

Dr.C.Bharath Chandran vs Ms.Sabine Hospital And Research Centre ... on 19 October, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT) (CH) (Ins) No. 320 of 2022
&
IA Nos.677 and 710/2022

[Arising out of Order dated 02.06.2022 passed by the Adjudicating Authority/National Company Law Tribunal, Bengaluru Bench in IA(IBC)49/(KOB)2022 in IBA/51/KOB/2021]

IN THE MATTER OF:

1. Dr. C. Bharath Chandran
Erstwhile Promoter and Resolution
Applicant
Trivandrum International Health Services
Ltd. ("Corporate Debtor"), 72,
Nambalakathu Thazhamangalam, Athani
Lane, TC 26/362, Vanzhiyoor, Trivandrum
695035.

...Appella

Versus

1. Ms. Sabine Hospital and Research Centre
Pvt. Ltd.
Pezhakkappilli, XII/58, Muvattupuzha,
Ernakulam, Kerala- 686673.

...Respondent No.

2. Raju Palanikkunathi Kesavan,
Resolution Professional of the Corporate
Debtor,
M/s. Agasti Associates,
Chartered Accountants,
First Floor, CNRWA-6,
Cherupushpam Lane, Kadavantha
Kochi, Kerala-20

...Respondent No.

3. Kerala State Financial Corporation
Having its Office at Vellayambalam
Branch, Thiruvananthapuram,
Kerala, Pin Code- 695033.

...Respondent No.

4. State Bank of India
Having its Office at Stressed Asset
Recovery Branch (05182)
7th floor, Vankarath Buildings,
By pass Jn, Palarivattom,

Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022

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Pin Code-682024.

...Respondent No. 4

5. Dhanlaxmi Bank Ltd.
Having its Office at Fort Branch
2nd Floor, Karimpanal Arcade Fort,
Thiruvananthapuram,
Pin Code-695023, Kerala

...Respondent No. 5

Present:

For Appellant : Mr. C.A. Raghunath Sarangapani, Advocate.

For Respondent : Mr. Vinod P.V., India Law, Advocate.

J U D G M E N T

(Virtual Mode) (19.10.2022) NARESH SALECHA, MEMBER (TECHNICAL) The Present 'Appeal' is filed against the 'Impugned Order' dated 02.06.2022 passed in IA(IBC)49/(KOB)2022 in IBA/51/KOB/2021 by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench), whereby, the 'Adjudicating Authority' dismissed the Petition filed under the Insolvency & Bankruptcy Code, 2016 (in short 'I & B Code 2016').

Heard the Learned Counsel for both the 'Parties' and also perused the record made available to us.

2. The 'Trivandrum International Health Services Ltd.' who was a 'Corporate Debtor' was admitted into the 'Corporate Insolvency Resolution Process' vide 'Impugned Order' dated 07.02.2020 under Section 7 of the I & B Code, 2016, passed by the 'Adjudicating Authority'. Dr. C. Bharath Chandran is the 'Appellant' and was the 'Promoter' and 'Erstwhile Director' of the 'Corporate Debtor', who along with two other co-applicants, had submitted a 'Resolution Plan' for revival of the 'Corporate Debtor' which could Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 2 of 32 not be proceeded since, the 'Appellant' failed to furnish the 'Performance Bank Guarantee', which was a pre-requisite.

3. Ms. Sabine Hospital and Research Centre Pvt. Ltd. is the 1st Respondent, who made an application to the 'Adjudicating Authority' for being permitted to submit a 'Resolution Plan' after the due date to submit an 'Expression of Interest' ('EoI'), within the time specified by the 'Committee of Creditors' i.e., on or before 14.11.2020. The 1st Respondent name was not included in the Provisional List or in the Final List of the 'Prospective Resolution Applicants' ('PRA').

4. Raju Palanikkunathil Kesavan is the 2nd Respondent who was appointed as 'Resolution Professional' by the 'Adjudicating Authority' and later as the 'Liquidator' of the 'Corporate Debtor' on the recommendation of 'Committee of Creditors'.

5. The 2nd Respondent published a Public Announcement in Newspapers in 'Form A' on 12.02.2020 and verified the 'Claims' received and also formed the 'Committee of Creditors' ('CoC'). Kerala State Financial Corporation, State Bank of India & Dhanlaxmi Bank Ltd. are respectively the 3rd, 4th & 5th Respondents in this 'Appeal' who together constitute the 'Committee of Creditors' of the 'Corporate Debtor'. The 3rd Respondent held 48.11% of the 'Voting Share' and the 4th

Respondent held 35.87% of the 'Voting Share' and the 5th Respondent held 16.02% of the 'Voting Share'.

6. The 'Appellant' (along with the two co-applicants, viz. Dr. Pradeep Mahajan and Mr. Ramu Tatini) had submitted a 'Resolution Plan' which was Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 3 of 32 approved by the 'Committee of Creditors' at its meeting held on 07.10.2021 and a 'Letter of Intent' was issued to the 'Appellant' and his two co-applicants. The '2nd Respondent' ('Resolution Professional') informed the 'Appellant' was ineligible to submit the 'Resolution Plan' in terms of Section 29A of I & B Code, 2016. The 'Appellant' however was permitted to submit the 'Resolution Plan' by order dated 30.06.2021 of the 'Adjudicating Authority', on the basis that the 'Corporate Debtor' was an MSME, as per notification dated 01.06.2020 of the 'Ministry of Micro, Small and Medium Enterprises'.

7. This 'Appellate Tribunal' notes from the Para 3 of the 'Impugned Order' dated 02.06.2022, which reads as under:-

"Para 3....Since the Resolution Plan submitted by the Resolution Applicants were bundled with conditions and to incorporate details on feasibility and viability, and to consider a substantial increase in the financial outlay, the CoC requested the Resolution Applicants to file the modified Resolution Plan and held further meetings on 30.07.2021, 04.08.2021, 18.08.2021 and 22.09.2021 and granted a last opportunity to submit the modified plan before 30.09.2021. Accordingly, Dr. C Bharath Chandran, the Suspended Director filed a revised and final Resolution Plan on 30.09.2021 and the other Prospective Applicants refused to revise their Resolution Plans, but requested to consider the Resolution Plan they have already submitted. The 14th meeting of the CoC held on 07.10.2021 considered all the four Resolution Plans submitted by Dr. C Bharath Chandran along with Dr. Pradeep Mahajan and Mr. Ramu Tatini with 100% voting rights accepted the Resolution Plan of Dr. C Bharath Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 4 of 32 Chandran and rejected all the other Resolution Plans. Further, in the same meeting of the CoC, it was resolved to liquidate the Corporate Debtor in case of failure of Resolution Plan or non-approval of Resolution Plan by the Adjudicating Authority and approved the appointment of Liquidator and the other terms and conditions to be adopted in case of Liquidation of the Company. Thereafter, the Resolution Professional issued a Letter of Intent (LOI) to Dr. C Bharath Chandran conveying the approval of the Resolution Plan on 12.10.2021 and the same was unconditionally accepted by Dr. C Bharath Charndran successful Resolution Applicant, on 13.07.2021 on behalf of the consortium applicants. As per the conditions stipulated in the LoI & RFRP, the successful Resolution Applicant was to furnish a Performance Guarantee for Rs 5 Crore latest by 20.10.2021. However, the Resolution Applicant failed to execute the performance guarantee within the stipulated time, i.e., on or before 20.10.2021."

[emphasis supplied]

8. The Learned Counsel for the Appellant stated that as per the understanding between the 'Appellant' and his co-applicants, the co- applicants were required to make arrangements for depositing a Performance Bank Guarantee of Rs. 5 Crore with the 'Committee of Creditors'. However, as the co-applicants did not make the required arrangement, the 'Appellant' was unable to furnish the same. In view of the failure to submit the Performance Bank Guarantee, the same being a pre-requisite to file a 'Resolution Plan' before the 'Adjudicating Authority', the 'Committee of Creditors', in its meeting Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 5 of 32 held on 21.10.2021, authorised the 2nd Respondent to file for 'Liquidation' of the 'Corporate Debtor'.

9. The Learned Counsel for the Appellant stated that he sought permission to replace two Original Co-applicants with two new Applicants i.e. Dr. Chitra Sudeep and Dr. Sudeep Kumar and except for replacement of the co- applicants, the 'Resolution Plan' was retained exactly as approved by the 'Committee of Creditors' at its meeting held on 07.10.2021.

10. At the subsequent meeting of the 'Committee of Creditor' held on 30.10.2021, two of the 'Financial Creditors' holding 64.13% stake in the 'Committee of Creditor' (viz. Kerala Financial Corporation and Dhanlaxmi Bank) expressed their "No Objection" which was still short of required minimum 66% 'Voting Rights'.

11. The Learned Counsel for the Appellant emphasised that the 'Committee of Creditors' was empowered to consider this amendment to the 'Resolution Plan', in as much as paragraph 9 of the 'Request for Resolution Plan' ('RFRP') permitted amendment to the 'Resolution Plan'.

12(A). The Learned Counsel for the Appellant brought to the notice of this 'Appellate Tribunal' that the following three applications were filed before the 'Adjudicating Authority':

(I) I.A.(IBC)/180/KOB/2021 filed by the 2ndRespondent (Resolution Professional) praying for an order of Liquidation' of the 'Corporate Debtor'.

Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 6 of 32 (II) I.A. (IBC)/177/KOB/2021 filed by the 'Appellant', inter alia, praying that the 'Committee of Creditors' be directed to consider and accept the amendment to the 'Resolution Plan' in terms of replacement of the existing co-applicants with newco-applicants.

(III) I.A. (IBC)/166/KOB/2021 filed by the Ms. Sabine Hospital and Research Centre Pvt. Ltd. who is the 1st Respondent praying that the 1st Respondent be permitted to file an "EoI" and to submit a 'Resolution Plan' for the 'Corporate Debtor'.

12(B). The Learned Counsel for the Appellant also briefed this 'Appellate Tribunal' that all the aforesaid 'Interlocutory Applications' were heard together by the 'Adjudicating Authority' and the Order was passed, whereby it was held that the time for 'Corporate Insolvency Resolution Process' was to come to an end on 25.02.2022 by excluding the period of time taken in deciding the

Interlocutory Application Nos. (IBC)/177/KOB/2021, I.A. (IBC)/166/KOB/2021 and I.A. (IBC)/180/KOB/2021. It was pointed out that considering the 'Suo moto Order' of the Hon'ble Supreme Court of India, time was available till 01.01.2022, which time was insufficient to call for a fresh "EoI" in terms of Regulation 36A of the 'Corporate Insolvency Resolution Process' Regulation. Further, the 'Appellant' along with the new co-applicants as well as '1st Respondent' were directed to submit their "EoI" to the '2nd Respondent' forthwith and were also permitted to submit their 'Resolution Plan', before the 'Committee of Creditors', for its consideration.

13. The Learned Counsel for the Appellant assailed the order of the 'Adjudicating Authority' allowing the '1st Respondent' at a late stage which Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 7 of 32 according to the 'Appellant' was not advisable and permissible under I & B Code, 2016. Pursuant to this 'Impugned Order', the 2nd Respondent invited a fresh "EoI" from the 'Appellant' and the 1st Respondent has asked for the same to be submitted with the supporting documents, Affidavit and Non-Disclosure Agreement by 30.12.2021.

14. It has been brought to the notice of this Appellate Tribunal that the 'Committee of Creditors', evaluated the 'Resolution Plans' of both the parties at their 21st Meeting held on 19.02.2022 and were divided on the vote and neither plan received the 66% minimum votes required to be approved by the 'Committee of Creditors' with one 'Financial Creditor'(holding 48.11% voting share) for the 'Resolution Plan' in favour of the 'Appellant' herein and the other two Financial Creditors (holding the balance 51.89% of voting share) for the 'Resolution Plan' submitted by the 1st Respondent. The 'Committee of Creditors' passed the resolution rejecting both the 'Resolution Plans'.

15. The 'Resolution Professional' filed Interlocutory Application No. 49 of 2022 (Liquidation Application) seeking 'Liquidation' of the 'Corporate Debtor' and the 'Adjudicating Authority', passed an interim Order dated 30.03.2022, relying on the Regulation 39(3B) of the IBBI [(Insolvency Resolution Process for Corporate Persons)] Regulations, 2016, directed the 'Committee of Creditors' to re-vote only on the Resolution Plan which received the highest percentage of votes and extended the time for 'Corporate Insolvency Resolution Process' by another 20 days for the said purpose and directed the 2nd Respondent to file a report on the outcome. Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 8 of 32

16. The 'Committee of Creditors' in their 23rd meeting held on 11.04.2022, voted in divergent manner and none of the 'Resolution Plans' received the requisite 66% of the votes.

17. In the interim, the 'Appellant' herein had filed an Intervention Application of 2022 in the Liquidation Application, seeking to be heard before the matter was finally adjudicated upon and at the next hearing of the Liquidation Application at the behest of the Appellant herein, the 'Adjudicating Authority' gave the 'Appellant' one last chance to submit his resolution plan in cooperation with 1st Respondent in order to save the 'Corporate Debtor' from 'Liquidation', but due to failure of negotiation, no joint 'Resolution Plan' could be submitted by the 'Appellant' and 1st Respondent. The 'Adjudicating Authority' disposed of the matter by admitting the 'Corporate Debtor' into Liquidation.

18. It is a case of the 'Appellant' that the 'Adjudicating Authority' gave permission to 1st Respondent wrongly to submit "EoI" after due date. It is further a case of the 'Appellant' that if he would have been allowed to replace original two co-applicants with new two co-applicants rather than allowing 1st Respondent also to submit a 'Resolution Plan', the matter would have been resolved long back. The 'Appellant' has also made a case that provisions of Regulations 39 of 'Insolvency & Bankruptcy Board of India (Corporate Insolvency Resolution Process)' Regulations, 2016, have not been complied with fully and the initial decision/commercial wisdom of 'Committee of Creditors' was by-passed by the 'Adjudicating Authority'. Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 9 of 32

19. This 'Appellate Tribunal' would like to go through the provisions of relevant Section of I & B Code, 2016 along with Regulation 39 of the 'Insolvency & Bankruptcy Board of India (Corporate Insolvency Resolution Process)' Regulations, 2016, which reads as under:-

THE INSOLVENCY & BANKRUPTCY CODE, 2016:

"Section33: Initiation of liquidation (1) Where the Adjudicating Authority,--

(a)before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b)rejects the resolution plan under section 31 for the non- compliance of the requirements specified therein it shall-

(i)pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii)issue a public announcement stating that the corporate debtor is in liquidation; and

(iii)require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 1[approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor, the Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 10 of 32 Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses

(i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation.- For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority [under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1). (5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 11 of 32 debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Section 30: Submission of resolution plan.

(1) A resolution applicant may submit a resolution plan ¹[along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan-

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the ²[payment] of other debts of the corporate debtor;

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

(i) the amount to be paidJ1 to such creditors in the event of a liquidation of the corporate debtor under section 53; or Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 12 of 32

(ii)the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation1. -- For removal of doubts, it is here by clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. -- For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i)where are solution plan has not been approved or rejected by the Adjudicating Authority;

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

(iii)where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;] Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 13 of 32

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

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

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

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

Explanation.--For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Actor law.] (3)The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the

conditions referred to in sub- section(2).

(4)The committee of creditors may approve a resolution plan by a vote of not less than 5[sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, 6[the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 14 of 32 Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

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

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

(5)There solution applicant may attend the meeting of the committee of creditors in which there solution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 15 of 32 unless such resolution applicant is also a financial creditor.

(6)The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority."

INSOLVENCY & BANKRUPTCY BOARD OF INDIA (CORPORATE INSOLVENCY RESOLUTION PROCESS) REGULATION 2016:

"CHAPTER X RESOLUTION PLAN:

39. Approval of Resolution Plan.

[(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with

(a) an affidavit stating that it is eligible under section 29A to submit resolution plans;

(c) an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code. (1A) The resolution professional may, if envisaged in the request for resolution plan-

(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or

(b) use a challenge mechanism to enable resolution applicants to improve their plans.

(1B) The committee shall not consider any resolution plan- Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 16 of 32

(a) received after the time as specified by the committee under regulation 36B; or

(b) received from a person who does not appear in the final list of prospective resolution applicants; or

(c) does not comply with the provisions of sub-section(2) of section 30 and sub regulation (1).].

(2) [The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -

(a) preferential transactions under section 43;

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.] [(3) The committee shall-

(a) evaluate the resolution plans received under sub- regulation (2) as per evaluation matrix;

(b) record its deliberations on the feasibility and viability of each resolution plan; and

(c) vote on all such resolution plans simultaneously. (3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes. (3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:

Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 17 of 32 shall approve any one of them, as per the tie-breaker formula announced before voting:

Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.

Illustration. - The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under:

Voting outcome	% of votes in favour of		Status of approval
	Plan A	Plan B	
1	55	60	No Plan is approved, as neither of the Plans received requisite votes. The committee shall vote again on Plan B, which received the higher votes, subject to the timelines under the Code.
2	70	75	Plan B is approved, as it received higher votes, which is not less than requisite votes.
3	75	75	The committee shall approve either Plan A or Plan B, as per the tie-breaker formula announced before voting.]

[(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 18 of 32 compliance certificate in 121[Form H of the 122[Schedule-I] and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B.]] (5)The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

[(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:

Provided that this sub-regulation 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;] (6)A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained. (7)No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.

(8)A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 19 of 32 may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.

[(9)A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions.] [39A. Preservation of records.

(1) The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of all such records which are required to give a complete account of the corporate insolvency resolution process. (2) Without prejudice to the generality of the obligations under sub-regulation (1), the interim resolution professional or the resolution professional, as the case may be, shall preserve copies of records relating to or forming the basis of:-

- (a) his appointment as interim resolution professional or resolution professional, including the terms of appointment;
- (b) handing over / taking over of the assignment;
- (c) admission of corporate debtor into corporate insolvency resolution process;
- (d) public announcement;
- (e) the constitution of committee and meetings of the committee;
- (f) claims, verification of claims, and list of creditors;
- (g) engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;
- (h) information memorandum;

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- (i) all filings with the Adjudicating Authority, Appellate Authority and their orders;
- (j) invitation, consideration and approval of the resolution plan;
- (k) statutory filings with Board and insolvency professional agencies;
- (l) correspondence during the corporate insolvency resolution process;
- (m) insolvency resolution process cost; and
- (n) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading. (3) The interim resolution professional or the resolution professional shall preserve :

- (a) electronic copy of all records (physical and electronic) for a minimum period of eight years; and
- (b) a physical copy of records for a minimum period of three years;

from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

(4) The interim resolution professional or the resolution professional shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations.

Explanation - The records referred to in this regulation includes records pertaining to the period of a corporate insolvency resolution process during which the interim resolution professional or the resolution professional acted as such, irrespective of the fact that he did not take up the Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 21 of 32 assignment from its commencement or continue the assignment till its conclusion.] [39B.Meeting liquidation cost.

(1) While approving a resolution plan under sub-section (4) of section 30 or deciding to liquidate the corporate debtor under sub-section (2) of section 33, the committee may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order for liquidation is passed under section 33. (2) The committee shall make a best estimate of the value of the liquid assets available to meet the liquidation costs, as estimated in sub-regulation (1) (3) Where the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two.

(4) The resolution professional shall submit the plan approved under sub-regulation (3) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be. Explanation.- For the purposes of this regulation, 'liquidation costs' shall have the same meaning as assigned to it in clause (ea) of sub-regulation (1) of regulation (2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

[39BA. Assessment of Compromise or Arrangement. (1) While deciding to liquidate the corporate debtor under section 33, the committee shall examine whether to explore compromise or arrangement as referred to under sub - Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 22 of 32 regulation (1) of regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 and the resolution professional shall submit the committee's recommendation to the Adjudicating Authority while filing application under section 33.

(2) Where a recommendation has been made under sub- regulation (1), the resolution professional and the committee shall keep exploring the possibility of compromise or arrangement during the period the application to liquidate the corporate debtor is pending before the Adjudicating Authority.] 39C. Assessment of sale as a going concern.

(1) While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may recommend that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquidation is passed under section 33. (2) Where the committee recommends sale as a going concern, it shall identify and

group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. (3) The resolution professional shall submit the recommendation of the committee under sub regulations (1) and (2) to the Adjudicating Authority while filing the Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 23 of 32 approval or decision of the committee under section 30 or 33, as the case may be."

39D. Fee of the liquidator While approving a resolution plan under section 30 or deciding to liquidate the corporate debtor under section 33, the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for -

(a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;

(b) the period, if any, used for sale under clauses (e) and

(f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and

(c) the balance period of liquidation.]"

20. This `Appellate Tribunal' notes that from the reading of the 'Impugned Order' dated 02.06.2022, it is quite evident that the 'Adjudicating Authority' did everything under its command and available options within its purview under I & B Code, 2016 and 'Insolvency & Bankruptcy Board of India (Corporate Insolvency Resolution Process)' Regulations, 2016 to avoid `Liquidation' of the 'Corporate Debtor'. The 'Adjudicating Authority' gave fair and equal chances to both the `Resolution Applicants' to the extent that a 'Resolution Plan' in tandem and in co-operation of both the `Parties' could be submitted, however both the `Parties' could not do so. Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 24 of 32

21. From the Para 11.6 of the 'Impugned Order', this `Appellate Tribunal' notes the following written submissions made by both the `Resolution Applicants' about their failure to give the `Resolution Plan'.

"Letter from Sabine Hospital and Research Centre:

"This is to inform you that though a series of discussions were held between us and Promoter of the Corporate Debtor C Bharath Chandran and multiple feasible options were tired, we are unable to resolve the legal intricacies ensuring from such combinations and its associated risks Though we earnestly tied to arrive at a resolution planed situated to all, we could not successfully arrive at the desired outcome. Hence, we regret Our inability. Hence, it is requested to proceed as per law."

Letter from Dr. Bharath Chandran:

At the outset, I am extremely grateful to have been given the opportunity to submit a Joint Resolution Plan by the Committee of Creditors, as the resolution of M/s Trivandrum International Health Services Limited ('Corporate Debtor') is of the utmost importance to me.

To this end, and to ensure that there is, in fact, a resolution of the Corporate Debtor, and that the Corporate Debtor is not liquidated, I had reached out to M/s Sabine Hospital and Research Centre Pvt Ltd ('Sabine'), the only other Resolution Applicant, in order for both parties to come together and submit a Joint Resolution Plan that would be acceptable to the Committee of Creditors of the Corporate Debtor.

With the impending pendency of adjudication of the Interlocutory Application Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 25 of 32 filed by yourself before the Hon'ble National Company Law Tribunal, Kochi Bench, I endeavoured to time and again to discuss with and give in to the demands of Sabine with the singular goal of resolution in mind. I bring to your notice, however, that there are irreconcilable differences between the two resolution applicants and that, therefore, I will not be able to submit a Joint Resolution Plan for resolution of the Corporate Debtor.

I sincerely regret being unable to submit a Joint Resolution Plan to the members of the Committee of Creditors of the Corporate Debtor and thank the COC members for giving us an opportunity again."

22. Towards the end of the 'Corporate Insolvency Resolution Process', a 'Resolution Applicant' proposes a 'Resolution Plan' which is placed before the 'Committee of Creditors' by the 'Resolution Professional' and upon several deliberations by 'Committee of Creditors', the crucial decision pertaining to the approval or rejection of a Resolution Plan is taken. Thereafter, if a rejected plan is placed before the 'Adjudicating Authority', the 'Adjudicating Authority' is expected to do nothing more, but to initiate the 'Liquidation' process under section 33(1) of I & B Code, 2016, but if the plan is approved by at least 66% 'Voting Share' of 'Committee of Creditors' and is placed before the 'Adjudicating Authority' for its approval, the 'Adjudicating Authority' has to look into two basic check boxes, only then the 'Plan' stands approved and binding on all the 'Stakeholders'. Firstly, whether the plan has been approved by not less than 66% of 'Voting Share' by the 'Committee of Creditors' Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 26 of 32 members or not and secondly, whether the requirements stated under section 30(2) of the I & B Code, 2016 are being complied with or not. However, there are no provisions under the Code, which authorizes 'Adjudicating Authority' to modify or interfere with the merits of the plan.

Similarly in the present case, since the 'Committee of Creditors' did not approve the plan by a vote of not less than 66% as required under Section 30 (4) of the I & B Code, 2016, hence, it is considered that the Resolution Plan has failed. Therefore, in such a situation if a rejected plan is placed before

the 'Adjudicating Authority', the 'Adjudicating Authority' is expected to do nothing more, but to initiate 'Liquidation' process under section 33(1) of I & B Code, 2016.

23. This 'Appellate Tribunal' also observed that the 'Appellant' was given all possible opportunities to submit the 'Resolution Plan', including extension of time, replacement of co-applicant and opportunity to submit joint 'Resolution Plan' with the other 'Resolution Applicant' namely, 'M/s Sabine Hospital and Research Centre', etc. Unfortunately, the 'Appellant' was not able to come out with the 'Resolution Plan' acceptable to the 'Committee of Creditors'. This 'Appellate Tribunal' has also noted that there was clear divergent view among the members of the 'Committee of Creditors' and on last two occasions the 'Committee of Creditors' Member could not muster minimum stipulated 66% of voting right to approve the 'Resolution Plan'. However, the 'Committee of Creditors' unanimously with 100% 'Voting Rights' recommended for 'Liquidation' of the 'Corporate Debtor'. This Appellate Tribunal is conscious of catena of Judgment of Hon'ble Supreme Court of India including K. Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 27 of 32 Sashidhar Vs. Indian Overseas Bank, Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. and Vallal RCK Vs. Siva Industries & Holding Ltd. where, the Apex Court has given clear verdict that 'commercial wisdom' of the 'Committee of Creditors' is supreme and there should be minimum judicial intervention by NCLAT/NCLT.

24. Not only the legislature has been clear with primacy of creditors over the 'Adjudicating Authority' for 'Approval' of 'Plan', but even the Judiciary through several Judgments has stated that no 'Adjudicating Authority' or 'Appellant Authority' i.e. 'National Company Law Appellate Tribunal' ('NCLAT') has been empowered to question the decision makers of the 'Plan'. Hence, the 'NCLT'/'NCLAT' have to abide by the "commercial wisdom of the CoC" and do generally nothing else, except 'Approve' or 'Reject' the 'Plan', after ensuring that the plan fulfills the criteria under section 30(2) of the Code. This concept was set as a bed-rock in one of the landmark judgments of I & B Code, 2016 i.e. K. Sashidhar v. Indian Overseas Bank, wherein the Apex Court held that "52.There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 28 of 32 wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable."

64.....There solution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors be it for approving, rejecting or abstaining, As the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake

scrutiny of the justness of the opinion expressed by financial creditors at the time of voting"

[emphasis supplied]

25. At this instance, it is also essential to understand that the NCLT & NCLAT has limited 'Judicial Review Jurisdiction', while dealing with the approval or rejection of the 'Resolution Plan' which has to be within four corners of section 30(2) of I & B Code, 2016, insofar as the 'Adjudicating Authority' is concerned and section 32 read with section 61(3) of the Code insofar as the 'Appellate Tribunal' is concerned and under no circumstances the 'Adjudicating Authority' or the Appellate Tribunal can trespass upon the commercial decision of the 'Committee of Creditors'. This concept was looked Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 29 of 32 broadly in one of the judgments of Apex Court i.e. in the matter of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors, wherein it was held that "73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code a real so provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditor store- submit such plan after satisfying the aforesaid parameters. There as on given by the Committee of Creditors while approving a resolution plan may thus be Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 30 of 32 looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass there solution plan, other things being equal."

[emphasis supplied]

26. This 'Appellate Tribunal' is very conscious of the fact that 'Liquidation' should be the last resort as this virtually tantamount to death knell of the 'Corporate Debtor', However, it is also to be considered that the 'Corporate Insolvency Resolution Process' proceedings are required to be completed within stipulated period as stipulated in 'Insolvency & Bankruptcy Board of India

(Corporate Insolvency Resolution Process) Regulations, 2016, herein this case the 'Adjudicating Authority' has taken all the precaution and action to ensure that the 'Corporate Debtor' is kept as a going concern. However, coming to the end of the wall with no further option left, the 'Adjudicating Authority' had to issue 'Impugned Order' for the 'Liquidation' in the 'Order' dated 02.06.2022.

27. Hence, it is clear from the above discussion that the 'Adjudicating Authority' has no jurisdiction and/ or authority to analyse or evaluate the decision of the 'Committee of Creditors' to enquire into the justness of the rejection of the 'Resolution Plan' by the dissenting 'Financial Creditors'.

28. Upon receipt of a "rejected" Resolution Plan, the 'Adjudicating Authority' is not expected to do anything more, but is obligated to initiate the 'Liquidation Process' under Section 33(1) of the I&B Code. Similarly, in the Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 31 of 32 present case, since the 'Resolution Plan' was not approved by the 'Committee of Creditors' and did not meet the requirements of Section 30 (4) of the I & B Code, 2016, The 'Adjudicating Authority' now is to proceed for 'Liquidation' under Section 33 (1) of the I & B Code, 2016.

29. Looking at from that perspective, the 'Adjudicating Authority' was right in ordering 'Liquidation' of the company, as per Section 33(1) of the I & B Code, 2016.

30. In view of the aforesaid deliberations and reasons, this 'Tribunal' does not find any error in the 'Impugned Order' dated 02.06.2022, passed in IA (IBC) 49/(KOB)/2022 in IBA/51/KOB/2021. The 'Appeal' being devoid of any merit is set aside and therefore stands dismissed. No costs.

The connected pending Interlocutory Applications, if any, are Closed.

[Justice M. Venugopal] Member (Judicial) [Naresh Salecha] Member (Technical) Simran Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & I.A. No. 677 & 710 of 2022 32 of 32