

Jayanta Banerjee vs Sashi Agarwal on 4 June, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 348 of 2020

[Arising out of Common Order dated 7th February 2020 passed by the
Adjudicating Authority/National Company Law Tribunal, Kolkata Bench,
Kolkata in C.A. (I.B.) No. 1748/K.B./2019 and C.A. (I.B.) 57/K.B./2020]

IN THE MATTER OF:

Jayanta Banerjee
Ambika Mukherjee Road
Natagarh, Gholia, North Parganas
Pin - 700 113

Appellant (Original
Operational
Creditor in CP 1684
of 2018)

Versus

1. Shashi Agarwal
Liquidator of INCAB Industries Ltd
Subarna Apartment (Udayan Club)
21N, Block - A, New Alipore
Kolkata - 700 053

Respondent No.1
(IRP/RP/Liquidator
of CP 1684 of 2018)

2. Committee of Creditors of INCAB
Industries Ltd/Corporate debtor
Through Kamala Mills Ltd
(Being the Largest Financial Creditor)
Office At: Kamala Mills Compound
Senapati Bapat Marg, Lower Parel
Mumbai - 400013

Respondent No.2

Present:

For Appellant : Mr Rishav Banerjee, Mr Avishek Das,
Mr Radovan Sarkar and Ms Madhuja Barman,
Advocates.

For Respondent : Mr Sanjib Kumar Mohanty, Mr Akhilesh
Shrivastava, Ms P.S. Chandralekha,
for Intervener and Mr Akash Sharma.

Mr Krishnendu Datta, Sr. Advocate with
Mr Kumar Anurag Singh, Mr Anando Mukherjee,
Mr Zain A. Khan for Liquidator.
Mr Rudreshwar Singh, Mr Gautam Singh and

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020
Mr Saurabh Jain, for CoC.

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Mr Kamlendra Singh (Intervention for Tropical Ventures Company Ltd).

With
Company Appeal (AT) (Insolvency) No. 720 of 2020

IN THE MATTER OF:

Bhagwati Singh
(Authorised Representative of 277 workers)
S/o Late Biswanath Singh
R/o L4/51, Shisham Road, New Cable Colony
Golmuri, Jamshedpur
East Singhbhum, Jharkhand - 831003

Appellant

Versus

1. INCAB Industries Ltd
Registered Office at 9, Hare Street
Kolkata - 700001
Through Mr Shashi Agarwal
The Liquidator
Office at: Subarna Apartment
(Opposite Udayan Club)
21N, Block - A, New Alipore
Kolkata - 700 053
2. Committee of Creditors of INCAB
Industries Ltd
Through Kamala Mills Ltd
Being the Largest Financial Creditors
Office At: Kamala Mills Compound
Senapati Bapat Marg, Lower Parel
Mumbai - 400013

Respondent No.1/
Corporate Debtor

Respondent No.2

Present:

For Appellant : Mr Sanjib Kumar Mohanty, Mr Akhilesh
Shrivastava, Ms P.S. Chandralekha &
Mr Akash Sharma, Advocates.

For Respondent : Mr Krishnendu Datta, Sr. Advocate with
Mr Kumar Anurag Singh, Mr Anando Mukherjee
& Mr Zain A. Khan for Liquidator, R-1.
Mr Rudreshwar Singh, Mr Gautam Singh &
Mr Saurabh Jain for CoC, R-2

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020
J U D G M E N T

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[Per; V. P. Singh, Member (T)] These two Appeals emanate from the Common Order dated 7th February 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata

Bench, Kolkata in C.A. (I.B.) No. 1748/K.B./2019 and C.A. (I.B.) 57/K.B./2020 in C.P. (I.B.) No 1684/K.B./2018, whereby the Adjudicating Authority/NCLT initiated liquidation proceedings against the Corporate Debtor 'INCAB Industries Limited', wherein the Appellant of Appeal No.348 of 2020 was employed until the date of passing the order of liquidation. Parties original status in the Company Petition represents them in these Appeals for the sake of convenience.

Appellants Averment

2. The Corporate Debtor was admitted into the Corporate Insolvency Resolution Process (in short 'CIRP'), vide order dated 7th August 2019, and Respondent No. 1 was appointed as Interim Resolution Professional (IRP) of the Corporate Debtor.

3. Under the invitation of claims by the IRP, the Appellant and thousands of other employees who were employed with the Corporate Debtor submitted their claim, along with other Operational Creditors and Financial Creditors.

4. Subsequently, after forming the Committee of Creditors ('COC'), the resolution was adopted on 5th December 2019 to liquidate the Corporate Debtor, thereby sabotaging the chances of revival of the Corporate Debtor and pushing the Corporate Debtor employee's into an abyss with an uncertain future.

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5. The liquidation order came into the Appellant's knowledge when the Application under Section 33 of the Insolvency and Bankruptcy Code, 2016, the Respondent filed C.A.(I.B.) No. 17/K.B./2019 before the Adjudicating Authority/NCLT Kolkata Bench. The Appellant intervened in the said matter and filed its opposition in the same. The Appellant also filed an Application under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 being C.A. (I.B.) No. 57/K.B./2024 to remove the Respondent as the Resolution Professional working connivance with the majority of the creditors of the Corporate Debtor.

6. The Committee of Creditors (from now on referred to as CoC) also consist of 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited', both were managed and owned by one of the Directors of the Corporate Debtor, Mr Ramesh Ghamandiram Gowani, resigned from the management of the Corporate Debtor after the initiation of the Corporate Insolvency Resolution Process.

7. We have heard the arguments of the Learned Counsel for the parties and perused the record. The following issue arises in these appeals for our consideration.

1. Whether 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' who were made part of CoC are related parties in terms of proviso to Section 21(2) of the Insolvency and Bankruptcy Code 2016?

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2. Whether assignment of debt in violation of Section 5 of the SARFAESI Act 2002 and Factoring Regulation Act 2011 is valid?

3. Whether IRP/RP can constitute CoC based on submission of claims only, without verifying and admitting or rejecting the claims? Point No.1.

Whether 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' who was made part of CoC are related parties in terms of proviso to Section 21(2) of the Insolvency and Bankruptcy court 2016?

Appellants Submission 7(a) The Impugned Order passed under Section 33 of the Insolvency and Bankruptcy Code 2016 is based on the Committee of Creditors' resolution in its 5th COC meeting. The majority of CoC members (in terms of voting rights) passed the resolution for liquidation. They are none other than related parties of the Corporate Debtor. These two Financial Creditors together constitute the majority of Financial Creditors with a vote share of 77.20%. 7(b). Under Section 5(24)(a) of the Code, a "related party", in relation to the corporate debtor, means a director or partner of the corporate debtor or a relative of a director or Companies Act. A related party about the Corporate Debtor (public company) includes "a Director of the Corporate Debtor holding more than 2% of the shares capital. Sub-section (f) of 5(24) states that "a body corporate whose board of directors, managing director or manager, in the Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 5 of 82 ordinary course of business, acts on the advice, directions or instructions of the individual."

7(c). Given the provisions above, it is found that 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' (both members of COC) were related party as Mr Ramesh Ghamandiram Gowani had a substantial shareholding of 99.74% in the Financial Creditor Kamla Mills Ltd and is also a Director and Shareholder of the Financial Creditor 'Fasqua Investment Private Limited'. He was the Director of the Corporate Debtor 'Incab Industries Ltd' till the commencement of the CIRP. After that, he resigned from the Directorship of the corporate debtor.

7(d). The Appellant's contention is further substantiated with the support of master data of the Corporate Debtor, which reflects that Mr Gowani was the Director of the Corporate Debtor till 28th November 2019. (Copy of master data at Volume 3rd, page 555 of appeal paper book).

7(e). The master data of 'Fasqua Investment Private Limited' reflect that Mr Gowani was both a Director and Shareholder. (Copy of master data at volume II, page 244) 7(f). The shareholding pattern of 'Kamla Mills Private Limited' reflects that Mr Gowani was both a Director and Shareholder. (Copy of shareholding pattern, Vol. III, Appeal Paper book, Page-488).

7(g). The locus of the majority of Financial Creditors in the 'COC', namely 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited', both of Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 6 of 82 which were managed and owned by one of the directors of the Corporate

debtor, is also questionable on account of unlawful assignment of debt which is contrary to law.

7(h). The Corporate Debtor was operational and could have been revived if a premature liquidation order had not been passed.

7(i). The liquidator is working 'hand in gloves' with the 'COC' to Liquidate the Corporate Debtor and, as such, acted in a manner dehors the provision of the Insolvency and Bankruptcy Code, 2016.

7(j). The Appellant contends that the documents filed with the Appeal could indicate that Mr Gowani held the position as Director of the Corporate Debtor till 20th November 2019, which is much after the commencement of the CIR process. This suggests that Mr Gowani was the Director of the Corporate Debtor as on the insolvency commencement date. The same Mr Gowani, i.e. a 'CoC' Member, is also a Director and Shareholder of the 'Fasqua Investment Private Limited'. Thus, at the very threshold, the Constitution of 'CoC' is liable to be declared as invalid and is liable to be set aside in terms of proviso to Section 21(2) of the Insolvency and Bankruptcy Code, 2016, which makes it vividly clear that the Financial Creditor, if it is a related party to the Corporate Debtor, shall not have the right of representation, participation, or voting in meeting the Committee of Creditors.

8. Respondent No. 1/Liquidator's reply regarding the inclusion of 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited in the Committee of Creditors.

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 7 of 82 a. Respondent No. 1/Liquidator contends that Mr Ramesh Gowani claims to be a Director of the Corporate Debtor in terms of the Telefax Communication, dated 4th May 2009, passed by the BIFR in case No. 390 of 1999. In terms of the said order of the BIFR, while approving the Corporate Debtor's change in Directors, Mr Ramesh Gahmandiram Gowani was appointed as an Additional Director of the Corporate Debtor.

b. Hon'ble High Court of Delhi, in Writ Petition (Civil) No. 3358/2012, passed an order dated 29th April 2013, set aside the said Telefax Communication of BIFR dated 4th May 2009. Since the said Telefax Communication was set aside by the Hon'ble High Court, therefore, Mr Gowani cannot be said to have been appointed and/or continued as such.

c. That even if for the sake of arguments, the stand was taken by the Appellant that Mr Ramesh G. Gowani was appointed and continued as an Additional Director of the Corporate Debtor, is taken as correct, in terms of Section 260 of the Companies Act, 1956, such Director could hold office only till the conclusion of the next Annual General Meeting, which could have been held up to 30th September 1999. In case the meeting was not held on that date or thereafter, such directors would be deemed to have vacated the office after that. d. Hence, Mr Gowani more or less stood on the footing of a special officer appointed by BIFR. He resigned in 2019 as a preventive. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 8 of 82 Therefore, it could not be interpreted as a continuation as a Director up to the resignation. His resignation was only to correct the Ministry of Corporate Affairs records, which could not be updated as no AGM held for the last 20 years. Therefore, such resignation was a corrective measure and could not be interpreted as a continuation as Director.

9. Discussion on the objection regarding the inclusion of 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' in the Committee of Creditors.

a. The term 'related party' relating to the Corporate Debtor is defined in Section 5(24) of the Insolvency and Bankruptcy Code 2016. Given sub-section (5) of Section 24 of the Code, a related party of the Corporate Debtor shall not have any right of representation, participation or voting in a meeting of the Committee of Creditors.

b. Section 21 of the Insolvency and Bankruptcy Code 2016 reads as under;

"Sec 21. Committee of creditors;

(1) The interim resolution professional shall, after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 9 of 82 Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub- section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

(emphasis supplied)

10. Hon'ble Supreme Court in case of Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475 : (2021) 2 SCC (Civ) 1: 2021 SCC OnLine SC 51 at page 520 has held ;

"61. The definition of the expression "related party" in Section 5(24) is exhaustive, since the expression is defined to "mean" what is set out in sub-clauses (a) to

(m). The expression "related party" is defined in Section 5(24) as follows:

"5. (24) "related party", in relation to a corporate debtor, means--

(a) a Director or partner of the corporate debtor or a relative of a Director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a Director, partner, or manager of the corporate debtor or his relative is a partner; Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 10 of 82

(d) a private company in which a Director, partner or manager of the corporate debtor is a Director and holds along with his relatives, more than two per cent of its share capital;

(e) a public company in which a Director, partner or manager of the corporate debtor is a Director and holds along with relatives, more than two per cent of its paid-up share capital;

(f) anybody corporate whose Board of Directors, Managing Director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a Director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a Director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a Director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement;

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(k) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the Board of Directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of--

(i) participation in policy-making processes of the corporate debtor; or

- (ii) having more than two Directors in common between the corporate debtor and such person; or
- (iii) interchange of managerial personnel between the corporate debtor and such person; or
- (iv) provision of essential technical information to, or from, the corporate debtor;"

The expression "related party" is defined in Section 5(24) in relation to a corporate debtor. Section 5(24-A) provides a corresponding definition in relation to an individual.

62. The definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X. The definition of "related party"

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 12 of 82 under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of interrelationships between the financial creditor and the corporate debtor [Richa Saraf, "Concept of Related Party: Interpretation by Letter or Spirit of the IBC?", (India Corp Law, 11-8-2018) available at <<https://indiacorplaw.in/2018/08/concept-related-party-interpretation-letter-spirit-ibc.html>>.]

63. The term "related party" has also been defined by Parliament in the Companies Act, 2013 for all corporations. The definition of the expression has also been expanded for listed entities by the Securities Exchange Board of India by amendment to the Equity Listing Agreement to include elements mentioned under applicable accounting standards. However, in the present case, we are assessing its definition only under the IBC, which is exhaustive. The purpose of defining the term separately under different statutes is not to avoid inconsistency but because the purpose of each of them is different. Hence, while understanding the meaning of "related party" in the context of the IBC, it is important to keep in mind that it was defined to ensure that those entities which are related to the corporate debtor can be identified clearly, since their presence can often negatively affect the insolvency process.****

88. An issue of interpretation in relation to the first proviso of Section 21(2) is whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt.**** Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 13 of 82

103. Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.

104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a "related party"

before the corporate debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors."

(verbatim copy) (emphasis supplied) Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 14 of 82

11. Hon'ble Supreme Court has dealt with the issue of related Party in relation to the Corporate Debtor and has laid down the rationale for excluding the related Party from the Committee of Creditors. Hon'ble Supreme Court has further propounded that the default rule under the 1st proviso to Section 21(2) of the I&B Code 2016 is that only those Financial Creditors related parties in praesenti would be debarred from the 'CoC'. But bar under 1st proviso to Section 21(2) denying the right of representation, participation or voting in a meeting of the Committee of Creditors who are related Party may even apply to a party who in the present is not related, but in the past was a related party, if divesting was intending to be part of CoC.

12. The Appellant contends that the corporate debtor was operational and could have been revived had the premature liquidation order not passed. It is submitted that IRP/RP should have made every effort to run the Corporate Debtor as a going concern. The liquidation should have been the last resort in the CIR process. However, the Company was sent into liquidation in the instant case without even publishing the Information Memorandum. The fact that the Company was a going concern could be reflected from the facts that the Pune plant of the Corporate Debtor was in production till the year 2016, which could be clear from the Custom Returns filed by the Corporate Debtor before the Central Board of Excise and Customs. (Copy of the Customs Return is at Vol.III pages 482 for 486).

13. The Appellant contends that the liquidator worked 'hand in gloves' with the 'COC' to liquidate the Corporate Debtor. During the 3rd 'COC' meeting, dated 18th October 2019, the IRP, who is also liquidator, was informed by one Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 15 of 82 of the Members of the 'COC', namely 'Pegasus Assets Reconstruction Private Limited', that Mr Gowani, who was, in fact, the Director of the Fasqua Investment Private Limited and also the majority Shareholder of the Kamla Mills Ltd was a related party of the Corporate Debtor that is a clear violation of the explanation to Section 21 (2) of the Code. (Ref; Minutes of 3rd COC meeting dated 18th October 2019 is at volume 1st, pages 110 to 111 of Appeal Paper book.) The IRP/RP ignored the concerns raised by Pegasus Assets Reconstruction Company Private Limited & informed the COC that he would take necessary steps to prepare the Information Memorandum by 22nd November, specified under Regulation 36 of the IBBI (Insolvency Resolution for Corporate Persons) Regulation, 2016. (Ref; 4th 'CoC' meeting minutes dated 11th November 2019 is Vol.1. Pages 119-120).

14. The Appellant further contends that the Adjudicating Authority, by its order dated 20th November 2019, passed the direction upon the suspended management to cooperate with the R.P. Despite such an order, the R.P. made no progress in preparing the Information Memorandum and stated that there was a resolution of the 'CoC' for an order of liquidation, and no Information Memorandum was required. It is pertinent to mention that the resolution was passed by the 'CoC' much after the date of expiry of timelines for issuing the Information Memorandum, and nothing prevented the R.P. from carrying out his duties. (Ref CoC minutes of the meeting, dated 5th December 2019, volume I, page 125). This is a flagrant violation of Regulation 36 Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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15. The Learned Counsel for the Appellant further submitted that the R.P. chose to ignore his basic duties, and instead, his actions and inactions jeopardised the livelihood of 1000's workers. The Appellant also relied on the Hon'ble Supreme Court judgement in the Committee of Creditors, Essar Steel India Ltd versus Satish Kumar Gupta Manu/SC/1577/2019. Respondent number 1/liquidator's submission& Discussion

16. Respondent No. 1 contends that as an IRP/RP, despite non-availability of documents and non-cooperation, had prepared an information memorandum having information to the extent available as stated in the 4th 'COC' meeting. Still, the same is incomplete as all information stipulated by the Regulations was not available. However, the same would be made available on the receipt of the non-disclosure agreement.

17. Respondent No. 1 /Liquidator states that he had proposed and appointed the valuer in the 4th 'COC' meeting and proposed two registered valuers to determine the fair value and liquidation value under Regulation 35 CIRP regulations. In the 4th COC meeting, he circulated the quotation for valuation of assets of the Corporate Debtor he received by email from three Registered Valuers. After careful deliberation on the same concluded that the 'CoC' would confirm the names of the

valuation professional after having consultations among themselves within two days. After that, in the 5th CoC meeting, at the time of discussion for status/steps taken, the CoC members present proposed and discussed for liquidation of the corporate debtor. After Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 17 of 82 that, the Adjudicating Authority allowed Application u/s 33 of the Code, and he was appointed as liquidator of the Corporate Debtor.

18. Respondent No. 1 further contends that the Appellant, an erstwhile workman of the Corporate Debtor and Operational Creditor, has no locus to institute the Appeal and question the Creditors' Committee's commercial wisdom to liquidate the Corporate Debtor.

19. Respondent No. 1 states that in the notice of the 'CoC' meeting sent to 'COC' members, there was no agenda about the Corporate Debtor liquidation. The members suo-moto took up the issue of liquidation of the Corporate Debtor. None of the members presents either physically or through video conferencing opposed discussion regarding the corporate debtors liquidation. As per the discussion in the 'COC' meeting, members exercised their right to vote on resolutions through e-voting.

20. Respondent No. 1 further contends that with effect from 16th August 2019, Section 33 (2) of the Insolvency and Bankruptcy Code 2016 have been amended. The explanation has been added to the said Section 33 (2) in terms of which the Committee of Creditors may decide to liquidate the Corporate Debtor, any time after its Constitution of CoC under Sub-section (1) of Section 21 but before the confirmation of the Resolution Plan, including any time before the preparation of the Information Memorandum.

21. The decision to liquidate the Corporate Debtor was taken with a majority of the entire Committee of Creditors except for Pegasus Assets Reconstruction Company with a vote share of 7.9%. The rests of the members Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 18 of 82 voted for and in favour of the liquidation of the Corporate Debtor. The said resolution was passed with an overwhelming majority of 90.83%.

22. The Adjudicating Authority made the following observation in the impugned order;

"71. The other challenge is that M/S Kamla Mills Ltd and Fasqua investment Private Limited related parties of the corporate debtor because Mr Ramesh G Gowani was a common director in all these entities. This plea is also devoid of merits for the reason that in our order dated 19th November 2019, it has been held that he has never been a director of the Company and which order has been attained finality. In addition to that, section 260 of the Companies Act 1956, now cited by the applicant's, in fact, further support our order. As per this provision, read with the circular issued by MCA, Mr Ramesh G Gowani is deemed to have vacated the office on 29th September 1999, in the event, he was found to be additional Director validly appointed. Further, as far as the aspect of resignation on 20th November 2019 is concerned, in our considered view, it is of no consequence as it has already been established that he was never the Director or be deemed to have vacated much before. We further find force

in the contention made of of Mr Gowani that such action was taken as a precautionary measure and to update the MCA records, which were pending for updation since 1999 as no meetings of shareholders, i.e. AGM or EGM, have taken place since then."

(Verbatim copy)

23. In the above order, the Adjudicating Authority mentions that in the order dated 19th November 2019, it has been held that Mr Ramesh G Gowani has never been a Director of the Company and that order has attained finality. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 19 of 82 It is pertinent to mention that IRP/RP filed an Application under Section 19(2) of the Insolvency and Bankruptcy Code 2016 for directions to the respondents to give access to the books of account and other statutory records of the Corporate Debtor, provide all information and handover possession of all assets to resolution professional for a smooth implementation of CIRP. The adjudicating authority, while disposing of the said Application C.A. 1453/K.B./2019, made observations;

"3. When the matter came up for hearing, representative of one Respondent, i.e. Ramesh Ghamandiram Gowani appeared and pleaded that such person was not a director of the corporate debtor, hence it should not be implied in the said petition. In support of such claim it was mentioned that the corporate debtor had earlier been subject to proceedings before the BIFR in 1999. In 2008, the additional directors were appointed, which were confirmed by the BIFR on 4th May 2009. In addition to these three directors, Mr Ramesh Ghamandiram Gowani was also appointed as nominee director of the Company Mrs Kamla Mills Ltd. Who is one of the financial creditors of the Company holding 46% of the total debt. However, Hon'ble Delhi High Court in writ petition number 3358/2012 and writ petition number 3999/2012 set aside the order of the BIFR dated 4th May 2009 and restored the position as existing prior to that date.

4.*

5. We have considered the submissions made by the learned counsel for the resolution professional as well as Respondent namely Ramesh Ghamandiram Gowani. Before proceeding further it is, in our considered view, necessary to Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 20 of 82 decide the issue whether such Respondent is a director of the Company or not because Cooperation/support for implementing CIRP in a smooth and timely manner depends upon the active support from the erstwhile directors of the corporate debtor. Copy of Hon'ble Delhi High Court order dated 29th April 2013 in writ petitions(civil) number 3358 of 2012, which refers to the writ petition (civil) number 3999/2018, has been placed on record. In the said petition, telefax communication dated 4th May 2009 of the BIFR has been set aside. Said telefax communication refers to the case No. 390 of 1999. As per the communication, three directors namely (a) Mr Mahendra Shah (P) Y R Kori (c) Kersi Amaria have been appointed as additional directors of the

corporate debtor. In the said telefax, representative of Kamla Mills Ltd has also been appointed as a nominee director. The said telefax has been set aside, hence, this Respondent cannot be said to have remained a director or to have been appointed as Director and/or continued as such. Accordingly, we hold that Mr Ramesh Ghamandiram Gowani is not a director of the corporate debtor company and he should not be impeded as Respondent in the said petition filed under section 19 (2). Accordingly, this petition stands modified in terms of our this order.

6. Having stated so, we direct the respondents/directors and officers of the Company to provide all necessary documents, information and handover the possession of the assets of the corporate debtor to resolution professional so that CIRP can be completed smoothly and in timely manner-----."

(verbatim copy)

24. We find that the Adjudicating Authority's observation is based on its earlier order dated 19th November 2019 about 'Kamla Mills Ltd' and 'Fasqua Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 21 of 82 Investment Private Limited' being not related parties to the corporate debtor, has attained finality. However, the Adjudicating Authority failed to notice that his earlier order contains a stray observation about the Directorship of Mr Ramesh G Gowani in the corporate debtor company. Because it was not an issue in C.A., 1453/K.B./2019 filed under Section 19(2) of the Code. The said Application was filed U/S 19(2) of I & B code 2016 by IRP/RP, only on a limited issue involving direction to extend cooperation to the IRP. But it appears that the Adjudicating Authority, instead of deciding the main issue to extend cooperation by the suspended directors of the corporate debtor to the IRP, has travelled beyond the scope of Section 19 (2) of the Code and decided that Mr Ramesh Ghamandiram Gowani is not a director of the corporate debtor company and that he should not be implicated as Respondent in the said petition. The appellants or other parties likely to be affected by such order were not a party to such decision. Their right to question the status of Mr Ramesh Ghamandiram Gowani cannot be taken away. Therefore, such a finding could not be treated as has attained the finality.

25. While passing the above-mentioned order, the Adjudicating Authority has placed reliance on the Hon'ble Delhi High Court order dated 29th April 2013 in Writ Petition (Civil) No. 3358 of 2012, which refers to the Writ Petition (Civil) No. 3999 of 2018. In the said petition, telefax communication dated 4th May 2009 of the BIFR has been set aside. As per the communication, three directors, namely (a) Mr Mahendra Shah (b) Y R Kori (c) Kersi Amaria, had been appointed as additional directors of the corporate debtor. A representative of Kamla Mills Ltd had also been appointed as a nominee Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 22 of 82 director by the said telefax. The Adjudicating Authority has further observed that since the said telefax order of BIFR has been set aside, this Respondent cannot be said to have remained a director or have been appointed as Director and/or continued.

26. In the circumstances, it is necessary to go through the telefax communication dated 4th May 2009 and the order of the Hon'ble High Court in Writ Petition No. 3358 of 2012, dated 29th April

2013. The copy of the telefax message is annexed with the reply of respondent number 2 as Annexure R1. The Xerox copy of the telefax communication (Annexure R-1)is as under; Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 23 of 82 The Xerox copy of the Hon'ble High Court order dated 29th April 2013 (Annexure R2) is as under;

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27. On perusal of the telefax message dated 4th May 2009, it is clear that the said telefax communication was relating to the appointment of additional directors by the BIFR. This telefax communication does not contain the order to appoint Mr Ramesh Ghamandiram Gowani as Director of the Corporate Debtor. However, on perusal of the order of the Hon'ble High Court dated 29th April 2013, it is found that Hon'ble High Court has set aside the telefax communication dated 4th May 2009. The Hon'ble High Court has observed that "after considering the matter, the parties are agreed that the telefax communication is set aside as there is no order dated 4th May 2009 passed by the bench as such." It is also specifically stated in the order that "the result of this is clearly understood by the parties to mean that the position as existing on 3rd May 2009 would revive as regards the contents of the said telefax communication dated 4th May 2009."***** It is further observed by the Hon'ble High Court that "we have consciously not said anything about the merits of the matter because that had the potential for confounding the situation even more".

28. Based on telefax communication dated 4th May 2009 and the Hon'ble High Court order dated 29th April 2013, the position that emerges is that the BIFR never passed such order as stated in telefax communication.

29. The Learned Counsel for the Appellant has placed reliance on the master data of the Corporate Debtor annexed with the appeal paper book as Annexure VI. Photocopy of the master data is as under; Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 26 of 82

30. The Master data of the Ministry of Corporate Affairs clearly shows that Corporate Debtor 'Incab Industries Limited' was having four directors, and one of them was Mr Ramesh Ghamandiram Gowani. It also appears that Mr Gowani is having the DIN/PAN 00005676, was Director of the corporate debtor from 11th May 2009 till 20th November 2019.

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31. The master data of the Ministry of Corporate Affairs about Financial Creditor Fasqua Investment Private Limited is annexed with the Appeal paper book volume 2/page 244. The Xerox copy of the master data is as under;

32. On perusal of the master data of Fasqua Investment Private Limited, it appears that Mr Ramesh Ghamandiram Gowani has the DIN/PAN 00005676 and is a Director in the Company since 27th November 1992. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 28 of 82

33. The Learned Counsel for the Appellant further submitted that the shareholding pattern of Financial Creditor Kamla Mills Private Limited reflects that Mr Ramesh Ghamandiram Gowani is both a director and shareholder in the Company. The Xerox copy of the list of shareholders of Kamla Mills Ltd dated 31st March 2018 is annexed with the Appeal paper book on Page No. 488, which is as under;

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34. The shareholding pattern of the Financial Creditor, Kamla Mills Ltd, shows that Mr Ramesh Gowani's shareholding in the Kamla Mills is 99.74%.

35. The Learned Counsel for the Appellant contends that Mr Gowani held the position as Director of the Corporate Debtor till 20th November 2019, which is much after the commencement of the CIR process, i.e. on 7th August 2019.

36. The Adjudicating Authority has observed that Section 260 of the Companies Act 1956, read with the Ministry of Corporate Affairs circular, supports its order. By implication of the said provision, Mr Ramesh Ghamandiram Gowani is deemed to have vacated the office on 29th September 1999. Further, as far as the aspect of resignation on 20th November 2019 is concerned, it is held by the Adjudicating Authority that it is of no consequence because it has already been established that he was never a director or be deemed to have vacated much before. We further find force in the contention made by Mr Gowani that such action was taken as a precautionary measure and to update the MCA records, which were pending for updation since 1999 as no meetings of the shareholders, i.e. AGM or EGM, have taken place since then.

37. Section 260 of the Companies Act 1956 reads as under;

"Section 260. Additional directors, Companies Act 1956

260. Additional directors.--Nothing in Section 255, 258 or 259 shall affect any power conferred on the Board of directors by the articles to appoint additional directors:

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 30 of 82 Provided that such additional directors shall hold office only up to the date of the next annual general meeting of the Company:

Provided further that the number of the directors and additional directors together shall not exceed the maximum strength fixed for the Board by the articles."

38. The Adjudicating Authority has noted that by implication of Section 260 of the Companies Act 1956, Mr Ramesh Ghamandiram Gowani is deemed to have vacated office, in the event he was found to be Additional Director validly appointed, on 29th September 1999, i.e. much before his resignation on 20th November 2019.

39. The said Finding appears to be incorrect given Section 260 of the Companies Act 1956. Because of the statutory provision, Additional Directors shall hold office only up to the date of the next Annual General Meeting of the Company. The Appellant has filed a copy of the 81st Annual Report of INCAB industries limited, which contain the report from 1st April 1999 to 31st December 1999. Page 7 of this report is the Director's report. Clause 13 of this report specifically provides that Mr Ramesh Gowani (DIN: 00005676) was appointed as an additional director with effect from 11th May 2009. Each of these directors shall hold office up to the ensuing Annual General Meeting. Accordingly, the Board recommends the appointment of these directors for the Company's shareholders approval.----The brief resume/details relating to the directors who are proposed to be appointed/re-appointed are furnished in the explanatory statement to the notice of the next Annual General Meeting. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 31 of 82

40. The explanatory statement includes a brief profile of the directors to be appointed, the nature of their expertise, and other disclosures. The disclosure about the proposed Director Ramesh G. Gowani shows that his first appointment on the Board of 'Incab Industries Ltd' was made on 11th May 2009. The disclosure contains the list of names of 20 companies, including Fasqua Investment Private Limited & Kamla Mills Ltd. This report dated 1st February 2018 (which is much after the orders of Hon'ble High Court dated 29th April 2013) contains the notice of the Annual General Meeting proposed for 3rd March 2018. The Appellant has also filed a letter sent by the corporate debtor Board of Directors seeking police help for the proposed AGM dated 3rd March 2018. The authorised signatory of the Corporate Debtor had written a letter to the Joint Commissioner for providing police protection, as AGM is proposed after 18 odd years. Before this, the last AGM took place on 22nd December 1999. Appellant had also filed the notice to show that the AGM dated 3rd March 2018 was again postponed for 27th March 2018.

41. Based on the above, it is clear that Mr Ramesh Ghamandiram Gowani's appointment as Director of the Corporate Debtor was based on the resolution of the AGM held in 1999. Before his appointment, he was holding the post of Additional Director of the Company. It is also undisputed that after 1999 no AGM took place. The AGM scheduled for 3rd March 2018 was again postponed for 27th March 2018. Because no AGM took place since 1999, as per provision of Section 260 of the Companies Act, 1956, Mr Ramesh Ghamandiram Gowani continued as Director until his resignation, i.e. 20th November 2019, which is much after the commencement of the CIR process on 7th August Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 32 of 82 2019. Apart from this, in IBC, directors responsible for bringing corporate debtor on the doors of liquidation cannot be allowed to escape responsibility and liabilities based on provisions of the Companies Act seeking deemed vacation of Director's office.

42. The Adjudicating Authority has observed that Mr Ramesh Ghamandiram Gowani appointment as Director of the corporate debtor was based on telefax communication dated 4th May 2009, set aside by the Hon'ble High Court order Dt. 29th April 2013. From the Hon'ble High Court order, it appears that after noticing that there is no such Order dated 4th May 2009 passed by the Bench, the Hon'ble High Court, without adding anything further set aside the telefax communication dated 4th May 2009. It is also clarified in the order that the position that was existing prior to telefax communication, i.e. that is, on 3rd May 2009, stood revived. Hon'ble High Court has further

clarified in the order that that they are not saying anything about the merits of the matter because both parties have agreed that the said telefax communication be either set aside or ignored. Since no order was passed on 4th May 2009, there could not be any impact of the said non-existent order.

43. It is pertinent to mention that Mr Ramesh Ghamandiram Gowani resigned from the post of Directorship only after the initiation of CIRP against the Corporate Debtor. Therefore, it is inconceivable that the resignation of Mr Ramesh Ghamandiram Gowani from Directorship of the Corporate Debtor with effect from 20th November 2019 was taken as a precautionary measure to update the MCA records, which were pending updating since 1999. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 33 of 82

44. The Appellant has further placed on record the authorisation letter dated 21st January 2011 for operating the bank account of the Corporate Debtor Company 'Incab Industries Limited' having Current Account No. 00290200000541. Xerox copy of the letter annexed with the appeal paper is as under;

45. The above-stated Bank Authorisation Letter dated 24th January 2011 shows that Mr R. G. Gowani was authorised by the Board of the Corporate Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 34 of 82 Debtor 'Incab Industries Limited' for operating the bank account number 00290200000541.

46. The Appellant has also filed the extract of the minutes of the Board Meeting dated 3rd May 2012 of the Corporate Debtor Company whereby the Board has changed the authorised signatory for the operation of the bank account maintained with the State Bank of India, Current Account No. 14/16312. This contains the name of Mr Ramesh G Gowani, as Director of the Company, as one of the authorised signatories. The Xerox copy of page 617 of the Appeal paper book is as under ;

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47. Based on the above discussion, we are of the considered opinion that Mr Ramesh Ghamannndiram Gowani was the Director of the Company till his resignation 20th November 2019, i.e. much after initiation of the Corporate Insolvency Process of the Corporate Debtor.

48. Section 5(24) (f) of the Insolvency and Bankruptcy Code 2016 clearly defines related Party in relation to Corporate Debtor that includes anybody corporate whose Board of directors, managing Director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor. In the instant case undisputedly, Mr Ramesh Ghamannndiram Gowani had a substantial shareholding of 99.74% in Financial Creditor Kamla Mills private limited. He is also Director and Shareholder of the Financial Creditor Fasqua Investment Private Limited. It is also on record that Mr Ramesh Ghamannndiram Gowani, who was in the proposed AGM Dt. 3rd March 2018 seeking the re- appointment, resigned from the Corporate Debtor's Board with effect from 20th November 2019, i.e. much after initiation of the Corporate Insolvency Process against the Corporate Debtor Incab Industries Limited.

49. Hon'ble Supreme Court in the case of Phoenix ARC (supra), has laid down the law that the term related Party in the context of IBC is defined to ensure that those entities which are related to the Corporate Debtor can be identified clearly since their presence can often negatively affect the insolvency process. Hon'ble Supreme Court has further propounded that the default rule under the first proviso to Section 21(2) is that only those Financial Creditors that are related parties in praesenti would be barred Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 36 of 82 from the 'COC'. However, the related Party Financial Creditors that seem to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2) should also be considered as being covered by the exclusion thereunder. Therefore Mr Ramesh Ghamanndiram Gowani's resignation from the Board of Directors of the Corporate Debtor 'Incab Industries Limited' after initiation of the Corporate Insolvency Process will not circumvent the exclusion under the first proviso to Section 21 (2) of the Code. Thus Financial Creditors' Fasqua Investment Private Limited' & 'Kamla Mills Ltd' are the related Party of the Corporate Debtor 'Incab Industries Ltd' in terms of Section 5 (24)(f) of Insolvency and Bankruptcy Code 2016 and terms of Ist proviso to Sec 21(2) of I & B Code; they are not entitled to represent, participate and vote in the CoC of the corporate debtor 'Incab Industries Ltd.'

2. Whether assignment of debt in violation of section 5 of the SARFAESI Act 2002 and Factoring Act 2011 is valid?

50. The Learned Counsel for the Appellant contends that the legal status of the Financial Creditors, namely, 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited', having a majority voting rights in the 'COC', is questionable due to an existing dispute concerning the assignment of debt.

51. The Appellant contends that no corporate debtor's debt could have been assigned in favour of 'Kamla Mills Ltd'. The loan was initially granted by Asset Reconstruction Company (India) Ltd. However, in 2006, the loan was assigned in favour of Kamla Mills Ltd given to section 5 of the SARFAESI Act 2002, which provides that "notwithstanding anything contained in any other law for Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 37 of 82 the time being in force, any securitisation company or reconstruction company may acquire financial assets of the bank or financial institutions".

52. The Factoring Regulation Act was enacted to govern the assignment of debt, and as per the provisions of this Act, Kamla Mills Ltd was not an eligible party. In this regard, the Hon'ble Supreme Court vide order dated 11th September 2018 left the question of assignment of debt open with liberty to be raised under the Insolvency and Bankruptcy Code, 2016. Therefore, when the very question of the assignment was left to be decided by the Adjudicating Authority and in law while deciding the question in a summary manner without appreciating the evidence on record raises serious question about the assignment affecting the Constitution of the 'COC'.

53. Hon'ble Supreme Court, after enactment of the Insolvency and Bankruptcy Code, vide order dated 11th September 2017, dismissed the SLP with liberty to the aggrieved parties to raise all issues, including the assignment's validity.

54. The Learned Counsel for the Respondent No.2 submits that Reference under the 8th Schedule could have been made only in cases where proceedings were pending before the BIFR or AAIFR, within 180 days from the commencement of the Insolvency and Bankruptcy Code 2016. Since no proceedings were pending before BIFR or AAIFR, the proceedings before BIFR and AAIFR had attained finality. Further, no reference has been made under the 8th Schedule by any of the aggrieved parties within 180 days from the date of commencement of the Insolvency and Bankruptcy Code, 2016. Hence, the Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 38 of 82 aggrieved parties have wilfully preferred not to address the said issues. Therefore by the principle of estoppel, the parties are barred from raising any such issue, particularly when the proceedings for liquidation of the Corporate Debtor is at such an advanced stage.

55. The Appellant has relied on Section 5 of the SARFAESI Act 2002 and the Factoring Act, 2011. Section 5 of the SARFAESI Act 2002 provides debt assignment only to an Asset Reconstruction Company. However, the SARFAESI Act 2002 does not apply to the proceedings under the Insolvency and Bankruptcy Code 2016 since there is no condition prescribed under the Insolvency and Bankruptcy Code 2016 mandating the assignment of debt only to an Asset Reconstruction Company. Further, the provisions of the Factoring Act 2011 shall not be available to the Appellant since the assignment in the instant case took place much before the commencement of the Factoring Act 2011. It was promulgated to provide liquidity to the micro, small and medium enterprises sector by devising a mechanism for assignment of receivables of the industries to manage the working capital needs and hence has no applicability to instant proceedings.

56. The deed of assignment derives its source from Section 130 of the Transfer of Property Act, 1882, that was executed in compliance with the said provisions. Therefore, there exists no violation of any of the provisions of the Insolvency and Bankruptcy Code 2016.

57. It is further contended that it is not open to the 3rd parties like the Appellant in the instant case, who was an Operational Creditor with no voting Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 39 of 82 rights in the 'COC' to challenge the validity of the assignment. Specifically, in view of the fact that the parties to the assignment have no claims against each other, i.e. neither the assigners nor the assignee has challenged the said assignment on one ground or another.

58. The Learned Counsel for the Respondent also submits that the assignment of debt has also been settled by the Hon'ble High Court of Delhi vide order dated 9th April 2009, passed in W.P. (Civil) No 942 of 2007.

59. The learned counsel for Respondent No. 2 submits that the challenge to the assignment deed is not maintainable without impleading the parties to the assignment deed.

Finding

60. Based on the above discussion, we believe that because the parties to the assignment deed were not made Party either before the Adjudicating Authority or before this Appellate Tribunal, the assignment in question can not be raised on this ground.

Point No 3. Whether IRP/RP can constitute CoC based on submission of claims only, without verifying and admitting or rejecting the claims?

61. In the instant case, we have noticed that the Committee of Creditors decided to liquidate the Corporate Debtor even without the valuation of the Corporate Debtor. We have also seen that the IRP/RP has formed the Committee of Creditors even without admitting the claim, i.e. only based on claims submission. It is essential to evaluate the validity of the Committee of Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 40 of 82 Creditors, which was constituted even without verification, admission or rejection of claims. It is essential to evaluate how the Corporate Insolvency Resolution Process can go on without knowing the actual percentage of voting share of a Financial Creditor, based on the Financial Debt owed by that creditor. In this case, we have also noticed that no Information Memorandum was prepared. An order of liquidation is passed on the pretext of the proviso to Section 33 (2) of the Insolvency and Bankruptcy Code. In the instant case, liquidation has been started even without valuation and determination of the liquidation value.

62. Under the Insolvency and Bankruptcy Code 2016, the role assigned to the Committee of Creditors is of paramount importance. Section 28 of the I & B code 2016 specifically provides the actions that require the approval of the Committee of Creditors. The success of corporate insolvency resolution entirely depends upon the validly constituted Committee of Creditors. Therefore the legislature has barred the representation, participation and voting by related parties in a meeting of Committee of creditors under the proviso to section 21 (2) of the I.B. code 2016.

63. In the instant case, in addition to the representation, participation and voting by related parties in the Committee of Creditors, other serious irregularities have been noticed in the conduct of the corporate insolvency resolution process, so we think it proper to deal with other issues also to avoid such malpractices in the conduct of the CIRP.

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64. Completing the Corporate Insolvency Resolution Process strictly in terms of provisions of the I&B Code, as per the Code and Regulations made thereunder, are an essential element of the CIRP. Skipping any statutory process as per the Code would have significant repercussions and impact on the entire Resolution Process under the Insolvency and Bankruptcy Code 2016. In the circumstances, we think it proper to scrutinize every step of the corporate Insolvency Process in the instant case, to see whether it conforms with the statutory provisions under the Insolvency and Bankruptcy Code and Regulations thereunder. Further, we have to see whether any of the procedures prescribed under the Code can be skipped on the pretext of the commercial decision of CoC.

Information collected by IRP/RP and formation of a committee of creditors:

64(a). To ascertain the CIR process's validity, it is necessary to summarise the CIRP proceedings by going through the minutes of all the five CoC meetings.

Summary of first CoC meeting dated 6th September 2019;

The Learned Counsel for the Appellant has filed the minutes of the first CoC meeting dated 6th September 2019.

Clause 4 of the minutes of the first CoC it is stated that;

4. "As per section 18 (b) of the insolvency and bankruptcy code, 2016 and other applicable provisions, it is the duty of IRP to receive and collate all the claim submitted by creditors, pursuant to the public announcement Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 42 of 82 made under section 13 and 15 of the insolvency and bankruptcy code 2016.

The insolvency resolution professional has received claims in form C (received over email) from 3 financial creditors as of 21st August 2019 (date of receipt of claim), i.e., the cut of date as per public announcement, namely.

Serial number	Name of Creditor	the amount claimed by creditors (amounting rupees)	to	amount admitted (amounting to rupees)	details security and status
1.	Pegasus Assets Reconstruction Private Limited	1,87,06,37,178.	64	*	
2.	Kamla Mills Ltd	1,554,72,71,570 (including interest, if any)		*	
3.	Fasqua investment private limited	266,77,66,485.80 (including interest, if any)		*	
	Total	1,741,79,08,748.	64	*	

*The verification of claims is under process, and the amount of claims is yet to be determined.

64(b) The Interim Resolution Professional has also received claims in form B (received via email/speed post) from one Operational Creditor other than workers and employees as of 31st August 2019 (date of receipt of claims), i.e., the cut of date per public announcement namely.

Serial number	Name of the creditors	Amount claimed by the creditors (amounting to rupees)	Amount admitted (amounting to rupees) till date	Remarks
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Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020	
1	Tata steel 77,66,49,726.65 *
	limited (including interest
	35,09,89,602.24
Total	77,56,49,726.65 *

64(c). No claim was received from creditors (other than Financial Creditors and Operational Creditors) in form F until 21st August 2019. 64(d) A list of these claims received as of 21st August 2019, i.e. (cut off date is), was placed before the Committee of Creditors in the meeting and discussed except claim from employees.

The chairman further informed that the voting percentage of the members of the committee of creditors as of date are as follows;

Serial No. Name of the Financial voting percentage Creditor

1. Pegasus Assets 9.31% Reconstruction Private Limited

2. Kamla Mills Ltd 77.41%

3. Fasqua Investment Private 13.28% Limited Total 100 % 64(e) The interim resolution professional mentioned that all the claim received is under verification. The verification is pending due to supporting information/documents collected from the Financial Creditors, Operational Creditors, and Corporate Debtor. IRP is making efforts to get it done at the earliest. So, the voting percentage may change when the verification is completed.

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 44 of 82 64(f).To take note of the Committee of Creditors (COC) constituted by the interim Resolution Professional.

As per Section 18 (c) of the Insolvency and Bankruptcy Code, 2016, the IRP must constitute a Committee of Creditors. The Committee of Creditors was constituted on 23rd August 2019.

64(g) Status update by Interim Resolution Professional Accounts-; it was informed that accounts of the corporate debtor were only audited up to 31st December 1999. After that, accounts were never audited, and regular books of accounts are not maintained. Production-factory at Jamshedpur is closed for a long time, whereas production at Pune was being carried up to 2014 in a minimal manner. However, no records have been given.

A list of statutory dues, dues, etc., as available at the Kolkata office, was produced and copies handed over to the COC member. It was informed that no register of assets was available. Accordingly, details of all assets/properties were not available.

65. Status update by IRP in IInd CoC meeting dated 26th September 2019;

"Chairman informed that no books of accounts and records are available at the registered office of the corporate debtor or Jamshedpur or Pune. Employees have informed that they don't have any statutory records. A detailed list of assets is also unavailable at the registered office. Therefore, the chairman submitted a list of immovable assets that Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 45 of 82 had been prepared. A copy of the said list of assets was given to the COC members with the request that, if any member of COC knows any other assets, then it can be informed to the R.P. in the next COC meeting time through email.

It is also mentioned that the resolution professional proposed appointment of two registered valuers, who will determine the fair value and liquidation value in terms of regulation 35 of CIRP regulations.

It is stated that registered valuers extension deferred up to the next 15-20 days and will be taken up in the next meeting of the committee of creditors.

It is also mentioned that once the list of assets at different locations is ascertained, valuers' appointment will be made. It was also decided that once the statutory records, audited accounts, and books of accounts of the corporate debtor's are available, the forensic audit can be conducted. The existence of preferential transaction, if any, cannot be ascertained.

66. Summary of Third COC meeting took place on 18th October 2019; Minutes of the CoC meeting has been filed by the Appellant which shows that during this meeting Chairman informed about receiving a letter from Pegasus Assets Reconstruction Private Limited wherein it was stated c (in which Mr Ramesh Ghamandiram Gowani, a director of Incab, holds substantial shareholding) had been made the member of CoC which is void ab initio and in violation of IBC 2016. It is again stated that Information Memorandum could not be prepared on account of the non-availability of statutory records, audited accounts, books of accounts of the corporate debtor. It is also stated that the COC decided that appointment of valuers will be made once the list of assets at different locations is ascertained. Likewise, the same Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 46 of 82 decision was taken for the appointment of a transaction and forensic audit. It is also stated that the CoC deferred the decision for publication of form G for inviting expression of interest.

67. Summary of Fourth COC meeting took place on 11th November 2019. Minutes of the meeting show that claims from 12 Financial Creditors in Form C total amounting to 23,38,83,79,339.11 were received to date. However, no amount of claim admitted till then. It is stated in the minutes that verification of claims is under process, and the amount of claims is yet to be determined. It is also stated that Information Memorandum as specified under Regulation 36 will be ready by 22nd November 2019 and will be submitted to the COC.

68. Summary of Minutes of fifth COC meeting held on 5th December 2019;

68(a). Appellant has filed the minutes of the fifth COC meeting held on 5th December 2019 containing details of Financial Creditor, percentage of their vote share. In the same meeting, the CoC members voted for liquidation of the Corporate Debtor. Further, it was decided that there is no need for an Information Memorandum, no requirement for the Transaction and Forensic Audit, and no provision of publication of form G for inviting Expression of Interest as the Committee of Creditors has already resolved to liquidate the corporate debtor. It was also resolved that due to the non-availability of information, an Information Memorandum could not be prepared. Further, in the light of the Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 47 of 82 resolution to liquidate the Corporate Debtor, the decision was taken that there is no requirement of an Information Memorandum. It was also agreed that for valuation purposes of the assets for valuing the Corporate Debtor's assets, a proper valuer suggested by COC might be appointed.

68(b). It is stated in the minutes of 5th COC that "the chairman further informed that an application under section 19 (2) Of the Insolvency and Bankruptcy Code, 2016 was filed before the NCLT, Kolkata bench for necessary directions for providing statutory records, financial books of accounts and other necessary information. Hon'ble NCLT has passed the necessary order for assistance.

68(c). The chairman submitted that earlier Kamla Mills Ltd and Fasqua Investment Private Limited while declared as related parties based on the fact that Ramesh Gowani is a director of Incab Industries limited, and he also holds 99% of shares in Kamla Mills Ltd. Besides, Ramesh Gowani also holds 22% shares Fasqua Investment Private Limited.

69. Based on the minutes of all the five 'COC' meetings, it is crystal clear that entire CIRP proceedings were conducted & completed even without any valuation of the Corporate Debtor. In all the COC meetings, it was informed that no records are available and suspended directors are not cooperating. The Interim Resolution Professional has constituted the Committee of Creditors even without admitting the claims. The Committee of Creditors has been formed based on claims submitted. In the column of a status report, It Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 48 of 82 is everywhere mentioned that verification of claims is under process. No Information Memorandum was prepared, and the decision to liquidate the Corporate Debtor was taken. There was no publication of Form 'G' for inviting expression of interest. One of the Financial Creditors objected to the participation of Financial Creditors, Kamla Mills Ltd and Fasqua Investment Private Limited, as they are related parties. However, this objection was overruled by the Adjudicating Authority while he was issuing directions to the suspended Director to extend cooperation to the IRP for submission of records of the Corporate Debtor.

70. In the circumstances, we have to analyse the statutory provision and their compliance to ascertain whether a Committee of Creditors could have been formed only based on claims submitted, even without admitting any claim. The statutory provisions in this regard are given below for ready Reference.

"18. Duties of interim Resolution Professional.--(1) The interim Resolution Professional shall perform the following duties, namely--

"(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to--

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date;

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(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary;

and

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

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

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

(g) to perform such other duties as may be specified by the Board. Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 50 of 82 Explanation.--For the purposes of this 45[section], the term "assets" shall not include the following, namely--

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

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

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

21. Committee of creditors.--(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a [financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

[Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed,] prior to the insolvency commencement date.] Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 51 of 82 (3) [Subject to sub-sections (6) and (6-A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,--

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility [* * *] provide for a single trustee or agent to act for all financial creditors, each financial creditor may--

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

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(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

[(6-A) Where a financial debt--

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share. (6-B) The remuneration payable to the authorised representative-- Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 53 of 82

(i) under clauses (a) and (c) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.] [(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub- sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.] (9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

17. Restriction on participation.--The proviso to Section 21(2) clarifies that a Director who is also a financial creditor who is a related party of the corporate debtor shall not have any right of representation or participation or voting in a meeting of the Committee of Creditors. Further, Directors simpliciter, are not the subject-matter of the proviso to Section Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 54 of 82 21(2), but only Directors who are related parties of the corporate debtor, and it is only such persons who do not have any right of representation, participation, or voting in a meeting of the Committee of Creditors, Vijay Kumar Jain v. Standard Chartered Bank, (2019) 20 SCC 455.

24. Meeting of committee of creditors.--(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

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

(a) members of 57[committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6-A) of Section 21 and sub-section (5)];

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

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 55 of 82 (5) [Subject to sub-sections (6), (6-A) and (6-B) of Section 21, any creditor] who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.

25. Duties of resolution professional.--(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely--

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings; Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 56 of 82

(c) raise interim finances subject to the approval of the committee of creditors under Section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with Section 29;

[(h) invite prospective resolution applicants, who fulfil such

criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

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.

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 57 of 82 (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.

28. Approval of committee of creditors for certain actions.--(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely--

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
- (b) create any security interest over the assets of the corporate debtor;
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 58 of 82 class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
- (d) record any change in the ownership interest of the corporate debtor;
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
- (f) undertake any related party transaction;
- (g) amend any constitutional documents of the corporate debtor;
- (h) delegate its authority to any other person;
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- (j) make any change in the management of the corporate debtor or its subsidiary;
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
- (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor. (2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 59 of 82 (3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 63[sixty-six] per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. (5) The committee of creditors may report the actions of the resolution professional

under sub-section (4) to the Board for taking necessary actions against him under this Code.
Approval of committee of creditors for certain actions.

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)
Regulations, 2016

8. Claims by financial creditors.--

(1) A person claiming to be a ¹⁵[financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof] to the interim resolution professional in electronic form in Form C of the Schedule:

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

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

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

(b) other relevant documents, including--

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

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

(iii) financial statements showing that the debt has not been [paid]; or

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

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

[(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.] (3) Where the creditor in sub-regulation (2) is [a financial creditor under Regulation 8], it shall be included in the committee from the date of admission of such claim:

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

[12-A. Updation of claim.--A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.]

13. Verification of claims.--(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 61 of 82 them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be--

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

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

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

Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;]

(d) filed with the Adjudicating Authority; and

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

14. Determination of amount of claim.--(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him. (2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 62 of 82 CHAPTER V COMMITTEE OF CREDITORS

16. Committee with only operational creditors.--

(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this regulation. (2)

The committee formed under this Regulation shall consist of members as under--

(a) eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

(c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation.--For the purposes of this sub-regulation, 'total debt' is the sum of--

(a) the amount of debt due to the creditors listed in sub-

regulation 2(a);

(b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and

(c) the amount of the aggregate debt due to employees under sub-regulation 2(c).

Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 63 of 82 (4) A committee formed under this regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be."

[17. Constitution of committee.--(1) The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received under sub-regulation (1) of Regulation 12. (2) The interim resolution professional shall hold the first meeting of the committee within seven days of filing the report under this regulation. (3) Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the fortieth day of the insolvency commencement date till a resolution professional is appointed under Section 22.] [27. Appointment of registered valuers.--The resolution professional shall within [seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date], appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with Regulation 35:

Provided that the following persons shall not be appointed as registered valuers, namely--

- (a) a relative of the resolution professional;
- (b) a related party of the corporate debtor;
- (c) an auditor of the corporate debtor at any time during the five

years preceding the insolvency commencement date; or

(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.] Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 64 of 82 [35. Fair value and Liquidation value.--(1) Fair value and liquidation value shall be determined in the following manner--

(a) the two registered valuers appointed under Regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.]

36. Information memorandum.--[(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 65 of 82 appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.] (2) The information memorandum shall contain the following details of the corporate debtor--

[(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation--"Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.]

(b) the latest annual financial statements;

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

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

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

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

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

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

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

(j) [* * *]

(k) [* * *]

(l) other information, which the resolution professional deems relevant to the committee.

(3) A member of the committee may request the resolution professional

for further information of the nature described in this Regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

[(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee [* * *] to the effect that such member or resolution

applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section

29.] [36-A. Invitation for expression of interest.--(1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.

(2) The resolution professional shall publish Form G--

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 67 of 82 office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;

(ii) on the website, if any, of the corporate debtor;

(iii) on the website, if any, designated by the Board for the purpose; and

(iv) in any other manner as may be decided by the committee.

(3) The Form G in the Schedule shall--

(a) state where the detailed invitation for expression of interest

can be downloaded or obtained from, as the case may be; and

(b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.

(4) The detailed invitation referred to in sub-regulation (3) shall--

(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub- section (2) of Section 25;

(b) state the ineligibility norms under Section 29-A to the extent applicable for prospective resolution applicants;

(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and

(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest. (5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 68 of 82 within the time specified in the invitation under clause (b) of sub-

regulation (3).

(6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected. (7) An expression of interest shall be unconditional and be accompanied by--

(a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of Section 25;

(b) relevant records in evidence of meeting the criteria under clause (a);

(c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under Section 29-A to the extent applicable;

(d) relevant information and records to enable an assessment of ineligibility under clause (c);

(e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

(f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 69 of 82

(g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.

(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with--

(a) the provisions of clause (h) of sub-section (2) of Section 25;

(b) the applicable provisions of Section 29-A, and

(c) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee

and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.]"

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71. Section 18 is relating to the duties of an Interim Resolution Professional. Section 18(1)(b) mandates the IRP to receive and collate all the claims submitted by the creditors under the public announcement made under Section 13 and 15. Section 18(1)(c) authorises IRP to constitute a Committee of Creditors. Section 21(1) imposes a precondition for the collation of all claims received to determine the financial position of a Corporate Debtor. The word 'collation' used in Sub-section 21(1) means verification of claims. The literal meaning of the word 'collation' is the comparison of a copy with its original to ascertain its correctness. Section 21 (7) mandates for determination of the voting share to be assigned to each creditor. Section 24 is about the meeting of the Committee of Creditors.

Section 24(6) provides that each creditor shall vote by the voting share assigned to him based on the financial debts owed to such creditor. Section 24 (7) imposes a duty on the resolution professional to determine the voting share assigned to each creditor.

72. It is pertinent to mention that Regulation 12(1) of CIRP Regulations mandates to submit proof of claim on or before the last date given in the public announcement. Regulation 12 (2) provides a maximum time limit for the submission of proof of claim. Regulation 12 (3) specifically provides that a financial creditor shall be included in the Committee of Creditors from the date of admission of such claim.

73. Regulation 13 imposes a mandatory duty on IRP/RP to verify a claim within seven days from the last date of receipt of the claim, and thereupon the Resolution Professional has to maintain a list of creditors Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 71 of 82 containing the names of creditors along with the amount claimed by them, and the amount of the claim admitted, in respect of such claims. However, Regulation 14 deals with the claim where a creditor's amount is not precise due to any contingency. In such cases, the Regulation 14 provides that IRP/RP shall make the best estimate of the claim based on the information available.

74. Regulation 14 deals with the situation where the amount claimed by a Creditor is not precise; then, in that case, Regulation authorises the IRP/RP to make the best estimate of the amount of the claim. But this Regulation cannot apply to the Financial Creditor because Regulation 12 (3)

specifically provides that where the creditor fails to submit a claim with proof within the stipulated time, such Financial Creditor shall be included in the creditors' committee from the date of admission of such claim. Thus under Regulation 12 (3) of CIRP Regulations, the IRP/RP has no discretionary power to constitute the Committee of Creditors without admission of a claim.

75. Regulation 27 of CIRP regulations provides the maximum timeline for the appointment of registered valuers, i.e. within seven days from the date of his appointment but not later than the 47th day from the insolvency commencement date. Regulation 35 provides that valuers appointed under Regulation 27 shall submit the Resolution Professional and estimate of the fair value and the liquidation value computed in accordance with internationally accepted valuation a standard, after Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 72 of 82 physical verification of the inventory and fixed assets of the Corporate Debtor. Thus it is clear that IRP/RP has not conducted the Corporate Insolvency Resolution Process as per the CIRP Regulations.

76. It is pertinent to mention the contents of paragraph 22 of the application filed by the Resolution Professional under section 33 of the Code for liquidation of the corporate debtor, which relates to the objection of the Financial Creditor 'Pegasus Assets Reconstruction Company' about voting percentage assigned to the members of COC without the verification of their claims. The copy of the said application is Annexure III (pages 45 - 156 of the appeal paper book). Para 22 reads as under;

"The applicant states that an email was received from ravendernath@peagasus-arc.com on Wed, 11 December 2019 18:09:12 inter alia it was stated that;

'we refer to the e-voting called for by you today pursuant to the circulation of minutes of 5th COC meeting conducted on 5th of December 2019 and request you to defer the voting till the issues raised by us with regards to verification of voting percentage, compliance of CIRP process, and other issues raised by us are addressed by you".

(verbatim copy)

77. The Appellant's Learned Counsel further drew our attention towards the email dated 9th December 2019 sent to respondent number 1 Resolution Professional on 15:39:58 (pages 142 144 of the appeal paper book). In this email letter, the financial creditor Pegasus assets reconstruction company had written that "as you are aware that as per the provision of the IBC, Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 73 of 82 2016 you have to verify the claims submitted by the various creditors within a stipulated period. In the 5th COC held on 5th December 2019, you have informed the COC members that till date, you have not adjudicated the claims filed by the various creditors. In the absence of adjudication of claim, we fail to understand how you have derived the voting percentage of the COC members."

78. In continuation of the above-mentioned correspondence, the Financial Creditor Pegasus assets reconstruction company again sent an email (pages 145-148 of appeal paper) dated 11th December 2019 and 15:31:46 to the resolution professional stating that "the agenda circulated widely or email

dated 2 December 2019 was to discuss the following points;

1. To confirm minutes of 4th meeting of the committee of creditors.
2. To take note of the claims received.
3. To discuss the steps taken by the resolution professional as a part of the corporate insolvency resolution process and report/status thereto in view of non-availability of books of accounts and other records, no business in operation of the C.D.
4. To deliver it, decide about the status of information memorandum.**** The minutes circulated vide your email dated 10th of December 2019 did not capture the discussions not the decisions taken by the COC members.*** Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 74 of 82 2(d) CIRP process; as RP is unable to get access to books of accounts, fixed assets register and other data-he expresses helplessness to prepare the IM and appoint valuers and transaction auditors and letter for calling EOI's, he stated that liquidation is the way forward and it is not to be construed as the decision of the COC. The minutes gives an impression that it was the members of the COC suggesting liquidation which is to be amended accordingly.

Since the RP is unable to follow the CIRP process as required under IBC, he is required to seek necessary orders from NCLT and not propose liquidation without verifying eligible voting percentage are verifying claims of the secured creditors for this purpose.

A copy of our letter addressed to the RP taking necessary compliance under the IBC and action is appellant herewith. Request you to take on record the same and do the needful."

79. Based on the above-mentioned letters issued by the financial creditor Pegasus assets reconstruction company to the resolution professional, it is clear that the financial creditor was regularly sending his objections to the resolution professional about the determination of the voting percentage of the COC members. However, despite reminders, Resolution Professional, without even admitting/rejecting the claims of the financial creditors, had constituted the committee of creditors and determined their voting percentage. It is also clear that in the 5th COC meeting, there was no such an agenda regarding the deliberation on the liquidation of the corporate debtor. But, by permitting the financial creditor/related parties, Kamla Mills Ltd and Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 75 of 82 Fasqua investment private limited, to represent, participate and vote in the COC, the decision was taken to liquidate the corporate debtor.

80. It is important to mention that all the statutory provisions for the conduct of CIRP are interlinked; it doesn't leave any scope to the IRP/RP to skip any of the provisions. CIRP regulations are exhaustive and include a provision to deal with all the eventualities that may arise in the conduct of the CIRP. For example, during CIRP, the IRP has to publish the notice in the newspaper for inviting claims. After receiving and collating the claims, he has to form the Committee of Creditors. Based on the collation of the claims, IRP has to form the Committee of Creditors from among the Financial Creditor. IRP has to assign the voting share to each creditor based on the Financial Debts

owed to such creditor. Without verification and admission of a claim, the IRP cannot assign the voting share to a creditor, and without that, there cannot be a meeting of the Committee of Creditors.

81. In the instant case, we find that the IRP/RP had formed the Committee of Creditors based on the Financial Creditors' submission of claims even without verification, despite that one of the financial creditors had explicitly requested to defer the e-voting on the resolution of the 5th CoC dated 5th December 2019, till the verification of voting percentage and compliance of CIRP process. The IRP/RP has formed the Committee of Creditors without admitting the claims of the Financial Creditors, which violate Regulation 12 (3) of the CIRP Regulations.

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82. We also find that during CIRP, five meetings of the Committee of Creditors took place. Still, till the end of CIRP, IRP did not verify the claims submitted by the Financial Creditors but allotted the voting share to the Financial Creditors, based on the submission of claims. The procedure adopted by the IRP/RP was against the statutory provision of the Code despite the fact that compliance with the statutory requirements of the Code was mandatory.

83. We have also noticed that the IRP/RP has not prepared the Information Memorandum. In the Minutes of the fourth COC meeting dated 11 November 2019, it is stated that verification of claims is under process, and the amount of claims is to be determined. The Information Memorandum, as specified under Regulation 36, will be ready by 22 November 2019. However, in the fifth CoC meeting, i.e. the last meeting, it was decided that there is no need for an Information Memorandum. It was also decided that there is no requirement of Transaction and Forensic Audit and also no need for publication of Form-G for the invitation of expression of interest. The COC also decided to liquidate the corporate debtor. Therefore, there is no need to prepare Information Memorandum.

84. Based on the minutes of all the five 'CoC' meetings, it is crystal clear that entire CIRP proceedings were conducted & completed even without any valuation of the Corporate Debtor. In all the COC meetings, it was informed that no records are available and suspended directors are not cooperating. The Interim Resolution Professional has constituted the Committee of Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 77 of 82 Creditors even without admitting the claims. The Committee of Creditors has been formed based on claims submitted. In the column of a status report, It is everywhere mentioned that verification of claims is under process. But the said verification process never came to an end, and the committee of creditors resolved to liquidate the corporate debtor ignoring mandatory requirements of determination of fair market value, liquidation value and preparation of information memorandum. There was no publication of Form 'G' for inviting expression of interest. One of the Financial Creditors objected to the participation of Financial Creditors, Kamla Mills Ltd and Fasqua Investment Private Limited, as they are related parties. However, this objection was overruled by the Adjudicating Authority while it was issuing directions to the suspended Director to extend cooperation to the IRP for submission of records of the Corporate Debtor.

85. Based on the above discussion, we are the considered opinion that the Constitution of the Committee of Creditors violates the proviso to Section 21 (2) of the I & B code 2016 read with 12(3) of CIRP Regulations. Therefore, the Constitution of the creditors' committee is a nullity in the eye of law that vitiates the entire CIRP. Liquidation is like a death knell for the corporate entity/corporate person. Liquidation based on the resolution of the CoC, which consists of related party Financial Creditors having 77.20 % vote share, is a matter of grave concern. Hon'ble Supreme Court in the case of Phonix ARC (supra) has described the entering of such related party Financial Creditors in the Committee of Creditors as an act of commercial contrivances through which these entities sought to enter the COC, Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 78 of 82 which could affect the other independent Financial Creditors. An order for liquidation of corporate debtor based on the sole decision of related parties Financial Creditors could be fatal for the existence of the corporate debtor, cannot be sustained. It is also pertinent to mention that when the Constitution of the Committee of Creditors itself is found to be tainted, then the decision of that COC cannot be validated on the pretext of exercise of commercial wisdom.

86. We have also noticed that the role of IRP/RP/liquidator was not impartial in the conduct of the corporate insolvency resolution process; therefore, we think it proper to change the Resolution Professional. The above discussions show that the Resolution Professional failed to discharge duties and responsibilities cast on the Resolution Professional under the IBC and Regulations' provisions. 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' are related parties that were made part of this CoC and were in a commanding position to rush through the decision to liquidate the Corporate Debtor. Facts show that the Corporate Insolvency Resolution Process was initiated in view of Section 9 of the IBC. The petition was admitted on 7th August 2019, and the 5th CoC meeting held on 8th December 2019, which is within 122 days, decided to liquidate the Corporate Debtor. The CoC had two entities holding the majority of the voting rights of 77.20%. However, their claims were not even admitted and were also related parties and thus, the whole process before CoC has got vitiated. In view of the extraordinary facts of the present matter and the disputes being raised by so many workers through the Appellants, the interest of justice requires certain directions to Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 79 of 82 do justice in the matter. The impugned order dated 7th February 2020 was passed within 184 days of the petition being admitted on 7th August, 2019. The Application under Section 33 of the IBC appears to have been filed on 17th December, 2019. It appears in the interest of justice that the time spent before the Adjudicating Authority when the application under Section 33 of the IBC was filed, till now should be excluded from calculating the period under Section 12 (1), (2) & (3) of the IBC. Parties and Corporate Debtor need not suffer for time spent during this period before Adjudicating Authority and in Appeal, as an effort at Resolution needs to be made.

87. We further observe that the corporate insolvency process in the instant case is totally in disregard of the provision of the Code and Regulations thereunder. The formation of the Committee of Creditors in the instant case is a nullity in the eyes of the law. Since the illegally constituted committee of creditors took the decisions at every stage of CIRP. Therefore, the entire corporate insolvency resolution process of the Corporate Debtor is found to be vitiated. Therefore the impugned order of liquidation passed by the Adjudicating Authority deserves to be set aside.

88. For the reasons mentioned above, we order that:-

(i) The Company Appeal (AT) (Insolvency) Nos. 348 of 2020 and 720 of 2020 are allowed with the following directions:-

(a) The impugned order passed in C.A. (I.B.) No. 1748/K.B./2019 and C.A. (I.B.) 57/K.B./2020 in C.P. (I.B.) No 1684/K.B./2018 whereby the Adjudicating Authority Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 80 of 82 directed initiation of liquidation proceedings against the Corporate Debtor- 'INCAB Industries Limited' is quashed and set aside. Actions taken pursuant to impugned order are also quashed and set aside and shall not be binding on the corporate debtor. The Original Application under Section 9 of IBC is restored to the file of the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata).

(b) The Adjudicating Authority is directed to appoint another IRP/ Resolution Professional in place of Respondent No.1-

Shashi Agarwal, at the earliest, preferably within seven days (from the list, if any, maintained by the Adjudicating Authority or urgently getting names from IBBI).

(c) The time spent from the date of earlier filing of the application under Section 33 of the IBC, i.e. 17th December 2019, till date is excluded from the period of CIRP.

(d) Respondent No.1- Shashi Agarwal will immediately hand over the complete charge of the Corporate Debtor to the new IRP/ Resolution Professional as the Adjudicating Authority may appoint.

(e) The new IRP/ Resolution Professional will collate all the claims submitted by Creditors before the earlier IRP/ Resolution Professional and, depending on the claims Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 81 of 82 admitted from CoC excluding 'Kamla Mills Private Limited' and 'Fasqua Investment Private Limited' and proceed further with the CIRP.

(f) Parties to appear before Adjudicating Authority on 09th June 2021.

(g) Copy of the present order may be sent to IBBI for further action(s), which may be deemed fit, if any, against the earlier Resolution Professional.

(h) Appeals are disposed accordingly. No costs.

[Justice A.I.S. Cheema] Officiating Chairperson [V. P. Singh] Member (Technical) NEW DELHI 4th June, 2021 pks Company Appeal (AT) (Insolvency) No. 348 & 720 of 2020 82 of 82