'resolution plan' has already been approved by the 'Committee of Creditors' and the 'Resolution Professional' had placed the same before the Adjudicating Authority on 4th October, 2018 in 'M/s. Prasad Gempex' with regard to the 'corporate insolvency resolution process' initiated against 'M/s. Star Agro Marine Exports Pvt. Ltd.' (subject matter of Company Appeal (AT) (Insolvency) No. 291/18). A 'resolution plan' has already been approved and placed before the Adjudicating Authority (Chennai) on 4th October, 2018. However, till date no order under Section 31 has been passed. We find that 270 days have passed."

133. In the case mentioned above, this Appellate Tribunal has clarified that this Tribunal **has not expressed any opinion with regard to the claim** made by 'Srei Infrastructure Finance Limited' **or the decision taken by the Resolution Professional.**

134. Relevant Regulation in this regard is given as under for ready reference;

"Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

Regulation "8. Claims by financial creditors.—

(1) A person claiming to be a [8][financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof] to the interim resolution professional in electronic form in Form C of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the financial creditor may be proved on the basis of –

(a) the records available with an information utility, if any; or

(b) other relevant documents, including -

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid; or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any."

135. Based on the above Regulation, it is clear that a Financial Creditor has to file a financial contract supported by financial statements as evidence of the debt; a record evidencing that the Corporate Debtor has drawn the amounts committed by the Financial Creditor to the Corporate Debtor under a facility; financial statements showing that the debt has not been repaid to substantiate its claim.

136. The Resolution Professional stated that the Appellant had provided certain bank statements and information on being requested to provide additional supporting documents regarding his claim. Further, an excel document indicating outflow and inflows concerning the Corporate Debtor was made available. However, the same was merely a list that was created but could not be verified. Moreover, there was no clarity on the nature of the transaction in which the money was received by the Corporate Debtor. Assuming that the money provided was a loan, there was no clarity from the accounts maintained by the Corporate Debtor on whether the relevant amount has been repaid or not. The Resolution Professional further submits

that on reviewing the annual report, the balance sheet, ledger and excel document shared by the Appellant, he found no conclusive proof to substantiate the claim of the Appellant. In the circumstances, the Resolution Professional had rejected the claim of the Appellant.

137. It is pertinent to mention that under Regulation 13(1) of the 'CIRP' Regulations, Resolution Professional is empowered to verify the claims. Regulation 13 is given below for ready reference:

> ***"13. Verification of claims.--***
>
> *(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.*
>
> ***14. Determination of amount of claim.--***
>
> *(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.*
>
> *(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable,*

when he comes across additional information warranting such revision."

138. Based on the above CIRP Regulations, it is clear that the IRP/Resolution Professional is empowered to make the best estimate of the claim based on the information available with him. IRP/RP is further authorised to revise the amounts of the claim admitted, including the estimates of the claim made under Regulation 14(1), when he comes across additional information warranting such revision.

139. In the instant case, Resolution Professional sought additional supporting documents concerning the claim. But the Appellant failed to submit the documents required to be filed as per Regulation 8 of the CIRP Regulations. Verification of claim by the Resolution Professional cannot be treated as an adjudicatory exercise. Therefore, Appellants contention that Resolution Professional has exceeded jurisdiction is not sustainable.

140. In the circumstances as stated above, the RP had rejected the claim of the Appellant for want of sufficient evidence as required under Regulations. The Adjudicating Authority also found no illegality or irregularity rejected the Company Application against Resolution Professional's order. We find no discrepancy in the order of the Adjudicating Authority. Based on the above discussion, we believe that Appeal sans merit and deserves to be dismissed.

Civil Appeal (AT) (Ins.) No. 1125 of 2019

141. The Appellant Vanguard Credit and Holdings Private Limited being aggrieved by the Order in Company Application (I.B.) No. 462/K.B./2019

under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 in Company Petition No. (I.B.) 349/K.V./2019 has filed this Appeal.

142. The Appellant contends that the Adjudicating Authority has approved the Resolution Plan even though the Resolution Plan in respect of the Corporate Debtor envisages the transfer of land belonging to the Appellant and not the Corporate Debtor, measuring about 52.49 acres situated at Banskopa Inn Road, Gopalpur, Mouza, J.L. No 65, Durgapur in the Burdwan District, West Bengal (hereinafter referred to as "the said premises"). In the eyes of the law, the Appellant is a stranger to the Corporate Insolvency Resolution Process initiated against the Corporate Debtor.

143. The Appellant contends that the premises belong to it. The Adjudicating Authority has failed to appreciate that it has no jurisdiction to adjudicate upon the disputes regarding rights, title, and interest in respect of the property. It has failed to consider that no transfer or conveyance of the said premises can be permitted without first obtaining the express consent of the owner of the land, i.e. Appellant herein.

144. The Appellant further contends that the Adjudicating Authority has failed to appreciate the provision of Section 18 of the Code read with the Regulation 37(a) of the Insolvency Resolution Process for Corporate Person's Regulation, 2016, which bars the transfer of title of the third party such as the Appellant herein in favour of the Resolution Applicant. Further, the Adjudicating Authority has erred in essentially giving effect to the provisions

of the SARFAESI Act, 2002 by allowing the Resolution Plan of the Resolution Applicant, which could not be permitted in law.

145. The Appellant further contends that the Adjudicating Authority has failed to appreciate that the Resolution Plan is conditional and contingent in as much as the Resolution Applicant had sought a direction to the effect that upon the Resolution Plan being sanctioned, the land in the Durgapur would be transferred in the name of the Resolution Applicant which cannot be allowed. Further, the land in the Durgapur not being a property of the Corporate Debtor and property belonged to a third party cannot be transferred by way of a Resolution Plan. As such, the Adjudicating Authority approval is conditional under which the property not belonging to the Corporate Debtor, whose ownership lies with the third-party stated to be transferred to the Resolution Applicant under the Resolution Plan.

146. The Appellant contends that Vanguard Credit And Holdings Private Limited is the owner of the land measuring 52.49 acres in Durgapur, West Bengal. The said property which is sought to be transferred by way of Resolution Plan does not belong to the Corporate Debtor but belongs to a third party, i.e. Appellant herein, which is ultimately a separate legal entity and even though Vanguard is a stranger to the Corporate Insolvency Resolution Process of the Corporate Debtor. The Resolution Applicant had sought approval from the Adjudicating Authority in regards to the transfer of the said property to the Corporate Debtor in respect of which the Resolution Plan is

approved. The Appellant argued that the property which does not belong to the Corporate Debtor could not be transferred by way of a Resolution Plan.

147. The Adjudicating Authority failed to consider Section 18(1)(f) of the Code read with the explanation appended to it defines "**assets**". According to the explanation thereto, "assets does not include assets owned by the third party in possession of the Corporate Debtor or assets of any Indian or foreign subsidiary of the Corporate Debtor". Regulation 37 of the 'CIRP' Regulations, 2016, states that Resolution Plan can only contemplate the transfer of all or part of the assets of the Corporate Debtor to one or more persons on sale of all or part of the 'assets' whether or not subject to any security interest or not. It is further contended that the security interest means "security interest created in respect of an asset of the Corporate Debtor" and not security interest created by a separate legal entity or a third party on behalf of the Corporate Debtor. Regulation 37(d) provides for satisfaction or modification of any security interest created by the Corporate Debtor for its own assets and not of the assets belonging to third parties.

148. The Resolution Professional contended that the Appellant's property was mortgaged with the Banks/Financial Creditors. Thus, the Resolution Applicant is entitled to transfer the said premises by way of the Resolution Plan. In this context, it is relevant to mention that no possession has been taken under Section 13(4) of the SARFAESI Act, 2002 by any Financial Creditors regarding the Durgapur land. The Appellant has also challenged the notice under Section 13(2) of the SARFAESI Act, 2002 and proceedings under

Section 17 of the SARFAESI Act, 2002, pending before DRT, Kolkata. If during the pendency of the proceedings under Section 17 of the SARFAESI Act, 2002 the said premises is transferred by way of Resolution Plan, the entire proceedings before the DRT would be rendered infructuous, especially when the creation of a mortgage and enforcement procedure thereof is under challenge, is under the exclusive jurisdiction of the DRT.

149. The Appellant further contends that the Adjudicating Authority has failed to consider that no transfer or conveyance of the said premises can be permitted without first obtaining the landowner's express consent, i.e. the Appellant herein. The Process Memorandum also states that the Resolution Plan cannot be conditional. Still, the Resolution Applicant has submitted the Resolution Plan, which dehors the Process Memorandum; thus, Resolution Plan is liable to be rejected.

150. In reply to the above, the Learned Counsel representing the Committee of Creditors submitted that Mr Ashish Jhunjhunwala, the Corporate Debtor's promoter, had filed an application under Section 10 of the I&B Code, which was admitted on January 8, 2019. He has been a part of almost all 'CoC' meetings from the beginning, including the first 'CoC' Meeting conducted on February 7, 2018. Time and again, various issues about the Durgapur unit/land have been discussed in the 'CoC' Meetings in the presence of Mr Jhunjhunwala. However, he failed even once to point out that the Appellant was to be treated as a separate entity, and the land could not be a part of the Resolution Process. For the first time in the 21st 'CoC' Meeting held on

February 11, 2019, Mr Ashish Jhunjhunwala raised an objection stating that Durgapur's land does not belong to the Corporate Debtor. The same was done only at the fag end when Mr Jhunjhunwala realised that the 'CIRP' was at the final stage against his expectations. Therefore, with the only aim of obstructing the Resolution Process, such objections were raised at such a belated stage, which is an afterthought.

151. For the first time, on February 28, 2019, the Appellant wrote to the Resolution Professional, stating that the land that did not belong to the Corporate Debtor should be excluded from the Resolution Process. The Appellant is not a separate legal entity but is only acting on the whims and fancies of Mr Ashish Jhunjhunwala. Therefore, the Corporate veil should be pierced, and the real promoter/management and the acts and intention could be noticed.

152. It is an admitted fact that the Appellant is a Corporate Guarantors and had mortgaged the land to the Financial Creditors. The Appellant is a Company, which is wholly owned by the promoter of the Corporate Debtor.

153. On perusal of the factory license (page 125 of the convenience compilation), it appears that the Appellant has provided the right to use the land to the Corporate Debtor since September 2006. The Corporate Debtor had constructed a plant and factory on the said land to set up, establish and run the plant and factory for its wire business from the said land.

154. The Appellant herein is the Corporate Guarantors to the loans availed by the Corporate Debtor from Financial Creditors. For this purpose, the Appellant had duly executed Deeds of Guarantee dated May 27, 2009. Accordingly, for the purpose of securing the loan granted to the Corporate Debtor, the present Appellant secured the said loans by way of creating an equitable mortgage of the property owned by it, more particularly the land, building and structure along with the immovable property situated at Durgapur.

155. The Guarantee described above gave all rights in respect of the mortgaged properties to the Financial Creditors. Clause 10 of the deed, as mentioned earlier, dated July 27 2009, is as under;

> *"**In case the bank sells the hypothecated, pledged or mortgaged security/ies held in the account, the guarantors agree (s) that the bank may sell securities without giving any notice of such sale to the guarantors. The guarantors agrees that he will not question the sale or sale price in any manner or on any ground whatsoever**."*

156. Learned Counsel representing the 'CoC' argued that the Financial Creditors such as Punjab National Bank and Axis Bank had provided their respective loans to the Corporate Debtor on the basis that the repayment by the Corporate Debtor was secured by way of a mortgage over the land (provided by the Appellant) and by way of Corporate Guarantees provided by the Appellant itself.

157. By creating a mortgage over the land, Appellant created a security interest over the land in favour of Punjab National Bank (subsequently transfer to Respondent No.3/ARCIL) and Axis Bank. It is thus, evident that the land has been committed by the Appellant to be utilised for the repayment of the debts of Punjab National Bank and Axis Bank. The Punjab National Bank has already taken possession of the land and in the exercise of its power under Section 13(4) of the SARFAESI Act, 2002 and thus, the right to enforce the mortgage is created in its favour. The creation of a mortgage is evident based on documents relating to the deposit of the title deed.

158. By implication of Section 13(4) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, a secured creditor can take possession of the secured assets, including the right to transfer by way of lease, assignment or sale for realising the secured asset. Accordingly, the mortgagees will have the right to enforce the mortgage over the land. The Resolution Plan provides the mechanism for the transfer of the land, which is as follows;

- ARCIL and Axis Bank would assign a portion of the debt to Narantak Dealcom limited (a nominee of the Resolution Applicant).

- Pursuant to such assignment, Vanguard will be required to take all actions is required to transfer the land to the Resolution Applicant.

- This obligation to transfer the land will be pursuant to discharging of Vanguard's Corporate Guarantee and mortgage obligations.
- In case of no consensual transfer of Vanguard, the creditors shall have the right to enforce the mortgage for the transfer of land.
- In pursuance to the obligations of the Applicant under the guarantee obligations and the mortgage provided, the Resolution Applicant's 1st seeking a direction to allow the transfer of the land from the Applicant to the Corporate Debtor.
- Failing this, the Resolution Plan suggests that the assignee of the loan and security should be allowed to enforce under SARFAESI Act and transfer the land to the Corporate Debtor.

159. It is pertinent to mention that Regulation 37 (B) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 provides that "a Resolution Plan shall provide for the measures, as may be necessary for Insolvency Resolution of the Corporate Debtor for maximisation of value of its assets, including but not limited to the sale of all or part of the assets whether subject to any security interest or not."

160. As per Section 31 of the Insolvency and Bankruptcy Code, 2016, the approved Resolution Plan binds all the stakeholders, including the Corporate Debtor's Guarantors. Thus Vanguard, being corporate Guarantor of the

Corporate Debtor, is bound by the approved Resolution Plan. In light of the above discussion, we believe that the objections raised by "Vanguard/Appellant" are not sustainable.

161. The Learned Counsel for Appellant emphasised the judgment of Hon'ble Supreme Court in case of *Embassy Property Developments (P) Ltd. v. State of Karnataka*, (2020) 13 SCC 308 : 2019 SCC OnLine SC 1542 at page 332;wherein Hon'ble Supreme Court has held:

> ***"38.*** *It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty-bound under Section 20(1) to preserve the value of the property of the corporate debtor and that the word "property" is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the corporate debtor.*
>
> *But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact Section 20(1) cannot be read in isolation, but has to be read in conjunction with Section 18(1)(f)(vi) of the IBC, 2016 together with the Explanation thereunder. Section 18(1)(f)(vi) reads as follows:*
>
> > *"**18. Duties of interim resolution professional**.—(1) The interim resolution professional shall perform the following duties, namely—*

*(a)-(e) ****

(f) ***take control and custody of any asset over which the corporate debtor has ownership rights*** *as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry* ***that records the ownership of assets including—***

*(i)-(v) ****

(vi) assets subject to the determination of ownership by a court or authority;

*(g) ****

Explanation.—For the purposes of this section, the term "assets" shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

40. *If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority****. In fact***

an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". *Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:*

> *"**25. Duties of resolution professional**.—(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*
>
> *(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:*
> *(a) ****
> *(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings;"*
>
> *(emphasis supplied)*

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."

(emphasis supplied)

162. It is contended that in the case mentioned above, Hon'ble Supreme Court has held that an asset owned by a third party, but which is in possession of the Corporate Debtor under contractual arrangements, is specifically kept out of the definition of the term 'assets' under the explanation to Section 18.

163. In paragraph 40 of the said judgement, Hon'ble Supreme Court has expressly held that in the light of the statutory claim as culled out from various provisions of I&B Code, it is clear that wherever the Corporate Debtor had to exercise a right that falls outside the purview of I&B Code especially in the realm of public law, they cannot through Resolution Professional take a bypass and go before NCLT for enforcement of such a right.

164. In the case, Hon'ble Supreme Court observed that an asset owned by 3rd party but which owns the Corporate Debtor under the contractual arrangement is kept explicitly out of the definition of the term assets under the explanation to Section 18 of the Code. It is further observed that Section 14(1)(D) of I&B Code, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor, will not go to the rescue of the Corporate Debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have the renewal of the lease of such property. The right not to be dispossessed, found in Section 14(1)(D) will have nothing to do with the rights conferred by a mining lease expressly on government land. What is granted under the deed of mining lease in ML 2293 dated January 4, 2001, by the Government of Karnataka, to the Corporate Debtor, for the right to mine, excavate and recover red oxide for a specified period of time. The deed of lease contains a schedule divided into several parts. The restrictions and conditions subject to which the grant can be enjoyed are found in part 3rd of the Schedule. Therefore, NCLT did not have jurisdiction to entertain an Application against the government of Karnataka for a direction to exclude Supplemental Lease Deeds for the extension of the mining lease. Since a NCLT choose to exercise of jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the Writ Petition on the basis that NCLT was quorum non-judice.

165. The Learned Counsel for the Appellant, the Corporate Guarantor of the Corporate Debtor, further emphasised the law laid down by Hon'ble Supreme Court in the case of *Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd.*, (2020) 8 SCC 401**; i**t is contended that in the instant case JP Infratech Limited was undergoing 'CIRP'. Jayprakash Associates Ltd was the holding company. The Corporate Guarantors of JP Infratech Limited mortgaged its property to secure the loan of JP associates Ltd. Before the Hon'ble Supreme Court, the issue was whether the lenders of JP Associates Ltd, in whose favour mortgage was created by JP Infratech limited and joined the Corporate Insolvency Resolution Process of JP Infratech Limited can be treated as Financial Creditor of JP Infratech limited. According to the lenders, JP Infratech Limited, having mortgaged its property and having given a guarantee, has transferred the right, title and interest to the lenders of JP Associates Ltd. Hon'ble Supreme Court held that merely because the mortgage has been created and the guarantee is being given, the Respondent lenders will not be able to claim as Financial Creditors of JP Infratech Limited, which is undergoing 'CIRP'.

166. It is further said applying the ratio of the above-mentioned case, merely because the Vanguard mortgaged its land to secure the debt of the Corporate Debtor, the land does not get vested with the Corporate Debtor and the lenders of the Corporate Debtor are trying for the transfer of the land of the third party in the Corporate Insolvency Resolution Process of the Corporate Debtor.

167. In case of *Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd.*, (2020) 8 SCC 401 : 2020 SCC OnLine SC 237at page 529 Hon'ble Supreme Court held that**;**

> *"**57.** For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, we hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any "financial debt" within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the "financial creditors" of the corporate debtor JIL."*

168. From the facts of the above-mentioned case, it is clear that in the above case, the Hon'ble Supreme Court was dealing with the issue relating to the preferential transaction. The facts and ratio of the above case are distinguishable from the instant case; therefore, the above case law does not apply to this case.

169. It is pertinent to highlight that the Financial Creditors such as Punjab National Bank and Axis Bank had provided their respective loans to the Corporate Debtor on the basis that the repayment by the Corporate Debtor was secured by way of a mortgage over the land (provided by the Appellant) and by way of Corporate Guarantees provided by the Appellant itself. By creating the mortgage over the land, the Appellant has created a security

interest over the land in favour of Punjab National Bank (subsequently transferred to Respondent No. 3/ARCIL) and Axis Bank. It is thus evident that the land has been committed by the Appellant to be utilised for the repayment of the debts of Punjab National Bank and Axis Bank. The Punjab National Bank has already taken possession of the land in exercise of its powers under Section 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 from August 1, 2013, and has the right to enforce the mortgage created in its favour. The copy of the letters confirming the deposit of the title deeds to create a mortgage for the Durgapur property indicates the above position.

170. It is important to point out that the date of creation of mortgage and extension of guarantees in favour of the Financial Creditors, there were two Directors of the Appellant, namely, Ashish Jhunjhunwala and Naveen Gupta. Mr Ashish Jhunjhunwala being the promoter of the Appellant (also the Promoter / Managing Director of the Corporate Debtor), holds 99.99% of the shareholding of the Appellant even as on date. Therefore, the Appellant's plea that it is an entirely separate and distinct entity is bogus and sham.

171. It is also important to point out that land is an essential part of the corporate debtor's business. The entire wire business of the Corporate Debtor being run on the Durgapur unit, which is situated on the said land, forms an essential part of the business of the Corporate Debtor. Therefore it is an essential part of the Resolution Process. The value arrived in the 'CIRP', the purported liquidation value, all includes the value of the land and the same

has always been the essence of the business of the Corporate Debtor. It is also pertinent to mention that Mr Ashish Jhunjhunwala, who had himself filed the Application before the Adjudicating Authority, had relied on the valuation of the corporate debtor's assets. Such a list of assets includes the property at Durgapur. Thus it appears that the present Appeal is only a mischievous attempt to segregate a portion of the property from the Corporate Debtor, which was already considered as the assets of the Corporate Debtor by the Appellant as well as Mr Ashish Jhunjhunwala.

172. Since Mr Ashish Jhunjhunwala, the Appellant and the Corporate Debtor promoter, had filed An Application under Section 10 of I&B Code, 2016 of the Corporate Debtor. Therefore, after the same was admitted on 8 January 2019, he has been a part of almost all 'CoC' meetings from the beginning, including the 1st 'CoC' meeting, which was conducted on 7th February 2018. Time and again, various issues about the Durgapur unit/land had been discussed in the 'CoC' meetings in the presence of Mr Jhunjhunwala. However, he failed even once to point out that the Appellant was to be treated as a separate entity, and the land could not be part of the Resolution Process. For the 1st time, in the 21st 'CoC' meeting held on 11 February 2019, Mr Ashish Jhunjhunwala raised an objection stating that the land at the Durgapur does not belong to the Corporate Debtor. The same was done only at the fag end and when Mr Jhunjhunwala realised that the 'CIRP' was at the final stage against his expectations. Therefore, with the only aim of spoiling the resolution process, such objections were raised at such a belated stage

which is only an afterthought. For the 1st time on 20th February 2019, the Appellant wrote to the Resolution Professional stating that the land does not belong to the Corporate Debtor and to exclude from the Resolution Process. The same is also indicative that the Appellant is not a separate legal entity but is only acting on the whims and fancies of Mr Ashish Jhunjhunwala. Therefore, the Corporate veil should be pierced, and the real Promoter/Management's acts and intention cannot be ignored.

173. In light of the discussion above, we find no merit in this appeal, and the appeal deserves to be dismissed.

Company Appeal (AT) (Ins.) No. 988 of 2019

174. The Appellant Pegasus Assets Reconstruction Pvt Ltd has challenged the impugned order on the ground that the Adjudicating Authority has arbitrarily dealt with the Appellant's Application in para No. 18 to 23 of the Impugned Order and while dismissing the same without looking into the documents on record has erroneously held that the Appellant has failed in proving that it has an exclusive charge over the Air Separation Plant ("AS Plant") of Respondent No. 2 and 1st paripassu charge(along with State Bank of India) over the Sinter plant of the Respondent No. 2, both located at Saha Chowk, Kharagpur and has accordingly erred in holding that 'IDBI' has a first paripassu charge over the movable fixed assets of the Respondent No. 2 and second paripassu charge over the current assets, hence is on equal footing as that of Appellant in the A. S plant and the Sinter plant.

175. It is contended that the Adjudicating Authority has arbitrarily upheld the unreasonable and unsubstantiated methodology of the Resolution Professional whereby Respondent No. 3 has been unjustifiably enriched and there has been a wrongful loss to the Appellant to the tune of ₹ 35.76 crores as per the following;

Air separation plant	T.L.	value		Sinter plant		
Peagasus	222.02	15.12		Peagasus	222.02	7.76
IDBI	528.24	15.12		SBI	174.76	6.11
Total	750.26	21.48		IDBI	528.24	18.47
				Total	925.02	32.35

176. Respondent No. 3 (assign of 'IDBI') does not have any charge whatsoever over the Air Separation Plant and the Sinter Plant, respectively. The following should have been the correct calculation payable to the Appellant as its share under Section 30 and Section 53 of the Code, as the Appellant is a dissenting creditor to the approved Resolution Plan. According to the same, the total amount payable to the Appellant should be ₹52.45 crores instead of ₹ 16.69 crores.

177. However, since ARCIL (IDBI) does not have any charge whatsoever over the AR separation plant And Sinter Plant, respectively, the following should have been the correct calculation.

Air separation plant				Sinter plant		
	TL	Value			TL	Value

Pegasus	222.02	21.48		Peagasus	222.02	18.10
Total	222.02	21.48		SBI	174.36	14.251
				Total	396.78	32.35

178. Details have been set out in chart to show that the Appellant has exclusive and paripassu charge with the 'SBI' over Air Separation Plant (which was exclusively financed by the assignor of the Appellant and over which the Appellant has first, and exclusive charge and Sinter Plant ,which the assignor State Bank of India financed, and over the said asset the Appellant has first paripassu charge along with the State Bank of India.

179. It is submitted by the plant that the Adjudicating Authority has made a gross error in law by arbitrarily dismissing the Application of the Appellant without considering the correct factual position and not considering the error made by the Resolution Professional while calculating the distribution as per Section 30 and 53 of the Code. Appellant has prayed that the Appellant's charge position be corrected to prevent the monetary loss, which the Appellant may suffer.

180. In reply to the above the Respondent No. 3 ARCIL submits that the main objection of the Appellant before the Adjudicating Authority as well as in this Appeal is that the RP failed to consider that the Appellant has an exclusive charge over two plants-Air Separation Plan and Sinter Plant of the Corporate Debtor ,consequently RP and the Process Advisers committed an error in the

methodology of distribution of the proceeds in respect of these two plants and wrongly allocated the proceeds also to IDBI/ARCIL.

181. The Adjudicating Authority observed that the 'IDBI' had also granted a loan to the Corporate Debtor and had charge over the Kharagpur unit of the Corporate Debtor. It is pertinent to mention that the 'IDBI' vide registered deed of assignment deed with the Asset Reconstruction Company (India) Ltd assigned the secured debts of the Corporate Debtor in favour of the Asset Reconstruction Company (India) Ltd.

182. The Resolution Professional, in its reply, submitted that Ramsarup Industries Ltd (Corporate Debtor) had availed the facility to the extent of ₹ 29 crores ("facility 1") and ₹ 50 crores ("facility 2") from Allahabad Bank, which has now been assigned to Pegasus Asset Reconstruction Company Limited ("Pegasus"). Facility 1 is secured by a charge created under a letter of hypothecation dated June 8, 2007. Facility 2 is secured by a charge created under a letter of hypothecation dated April 29, 2008. The charges created under Letter of hypothecation 1 and letter of Hypothecation 2, are charges only on movable properties and not immovable properties, as no charge by way of hypothecation can be created on immovable properties. In its Appeal, Pegasus has claimed that ARCIL has been unjustly enriched by the incorrect distribution methodology. However, the grounds of Appeal raised by Pegasus are primarily with reference to the nature of its charge over the Corporate Debtor's movable property.

183. It is further contended that Facility 1 and Facility 2 were assigned to Pegasus on September 27, 2013. Letter dated July 3, 2014 was issued over nine months after the assignment of facility 1 and facility 2. It is for the first time it was written to the leading bank that Pegasus had a first exclusive charge over the Air Separation Plant. Mere issuance of such a letter cannot possibly alter the factual position that Pegasus does not have a first exclusive charge on the Air Separation Plant. The initial understanding may have been that Allahabad bank has a first exclusive charge over the Air Separation Plant. However, subsequent to such an initial understanding, discussions and decisions taken collectively by the consortium of lenders has resulted in a change of position of security currently held by Pegasus. The Resolution Professional pleaded that the Adjudicating Authority has rightly approved the distribution methodology, which requires no interference at Appellate Stage.

184. The Respondent No. 3-ARCIL contended that the Appellant filed its limited objection to the Plan by way of Company Application No. (IB)/424/KB/2019 in CP (IB)/349/KB/2017. The main objection of the Appellant is that RP failed to consider that the Appellant has an exclusive charge over two plants-Air Separation Plant and Sinter Plant of the Corporate Debtor. The RP and the process advisers committed an error in the methodology of distribution of the proceeds in respect of these 2 plants and wrongly allocated the proceeds also to IDBI/ARCIL.

185. The Adjudicating Authority considered the objections of the Appellant and gave a finding that 'IDBI' had also granted loan to the Corporate Debtor

and had charge over the Kharagpur unit of the Corporate Debtor. The 'IDBI' vide registered deed of assignment of that duly executed with Asset Reconstruction Company (India) Ltd assigned the secure debts of the Corporate Debtor in favour of the Asset Reconstruction Company (India) Ltd. The Corporate Debtor approached the 'IDBI' for financial exposure to the extent of the ₹124 crores for capital expenditure on its Kharagpur unit. IDBI Bank accepted the request of the Corporate Debtor and made financial exposure for ₹124crores in Corporate Debtor for capital expenditure on its Kharagpur unit. The Corporate Debtor, committed defaults, in repayment to IDBI Bank Ltd and requested the financial restructuring of its financial liabilities towards IDBI Bank Ltd. The IDBI agreed in principle to the structure the financial liabilities towards IDBI Bank Ltd subject to creation/modification of charge by the Corporate Debtor in favour of IDBI Bank Ltd. The Corporate Debtor vide letter of hypothecation dated June 17, 2009 executed in favour of IDBI Bank Ltd secured financial exposure of ₹124 crores of IDBI Bank Ltd. The Corporate Debtor, vide equitable Mortgage Deed dated November 24, 2010, executed in favour of IDBI Bank Ltd, created security in respect of total financial exposure of ₹ 141 crores (1 24 crore and 17 crore, totalling to ₹141 crores). IDBI Bank Ltd/ARCIL holds 1st charge on paripassu basis on the movable and immovable assets of the Corporate Debtor in terms of Deed of Hypothecation dated June 17, 2009 and equitable mortgage dated November 24, 2010 both duly executed by the Corporate Debtor in favour of IDBI Bank Ltd to secure financial exposure by IDBI Bank Ltd in Corporate Debtor. None of the lenders, including the assignee of the Appellant, neither raised any

objection on registration of such charge nor initiated any legal proceedings under Section 141 of the Companies Act,1956 to rectify the register of charges maintained by the 'ROC'. Hence, all other lenders of the Corporate Debtor, including the assignee of the Appellant and consequently the Appellant by its conduct, accepted the first charge on paripassu basis on these assets of the Corporate Debtor situated at Kharagpur. Thus, the Appellant at this belated stage is stopped from raising any issue about the IDBI Bank/Appellant's charge on the assets of the Corporate Debtor situated at Kharagpur.

186. The Appellant further contends that it cannot be treated as a dissenting Financial Debtor for the purpose of Section 30 (2) (B) of Insolvency and Bankruptcy Code, 2016. The Appellant, in principle, approved the Plan and agreed for distribution of the Resolution amount allocated to Financial Creditors as per facility -wise distribution methodology based on security structure.

187. It is pertinent to mention that the Appellant in its Application before the Adjudicating Authority did not raise its entitlement as per dissenting creditor as stipulated under Section 30 (2) of I&B Code albeit the Appellant prayed in the Application to pass necessary direction to the Resolution Professional to modify the Resolution Plan to the extent of "Facility wise distribution methodology based on security structure".

188. The Adjudicating Authority has observed that the Pegasus Asset Reconstruction Private Limited has failed in proving that it has an exclusive charge over Air Separation Plant and Sinter Plant. Admittedly, 'IDBI' had also

issued loans to the Corporate Applicant, which was subsequently assigned in favour of the ARCIL and ARCIL, inter alia, had charge over the Kharagpur unit. The Resolution Professional had seen and examined the Mortgage Deed executed by 'IDBI'. The Mortgage Deed indicates that IDBI had a charge of the Corporate Applicant's property at Kharagpur.

189. It is pertinent to mention that both the objectors were members of the Committee of Creditors. It is also understood that the security interests recorded for each creditor have been made available to all the members of the 'CoC' before finalisation of the approval of the Resolution Plan. Therefore, the challenges raised by the above said Financial Creditors claiming exclusive charge over the above said plants are found devoid of any merits. They are estopped from contending that the RP has erred in recording the value of Financial Creditors' security interest after the approval of the Resolution Plan by the required majority, wherein they were parties and participated in the discussions. It is also observed that Mortgage Deed executed by IDBI indicates that the 'IDBI' had the first paripassu charge over the movable fixed assets of the Corporate Applicant, and the 2nd paripassu was set with the working capital lenders over the current assets. The Allahabad bank assigned the debt to Pegasus Asset Reconstruction Private Limited, and UCO Bank had assigned the debt to the Corporate Applicant and M/s JM Financial Asset Reconstruction Company Private Limited. None of the Banks came forward to raise the contention that they have had first paripassu charge over the plant's as the Financial Creditors alleged in the objection and the applications. They

are the consortium members wherein the fact remained that 'IDBI' has got the first paripassu charge, and it is conceded by the lenders.

190. It is pertinent to mention that Pegasus case is peculiar in so far as Pegasus is an assignee of the debts owned to Allahabad bank by the corporate debtor, and neither Allahabad Bank not Pegasus itself had raised any objection to the pari passu charge in favour of IDBI Bank despite being aware of the same. The Appellant had not objected until after the Resolution Plan's approval by the 'CoC'. No justification has been offered as to why Pegasus conduct should not be regarded as its unconditional acquiescence to the status quo adopted by all of the Corporate Debtor's lenders.

191. It is also important to mention that the security interest was always available with Pegasus during the corporate insolvency resolution process of the Corporate Debtor. However, concerns were raised only after approval of the Resolution Plan by the 'CoC'. The distribution of proceeds amongst the lenders being an inter-creditor issue. It was the 'CoC' along with the Process Advisers to the 'CoC' that prepared and confirmed the methodology of distribution of proceeds on the basis of security structure. The security interests recorded for each creditor has been made available, to be scrutinised and inspected by the 'CoC' during the 'CIRP'. The distribution methodology has been repeatedly shared with the members of 'CoC' vide various emails. The 'CoC' in its 24th meeting held on 6 March 2019 discussed the methodology of distribution and was put to vote. The members of the 'CoC' were specifically asked to review the final distribution methodology that was prepared. The Pegasus sent an email to the RP on 19 March 2019, i.e. after the voting on the

Resolution Plan had concluded, and the Resolution Plan along with the distribution methodology as per the security interest was approved by a vote share of 74.41%.

192. Based on the above discussion, we consider that the Appeal sans merit and deserves to be dismissed.

CONCLUSION

COMMON ORDER

193. Company Appeals (AT) (Insolvency) Nos.995, 988, 1039, 1124, 1125, 1159, 1242 of 2019 & 468 of 2020 are being dismissed.

194. While deciding Company Appeal No.995 of 2019, we have observed that the Successful Resolution Applicant/Appellant S.S. Natural Resources Pvt. Ltd. Has not implemented the Resolution Plan despite its approval by the Adjudicating Authority on 04th September 2019. Pandemic Covide-19's effect in India started from 15th March 2020 onwards. But the Successful Resolution Applicants has filed an application informing about the invoking of Force Majure Clause, and based on that; it is seeking withdrawal of the Resolution Plan on the ground that subsequent events have made Resolution Plan financially, economically and operationally unviable for the reasons beyond the Appellant's Control.

195. It is pertinent to mention that Resolution Plan was approved on 04th September 2019, and Plan was to be implemented from the date of pronouncement of the order. The lockdown on account of Covid-19 Pandemic started on 15th March 2020, and till then, Successful Resolution Applicant

had already committed default in not implementing the Resolution Plan. Therefore, it cannot be concluded that the Resolution Plan becomes financially, economically and operationally becomes unviable on account of the Covid-19 Pandemic. It is also important to point out that after the Resolution Plan's approval on 04th September 2019 first meeting of the Monitoring Agency took place on 13th September 2019. After that, five meetings of the Monitoring Agency took place within 20 days from the date of approval of the Resolution Plan. But the Successful Resolution Applicant has not participated in the Monitoring Agency meetings and never attended the said meetings. The Appeal is filed simply to avoid anticipated action on refusal to implement the approved plan.

196. It is also noticed that by order of this Appellate Tribunal dated 25th September 2019, operation of the impugned order to the extent it relates to the payment of the amount in excess of Rs.400 Crores stayed. We have also noticed that the Successful Resolution Applicant/Appellant has filed the Appeal on erroneous assumption and made arbitrary calculations with the sole aim of evading its obligations under the approved Resolution Plan and has not paid a single penny on the pretext of the order dated 25th September 2019 without there being any stay of the payments up to Rs.400 crores. This clearly shows a failure on Successful Resolution Applicant S.S. Natural Resources Pvt. Ltd. in implementing the approved Resolution Plan. After approval of the Resolution Plan, it took about 1½ year. To date, not a single penny had been paid on the pretext of the order of this Tribunal dated 25th

September 2019 without there being any stay on the payments up to Rs.400 crores. The relevant portion of our order dated 25th September 2019 is as under:

> "***In the meantime, the operation of the impugned order, in so far it relates to the payment of amount in excess of Rs.400 crores shall remain stayed."***

197. Based on the above order, it is clear that there was no stay for implementation of the Resolution Plan, but after about 1½ year period after the date of approval of the Resolution Plan, Appellant has not taken any stay towards the implementation of the Plan. The approved Resolution Plan contemplates Financial Creditors to get only 5.8% of the admitted claim amounting to Rs.5,853 crores and Operation Creditors to get Rs.10.5 Crores out of the admitted claim amount of Rs.224.05 crores.

198. It is further to observe that the Adjudicating Authority has also observed that the Applicant's overall conduct in filing multiple applications cannot be considered with the genuine object to get the relief as prayed for, with the object to protract the matter…… If this kind of approach is not prevented, it will air a wrong message to the similarly situated Directors of the Corporate Debtor Company. It is essential to point out that the Adjudicating Authority, while dismissing the CA (IB) No.461 & 462 of 2019, imposed a cost of Rs.25 lakhs payable by the Promoter Director Ashis Jhunjhunwala.

199. It is also noticed that while dismissing CA (IB) No.497/KB/2019, the Adjudicating Authority imposed a cost of Rs.5 lacs to be paid by the Orissa Metalic Private Limited. We also observe that after approval of the Resolution

Plan, if Successful Resolution Applicant wants to back out from the approved Resolution Plan, multiple applications are being filed in different names to protract the litigation. In the circumstances, we are fully convinced that the order of imposing cost by the Adjudicating Authority is also justified and needs no interference.

200. Based on the above discussion, Company Appeals (AT) (Insolvency) Nos.995, 988, 1039, 1124, 1125, 1159, 1242 of 2019 & 468 of 2020 are being dismissed.

201. We further direct the Monitoring Agency to start taking steps for implementation of the Resolution Plan immediately, and in case the Successful Resolution Applicants fails to implement the approved Resolution Plan; appropriate action should be taken immediately, and without waiting further, the application should be moved before the Adjudicating Authority for liquidation of the Corporate Debtor. Registrar NCLAT is directed to send the order's copy immediately to all the concern parties through e-mail as well as by post for compliance.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

[V. P. Singh]
Member (Technical)

NEW DELHI
04th MARCH, 2021

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Hon'ble Mr. Balvinder Singh, Member (Technical) is on leave, therefore Judgment is being pronounced under Rule 92 of NCLAT Rules, also on his behalf.

[Justice Jarat Kumar Jain]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
04th MARCH, 2021