Ebix Singapore Pte Ltd. vs Committee Of Creditors Of Educomp ... on 13 September, 2021

Equivalent citations: AIRONLINE 2021 SC 713

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Bench: M. R. Shah, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 3224 of 2020

Ebix Singapore Private Limited .... Appellant

Versus

Committee of Creditors of Educomp .... Respondents

Solutions Limited & Anr.

With

Civil Appeal No. 3560 of 2020

Kundan Care Products Limited .... Appellant

Versus

Mr Amit Gupta and Ors. .... Respondents

With

Civil Appeal No. 295 of 2021

Seroco Lighting Industries Private Limited .... Appellant

Versus

Ravi Kapoor RP for Arya Filaments

.... Respondents

Private Limtied & Ors.

Reason:

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

This judgment has been divided into sections to facilitate analysis. Further, a Glossary of defined terms which have been used throughout the judgment has also been provided. The sections in the judgment are as follows:

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Appellate Authority National Company Law Appellate Tribunal Company Appeal (AT) (Insolvency) No 587 of 2020 - Approval Appeal filed by E-CoC before NCLAT Approval Application CA No 195 (PB) of 2018 - filed by E-RP before NCLT Resolution Professional for Astonfield Renewables A-RP Private Limited Arya Filaments Arya Filaments Private Limited Committee of Creditors of Arya Filaments Private Arya-CoC Limited Resolution Professional for Arya Filaments Private Arya-RP Limited Astonfield Astonfield Renewables Private Limited Axis Axis Bank Limited Axis Application IA No 448 (PB) of 2018 - filed by Axis before NCLT BLRC Bankruptcy Law Reforms Committee Report of the Bankruptcy Law Reforms

Committee, BLRC Report BSE Bombay Stock Exchange CBI Central Bureau of Investigation CIRP Corporate Insolvency Resolution Proceedings IBBI (Insolvency Resolution Process for Corporate CIRP Regulations Persons) Regulations, 2016 Contract Act Indian Contract Act 1872 Chhattisgarh State Electricity Board Gratuity and CSEB Pension Trust and Chhattisgarh State Electricity Board Provident Fund Trust CSEB Application CA No 160 (PB) of 2018 - filed by E-RP before NCLT Ebix Ebix Singapore Private Limited Ebix Appeal Civil Appeal No 3224 of 2020 E-CoC Committee of Creditors of Educomp Solutions Limited Educomp Educomp Solutions Limited EMD Earnest Money Deposit EOI Expression of Interest E-RP Resolution Professional for Educomp Solutions Limited CoC of Essar Steel India Ltd. v. Satish Kumar Gupta & Essar Steel Ors.

EXIM Bank Export Import Bank of India First Withdrawal CA 1252 (PB) of 2019 in CP (IB) No 101 (PB) of 2017 -

Application filed by Ebix before NCLT Ghanashyam Mishra and Sons Private Limited through Ghanshyam Mishra & the Authorized Signatory v. Edelweiss Asset Sons Reconstruction Company Limited through the Director & Ors.

Gujarat Urja Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors.

GUVNL Gujarat Urja Vikas Nigam Limited Civil Appeal No 9241 of 2019 - filed by GUVNL before GUVNL Appeal Supreme Court IBC Insolvency and Bankruptcy Code, 2016 IBBI Insolvency and Bankruptcy Board of India IFC International Finance Corporation IFC Application CA No 358 of 2018 - filed by IFC before NCLT IM Information Memorandum Investigation Audit CA No 793 (PB) of 2018 - filed by E-RP before NCLT Application IRP Interim Resolution Professional Jaypee Kensington Boulevard Apartments Welfare Jaypee Association & Ors. v. NBCC (India) Ltd. & Ors.

K Sashidhar	K Sashidhar v. IOC
Kotak	Kotak Mahindra Bank
Kundan Care	Kundan Care Products Limited
Kundan Care Appeal	Civil Appeal No 3560 of 2020
LOI	Letter of Intent

Maharashtra Seamless	Maharashtra Seamless v. Padmanabhan Venkatesh and Ors
MCA	Ministry of Corporate Affairs
MSME	Micro, Small and Medium Enterprise
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NSE	National Stock Exchange
PBG	Performance Bank Guarantee
PFCL	Power Finance Corporation Limited
PPA	Power Purchase Agreement
Recovery of Debts Act	Recovery of Debts Due to Banks and Financial Institutions Act 1993
RFRP	Request For Resolution Plan
Rhino	Re Rhino Enterprises Properties Ltd. Schofield v Smith
RP	Resolution Professional

Securitisation and Reconstruction of Financial Assets SARFAESI and Enforcement of Security Interest Act 2002 SBI State Bank of India SBI Application CA No 639 (PB) of 2018 - filed by SBI before NCLT Second Withdrawal CA 1310 (PB) of 2019 in CP (IB) No 101 (PB) of 2017 -

Application	filed by Ebix before NCLT
Seroco	Seroco Lighting Industries Private Limited
Seroco Appeal	Civil Appeal No 295 of 2021
SFIO	Serious Frauds Investigation Office
SICA	Sick Industrial Companies Act 1985
Singapore Act	Companies (Amendment) Act 2017
Swiss Ribbons	Swiss Ribbons (P) Ltd v. Union of India

Third Withdrawal CA No 1816 (PB) of 2019 in CP (IB) No 101 (PB) of Application 2017 - filed by Ebix before NCLT UBIL Union Bank of India Limited UK Act UK Insolvency Act 1986 UNCITRAL Guide UNCITRAL Legislative Guide on Insolvency Laws Uttara Foods Uttara Foods and Feeds (P) Ltd v. Mona Pharmachem Company Appeal (AT) (Insolvency) No 203 of 2020 -

Withdrawal Appeal	filed by E-CoC before NCLAT

A Civil Appeal No 3224 of 2020 – the Ebix Appeal

A.1 The appeal

1 This judgment arises out of an appeal from a judgment dated 29 July 2020 of the NCLAT. The NCLAT allowed the Withdrawal Appeal1 instituted by the first respondent, E-CoC, under Section 61 of the IBC against a judgment dated 2 January 2020 of the NCLT at its Principal Bench in New Delhi.

2 The NCLT allowed the Third Withdrawal Application2 filed by Ebix under Section 60(5) of the IBC to withdraw its Resolution Plan submitted for Educomp. While reversing that order, the NCLAT held that the application to withdraw from the Resolution Plan could not have been allowed since: (i) it was barred by res judicata; and (ii) the NCLT does not have jurisdiction to permit such a withdrawal. The correctness of the view of the NCLAT comes up for determination in the present appeal.

A.2 Initiation of CIRP

3 On 5 May 2017, Educomp filed a petition3 under Section 10 of the IBC seeking to initiate voluntary CIRP. The NCLT admitted this petition on 30 May 2017, and appointed an IRP. Hence, 30 May 2017 would be taken as the 'Insolvency Commencement Date' for the purposes of Section 5(12) of the IBC. Company Appeal (AT) (Insolvency) No 203 of 2020 CA No 1816 (PB) of 2019 in CP (IB) No 101 (PB) of 2017 CP (IB) No 101 (PB) of 2017 PART A 4 E-CoC was then constituted on 28 June 2017, following which it appointed Mr Mahender Kumar Khandelwal as the RP for Educomp on 27 July 2017. This was confirmed by the NCLT on 12 September 2017. On 18 September 2017, the E-RP took over information, documents, reports and records pertaining to Educomp from the IRP.

5 On an application4 of the E-RP, the NCLT by its order dated 13 November 2017 extended the period of the CIRP by 90 days, beginning from 26 November 2017 till 24 February 2018.

A.3 Invitation, submission and approval of Resolution Plan 6 In terms of Section 25(2)(h) of the IBC, the E-RP invited EOI on 18 October 2017 from prospective bidders, investors and lenders. 7 On 10 November 2017, the last date for submission of EOIs was extended to 17 November 2017. Commencing from 5 December 2017, the E-RP provided access to the Virtual Data Room of Educomp to prospective Resolution Applicants who had submitted a confidentiality undertaking and made an upfront payment of Rs 5,00,000.

8 On 5 December 2017, the final RFRP was issued in accordance with Section 25(2)(h) of the IBC. The last date for submission of the Resolution Plans was 8 January 2018. The RFRP was amended on 17 January 2018 and 20 January 2018 to extend the last date for submission to 20 January 2018. On 25 CA No 405(PB) of 2017 PART A January 20185, the NCLT again extended the last date for submission of the Resolution Plans until 27 January 2018.

9 By the last date for submission, Resolutions Plans were received by the E- RP from Ebix and another entity. These were shared with the E-CoC on 29 January 2018. Following this, both the Applicants were invited to give their presentations to the E-CoC on 2 February 2018.

10 Ebix was declared as the successful Resolution Applicant by the E-CoC on 9 February 2018. Ebix had discussions about its Resolution Plan with the E-CoC, and submitted a revised Resolution Plan on 19 February 2018, with an addendum on 21 February 2018.

11 Upon the directions of the E-RP, the E-CoC commenced e-voting on the Ebix's Resolution Plan at 7.00 pm on 21 February 2018. The voting lines were kept open till 7.00 pm on 22 February 2018. According to the results of the e- voting, in terms of the voting share percentage: (i) 74.16 per cent members of the E-CoC voted to approve the Resolution Plan; (ii) 17.29 per cent members voted to reject the Resolution Plan; and (iii) the remaining members, having cumulatively 8.55 per cent share, abstained from voting on the Resolution Plan. The Resolution Plan thus failed to achieve the minimum percentage of 75 per cent, in accordance with Section 30(4) of the IBC (as it stood then). 12 A day later on 23 February 2018, one of the members of the E-CoC (CSEB) informed the E-RP by an email that due to a technical error, they could not participate in the e-voting process. CSEB had a voting share of 1.195 per In applications CA No 30 of 2018 and CA No 42 of 2018 PART A cent in the E-CoC, and wanted its affirmative vote to be recorded on the Resolution Plan. CSEB's vote would enhance the voting share in favour of Ebix's resolution plan to 75.35 per cent, thus meeting the threshold under Section 30(4). 13 The E-RP filed the CSEB Application6 under Section 60(5) to seek the directions of the NCLT in regard to CSEB's late vote. NCLT by its order dated 28 February 2018, directed the E-RP to file an application for approval of Ebix's Resolution Plan under Section 30(6) of the IBC, clarifying that the issue of CSEB's vote would be taken up together with the application. On 7 March 2018, the E-RP filed the Approval Application7 seeking NCLT's approval to Ebix's Resolution Plan under Section 30(6).

14 On 2 July 2018, Ebix issued a letter to the E-RP to expedite the CIRP for Educomp. The relevant portions of the letter are extracted below:

> "...we would like to submit that the resolution plan for the Company was submitted with an expectation that the resolution process shall be completed in a time bound manner, and the Resolution Applicant shall get the management control of the Company before the start of new academic session in India i.e. April 2018, subject to being selected as the successful applicant (as per the terms and conditions provided in the resolution plan), and the approval of the plan by the NCLT. This would have provided the Resolution Applicant with sufficient time to restructure the operations of the Company.

As you are aware, the operations of the Company are already under stress and it would be safe to assume that no new contracts / customers are coming up. Further, the competitors of the Company may be trying to take undue advantage of the situation, which may further erode the business value of the Company and may make the revival process more difficult.

CA No 160 (PB) of 2018 CA No 195 (PB) of 2018 PART A The above negatively impacts the commercial consideration provided by the Resolution Applicant in the resolution plan submitted for the Company.

As per the clause 7 of the Resolution Plan dated February 19, 2018 submitted by the Resolution Applicant, the terms of the resolution plan is valid for six months from the date of the submission of the plan i.e. August 19th, 2018.

In light the above and fact that delay in completion of the resolution process is negatively impacting the commercial consideration offered by the Resolution Applicant in the resolution plan, we request you to ensure that the resolution process is completed in a time bound manner. Otherwise, the Resolution Applicant will be forced to re- consider or withdraw the resolution plan on expiry of the term of the plan in order to protect the interest of all its stakeholders." A.4 Investigations into financial transactions of Educomp

15 On 3 April 2018, an Indian online news publication, The Wire, published an article titled "How Educomp May Have Subverted the Spirit of India's Insolvency and Bankruptcy Process"8. Another article titled "Educomp's Insolvency Process Becomes Murkier as Ebix Buys Smartclass Educational Services" was published by The Wire on 26 April 20189.

16 The E-RP has stated before this Court that based on these reports, IFC, a financial creditor of Educomp, filed the IFC Application10 under Section 60(5) of the IBC seeking investigation of the affairs/transactions of Educomp. On 4 May 2018, when the IFC Application came up before the NCLT, along with the CSEB Manoj Gairola, "How Educomp May Have Subverted the Spirit of India's Insolvency and Bankruptcy Process" (The Wire, 3 April 2018) available at <https://thewire.in/business/how-educomp-may-have-subverted-the-spirit-of-indias-insolvency-and-bankruptcy-process> accessed on 26 July 2021 Manoj Gairola, "Educomp's Insolvency Process Becomes Murkier as Ebix Buys Smartclass Educational Services" (The Wire, 26 April 2018) available at <https://thewire.in/business/educomps-insolvency-process-becomes-murkier-as-ebix-buys-smartclass-educational-services> accessed on 26 July 2021 CA No 358 of 2018 PART A Application and the Approval Application, it directed the E-RP to file its reply and also directed IFC to serve a notice on Ebix.

17 Similar applications- Axis Application11 and SBI Application12, under Section 60(5) of the IBC read with Section 213 of the 2013 Act were filed by other financial creditors of Educomp, Axis Bank and SBI, seeking 'appropriate directions' from the NCLT in view of the alleged irregularities in the conduct of the affairs of Educomp.

18 In the meantime, on 1 August 2018, due to allegations of financial mismanagement of Educomp between 2014-2018, the MCA directed an SFIO investigation13 into its affairs.

19 The NCLT, by its order dated 9 August 2018, dismissed the applications filed by IFC, Axis and SBI and directed that: (i) the E-RP shall convene a meeting of the E-CoC within three days to discuss the subject matter of the applications; and (ii) the E-RP and E-CoC could move an application before NCLT according to law, if advised to do so by E-CoC.

20 Pursuant to NCLT's order dated 9 August 2018, the E-CoC hosted its 13th meeting on 13 August 2018, and a resolution was passed with a 77.85 per cent vote to appoint an independent agency to conduct a Special Investigation Audit into the affairs of Educomp. The relevant terms of the resolution are as follows:

> "RESOLVED THAT a special investigation audit on the affairs of the Company be conducted by an independent agency, which shall be appointed by the Committee of Creditors, for IA No 448 (PB) of 2018 CA No 639 (PB) of 2018 Order No 32/2018/SFIO/CL-II PART A period beginning from [1st January 2014] to [30th January 2018] having following scope of work:
>
> (i) All the matters/issues (approximate 21 in number) raised in the Annual Audit Report of the Company for the Financial Year 2016-17 issued by Haribhakti & Co, basis which adverse opinion has been issued;
>
> (ii) Transactions involving alleged deliberate transfer of business between the Company and SmartClass Educational Services Private Limited ("SESPL") prior to the commencement of the insolvency process of the Company;
>
> (iii) Transactions regarding genuineness of receivables from Edusmart Services Private Limited including cross-verification with payables to Educomp Solutions Limited in the books of Edusmart Services Private Limited;
>
> (iv) Transactions involving settlement between the Company, Educomp Learning Hour Private Limited, Vidya Mandir Classes Limited and ICICI Bank Limited;
>
> (v) Transactions relating to impairment with respect to investment made by the Company in 4 of its subsidiaries;
>
> (vi) Transaction relating to advance received by the Company from Educomp Raffles Higher Education Limited;
>
> (vii) Distribution agreement with Digital Learning Solution SDN BHD;
>
> (viii) Transactions referred to in the applications filed by International Finance Corporation, Axis Bank Limited and State Bank of India with the Hon'ble National

Company Law Tribunal; and

(ix) Review of provisions against receivables done by Educomp Solutions Limited;

(x) All other transactions/points raised in the applications filed by Axis Bank, IFC and SBI with Hon'ble NCLT;

(xi) Any other issue, which the Committee of Creditors may deem fit RESOLVED FURTHER THAT the Resolution Professional, be and is hereby authorized by the Committee of Creditors and directed to file appropriate application/petition with the Hon'ble National Company Law Tribunal, inter alia, seeking consent/order of the Hon'ble NCLT on the proposed special investigation audit to be conducted by the independent agency.

PART A RESOLVED FURTHER THAT given the limitations inherent in the previous audits conducted on the Company, and in order for the said investigation to be comprehensive, the Resolution Professional, while filing such application/ petition, shall also, as an additional prayer, seek consent/ order of the Hon'ble NCLT that SESPL, other group companies of the Company and the erstwhile customers of the Company, be directed to cooperate with the independent agency so appointed, or in the alternative, to refer the matter to the Central Government to appoint an Inspector under the Companies Act, 2013 to conduct said investigation.

RESOLVED FURTHER THAT the entire cost of the proposed investigation (special investigation audit), shall be included in CIRP Cost and accordingly be paid in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 and the relevant Regulations.

RESOLVED FURTHER THAT, the independent agency to conduct the special investigation audit, shall be appointed by the Core Committee, comprising of SBI, IDBI Bank, Axis Bank, IFC, Yes Bank and J&K Bank" 21 The resolution was placed before the NCLT on 20 August 2018, when it was hearing the CSEB Application and the Approval Application. The NCLT directed the E-RP to file an appropriate application. In accordance with the resolution dated 13 August 2018 and NCLT's order dated 20 August 2018, the E- RP filed the Investigation Audit Application14 under Section 60(5) of the IBC seeking directions from NCLT to carry out the Special Investigation Audit of Educomp.

22 It is stated before us that the Investigation Audit Application was heard on 11 September 2018, 20 September 2018, 27 September 2018 and 4 October 2018. On 4 October 2018, while reserving its order in the Investigation Audit Application, the NCLT also directed the E-RP to file an affidavit in relation to the CA No 793 (PB) of 2018 PART A transactions carried out by Educomp under Sections 43, 45, 50 and 66 of the IBC.

23 The E-RP states that such an affidavit was filed, stating that on the basis of the books of account and other relevant material pertaining to Educomp, no transactions which needed to be avoided under Sections 43, 45, 50 and 66 of the IBC were found. The E-RP also stated that since the NLCT had not issued specific directions for the conduct of a Special Investigation Audit, no such audit was

conducted.

24 This affidavit was listed before the NCLT on 7 December 2018, along with the Approval Application. On 10 January 2019, the NCLT reserved its orders on the Approval Application.

25 On 12 June 2019, Educomp made a regulatory disclosure to the BSE and NSE in relation to the ongoing investigations being conducted by agencies such as SFIO and CBI. The material parts of the disclosure read thus:

> "This is with reference to your mail dated June 10, 2019, related to news appeared in the "Business Standard"
>
> captioned "Transactions of debt-ridden Educomp Solutions come under SFIO scanner".

[...]

3. It is pertinent to note that BDO India LLP carried out transaction audit in order to ascertain if there was any preferential, undervalued, extortionate or fraudulent transactions falling within the ambit of Section 43, 45, 50 and 66 of the Code. The Transaction review report was prepared by BDO India LLP in February 2018 which was further circulated and discussed with the CoC. On examination of the BDO Report and other relevant material available with the Resolution Professional during the CIRP period, no transaction was found by the Resolution Professional which was required to be avoided in terms of the said Sections. Further, the two land transactions as alleged in the Media PART A Report have not been reported by BDO in their Report and hence, the Resolution Professional is not in a position to comment on the same.

As regards allegation in the Media Report that "Suspect transactions of debt-ridden Educomp Solutions have come under the lens of Serious Fraud Investigation (SFIO), which is probing the company for alleged fund-diversion and inflated land deals, we would like to clarify that SFIO Investigation into the affairs of Educomp Solutions Limited is currently ongoing wherein the Resolution Professional has been supplying the data/ information/ documents to them as and when required however, no such information has been brought to the notice of the Resolution Professional as yet. Moreover, the article appears to be based on a false, motivated, fabricated data." A.5 Applications for withdrawal of the Resolution Plan 26 On 5 July 2019, Ebix filed the First Withdrawal Application15 under Section 60(5) of the IBC, for the following reliefs:

> "i. Direct that the Ld. Resolution Professional supply a copy of the Special Investigation Audit to the Resolution Applicant forthwith;
>
> ii. Direct that the Ld. Resolution Professional supply a copy of the Certificates under Sections 43, 45, SO and 66 of the Insolvency and Bankruptcy Code, 2016 to the Resolution Professional forthwith;

iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;

iv. Grant the Resolution Applicant sufficient time to re- evaluate its proposals contained in the Resolution Plan, and also to suitably revise/modify and/or withdraw its Resolution Plan;" (emphasis supplied) CA 1252 (PB) of 2019 in CP (IB) No 101 (PB) of 2017 PART A Ebix contends that the application was necessitated because: (i) the Approval Application had been pending before the NCLT for 17 months, much beyond the period envisaged in the RFRP and its Resolution Plan; (ii) Educomp's CIRP had been pending for 26 months, beyond the statutory period under the IBC; (iii) the tenure of the government contracts awarded to Educomp, which was crucial to its functioning, may have ended, leading to an erosion of its substratum; and (iv) due to recent media reports, it had misgivings about the management and affairs of Educomp.

27 On 10 July 2019, the NCLT dismissed the First Withdrawal Application with the following order:

"C.A. No. 1252(PB)/2019 This is an application filed by one Ebix Singapore Ptd. Limited seeking re-valuation of the Resolution Plan submitted by it before the Resolution Professional.

No ground for considering the prayer sought in the application is made out.

The application is dismissed as such."

28 Thereafter, Ebix filed the Second Withdrawal Application16 under Section 60(5) of the IBC, seeking the following reliefs:

"i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;

ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;

CA 1310 (PB) of 2019 in CP (IB) No 101 (PB) of 2017 PART A iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vide order dated 1.1.04.2018, pending detailed consideration of the same by the Resolution Applicant;" While repeating the reasons mentioned in the First Withdrawal Application, it provided a reason for filing the Second Withdrawal Application in the following terms:

> "xii. That the present Applicant had also filed an Application dated 05.07.2019 bearing PB/IA/1252/2019 under Section 60(5) of the Code, seeking revision/revaluation of the Resolution Plan. However, the same was dismissed by this Hon'ble Tribunal, and during the course of hearing in the said Application, this Hon'ble Court put it to the Resolution Applicant to withdraw the Resolution Plan by way of a separate Application. The present Application for withdrawal of the Resolution Plan is being made in pursuance of the same."

29 On 5 September 2019, the NCLT dismissed the Second Withdrawal Application with the following order:

> "C.A. No. 1310(PB)/2019 In para 'B (xii)' under the caption 'facts of the case', the following averments have been made [...] The italic portion of the aforesaid para shows that the prayer for withdrawal of the Resolution Plan has been made inter alia on the suggestion of the Court which is neither reflected in the order nor is born out from any record. Such an averments imputing to the Court something which has never been said is condemnable. The cause of action cannot be based on any such things.
>
> Accordingly, we dismiss this application with liberty to the applicant to file fresh one on the same cause of action, if so advised." PART A

30 Thereafter, Ebix filed the Third Withdrawal Application, seeking the following reliefs:

> "i. Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;
>
> ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;
>
> iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vid order dated 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;" The earlier applications for withdrawal were referred to:
>
> "xiv. It may be noted that, the present Applicant had also filed an Application dated 05.07.2019 bearing PB/IA/1252/2019 under Section 60(5) of the Code, seeking revision/revaluation and/or withdrawal of the Resolution Plan. The said application was dismissed by this Hon'ble Tribunal on the basis that modification/revaluation of the Resolution Plan could not be permitted. The Applicant thereafter filed an Application bearing PB/IA/1310/2019 seeking withdrawal of the Resolution Plan

simpliciter, which was dismissed by the Hon'ble Tribunal vide order dated 07.09.2019, while granting liberty to file a fresh application seeking withdrawal of the Resolution Plan." The reasons for withdrawal were the same as those in the previous applications for withdrawal.

31 On 18 September 2019, the NCLT issued notice in the Third Withdrawal Application and directed the E-RP to place it before the E-CoC. The E-RP placed PART A the application before the E-CoC at the 14th meeting on 26 September 2019. The E-CoC resolved not to allow the application for withdrawal.

A.6 Orders of NCLT and NCLAT

32 By its order dated 2 January 2020, NCLT allowed the Third Withdrawal

Application. The NCLT held that the application for withdrawal was not barred by res judicata since in the previous proceeding relating to the First Withdrawal Application, it had not consciously adjudicated on whether the Resolution Plan could be withdrawn. The rationale for the order is indicated in the following extract:

"11. No doubt there was a prayer for withdrawal of resolution plan amongst others in CA No.1252 (PB)/2019, the prayer for revaluation was specifically declined dismissal order dated 10.07.2019. While dismissing CA No.1252(PB)/2019 the prayer for withdrawal of resolution plan was neither considered nor was ever dealt with. The issue of withdrawal of the resolution plan by the Applicant has never been considered consciously on merit and/or adjudicated upon in CA No.1252(PB)/2019.

12. Doctrine of Constructive Res Judicata does not apply to the issues/points, or any "lis' between parties that has not been decided previously, and despite being pleaded, has not been considered by a court/tribunal and expressly dealt with in the order so passed.

13. Even a bare perusal of the Order dated 10.07.2019 would indicate that the issue of withdrawal of the Resolution Plan by the Resolution Applicant was not dealt with on merit and that no decision has either been passed or attained finality as regards allowing the party to withdraw the Resolution Plan.

14. It is also pertinent to note here that the Resolution Applicant had subsequently taken up the prayer for withdrawal of the Resolution Plan in the Application bearing CA No.1310 (PB)/2019. While dealing with the said Application, liberty was given to the Applicant vide order PART A dated 01.09.2019 to re-file an application for withdrawal of the Resolution Plan. This direction further confirms that there was no conscious adjudication in CA No.1252(PB)/2019 on the issue of withdrawal of the resolution plan by the Applicant." (emphasis supplied) The NCLT held that: (i) a

> Resolution Plan becomes binding after it is approved by it as the Adjudicating Authority; (ii) under Section 30(2) of the IBC, the Adjudicating Authority has the power to examine whether the Resolution Plan can be effectively enforced and implemented; and (iii) in the 'present circumstances', an unwilling successful Resolution Applicant would be unable to effectively implement the Resolution Plan. The relevant parts of the order are extracted below:
>
> "20. In the instant case the Resolution Plan is still pending before the Adjudicating Authority for approval. Under the provisions of Section 31 of the Code, a Resolution Plan becomes binding only after acceptance of a plan by the Adjudicating Authority.
>
> [...]
>
> 23. Section 30(2)(d) of the Code mandates the Adjudicating Authority to ensure that there are effective means of enforcement and implementation of the Resolution Plan.

Similarly, the proviso to sub-section (1) of Section 31 of the Code mandates Adjudicating Authority to ensure effective implementation of the resolution plan. The object. in approval of the resolution plan is to save the corporate debtor and to put it back on its feet. An unwilling and reluctant resolution applicant, who has withdrawn his resolution plan, neither can put the corporate debtor back to its feet nor the effective implementation of its resolution plan can be ensured.

24. No doubt the withdrawal of the resolution plan at this advance stage has caused great prejudice to the creditors/stake holders and legal consequences on the withdrawal of the resolution plan shall follow as per law. The Resolution Professional and CoC are free to take action as PART A per law consequent upon withdrawal of the resolution plan by the resolution applicant including on the issue of refund of the earnest money deposited by the applicant.

25. Be that as it may compelling an unwilling and reluctant resolution applicant to implement the plan may lead to uncertainty. The object of the Code is to ensure that the Corporate Debtor keep working as a going concern and to safeguard the interest of all the stake holders. The provisions of the Code mandate the Adjudicating Authority to ensure that the successful resolution applicant starts running the business of the Corporate Debtor afresh. Besides Court ought not restrict a litigant's fundamental right to carry on business in its way under Article 19(1)(g) of the Constitution. Once the applicant is unwilling and reluctant and itself has chosen to withdraw its resolution plan, a doubt arises as to whether the resolution applicant has the capability to implement the said plan. Uncertainty in the implementation of the resolution plan cannot also be ruled out." (emphasis supplied) The NCLT also directed that Educomp's CIRP be extended by a period of 90 days, commencing from 16 November 2019.

33 As a consequence of its order allowing the Third Withdrawal Application, the NCLT also dismissed the Approval Application on 3 January 2020 as being infructuous.

34 E-CoC filed the Withdrawal Appeal assailing NCLT's order dated 2 January 2020. On 3 February 2020, the NCLAT stayed the order dated 2 January 2020. The Approval Appeal17 was also filed by the E-CoC under Section 61 of the IBC, assailing NCLT's order dated 3 January 2020.

Company Appeal (AT) (Insolvency) No 587 of 2020 PART A 35 By its order dated 29 July 2020, NCLAT set aside the order of the NCLT allowing the withdrawal of the resolution plan. On the issue of res judicata, the NCLAT held that there being no appeal against the order of the Adjudicating Authority rejecting the First Withdrawal Application, the issue had attained finality. The NCLAT held:

> "82...in view of the dismissal of said CA 1252(PB)/2019 by the Adjudicating Authority and the said order which had attained finality and more so in the absence of any 'Appeal' being filed against the said order, then the dismissal order of CA 1252 of 2019 order dated 10.7.2019 binds the 1st Respondent/'Resolution Applicant' as an 'Inter-se' party.
>
> [...]
>
> 84....the Adjudicating Authority in the particular circumstances of the present case has no power to grant /reserve liberty to bring a fresh application and hence, the subsequent application filed by the 1st Respondent /'Resolution Applicant is barred by the principle of 'Res Judicata' notwithstanding the liberty to file fresh one." On the merits of the application for withdrawal, the NCLAT held that: (i) once the Resolution Plan was approved by the CoC, the NCLT did not have jurisdiction to permit its withdrawal; (ii) the Adjudicating Authority could not enter upon the wisdom of the decision of the CoC to approve the Resolution Plan; (iii) the Resolution Applicant had accepted the conditions of the Resolution Plan and no change could be permitted; (iv) orders have already been reserved in the Approval Application; (v) no Special Investigation Audit had been conducted; (vi) Section 32A of the IBC grants full immunity to the Resolution Applicant from any offences committed before the commencement of the CIRP; and (vii) Ebix had participated in the process from August 2018 to January 2019 when orders had been reserved on the Approval Application, and hence it could not claim any right based on delay.

PART A A.7 Present status of SFIO and CBI investigation 36 In an email dated 17 February 2020, the E-RP informed the E-CoC that the CBI conducted a search of the premises of Educomp on 11 February 2020 and seized numerous documents (a list was enclosed with the email). By another email dated 19 February 2020, the E-RP informed the E-CoC that CBI had resumed its search for documents at Educomp's office. 37 In the 16th meeting of the E-CoC on 30 March 2020, the E-RP provided the following updates in relation to the CBI and SFIO investigations:

> (i) The CBI search at the premises of Educomp on 11 February 2020, was conducted upon a complaint by SBI on behalf of a consortium of banks;

(ii) Since the initiation of an enquiry by the MCA on 1 August 2018, the SFIO has requisitioned documents/information, which have been provided;

(iii) The last communication from the SFIO was received on 27 February 2020;

and

(iv) In response to the grievance of some members of the E-CoC that the E- RP had only informed them of the investigations at a belatedly, the Chairperson of the E-CoC justified it by stating that the communication could only take place once the relevant investigation was completed. However, for future references, the Chairperson took note of the suggestion that the E-RP would add all members of the E-CoC to a WhatsApp group, where real-time updates could be shared. PART B At the meeting, the E-CoC also passed a resolution with 77.05 per cent majority vote directing the E-RP to invoke and forfeit the EMD of Rs 2 crores furnished by Ebix in accordance with Clause 1.9.1 of RFRP. The E-RP issued a letter to IDBI on 1 April 2020 for encashment of the EMD.

38 In the 17th meeting of the E-CoC on 8 May 2020, the E-RP provided further updates in relation to the CBI and SFIO investigations, noting that they were still ongoing and no further action was required to be taken. 39 The E-RP has informed this Court that the last communication received from the SFIO was on 4 September 2020. The investigations by the CBI and SFIO are continuing.

B Civil Appeal No 3560 of 2020 – the Kundan Care Appeal

B.1 The appeal

40 This appeal arises under Section 62 of the IBC from a judgment dated 30 September 2020 of the NCLAT. The NCLAT dismissed an appeal18 instituted by the appellant, Kundan Care, under Section 61 of the IBC against an order dated 3 July 2020 of the NCLT.

41 The NCLT had dismissed an application19 filed by Kundan Care under Section 60(5) of the IBC to withdraw its Resolution Plan submitted for the fourth respondent – Corporate Debtor, Astonfield. In appeal, the NCLAT upheld the NCLT's decision, relying on its judgment impugned in the Ebix Appeal. It held that Company Appeal (AT) (Insolvency) No 653 of 2020 IA No 1679 of 2019 in CP No (IB)-940 (ND) of 2018 PART B an application filed by a Resolution Applicant to withdraw from the Resolution Plan approved by the CoC could not be allowed since: (i) there was no provision in the IBC for it; (ii) the Resolution Plan is enforceable as a contract against the Resolution Applicant; and (iii) the Resolution Applicant was estopped from withdrawing.

42 The correctness of this view of the NCLAT now comes up for determination in the present appeal. While issuing notice on 16 November 2020, this Court had directed for an ad-interim stay on the judgment of the NCLAT, which continues till date.

B.2 Initiation of CIRP

43 On 20 November 2018, Astonfield filed a petition20 under Section 10 of the

IBC seeking to initiate voluntary CIRP. The NCLT admitted this petition on 27 November 2018 and appointed an IRP.

44 A CoC was then constituted, which consisted of the second and third respondents, EXIM Bank and PFCL. The A-CoC appointed the first respondent, Mr Amit Gupta, as the RP and his appointment was confirmed by the NCLT on 1 February 2019.

CP No (IB)-940 (ND) of 2018 PART B B.3 Invitation, submission and approval of Resolution Plan 45 On 20 February 2019, A-RP invited prospective resolution applicants to submit their EOIs in accordance with Regulation 36 of the CIRP Regulations and Form G was also published. Form G was amended by the A-RP, with due approval from the A-CoC, on 2 May 2019 and 17 May 2019.

46 A-RP received nine EOIs, out of which seven were found to be eligible. However, Kundan Care did not submit its EOI within the time prescribed by the A- RP, and its belated submission was rejected by the A-RP. 47 Thereafter, A-RP issued the RFRP on 6 March 2019 to the prospective Resolution Applicants who had been selected. Further, the IM was issued on 13 March 2019. Based on this, two Resolution Plans were received by the A-RP on 31 May 2019, which were then discussed with the A-CoC. 48 In the interim, Kundan Care filed an application21 before the NCLT challenging the A-RP's rejection of its belated EOI. A-RP received the notice of this application on 30 August 2019. By order dated 6 September 2019, the NCLT allowed Kundan Care's application. Thereafter, it was provided access to the RFRP, IM and other documents pertaining to Astonfield in the data room. 49 Kundan Care submitted its Resolution Plan for consideration on 16 September 2019. The Resolution Plan was placed before the A-CoC, which requested Kundan Care to submit a revised proposal. Kundan Care then submitted an updated draft of its Resolution Plan on 29 October 2019.

CA No 1119 of 2019 PART B 50 A-RP then conducted the 17th meeting of the A-CoC on 11 November 2019, to discuss the Resolution Plans submitted by Kundan Care and one more prospective Resolution Applicant (who had also submitted a revised Resolution Plan after negotiations with the A-CoC). Thereafter, Kundan Care submitted a revised version of its Resolution Plan on 12 November 2019, along with an addendum on 13 November 2019.

51 The A-CoC voted on the Resolution Plans on 14 November 2019, where the Resolution Plan submitted by Kundan Care was approved with a majority of 99.28 per cent, with 0.72 per cent abstaining. On 15 November 2019, the A-RP issued a Letter of Award to Kundan Care. Kundan Care also deposited a PBG of Rs 5 Crores with the A-RP/A-CoC.

52 A-RP then filed an application22 for approval of the Resolution Plan under Section 31 of the IBC before the NCLT, along with Form H, as mandated under the CIRP Regulations. This application is currently pending adjudication before the NCLT.

B.4 Astonfield's dispute with GUVNL

53 Before proceeding further, it is important to discuss the dispute arising out

of Astonfield's PPA with GUVNL. The PPA was signed on 30 April 2010, came into force in December 2012. and was valid for a period of 25 years. Crucially, CA No 1526 of 2019 PART B this PPA was the only agreement entered into by Astonfield and formed the entirety of its business.

54 When CIRP was initiated against Astonfield, GUVNL issued a notice of default under Article 9.2.1(e) of the PPA, stating that the initiation of insolvency was an "event of default". This was challenged before the NCLT by A-RP23 and EXIM Bank24 through applications under Section 60(5) of the IBC. 55 It is important to note that Kundan Care was aware of this dispute, and made specific references to it in its Resolution Plan. Under the heading of "PPA Risk", it noted:

> "GUVNL had served notices to terminate the Agreement since the Company is undergoing the process of Insolvency. However as per the Order of the Hon'ble NCLT dated 29 August 2019 (CA) 700/ND/2019 & CA 701/ND/2019) it is concluded that the Power Purchase Agreement (PPA) is an "instrument" for the applicability of Section 238 of the IBC, 2016 and clauses 9.2.1 e read with 9.3.1 of the PPA under reference are inconsistent within the ambit of Section 238 of/BC, 2016, provisions of/BC, 2016 and process initiated under /BC shall have an overriding effect over the PPA.
>
> Further, the Hon'ble NCLAT vide order dated 15 October 2019 has clearly stated that even in the event of Liquidation of the Corporate Debtor the appellant, Gujarat Urja Vikas Nigam Limited, cannot terminate the Power Purchase Agreement under the Code. Also, the Liquidator shall ensure that the Corporate Debtor remains a going concern. It is therefore very evident and clear that the Power Purchase Agreement cannot be terminated and has to continue even after the Resolution Plan has been approved by the Hon'ble NCLT." CA No 700 of 2019 CA No 701 of 2019 PART B

56 On 29 August 2019, the NCLT allowed the applications and set aside the notice of default issued by GUVNL. It held that allowing the termination of the PPA would adversely affect the 'going concern' status of Astonfield. However, it held that if Astonfield was to undergo liquidation subsequently, the termination would be permitted.

57 The NCLT's judgment was challenged by GUVNL in an appeal25 before the NCLAT. By judgment dated 15 October 2019, the NCLAT dismissed the appeal and partly upheld the decision of the NCLT, in as much as it disallowed the termination of the PPA during the CIRP. However, it reversed

the NCLT's findings and held that even if Astonfield were to undergo liquidation, the termination of the PPA would not be allowed.

58 GUVNL challenged NCLAT's judgment in the GUVNL Appeal26 before this Court. When the present appeal was filed by Kundan Care, the GUVNL Appeal was pending before this Court. However, it has been disposed by a judgment dated 8 March 2021, in the following terms:

> "165 Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take Company Appeal (AT) Insolvency No 1045 of 2019 Civil Appeal No 9241 of 2019 PART B place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix)." Hence, this Court held that GUVNL would not be allowed to terminate its PPA with Astonfield since: (i) the termination was solely on account of Astonfield entering into insolvency proceedings; and (ii) being its sole contract, the PPA's termination would necessarily result in the corporate death of Astonfield, which would derail the entire CIRP.

B.5 Withdrawal of the Resolution Plan

59 On 17 December 2019, Kundan Care filed an application under Section 60(5) of the IBC seeking permission of the NCLT to withdraw its Resolution Plan, which had been previously approved by the A-CoC and was pending confirmation by the NCLT under Section 31 of the IBC. In its application, it prayed for the following reliefs:

> "a) Allow the present application and permit the Applicant to withdraw its Resolution Plan as submitted and approved by the CoC on 14.11.2019;

> b) Direct that the Performance Bank Guarantee submitted by the Applicant be cancelled/revoked/returned/refunded to the Applicant;" PART B In its application, Kundan Care stated that there was no bar under the IBC on it withdrawing its Resolution Plan before it was confirmed by the NCLT. It sought to withdraw its Resolution Plan on account of four reasons:
>
> (i) That there was uncertainty in relation to the PPA with GUVNL, since the GUVNL Appeal was pending before this Court. It noted that the PPA was central to the CIRP, and its termination would affect its Resolution Plan.

Further, it noted that GUVNL had unilaterally refused permission to Astonfield to change the solar panels which had been damaged in the floods of 2017, and had not made any payments to Astonfield for the electricity being supplied currently;

(ii) That due to heavy floods in the State of Gujarat during 2019, the solar panels and other equipment at the Project Site of Astonfield had been damaged. Further, it alleged that there was stagnant water at the Project Site, which continued to deteriorate them;

(iii) That Astonfield's insurance claim of Rs 46.40 crores in relation to floods in 2017 had been repudiated by the insurer. Further, it also noted that this may also adversely affect the claim for the floods in 2019; and

(iv) That the IM issued by A-RP represented that since Astonfield had not availed the benefit of "Accelerated Depreciation" under the PPA, hence, it was entitled to a sum of Rs 6.614 crores from GUVNL, which was a "Trade Receivable". However, it noted that Kundan Care had subsequently discovered a previous judgment of this Court upon identical facts, where it was noted that the Project Developer shall not be entitled to a higher/revised tariff in case of not availing "Accelerated Depreciation". PART B 60 On 6 January 2020, Kundan Care filed an additional affidavit outlining the additional costs it would face on account of: (i) deterioration of the solar panels due to GUVNL unilaterally not permitting their replacement, thereby leading to additional cost of Rs 30 crores (against an initial expected cost of Rs 9 crore); (ii) Astonfield's Plant not producing electricity at its optimum level, thereby leading to a loss of revenue up to Rs 150 lacs per month; and (iii) CIRP costs on account of delay in CIRP, thereby leading to a loss of Rs 12 lacs per month (approx.). It noted:

> "5. I say and submit that after submission of the Resolution plan, the Applicant's representatives had visited the site again and found that almost all the solar panels installed at the Project site are required to be changed/replaced at a total cost of over INR 30 crores instead of INR 9 crores ascertained by the Applicant at the time of submission of the Plan.
>
> [...]
>
> 17. I say and submit that the plant is capable of generating 18133200 KWH/Units of Electricity per annum (11.5 MW * 365 days * 24 hours* 1000 (from MW to KW) *

> 18% CUF = 18133200 KWH/Units), when operating at the optimum capacity which would only be possible after change/replacement of solar panels, inverters etc. as contemplated in the Resolution Plan. This translates to generation revenue of roughly INR 1800 lacs per annum or roughly INR 150 lacs per month which is being incurred by the Project.
>
> 18. I say and submit that in addition to the aforesaid generation loss, a sum of INR 12 lacs (approx.) is being incurred towards monthly CIRP cost on account of the delay in the CIR process." PART B

61 Thereafter, Kundan Care also filed an application for impleadment27 in the GUNVL Appeal pending before this Court, along with an application for directions28 praying, in exercise of this Court's jurisdiction under Article 142 of the Constitution of India, for the following reliefs:

> "a) Set aside/quash the Notice dated 28.03.2019 issued by Gujarat Urja Vikas Nigam Limited to Astonfield Solar (Gujarat) Private Limited and declare that the Applicant/Corporate Debtor shall be free to change/replace the solar panels/modules and other equipment of the Project, as may be deemed fit by the Applicant/Corporate Debtor;
>
> b) Declare that the Power Purchase Agreement dated 30.04.2010 executed between Gujarat Urja Vikas Nigam Limited and Astonfield Solar (Gujarat) Private Limited shall stand extended by the period of moratorium declared under IBC during the CIR Process;

c) In alternate to prayers a) and b), permit the Applicant to withdraw its Resolution Plan dated 12.11.2019 and direct that the Performance Bank Guarantee submitted by the Applicant to the Committee of Creditors shall stand cancelled/revoked and/or returned/refunded to the Applicant;" 62 While the GUVNL appeal and its application remained pending, on 14 May 2020, Kundan Care requested the NCLT to take up its application for an early hearing. Following this, the application was listed on 15 June 2020. 63 On 12 June 2020, A-RP filed its reply to Kundan Care's application and additional affidavit, where it opposed the withdrawal of the Resolution Plan after its approval by the A-CoC and stated that:

> (i) In relation to the ongoing dispute with GUVNL, Kundan Care was aware of the same when it submitted the Resolution Plan;

IA No 9679 of 2020 IA No 9682 of 2020 PART B

(ii) In relation to the damage to the solar panels, it pointed out that the A-RP had informed Kundan Care about the floods in 2019 and an Operation and Management Agency had been hired to clear the water at the Project Site, which had been done;

(iii) In relation to the repudiation of the insurance claim, the RFRP or IM never guaranteed that the claim would be successful. In any case, the A-RP was actively pursuing the challenge to its repudiation;

(iv) In relation to the "Accelerated Depreciation", that the same had been listed as a "doubtful debt" by the A-RP in the IM. Further, in any case, Kundan Care would have done their own due diligence surrounding it; and

(v) In relation to Astonfield's Plant not operating at full capacity, the IM issued by A-RP noted that the floods in 2017 had affected the Plant and it may not be able to operate at full capacity.

64 Kundan Care filed its rejoinder to the A-RP's reply on 29 June 2020, in which they argued that the Resolution Plan proposed by them and approved by the A-CoC, was no longer "feasible" and "viable" commercially, in accordance with Section 30(2)(d) read with proviso to Section 31(1) of the IBC, due to the intervening circumstances before its confirmation by the NCLT which had materially altered the financial projections. Hence, the NCLT should allow it to withdraw the Resolution Plan. In the alternative, Kundan Care proposed re- negotiation of the Resolution Plan by stating the following:

> "55. That Para 78 of the Reply is the Prayer Clause, which is wrong and denied. The Prayer Clause of C.A. No. 16798/2019 is reiterated and reaffirmed. Alternatively, and without prejudice to the above, it is prayed that the Applicant PART B may be permitted to re-negotiate the financial proposal with the CoC"

65 The A-CoC also filed its reply to Kundan Care's application on 30 June 2020, where it stated that: (i) NCLT could not adjudicate upon the application since Kundan Care had filed another application before this Court in the GUVNL Appeal; and (ii) in any case, Kundan Care knew of the risks while entering the CIRP and should not be allowed to withdraw at such a belated stage. 66 The NLCT passed an order dated 3 July 2020, by which it rejected Kundan Care's application by noting that: (i) it did not have jurisdiction to permit withdrawal; and (ii) the matter was also sub judice before this Court by the virtue of Kundan Care's application in the GUVNL Appeal. The order stated:

> Counsels for the Resolution Applicant, COC and IRP are present.
>
> The Resolution Applicant has prayed to withdraw the resolution plan which was submitted before this Tribunal after approval of the COC. After careful consideration of the matter, we are of the view that the NCLT has no jurisdiction to permit withdrawal of the resolution plan which has been placed before the authority with due approval of the COC. Notwithstanding this fact, it has been pointed out by the Counsel for the COC that another matter is subjudiced before the Hon'ble Supreme Court in which inter-alia a similar request has been made. This has been submitted by the Cotinsel for the COC on page 31 of the reply filed by COC in response to the application.

> Keeping this in view, it will not be appropriate for this Tribunal to deal with an issue which is already subjudiced before the Hon'ble Supreme Court. The Application is hereby rejected." PART B

67 In view of the NCLT's order, Kundan Care made an oral request for withdrawal of its application to this Court when the GUVNL Appeal was listed on 20 July 2020. This request was allowed by this Court.

68 Thereafter, the appellant filed an appeal before the NCLAT, challenging the order dated 3 July 2020 passed by the NCLT. NCLAT did not issue notice in the appeal, but heard the submissions of all parties at the stage of admission and directed them to file their written submissions.

69 By the impugned judgment dated 30 September 2020, the NCLAT dismissed the appeal by Kundan Care, relying on the judgment impugned in the Ebix Appeal. It noted:

> "7. Be it seen that the CIRP process undertaken involves filing of Expression of Interest by the prospective Resolution Applicants which may ultimately manifest in the form of prospective Resolution Plan after negotiations as regards improvement or revision in terms of the proposed Resolution Plan. This process is in the nature of a bidding process where, based on consideration of the provisions of a Resolution Plan with regard to financial matrix, capacity of the Resolution Applicant to generate funds, infusion of funds, upfront payment, the distribution mechanism and the period over which the claims of various stake holders are to be satisfied besides the feasibility and viability of the Resolution Plan, a Resolution Applicant emerges as the highest bidder (Hl) eliminating the Resolution Plans of Resolution Applicants, which are ranked H2 and H3. The approval of a Resolution Plan by the Committee of Creditors with requisite majority has the effect of eliminating H2 and H3 from the arena. Though, such approved Resolution Plan would be binding on the Corporate Debtor and all stake holders only after the Adjudicating Authority passes an order under Section 31 of the I&B Code approving the Resolution Plan submitted by Resolution Professional with the approval of Committee of Creditors in terms of provisions of Section 30(6) of the I&B Code, it does not follow that the Successful Resolution Applicant would be at liberty to withdraw the Resolution Plan duly approved by the Committee of Creditors and laid before the Adjudicating Authority for approval thereby sabotaging the PART B entire Corporate Insolvency Resolution Process, which is designed to achieve an object. A Resolution Applicant whose Resolution Plan stands approved by Committee of Creditors cannot be permitted to alter his position to the detriment of various stake holders 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 naught all possibilities of insolvency resolution and protection of a Corporate Debtor, more so when it is a going concern. That apart, there is no express provision in the I&B Code allowing a Successful Resolution Applicant to stage a U-tum and frustrate the entire exercise of

Corporate Insolvency Resolution Process. The argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant has to be repelled on four major grounds:-

(i) There is no provision in the l&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plai1 stands approved by the Committee of Creditors with requisite majority;

(ii) The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant but it is not a contract of personal service which may be legally unenforceable;

(iii) The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by conduct would apply to it;

(iv) The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in 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 stake holders in a state of devastation." The NCLAT held that withdrawal of a Resolution Plan by the Resolution Application after its approval by the CoC cannot be permitted since: (i) it contravenes the principles of IBC, which require the CIRP to be conducted in a time-bound manner in order to maximise the value of the assets of the Corporate Debtor; (ii) permitting Kundan Care to withdraw would sabotage the CIRP, where PART C the A-CoC had previously rejected other prospective Resolution Applicants in favor of Kundan Care; (iii) there is no specific provision in the IBC for allowing withdrawal; (iv) the Resolution Plan incorporated contractual terms binding the Resolution Applicant, and it is not akin to a contract of personal service which is legally unenforceable; (v) by the virtue of principle of estoppel of conduct, Kundan Care is estopped from withdrawing; and (vi) the withdrawal may lead to the Astonfield's liquidation, and the value of its assets were bound to have depleted in the interim.

C Civil Appeal No 295 of 2021 – the Seroco Appeal

C.1 The appeal

70 This is an appeal under Section 62 of the IBC from an order dated 10

December 2020 of the NCLAT. By its judgment, the NCLAT dismissed an appeal29 instituted by Seroco, under Section 61 of the IBC against an order dated 23 October

2020 of the NCLT.

71 The NCLT dismissed an application30 by Seroco under Section 60(5) seeking permission to modify its Resolution Plan submitted for the Corporate Debtor – Arya Filaments. NCLT relied on the impugned judgment in the Kundan Care Appeal. Further, it noted that while the application prayed for a modification of the Resolution Plan, its title was "Application for withdrawal under section 60(5) of the Insolvency and Bankruptcy Code, 2016".

Company Appeal (AT) (Insolvency) No 1054 of 2020 IA No 96 of 2020 in CP (IB) No 29 of 2018 PART C 72 In appeal, the NCLAT partly upheld the NCLT's decision and held that Seroco could not be allowed to modify or withdraw the Resolution Plan approved by the Arya-CoC since: (i) it was the sole Resolution Applicant in the CIRP; (ii) Arya Filaments was an MSME; and (iii) it was aware of Arya Filaments' financial condition when it submitted the Resolution Plan. However, it set aside the NCLT's decision in relation to the costs imposed on Seroco.

C.2 Initiation of CIRP

73 The second respondent, Kotak, being a financial creditor of Arya

Filaments, filed a petition31 under Section 7 of the IBC seeking to initiate CIRP. 74 By an order dated 17 August 2018, the NCLT initiated CIRP against Arya Filaments and appointed the first respondent, Mr Ravi Kapoor, as the IRP. Thereafter, a CoC was constituted, which consisted of Kotak Mahindra and the third respondent, UBIL. The Arya-CoC then appointed Mr Ravi Kapoor as the RP.

C.3 Submission and Approval of Resolution Plan

75 The Arya-RP thereafter invited Resolutions Plans for Arya Filaments.

Seroco, being a company formed by the former employees of Arya Filaments, submitted a Resolution Plan on 13 March 2019 where, inter alia, they offered to pay Rs 6,79,22,000. This was the only Resolution Plan which was received.

CP (IB) No 29 of 2018 PART C 76 At its 4th meeting held on 16 April 2019, the Arya-CoC noted that Seroco's Resolution Plan needed some improvements and directed it to submit a revised Plan. Seroco's revised Resolution Plan was then approved by the Arya-CoC in its 5th meeting held on 10 May 2019, with 100 per cent approval. 77 On or about 15 May 2019, the Arya-RP filed an application32 under Section 30(6) before NCLT for confirmation of the Resolution Plan. Form H under the CIRP Regulations was filed by way of an affidavit on 5 June 2020.

C.4 Modification of the Resolution Plan

78 On 9 June 2020, Seroco addressed a letter to the Arya-RP and Arya-CoC

highlighting that their Resolution Plan was based on the economic conditions which prevailed at that time, which had been significantly altered due to the onset of the COVID-19 pandemic. In particular, it highlighted that:

> (i) The physical condition of Arya Filament's machinery would have deteriorated;
>
> (ii) Financial losses must have been suffered by Arya Filaments during the COVID-19 pandemic;
>
> (iii) Demand/sale of Arya Filaments' products must have suffered during pandemic; and
>
> (iv) Due to the pandemic, the funds of Seroco have also been drastically reduced.

IA No 280 of 2019 in CP (IB) No 29 of 2018 PART C It submitted a revised Resolution Plan to be considered by the Arya-CoC. In the revised Resolution Plan, Seroco offered to pay, inter alia, an amount of Rs 5,29,22,000. It also requested the Arya-RP and Arya-CoC to file the revised Resolution Plan before the NCLT, and keep the proceedings on the confirmation of the previous Resolution Plan in abeyance.

79 Thereafter, on 10 July 2020, Seroco filed an application before the NCLT praying for the following reliefs:

> "a) permit the Applicant to revise the Resolution Plan dated 13.3.2020 in terms of letter dated 09/06/2020 at Annexure C hereto;

b) direct the Respondent No. 2 to consider the modified resolution plan as per Letter at Annexure C and vote afresh on the same;

c) direct the Respondent No.1 to provide an updated Information Memorandum providing financial condition of the Corporate Debtor as on 1/07/2020;

d) during the hearing of this Application, stay the implementation, operation and execution of the Resolution Plan dated 13.3.2020 of the Applicant;" It noted that its Resolution Plan was filed eighteen months ago and was based on an IM published two years previously, following which the conditions had materially altered. Hence, Seroco stated that while it was genuinely interested in Arya Filaments, its changed circumstances meant that it could not pay the entire consideration envisaged in the Resolution Plan approved by the Arya-CoC earlier.

80 Seroco's application was listed before the bench of the NCLT which was hearing the Arya-RP's application for confirmation of the Resolution Plan. By a PART C common order on 23 October 2020, the NCLT allowed the Arya-RP's application and confirmed Seroco's Resolution Plan which

had been approved by the Arya- CoC. In relation to Seroco's application for modification, it noted:

> "18. It is the matter of record that the instant application was filed subsequent to the filling of the above stated IA ie. IA 280 of 2019 filed under Section 30(6) of the IB Code. It is stated by the Applicant that the Resolution Plan, so submitted by the Applicant, is based on the Information Memorandum which was published two years ago. Considering the time of two years and outbreak of Covid-19, the Applicant is not aware of the current financial condition of the Corporate Debtor and is now not in a position to bear the costs/losses of the Corporate Debtor and hence, is seeking for withdrawal of the Resolution Plan. This story is not believable as the Corporate Debtor, being a MSME, has filed the plan considering the financial 'condition of the Corporate Debtor and have shown his interest to take the Company. Hence, having no knowledge of the financial condition does not arise at all.
>
> 19. It is pertinent to mention herein that in view of the judgement passed by Hon'ble NCLAT in Kundan Care Products Ltd vs. Mr. Amit Gupta Resolution Professional and-

Ors (Company Appeal (AT) (Insolvency) No. 653 of 2020), the Resolution Plan, once submitted, cannot be withdrawn as there is no provision in the IB Code which allows withdrawal of an approved Resolution Plan & the successful Resolution Plan incorporates contractual terms binding the Resolution Applicant but it is not a contract of personal service which may be legally unenforceable.

20. Moreover, there is an ambiguity in the instant application with regard to the relief sought for, as the title of the application states "Application for withdrawal under section 60(5) of the Insolvency and Bankruptcy Code, 2016" whereas the prayer, as stated above, has no whisper regarding the withdrawal of the Resolution Plan." Hence, it rejected Seroco's application and imposed costs of Rs 50,000. 81 Seroco filed an appeal against the NCLT's judgment, which came to be dismissed by the NCLAT by its impugned order dated 10 December 2020, where it noted:

> PART D "2. After hearing learned counsel for the Appellant and having regard to the Judgments rendered by this Appellate Tribunal holding that the Successful Resolution Applicant cannot be permitted to withdraw the approved Resolution Plan coupled with the fact that the Appellant in the instant case being the sole Resolution Applicant in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor which has been classified as an MSME and admittedly having knowledge of the financial health of the Corporate Debtor as a promoter or a connected person cannot be permitted to seek revision of the approved Resolution Plan on that ground which would not be a material irregularity within the ambit of Section 61(3) of the Insolvency and Bankruptcy Code, 2016. We are of the considered opinion that there is no merit in this appeal and the same is liable to be dismissed." Considering Arya Filament's position as an MSME, Seroco being a company formed by its former employees (who would have been aware of its financial condition) and also being the

sole Resolution Applicant, the NCLAT refused to permit modification/withdrawal of the Resolution Plan.

D Submissions of counsel in the Ebix Appeal

D.1 Submissions for the appellant

82 Mr K V Vishwanathan, learned Senior Counsel appearing on behalf of Ebix

submitted that a successful Resolution Applicant may be permitted to withdraw the resolution plan (pending approval of the Adjudicating Authority), on account of: (a) subsequent developments in relation to Educomp (which in this case relate to investigations of fraud and mismanagement during the pre-CIRP period); and

(b) due to an inordinate lapse of time, which has resulted in the complete erosion of the fundamental commercial substratum underlying the Resolution Plan.

PART D Further, he argues that the NCLAT did not correctly apply the doctrine of constructive res judicata. He has made the following submissions:

(i) Ebix is not bound by the Resolution Plan prior to the approval of the Adjudicating Authority, in terms of the CIRP documents read with the scheme of IBC. In this regard, our attention was drawn to:

(a) Section 31(1) of the IBC, which provides that the Resolution Plan is “binding…on all stakeholders” only upon approval by the Adjudicating Authority;

(b) Section 74(3) of the IBC, which provides that a person can be prosecuted or punished for contravening the Resolution Plan only after its approval by the Adjudicating Authority;

(c) The documents underlying the CIRP, i.e., invitation of EOI, the RFRP, sanction letter and Resolution Plan take effect of a binding contract only upon the approval of the Adjudicating Authority and the execution of definitive agreements thereafter;

(d) Clause 1.1.6 of the RFRP provides that the Plan submitted by Ebix will have to be approved by the Adjudicating Authority and will be binding on all the stakeholders in relation to the Corporate Debtor and Ebix, only after it has been approved by the Adjudicating Authority;

(e) Clause 1.10(1) of the RFRP provides that Ebix shall be responsible for the implementation and supervision of the Resolution Plan from the date of approval by the Adjudicating Authority; and

(f) Clause 2.2.9 of the RFRP provides that Ebix shall, pursuant to approval by the Adjudicating Authority, execute definitive agreements;

PART D

(ii) The Resolution Plan constitutes an offer qualified by time and cannot be enforced against the parties after such a long period of time has elapsed. In this regard, the following terms of the documents underlying the CIRP were highlighted:

(a) Clause 1.1.5 of the RFRP, which invites Resolution Plans from prospective Resolution Applicants. Further, Clause 1 of the covering letter for submission of the Resolution Plan provides that Ebix is setting out the offer in relation to the insolvency resolution of Educomp;

(b) The Resolution Plan was valid only for six months, since Clause 1.8.3 of the RFRP invites resolution plans/offers with a validity of six months;

(c) In accordance with the RFRP, Clause 7 of the Resolution Plan provides that it is valid for a period of six months from the date of submission.

The appellant is a liberty to withdraw the resolution plan if there is delay of several months beyond the period of six months. It was emphasized that the Resolution Plan is a qualified offer which is not open to acceptance for an indefinite period. Reliance was placed on the decision of this Court in Riya Travel & Tours (India) (P) Ltd. v. C.U. Chengappa33 to support this proposition;

(d) The CSEB Application for the approval of the resolution plan continues to be pending before the Adjudicating Authority, while the Approval Appeal is pending before the Appellate Authority. A period of eighteen months has passed from the date of submission of the resolution plan (i.e., 19 February 2018) and twenty-seven months from the CIRP (2001) 9 SCC 512 PART D commencement date. Such severe and inordinate delay is impermissible under Section 12 of the IBC and justifies the withdrawal of the Plan;

(e) The delay in the approval was on account of the actions of members of the E-CoC, who had sought a special audit of Educomp due to the concerns relating to mismanagement of its affairs. Several members had filed applications (IFC, Axis Bank and SBI) before the Adjudicating Authority in this regard. The Adjudicating Authority by orders dated 13 August 2018, 20 August 2018 and 31 August 2018 took cognizance of these applications and directed them to be placed before the E-CoC. The E-CoC approved the Investigation Audit Application filed on its behalf before the Adjudicating Authority for conducting a special audit by 77.85 per cent votes;

(f) SFIO initiated investigation against Educomp. Ebix became aware of the investigation only through disclosures made to NSE/BSE and regulators on 12 June 2019;

(g) Ebix had sent a notice dated 2 July 2018 to the E-CoC/E-RP stating that the severe delays in the CIRP have prejudiced the commercial considerations underlying the Resolution Plan and, in any case, the Resolution Plan was valid only for six months. It urged the E-CoC/E-RP to expedite the process for obtaining the Adjudicating Authority's approval. Thereafter, Ebix filed the First Withdrawal Application for seeking information relating to the financial position and other commercial aspects of Educomp. After the dismissal of the First PART D Withdrawal Application, the appellant filed the Second and Third Withdrawal Applications for withdrawal of its Resolution Plan; and

(h) The above sequence of events shows that Ebix had no role to play in the delays plaguing the CIRP of Educomp. Section 12 of the IBC stipulates that the insolvency resolution process should be completed in 270 days with an outer limit of 330 days. This Court in CoC of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.34 has held that "[i]t is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation";

(iii) The events that have taken place subsequent to the submission of Resolution Plan justify its withdrawal. In this regard, it was urged on behalf of Ebix that:

> (a) The Resolution Plan was based on certain considerations that were fundamental to the Ebix's bid for the business of Educomp, and were crucial for keeping the business of Educomp as a going concern. These were the government contracts and IP driven solutions in the education and health industries. However, due to the inordinate delay in the completion of the CIRP, many of the government contracts may have ended. Further, various technology driven solutions and intellectual property owned and operated by Educomp, which Ebix had sought to acquire, were no longer valid;
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> (2020) 8 SCC 531 PART D
>
> (b) The E-CoC passed a resolution with 77.85 per cent votes to conduct a special audit into the affairs of Educomp, which shows that evidence is available to conclude that the affairs of the company were mismanaged, which materially affect the economic considerations underlying the Resolution Plan;
>
> (c) The affairs of Educomp are also being investigated by the SFIO and CBI, which provides further evidence that the affairs of Educomp were severally mismanaged and are susceptible to criminal investigations;
>
> (d) There has been a lapse of over three years resulting in an erosion of vital business prospects of Educomp; and

(e) The implementation and viability of a Resolution Plan is to be assessed at the time of consideration of such plan by the competent Court/Tribunal, and not at the time of submission of the Plan. The subsequent events that have transpired after the submission of the Resolution Plan are relevant for evaluating the commercial viability and the capability to implement the plan. In the present case, the substratum forming the basis of the resolution plan has been eroded by the occurrence of the abovementioned events. Thus, the successful Resolution Applicant has the right to withdraw the Resolution Plan in such circumstances;

(iv) Material information relating to the financial position and affairs of Ebix was not provided to Ebix after the submission of the Resolution Plan, as a consequence of which, there is an impairment of a fair process in the conduct of a commercial transaction. In this context:

PART D

(a) Section 29(2) of the IBC, provides that all relevant information should be provided to the Resolution Applicant;

(b) Regulation 36 of the CIRP Regulations provides that the IM prepared under Section 29 of the IBC should contain information relating to, inter alia: (1) "assets and liabilities…"; (2) "the latest annual financial statement"; and (3) details of "…ongoing investigations or proceedings initiated by Government and statutory authorities". While this information is relevant for the preparation of the Resolution Plan, there is a continuing obligation to disclose such information if there is a substantial delay in the CIRP (beyond the period prescribed under Section 12 of the IBC) qua the Corporate Debtor;

(c) The Resolution Applicant's right to complete and accurate information relating to the Corporate Debtor has been recognized under the UNCITRAL Guide. The principle of "equality of information" to all stakeholders, including the resolution applicant, has been underlined in the BLRC Report; and

(d) The E-CoC/E-RP withheld information relating to mismanagement of affairs of Educomp between 2014-2018, and also in relation to the investigation into the affairs of Educomp by governmental authorities;

(v) The Adjudicating Authority has the power to permit the withdrawal of the Resolution Plan. Under Section 31 of the IBC, it has the power to independently satisfy itself that the "Resolution Plan as approved by the CoC… meets the requirements as referred to in sub-section (2) of Section 30". Section 30(2)(d) of the IBC provides that the Adjudicating Authority PART D can assess whether adequate provisions have been made for the "implementation and supervision of the resolution plan". This Court in K Sashidhar v. IOC35 has emphasized that the Adjudicating

Authority has the discretion to reject the Resolution Plan if it does not conform to the stated requirements of Section 30(2)(d). The proviso to Section 31(1) of the IBC expressly prohibits the Adjudicating Authority from approving a plan that is incapable of being effectively implemented. The NCLAT, in the impugned judgement, has not considered whether the exercise of the jurisdiction by the Adjudicating Authority under Section 31(1) read with Section 30(2)(d) was valid. In the present circumstances, the Resolution Plan is no longer capable of being implemented due to the erosion of the commercial basis of the Resolution Plan and an inordinate lapse of time;

(vi) The NCLT had good and valid reasons allowing for the withdrawal of the resolution plan since:

(a) There was no approval by the E-CoC with the requisite majority of 75 per cent. When the voting took place on the resolution plan submitted by the Appellant on 22 February 2018, there was a shortage in the votes required to achieve the statutory requirement of 75 per cent of votes in the E-CoC. On 23 February 2018, one of the financial creditors who was not present at the meeting of the E-CoC intimated its agreement with the resolution plan and accordingly the Approval Application was filed on 7 March 2018. Orders have been reserved on the Approval Application on 10 January 2018; and (2019) 12 SCC 150 PART D

(b) Fulfilment of the Plan cannot be foisted on an unwilling Applicant. This view of the NCLT is consistent with the legal position which vests it with the power to permit a withdrawal from a resolution plan for good and substantial reasons; and

(vii) The doctrine of res judicata does not bar the relief that Ebix had sought in its Third Withdrawal Application of its Resolution Plan. The First Withdrawal Application arose from a different cause of action, namely seeking information and re-evaluation of the financial position of Educomp due to a lapse of time. The order dated 10 July 2019 passed by the Adjudicating Authority in the First Withdrawal Application had only adjudicated the issue relating to the non-disclosure of information and material sought by Ebix, and had not considered the relief of withdrawal of Resolution Plan. This was also confirmed in the express finding of the Adjudicating Authority in its order dated 2 January 2020, which was appealed before the NCLAT.

D.2 Submissions for the first respondent

83 Mr Shyam Divan, learned Senior Counsel appearing on behalf of E-CoC, has urged the following submissions:

(i) Ebix submitted its Resolution Plan on 27 January 2018, after month-long negotiations. Meetings between the E-CoC and Ebix were conducted on 17 February 2018, 19 February 2018 and 21 February 2018. Addendums were submitted on 21 February 2018. The mutually approved and PART D negotiated plan was put to vote, and approved by 75.36 per cent of the E-

CoC. This constituted a binding contract between Ebix and the E-CoC;

(ii) The IBC is a complete code as held by this Court in M/s Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.36 and M/s Innoventive Industries Ltd. v. ICICI Bank & Anr.37. It does not envisage withdrawals of Resolution Plans after mutual negotiations between the Resolution Applicant and the CoC, which culminates into a binding agreement. The Adjudicating Authority cannot contravene the text to invoke the spirit/object of the IBC without a conscious statutory prescription, as held by this Court in Gujarat Urja Vikas Nigam Limited v. Amit Gupta38;

(iii) The basic tenets of any insolvency law are to ensure the sanctity of the prescribed processes and timelines. Maximization of the value of assets and resolution of the Corporate Debtor are the core objectives of the IBC, as held by this Court in Swiss Ribbons (P) Ltd v. Union of India 39. Enabling withdrawals, especially at the tail end of the process, would push financially distressed Corporate Debtors into liquidation;

(iv) The Specific Relief (Amendment) Act 2018, as is evinced from the speech of the Union Minister of Law & Justice before the Rajya Sabha while introducing the amendments, shifted the paradigm on contract enforcement in India where specific performance is now the norm, rather than the exception;

(2020) 13 SCC 308 (2018) 1 SCC 407 2021 SCCOnLine SC 194, para 181 (2019) 4 SCC 17, paras 27-28 PART D

(v) The resolution process involves significant public money, resources and time. Enabling withdrawals would undermine the goals of predictability and finality, which the legislature had recognized as the need of the hour in the Rajya Sabha debates on the IBC;

(vi) Non-implementation of Resolution Plans after approval from the Adjudicatory Authority under Section 31 of the IBC, pertinently on a narrow scope of judicial review, is liable to criminal prosecution under Section 74(3) of the IBC. This Court should not allow a successful Resolution Applicant to withdraw from a duly concluded contract;

(vii) The consequences of permitting a withdrawal by Ebix would push Educomp towards liquidation, which would risk thousands of crores of public monies owed to public sector banks during the economic crisis caused by the COVID-19 pandemic;

(viii) Permitting withdrawal of an approved Resolution Plan would tread on the exclusive domain of the CoC, which has the power to determine the feasibility and viability of a Resolution Plan. The

mandate of Section 30(2)(d) of the IBC, which envisages 'implementation and supervision of the resolution plan', would be breached if the Court would allow withdrawals by holding that an unwilling Resolution Applicant would make a Resolution Plan itself un-implementable;

(ix) The scope of judicial review with the Adjudicatory Authority, under Section 31 of the IBC, is confined to parameters delineated in Section 30(2), which does not envisage the withdrawal or unwillingness of the Resolution Applicant to continue with a CoC-approved Resolution Plan. The PART D Adjudicating Authority, as a creature of the statute, cannot exercise jurisdiction beyond the scope of the IBC or second-guess the commercial wisdom of the CoC, as held by this Court in Essar Steel (supra), after noting the observations of this Court in K Sashidhar (supra);

(x) The Supreme Court, in Essar Steel (supra) and K Sashidhar (supra), has held that the Adjudicating Authority cannot trespass upon the majority decision of the CoC, except on the grounds enumerated under Section 30(2)(a) to (e) of the IBC;

(xi) The provisions of the RFRP were designed to ensure predictability and finality. The provisions which elucidated this aim were:

> (a) Clause 1.13.5, which did not envisage any change or supplemental information to the Resolution Plan, after the submission date;
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> (b) Clause 1.8.4, which stated that a submitted Resolution Plan shall be irrevocable; and
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> (c) Clause 1.10(l), which stipulated that the Resolution Applicant will not be permitted to withdraw the Resolution Plan;
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> (xii) The RFRP did not envisage six months to be the validity of the Resolution Plan. Clause 1.8.3, which stipulated a minimum six-month validity of the Resolution Plan, is relatable to the acceptance of the plan by the E-CoC and not the Adjudicating Authority. This is evident from the clauses of the RFRP which stipulate that the submitted plan is irrevocable;
>
> (xiii) The resolution process belies the claim that withdrawals were permissible after the six-month period. The process was delineated in the following terms:
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> PART D
>
> (a) Clause 1.3.1 and 1.3.2 empowers the E-RP to issue an invitation to prospective resolution applicants, subject to, inter alia, non-disclosure agreements and participation fees;
>
> (b) Clause 1.3.6, read with Clause 1.9.1, enables a party to submit a Resolution Plan upon payment of an earnest money deposit of Rs 2 crore. Along with the Resolution

Plan, the Resolution Applicant was required to submit an undertaking accepting the terms of the RFRP, including the minimum six-month period of Resolution Plan validity;

(c) Clause 1.9.3, read with Clause 1.9.5, ensures that a CoC approved Resolution Plan becomes a binding contract between the E-CoC and Ebix, since the earnest money deposit needs to be replaced with a performance guarantee, which is 10 per cent of the Resolution Plan value. Any violation of the concluded contract, which would be the approved Resolution Plan in this case, would give the E-CoC the right to invoke the performance guarantee;

(d) The above clauses, in addition to clause 1.8.3, read with 1.9.5, evince that the six-month validity is with respect of the EMD alone, and is hence only related to a period until acceptance by the E-CoC;

(e) The consequence of approval by the Adjudicating Authority under Section 31 of the IBC is that the parties enter into definitive binding agreements, the implementation of the Resolution Plan commences and the performance guarantee is returned. A Section 31-approval binds all stakeholders to a concluded contract between the Ebix and the E-CoC;

PART D

(f) The CoC or the RP do not have the authority to impose a time limit on the Adjudicating Authority. Therefore, it would not be plausible to construe Clause 1.8.3 to impose a maximum validity period on a Resolution Plan; and

(g) In any event, Ebix had waived the term of validity of the plan being six months by pursuing the plan after six months, i.e., from August 2018 till reserving of orders by the Adjudicating Authority in January 2019, and not raising any claims till July 2019. Therefore, Ebix is estopped from raising the plea, after the purported expiry of the validity period;

(xiv) Clause 1.1.6 of the RFRP, which reiterated Section 31 of the IBC and states that the Resolution Plan will be binding on all stakeholders only after the approval of the Adjudicating Authority, does not militate against E- CoC's proposition that the CoC-approved Resolution Plan is a concluded contract. This is because:

(a) Section 30(4) of the IBC does not contemplate any statutory exit after the approval of the Resolution Plan by the CoC, which determines its feasibility and viability;

(b) Clause 1.1.6 paraphrases Section 31(1) of the IBC, which merely makes the Resolution Plan binding on all other stakeholders. The Adjudicating Authority's approval under Section 31(1) amounts to a 'super-added imprimatur' to the

concluded terms between the CoC and the Successful Resolution Applicant; and

(c) A conjoint reading of Clause 1.1.6, along with Clause 1.8.4, which declares a submitted Resolution Plan to be irrevocable, and Clause PART D 1.10(l), which prohibits withdrawal of a submitted Resolution Plan, belies the claim that the Resolution Plan is binding on the Successful Resolution Applicant only after approval of the Adjudicating Authority;

(xv) The delay in the resolution process is not attributable to the E-CoC. It cannot be cited to allow Ebix to withdraw from a legally binding plan;

(a) The E-CoC approved the submitted Resolution Plan within 270 days, and it was promptly filed before the Adjudicating Authority in March 2018. The orders on the plan approval were reserved in January 2019 and pronounced only in January 2020. The delay cannot be attributable to the E-CoC or used to withdraw from a plan which provided a 90 per cent haircut; and

(b) actus curiae neminem gravabit, i.e., the act of Court shall harm no man, is a settled principle in law;

(xvi) Ebix's argument that the substratum or commercial viability has eroded due to the subsequent circumstances is facetious since:

(a) Ebix had conducted its own due diligence, in accordance with the RFRP. Section 29 of the IBC also enabled the appellant to access to an IM on Educomp, which would include all relevant information, including financial position and pending disputes. Clause 1.13.7 of the RFRP also stipulates that failure to conduct adequate due diligence is not a ground to relieve the Resolution Applicant from its obligations under a submitted Resolution Plan;

(b) Ebix continued to be interested in Educomp as late as 1 June 2020, when it addressed a letter stating that the software licenses for online PART D education, issued by Educomp, have become even more relevant in the circumstances of the pandemic;

(c) The Investigation Audit Application for investigations into the affairs of Educomp was filed in May 2018 and disposed of by August 2018, which was prior to the Adjudicating Authority reserving its orders on the Resolution Plan. In any event, no such audit by the Special Investigation Team was undertaken;

(d) According to the information available with the E-CoC, the E-RP had provided all the information available with Educomp regarding the CBI and SFIO investigations, on a best effort basis. Additionally, Ebix was also appearing before the NCLT when the E-CoC sought an investigation into the affairs of Educomp, as recorded in the order of the NCLT dated 9 August 2018;

(e) Ebix had evaluated the business and business conduct of Educomp, before submitting a Resolution Plan worth Rs 314 crores, against an admitted financial debt worth Rs 3003 crores. This 90 per cent haircut indicates that the appellant was aware of the conditions of Educomp;

and

(f) In any event, Section 32A of the IBC grants immunity to a Resolution Applicant from any offences committed by the Corporate Debtor, prior to the commencement of the CIRP, and provides certainty that the assets of the Corporate Debtor, as represented, would be available in the same manner as at the time of submission of a Resolution Plan. Section 25(2)(j) of the IBC empowers and obligates the RP to file PART D applications for avoidance of certain transactions, to protect the interests of the Resolution Applicant; and (xvii) The Third Withdrawal Application is barred by res judicata since the grounds raised by Ebix were rejected by the NCLT in the First Withdrawal Application on 10 July 2019. The liberty granted by the NCLT to file a fresh application on 5 September 2019 was with respect to filing a proper pleading without defects, and not on merits. This conditional liberty cannot be construed as a waiver of the objection of res judicata. In any event, the issue of limited validity of the approved Resolution Plan and delay of seventeen months, is barred by the principles of constructive res judicata. 84 In the alternative, if Ebix were to succeed before this Court, the learned Senior Counsel on behalf of the E-CoC has prayed that this Court exercise its powers under Article 142 of the Constitution of India, and extend the limitation period for conducting the insolvency process by three to four months for a fresh process to be initiated, subject to the consent of the E-CoC.

D.3 Submissions for the second respondent

85 Supporting the submissions of the E-CoC, Mr Nakul Dewan, learned

Senior Counsel, has appeared on behalf of the E-RP. He has submitted that:

(i) Upon the approval of a Resolution Plan by the CoC, a concluded contract comes into existence between the Resolution Applicant and CoC. Any withdrawal of the Resolution Plan would violate the concluded contract;

PART D

(ii) In the present case, Clauses 1.9.3 and 1.9.5, give the right to the E-CoC to invoke the PBG submitted by Ebix if it attempts to renege from its contractual obligation to implement the Resolution Plan;

(iii) The withdrawal would also be in violation of the objective of the IBC, as noted by this Court in Swiss Ribbons (supra), which is to ensure the revival and continuation of the Corporate Debtor. The withdrawal of the Resolution Plan at a belated stage, would lead to the Corporate Debtor going into

liquidation;

(iv) The withdrawal of a Resolution Plan after its approval by the CoC is not contemplated by:

> (a) The UNCITRAL Guide, according to which the role of judicial authorities is limited to approving the Resolution Plan after ensuring that it was approved by the CoC properly. It does not envisage that the role of the judicial authorities would extend to questioning the commercial wisdom of the CoC, much less allow for the withdrawal of the Resolution Plan at the behest of the Resolution Applicant;
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> (b) The BLRC Report: (1) notes that the UNCITRAL Guide was used as a benchmark by Parliament while enacting the IBC; (2) opined that the CoC should be the driving force behind the resolution of the Corporate Debtor; and (3) does not discuss the withdrawal of a Resolution Plan;
>
> (c) The UK Act does not allow for the withdrawal of a Resolution Plan and limits the grounds of challenge. In Singapore, the Singapore Act allows challenges to the Resolution Plan, without envisaging withdrawal;

PART D

(d) The Resolution Plan is a contract executed under the aegis of the IBC and hence the statute must be interpreted so as to further its objectives. Reliance for this proposition is placed on the following English decisions: (1) Allied Domecq (Holdings) Ltd v. Allied Domecq First Pension Trust Ltd40; (2) Reinwood Ltd v. L Brown & Sons Ltd41; (3) Doleman v. Shaw42; and (4) Standard Life Assurance Ltd v. Oak Dedicated Ltd43; and

(e) If the Parliament while enacting the IBC intended to permit the withdrawal of the Resolution Plan after its approval by the CoC or NCLT, it would have provided for such an eventuality. Section 12A was inserted by amendment for situations involving a withdrawal from the CIRP. On the contrary, Section 74 provides for penalties in case the Resolution Applicant does not comply with the Resolution Plan;

(v) Ebix's argument, that the RFRP which provides that the Resolution Plan must be approved within six months would also include its approval by the Adjudicating Authority, is contrary to the IBC since the parties, through an agreement, cannot impose a restriction/condition on a judicial authority;

(vi) In any case, Ebix has actively pursued the Resolution Plan even after the period of six months by communicating with the E-CoC/E-RP, arguing in its favor in the Approval Application and by extending the EMD. The First Withdrawal Application was filed only on 5 July 2019, after the expiry of [2008] Pens. L.R. 425, paras 24 and 38 [2008] 1 W.L.R. 696, paras 5 and 11 [2009] Bus. L.R. 1175, paras 40 and 56 [2008] EWHC 222 (Comm), para 16 PART D nearly one year from the expiry of the period of six months on 19 August 2018;

(vii) The investigations by the SFIO and CBI were initiated after the filing of the Approval Application before the NCLT. Since the E-RP was not aware of any discrepancies or illegalities committed by the former management of Educomp, information about such activities could not have been provided to intending Resolution Applicants under Section 29 of the IBC. Section 29 only envisages that the RP will provide information to prospective Resolution Applicants on a best-effort basis;

(viii) Ebix is a professional corporate entity, and through the express provisions of its own Resolution Plan, has stated that it has significant previous experience in the revival of stressed assets. Before submitting its Resolution Plan for Educomp, Ebix was provided access to the Virtual Data Room by the E-RP and conducted its due diligence. Hence, it should not be allowed to seek a withdrawal, by arguing that certain facts were not within its knowledge; and

(ix) In view of the decision of this court in Nagabhushanammal v. C Chandikeswaralingam44, the Third Withdrawal Application was barred by the principles of res judicata since it sought the same prayer which was raised in the First Withdrawal Application, and rejected by the NCLT in its order dated 10 July 2019.

(2016) 4 SCC 434, para 15

PART E

E Submissions of counsel in the Kundan Care Appeal

E.1 Submissions for the appellant

86 Mr Ramji Srinivasan, learned Senior Counsel appearing on behalf of

Kundan Care, has urged the following submissions:

(i) The IBC vests the Adjudicating Authority with inherent powers to direct withdrawal:

(a) Section 60(5)(c) of the IBC vests the Adjudicating Authority with wide powers and jurisdiction to “entertain and dispose of any question of law or facts, arising out of or in relation to” the CIRP. Rule 11 of the NCLT Rules 2016 also endows the NCLT with inherent powers. This Court, in Gujarat Urja (supra), has held that disputes arising in relation to insolvency can be adjudicated under Section 60(5)(c). Accordingly, the

dismissal of Kundan Care's application on "lack of jurisdiction" is impermissible. Declining to go into merits of its application amounts to an impermissible refusal to exercise jurisdiction, as noted by this Court in National Thermal Power Corporation Ltd. v. Siemens Atkeingesellschaft45;

(b) The NCLT erred in rejecting Kundan Care's contention by confining its jurisdiction to Section 31(1) of the IBC which specifically deals with approval or rejection of Resolution Plans;

(c) The NCLAT incorrectly proceeded on the assumption that its powers in disposing off Kundan Care's application seeking withdrawal were circumscribed by Section 61(3) of the IBC, which concerns appeals against AIR 2007 SC 1491, para 5 PART E approval of a Resolution Plan. Kundan Care sought to invoke jurisdiction under Section 61(1) of the IBC which provides a right of appeal against any order of the NCLT;

(d) The facts and circumstances, on the basis of which the 'feasibility and viability' of the Resolution Plan were approved by the A-CoC in its commercial wisdom, have changed. Since the edifice of the A-CoC's satisfaction had altered, the NCLT has power to look into the facts which warrant withdrawal or modification of the Resolution Plan;

(e) The legislative background of Section 31 of the IBC does not contemplate circumstances that could arise after submission of the Resolution Plan to the Adjudicating Authority. The UNCITRAL Guide and the BLRC Report place the viability of the Corporate Debtor at the heart of the insolvency process. The CIRP mandates interests of stakeholders to be better preserved by reorganization than liquidation. The BLRC Report was relied upon by this Court in K Sashidhar (supra) to propound the principle of "commercial wisdom of the CoC" which the Adjudicating Authority cannot interfere with as the creditors, as the loss-making party in the insolvency, are best placed to determine the terms of the resolution. However, this principle does not touch upon instances where there is a conflict between the CoC and the Resolution Applicant where the latter will prima facie suffer a loss. The Resolution Applicant has no stake in the process until their Plan is approved by the NCLT and the probability of a complete loss, prior to the approval of the Plan, is justiciable;

PART E

(f) The IBC contemplates strict timelines, and therefore did not envisage a scenario of withdrawal, prior to approval of the Resolution Plan under Section 31(1) of the IBC. This Court, in Essar Steel (supra), held that the 330-day outer limit is directory which has resulted in Kundan Care's Plan remaining pending before the NCLT for over a year, resulting in unviability and losses. Therefore, Section 31 cannot be asserted while adjudicating a plea for withdrawal or modification of a plan due

to intervening factors having a material adverse effect in this case;

(g) Kundan Care's Resolution Plan was contingent on the continuance of the PPA with GUVNL. If the contingency does not arise, the Plan would become impossible. This Plan was accepted by the A-CoC on this contingency. Therefore, disabling withdrawals or modifications would in fact violate the commercial wisdom of the A-CoC;

(h) The Resolution Plan has become unviable and impossible to implement. If mandatorily implemented, Astonfield is bound to suffer losses and eventually declare itself insolvent. These events hinder its effective implementation and warrant the Plan's rejection by the A-CoC since the first proviso of Section 31(1), read with Sub-section (2)(d) warrants a determination by the Adjudicating Authority of the Resolution Plan's effective implementation. The determination by the Adjudicating Authority under Section 31(1) cannot be equated to that of a rubberstamp where a holistic analysis is precluded;

(i) BLRC's Interim Report of February 2015 mentions that 'viability' is determined by providing that the cost of financial arrangement (resolution PART E amount invested by the Resolution Application) should be lower than the Net Present Value of future cash flows of the Corporate Debtor. In Kundan Care's calculation, the computed Net Present Value for future cash flow of Astonfield demonstrates loss and a potential repeated CIRP; and

(j) The proposition that a Resolution Plan approved by the CoC cannot be withdrawn or modified under any circumstance, no matter the extent of impossibility or unviability that may have arisen subsequently, is seriously flawed and is likely to lead to draconian and absurd consequences. In the event that the basis of the Resolution Plan is completely eroded, a Resolution Applicant's failure to implement the Plan would invite penal prosecution under Section 74 of the IBC and a repeated CIRP. This will discourage prospective Resolution Applicants from coming forward with their Plans in the future, thus defeating the very purpose and object behind the IBC;

(ii) There is no concluded and binding contract between the Resolution Applicant and the CoC, prior to approval by the Adjudicating Authority:

> (a) There is no concluded contract between the Resolution Applicant and the CoC until the NCLT approves of the same. Section 7 of the Contract Act requires the acceptance of offer to be absolute, unconditional and unqualified. Clauses 1.1.9, 1.2, 1.9.4 and 2.2.6 of the RFRP record the fact that the Plan would be binding only after the approval of the Adjudicating Authority;
>
> (b) The RFRP is in the nature of an invitation to offer. Kundan Care's Resolution Plan is an offer that is made in pursuance of the RFRP. A PART E contract is concluded and becomes binding between the parties, only upon the communication of its acceptance under Regulation 39(5) of the CIRP Regulation, after the approval of the Adjudicating Authority under Section 31 of the IBC. It would be incorrect to term it as a concluded contract, since it would have unforeseeable public ramifications;

(c) Since there is no concluded contract, withdrawal of an offer prior to acceptance is a settled principle in contract law and the Adjudicating Authority can give effect to this under Section 60(5) of the IBC;

(d) Arguendo, if there is a concluded contract, it has become void under Sections 32 and 35 of the Contract Act. Clause 1.8.3 of the RFRP provided that the Plan must be valid for not less than six months. On this representation, Kundan Care prepared financial projections on the assumption that they would take over the project on 1 January 2020 and make it operational by 1 April 2020. The projections were based on the continuation of GUVNL's PPA with Astonfield till 2037. Kundan Care even furnished revised projections based on the assumption that they would be able to take over the project by 30 September 2020 and make it operational by 1 January 2021. Owing to this delay, Kundan Care had noted that its original projections for the year 2038 went from a cumulative profit of Rs 886.53 lakhs to a cumulative loss of Rs 760.71 lakhs. The A- RP's statement was recorded by the NCLT on 20 February 2020 that Astonfield is incurring a daily loss of Rs 5 lakhs. This takes the cumulative loss of Astonfield to Rs 1647.24 lakhs;

PART E

(e) Sl.No. 5.1 of Kundan Care's Resolution Plan also clearly stated that they would be at liberty to withdraw the Resolution Plan in the event that there is any change in the information provided in the IM or new information is available, which constitutes a 'material adverse change'. Kundan Care contends that this was specifically introduced due to GUVNL's attempts to terminate the PPA. The A-CoC was not obligated to accept this provision in the Plan, but since it has, the provision must be enforced;

(f) Withdrawal was necessitated because of uncertainty over the continuation of the sole contract of Astonfield, deterioration of the assets of Astonfield owing to the floods in Gujarat, repudiation of Astonfield's insurance claim due to the alleged failure of the A-RP to provide supporting documents and misrepresentation in respect of trade receivables towards non-availing the benefit of accelerated depreciation; and

(g) Kundan Care had also demonstrated good faith since it sought to withdraw the Resolution Plan on 17 December 2019, soon after GUVNL Appeal was listed before this Court. This interim application for withdrawal was filed within a month of the A-RP submitting the plan to the Adjudicating Authority. The NCLAT erred in noting that this was a ploy on behalf of Kundan Care to frustrate the CIRP after pushing out all rivals during the bidding process;

(iii) Alternatively, the CoC-approved Resolution Plan is a contingent contract under Section 32 of the Indian Contract Act:

PART E

(a) The contract has become void since the contingency of certainty of PPA with GUVNL within a specified time through approval of the NCLT has become

impossible;

(b) GUVNL's Appeal against the continuation of the PPA, resolved by this Court in Gujarat Urja (supra), compounded by the COVID-19 pandemic and the lockdown, is primarily responsible for the delay in the conclusion of the CIRP. The delay, as of 14 July 2021, in concluding the CIRP is 608 days. The CIRP costs (Rs 12 lakhs per month approx.) are also increasing, which have to be borne entirely by Kundan Care. The NCLT should have considered the alternative prayer of permission to re-negotiate the financial proposal with the CIRP;

(c) The A-CoC's approval through voting constitutes 'provisional acceptance of offer', as was held analogously by this Court in Haridwar Singh v.

Bagun Sumbrui46 which held that the contract was not concluded in the absence of the confirmation by the Government of the conditional acceptance by the Divisional Forest Officer. A statutory reading of Resolution Plans as contingent contracts under Section 7 and 32 of the Contract Act would align with the intention of the IBC in attracting investors to make offers as conditional acceptance of the Plan, until it becomes binding upon approval under Section 31(1) of the IBC; and

(d) Only section 31(1) of the IBC makes the Resolution Plan binding on all stakeholders, including the Resolution Applicant and the CoC. This view is bolstered by the fact that criminal sanctions for non-implementation on a (1973) 3 SCC 889 PART E Resolution Applicant under Section 74(2) of the IBC are applicable only after approval of the Resolution Plan under Section 31(1). Regulation 36-A(7)(f) of the CIRP Regulations also states that the refundable deposit can be forfeited only in case of discovery of any false information or record by the prospective Resolution Applicant. Regulation 36-B(4A) also states that the non-refundable deposit shall be forfeited only on failure to perform after approval of the Plan under Section 31 of the IBC. The impugned judgement's effect is to make it binding prior to the Adjudicating Authority's approval which does violence to the unambiguous language of S.31(1). This is further supported by the provisions of the IBC as noted by this Court in ArcelorMittal India Private Limited v. Satish Kumar Gupta 47, that disapproval by the CoC of a Plan on the grounds of Section 29A of the IBC is still appealable by the Resolution Applicant before the NCLT, and therefore an approved Plan by CoC can still be replaced by another Plan which has been able to satisfy the criteria under section 29A before the NCLT. In other words, a Plan approved by the CoC does not result in a concluded contract because it is replaceable by another party. 87 In the course of the final stage of the hearings, Kundan Care submitted that it had mutually negotiated a settlement with A-RP/A-CoC and requested the exercise of this Court's powers under Article 142 of the Constitution of India for a one-time relief of modification, which would enable them to arrive at a mutually acceptable modification to the Resolution Plan.

PART E

E.2 Submissions for the first respondent

88 Mr Nakul Dewan, learned Senior Counsel appeared on behalf of the A-RP

in the Kundan Care Appeal. He has also appeared on behalf of the E-RP in the Ebix Appeal, both being collectively disposed of by this judgement. He has made the following submissions, in addition to the arguments recorded above in the Ebix Appeal:

(i) There is no direct provision with respect to withdrawal of a Resolution Plan under the IBC by a Resolution Applicant, once approved by the CoC.

Consequently, the Adjudicating or Appellate Authority has no jurisdiction to direct withdrawals or modification of Resolution Plans;

(ii) Section 12 of the IBC provides for a time bound period of 180 days extendable up to 330 days for the completion of the CIRP. Permitting the Resolution Applicant to withdraw the Resolution Plan after the approval of the CoC sets at naught the entire time period subsumed in negotiating and voting upon a Resolution Plan;

(iii) Kundan Care was permitted to submit its Resolution Plan in spite of a failure to submit an EOI in time. Kundan Care was aware of the pending litigation regarding the continuance of the PPA with GUVNL and had negotiated with the A-CoC on that basis. Yet, Kundan Care filed an application to withdraw its Plan within a month of its approval and filing before the Adjudicating Authority. The plea of withdrawal is an opportunistic tactic for re-negotiation;

(iv) Clause 1.8.4 of the RFRP stated that a submitted Resolution Plan shall be irrevocable. The format of the cover letter annexed to the RFRP also PART E makes statements on the binding effect of the submission and its irrevocability. The LOI issued by Kundan Care also states that the Resolution Applicant will not be permitted to withdraw;

(v) Clause 1.6.2 of the RFRP explicitly stated that any 'Condition Precedents' to the Plan had to be set out, for the CoC to specifically consider. Any walk-away conditions also had to be conspicuously set out with a heading, and under a consolidated paragraph. Sl. No.5.1 of the Resolution Plan was not set out in this format, which clearly evinces that it is being deployed as an afterthought to evade the consequences of a submitted Resolution Plan. In any event, none of the claims of Kundan Care constitute a material adverse change that they did not account for, after perusing the IM;

(vi) Sl.No. 5.1 of Kundan Care's Resolution Plan was not introduced as a condition precedent to the Resolution Plan. Sl.No. 12 of the Form H, that is required to be mandatorily submitted by the RP to the Adjudicating Authority, as per Regulation 39(4) of the CIRP Regulations expressly stipulates 'Conditionalities' that need to be specified, for the benefit of the Adjudicating Authority. Attempts at

subsequent modification and withdrawal are not supported by the Resolution Plan, the RFRP or the provisions of the IBC;

(vii) The CIRP costs currently stand at Rs 2.5 crore which Kundan Care had committed to paying in full. As of 26 July 2021, the unpaid CIRP cost is Rs 1.66 crores which would probably be payable from the pending insurance claim. A table detailing the financial health of Astonfield for the last three PART E years was also annexed, to bolster the claim that financial health has improved and profits can still be generated; and

(viii) The delay in approval of the Resolution Plan by the Adjudicating Authority is an imponderable which cannot be used to resile from a binding contract. The delay is also not attributable to the A-RP or the A-CoC.

E.3 Submissions for the second respondent

89 Mr V Giri, learned Senior Counsel appearing for EXIM Bank on behalf of the A-CoC, has made the following submissions:

(i) A Resolution Plan approved by the CoC is submitted by the RP to the NCLT under Section 30(6) of the IBC. Once the NCLT is satisfied that the Resolution Plan complies with the requirements of Section 30(2), it grants its approval to the Plan, which becomes binding on all the stakeholders involved in the Resolution Plan. Thus, in the above scheme of things, IBC does not contemplate withdrawal of Resolution Plan once it has been approved by the CoC;

(ii) The penal provision under Section 74(3) is applicable to a successful Resolution Applicant as it is a stakeholder in the CIRP. The existence of a penal provision indicates that the legislature intended to deter and discourage withdrawals of Resolution Plans;

(iii) CIRP is a time bound process of 180 days, which can be further extended up to 330 days. If a successful Resolution Applicant is allowed to withdraw its Resolution Plan, it will set the clock back on the time spent on receiving PART E the Resolution Plan, evaluating it under Section 30(2) of the IBC, putting it to vote before the CoC and finally obtaining its approval from the Adjudicating Authority;

(iv) Withdrawal of the Resolution Plan at this stage would result in the failure of the CIRP and Astonfield will go into liquidation. IBC envisages liquidation as the last resort;

(v) The process of issuing the RFRP and proposal of a Resolution Plan, and its subsequent approval by the CoC is statutorily mandated. The formats of the documents underlying the CIRP process are also provided by the statute and the Regulations made thereunder. There is some room for maneuverability provided to the parties to negotiate the terms of the documents, however, that does not make any difference to the statutorily prescribed nature of the documents; and

(vi) The approval of the Resolution Plan under Section 30(3) of the IBC by the CoC creates a binding contract between the CoC and the successful Resolution Applicant because:

(a) The proposed Resolution Plan has been approved by the CoC and has been further submitted before the NCLT by the RP;

(b) A Resolution Applicant is aware of the conditions stipulated under the IM and conducts its own due diligence. It is given an opportunity to raise queries on the information that is provided in the IM. Thus, once the Resolution Applicant decides to submit a Resolution Plan and a substantial time and effort is spent by the RP and the CoC in the process of finalizing and approving a Resolution Plan, it cannot simply PART F withdraw the Resolution Plan without being subjected to necessary consequences;

(c) The approval of the plan by the CoC indicates the ad idem between the parties to enter into a contract. The resulting contract is conditional only upon the approval by the NCLT;

(d) Pursuant to the approval of the Resolution Plan by the CoC, the CoC issues an unconditional LOI to the successful Resolution Applicant stating that it has been selected as the successful Resolution Applicant subject to the approval of the NCLT. The successful Resolution Applicant accepts the LOI and submits a PBG. The successful Resolution Applicant is required to state that the LOI is "accepted unconditionally". It is only after the LOI is unconditionally accepted by the successful Resolution Applicant and the PBG is furnished, that the RP makes an application to the NCLT for approval of the Resolution Plan; and

(e) Contracting parties cannot renege on their promise to perform the contract without facing any consequences.

F Submissions of counsel in the Seroco Appeal

F.1 Submissions for the appellant

90 Mr Tirth Nayak has made the following submissions on behalf of Seroco:

(i) The Resolution Plan was submitted on the basis of information that was provided under the IM issued by the Arya-RP in August 2018. Over 18 PART F months have passed since the Resolution Plan was submitted. The inordinate delay in the approval of the Resolution Plan by the NCLT, along with the outbreak of COVID-19 pandemic, has substantially affected the valuation of Arya Filaments, apart from impacting its business operations and financial position. Thus, Seroco is entitled to re-evaluate and modify the Resolution Plan based on such considerations;

(ii) The delay cannot be attributed to Seroco;

(iii) The value of assets and the working capital funds of Arya Filaments have plummeted due to the losses that have occurred in the past eighteen months rendering the implementation of the current Resolution Plan impossible, thereby making it necessary to modify the Plan to suit the current circumstances;

(iv) Seroco was not made aware of the updated financial status of Arya Filaments. It will be unjust if it is made to abide by a Resolution Plan that was submitted eighteen months ago based on the IM that was issued over twenty-four months ago;

(v) Clause 5.3.2. of the BLRC Report provides that the "RP must provide the most updated information about the entity as accurate as is reasonably possible to this range of solution providers. In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the power to appoint whatever outside resources that she may require in order to carry out this task including accounting and consulting services…". Seroco cannot be expected to make a huge PART F investment in Arya Filaments without being given information on its current financial status;

(vi) Seroco is genuinely interested in investing in Arya Filaments, however, due to the change in circumstances, it is incapable of paying the entire consideration as was stipulated under the current Resolution Plan; and

(vii) A Resolution Plan is an offer under Section 2(a) of the Contract Act. The Resolution Applicant becomes bound by the offer only if the Resolution Plan is approved by the NCLT. At present, the Plan is still under the consideration of the NCLT. Thus, Seroco can withdraw or seek modification of the Plan.

F.2 Submissions for the second and third respondents 91 Mr Jayant Mehta appearing on behalf of the Arya-CoC, consisting of Kotak and UBIL, has supported the arguments of the E-CoC and A-CoC. He has urged the following additional submissions:

(i) There is no scope for modification of a Resolution Plan, once it has been submitted by the RP to the Adjudicating Authority, after voting by the CoC.

The only ground sought by Seroco for modification of the submitted Resolution Plan here is the exigency that has arisen due to the pandemic. This is evinced from the fact that the application for modification was made within 2 months of the outbreak of the pandemic;

(ii) The Resolution Plan of Seroco was approved by the Arya-CoC on 10 May 2019 and submitted to the Adjudicating Authority for approval on 14 May PART F 2019. When Seroco filed their application before the NCLT for modification of the Resolution Plan, Kotak and UBIL, by their emails dated 13 July 2020 and 17 July 2020 respectively, had informed the Arya-RP that they record

their disapproval for any such attempts at modification of the Resolution Plan which sought to reduce the resolution amount payable to secured creditors by Rs 1.5 crore;

(iii) There has been no material change in the assets or valuation of Arya Filaments. Seventy-five per cent of the funds were to be generated by Seroco by the sale of the Arya Filament's assets; and

(iv) The following authorities were cited to elucidate on the power of the Adjudicating Authority, which is tightly circumscribed by the IBC, and designed to uphold the commercial wisdom of the CoC: K Sashidhar 48 (supra), Essar Steel49 (supra), Committee of Creditors AMTEK Auto Limited Through Corporation Bank v. Dinkar T Venkatasubramanian & Ors.50, Kalparaj Dharamshi v. Kotak Investment Advisors Ltd.51, Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors.52 and Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director & Ors.53 An appeal under Section 61(3) of IBC, is therefore not maintainable for a Resolution Applicant seeking modification of its approved Resolution Plan. Paras 52-58, 62, 68, 65 Paras 65, 67, 69 and 88 (2021) 4 SCC 457 2021 SCC OnLine SC 204, para 143 2020 SCC OnLine SC 1192, para 170 2021 SCC OnLine SC 313, paras 55-57, 67, 77 PART G The Adjudicating Authority in allowing any such modification, cannot do indirectly, what the statute does not permit it to do directly. 92 The rival submissions in the three appeals shall now be considered.

G Purpose of a law on insolvency

93 An examination of the raison d'etre of the IBC must necessarily precede its

analytical interpretation. A purposive interpretation of the statute, as is argued by the contesting parties, cannot be evinced without examining the aims and objectives of the legislation. The IBC was introduced as a water-shed moment for insolvency law in India that consolidated processes under several disparate statutes such as the 2013 Act, SICA, SARFAESI, Recovery of Debts Act, Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920, into a single code. A comprehensive and time-bound framework was introduced with smooth transitions between reorganization and liquidation, with an aim to inter alia maximize the value of assets of all persons and balance the interest of all stakeholders54.

94 Before we analyse the framework of the statute, the UNCITRAL Guide, which was instructive for the Indian experience on drafting the IBC55, provides some critical guidance on what an insolvency law represents. Notably, the UNCITRAL Guide explicitly refrains from prescribing mandates for the specific choices (procedural or substantive) that an insolvency law should provide. Statement of Objects and Reasons, IBC, 2016 3.3.1, The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (November 2015), available at <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed on 20 August 2021 PART G Instead, it clarifies that each jurisdiction evolves its own insolvency regime based on its social, political and economic goals. It notes56:

> "15. Since an insolvency regime cannot fully protect the interests of all parties, some of the key policy choices to be made when designing an insolvency law relate to defining the broad goals of the law (rescuing businesses in financial difficulty, protecting employment, protecting the interests of creditors, encouraging the development of an entrepreneurial class) and achieving the desired balance between the specific objectives identified above. Insolvency laws achieve that balance by reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals. As such, an insolvency law can have widespread effects in the broader economy.....

[...]

17. There is no universal solution to the design of an insolvency law because States vary significantly in their needs, as do their laws on other issues of key importance to insolvency, such as security interests, property and contract rights, remedies and enforcement procedures. Although there may be no universal solution, most insolvency laws address the range of issues raised by the key objectives discussed above, albeit with different emphasis and focus. Some laws favour stronger recognition and enforcement of creditor rights and commercial bargains in insolvency and give creditors more control over the conduct of insolvency proceedings than the debtor (sometimes referred to as "creditor-friendly" regimes). Other laws lean towards giving the debtor more control over the proceedings (referred to as "debtor-friendly" regimes), while yet others seek to strike a balance in the middle....." (emphasis supplied) 95 With this legislative guidance from international law, the BLRC was commissioned by the Government of India for submitting a report with recommendations of reforms for the existing regime and a draft of the proposed Insolvency and Bankruptcy Code. In November 2015, the BLRC Report Pgs 14-16 of the UNCITRAL Legislative Guide to an Insolvency Law, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed on 20 August 2021 PART G published its report in two volumes, with the first volume57 delineating the rationale and the second volume providing the design of the proposed legislation. 96 The BLRC report noted that the insolvency regime was due for a major overhaul as the recovery rates in India were among the lowest in the world58 and a revamped, coherent code was envisaged with speed and predictability woven into its underlying design to ensure higher recovery rates and immediate liquidation, in the event of a failed resolution. As noted by this Court in Essar Steel (supra), the insolvency regime in India was overhauled after the provisions of SICA, SARFAESI and Recovery of Debts Act, in spite of providing for expeditious determination, were used by defaulting companies to enjoy extended moratorium periods and failure to enforce timelines meant legal proceedings would drag on for years and not result in recovery of stressed assets59. Similarly, in its observation on "Speed is of Essence", the BLRC report elaborated the commercial purpose of a revamped insolvency regime in the following terms60:

> "Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely

it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value supra note 55 Executive Summary, BLRC Report, supra note 55 Para 118, Essar Steel (supra) Executive Summary, BLRC Report, supra note 55 PART G destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay." In identifying the sources of delay, adjudicating mechanisms were identified as one of the two important sources of delay which need to be equipped with the right resources. In order to respond to the rapid changes in the economy, the BLRC report recommended the formation of an IBBI which would function as a regulator and formulate regulations that dynamically detail the procedural norms of the working of the IBC with the necessary immediacy. It is also important for this Court, as a constitutional authority which determines questions of law concerning the IBC framework, to note that a rapid liquidation may sometimes be preferable to a protracted CIRP. This sentiment was stressed in the BLRC Report, in its concluding statement in the Executive Summary, which noted:

"Conclusion The failure of some business plans is integral to the process of the market economy. When business failure takes place, the best outcome for society is to have a rapid re-negotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigor and greater competition.

India is in the process of laying the foundations of a mature market economy. This involves well drafted modern laws, that replace the laws of the preceding 100 years, and high performance organisations which enforce these new laws. The Committee has endeavored to provide one critical building block of this process, with a modern insolvency and bankruptcy code, and the design of associated institutional infrastructure which reduces delays and transaction costs. We hope that the implementation of this report will increase GDP growth in India by fostering the emergence of a modern credit market, and particularly the corporate bond market. PART G GDP growth will accelerate when more credit is available to new firms including firms which lack tangible capital. While many other things need to be done in achieving a sound system of finance and firms, this is one critical building block of that edifice."

97 A reading together of the UNCITRAL Guide and the BLRC Report clarifies, in no uncertain terms, that the procedure designed for the insolvency process is critical for allocating economic coordination between the parties who partake in, or are bound by the process. This procedure

produces substantive rights and obligations. For instance, the composition of the CoC, the method and percentage of its voting, the timelines for CIRP, the obligation on the RP to file specific forms after every stage of the process and the obligation to explain to the Adjudicating Authority reasons for any deviations from the timeline while submitting a Resolution Plan, and other such procedural requirements create a mechanism which tightly structures the conduct of all participants in the insolvency process. This process invariably has an impact on the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework. An analysis of the framework of the statute and regulations provides an insight into the dynamic and comprehensive nature of the statute. Upholding the procedural design and sanctity of the process is critical to its functioning. The interpretative task of the Adjudicating Authority, Appellate Authority, and even this Court, must be cognizant of, and allied with that objective. The UNCITRAL Guide has echoed PART G this position by noting the interplay between the procedural design of the insolvency law and the corresponding institutional infrastructure by observing61:

> "27. While the institutional framework is not discussed in any detail in the Legislative Guide, some of the issues are touched upon below. Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role in determining how roles are to be allocated between the various participants, in particular in terms of decision-making. To the extent that the insolvency law places considerable responsibility upon the institutional infrastructure to make key decisions, it is essential that that infrastructure be sufficiently developed to enable the required decisions to be made."

98 Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinized for broader compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC. Any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP, the economy of the country and the lives of the workers and other allied parties who page 20, UNCITRAL Guide, supra note 56 PART H are statutorily bound by the impact of a resolution or liquidation of a Corporate Debtor.

H Nature of a Resolution Plan

99 Before we advert to whether withdrawals or modifications by successful

Resolution Applicants are permissible under the IBC, we must begin by understanding the nature of a Resolution Plan. "Resolution Plan" has been defined in Section 5(26) of the IBC in the following

terms:

> "(26) "resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;
>
> Explanation.—For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;" The Explanation to the provision was added by the Insolvency and Bankruptcy Code (Amendment) Act 2019. Further, the term "Resolution Applicant" was substituted for "any person" by the Insolvency and Bankruptcy Code (Amendment) Act 2018.
>
> 100 The term "Resolution Applicant" has been defined in Section 5(25) of the IBC as follows:
>
> "(25) "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section 25 or pursuant to Section 54-K, as the case may be" PART H 101 The IBC provides a roadmap for the entire CIRP in Chapter II of Part II.

This process is tightly regulated to include, inter alia, timelines of the CIRP specified by Section 12, duties of the RP to provide adequate information to propose a Resolution Plan in Section 29 and restrictions on who can be a Resolution Applicant in Section 29A. Thereafter, Section 30 provides for the submission of a Resolution Plan, and it reads as follows:

> "30. Submission of resolution plan.—(1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under Section 29-A to the resolution professional prepared on the basis of the information memorandum.
>
> (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 such creditors in the event of a liquidation of the corporate debtor under Section 53; or

(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 PART H provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(i) where a 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.

Explanation.—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2). (4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent 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 of 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:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

PART H Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of Section 29-A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of Section 29-A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of Section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority." Once a Resolution Applicant submits a Resolution Plan under sub-Section (1) of Section 30, the RP must assess whether it conforms with all the requirements of sub-Section (2). Having satisfied itself, the RP under sub-Section (3) must then present those Resolution Plans to the CoC which fulfill the criteria under sub-

Section (2). The CoC will then proceed to decide on the approval of the Resolution Plan, with a majority vote of sixty-six percent, after satisfying itself that the requirements under sub-Section (4) have been met, including testing the Resolution Plan for its feasibility and viability. A Resolution Applicant may attend this meeting of the CoC under sub-Section (5), but it does not have a right to vote PART H unless it is also a financial creditor. The Resolution Plan approved by the CoC under sub-Section (4) is then placed by the RP before the Adjudicating Authority for its approval under sub-Section (6).

102 Other than the IBC, the process is also regulated by the CIRP Regulations created under the IBC. Regulation 37 provides an illustration of the solutions which can be proposed in a Resolution Plan. Regulation 38 provides for the mandatory contents of a Resolution Plan, which are similar to the pre-conditions mentioned in Section 30(2) of the IBC. Regulation 39 provides for the process of approval of a Resolution Plan by the CoC, and under sub-Regulation (3), the CoC has to evaluate every Resolution Plan based on an "evaluation matrix" it has come up with under Regulation 5(ha).

103 Having briefly taken an overview of the process, we now understand that there are broadly three stages: (i) the first stage is prior to and ends with the approval of the Resolution Plan by the CoC; (ii) the second stage is the interim period between the Resolution Plan's approval by the CoC and before its confirmation by the Adjudicating Authority; and (iii) the third stage is after the approval of the Resolution Plan by the Adjudicating Authority. In the first stage, the relationship between the parties is explicitly governed by the provisions of the IBC – such as the right of a prospective Resolution Applicant to seek the IM and RFRP upon submission of its EOI, which may have been rejected by the RP (as it happened in the Kundan Care Appeal). In the third stage, the same holds true since Section 31(1) makes the Resolution Plan binding upon all the stakeholders and its violation will attract a penalty under Section 74 of the IBC. However, what we are assessing right now is the interim second stage between both of those. To PART H understand the relationship of the parties therein, it becomes important to understand the exact "nature" of the Resolution Plan after it has been submitted to the Adjudicating Authority and before it has been approved under Section 31(1).

104 To summarize the arguments of the parties, the appellants have argued that Resolution Plans are in the nature of an offer, which becomes binding as a concluded contract only once the Adjudicating Authority has approved the Resolution Plan. Section 7 of the Contract Act requires the acceptance of offer to be absolute, unconditional and unqualified. Since the approval by the CoC is effectively conditional upon the confirmation of the Plan by the Adjudicating Authority, it cannot be said that there is absolute acceptance of the Resolution Plan. Alternatively, it has been argued that Resolution Plans approved by the CoC are contingent contracts, whose enforceability is conditional upon the approval of the Adjudicating Authority in accordance with Section 32 of the Contract Act. The Respondents (RPs and the CoCs) have argued that a concluded contract comes into being when the Resolution Plan is approved by the CoC and a successful Resolution Applicant cannot renege from their contractual obligation to implement the Resolution Plan. In furtherance of this argument, Mr Shyam Divan appearing for the E-CoC made a reference to the Specific Relief (Amendment) Act 2018, which has brought a change to the regime on contract enforcement in India by making specific performance the norm rather than the exception.

105 The determination of the nature of the Resolution Plan would help us establish the source of the legal force of the Resolution Plan – whether it is the PART H statute, i.e., the IBC or the law of contract. The insolvency process, as governed by the IBC, does not merely structure the conduct of all the participants in the process after finalization and approval of a Resolution Plan by a CoC, but also the conduct stemming from the very first steps of inviting prospective Resolution Applicants. The RP, with the approval of the CoC62, invites prospective Resolution Applicants through an RFRP. Once an unconditional EOI has been received from prospective Resolution Applicants who

are otherwise eligible under Section 29A, the RP prepares an IM as per the provisions of Section 29 which furnishes all relevant information of the Corporate Debtor to enable prospective Resolution Applicants to make an informed decision, before proposing a Resolution Plan. As a consequence of the IBC and its regulations, prospective Resolution Applicants, who are not disqualified under Section 29A, propose drafts of their Resolution Plans. The RP examines the Resolution Plan against the contours of Section 30(2) and submits only the eligible plans to the CoC63. Prior to the IBBI (CIRP) (Fourth Amendment) Regulations 2020, which now requires the CoC to vote on all Plans simultaneously after recording its deliberations on the feasibility and viability of each Plan, Regulation 39(3) earlier enabled the CoC to approve a Resolution Plan with "such modifications as it deems fit". This meant that the prospective Resolution Applicants and the CoC would indulge in several rounds of negotiations, within a strict time-frame, to arrive at a mutually agreeable Resolution Plan which was then subject to voting by the CoC. Subsequent to the voting, the RP would submit the plan to the Adjudicating Authority along with receipt of the PBG and a compliance certificate Section 25(2)(h), IBC Regulation 39(2), CIRP Regulations PART H in the form of Form H. Each of the stages detailed above correspond to several rights and obligations on all parties that are specifically created by the statute. 106 Since the interpretation of the IBBI (CIRP)(Fourth Amendment) Regulations 2020 and the impact on the Resolution Applicants and the CoC to negotiate the terms of the Resolution Plan is not before this Court and the present appeal essentially seeks to determine the nature of the Resolution Plan after its approval by the CoC and prior to its approval by the Adjudicating Authority, this Court will proceed to determine of the nature of such a Plan, on the assumption of the law as it stood then, i.e., Regulation 39(3) which directed that "[t]he 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"64. This power of the CoC to suggest modifications invariably entailed an element of negotiation with the Resolution Applicants, who would make suitable revisions and re-submit their Resolution Plans. The scope of a commercial bargain with the Resolution Applicants evinces a sense of a negotiated agreement that is arrived between the parties, which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant.

107 If this court were to hold that CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This As substituted by the Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04-07-2018). Prior to this substitution, Regulation 39(3) stated "the committee may approve any resolution plan with such modifications as it deems fit." PART H would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies and damages would become applicable to CoC- approved Resolution Plans. For instance, in the United States, plans confirmed by courts have been characterized as contracts, whose breach can even give rise to contractual remedies. In In re Hoffinger Indus, Inc65, a bankruptcy court in Arkansas has held that "a confirmed plan should be enforceable and amenable to damages between contractually bound parties." Indeed, it has been argued before us that Resolution Plans should be enforced through the contractual remedy of specific performance. Further, a determination that Resolution Plans are contracts in the period between approval by the CoC and the approval of the Adjudicating Authority would require us to analyse whether all elements of contract formation have

been satisfied, including the question of whether the acceptance of the Resolution Plan by the CoC fulfils the criteria laid down under Section 7 of the Contract Act or whether the conditionality of seeking approval from the Adjudicating Authority makes the Resolution Plan a contingent contract. Our intent of laying down the consequences of our determination of Resolution Plans as contracts is to highlight the importance of ascertaining the nature of a CoC-approved Resolution Plan, prior to its approval by the Adjudicating Authority. 108 The text of the IBC does not specify whether Resolution Plans at the second stage of the process, i.e., in the intervening period of submission to and approval by the Adjudicating Authority, are pure contracts. As noted previously, by specifications such as eligibility for resolution applicants, the contents of the IM and duties of the RP to prospective Resolution Applicants and statutory 327 B.R. 389 (Bankr. E.D. Ark. 2005), United States Bankruptcy Court, E.D. Arkansas PART H procedures on timelines and voting, strictly govern the insolvency process even prior to the submission of the Plan to the Adjudicating Authority. The CoC, who the appellants allege is in the nature of a free contracting party, is governed by the binding principles of the statute with regard to the contents and nature of the statutory plan that it approves under Section 30(4) and even its own composition. 109 Section 30(4) provides that the consent of all the members of the CoC, though a unanimous vote is not required and a sixty-six per cent vote is sufficient for approval of a resolution plan. The constitution of the CoC is based on specific scenarios envisaged in the statute and accounts for varying compositions, based on factors such as the nature and quantum of debt owed. For example, if it comprises of operational creditors alone, the percentage of debt owed between the operational and financial creditors and other such variables impact voting thresholds inter se members of the CoC. A sixty-six per cent vote of the CoC is required to approve a Resolution Plan. The dissenting creditors are deemed to have given their approval and are bound by the decision of the majority of the CoC. The dissenting creditors are bound as a result of the statutory provision and not because they have actually consented to be parties to such an arrangement. Other elements governing the Resolution Plan indicate that the entire process from initiation and leading up to its acceptance by the CoC takes place within the framework of the IBC. In addition, the IBC provides penalties for non-compliance with the Resolution Plan after its approval under Section 31 and forfeiture of the PBG for failing to implement the Resolution Plan or contributing to the failure of its implementation. The violation of the terms of the Resolution Plan does not give rise to a claim of damages, rather it leads to prosecution and imposition of PART H punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.

110 The CoC even with the requisite majority, while approving the Resolution Plan must consider the feasibility and viability of the Plan and 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 of the IBC. The CoC cannot approve a Resolution Plan proposed by an applicant barred under Section 29A of the IBC. Regulation 37 and 38 of the CIRP Regulations govern the contents of a Resolution Plan. Furthermore, a Resolution Plan, if in compliance with the mandate of the IBC, cannot be rejected by the Adjudicating Authority and becomes binding on its approval upon all stakeholders – including the Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of the CoC and the workforce of the Corporate Debtor who would now

be governed by a new management. Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity becomes inapplicable once the Adjudicating Authority confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan. In fact, a PART H commentator has noted that the purpose of bankruptcy law is to actually solve a specific 'contracting failure' that accompanies financial distress. Such a contracting failure arises because "financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario." Thus, insolvency law recognizes that parties can take benefit of such 'incomplete contract' to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., "the law puts in place guardrails that give the parties room to bargain while keeping them from taking position that veer toward extreme hold up"66.

111 It may be useful to refer to how this Court has analyzed instruments that are analogous to a Resolution Plan. In SK Gupta v. KP Jain67, this Court while discussing the nature of compromise or arrangements entered between a company and its creditors or members observed that such a compromise or arrangement once sanctioned by the court is not merely an agreement between parties because it binds even dissenting creditors or members through statutory force. This Court made the following observations:

> "12...The scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that Anthony J. Casey, 'Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy', Columbia Law Review Vol 120 No 7, available at <https://columbialawreview.org/content/chapter-11s-renegotiation-framework-and-the-purpose-of-corporate-bankruptcy/> accessed on 5 September 2021 (1979) 3 SCC 54 PART H individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" [see J.K. (Bombay) Pvt. Ltd. v. New Kaiser-i-

Hind Spg. & Wvg. Co. Ltd. [AIR 1970 SC 1041 : (1969) 2 SCR 866, 891 : (1970) 40 Com Cas 689]].." (emphasis supplied) 112 While the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant. The Resolution Plan cannot be construed purely as a 'contract' governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that "[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors"68. The BLRC Report also mentions that, "the RP submits a binding agreement to the Adjudicator

before the default maximum date"69. We have further discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract. 113 The BLRC Report, which furnished the first draft of the IBC and elaborated on the aims behind the overhaul of the insolvency regime, refers to a CoC- approved Resolution Plan as a 'binding contract' in one instance and refers to it as a 'binding agreement' in other instances. The report also refers to a CoC-

Page 13, BLRC Report, supra note 55 Page 92, BLRC Report, supra note 55 PART H approved Resolution Plan as a 'financial arrangement'70, 'revival plan'71 or a 'solution'72. The interchangeability of the terms – 'agreement', 'contract', 'financial arrangement', 'revival plan' and 'solution' indicates that there is no clear intention of the BLRC in characterizing the nature of the Resolution Plan as a contract. The binding effect of the Resolution Plan has the consequence of preventing the CoC or the Resolution Applicant to renege from its terms after the plan has been approved by the CoC through a voting mechanism. The fleeting mention of a 'binding contract' on one occasion in the BLRC Report (which was a pre- legislative text that underwent subsequent modifications by the Legislature) to indicate the binding nature of the Resolution Plan and the finality of negotiations once it is approved by the CoC, does not establish the legal nature of the document, especially when it is not complemented by the text and design of the IBC.

114 Certain stages of the CIRP resemble the stages involved in the formation of a contract. Echoes of the process involved in the formation of a contract resonate in the steps antecedent to the approval of a Resolution Plan such as: (i) the issuance of an RFRP may be equated to an invitation to offer; (ii) a Resolution Plan can be considered as a proposal or offer; and (iii) the approval by the CoC may be similar to an acceptance of offer. The terms of the Resolution Plan contain a commercial bargain between the CoC and Resolution Applicant. There is also an intention to create legal relations with binding effect. However, it is the structure of the IBC which confers legal force on the CoC-approved Page 21, BLRC Report, supra note 55 Page 13, BLRC Report, supra note 55 Pages 21, 75 and 126, BLRC Report, supra note 55 PART H Resolution Plan. The validity of the Resolution Plan is not premised upon the agreement or consent of those bound (although as a procedural step the IBC requires sixty-six percent votes of creditors), but upon its compliance with the procedure stipulated under the IBC.

115 It was argued for the E-RP that a Resolution Plan is a contract executed in furtherance of a statutory regime under the IBC. A question arises whether a Resolution Plan can be classified as a 'statutory contract'. This Court has defined a statutory contract in India Thermal Power Ltd. v. State of MP73 in the following terms:

> "11. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the

> tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and (2000) 3 SCC 379 PART H which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2)…" (emphasis supplied)

116 The above observations were in the context of a PPA entered into under the provisions of Electricity Supply Act 1948. Section 43-A(1) of the Act stipulated that the generating company may enter into a contract with the Electricity Board. Thus, the judgement pre-supposes the existence of a subsisting contract. The controversy in the case was whether the PPA could be characterized as a statutory contract. To say that a Resolution Plan is a statutory contract, we must first consider whether the IBC envisages the CoC-approved Resolution Plan as a contract. There is no provision under the IBC referring to a Resolution Plan as a contract, unlike Section 43-A(1) of the Electricity Supply Act 1948 which mentions that a contract may be entered into between the concerned parties. The legal force of a Resolution Plan arises due to the framework provided under the IBC. The mechanisms of the IBC provide sufficient guidance on the conduct of all participants in the process and the binding effect of the CoC- approved Resolution Plan is evidenced by the execution of a PBG furnished by the successful Resolution Applicant, in compliance with the CIRP Regulations. This PBG is returnable once the Adjudicating Authority approves the Resolution Plan under Section 31 and makes it binding on all stakeholders. Therefore, the IBC and its regulations institute sufficient safeguards to ensure the binding effect of a CoC-approved Resolution Plan. In our discussion in Sections I and J below, PART H we further elaborate on the nature of a CoC-approved Resolution Plan and the code of conduct that is permissible by the statutory framework. 117 While insolvency regimes are specific to each jurisdiction, it may be useful to analyze how Resolution Plans or similar instruments are characterized in foreign jurisdictions.

118 Certain precedents from other jurisdictions have been cited by Mr Nakul Devan for the E-RP, to argue that contracts entered into, in furtherance of a statutory regime have to be interpreted in accordance with the objective and intent of the concerned statute. It has been submitted that the Resolution Plan is one variety of such a statutory contract. However, since we have arrived at the decision that Resolution Plans are not statutory contracts, it is not required for us to analyze

whether terms of the Resolution Plan can be given effect to, as terms of a contract, as long as they further the statutory objective. It is also important to note that India adopts a unique insolvency framework where third-parties have the right to participate in an insolvency regime and acquire the Corporate Debtor as a going concern. In several jurisdictions, the insolvency arrangements are between the debtor and the creditors, which has a closer resemblance to 'repayment plans' by corporate debtors, as envisaged by the IBC under Section 105 and broadly prescribed under Chapter III as opposed to 'resolution plans' that are not proposed by debtors. In any event, an analysis of such arrangements is detailed below.

119 In the United Kingdom, the UK Act allows the directors, administrator or liquidator of a company to propose a company voluntary arrangement or a 'CVA' PART H (similar to Section 10 of the IBC), which has to be approved by creditors having seventy-five per cent of the vote share. Section 5(2)(b)74 of the UK Act provides that once the CVA is approved, the company and the creditors are bound by it. Professor Roy Goode in his authoritative treatise Principles of Corporate Insolvency Law75 observes that, "[t]he wording of s.5(2)(b), discussed below, has led the courts to characterise the relationship between the parties to a CVA as essentially contractual in nature and its scope and effect are determined by its terms, which fall to be interpreted by application of the ordinary principles of contractual interpretation." In some judgements of the Court of Appeal, English Courts have held that a CVA creates a contractual obligation76, is a statutory contract77, or has a contractual effect and is subject to ordinary principles of interpretation applying to contracts78. However, the position on this issue is not completely settled. In a recent decision of the High Court of Justice79, it was held that the CVA is not a contract. Crucially the court made the following observations:

> "83. Further, and as noted by Mr Pymont QC in SHB Realisations Ltd, a voluntary arrangement is not formed or analysed as a contract. Certain legal principles applicable to contracts, for example their interpretation, are applied to voluntary arrangements; that is no less true of other instruments which are not contracts. Other principles of contract law, for example those relating to penalties, are not applicable to voluntary arrangements. Mr Pymont QC concluded that a voluntary arrangement is not a contract.
>
> "5 ...(2) The voluntary arrangement— (b) binds every person who in accordance with the rules — (i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made, or (ii) would have been so entitled if he had had notice of it — as if he were a party to the voluntary arrangement." Roy Goode, Principles of Corporate Insolvency Law (5th edn., Sweet and Maxwell, 2018) Re TBL Realisations Plc, Oakley-Smith v Greenberg, [2004] B.C.C. 81 (Court of Appeal) Tucker v Gold Fields Mining LCC, [2010] B.C.C. 544 (Court of Appeal) Heis v Financial Services Compensation Scheme Ltd, [2018] EWCA Civ 1327 (Court of Appeal) Re Rhino Enterprises Properties Ltd. Schofield v Smith [2020] EWHC 2370 (Ch).

> PART H Characterising a CVA as a hypothetical agreement or by reference to a statutory hypothesis neatly and accurately makes clear that a CVA is different from, and is not in fact, a contract." (emphasis supplied)

120 In Singapore, under Section 210 (3AA and 3AB) of the Singapore Act, a compromise or arrangement between the company and its creditors becomes binding when the requisite majority of creditors agree to it and it is approved by the court. The Singapore Court of Appeal has referred to such a scheme of arrangement as a 'contractual scheme'80. Subsequently, a controversy arose before the Singapore Court of Appeal on whether a scheme can be substantially amended after it has been approved by the court. The court observed that the answer to this question depends upon the nature of schemes of arrangement; whether the schemes derived their efficacy from the order of the court or the statute. The court observed that under the English approach81, a scheme approved by the majority of the creditors derives its efficacy from the statute and is a statutory contract. Thus, the court has a limited jurisdiction and cannot make substantial alterations to such a scheme. However, the court noted that in Australia, the scheme operates as an order of the court. The court held that its previous decision which referred to a scheme of arrangement as a 'contractual scheme' does not mean that in Singapore such schemes are considered as statutory contracts. The court chose to follow the Australian approach holding that a scheme takes effect as an order of the court and like any other court order, it can be altered, in certain circumstances. The court observed:

> Daewoo Singapore Pte Ltd v CEL Tractors Private Limited, [2001] 4 SLR 35 (Court of Appeal) Kempe and Another v. Ambassador Insurance Co., [1998] 1 W.L.R. 271 PART H "66. ....We would also add, in respect of the latter concern, that a court order is in no way less binding than a statutory contract on the parties to a scheme of arrangement, and it is trite law as well as common sense that a court order cannot be altered at will by the parties who are subject to the order...."

121 In Australia, as noted above, the scheme of arrangement operates as a court order82. The Supreme Court of New South Wales, rejecting the English approach of characterizing schemes (different from CVAs) as statutory contracts, observed:

> "46..
>
> [....]
>
> (b) In Australia, [the] authorities [namely, Hill v Anderson Meat Industries Ltd [1971] 1 NSWLR 868, Caratti and Bond Corp Holdings Ltd v Western Australia (1992) 7 ACSR 472] establish that an approved scheme does indeed derive its force from the court order, [and] not from the antecedent resolutions of members and creditors."

122 Under the United States Bankruptcy Code, a restructuring plan becomes binding once it is confirmed by the court in terms of Section 1141. There are decisions of the bankruptcy courts in the United States which indicate that such restructuring plans are characterized as contracts83. It has

been held that a confirmed plan is binding on the debtor and the plan proponent and has the same effect as contract84. However, commentators have noted that the United States Bankruptcy Code's, "embrace of a contractual paradigm is somewhat inconsistent...Both bankruptcy courts and the Code itself are far more Caratti v Hillman [1974] WAR 92 (Supreme Court of Wester Australia) In re Hoffinger Indus, Inc, 327 B.R. 389 (Bankr. E.D. Ark. 2005), United States Bankruptcy Court, E.D. Arkansas In Re Shenandoah Realty Partners, L.P. v. Ascend Health Care, Inc, 287 BR 867 (US Bankruptcy Court, WD) PART H sympathetic to ex post than to ex ante contracting"85. It has been further observed that, "there are a few provisions in the Bankruptcy Code inviting parties to "otherwise agree" by contract and in some contexts the Code explicitly overrides ex ante contracts", these include provisions of the Code overriding ipso facto clauses in pre-bankruptcy contracts which stipulate that a necessary condition of default is filing of an insolvency or bankruptcy petition86. 123 The above discussion indicates the law in other jurisdictions, irrespective of differing frameworks, is not completely settled on whether instruments akin to Resolution Plans are pure contracts. To recapitulate, in the United Kingdom, while schemes of arrangement are characterized as statutory contracts, the law on CVAs, which are similar to the insolvency process initiated under Section 10 of the IBC, is not clear with the High Court of Justice noting that it is not a contract87, even though principles of interpretation applicable to contracts may be used for constructing the language of such CVAs. In Singapore, the English approach of denoting schemes as statutory contracts was rejected and it was held that the schemes operate as orders of court. A similar position was taken under the Australian law. The Singapore and Australian courts specifically indicate that schemes are more than mere contracts with a "super-added imprimatur" by a court, rather they envisage an active role to be played by court in supervising the schemes to the extent of making substantial alterations to it, if required. In the United States, restructuring plans have been equated to David Skeel and George Triantis, 'Bankruptcy's Uneasy Shift to a Contractual Paradigm', Faculty Scholarship at Penn Law, (2018), available at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2993&context=faculty_scholarship> accessed on 5 September 2021 Ibid.

Rhino supra note 78 PART H contracts, but as noted above there has been some inconsistency in relation to upholding the contractual bargain.

124 The lack of an apparent international consensus on the issue of whether instruments like CoC-approved Resolution Plans are contracts, prior to the Court's sanction, is also attributable to the peculiarity of the insolvency regime in each jurisdiction. This Court will have to be wary of transplanting international doctrines that are evolved as responses to the specific features of a jurisdiction's insolvency regime, without identifying an analogous framework in our insolvency regime.

125 The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and

applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority88. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that "(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 its deliberations on the feasibility and viability of the resolution plans"
>
> PART H CoC-approved Resolution Plans are contracts. CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3)89 further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC90. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC- approved Resolution Plans owing to the nature of the IBC. Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available "39....(3)The committee shall-
>
> (a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix; (b) record its deliberations on the feasibility and viability of each resolution plan; and
>
> (c) vote on all such resolution plans simultaneously. (3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes. (3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:
>
> Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting:

Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code……." available at <https://www.ibbi.gov.in/uploads/whatsnew/fbe59358a8c440d001f3b950be4a1c67.pdf> accessed on 5 September 2021 PART H to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the Adjudicating Authority. The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP91. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments. However, if the intention was to view a CoC- approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and Pages 55-56, Report of the Insolvency Law Committee (February 2020), Ministry of Corporate Affairs, available at <https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf> accessed on 20 August 2021 PART H distort the mechanism of the IBC altogether. This Court in Laxmi Pat Surana v. Union Bank of India92 has held that the IBC is a self-contained Code. Thus, importing principles of any other law or a statute like the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be of "such nature, value, duration and source, as may be specified in

the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor". Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation. This Court in Amtek Auto (supra), had curbed a similar attempt by a (2020) SCC OnLine SC 1187 PART I successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC.

I Statutory framework governing the CIRP

126 The CIRP is a time bound process with a specific aim of maximizing the

value of assets. IBC and the regulations made under it lay down strict timelines which need to be adhered to by all the parties, at all stages of the CIRP. The CIRP is expected to be completed within 180 days under Section 12(1) of the IBC. In terms of sub-Section (2) and (3) of Section 12, an extension can be sought from the Adjudicating Authority for extending this period up to 90 days.

The first proviso to Section 12(3) clarifies that such an extension can only be granted once. In Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta93, this Court had held that the time taken in legal proceedings in relation to the CIRP must be excluded from the timeline mentioned in Section 12. Since this could (2019) 2 SCC 1, para 86 PART I extend the CIRP indefinitely, the Insolvency and Bankruptcy Code (Amendment) Act 2019, inserted a second proviso to Section 12(3) with effect from 16 August 2019 to state that the CIRP in its entirety must be mandatorily completed within 330 days from the insolvency commencement date, including the time taken in legal proceedings. A legislative amendment that takes away the basis of a judicial finding is indicative of the strong emphasis of the IBC on its timelines and its attempt to thwart the prospect of stakeholders engaging in multiple litigations, solely with the intent of causing undue delay. Delays are also a cause of concern because the liquidation value depletes rapidly, irrespective of the imposition of a moratorium, and a delayed liquidation is harmful to the value of the Corporate Debtor, the recovery rate of the CoC and consequentially, the economy at large. In Essar Steel (supra) a three judge Bench of this Court, emphasized the rationale of the Insolvency and Bankruptcy Code (Amendment)

Act 2019, which introduced the second proviso to Section 12(3). The court adverted to the BLRC report which underscored delays in legal proceedings as the cause of the failure of the previous insolvency regime under the SICA and the recovery mechanism in SARFAESI. It also extracted a Speech of the Union Minister in the Rajya Sabha to explain the proposal for the amendment in 2019, which was to avoid the same pitfalls in the IBC. The Court, speaking through Justice R F Nariman, noted:

> "119. The speech of the Hon'ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been PART I encouraging. The Minister in her speech to the Rajya Sabha gives the following facts and figures:
>
> "Now, regarding the Corporate Insolvency Resolution Process (CIRP), under the Code, I want to give you data again as of 30-6-2019. First, I will talk about the status of CIRPs. Number of admitted cases is 2162; number of cases closed on appeal, which I read out about, is 174; number of cases closed by withdrawal under Section 12-A, is 101, I have given you a slightly later data; number of cases closed by resolution is 120; closed by liquidation, 475; and ongoing CIRPs are 1292.

So, now, I would like to mention the number of days of waiting. I would like to mention here the details of the ongoing CIRPs, along with the timelines. Ongoing CIRPs are 1292, the figure just now I gave you. Over 330 days, 335 cases; over 270 days, 445 cases; over 180 days and less than 270 days, 221 cases; over 90 days but less than 180 days, 349 cases; less than 90 days, 277 cases. The number of days pending includes time, if any, excluded by the tribunals. So, that gives you a picture on what is the kind of wait and, therefore, why we want to bring the amendments for this speeding up." [...]

123. As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, we take aid from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about." 127 The decision in Essar Steel (supra) while reiterating the rationale of the IBC for ensuring timely resolution of stressed assets as a key factor, had to defer to the principles of actus curiae neminem gravabit, i.e., no person should suffer because of the fault of the court or the delay in the procedure. In spite of this Court's precedents which otherwise strike down provisions which interfere with a litigant's fundamental right to non-arbitrary treatment under Article 14 by mandatory conclusion of proceedings without providing for any exceptions, this Court refused to strike down the second proviso to Section 12(3) in its entirety. It noted that the previous statutory experiments for insolvency had failed because PART I of delay as a result of extended legal proceedings and chose to only strike down the word 'mandatorily', keeping the rest of the provision intact. Therefore, the law as it stands, mandates the conclusion of the CIRP – including time taken in legal proceedings, within 330 days with a short

extension to be granted only in exceptional cases. However, the Court has warned that this discretion must be exercised sparingly and only in the following situations:

> "127...Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation." PART I

128 The evolution of the IBC framework, through an interplay of legislative amendments, regulations and judicial interpretation, consistently emphasizes the predictability and timeliness of the IBC. The legislature and the IBBI have been proactive to introduce amendments to the procedural framework, that respond to changes in the economy. For instance, Regulation 40(c), which came into effect on 20 April 2020, was inserted in the CIRP Regulations to take into account the delay that may be caused to the CIRP on account of the lockdown being imposed by the Central Government due to the COVID-19 pandemic. Regulation 40(c) provides that the delay in completing any activity related to the CIRP because of imposition of lockdown will not be counted for the purposes of the timeline that has been stipulated under the statutory framework. If the CIRP is not completed within the prescribed timeline, the Corporator Debtor is sent into liquidation. This understanding of the evolution of the law is critical to our task of judicial interpretation. We cannot afford to be swayed by abstract conceptions of equity and 'contractual freedom' of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC. 129 The IBC and the regulations provide a detailed procedure for the completion of CIRP. An application for initiation of CIRP is filed either by the financial creditor, operational

creditor or the Corporate Debtor itself under Sections 7, 9 and 10 of the IBC, respectively. Once the application is admitted by the Adjudicating Authority, it passes the following orders under Section 13(1) of the IBC: (i) declaration of a moratorium for the purposes referred to in Section 14 of the IBC; (ii) causing a public announcement to be made for the initiation of CIRP and issuing a call for submissions of claims as may be specified under PART I Section 15 of the IBC; and (iii) appointing an IRP in accordance with Section 16 of the IBC.

130 Section 13(2) provides that the public announcement is to be made immediately after the appointment of an IRP. The word 'immediately' here means not later than three days from the date of appointment as provided in the explanation to Regulation 6(1) of the CIRP Regulations. Section 15 of the IBC lists down the information that should be included in the public announcement of CIRP. It should specify the last date up to which the claims, i.e., a right of payment or right to remedy as defined under Section 3(6) of the IBC, can be made by creditors, workmen and employees. Regulation 6(2)(c) provides that the last date of submission of claims shall be fourteen days from the date of appointment of the IRP. The public announcement also specifies the date on which the CIRP shall close, which is the one hundred and eightieth day from the date of the admission of the application under Sections 7, 9 or 10, as may be applicable. Regulation 6 of the CIRP Regulations stipulates additional requirements relating to how the public announcement is to made. 131 On receipt of claims from the operational creditors, financial creditors, workmen and employees, the IRP prepares a list of creditors after verifying the claims. Regulation 13(1) provides that the verification of all the claims is to be done within seven days from the last date of receipt of the claims. Thereafter, the IRP constitutes a CoC in accordance with Section 21(1) of the IBC. Regulation 17 of the CIRP Regulations stipulates that the IRP must submit a report certifying the constitution of the CoC within two days of the claims being verified. The IRP is required to hold the first meeting of the CoC within seven days of filing of the PART I report under the said regulation. If the appointment of the RP by the CoC is delayed, the IRP is to perform the functions of the RP from the fortieth day of the insolvency commencement date till the RP is appointed under Section 22 of the IBC.

132 The CoC, in its first meeting, appoints the RP in terms of Section 22(2) of the IBC. Section 23(1) provides that the RP is responsible for conducting the entire CIRP and managing the operations of the Corporate Debtor during the CIRP period. The RP continues to manage the operations of the Corporate Debtor after the expiry of CIRP period until an order approving the resolution is passed by the Adjudicating Authority under Section 31(1) of the IBC or a liquidator is appointed under Section 34 of the IBC. The intent of this Section is to ensure that the Corporate Debtor remains a going concern until the Resolution Plan is approved by the Adjudicating Authority. The powers and duties of the RP are listed under Section 23(2) of the IBC.

133 The significant, if not the most important, duty of the RP is to solicit Resolution Plans. The RP is empowered to invite prospective Resolution Applicants who fulfil the criteria as laid down by the RP and approved by the CoC, considering the complexity and the scale of the business operations of the Corporate Debtor and other such conditions specified by the IBBI, to submit a Resolution Plan or Plans under Section 25(2)(h) of the IBC. Further, a person should not be ineligible to be a Resolution Applicant under Section 29A of the IBC. Section 5(25) defines a Resolution Applicant in

the following terms:

> "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the PART I resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25; or pursuant to section 54K, as the case may be."

134 The first step in the process of soliciting a Resolution Plan is the preparation of an IM containing relevant information as specified by the IBBI for formulating a Resolution Plan in accordance with Section 29(1) of the IBC. The contents of the IM are specified under Regulation 36(2) of the CIRP Regulations. Regulation 36(1) of the CIRP Regulations specifies the timelines within which the RP must submit the IM to members of the CoC, which is within two weeks of his appointment but not later than the fifty-fourth day from the insolvency commencement date, whichever is earlier. Thereafter, the RP issues an invitation of EOI not later than the seventy-fifth day from the insolvency commencement date to seek expressions of interest from eligible prospective Resolution Applicants in terms of Regulation 36A of the CIRP Regulations. A prospective Resolution Applicant is required to submit an unconditional EOI within the time stipulated under the invitation, which shall not be less than fifteen days from the date of the issue of invitation. The RP conducts a due diligence of the Resolution Applicant based on material available on record in terms of Regulation 36A(8) of the CIRP Regulations. Thereafter, the RP issues a provisional list of eligible prospective Resolution Applicants within ten days of the last date for submission of EOIs to the CoC and to all the prospective Resolution Applicants who had submitted the EOI. Regulation 36A also specifies the timeline within which any objection can be made against the inclusion or exclusion of a prospective Resolution Applicant on the list, which is five days from the issue of the list. The PART I RP is required to publish a final list of prospective Resolution Applicants within ten days of the last date for the receipt of objections by the CoC. 135 Under Regulation 36B of the CIRP Regulations, the RP has to issue the IM, evaluation matrix for consideration of the Resolution Plan and an RFRP within five days of the date of issue of the provisional list of Resolution Applicants to every prospective Resolution Applicant on the list and any other prospective Resolution Applicants who have contested their non-inclusion in the list. Regulation 36B stipulates that the RFRP shall contain detailed steps of each process and the manner and purposes of interaction between the RP and the prospective resolution applicant along with the corresponding timelines. A minimum of thirty days is given to the prospective Resolution Applicant to submit a Resolution Plan. A Resolution Plan is defined under Section 5(26) of the IBC:

> "resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;
>
> Explanation.--For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;"

136 The timeline for the submission of Resolution Plans can be extended by an RP with the approval of the CoC. The RFRP must require the resolution applicant to furnish a performance security in

case their Resolution Plan is approved by the CoC under Regulation 36B(4A). The performance security shall stand forfeited if, after the approval of the Resolution Plan by the Adjudicating Authority, the Resolution Applicant fails to implement or contributes to the failure of implementation of the plan. Under the regulation, a performance security is PART I defined as "security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor". Regulations 37 and 38 list down the mandatory contents of the Resolution Plan.

137 The RP is required to review the Resolution Plan submitted in terms of Section 30(2) of the IBC, which provides that:

> "Section 30 - Submission of resolution plan [...] (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 such creditors in the event of a liquidation of the corporate debtor under section 53; or
>
> (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 PART I provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor--

(i) where a 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.

Explanation.-- For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law." (emphasis supplied) Sub-Section (3) of Section 30 of the IBC provides that the RP shall present Resolution Plans which conform to the above requirements before the CoC for approval. Sub-Section (4) of Section 30 stipulates that the CoC may approve a Resolution Plan by a vote of not less than sixty-six per cent after considering the feasibility and viability of the plan and any such requirements specified by the IBBI.

138 The CoC has been given wide powers under the IBC. It can direct the Corporate Debtor into liquidation any time before the approval by the Adjudicating PART I Authority, under Section 33(2) of the IBC. Further, under Section 12A of the IBC the Adjudicating Authority may allow withdrawal of the application submitted under Sections 7, 9 or 10 of the IBC for initiation of the CIRP (i.e., initiation of the CIRP by the financial creditor, operational creditor and the corporate applicant, respectively) if the withdrawal is approved by ninety per cent of the voting share of the CoC. Dealing with the question whether a successful Resolution Applicant can retreat through the route provided under Section 12A of the IBC, a three- judge Bench of this Court in Maharashtra Seamless v. Padmanabhan Venkatesh94 observed that, "[t]he exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code". However, this Court left the question whether a successful Resolution Applicant "altogether forfeits their right to withdraw from such process [CIRP] or not", open for subsequent judicial determination95.

139 In terms of Regulation 39(4), the RP shall endeavour to submit the Resolution Plan approved by the CoC before the Adjudicating Authority for its approval under Section 31 of the IBC, at least fifteen days before the maximum period for completion of CIRP. Section 31(1) provides that the Adjudicating Authority shall approve the Resolution Plan if it is satisfied that it complies with the requirements set out under Section 30(2) of the IBC. Essentially, the Adjudicating Authority functions as a check on the role of the RP to ensure compliance with Section 30(2) of the IBC and satisfies itself that the plan (2020) 11 SCC 467 Para 29, Ibid.

PART I approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) of the IBC. Once the Resolution Plan is approved by the Adjudicating Authority, it becomes binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan. Section 31(1) of the IBC is extracted below:

> "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 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. Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub- section, satisfy that the resolution plan has provisions for its effective implementation." (emphasis supplied) A contravention of a Resolution Plan binding under Section 31 is punishable under Section 74 (3) of the IBC. Section 74 (3) of the IBC provides thus:

> "Section 74 - Punishment for contravention of moratorium or the resolution plan [....] (3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which PART I shall not be less than one lakh rupees, but may extend to one crore rupees, or with both."

140 If the Resolution Plan is rejected by the Adjudicating Authority, the Corporate Debtor goes into liquidation in accordance with Section 33(1) of the IBC. The order of the Adjudicating Authority rejecting a Resolution Plan and directing liquidation under Section 33 of the IBC can be appealed only on the grounds of material irregularity or fraud, as stipulated under Section 61(4) of the IBC. The order of the Adjudicating Authority approving a Resolution Plan can be appealed before the NCLAT under Section 61(3) of the IBC only on the grounds specified in that section. The grounds of appeal are as follows:

> "Section 61 - Appeals and Appellate Authority [....] (3) An appeal against an order approving a 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.

(4) An appeal against a liquidation order passed under section 33, or sub-section (4) of section 54L, or sub-section (4) of section 54N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order." PART I

141 Under Regulation 39(5) of the CIRP Regulations, the RP is required to send a copy of the order of the Adjudicating Authority accepting or rejecting the Resolution Plan on a 'forthwith basis'. Regulation 39(5A) specifies that within fifteen days of the date of the order of Adjudicating Authority approving the Resolution Plan, the RP must inform each claimant about the principle or formulae for the payment of debts under the Resolution Plan. 142 As noted above, Section 12 of the IBC stipulates the timeline within which the CIRP is to be completed. The RP on the instructions of the CoC may make an application for extension of the CIRP. Regulation 40A of the CIRP Regulations provides a detailed model timeline for CIRP which accounts for all the procedural eventualities that are permitted by the statute and the regulations. Regulation 40A is extracted below:

"40-A. Model time-line for corporate insolvency resolution process.—The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:

Section/Regulation	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement …. of CIRP and appointment of IRP		T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c)/Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14

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Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under Regulation 12(1)	Within 7 days from the receipt of the claim	T+21
	Verification of claims received under Regulation 12(2)		T+97
Section 21(6A)	Application for	Within 2 days	T+23

(b)/Regulation 16-A appointment of from verification AR of claims received under Regulation 17(1) Report certifying Regulation T+23 constitution of 12(1) CoC Section 1st meeting of Within 7 days of T+30] 22/Regulation 19(2) the CoC filing of the report certifying constitution of the CoC, but with five days' notice.

Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	……
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47]
Section 12(A)/Regulation	Submission application withdrawal	Before issue of for EoI of	W

30-A	application admitted		
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35-A	RP to form an opinion on preferential and other transactions	Within 75 days of commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36-A	Publish Form G Invitation of EoI	Within 75 days of commencement	T+75
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List	Within 10 days	T+100

	of RAs by RP	from the last day of receipt of EoI	
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36-B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

AA: Adjudicating Authority; AR: Authorised Representative;

CIRP: Corporate Insolvency Resolution Process; CoC:

Committee of Creditors; EoI: Expression of Interest; IM:

Information Memorandum; IRP: Interim Resolution Professional; RA: Resolution Applicant; RP: Resolution Professional; RFRP: Request for Resolution Plan."

143 The statutory framework governing the CIRP seeks to create a mechanism for resolving insolvency in an efficient, comprehensive and timely manner. The IBC provides a detailed linear process for undertaking CIRP of the Corporate Debtor to minimize any delays, uncertainty in procedure and disputes. The roles and responsibilities of the important actors in the CIRP are

clearly defined under PART I the IBC and its regulations. In Innoventive Industries Ltd v. ICICI Bank96 a three judge Bench of this Court observed that "one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process". Recently, in Gujarat Urja97 (supra) a three judge Bench of this Court observed that a "delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner". The stipulation of timelines and a detailed procedure under the IBC ensures a timely completion of CIRP and introduces transparency, certainty and predictability in the insolvency resolution process. The UNCITRAL Guide also states that the insolvency law of a jurisdiction should be transparent and predictable. It notes the value of such predictability in the following terms98:

> "11. An insolvency law should be transparent and predictable. This will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. Unpredictable application of the insolvency law has the potential to undermine not only the confidence of all participants in insolvency proceedings, but also their willingness to make credit and other investment decisions prior to insolvency. As far as possible, an insolvency law should clearly indicate all provisions of other laws that may affect the conduct of the (2018) 1 SCC 407, para 13.
>
> (2021) SCC OnLine 194, para 71.

Page 13, UNCITRAL Guide, supra 56 PART J insolvency proceedings (e.g. labour law; commercial and contract law; tax law; laws affecting foreign exchange, netting and set-off and debt for equity swaps; and even family and matrimonial law)." This Court should proceed with caution in introducing any element in the insolvency process that may lead to unpredictability, delay and complexity not contemplated by the legislature. With this birds'-eye view of the framework of insolvency through the CIRP, we proceed to answer the question of law raised in this judgement - whether a Resolution Applicant is entitled to withdraw or modify its Resolution Plan, once it has been submitted by the Resolution Professional to the Adjudicating Authority and before it is approved by the latter under Section 31(1) of the IBC.

J Withdrawal of the Resolution Plan by a successful Resolution Applicant under the IBC J.1 The absence of a legislative hook or a regulatory tether to enable a withdrawal 144 The analysis of the statutory framework governing the CIRP and periodic reports of the Insolvency Law Committee indicates that it is a creditor-driven process. The aim of the process, in preferential order, is to: first, enable resolution of the debt by maintaining the corporate debtor as a going concern, in order to preserve the business and employment of the personnel; second, maximize the value of the assets of

the corporate debtor and enable a higher pay-back to its creditors than under liquidation; and third, enable a smoother and PART J faster transition to liquidation in the event that a time bound CIRP fails, in a bid to avert further deterioration of value.

145 Since the aim of the statute is to preserve the interests of the corporate debtor and the CoC, it was recognized that settlements between the corporate debtor and the CoC may be in the best interests of all stakeholders since insolvency is averted. Two decisions of two judge Benches of this Court, in Lokhandwala Kataria Construction (P) Ltd v. Nisus Finance and Investment Managers LLP99 and Uttara Foods and Feeds (P) Ltd v. Mona Pharmachem100, (prior to the insertion of Section 12A which enabled withdrawal of the CIRP on account of settlement between the parties), had refused to effectuate this remedy by exercising inherent powers of the Adjudicating Authority under Rule 11 of the NCLT Rules 2016 or the power of parties to make applications to the Adjudicating Authority under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. In Uttara Foods (supra) this Court had granted a one-time relief under Article 142 of the Constitution since all the parties were present before it and had presented it with signed consent terms. This course of action, in refraining from the exercise of inherent powers to effect procedures and remedies that were not specifically envisaged by the statute, was explicitly affirmed by the Insolvency Law Committee Report dated March 2018101 which proceeded to suggest amendments to the IBC and recommended a ninety per cent voting threshold by the CoC for withdrawals of a CIRP and a specific amendment to Rule 8 of the (2018) 15 SCC 589 (2018) 15 SCC 587 Pages 5 and 101, Report of the Insolvency Law Committee, Ministry of Corporate Affairs (March 2018) available at <https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf> accessed on 20 August 2021 PART J then existing CIRP Rules to enable parties to file such applications. This report led to the insertion of Section 12A which vested the CoC with the power to withdraw the CIRP or vote on such withdrawal, if sought by the Corporate Debtor. This provision was introduced with retrospective effect on 6 June 2018. Significantly, no such exit routes have been contemplated for the Resolution Applicant. It is relevant to note that the newly inserted and then unamended Regulation 30A (w.e.f. 4 July 2018) of the CIRP Regulations stipulated that withdrawal under Section 12A can be allowed through submitting an application to the IRP or RP (as the case maybe) before the invitation for EOI is issued to the public. The CoC was to consider the application within seven days of its constitution and an approval for such application required approval of the ninety per cent of the voting share of the CoC. However, on 14 December 2018, a two judge Bench of this Court, held in Brilliant Alloys (P) Ltd v. S Rajagopal102 that Regulation 30A is directory, and not mandatory in nature since Section 12A of the IBC does not stipulate a deadline by which a withdrawal from the CIRP can be made. Thus, in exceptional cases withdrawals from the CIRP under Section 12A of IBC could be permitted even after the invitation of EOI has been issued. Regulation 30A of the CIRP Regulations was then amended by the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations 2019, w.e.f. 25 July 2019 to reiterate the decision of this Court. The newly amended provision allows for withdrawals even after the invitation for expression of interest has been issued, provided that the applicant states the reasons justifying such withdrawal. Similarly, on 25 January 2019, a two judge (2018) SCC OnLine SC 3154 PART J Bench of this Court in Swiss Ribbons (supra) interpreted the true import of Section 12A and clarified that if the CoC is not yet constituted, a party can approach the Adjudicating Authority, which may in exercise of its inherent powers under Rule 11 of the NCLT Rules 2016, allow

or reject an application for withdrawal or settlement. On 25 July 2019, the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 amended Regulation 30A in terms of this decision in interpreting Section 12A and now specifically provides the procedure under the IBC that relates to affecting a withdrawal under Section 12A before the constitution of the CoC. The applicant submits an application for withdrawal through the IRP, directly before the Adjudicating Authority, since the CoC is not yet constituted to consider such an application. To ensure that the process for withdrawal is timely and efficient, the present Regulation 30A provides that the IRP shall submit an application for withdrawal of the CIRP prior to the constitution of the CoC to the Adjudicating Authority on behalf of the applicant within three days of the receipt. Alternatively, if the application for withdrawal is made after the constitution of the CoC, such application will be considered by the CoC within seven days of its receipt. If the CoC approves such an application with ninety per cent voting share, it is to be submitted to the Adjudicating Authority within three days of approval. Further, the application for withdrawal has to be accompanied by a bank guarantee towards estimated expenses relating to costs of the IRP (in case of a withdrawal prior to constitution of the CoC) or insolvency resolution process costs (where withdrawal is after constitution of the CoC). It is clear that withdrawal of the CIRP is allowed only if it upholds the interests of the CoC, is time-bound, and takes into PART J consideration how the expenses relating to the insolvency process up to withdrawal shall be borne. Thus, even the exit under Section 12A of the CoC, which is not available to the Resolution Applicant, is regulated by procedural provisions indicating that the legislature has applied its mind to the timelines and costs involved in the CIRP. Pertinently, the regulations do not provide for any costs that are payable to the prospective Resolution Applicants or a successful Resolution Applicant, who must have incurred a significant expense in participating in the process. This Court, in Maharashtra Seamless (supra) had denied relief to a Resolution Applicant who had sought to invoke Section 12A to resile from its Resolution Plan. The nature of the statute indicates the clarity of its purpose – primacy of the interests of the creditors who are seeking to cut their losses through a CIRP. Traditional models and understandings of equity or fairness that seek reliefs which are misaligned with the goals of the statute and upset the economic coordination envisaged between the parties, cannot be read into the statute through judicial interpretation. While parties have the freedom to negotiate certain commercial terms of the Resolution Plan to gain wide support, their ability to negotiate is circumscribed by the governing statute. A court cannot interpret the negotiated arrangements that are represented in the Resolution Plan in a manner that hampers the objectives of the IBC which is a speedy, predictable and timely resolution. The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the PART J Corporate Debtor and submitted a considered proposal. It cannot demand vesting of certain powers and rights which have been conspicuously omitted by the legislature under the statute, in furtherance of the policy objectives of the IBC. A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy. In Essar Steel (supra), a three judge Bench of this Court, affirmed a two judge Bench decision in K Sashidhar103(supra), prohibiting the Adjudicating Authority from second-guessing the commercial

wisdom of the parties or directing unilateral modification to the Resolution Plans104. These are binding precedents. Absent a clear legislative provision, this court will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC to re-negotiate a submitted Resolution Plan or agree to its withdrawal, at the behest of the Resolution Applicant. The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of approval or rejection, as the case may be, under Section 31105. In Government of Andhra Pradesh v. P Laxmi Devi106, while determining the constitutionality of a statute, this Court observed that it should be wary of transgressing into the domain of the legislature, especially in matters relating to economic and regulatory legislation. This Court observed:

> Para 62, supra note 35 Paras 64-73, supra note 35 Para 73, Essar Steel supra note 34 (2008) 4 SCC 720 PART J "80. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions." (emphasis supplied)

146 Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy. A court may be inept in laying down a detailed procedure for exercise of the power of withdrawal or modification by a successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. In this case, if Resolution Applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a Resolution Plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective Resolution PART J Applicants who are seeking to participate in the process and the successful Resolution Applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry of litigation which would cause the delay that the IBC seeks to disavow.

147 The IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan. However, the statutory framework laid down under the IBC and the CIRP Regulations provide a step-by-step procedure which is to be followed from the initiation of CIRP to the approval by the Adjudicating Authority. Regulation 40A describes a model-timeline for the CIRP that accounts for

every eventuality that may arise between the commencement of the CIRP and approval of the Resolution Plan by the Adjudicating Authority, including the different stages for pressing a withdrawal of the CIRP under Section 12A. Even a modification to the RFRP is envisaged by the CIRP Rules and is subject to a timeline. The absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of the IBC's proscription of any attempts at withdrawal at its behest. The rule of casus omissus is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction. Justice GP Singh in his authoritative treatise, Principles of Statutory Interpretation107, defines the rule of casus omissus as:

> "It is an application of the same principle that a matter which should have been, but has not been provided for in GP Singh, Principles of Statutory Interpretation (1st edn., Lexis Nexis 2015) PART J a statute cannot be supplied by courts, as to do so will be legislation and not construction. But there is no presumption that a casus omissus exists and language permitting the court should avoid creating a casus omissus where there is none." (emphasis supplied) The treatise further discusses that a departure from this rule is only allowed in cases where words have been accidently omitted or the omission has an effect of making any part of the statute meaningless. Further, only such words can be supplied to the statute which would have certainly been inserted by the Parliament, had the omission come to its notice. The relevant paragraph is extracted below:
>
> "As already noticed it is not allowable to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words". A departure from the rule of literal construction may be legitimate so as to avoid any part of the statute becoming meaningless. Words may also be read to give effect to the intention of the Legislature which is apparent from the Act read as a whole. Application of the mischief rule or purposive construction may also enable reading of words by implication when there is no doubt about the purpose which the Parliament intended to achieve. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these or similar words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law." In the wake of the COVID-19 pandemic, several Resolution Plans remained pending before Adjudicating Authorities due to the lockdown and significant barriers to securing a hearing. An Ordinance was swiftly promulgated on 5 June 2020 which imposed a temporary suspension of initiation of CIRP under Sections PART J 7, 9 and 10 of the IBC for defaults arising for six months from 25 March 2020 (extendable by one year). This was followed by an amendment through the IBC (Second Amendment) Act 2020 on 23 September 2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third

> Amendment) Regulations 2020, which inserted Regulation 40C on 20 April 2020, with effect from 29 March 2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. Recently, the IBC (Amendment) Ordinance 2021 was promulgated with effect from 04 April 2021 providing certain directions to preserve businesses of MSMEs and a fast-track insolvency process. There has been a clamor on behalf of successful Resolution Applicants who no longer wish to abide by the terms of their submitted Resolution Plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or re-negotiations has been provided, in the last eighteen months. In the absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by a successful Resolution Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door.

148 It is pertinent to note that even the UNCITRAL Guide does not contain any provisions for withdrawal of a submitted Plan. It only discusses the possibilities of amending a Resolution Plan. The UNCITRAL Guide indicates that it PART J contemplates that the Legislature should choose if it wants to allow any amendments to a submitted Resolution Plan. In the event, it does, it should lay down the detailed steps of proposing amendments to a submitted resolution plan108. In fact, even the scope of negotiations between the Resolution Applicant and the CoC has to be specifically envisaged by the statute109. Further, the UNCITRAL Guide envisages that amendments can be made to the Resolution Plan after it is approved by the creditors only in limited circumstances. It mentions that, "[a]n insolvency law may include limited provision for a plan to be modified after it has been approved by creditors (and both before and after confirmation) if its implementation breaks down or it is found to be incapable of performance, whether in whole or in part, and the specific problem can be remedied"110. If permitted by the statute, the recommendations strongly urge the establishment of a mechanism for amendment after approval by creditors which details requirements of, inter alia, approval by creditors of the modification and consequences of failure to secure approval to the amendments111. The BLRC Report has relied on the UNCITRAL Guide while designing the IBC112 and it is a critical tool for ascertaining legislative choice and intent. Parliament has not introduced an explicit provision under the IBC for allowing any amendment of the Resolution Plan after approval of creditors, let alone a power to withdraw the IV.A.52., page 225, and Recommendation 155: "155. The insolvency law should permit amendment of a plan and specify the parties that may propose amendments and the time at which the plan may be amended, including between submission and approval, approval and confirmation, after confirmation and during implementation, where the proceedings remain open." of the UNCITRAL Guide, supra note 56 Ibid.

IV. A. 66, page 230 of the UNCITRAL Guide, supra note 56 Recommendation 156: "The insolvency law should establish the mechanism for approval of amendments to a plan that has been approved by creditors. That mechanism should require notice to be given to the creditors and other parties affected by the proposed modification; specify the party required to give notice; require the approval

of creditors and other parties affected by the modification; and require the rules for confirmation (where confirmation is required) to be satisfied. The insolvency law should also specify the consequences of failure to secure approval of proposed amendments.", UNCITRAL Guide, supra note 56 3.3.1, supra note 55 PART J Resolution Plan at that stage. At the same time, the Corporate Debtor and the CoC have been empowered to withdraw from the CIRP. If it intended to permit parties to amend the Resolution Plan after submission to the Adjudicating Authority, based on its specific terms of the Resolution Plan, it would have adopted the critical safeguards highlighted by the UNCITRAL. J.2 Terms of the Resolution Plan are not sufficient to effect withdrawals or modifications after its submission to the Adjudicating Authority 149 It has been contended by the three appellants that a Resolution Plan only becomes binding when it is approved by the Adjudicating Authority under Section 31(1) of the IBC. Further, since Section 74(3) of the IBC, provides that a person can be prosecuted or punished for contravening the Resolution Plan only after its approval by the Adjudicating Authority, the successful Resolution Applicant is entitled to withdraw the Plan, on the terms of its contractual provisions, as long as it is not made binding under Section 31(1) of the IBC. We have held in Section H that a CoC-approved Resolution Plan is a creature of the IBC and cannot be construed as a pure contract between two consenting parties, prior to its approval under Section 31 of the IBC. In this section, independent of the above finding, we proceed to examine the contention that the terms of a Resolution Plan can reserve the right to modify or withdraw its contents after submission to the Adjudicating Authority.

150 The approval of the Adjudicating Authority under Section 31(1) of the IBC has the effect of making the Resolution Plan binding on all stakeholders. These PART J stakeholders include the employees of the corporate debtor whose terms of employment would be governed by the Resolution Plan, the Central and State Governments who would receive their tax dues on the basis of the terms of the Resolution Plan and local authorities to whom dues are owed. These stakeholders are not direct participants in the CIRP but are bound by its consequence by virtue of the approval of the Resolution Plan, under Section 31(1) of the IBC. Section 31(1) ensures that the Resolution Plan becomes binding on all stakeholders after it is approved by the Adjudicating Authority. The language of Section 31(1) cannot be construed to mean that a Resolution Plan is indeterminate or open to withdrawal or modification until it is approved by the Adjudicating Authority or that it is not binding between the CoC and the successful Resolution Applicant. Regulation 39(4) of CIRP Regulations mandates that the RP should endeavour to submit the Plan at least fifteen days before the statutory period of the CIRP under Section 12 is due to expire along with a receipt of a PBG and a compliance certificate as Form H. It is pertinent to note that sub-Section (3) to Section 12 mandates that the CIRP process, including legal proceedings, must be concluded within 330 days. This three-hundred-and- thirty-day period can be extended only in exceptional circumstances, if the process is at near conclusion and serves the object of the IBC, as held by a three judge Bench of this Court in Essar Steel (supra). Therefore, after accounting for all statutorily envisaged delays which the RP has to explain in its Form H and otherwise through Regulation 40B, the procedure envisages a fifteen-day window between submission of Resolution Plan and its approval or rejection by the Adjudicating Authority. This clearly indicates that the statute envisages a certain PART J level of finality before the Resolution Plan is submitted for approval to the Adjudicating Authority. Even the CoC is not permitted to approve multiple Resolution Plans or solicit EOIs after submission of a Resolution Plan to the Adjudicating Authority, which would possibly be in contemplation if the

Resolution Applicant was permitted to withdraw from, or modify, the Plan after acceptance by the CoC. Regulation 36B(4A) requires the furnishing of a performance security which will be forfeited if a Resolution Applicant fails to implement the Plan. This is collected before the Adjudicating Authority approves the Plan. Notably, the regulations also direct forfeiture of the performance security in case the Resolution Applicant "contributes to the failure of implementation", which could potentially include any attempts at withdrawal of the Plan. 151 The report of the BLRC also notes that the negotiations in the CIRP must be time bound and it envisages that one of the ways in which the CIRP comes to a close is that the RP is able to obtain a binding agreement from the CoC 113. Such a binding agreement is placed before the Adjudicating Authority, which orders the closure of the CIRP. If the Adjudicating Authority does not receive a binding agreement, it can send the Corporate Debtor into liquidation. The relevant paragraphs are extracted below:

> "5.3.4 Rules to close the IRP The Committee agrees that it is critical for the Code to preserve the time value of the entity by ensuring that negotiations in the IRP are time bound. The Code states that the IRP has a default maximum time limit that is strictly adhered to, regardless of whether the creditors committee has identified a solution. On the other side, the Committee is also of the view that, if a solution can be identified within a 5.3.4, BLRC Report, supra note 55 PART J shorter time frame, the process must accommodate closing the IRP in a shorter time period also. The Committee proposes that the IRP can come to a close in either of two ways. Either the RP is able to get a binding agreement from the majority of the creditors committee or the calm period reaches the default maximum date set by the Adjudicator at the start of the IRP. If either condition is met, the Adjudicator will issue an order to close the IRP.

However, the orders will vary depending upon the condition. If the RP submits a binding agreement to the Adjudicator before the default maximum date, then the Adjudicator orders the IRP case to be closed. If the Adjudicator does not receive a binding agreement by this date, the Adjudicator issues an order to close the IRP case along with an order to liquidate the entity." (emphasis supplied) 152 The binding nature, as between the CoC and the successful Resolution Applicant, of the Resolution Plan submitted for approval by the Adjudicating Authority is further evidenced from the fact that the CoC issues a LOI to a successful Resolution Applicant stating that it has been selected as the successful Resolution Applicant and its Plan would be submitted to the Adjudicating Authority for its approval. The successful Resolution Applicant is typically required to accept the LOI unconditionally and submit a PBG. Sequentially, the issuance of an LOI is followed by its unconditional acceptance by the successful Resolution Applicant. In Amtek Auto (supra), this court thwarted a similar attempt by a successful Resolution Applicant who had relied on certain open-ended clauses in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Resolution Plan had been approved by the Adjudicating Authority and the Resolution Applicant's IA was not entertained. The Resolution Applicant had then sought to challenge the approval of the Resolution Plan under Section 61(3) of PART J the IBC by seeking the same relief. This Court rejected the claim and observed that, "[t]o assert that there was any scope for negotiations and discussions after the approval of the resolution plan by the CoC would be plainly contrary to the terms of the IBC".

153 Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only PART J conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC.

154 If the appellants' claim were to succeed, a clause enabling a Resolution Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3). It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause

12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in K Sashidhar (supra), while discussing the jurisdiction of the Adjudicating Authority under Section 31 to evaluate a Resolution Plan, has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the PART J Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation"114. Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in

all the three Resolution Plans that are in dispute in this present appeal.

155 The Insolvency and Bankruptcy Law Committee in its report released in March 2018115 noted that many conditional Resolution Plans were being approved by the Adjudicating Authority on account of the uncertainty on statutory clearances, such as by the Competition Commission of India, and the approval by the Adjudicating Authority was being regarded as a "single window approval". This was in contravention of the intent of the IBC. The relevant extracts of the report are reproduced below:

> "16.1 Regulation 37(l) of the CIRP Regulations states that a resolution plan shall provide for obtaining necessary approvals from the Central and State Governments and other authorities. However, the timeline within which such approvals are required to be obtained, once a resolution plan has been approved by the NCLT, has not been provided in the Code or the CIRP Regulations. The Committee deliberated that as the onus to obtain the final approval would be on the successful resolution applicant as per the resolution plan itself, the Code should specify that the timeline will be as specified in the relevant law, and if the timeline for approval under the relevant law is less than one year from the approval Para 60 supra note 35 supra note 100 PART J of the resolution plan, then a maximum of one year will be provided for obtaining the relevant approvals, and section 31 shall be amended to reflect this.
>
> 16.2 Further, the Committee noted that there is no provision in the Code on the requirement to obtain an indication on the stance of the concerned regulators or authorities, if required, on the resolution plan prior to the resolution plan being approved by the NCLT. It was brought to the attention of the Committee that this was resulting in several conditional resolution plans being approved by the NCLT, and that the approval by the NCLT was being regarded as a 'single window approval.' This not being the intent of the Code, the Committee deliberated on introduction of a mechanism for obtaining preliminary observations from the concerned regulators and authorities in relation to a resolution plan approved by the CoC and submitted to the NCLT for its approval, but prior to the NCLT's approval." (emphasis supplied) The Insolvency and Bankruptcy Law Committee in its report dated February 2020116 stated that the current practice of obtaining governmental approvals after the approval of the Resolution Plan has created an uncertainty about the implementation of the Resolution Plan. The committee suggested that this uncertainty can be mitigated if amendments are made to the IBC to provide that once the Resolution Plan is approved by the CoC, it will be shared with the governmental and regulatory authorities, for approvals that are necessary for running the business of the Corporate Debtor. If no objections are raised within forty-five days, it would be deemed that they have granted an approval. If objections are raised or conditional approvals are granted, the Resolution Applicant should attempt to clear the objections or meet the conditions before placing the Resolution Plan before the Adjudicating Authority. This Plan would supra note 90 PART J thereafter be placed before the Adjudicating Authority for its approval. The committee further suggested

that this timeline of forty-five days should be excluded from calculating the timelines under Section 12 of the IBC. The relevant extract is reproduced below:

"14.8. To enable approvals or no-objections to be taken within the scheme of the Code, the Committee decided that amendments should be made to the Code such that once a resolution plan is approved by the CoC, it should be sent to all concerned government and regulatory authorities whose approvals are core to the continued running of the business of the corporate debtor, for their approvals or objections. If they do not raise their objections within forty-five days, they will be deemed to have no objections. This plan would then be placed before the Adjudicating Authority for its approval. If the government and regulatory agencies raise any objections or grant conditional approvals, the resolution applicant can attempt to clear the objections or meet the conditions for approval before placing the plan for the approval of the Adjudicating Authority, where this can be done within the time limit provided under Section 12. However, where this is not possible, the plan may still be placed before the Adjudicating Authority for its approval, and the successful resolution applicant should clear the objections or comply with the conditions for approval within a period of one year from the approval of the resolution plan.

14.9. To ensure that this aligns with the time-line for resolution provided in the Code, the Committee recommended that the window of forty-five days given to government and regulatory agencies should be excluded from the computation of the time limit under Section 12 of the Code. Although some members of the Committee were of the view that this time-line should ideally run concurrently with the CIRP period, the Committee felt that this exclusion would be justified since it would streamline the process of gaining government approvals considerably, which would lead to more value maximising resolutions, offsetting value lost, if any, in this forty-five day period in which the corporate debtor will be run as a going concern." (emphasis supplied) PART J The aim to tighten timelines for receiving regulatory approvals through the provision of in-principal approvals, prior to the approval of the Adjudicating Authority, indicates that the statutory framework under the IBC has consistently attempted to avoid situations which may introduce unpredictability in the insolvency resolution process and has sought to make the process as linear as it can be. Further, the recommendations made in the Insolvency Law Committee Report of February 2020117 discussed above indicate that the aim is to ensure that the Resolution Plan placed before the Adjudicating Authority should reach a certain finality, even in the context of governmental approvals. A conditionality which allows for further negotiations, modification or withdrawal, once the Resolution Plan is approved by the CoC would only derail the time-bound process envisaged under the IBC.

156 Regulation 40A envisages a model-time line for the CIRP. Any deviation from this timeline needs to be specifically explained by the RP in Clause 10 of Form H. Regulation 40B imposes a time-limit on the RP for filing the requisite forms at different stages of the CIRP, including forms seeking extensions on account of delays at any stage. The failure to fill these forms within the

stipulated deadline results in disciplinary action against the RP by the IBBI. Further, as discussed in Section I of the judgement, various mandatory timelines have been imposed for undertaking specific actions under the CIRP. If the legislature intended to allow withdrawals or subsequent negotiations by successful Resolution Applicants, it would have prescribed specific timelines for the exercise of such an option. The recognition of a power of withdrawal or modification after supra note 90 PART J submission of a CoC-approved Resolution Plan, by judicial interpretation, will have the effect of disturbing the statutory timelines and delaying the CIRP, leading to a depletion in the value of the assets of a Corporate Debtor in the event of a potential liquidation. Hence, it is best left to the wisdom of the legislature, based on the experiences gained from the working of the enactment, to decide whether the option of modification or withdrawal at the behest of the Resolution Applicant should be permitted after submission to the Adjudicating Authority; if so, the conditions and the safeguards subject in which it can be allowed and the statutory procedure to be adopted for its exercise. 157 Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.

PART J 158 Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60 (5)(c). In a decision of a three judge Bench of this Court in Gujarat Urja (supra), it was held that, “the NCLT’s residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do”. Further, the court observed that “this Court must adopt an interpretation of the NCLT’s residuary jurisdiction which comports with the broader goals of the IBC”118. The effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtors.

159 After the amendment to Section 12 in 2019 which mandate a 330 days outer-limit for conclusion of the CIRP (which can be breached only under exceptional circumstances as held in Essar Steel (supra)), it would be antithetical to the purpose of the IBC to allow the Adjudicating Authority to use its plenary powers under Section 60(5)(c) to potentially extend these timelines to enable the CoC to either issue a fresh RFRP if the Resolution Plan is withdrawn by a successful Resolution Applicant or direct further negotiations with the Resolution Applicant who is seeking a modification of the plan, whose failure could result in withdrawal as well. The likely consequence of a withdrawal by a successful Resolution Applicant after going through the stages of the CIRP for nearly 180 days (provided all statutory timelines have been strictly followed) Para 163-164, supra note 38 PART J

would inevitably be a delayed liquidation after the value of the assets has further depreciated. In the event of intervening delays on account of litigation or otherwise, the delay would be even more severe. If a CoC, could be compelled by the Adjudicating Authority to negotiate with the successful Resolution Applicant, it would have to resign itself to a commercial bargain at a much lower value. If Parliament intended to permit such withdrawals/modifications sought by successful Resolution Applicants as being beneficial to the economic policy, which it has sought to pursue while enacting the IBC, it would have prescribed timelines for setting the clock-back or directing immediate liquidation if the withdrawals occur after a certain period. For instance, under Regulation 36B (5) any modification to the RFRP or the evaluation matrix is deemed as a fresh issue of the RFRP and the timeline for submission of Resolution Plan starts afresh. Parliament has not legislated to provide for the eventuality argued by the appellants.

160 Permitting the Adjudicating Authority to exercise its residuary powers under Section 60(5) to allow for further modifications or withdrawals at the behest of the successful Resolution Applicant, would be in the teeth of the decision of this Court in Essar Steel (supra) which held that "[s]ection 60(5)(c) cannot be used to whittle down Section 31(1) of the IBC, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority"119.

Para 68-69, supra note 34

PART K

K Factual Analysis

161 We have held in Section H of this judgement that Resolution Plans are not in a nature of a traditional contract per se, and the process leading up to their formulation and acceptance by the CoC is comprehensively regulated by the insolvency framework. In Section J, we have further held that the IBC framework, does not enable withdrawals or modifications of Resolution Plans, once they have been submitted by the RP to the Adjudicating Authority after their approval by the CoC. In any event, and without affecting the legal position formulated above, we will also deal with the submissions of the parties that the contractual terms of their respective Resolution Plans enabled withdrawal or re-negotiation of terms. We will be undertaking an analysis on whether the individual Resolution Applicants before us had specifically negotiated with the respective CoCs for a right of modification or withdrawal and are contractually entitled to the same in the present case.

K.1 The Ebix Appeal 162 Before we begin our analysis on the factual matrix pertaining to Ebix's Appeal, we must deal with the preliminary issue alleged by the respondents during the course of the Ebix Appeal- whether the Third Withdrawal Application by Ebix was barred by res judicata; while

this will not have a bearing on the final outcome of the appeal, we shall analyze it briefly.

PART K K.1.1 Res Judicata 163 To begin our inquiry, it is important to first consider the contours of the principle of res judicata. In Indian law, the principle has been recognized in Section 11 of the Code of Civil Procedure 1908. Section 11, in so far as is relevant, reads as follows:

> "11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> [...] Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.
>
> [...]"

164 In Satyadhyan Ghosal v. Deorajin Debi120, a three judge Bench of this Court, speaking through Justice KC Das Gupta, explained the doctrine of res judicata in the following terms:

> "7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding (1960) 3 SCR 590 PART K and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct." From the above extract, it is clear that while res judicata may have been codified in Section 11, that does not bar its application to other judicial proceedings, such as the one in the present case.

165 Before proceeding further, it is important to compare the reliefs sought by Ebix in the First, Second and Third Withdrawal Applications. They have been tabulated below, for an easy comparison:

First Withdrawal Second Withdrawal Third Withdrawal Application Application Application i. Direct that the Ld. i. Allow the Resolution i. Allow the Resolution Resolution Professional Applicant to withdraw the Applicant to withdraw the supply a copy of the Special Resolution Plan dated Resolution Plan dated Investigation Audit to the 19.02.2018 (along with the 19.02.2018 (along with the Resolution Applicant Addendum/Financial Addendum/Financial forthwith; Proposal dated 21.02.2019) Proposal dated 21.02.2019) submitted by it, and as submitted by it, and as ii. Direct that the Ld. approved by the Committee approved by the Committee Resolution Professional of Creditors; of Creditors; supply a copy of the Certificates under Sections ii. Direct the Ld. Resolution ii. Direct the Ld. Resolution 43, 45, SO and 66 of the Professional and/or Educomp Professional and/or Educomp Insolvency and Bankruptcy Solutions Limited and the Solutions Limited and the Code, 2016 to the Resolution Committee of Creditors to Committee of Creditors to Professional forthwith; refund the Earnest Money refund the Earnest Money Deposit of Rs. 2,00,00,000/- Deposit of Rs. 2,00,00,000/- iii. Withhold approval of the furnished by the Resolution furnished by the Resolution Resolution Plan sanctioned Applicant in respect of the Applicant in respect of the by the Committee of Resolution Plan; Resolution Plan; Creditors of the Corporate Debtor, as filed before this iii. Withhold approval of the iii. Withhold approval of the Hon'ble Tribunal on Resolution Plan sanctioned Resolution Plan sanctioned 11.04.2018, pending detailed by the Committee of Creditors by the Committee of Creditors PART K consideration of the same by of the Corporate Debtor, as of the Corporate Debtor, as the Resolution Applicant; filed before this Hon'ble filed before this Hon'ble Tribunal on 07.03.2018 and Tribunal on 07.03.2018 and iv. Grant the Resolution recorded vide order dated recorded vid order dated Applicant sufficient time to re- 1.1.04.2018, pending detailed 11.04.2018, pending detailed evaluate its proposals consideration of the same by consideration of the same by contained in the Resolution the Resolution Applicant; the Resolution Applicant;

Plan, and also to suitably revise/modify and/or withdraw its Resolution Plan;

From the above table, it is clear that the prayers in the Second and Third Withdrawal Applications were identical. Further, prayer (iii) of both corresponds to prayer (iii) of the First Withdrawal Application, in almost identical terms, while prayer (ii) was not present in the First Withdrawal Application at all. At the same time, prayers (i) and (ii) in the First Withdrawal Application have not been repeated in the Second and Third Withdrawal Applications. However, what is at issue is prayer (iv) of the First Withdrawal Application and prayer (i) of the Second and Third Withdrawal Applications. Through the former, Ebix sought permission to re-evaluate its Resolution Plan and to suitably “revise/modify and/or withdraw” it, while through the latter, Ebix sought permission to withdraw its Resolution Plan. Now we must analyse whether this would attract the principle of res judicata.

166 In a judgment of this Court in Sheodan Singh v. Daryao Kunwar121, a four judge Bench of this Court elaborated on the various conditions which must be satisfied before the doctrine of res

judicata can apply in a given case. Justice KN Wanchoo, speaking for the Court, held:

> (1966) 3 SCR 300 PART K "9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely—
>
> (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;
>
> (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
>
> (iii) The parties must have litigated under the same title in the former suit;
>
> (iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and
>
> (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit..." (emphasis supplied)

167 In the present case, conditions (i) is not in dispute since the parties were the same. As regards (ii), in the First Withdrawal Application, the prayer was to enable Ebix to re-evaluate its proposals and to revise/modify and also withdraw its Resolution Plan. A prayer for withdrawal of the Resolution Plan was raised in the Second and Third Withdrawal Applications. Conditions (iii) and (iv) are also not in issue. What remains to be assessed is compliance with condition (v), i.e., whether Ebix's prayer in the First Withdrawal was in fact "heard and decided finally". While dismissing the First Withdrawal Application, the NCLT had held:

> "This is an application filed by one Ebix Singapore Ptd. Limited seeking re-valuation of the Resolution Plan submitted by it before the Resolution Professional.
>
> No ground for considering the prayer sought in the application is made out.
>
> The application is dismissed as such." PART K NCLT dismissed the First Withdrawal Application in a summary manner. Further, the order does not make mention of the prayer to "revise/modify and/or withdraw" of the Resolution Plan, but only refers to its re-evaluation.

168 The meaning of the phrase "heard and finally decided" was considered by a judgment of a two judge Bench of this Court in Krishan Lal v. State of J&K122, where it was held that the matter must have been heard on merits to have been "heard and finally decided". Justice BL Hansaria, speaking for the Court, held:

> "12. Insofar as the second ground given by the High Court — the same being bar of res judicata — it is clear from what has been noted above, that there was no decision

> on merits as regards the grievance of the appellant; and so, the principle of res judicata had no application. The mere fact that the learned Single Judge while disposing of the Writ Petition No. 23 of 78 had observed that:
>
> "This syndrome of errors, omissions and oddities, cannot be explained on any hypothesis other than the one that there is something fishy in the petitioner's version...." which observations have been relied upon by the High Court in holding that the suit was barred by res judicata do not at all make out a case of applicability of the principle of res judicata. The conclusion of the High Court on this score is indeed baffling to us, because, for res judicata to operate the involved issue must have been "heard and finally decided". There was no decision at all on the merit of the grievance of the petitioner in the aforesaid writ petition and, therefore, to take a view that the decision in earlier proceeding operated as res judicata was absolutely erroneous, not to speak of its being uncharitable." (emphasis supplied) (1994) 4 SCC 422 PART K

169 In Daryao v. State of U.P.123, a Constitution Bench of this Court held that orders dismissing writ petitions in limine will not constitute res judicata. It was noted that while a summary dismissal may be considered as a dismissal on merits, it would be difficult to determine what weighed with the Court without a speaking order. Justice PB Gajendragadkar, speaking for the Court, held:

> "26...If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32..."

170 Another two judge Bench of this Court, in its judgment in Erach Boman Khavar v. Tukaram Shridhar Bhat124, has held that the doctrine of res judicata can only apply when there has been a conscious adjudication of the issue on merits. Justice Dipak Misra, speaking for the Court, held:

> "39. From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation." (emphasis supplied) (1962) 1 SCR 574 (2013) 15 SCC 655 PART K

171 Res judicata cannot apply solely because the issue has previously come up before the court. The doctrine will apply where the issue has been "heard and finally decided" on merits through a conscious adjudication by the court. In the present case, the NLCT's order dismissing the First

Withdrawal Application makes it clear that it had only considered only that part of prayer (iv) which related to re-evaluation of the Resolution Plan, possibly because Ebix had hoped to re-evaluate the Resolution Plan on the basis of the information received as a consequence of prayers (i) and (ii) and those prayers were rejected since such information was not available.

172 In the impugned judgment, the NCLAT has relied upon Explanation (V) to Section 11 to state that since withdrawal was also prayed for as a relief in prayer

(iv) of the First Withdrawal Application, it would have also been assumed to have been rejected. Mulla's The Code of Civil Procedure states that Explanation V can only apply upon the fulfilment of two conditions: (i) the relief claimed must have been substantial, and not merely auxiliary; and (ii) the relief claimed must have been one which the Court is bound to grant, and not one which it is discretionary for the Court to grant125.

173 In Jaswant Singh v. Custodian of Evacuee Property126, a two judge Bench of this Court held that res judicata will only apply if the cause of action the same and that the party also had an earlier opportunity to apply for the relief it is now seeking. Justice ES Venkataramiah held:

> 125 th Sir Dinshaw Fardunji Mulla, The Code of Civil Procedure (18 edn, LexisNexis)
> (1985) 3 SCC 648 PART K "14...It is well-settled that in order to decide the question whether a subsequent proceeding is barred by res judicata it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit, and (v) the final decision...A cause of action for a proceeding has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour. In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings.

The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings..." (emphasis supplied)
174 The prayer for withdrawal of the Resolution Plan in the First Withdrawal Application was not substantial and one that the Court was bound to grant, since it was contingent upon a re-evaluation, which in itself was contingent upon receiving the information sought in prayers (i) and (ii). Since the latter two contingencies never arose, the NCLT did not apply its mind to the prayer for withdrawal independently. When it filed the Second Withdrawal Application, it was dismissed on a technical ground and not on its merits. When a revised Third Withdrawal Application was filed, the NCLT then adjudicated it on its merits and allowed it. Hence, since the NCLT did not adjudicate Ebix's prayer for withdrawal of their Resolution Plan on its merits while dismissing the First Withdrawal

Application, the opportunity to seek the relief was not available to Ebix in a real sense. Therefore, we reverse the finding of the NCLAT on this issue and hold that Ebix's Third Withdrawal Application was not barred by res judicata. PART K K.1.2 Analysis of the Resolution Plan of Ebix 175 To briefly recount the relevant facts for determination of the dispute over the terms of the resolution plan – the CIRP of Educomp commenced on 30 May 2017. After consultation with the E-CoC, the E-RP invited EOIs on 18 October 2017. The RFRP was issued on 5 December 2017, and was revised on 17 January 2018 and 20 January 2018. Ebix submitted its draft Resolution Plan after the last date of 27 January 2018, and after securing an extension from the Adjudicating Authority, on 29 January 2018. Ebix took the benefit of an extension of time which was granted to it to submit its Resolution Plan. In the absence of an extension of time, it would not have been permitted to enter the fray. After multiple rounds of negotiations, on 9 February 2018, Ebix was declared the successful Resolution Applicant and a LOI was issued by the E-CoC. On 17 February 2018, Ebix's Resolution Plan was approved by a 74.16 per cent voting share of the E-CoC, which was subsequently upgraded to 75.35 per cent by CSEB's vote being added belatedly on 23 February 2018. While it is true that the votes of CSEB were received in favour of the Resolution Plan on a later date, all the parties including Ebix proceeded on the notion that the Resolution Plan has been approved by the requisite majority of seventy-five per cent of the voting share of the E-CoC as was required then (now the requisite percentage has been reduced to sixty-six per cent pursuant to an amendment). Thus, the CSEB Application filed before the NCLT seeking a clearance of its delayed vote was a mere formality and there was no controversy raised in relation to that application at that stage. In fact, the Approval Application for the approval of the Resolution Plan was filed before the NCLT on the basis that the Plan has been duly PART K approved by the requisite majority of the CoC. No objections were raised against the Approval Application on the ground that the threshold of seventy-five per cent of votes was not met. The Resolution Plan dated 19 February 2018 and the addendum dated 21 February 2018 for a total bid amount of Rs 400 crores were then submitted by the E-RP to the Adjudicating Authority for approval on 7 March 2018.

176 Owing to the intervening applications for investigation into the accounts of Educomp (pertinently, no internal special audit has been conducted till date), Ebix filed the First Withdrawal Application on 5 July 2019, on account of a delay in approval of seventeen months. Thereafter, it filed the Second and Third Withdrawal Applications.

177 Ebix has alleged before this Court that it is entitled to withdraw its Resolution Plan by relying on: (i) the terms of the RFRP, which indicates that the Resolution Plan is binding on the Resolution Applicant only after approval by the Adjudicating Authority under Section 31; (ii) the terms of the Resolution Plan which indicate that the Plan was valid for six months; and (iii) the principles of contract law to urge frustration on account of fraud and an erosion of the commercial substratum.

178 Clause 1.8.3 of the RFRP, produced below, invited Resolution Plans with a validity of not less than six months:

> "1.8.3 A Resolution Plan once made/submitted must be valid for a period not less than 6 (six) months from the Resolution Plan Submission Date including any revisions to such Resolution plan Submission Date ("Resolution Plan Validity

> Period"). In case of extension of the Resolution Plan Submission Date by the Resolution Professional, the validity PART K period of the Resolution Plan shall also be deemed to be valid for a period of 6 (six) months from such revised Resolution Plan Submission date.
>
> If any Resolution Plan as approved by the CoC and submitted to the Adjudicating Authority is rejected by the Adjudicating Authority, then the Resolution Professional and the CoC shall act in accordance with the instructions/directions issued by the Adjudicating Authority." Ebix urges that in compliance with the above clause of the RFRP, Clause 7 of its Resolution Plan specified that it shall be valid for a term of six months from the date of submission:
>
> "7. Term of the Resolution Plan This Resolution Plan proposed by the Resolution Applicant is valid for a term of six months from the date of submission of this plan" Ebix urges that these matching terms of the offer (the RFRP) and the acceptance (the Resolution Plan) are binding on the E-CoC and the Resolution Plan is voidable and revocable at the instance of Ebix, upon the failure to seek timely approval under Section 31.

179 This submission of Ebix cannot be accepted since the terms of the RFRP or the Resolution Plan relate to the validity of the Resolution Plan for the period of negotiation with the E-CoC and not for a period after the Resolution Plan is submitted for the approval of the Adjudicating Authority. The time which may be taken before the Adjudicating Authority is an imponderable which none of the parties can predict. In fact, this is emphasized by Clause 1.3.7 of the RFPF which contains a schedule of the Resolution Plan submission process. As regards the approval of the Adjudicating Authority, it provides clearly that there is no time-line:

> PART K "1.3.7 Schedule of Resolution Plan Submission Process [...]
>
> 11. Approval of NCLT regarding the Resolution Plan of Successful Resolution Applicant – As per NCLT." Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period, failing which the CIRP process will inevitably come to an end. In this case, the draft Resolution Plan of Ebix was submitted on 29 January 2018 and remained valid for the term of the multiple rounds of negotiations with the E-CoC, until its submission to the Adjudicating Authority on 7 March 2018, which was within the six-month period envisaged in the Plan.

180 Even if it were to be assumed, for the sake of argument, that the term in the submitted Resolution Plan was in the nature of a qualified offer which would expire after six months of its submission, failing the imprimatur of the Adjudicating Authority under Section 31 which would make it binding on all parties, the surrounding terms of the RFRP and the subsequent legal materials including the LOI and the Compliance Certificate (Form H) under CIRP Regulations make it clear that there was no scope to resile from the implementation of the Resolution Plan, once it had

been submitted to the Adjudicating Authority, except in the event of a rejection. Clause 1.9.3 of the RFRP required Ebix to replace its EMD with a PBG equivalent to ten per cent of the Resolution Plan value, if it were to be declared as the 'successful Resolution Applicant'. This PBG can be invoked under Clause 1.9.5 of the RFRP if the Resolution Applicant fails to implement the Resolution Plan. Further, Clause 1.8.4 of the RFRP states that "[a] Resolution PART K Plan submitted by a Resolution Respondent shall be irrevocable". Clause 1.10(l) of the RFRP also provides that a successful Resolution Applicant is not permitted to withdraw an approved Resolution Plan:

> "Clause 1.10 of the RFRP "By procuring this RFRP and obtaining access to the Data room and Information Memorandum, in accordance with the terms of this RFRP, the Resolution Respondent is deemed to have made the following acknowledgements and representations:
>
> [...]
>
> (l) The Resolution Respondent upon declaration as Successful Resolution Respondent shall remain responsible for the implementation and supervision of the Resolution Plan from the date of approval by the Adjudicating Authority, and will not be permitted to withdraw the Resolution Plan and the Resolution Professional, PwC or the CoC assume no responsibility or liability in this respect." (emphasis supplied) Ebix's submission that Clause 1.10(l) is applicable only upon approval of the Adjudicating Authority is not plausible since the Resolution Plan becomes binding on all stakeholders as a consequence of the approval under Section 31. The E-

RP's argument holds much weight when it is argued that Clause 1.10(l) cannot be construed to infer that the Adjudicating Authority would declare Ebix as the 'Successful Resolution Applicant' once again, which would then impose the obligation of barring withdrawals for the first time. Mr Nakul Dewan, learned Senior Counsel for the E-RP, has also submitted before us that the validity of the Resolution Plan being six months was not mentioned as a specific conditionality in Form H that was submitted by the E-RP along with the Resolution Plan to the PART K Adjudicating Authority, which evinces that the six-month validity was only vis-à- vis the acceptance by the E-CoC.

181 Ebix has also tried to argue that its position has changed manifestly because of new allegations which have come up in relation to the financial conduct of Educomp. However, in this regard, it is pertinent to note Clause 1.3.2 of the RFRP which directs prospective Resolution Applicants to conduct their own due diligence. In so far as is relevant, it reads:

> "1.3.2 The Resolution Applicant(s) shall be provided access to the electronic as well as physical data room ("Data Room") established and maintained by the Company acting through the Resolution Professional and coordinated by PwC in order to conduct a due diligence of the business and operations of the Company" Similarly, Clause 1.13.6 also requires prospective Resolution Applicants to conduct independent investigations:

"1.13.6 This RFRP does not purport to contain all the information required by the Resolution Applicant. The Resolution Applicant should conduct independent investigations and analysis and should check the accuracy, reliability and completeness of the information in this RFRP and obtain independent advice from appropriate sources, prior to making an assessment of the Company." Ebix was responsible for conducting their own due diligence of Educomp and could not use that as a reason to revise/modify their approved Resolution Plan. In any event, Section 32A of the IBC grants immunity to the Corporate Debtor for offences committed prior to the commencement of CRIP and it cannot be prosecuted for such offences from the date the Resolution Plan has been approved by the Adjudicating Authority under Section 31, if the Resolution Plan PART K results in a change of management or control of the Corporate Debtor subject to certain conditions. Section 32A reads as follows:

"32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

[...] (2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint

to the relevant statutory authority or Court.

[...] (3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to PART K such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process." Thus, in any case even if it is found that there was any misconduct in the affairs of Educomp prior the commencement of the CIRP, Ebix will be immune from any prosecution or punishment in relation to the same. The submission that Ebix has been placed in a prejudicial position due to the initiation of investigation into the affairs of Educomp by the CBI and SFIO is nothing but a red herring since such investigations have no bearing on Ebix.

182 Finally, it is also important to note that no clause of Ebix's own Resolution Plans provides them with a right to revise/withdraw their Resolution Plan after its approval by the E-CoC, but before its confirmation by the Adjudication Authority. Clause 9.1 permits withdrawal in the event the Resolution Plan is not approved in its entirety by the NCLT, while Clause 9.7 allows for an amendment for the purposes of implementation of the Resolution Plan but only when the E-CoC approves it with a seventy-five per cent vote. Hence, Ebix did not have any right under their own Resolution Plan to revise/withdraw it. 183 It is also pertinent to note that Ebix did not stop pursuing their Resolution Plan after the expiry of six months, if the true import of the commercial bargain was a withdrawal of the Resolution Plan after six months of its submission. The First Withdrawal Application was filed on 10 September 2019, which was after one year of the alleged expiry of the six-month period. Therefore, even if the submitted Resolution Plan was considered as a conditional offer the terms did not PART K enable a withdrawal of the Resolution Plan in the event that the Adjudicating Authority does not approve it under Section 31 within six months of its submission.

184 Before we conclude our analysis on the substantive arguments raised by Ebix, we will be briefly dealing with its arguments that the RP had failed in its obligation to provide information under Section 29 of the IBC. K.1.3 Duties of the RP 185 Appearing on behalf of Ebix, Mr KV Vishwanathan has argued before this Court that the E-RP failed in its duties under Section 29 of the IBC when it failed to inform Ebix about the ongoing investigations against Educomp. While this argument was made in order to justify Ebix's withdrawal of its Resolution Plan, which we have already rejected, we shall assess it nonetheless. On behalf of the E-RP, Mr Nakul Dewan has appeared and argued that the obligation on an RP to provide information under Section 29 has to be understood on a "best effort basis".

186 Section 29 of the IBC places a duty upon the RP to provide an IM to the Resolution Applicant, containing such information which may be relevant to the Resolution Applicant to draft its Resolution Plan. It states:

> "29. Preparation of information memorandum.—(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution

plan.

PART K (2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation.—For the purposes of this section, "relevant information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified." 187 The BLRC Report elucidates the duties of the RP:

"1. The RP must provide the most updated information about the entity as accurately as is reasonably possible to this range of solution providers. In order to do this, the RP has to be able to verify claims to liabilities as well as the assets disclosed by the entity. The RP has the power to appoint whatever outside resources that she may require in order to carry out this task, including accounting and consulting services.

2. The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditors committee, based on which solutions can be offered to resolve the insolvency.

In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IRP. If the information is not comprehensive, the RP must put out the information memorandum with a degree of completeness of the information that she is willing to certify.

For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the PART K information memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator.

3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interested to bid a solution for the IRP. She has to inform the market (a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be presented and (d) with a channel through which solutions can be submitted for evaluation. The Code does not specify details of the manner or the mechanism in which this should be done, but rather emphasises that it must be done in a time-bound manner and that it is accessible to all possible interested parties." (emphasis supplied) 188 Similarly, the UNCITRAL Guide notes:

> "5. Duties and functions of the insolvency representative [...]
>
> (e) Obtaining information concerning the debtor, its assets, liabilities and past transactions (especially those taking place during the suspect period), including examining the debtor and any third person having had dealings with the debtor..."

189 Under the IBC, there is a duty upon the RP to collect as much information about the Corporate Debtor as is accurately possible to do. When such information is communicated through an IM to the Resolution Applicant, the RP must be careful to clarify when its information is not comprehensive and what factors may cause a change.

PART K 190 In the present case, Ebix has alleged that the E-RP did not inform it of the financial investigations into the conduct of Educomp in a timely fashion. To assess this claim, it is important to underline a few dates:

> (i) 5 December 2017 – E-RP provided Virtual Data Room access to Ebix and other prospective Resolution Applicants in relation to Educomp, and the final RFRP was issued;
>
> (ii) 7 March 2018 – E-RP filed the Approval Application before NCLT in relation to Ebix's Resolution Plan, after its approval by the E-CoC;
>
> (iii) 3 April 2018 and 26 April 2018 – two articles are published in The Wire in relation to financial mismanagement of Educomp;
>
> (iv) 4 May 2018 – the IFC Application came up before NCLT, having been filed by a financial creditor of Educomp seeking investigation of the affairs/transactions, in which the E-RP was directed file its reply and IFC was directed to serve a notice on Ebix;
>
> (v) 12 June 2019 – Educomp made regulatory disclosures to the BSE and NSE in relation to the ongoing investigations by SFIO and CBI; and
>
> (vi) 5 July 2019 – Ebix filed the First Withdrawal Application.

191 Ebix cannot dispute that E-RP had provided it the relevant information required under Section 29 to formulate its Resolution Plan. The issues in relation to financial investigations into the conduct of Educomp arose when the two articles were published by The Wire, both of which were after the Approval Application had been filed by the E-RP. Further, Ebix was aware of all the proceedings before the NCLT since the various applications were often listed along with the Approval Application, in which it continued to appear. Finally, Ebix PART K has brought nothing on record to prove that E-RP knew of the SFIO and CBI investigations before a regulatory disclosure was made by Educomp. Hence, it cannot be stated that the E-RP had faltered in its duty to provide relevant information to Ebix.

K.2 The Kundan Care Appeal 192 The CIRP of Astonfield commenced on 27 November 2018. On 1 May 2019, GUVNL issued a default notice under Article 9.3.1(e) of the PPA, taking the initiation of the CIRP as an event of default for the termination of the PPA. The validity of the default notice was adjudicated upon by the NCLT in a judgment dated 29 August 2019. The NCLT set aside the default notice on the ground that the termination of the PPA would adversely affect the "going concern" status of Astonfield. On 15 October 2019, the NCLAT dismissed an appeal filed by GUVNL. On 29 October 2019, Kundan Care submitted a Resolution Plan for being considered by the A-CoC, which was followed by a final version on 12 November 2019. On 14 November 2019, the Resolution Plan submitted by Kundan Care was approved by the A-CoC with a vote of 99.28 per cent. On 15 November 2019, a Letter of Award was issued by the A-RP to Kundan Care, and the Resolution Plan was submitted to the NCLT for approval to under Section 31 of the IBC.

193 On 27 November 2019, GUVNL moved this Court in appeal against the order of the NCLAT dated 15 October 2019 (this Court eventually dismissed the appeal). During the pendency of the appeal, the appellant moved an application PART K before the NCLT for withdrawal of its Resolution Plan and for return of its PBG. In view of the pendency of the appeal before this Court, NCLT deferred consideration of the Resolution Plan till the disposal of the appeal. On the request of Kundan Care, their application was listed for hearing and dismissed on 3 July 2020 for want of jurisdiction to enable withdrawals. This decision of the NCLT was confirmed by the NCLAT on 30 September 2020. While Kundan Care's appeal against this decision of the NCLAT was pending before this Court, Gujarat Urja (supra) was decided by this Court on 8 March 2021. 194 Kundan Care had initially sought to rely on Clause 5.1 of their Resolution Plan to argue that it had reserved the right to modify or withdraw its submitted Resolution Plan in the event of a 'material adverse change' which affects Astonfield. Clause 5.1 reads as follows:

> "5.1 Basis of Preparation The preparation of the Resolution Plan is based on the Information Memorandum provided to the Resolution Applicant by the Resolution Professional. If at any time before or after submission of this Resolution Plan, should the information on the basis of which this Resolution Plan has been prepared, change, or new information becomes available, or if there is a material adverse change i.e. shall there have occurred any fact, matter, event, circumstance, condition or change which materially and adversely affects, or could reasonably be expected to materially and adversely affect: individually or in aggregate, the business, operations, assets, liabilities, conditions (whether financial, trading or otherwise), prospects or

operating results of the Corporate Debtor, the Resolution Applicant shall have the right to reconsider, revise and/or withdraw the Resolution Plan on assessment of such additional information and/or make a fresh submission of resolution plan at its sole discretion" PART K However, the A-RP has pointed out to the court that the LOI awarded to Kundan Care clearly stipulated that the submitted Resolution Plan is irrevocable and there were no conditionalities mentioned in the Form H that was submitted to the Adjudicating Authority. Clause 9 of Kundan Care's Resolution Plan confirms this position, since it states:

"9 Condition Precedent THERE ARE NO CONDITION PRECEDENT FOR APPROVAL OF THIS RESOLUTION PLAN" This is also reaffirmed by the fact that Clause 1.6.2 of the RFRP issued by the A- RP, specifically indicated that the A-CoC may reject a Resolution Plan if it did not agree with any of the conditions precedent in the nature of "walk away conditions". Clause 1.6.2 states:

"1.61 The CoC reserves the right to reject the Resolution Plan, if any of the Conditions Precedent (as defined in Format VA - Resolution Plan), are not acceptable to the CoC. The Conditions Precedent, if any, in a Resolution Plan would mean the 'walk-away conditions' and shall be required to be specifically mentioned as such in the said Plan, with a conspicuous heading and placement of a paragraph in the Plan, and all such conditions shall be placed in a consolidated manner in the said paragraph." This indicates that the condition of a material adverse event could be exercised only until the A-CoC was considering the Resolution Plan, and not after it had been submitted to the Adjudicating Authority.

195 During the course of the hearing of the present appeal, the compilation of additional documents has been filed by Kundan Care. On 5 July 2021, Kundan Care had addressed a communication to EXIM Bank and PFCL "seeking a PART K revision/renegotiation of the resolution amount/financial proposal" of Kundan Care for the resolution of Astonfield. Responding to the above communication, EXIM Bank has addressed a letter dated 12 July 2021 stating that a meeting was held by "the lenders" (EXIM Bank and PFCL) on 9 July 2021, on a without prejudice basis to deal with the issues raised by Kundan Care in their letter dated 5 July 2021. Responding to the request of Kundan Care, it has been stated that:

"4... lenders were prima facie agreeable to deliberate the financial proposal seeking revision in resolution plan amount in the COC convened by the RP post the directions of the Hon'ble Supreme Court in accordance with the processes laid down by the IBC".

Pursuant to the above exchange of communications, a joint request has been made by Mr Ramji Srinivasan, learned Senior Counsel appearing on behalf of Kundan Care and Mr V Giri, learned Senior Counsel appearing on behalf of the A-CoC in the following terms:

"In view of the letter dated 12 July 2021 issued by the lenders who are members of the CoC, the appellant may be permitted to withdraw Civil Appeal 3560/2020 with liberty to the RA and the CoC to file the revised plan (in terms of the letter dated 12 July 2021) before the NCLT (through the RP) for approval. The CoC shall convene and take a call on the revised plan within one week and the NCLT shall dispose of the matter within two weeks upon receiving IA from RP for approval of revised plan." 196 This Court had been informed that EXIM Bank and PFCL represent 98 per cent of the financial creditors of Astonfeld. In view of the above agreement which has been arrived at, we deem it appropriate to exercise our jurisdiction under Article 142 of the Constitution of India for a one-time relief and direct that:

PART K

(i) The A-CoC shall convene and take a decision on the proposal submitted by Kundan Care on 5 July 2021, and the response by EXIM Bank and PFCL dated 12 July 2021;

(ii) In the event, that a revised Resolution Plan is agreed upon by the A-CoC, it shall be submitted through the A-RP for the approval of the NCLT within a week thereafter. In the event that a revised Resolution Plan is not agreed upon, the original Resolution Plan, as submitted before the NCLT on 15 November 2019, shall prevail; and

(iii) The NCLT shall dispose of the application with the revised Resolution Plan expeditiously, and preferably within a period of two weeks from the date of receipt of an application from the A-RP for the approval of the revised Resolution Plan.

197 We clarify that the above directions have been issued in view of the submission which has been urged as noted, and shall not amount to any finding by this Court on the issues raised with regard to modification or withdrawal of Resolution Plans at the behest of the Resolution Applicant. K.3 The Seroco Appeal 198 The CIRP of Arya Filaments, an MSME, was instituted on 17 August 2018. Seroco submitted a draft Resolution Plan on 13 March 2019 for an amount of Rs 6.79 crores (approx.). Subsequent to meetings with the Arya-CoC and revisions to the Resolution Plan, Seroco's plan was approved by the Arya-CoC on 10 May PART K 2019. On 15 May 2019, the Arya-RP filed the Resolution Plan for approval before the NCLT. Form H was filed by Arya-RP on 5 June 2020.

199 Seroco addressed a letter to Arya-RP and Arya-CoC on 9 June 2020 seeking a modification of the Resolution Plan and the resolution amount to Rs 5.29 crores (approx.) on account of the economic slowdown caused by the COVID-19 pandemic, and subsequently filed applications before the NCLT and an appeal before the NCLAT seeking a modification of the Resolution Plan on account of the original being filed over eighteen months ago. 200 Seroco has relied on the terms of its Resolution Plan which envisage payment to the Arya-CoC by sale of land and building, and old/unusable/spare plant and machineries to urge that there has been a frustration of the contract because of the economic slowdown which must have impacted the value of these assets. The

proposed revised solution envisages a further haircut to the Arya- CoC where Rs 1.5 crores less would be paid, over an extended timeline. There are no terms in the Resolution Plan or the Form H submitted by Arya-RP that could provide such a benefit to Seroco. To the contrary, Clause 19(vii) of the Resolution Plan provides that the preliminary approval of the Resolution Plan by the Arya-CoC is binding on Seroco:

> "19. Others:
>
> [...]
>
> (vii) We understand that the preliminary approval of the resolution pian is the prerogative of the Committee of Creditors and the final approval of the same lies with the Hon'ble Adjudicating authority i.e. NCLT and we undertake that the decision of the Committee of Creditors and NCLT will be final and binding on us." PART L Therefore, there is no scope to grant reliefs even on the terms of the Resolution Plan. As held in Section H of this judgement, common law remedies available under the Contract Act are not available to the parties since a submitted Resolution Plan is not a contract which can be otherwise voidable on account of frustration, force majeure or other such instances. Hence, parties can only seek reliefs that are specifically envisaged in the IBC.

L Conclusion

201 This Court is cognizant that the extraordinary circumstance of the COVID-

> 19 pandemic would have had a significant impact on the businesses of Corporate Debtors and upon successful Resolution Applicants whose Plans may not have been sanctioned by the Adjudicating Authority in time, for myriad reasons. But the legislative intent of the statute cannot be overridden by the Court to render outcomes that can have grave economic implications which will impact the viability of the IBC.

202 The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will PART L be wholly unregulated by the statute. Since the 330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating

Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.

203 If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the Adjudicating Authority, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the Corporate Debtor may be sent into liquidation by the Adjudicating Authority or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.

PART L 204 In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations. In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court in Gujarat Urja (supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2.

205 It would also be sobering for us to recognize that whilst this Court has declared the position in law to not enable a withdrawal or modification to a PART L successful Resolution Applicant after its submission to the Adjudicating Authority, long delays in approving the Resolution Plan by the Adjudicating Authority affect the subsequent implementation of the plan. These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation. The thirty-second report of the Ministry of Corporate Affairs' Standing Committee on Finance (2020-2021) on the 'Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions' 127 represented a despondent state of affairs with regard to pendency of applications before the Adjudicating Authority. It noted128:

Standing Committee on Finance, Seventeenth Lok Sabha, Ministry of Corporate Affairs, 'Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions: Thirty-second Report' (August 2021) <available at https://www.ibbi.gov.in/uploads/whatsnew/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf> accessed on 20 August Ibid., page 6 PART L In its observations, the Report noted that a delay in the resolution process with more than seventy-one per cent cases pending for more than 180 days is in deviation of the original objective and timeline for CIRP that was envisaged by the IBC129. The delays were attributable to: (i) the NCLT taking considerable time in admitting CIRPs; (ii) late and unsolicited bids by Resolution Applicants after the original bidder becomes public upon passage of the deadline for submission of the Plan; and (iii) multiplicity of litigation and the appellate process to the NCLAT and the Supreme Court130. Such inordinate delays cause commercial uncertainty, degradation in the value of the Corporate Debtor and makes the insolvency process inefficient and expensive. We urge the NCLT and NCLAT to be sensitive to the effect of such delays on the insolvency resolution process and be cognizant that adjournments hamper the efficacy of the judicial process. The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith. Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC. We cannot let the present insolvency regime meet the same fate.

Ibid., Page 20-21 Ibid., Page 23-25 PART L

206 In light of the above, the appeals preferred by Ebix (Civil Appeal 3224 of 2020) and Seroco (Civil Appeal 295 of 2021) stand dismissed. The parties to the appeal preferred by Kundan Care (Civil Appeal 3560 of 2020) shall abide by the directions issued by this Court in exercise of its Article 142 powers as a one-time relief, as specified in paragraph 196 (Section K.2) of this judgement. 207 Pending application(s), if any, shall stand disposed of.

……J. [Dr Dhananjaya Y Chandrachud] .....J. [M. R. Shah] New Delhi;

September 13, 2021.