Greater Noida Industrial Development ... vs Prabhjit Singh Soni on 12 February, 2024

Author: Dhananjaya Y. Chandrachud

Bench: Dhananjaya Y. Chandrachud

2024 INSC 102 REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7590-7591 OF 2023
(Arising out of Diary No.3628 of 2023)

GREATER NOIDA INDUSTRIAL
DEVELOPMENT AUTHORITY …APPEL

VERSUS

PRABHJIT SINGH SONI & ANR.
…RESPOND

JUDGMENT

MANOJ MISRA, J.

1. These appeals under Section 62 of the Insolvency and Bankruptcy Code, 20161 are directed against the judgment and order2 of the National Company Law Appellate Tribunal, Principal Bench, New Delhi3 passed in Company Appeal (AT) (Ins.) No. 867 of 2021 and I.A. No. 2315 of 2021, whereby the appellant's appeal against the order of the National Company Law Tribunal, New Delhi4 dated 05.04.2021 has been dismissed.

Reason: IBC

Order dated 24.11.2022

NCLAT

NCLT

b. By the order dated 05.04.2021, NCLT had

dismissed two applications filed by the appellant under Section 60(5) of the IBC, namely:

> (a) I.A. No.1380/ 2021, inter alia, to recall the order dated 04.08.2020 passed by NCLT in I.A. No. 2201 (PB)/2020 in Company Petition No. (IB)-272 (ND)/ 2019; and
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> (b) I.A. No.344/ 2021, inter alia, questioning the decision of the Resolution Professional (hereinafter referred to as the RP) in treating the appellant as an operational creditor and not informing the appellant about the meetings of the Committee of Creditors5.

Factual Background

3. The appellant being a statutory authority constituted under Section 3 of the U.P. Industrial Area Development Act, 19766 acquired land for setting up an urban and industrial township. On 28.10.2010, one of the plots of land acquired by it, namely, Plot No. 01-C, Sector 16C, Greater Noida, District Gautam Budh Nagar, U.P., was allotted, by way of lease for 90 years, to M/s. JNC Construction (P) Ltd (the Corporate Debtor7) for a residential project, by charging premium, payable in instalments starting from 29.10.2012 up to 29.04.2020, after initial moratorium of 24 months, albeit subject to COC 1976 Act CD payment of interest as well as penal interest, while reserving right to cancel the lease and resume the demised land, subject to certain conditions. The CD committed default in payment of instalments and was served with demand cum pre-cancellation notice.

4. A Company Petition No. (IB) 272 (PB)/ 2019 was filed against the CD for initiating Corporate Insolvency Resolution Process8, which was admitted on 30.05.2019. Consequent thereto, claims were invited through a public announcement.

5. Pursuant to the public notice, in the month of January 2020, appellant submitted a claim of Rs. 43,40,31,951, being unpaid instalments payable towards premium for the lease. The claim was set up by the appellant as a financial creditor of the CD.

6. However, the RP treated the appellant as an operational creditor and, vide e-mail dated 04.02.2020, requested the appellant to submit its claim in Form B, as an operational creditor of the CD.

7. The appellant did not submit its claim afresh as an operational creditor. In the meantime, the COC approved a plan which was presented to the Adjudicating Authority (NCLT) for approval. The NCLT vide order dated 04.08.2020 approved the same.

8. On getting information through letter dated 24.09.2020 that the plan has been finalised and approved, on 06.10.2020 the appellant filed I.A. No.344 of 2021 CIRP questioning, inter alia, the resolution plan, the decision of the RP to treat the appellant as an operational creditor, and all actions in pursuance thereof. Another I.A. No.1380/2021 was filed on 15.03.2021 seeking, inter alia, recall of the order dated 04.08.2020.

9. In the two applications referred to above, the appellant pleaded, inter alia, that, --

> (a) there was gross error on part of the RP in treating the appellant as an operational creditor, particularly, when it had no adjudicatory power under Regulation 13 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 20169;
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> (b) the resolution plan erroneously states that appellant did not submit a claim when, in fact, it was submitted;
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> (c) appellant being owner of the land with statutory charge over assets of the CD ought to have been given top priority for its dues as a secured creditor;
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> (d) no opportunity of hearing was given to the appellant by the COC, and the entire process right up to the approval of the plan by the Adjudicating Authority was ex parte.

CIRP Regulations 2016 NCLT's Order

10. The NCLT, vide order dated 5.4.2021, rejected the aforesaid applications, inter alia, on the ground that, despite lapse of seven months between the date of filing its claim in January, 2020 and the date of approval of the plan in August 2020, the appellant took no steps against the RP for not taking a decision on its claim, even though it was aware about initiation of the CIRP, and now it is not permissible to take a decision on the claim application of the appellant as the CIRP is complete consequent to approval of the plan.

Appeal before NCLAT

11. Aggrieved with the order of the NCLT, the appellant filed an appeal before the NCLAT, inter alia, on the following grounds:

> (i) The appellant was a financial creditor and, therefore, ought to have been a member of the COC. On account of absence of the appellant in the COC, the approval of the resolution plan by the COC and, thereafter, by the NCLT is rendered invalid;
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> (ii) By virtue of Sections 1310, 13A11 and 1412 of the 1976 Act, the appellant had a charge over the assets of the CD and was therefore a secured creditor within the meaning of Section 3(30)13 read with Section 3(31)14 of the IBC, yet the resolution plan does not treat the appellant as a secured creditor;
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> (iii) The appellant had submitted its claim with proof, yet the appellant was shown as one who submitted no claim. Additionally, the appellant was neither informed of the meetings of the COC nor adequate amount, commensurate to its status as a secured creditor and owner of the land with Section 13.- Imposition of penalty and mode of

> recovery of arrears.- Where any transferee makes any default in the payment of any consideration money or instalment thereof or any other amount due on account of the transfer of any site or building by the Authority or any rent due to the Authority in respect of any lease, or where any transfer or occupier makes any default in payment of any amount of fee or tax levied under this Act the Chief Executive Officer may direct that in addition to the amount of arrears, a further sum not exceeding that amount shall be recovered from the transferee or occupier, as the case may be, by way of penalty.

Section 13.A- Any amount payable to the Authority under Section 13 shall constitute a charge over the property and may be recovered as arrears of land revenue or by attachment and sale of property in the manner provided under Sections 503, 504, 505, 506, 507, 508, 509, 510, 512, 513, and 514 of the Uttar Pradesh Municipal Corporations Act, 1959 [Act 2 of 1959] and such provisions of the said Act shall mutatis mutandis apply to the recovery of dues of an authority as they apply to the recovery of a tax due to a Municipal Corporation, so however, that references in the aforesaid Sections of the said Act to "Municipal Commissioner", "Corporation Officer" and "Corporation" shall be construed as references to "Chief Executive Officer" and "Authority" respectively:

> provided that more than one modes of recovery shall not be commenced or continued simultaneously Section 14.- Forfeiture for breach of conditions of transfer.- (1) in the case of non-payment of consideration money or any installment thereof on account of the transfer by the Authority of any site or building or in case of breach of any condition of such transfer or breach of any rules or regulations made under this Act, the Chief Executive Officer may resume the site or building so transferred and may further forfeit the whole or any part of the money, if any, paid in respect thereof. (2) Where the Chief Executive Officer orders resumption of any site or building under sub-section (1) the Collector may, on his own requisition, cause possession thereof to be delivered to him and may for that purpose use or causes to be used such force as may be necessary Section 3 (30).- "secured creditor" means a creditor in favour of whom a security interest is created.

Section 3(31).- "security interest" means right, title or interest or a claim to a property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

> Provided that security interest shall not include a performance guarantee.

> statutory rights, was allocated to it in the resolution plan, which is violative of the provisions of Section 30(2)15 of the IBC; and

> (iv) The NCLT failed to address and appreciate the grounds taken in the correct perspective.

Findings of NCLAT

12. The appeal preferred by the appellant was dismissed by observing, inter alia, Section 30. Submission of Resolution Plan. – (1)..... (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(i) the amount to be paid to search creditors in the event of a liquidation of the corporate debtor under section 53;

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53; whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. Explanation 1.-- For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Explanation 2.-- For the purposes of this clause it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code [Amendment] Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor----

(i) where the resolution plan has not been approved or rejected by the adjudicating authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the adjudicating authority in respect of a resolution plan;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

(i) the materials on record reflect that the RP had informed the appellant vide

04.02.2020 about its status as an Operational Creditor and to submit its claim in Form 'B', yet the appellant chose not to file its claim;

(ii) in New Okhla Development Authority vs. Anand Sonbhadra16, it was held that disbursement is an indispensable requirement to constitute a financial debt within the meaning of Section 5(8)17 of the IBC and, that too, the disbursement must be from a creditor to a debtor, and as the lease executed by the appellant was not a financial lease or capital lease, the appellant does not qualify as a financial creditor;

(2023) 1 SCC 724 Section 5(8).—"financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note, purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or higher purchase contract which is deemed as a financial or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; Explanation.-- For the purposes of this sub clause,--

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter indemnity obligation in respect of a guarantee, indemnity bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

(iii) the resolution plan was approved by the Adjudicating Authority on 04.08.2020, and the successful resolution applicant (SRA) seeking implementation of the plan informed the appellant vide letter dated 24.09.2020 about the plan, yet I.A. No.344/ 2021 was not filed before 06.10.2020 and I.A. No. 1380/2021, seeking recall, was filed only on 15.03.2021, which shows that the appellant had not been diligent in pursuing its right, if any, therefore the challenge, post approval of the resolution plan, is liable to be rejected; and

(iv) there appears no material irregularity in the approval of the Resolution Plan, particularly, when the commercial wisdom of the COC is not justiciable.

13. We have heard Sri Ravindra Kumar, learned senior counsel, for the appellant; Dr. Abhishek Manu Singhvi, learned senior counsel, for respondent no.2 (Resolution Applicant); and Sri V.M. Kannan for respondent no.1 (Resolution Professional).

Submissions on behalf of the appellant

14. The learned counsel for the appellant, inter alia, submitted:

> (a) There is no dispute that appellant had submitted its claim with proof on 30.01.2020 as a financial creditor having security interest over the assets of the CD. Even if the appellant was not a financial creditor, the resolution plan ought to have noticed its claim as a secured creditor whereas the order of approval dated 4.8.2020 describes the appellant as one who did not submit its claim.
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> (b) The meetings of the COC were not notified to the appellant to enable its participation. In absence thereof, the resolution plan stood vitiated.
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> (c) At the time of approving the resolution plan, the adjudicating authority failed to consider whether the plan had made provisions commensurate to appellant's claim, and the statutory charge which the appellant enjoyed over the assets of the CD.

Not only that, it overlooked the ownership and statutory rights of the appellant over the land and thereby failed to consider whether the plan was feasible and viable. In absence of such consideration, the order of approval stood vitiated.

(d) The finding that there had been a delay on part of the appellant in pursuing its remedies is misconceived, particularly when it was established on record that I.A. No.344/ 2021 was filed promptly on 6.10.2020 upon getting information on 24.09.2020 from the monitoring agency regarding approval of the plan. Likewise, I.A. No.1380/ 2021 was filed immediately on 15.03.2021 when suspension of the period of limitation for any suit, appeal, application or proceeding, imposed between 15.03.2020 and 14.03.2021, was lifted in terms of this Court's order dated 8.03.2021 in RE: Cognizance For Extension of Limitation18.

Submissions on behalf of the respondents

15. Dr. Abhishek Manu Singhvi, leading the arguments on behalf of the respondents, submitted that the issue as to whether dues payable to an Industrial Area Development Authority, like the appellant, towards lease/ allotment premium / rental, would be a financial debt or not is no longer res integra, as it stands settled by a decision of this Court in Anand Sonbhadra (supra), wherein it has been held that it is not a financial debt. Therefore, the appellant had no voting right in the COC. And since the appellant pressed its case only on the ground that it is a financial creditor, its challenge to the order of approval had no basis. More so, when the commercial wisdom of the COC is not justiciable. Further, once the resolution plan, which makes a provision for the appellant, is approved by the Adjudicating Authority, it cannot be questioned through a recall application.

Analysis

16. Before we proceed to test the correctness of the impugned order against the weight of rival submissions, it would be useful to have a look at the statutory provisions (2021) 5 SCC 452 of the IBC and the Regulations framed thereunder with reference to the corporate insolvency resolution process.

17. As per the provisions of the IBC, on admission of a petition, and declaration of a moratorium under Section 13, a public announcement is made inviting claims against the CD by a specified date. The manner in which a public announcement is to be made and claims are to be submitted, is described in the CIRP Regulations 2016.

18. Regulation 719 of CIRP Regulations, 2016 deals with submission of a claim by a person who claims himself to be an operational creditor. Such claim is to be submitted in Form B specified in the Schedule. Whereas Regulation 820 deals with submission of a claim by a

7. Claims by operational creditors.—(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit claim with proof to the interim resolution professional in person, by post or by electronic means in Form B 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 operational creditor under this regulation 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 contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;

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

(iv) financial accounts.

8. Claims by financial creditors.—(1) A person claiming to be a 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— person who claims himself to be a financial creditor. Such a claim is to be submitted in Form C. Regulations 8-A, 9 and 9-A deal with other classes of creditors with which we are not concerned here.

19. Regulation 1221 mandates submission of proof of the claim by the date specified. Whereas, Regulation 1322

(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 paid; or

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

12. Submission of proof of claims.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement. (2) A creditor, who

fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim:

> Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

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. (2) The list of creditors shall be—

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor or their authorised representatives;

(c) displayed on the website, if any, of the corporate debtor; (ca) filed on the electronic platform of the Board for dissemination on its website:

> Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the speaks of verification of claims by the interim resolution professional (IRP) or the RP, as the case may be. Regulation 1423 provides for determination of amount of claim where the amount claimed is not precise.
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> 20. The use of the words “a person claiming to be an operational creditor” in the opening part of Regulation 7, and the words “a person claiming to be a financial creditor” in Regulation 8, indicate that the category in which the claim is submitted is based on the own understanding of the claimant. Thus, there could be a situation where the claimant, in good faith, may place itself in a category to which it does not belong. However, what is important is, the claim so submitted must be with proof. As to what could form proof of the debt/ claim is delineated in sub-

regulation (2) of Regulations 7 and 8 of the CIRP Regulations, 2016.

21. Once a claim is submitted with proof under any of the Regulations (i.e., Regulations 7, 8, 8-A, 9 and 9-A), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;

(d) filed with the adjudicating authority; and

(e) presented at the first meeting of the committee.

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." IRP or the RP, as the case may be, as per Regulation 13, has to verify the claim, as on the insolvency commencement date, 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 in terms of Regulation 12 A24.

22. As it could be noticed from the CIRP Regulations, 2016, on submission of a claim with proof, the IRP or the RP, as the case may be, has to verify the claim and prepare a list of creditors containing names of creditors along with the amount claimed by them and security interest, if any, the logical conclusion derivable from the provisions analysed above would be that the Form in which a claim is to be submitted under the CIRP Regulations 2016 is directory and not mandatory. What is important is, the claim must be supported by proof.

23. On collation of claims received against the CD, the IRP has to constitute a COC. As per Section 21 (2) of the IBC, subject to other provisions of Section 21, the COC must comprise all financial creditors of a CD. Under Section 22 of the IBC, the COC appoints an RP in its first meeting. It may, however, resolve to appoint the IRP as the RP, subject to confirmation by the Board.

24. The RP has many important duties. Some of the duties which an RP has to perform, under Section 25 of !2 A. Updation of claim. — A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

the IBC, are to: (a) take immediate custody and control of all the assets of the CD, including the business records of the CD; (b) maintain an updated list of claims; (c) convene and attend all meetings of the COC; (d) prepare information memorandum in accordance with Section 29 read with Regulation 36 of the CIRP Regulations 2016 25;

(e) invite prospective resolution applicants to submit a resolution plan or plans; and (f) present all resolution plans at the meetings of the COC.

Regulation 36. Information memorandum. – (1) Subject to sub regulation [4], the resolution professional shall submit the information memorandum in electronic form to each member of the committee within 2 weeks of his appointment, but not later than 54th day from the insolvency commencement date, whichever is earlier.

(2) the information memorandum shall contain the following details of the corporate debtor--

[a] assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values. Explanation.- Description includes the details such as date of acquisition cost of acquisition, remaining useful life identification number, depreciation charged, book value, and any other relevant details.

(b) the latest annual financial statements;

(c) financial statements of the corporate debtor for the last 2 financial years and provisional financial statements for the current financial year made up to a date not earlier than 14 days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least 1% stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) *******omitted

(k)*******omitted

(l) other information, which the resolution professional deems relevant to the committee. (3) A member of the committee may request the resolution professional for further information of the nature described in this regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan. (4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under subsection [2] of section 29.

25. The meetings of the COC are to be conducted by the RP. Sub section (3) of Section 2426, inter alia, provides that the RP shall give notice of each meeting of the COC to the operational creditors or their representative(s) if the amount of their aggregate dues is not less than ten percent of the debt. Regulation 19 of the CIRP Regulations, 2016 further mandates the RP to ensure that notice of the meeting is given to every participant. "Participant" is defined in Regulation 2 (l) of the CIRP Regulations 2016 as a person who is entitled to attend a meeting of the COC under Section 24 of the IBC or any other person authorised by the COC to attend the meeting.

26. Based on the information memorandum, when a resolution plan is submitted by a resolution applicant, eligible under Section 29-A of the IBC, the RP is under an obligation to examine whether the resolution plan(s) received by him conform(s) to the conditions referred to in "Section 24. Meeting of committee of creditors.--- (1)..... (2).....

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of committee of creditors, including the authorized representatives referred to in sub-sections (6) and (6A) of section 2 and sub-section (5);

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c). operational creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt sub-section (2) of Section 30 of the IBC as elaborated in Regulations 3727 and 3827A of the CIRP Regulations 2016.

27. The resolution plan that conforms to the conditions referred to in sub-section (2) of Section 30 is to be presented by the RP to the COC for its approval. Thereafter, under sub-section (4) of Section 3028, the COC Regulation 37. Resolution Plan.-- A resolution plan shall provide for the measures as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets including but not limited to the following:-

[a] transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

[ba] restructuring of the corporate debtor, by way of merger, amalgamation and demerger; [c] the substantial acquisition of shares of the corporate debtor or the merger or consolidation of the corporate debtor with one or more persons; [ca] cancellation or delisting of any shares of the corporate debtor if applicable; [d] satisfaction or modification of any security interest; [e] curing or waving of any breach of the terms of any debt due from the corporate debtor; [f] reduction in the amount payable to the creditors; [g] extension of a maturity date or change in interest rate or other terms of a debt due from the corporate debtor;

[h] amendment of the constitutional documents of the corporate debtor; [i] issuance of securities of the corporate debtor for cash, property, securities, or in exchange for claims or interest, or other appropriate purpose; [j] change in portfolio of goods or services produced or rendered by the corporate debtors; [k] change in technology used by the corporate debtor; and [l] obtaining necessary approvals from the central and state governments and other authorities. 27A Regulation 38. Mandatory contents of the resolution plan.---(1) The amount payable under a resolution plan-

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(a) to the operational creditors shall be paid in priority over financial creditors; and

(b) to the financial creditors, who have a right to vote under sub- section (2) of Section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders including financial creditors and operational creditors, of the corporate debtor.

(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the adjudicating authority at any time in the past.

(2) A resolution plan shall provide:

> [a] the term of the plan and its implementation schedule; [b] the management and control of the business of the corporate debtor during its term; and [c) adequate means for supervising its implementation. (3) A resolution plan shall demonstrate that----

[a] it addresses the cause of the fault;

[b] it is feasible and viable;

[c] it has provisions for its effective implementation;

(d) it has provisions for approvals required and the timeline for the same; and [e] the resolution applicant has the capability to implement the resolution plan.

Section 30 (4). The committee of creditors may approve a resolution plan by a vote of not less than sixty six percent of voting share of financial creditors, after considering its feasibility and viability, the manner of may approve the plan after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53, including the priority and value of security interest of a secured creditor and such other requirements as may be specified by the Board.

28. Once the plan is approved by the COC, the RP has to submit it for approval of the Adjudicating Authority. As per sub-section (1) of Section 3129 of the IBC, if the Adjudicating Authority is satisfied that the resolution plan as approved by the COC under sub-section (4) of Section 30 meets the requirements of sub-section (2) of Section 30, it has to approve the resolution plan. On its approval, the plan becomes binding on the CD and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. But where distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of secured creditor and such other requirements as may be specified by the Board:

> ……..” “Section 31. Approval of resolution plan.- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:
>
> ……”.
>
> the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, in exercise of power under sub- section (2) of Section 31, by an order, reject the resolution plan.
>
> 29. Explaining the scheme of the CIRP under the IBC, in Ghanashyam Mishra & Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd.30, a three-Judge Bench of this Court observed that one of the principal objects of the IBC is to provide for revival of the CD and to make it a going concern. The RP on commencement of CIRP is required to issue a publication inviting claims from all the stakeholders; thereafter, on basis of claims received, the RP is required to collate the information and submit necessary details in the information memorandum; the resolution applicant(s) submit their plan(s) on the basis of the details provided in the information memorandum; the resolution plan(s) undergo deep scrutiny by RP as well as COC; in the negotiations that may be held between COC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the CD is revived and is made an on-

going concern; after COC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2)

of Section 30 of IBC; and (2021) 9 SCC 657 (paragraph 93) only thereafter, the adjudicating authority can grant its approval to the plan.

30. What is clear from the provisions of the IBC and the Regulations noticed above is, that the RP is under a statutory obligation to collate the data obtained from (a) the claim(s) made before it and (b) information gathered from the records including those maintained by the CD. The data so collated forms part of the information memorandum. Based on that information, the resolution applicant(s) submit(s) plan. In consequence, even if a claim submitted by a creditor against the CD is in a Form not as specified in the CIRP Regulations, 2016, the same has to be given due consideration by the IRP or the RP, as the case may be, if it is otherwise verifiable, either from the proof submitted by the creditor or from the records maintained by the CD. A fortiori, if a claim is submitted by an operational creditor claiming itself as a financial creditor, the claim would have to be accorded due consideration in the category to which it belongs provided it is verifiable.

31. On submission of the plan by a resolution applicant, the RP examines it to confirm whether it meets the requirements of sub-section (2) of Section 30 and, if it conforms to the conditions referred to therein, present the plan to the COC for its approval. After the plan is presented to the COC for its approval, the COC, under sub-section (4) of Section 30, has to consider its feasibility and viability, the manner of distribution proposed, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board. Once that exercise is over, the plan is submitted for approval of the Adjudicating Authority, which must, under sub-section (1) of Section 31, satisfy itself as to whether the plan approved by COC under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30 of IBC.

32. In Jaypee Kensington Boulevard Apartments Welfare Association vs. NBCC (India) Ltd.,31 a three- Judge Bench of this Court had occasion to examine the scope of judicial review exercisable by: (a) the Adjudicating Authority, under Section 31 (1), over a resolution plan approved by the COC; and (b) the Appellate Authority exercising its power under Section 32 read with Section 61 (3) of the IBC. After examining the relevant provisions of the IBC and the Regulations framed thereunder, and upon a survey of various judicial pronouncements on the subject, the scope of judicial review was summarised as follows:

> "108. To put in a nutshell, the adjudicating authority has limited jurisdiction in the matter of approval of a resolution plan, which is well- defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-

referred. The jurisdiction of the appellate authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In the adjudicatory process concerning a (2022) 1 SCC 401 resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the adjudicating authority or the appellate authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis

the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court.

(Emphasis supplied)

33. In light of the analysis of the provisions of the IBC and the Regulations framed thereunder, in our view, though commercial wisdom of the COC in approving a resolution plan may not be justiciable in exercise of the power of judicial review, the Adjudicating Authority can always take notice of any shortcoming in the resolution plan in terms of the parameters specified in sub-section (2) of Section 30 of the IBC coupled with Regulations 37 and 38 of the CIRP Regulations 2016. If any such shortcoming appears in the resolution plan, it may send the resolution plan back to the COC for re-submission after satisfying the parameters so laid down. Likewise, the appellate authority can also interfere upon noticing any shortcoming in the resolution plan while exercising its powers under Section 3232 read with Section 61 (3)33 of the IBC.

Section 32. Appeal. - Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of Section 61.

Section 61. Appeals and Appellate Authority. – (1)..... (2).....

34. In the instant case, a perusal of the approval order dated 04.08.2020 would reveal that the resolution plan put forth by the resolution applicant refers to the appellant as a creditor who had not submitted its claim. Further, the dues shown payable to the appellant are Rs. 13,47,40,819/- when, according to the appellant, its claim was for Rs. 43,40,31,951/- Not only that, the amount proposed to be paid is just Rs.1,34,74,082/-, that too, payable by conversion of dues into square feet of area to be completed and payment to be made, on square feet basis, at the time of registration of each of the units.

35. However, what is important is that neither NCLT nor NCLAT rejected the assertion of the appellant that on 30.01.2020, in response to the public announcement, the appellant had submitted with proof a claim of Rs.43,40,31,951/- before the RP, being the amount payable to it by the CD towards unpaid premium including interest payable thereon for the lease/allotment of land owned by the appellant.

36. According to the appellant, the resolution plan fails to take into account the following: (a) the appellant (3) An appeal against an order approving resolution plan under Section 31 may be filed on the following grounds, namely:-

> [i] the approved resolution plan is in contravention of the provisions of any law for the time being in force;
>
> (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

> (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
>
> (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
>
> (v) the resolution plan does not comply with any other criteria specified by the Board.

had submitted its claim with proof for Rs. 43,40,31,951/- ; (b) the appellant had a statutory charge over the assets of the CD; (c) the entire land over which the project has been conceived is owned by the appellant; (d) a notice to cancel the lease for non-payment of dues had already been served on the CD; and (e) without approval of the appellant, the plan was not feasible. Further, according to the appellant, the plan did not conform to the conditions referred to in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations 2016; and that the entire process of preparing the resolution plan and approving the same had been ex parte, thereby seriously prejudicing the interest of the appellant. It is the case of the appellant that neither NCLT nor NCLAT accorded due consideration to the above aspects while rejecting the application/ appeal of the appellant.

37. Per contra, on behalf of the respondents, it was urged that,- (a) the appellant had pressed its case only on the ground that it was a financial creditor, once this plea is found unsustainable, no relief can be granted to the appellant, as commercial wisdom of the COC is not justiciable; (b) NCLT has no power to recall its order of approval, the remedy for the appellant was to file an appeal within the time provided by the statute; and (c) there has been inordinate delay on the part of the appellant in questioning the order of approval.

38. At this stage, we may put on record that the appellant had set up its claim as a financial creditor.

However, the appellant was found to be an operational creditor. Though a challenge to this finding has been laid but, during the course of arguments, the learned counsel for the appellant failed to demonstrate as to how could the appellant be considered a financial creditor. In view thereof, taking notice of the decision in Anand Sonbhadra (supra), we do not propose to deal with the submission that the appellant was a financial creditor.

39. Upon consideration of the rival submissions, following issues arise for our consideration in this appeal:

> (i) Whether in exercise of powers under sub-section (5) of Section 60, the Adjudicating Authority (i.e., NCLT) can recall an order of approval passed under sub-section (1) of Section 31 of the IBC?.
>
> (ii) Whether the application for recall of the order was barred by time?

> (iii) Whether the resolution plan put forth by the resolution applicant did not meet the requirements of sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016?
>
> (iv) As to what relief, if any, the appellant is entitled to?

Recall Application is maintainable.

40. Section 60 of the IBC specifies that the Adjudicating Authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. Sub- section (5) of Section 60 provides that notwithstanding anything to the contrary contained in any other law for the time being in force, the NCLT shall have jurisdiction to entertain or dispose of: (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC.

41. The NCLT has been constituted by the Central Government in exercise of power under Section 408 of the Companies Act, 2013. Section 408 of the Companies Act is in following terms:

> "The Central Government shall, by notification, constitute with effect from such date as may be specified therein, a tribunal to be known as the National Company Law Tribunal consisting of a President and such number of judicial and technical members as the Central Government may deem necessary, to be appointed by it by notification to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force."

42. Rule 11 of the National Company Law Tribunal Rules, 2016, framed under Section 469 of the Companies Act 2013, which is in pari materia with Section 15134 of Code of Civil Procedure, 190835, preserve the inherent powers of the Tribunal in the following terms:

> "Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

43. In Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal35 a four-Judge Bench of this Court in the context of powers vested in the Court, while interpreting Section 151 CPC, observed:

> "23... The Section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the

> provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it." (Emphasis supplied)

44. In Grindlays Bank Ltd. vs. Central Govt.

Industrial Tribunal36 a question arose whether Central Government Industrial Tribunal has power to recall/ set aside an ex parte award when the party aggrieved had been prevented from appearing by a sufficient cause. Holding Section 151.- Saving of inherent powers of Court. - Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court CPC AIR 1962 SC 527 1980 Supp SCC 420 that such power inheres in a Tribunal, this Court observed:

> "6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary." (Emphasis Supplied) In addition to above, recognising the difference between a procedural review and a review on merits, it was observed:
>
> 13.....The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. ..... Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

45. In State of Punjab vs. Davinder Pal Singh Bhullar37, while considering the bar imposed on a Court by Section 362 of the Criminal Procedure Code, 1973 on review of a judgment or final order disposing of a case, it was observed:

> "46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained

> by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 CrPC would not operate. In such an eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault."

46. The above passage was cited and approved by a three-Judge Bench of this Court in New India Assurance Co. Ltd. vs. Krishna Kumar Pandey38.

47. In Budhia Swain vs. Gopinath Deb39, after considering a number of decisions, a two-Judge Bench of this Court observed:

> "8. In our opinion a tribunal or a court may recall an order earlier made by it if
>
> (i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,
>
> (ii) there exists fraud or collusion in obtaining the judgment, (2011) 14 SCC 770 (2021) 14 SCC 683 (1999) 4 SCC 396
>
> (iii) there has been a mistake of the court prejudicing a party, or
>
> (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

48. The law which emerges from the decisions above is that a Tribunal or a Court is invested with such ancillary or incidental powers as may be necessary to discharge its functions effectively for the purpose of doing justice between the parties and, in absence of a statutory prohibition, in an appropriate case, it can recall its order in exercise of such ancillary or incidental powers.

49. In a recent decision (i.e., Union Bank of India vs. Dinakar T. Vekatasubramanian & Ors.), a five-member Full Bench of NCLAT held that though the power to review is not conferred upon the Tribunal but power to recall its judgment is inherent in the Tribunal and is preserved by Rule 11 of the NCLT Rules, 2016. It was held that power of recall of a judgment can be exercised when any procedural error is committed in delivering the earlier judgment; for example, necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered

adverse to a party. It was observed that there may be other grounds for recall of a judgment one of them being where fraud is played on the Court in obtaining a judgment. This decision of NCLAT was upheld by a two-Judge Bench of this Court vide order dated 31.07.2023 in Civil Appeal No.4620 of 2023 (Union Bank of India vs. Financial Creditors of M/s Amtek Auto Ltd. & Ors.).

50. In light of the discussion above, what emerges is, a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC. Further, Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal. Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order. However, such power is to be exercised sparingly, and not as a tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where (a) the order is without jurisdiction; (b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and (c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice.

51. In the case on hand, the recall application was filed by claiming that,- (a) the appellant was not informed of the meetings of the COC; (b) the proceedings up to the stage of approval of the resolution plan by the Adjudicating Authority were ex parte; (c) the RP misrepresented that the appellant had submitted no claim when, otherwise, a claim was submitted of an amount higher than what was shown outstanding towards the appellant; and (d) there was gross mistake on part of the Adjudicating Authority in approving the plan which did not fulfil the conditions laid down in sub-section (2) of Section 30 of the IBC.

52. In our view, the grounds taken qualify as valid grounds on which a recall of the order of approval dated 04.08.2020 could be sought. We thus hold that the recall application was maintainable notwithstanding that an appeal lay before the NCLAT against the order of approval passed by the Adjudicating Authority.

The Recall Application was not barred by time.

53. As regards the plea that the recall application was barred by time, suffice it to say that I.A. No.344/ 2021 was filed on 6.10.2020 upon getting information on 24.09.2020 from the monitoring agency regarding approval of the plan. Likewise, I.A. No.1380/ 2021 was filed on 15.03.2021 immediately when suspension of the period of limitation for any suit, appeal, application or proceeding, between 15.03.2020 and 14.03.2021, was lifted in terms of this Court's order dated 8.03.2021 in RE:

Cognizance For Extension of Limitation (supra). We, therefore, find no substance in the plea that the applications were barred by limitation.

The Resolution Plan did not meet the requirements of Section 30 (2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016

54. In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:

a. The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs.43,40,31,951/- No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form. As already discussed above, in our view the Form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof. Here, the resolution plan fails not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. According to the resolution plan, the amount outstanding was Rs. 13,47,40,819/- whereas, according to the appellant, the amount due and for which claim was made was Rs.

43,40,31,951/- This omission or error, as the case may be, in our view, materially affected the resolution plan as it was a vital information on which there ought to have been application of mind. Withholding the information adversely affected the interest of the appellant because, firstly, it affected its right of being served notice of the meeting of the COC, available under Section 24 (3) (c) of the IBC to an operational creditor with aggregate dues of not less than ten percent of the debt and, secondly, in the proposed plan, outlay for the appellant got reduced, being a percentage of the dues payable. In our view, for the reasons above, the resolution plan stood vitiated. However, neither NCLT nor NCLAT addressed itself on the aforesaid aspects which render their orders vulnerable and amenable to judicial review.

b. The resolution plan did not specifically place the appellant in the category of a secured creditor even though, by virtue of Section 13-A of the 1976 Act, in respect of the amount payable to it, a charge was created on the assets of the CD. As per Regulation 37 of the CIRP Regulations 2016, a resolution plan must provide for the measures, as may be necessary, for insolvency resolution of the CD for maximization of value of its assets, including, but not limited to, satisfaction or modification of any security interest. Further, as per Explanation 1, distribution under clause (b) of sub-section (2) of Section 30 must be fair and equitable to each class of creditors. Non-

placement of the appellant in the class of secured creditors did affect its interest. However, neither NCLT nor NCLAT noticed this anomaly in the plan, which vitiates their order.

> c. Under Regulation 38 (3) of the CIRP Regulations, 2016, a resolution plan must, inter alia,

demonstrate that (a) it is feasible and viable; and

(b) it has provisions for approvals required and the time-line for the same. In the instant case, the plan conceived utilisation of land owned by the appellant. Ordinarily, feasibility and viability of a plan are economic decisions best left to the commercial wisdom of the COC. However, where the plan envisages use of land not owned by the CD but by a third party, such as the appellant, which is a statutory body, bound by its own rules and regulations having statutory flavour, there has to be a closer examination of the plan's feasibility. Here, on the part of the CD there were defaults in payment of instalments which, allegedly, resulted in raising of demand and issuance of pre-cancellation notice. In these circumstances, whether the resolution plan envisages necessary approvals of the statutory authority is an important aspect on which feasibility of the plan depends. Unfortunately, the order of approval does not envisage such approvals. But neither NCLT nor NCLAT dealt with those aspects.

Relief

55. As we have found that neither NCLT nor NCLAT while deciding the application /appeal of the appellant took note of the fact that,- (a) the appellant had not been served notice of the meeting of the COC; (b) the entire proceedings up to the stage of approval of the resolution plan were ex parte to the appellant; (c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and (d) the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016, we are of the considered view that the appeals of the appellant are entitled to be allowed and are accordingly allowed. The impugned order dated 24.11.2022 is set aside. The order dated 04.08.2020 passed by the NCLT approving the resolution plan is set aside. The resolution plan shall be sent back to the COC for re-submission after satisfying the parameters set out by the Code as exposited above. There shall be no order as to costs.

.....CJI. (Dr. Dhananjaya Y. Chandrachud) .....J. (J. B. Pardiwala) .....J. (Manoj Misra) New Delhi;

February 12, 2024