

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Ins.) No. 1192 & 1193 of 2022
& I.A. No. 3897-3898, 3776-3777, 4512, 4520 of 2023**

IN THE MATTER OF:

Sandeep Gupta

...Appellant

Versus

**JM Financial Asset Reconstruction Company Ltd.
& Anr.**

...Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate, Mr. Abhijeet Sinha, Mr. Vikas Goel, Mr. Ritesh Sharma, Mr. Sidharth Aggarwal, Mr. Vivek Gupta, Ms. Anisha Dahiya, Advocates.

For Respondents: Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Shreya Mahalwar, Advocates for RP.

Mr. Maninder Singh and Mr. Navin Pahwa, Sr. Advocates with Mr. Siddharth Garg and Mr. Nikhil Khare, Advocates for UV ARCL.

Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bisht, Mr. Prateek Kushwaha, Mr. Sahas Bhasin and Mr. Yashu Rustagi, Advocates for Intervenor (EPFO).

Mr. Gopal Jain, Sr. Advocate, Ms. Bhavya Shukla, Advocates for Intervenor

Mr. Sumesh Dhawan, Mr. Wattan Sharma and Mr. Shaurya Shyam, Advocates for Applicant in I.A. No. 6049 of 2023.

With

Comp. App. (AT) (Ins.) No. 1271 of 2022

IN THE MATTER OF:

Asian Hotels (East) Ltd. & Ors.

...Appellants

Versus

Yes Bank Ltd. & Anr.

...Respondents

Cont'd.../

Present:

For Appellants: Mr. Sameer Sagar, Mr. Satymev Sabarn, Ms. Surabhi Chhabra, Advocates

For Respondents: Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Shreya Mahalwar, Advocates for RP.

Mr. Siddharth Garg and Mr. Nikhil Khare, Advocates for UV ARCL.

Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bisht, Mr. Prateek Kushwaha, Mr. Sahas Bhasin and Mr. Yashu Rustagi, Advocates for Intervenor (EPFO).

With

Comp. App. (AT) (Ins.) No. 1338 & 1339 of 2022
& I.A. No. 3903 & 3904 of 2023

IN THE MATTER OF:

Sudhir Gupta

...Appellant

Versus

JM Financial Asset Reconstruction Company Ltd.

...Respondent

Present:

For Appellant: Mr. Ashish Aggarwal, Mr. Nalin Dhingra, Ms. Ramya Aggarwal, Advocates.

For Respondent: Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Shreya Mahalwar, Advocates for RP.

Mr. Siddharth Garg and Mr. Nikhil Khare, Advocates for UV ARCL.

Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bisht, Mr. Prateek Kushwaha, Mr. Sahas Bhasin and Mr. Yashu Rustagi, Advocates for Intervenor (EPFO).

With

Comp. App. (AT) (Ins.) No. 1341 of 2022
& I.A. No. 3905 of 2023

IN THE MATTER OF:

Asian Hotels (East) Ltd. & Ors.

...Appellants

Versus

**JM Financial Asset Reconstruction Company Ltd.
& Ors.**

...Respondents

Present:

For Appellants: Mr. Sameer Sagar, Mr. Satymev Sabarn, Ms. Surabhi Chhabra, Advocates

For Respondents: Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Shreya Mahalwar, Advocates for RP.

Mr. Siddharth Garg and Mr. Nikhil Khare, Advocates for UV ARCL.

Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bisht, Mr. Prateek Kushwaha, Mr. Sahas Bhasin and Mr. Yashu Rustagi, Advocates for Intervenor (EPFO).

J U D G M E N T

ASHOK BHUSHAN, J.

These four appeals have been filed by the Suspended Director of the Corporate Debtor - Asian Hotels (West) Ltd. and shareholders of Corporate Debtor challenging the order passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench IV admitting Section 7 application filed by the Financial Creditor as well as orders passed in two Interlocutory Applications. These appeals arising out of same proceedings were heard together and are being decided by this common judgment. Company Appeal (AT) (Ins.) No.1192-1193 of 2022 and Company Appeal (AT) (Ins.) No.1338-1339 have been filed by the Suspended Directors of the Corporate Debtor – Asian Hotels (West) Ltd. challenging order dated 16.09.2022 passed by the Adjudicating Authority admitting Section 7 application filed by the Financial Creditor in C.P. (IB) No.571/PB/2021. Another order under challenge in

Company Appeal (AT) Insolvency No.1192-1193, 1271, 1338-1339 & 1341 of 2022

these appeals is the order dated 16.09.2022 passed in I.A. No.3041 of 2022 filed by JM Financial Asset Reconstruction Company Ltd. by which order the Adjudicating Authority permitted the JM Financial Asset Reconstruction Company Ltd. to be substituted in place of Yes Bank, the original Financial Creditor. Company Appeal (AT) (Ins.) No.1341 of 2022 has been filed by the Appellants who are Shareholder of the Corporate Debtor of about 88% challenging the order dated 16.09.2022 by which Section 7 application filed by the Financial Creditor has been admitted. Company Appeal (AT) (Ins.) No. 1271 of 2022 has been filed by Asian Hotels (East) Ltd. and shareholders of the Corporate Debtor challenging order dated 05.08.2022 by which I.A. No. 5699/PB/2021 filed by the Appellant for impleadment in Section 7 application has been rejected.

2. Brief background facts giving rise to these appeals need to be first noticed before noticing certain facts and events which took place during pendency of these appeals:

- i. The Corporate Debtor – Asian Hotel (West) Ltd. is a company registered on 08.01.2007 with registered office situated at 6th Floor, Aria Towers, JW Marriot, Aerocity Asset Area 4 Hospitality District Near IGI Airport, New Delhi. The Corporate Debtor is running hotel **Hyatt Regency, Mumbai.**
- ii. The Corporate Debtor availed financial assistance from Yes Bank on 21.04.2016, Term Loan amounting to Rs.180 Crores and further Term Loans in different Tranches totalling to Rs.200 Crores.

Overdraft facility of Rs.27 Crores was also availed by the Corporate Debtor. In the year 2020, a FITL Term Loan and a FITL-LRD facility was availed on 01.09.2020.

- iii. The Corporate Debtor served its all financial obligations to Yes Bank till 31.03.2021. Due to pandemic COVID-19 lockdown was enforced w.e.f. 25.03.2020 and during the period of COVID hotel business was worse affected.
- iv. During the COVID, Government of India in order to support the business enterprises severely affected by the COVID-19 introduced Emergency Credit Lines Guarantee Scheme (ECLGS). Under the ECLGS, eligible borrowers could avail of additional credit lines in form of additional working capital/term loan facility on the basis of 100% guarantee coverage sanctioned under the ECLGS.
- v. The Corporate Debtor applied for additional facility of Rs.40 Crore under ECLGS 2.0 on 24.11.2020. The Yes Bank issued sanction letter on 03.05.2021, which was accepted by the Corporate Debtor on 04.05.2021, however, the Bank did not release the amount sanctioned under ECLGS on the ground that certain conditions which are to be fulfilled by the Corporate Debtor have not been fulfilled.
- vi. The default was committed by the Corporate Debtor in paying the instalments of April, 2021. There was default committed by the Corporate Debtor for loan and with regard to other facilities during April, 2021 to August, 2021.

- vii. On 30.07.2021, Bank issue a Loan Recall Notice recalling the entire loan amount along with interest. On the same date, notice under Section 13(2) was issued by Yes Bank.
- viii. On 19.08.2021, the Yes Bank filed Section 7 application before the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench IV claiming a default of an amount of Rs.264,07,35,129/- as on 13.08.2021.
- ix. The Yes Bank also took possession of assets on 21.08.2021 under SARFAESI Act, 2002.
- x. The Corporate Debtor filed a counter affidavit in Section 7 application filed in November, 2021. The Corporate Debtor in its counter affidavit opposed the Section 7 application. It was pleaded that the Corporate Debtor having fulfilled its obligations under the Credit Facility upto 31.03.2021, however, due to severe blow on the operations of the Corporate Debtor's sole hotel at Mumbai i.e. Hyatt Regency instalments could not be paid by April, 2021. It was pleaded that the Applicant has unlawfully refused to release the amount of Rs.38.5 Crore against the ECLGS and had the amount be released, the Company would not have been a defaulter since on the date of Loan Recall Notice i.e. 30.07.2021 the total default was less than Rs.12 Crore. It was pleaded that the application has been filed as sheer abuse of process of law. The Government of India had taken several protective measures to help the business to survive from COVID-19 effect but the Yes Bank unmindful of

disastrous consequences on Hotel business has proceeded under SARFAESI as well as under Section 7. In the Counter Affidavit it is stated that the company is fully alive to its obligation and will perform the same in right earnest, provided the Bank release funds against the EGLGS and give suitable time to the Company to resume its operation in post pandemic period. It is submitted that all the obligations were met till 31.03.2021, which demonstrate Company's bonafide and willingness to abide by the terms of facilities granted by the Bank.

- xi. On 09.12.2021, an I.A. No. 5699/PB/2021 was filed by Asian Hotels (East) Ltd. praying for impleadment in the application filed by the Yes Bank under Section 7.
- xii. On 01.06.2022, the Yes Bank issued notice for sale of financial assistance/loan of the Corporate Debtor.
- xiii. On 21.06.2022, the Yes Bank assigned the debt of the Corporate Debtor to JM Financial Asset Reconstruction Company Ltd. I.A. No. 3041 of 2022 was filed by JM Financial Asset Reconstruction Company Ltd. for substitution in place of original Financial Creditor – Yes Bank. I.A. was opposed by the Corporate Debtor.
- xiv. The Adjudicating Authority vide order dated 05.08.2022 rejected I.A. No. 5699/PB/2021 filed by Asian Hotels (East) Ltd. for impleadment. Company Appeal (AT) (Ins.) No. 1271 of 2022 has been filed by Asian Hotels (East) Ltd. challenging order dated 05.08.2022.

- xv. The Adjudicating Authority heard the parties on Section 7 application as well as on I.A. No.3041 of 2022, I.A. No. 4021 of 2022 and by impugned order dated 16.09.2022 admitted Section 7 application filed by the Financial Creditor. I.A. No.3041 of 2022 filed by JM Financial Asset Reconstruction Company Ltd. to be substituted in place of Yes Bank was also allowed. Aggrieved by orders dated 16.09.2022, appeals have been filed, as noted above.
- xvi. Company Appeal (AT) (Ins.) No. 1192-1193 of 2022 was heard by this Tribunal on 29.09.2022 on which date notices were issued and this tribunal passed following interim order:

“In the meantime, CoC will not take any final decision regarding resolution.”

- xvii. During pendency of the appeal, by assignment dated 30.11.2022, the JM Financial Asset Reconstruction Company Ltd. has assigned its debt to UV Asset Reconstruction Company Ltd (UVARCL). After assignment of debt in favour of UV Asset Reconstruction Company Ltd. IAs have been filed by UV Asset Reconstruction Company Ltd. in the appeals for substituting it in place of JM Financial Asset Reconstruction Company Ltd. which application were taken up by this Tribunal and parties were granted time to file reply vide order dated 11.01.2023. The appeals were listed before this Tribunal and were heard from time to time. I.A. No. 3897-3898 of 2023 in Company Appeal (AT) (Ins.) No. 1192-1193 of 2022 was filed by Appellant – Sandeep Gupta, Suspended Director stating that

proposal under Section 12A has been submitted to the CoC on 11.08.2023 by the Promoters and Suspended Directors of the Corporate Debtor and Shareholders aggregating to 88% shareholding in the Corporate Debtor along with photocopy of the Bank Guarantee of INR 40 Crore, which came for consideration before the CoC on 18.08.2023, where the Promoters were asked to produce original Bank Guarantee for verification, which Bank Guarantee submitted to the Resolution Professional on 21.08.2023. In the application following prayers have been made:

- “a. Pass an interim order, thereby restraining the CoC and the RP to take any other steps or actions in the Corporate Insolvency Resolution Process till such time as the CoC considers and decides the 12A proposal filed by Applicants, including the Appellant;*
- b. Pass an order directing the CoC to accept the 12A proposal filed by the applicants including the Appellant;*
- c. Set aside the impugned orders dated 16.09.2022 passed by the Ld. Adjudicating Authority in CP (IB)-571/2021;*
- d. Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present matter and in the interest of justice.”*

xviii. To the similar effect I.A. No.3903-3904 of 2023 has been filed by Mr. Sudhir Gupta, Suspended Director of the Corporate Debtor in

Company Appeal (AT) (Ins.) No.1338-1339 of 2023. Another application being I.A. No.3905 of 2023 was filed in Company Appeal (AT) (Ins.) No. 1341 of 2022 by Asian Hotels (East) Ltd., shareholders of the Corporate Debtor paying for similar reliefs. The above applications filed by the Applicants came before this Tribunal on 29.08.2023, on which date this Tribunal directed learned counsel for the Respondent to obtain instruction.

- xix. After 13th meeting of CoC dated 18.08.2023, original Bank Guarantee was submitted to the Resolution Professional, which was also verified by the Resolution Professional. 14th CoC meeting held on 14.09.2023, where CoC noted, which was recorded in the minutes, that the proposal does not provide for an upfront payment. CoC indicated that if entire money is deposited with the Resolution Professional upfront, the member of CoC shall consider the proposal positively.
- xx. On 27.09.2023 when the appeal was taken, Appellants submitted before this Tribunal that Appellants are offering entire amount to be deposited along with interest. This Tribunal directed the said proposal to be placed before CoC to take a decision and in event CoC accepts the proposal, the Resolution Professional shall file an application, after deposit of the entire amount by the Appellant, under Section 12A for closure of the CIRP.
- xxi. Subsequent to order dated 27.09.2023, 15th CoC meeting took place on 10.10.2023 where it was noted that proposal has been

submitted by the Shareholders of the Corporate Debtor holding approx. 88% shareholding in the Corporate Debtor. It was noted that on 04.10.2023 the relevant shareholders submitted a Revised Settlement Proposal in which the proposers have envisaged to deposit the entire admitted outstanding dues, without any haircut within six weeks from approval of the Revised 12A Proposal by the CoC. It was recorded in the minutes that the Proposers will deposit the entire monies within six weeks and only thereafter CoC shall consider the Revised 12A Proposal of the relevant Shareholders. The CoC asked the Resolution professional to keep the proposal in abeyance and the CoC will consider it once the monies are deposited.

xxii. After aforesaid minutes of the CoC meeting dated 10.10.2023, the appeal was taken on 17.10.2023, where counsel for the Appellant submitted that they are ready to deposit the amount in Court within four weeks from the said date. This Tribunal passed order on 17.10.2023 directing the Appellant to deposit the entire outstanding amount less 40 Crores which is already deposited as Bank Guarantee within four weeks in the Court in a Fixed Deposit Receipt to the Registrar of NCLAT. Appellant was also directed to file an affidavit bringing on record the proof of payments.

xxiii. The 16th meeting of CoC was held on 13.10.2023, where the Revised 12A Proposal was put to vote and the CoC dissented the proposal. It is relevant to notice that CoC consists of only two Financial

Creditors i.e. (i) UV Asset Reconstruction Co. Ltd. (UVARCL) **(Voting Share 98.84%)**, and (ii) PTC India Financial Services Ltd. (PTC) **(Voting Share 1.16%)**.

xxiv. In pursuance of order dated 17.10.2023, a Compliance Affidavit has been filed by the Appellant bringing on record materials to indicate that FDR, as permitted by the Court, has been deposited.

xxv. On 24.11.2023, the appeals and applications were heard and Compliance Affidavit filed by the Appellant was noted. Submission of one Prospective Resolution Applicant was also noticed that against the order dated 17.10.2023 passed by this Tribunal appeal has been filed before the Hon'ble Supreme Court where order has been passed on 21.11.2023. Time was allowed to Prospective Resolution Applicant to bring the said order on record. The Counsel for the Financial Creditor submitted that amount deposited is not by the Appellant but by a third party. This Tribunal directed learned counsel for the Financial Creditor to obtain instructions, whether the financial creditor is willing to accept the amount deposited to liquidate their debt or not and the said statement shall be made by an affidavit.

xxvi. In pursuance of order dated 24.11.2023, an affidavit has been filed on 04.12.2023 stating that the Financial Creditor is not agreeable to accept the amount deposited by the Corporate Debtor. It was stated that Revised 12A Proposal has been twice disapproved by the CoC and the CoC in its commercial wisdom has not approved the

12A Proposal. It is further stated in the Affidavit that funds deposited on 15.11.2023 is actually Saraf Group/Public Shareholders of Asian Hotels (West) Ltd. The deposit made by Novak Hotels Pvt. Ltd is deposit made by a third party. In the Affidavit certain other objections were raised regarding 12A Proposal submitted by the Appellant. The counter affidavit to Affidavit dated 04.12.2023 filed by the Financial Creditor was filed by the Appellants. All the parties were heard on 20.12.2023 and orders were reserved.

3. We have heard Shri Arun Kathpalia, learned senior counsel appearing for the Appellants in Company Appeals filed on behalf of the Suspended Directors. We have heard Ms. Pooja Mahajan, learned counsel appearing for the Resolution Professional. Shri Maninder Singh, learned senior counsel and Shri Navin Pahwa, learned senior counsel have appeared for UVARCL. Shri Gopal Jain, learned senior counsel has been heard for Prospective Resolution Applicant. We have also heard Shri Sumesh Dhawan and Shri Brajesh Kr. Tamber, learned counsels appearing for the Interveners.

4. Shri Arun Kathpalia, learned senior counsel for the Appellant submits that the proposal having been submitted before the CoC for payment of 100% dues along with interest of Financial Creditors and 100% dues of the Operational Creditor, Government dues and dues of employees with entire CIRP cost, the CoC have acted arbitrarily in not accepting the proposal. It is submitted that the minutes of the 13th, 14th, 15th and 16th CoC meetings in which the proposal submitted by the Appellants came for consideration

indicate that the CoC have been shifting its stand. First, the CoC said that original Bank Guarantee be submitted by the Appellant of Rs.40 Crore need to be verified. When the Resolution Professional verified the said Bank Guarantee and stated that the proposal is compliant, the CoC took view that the proposal does not provide for upfront payment. On 04.10.2023, Revised Proposal was submitted offering to pay entire amount. In 15th CoC meeting held on 10.10.2023 it was decided that proposal be kept in abeyance and once the Appellant deposits entire money the CoC shall consider the proposal but within three days another CoC meeting was held on 13.10.2023 where voting was held dissenting the proposal by the CoC. It is submitted that in pursuance of the order dated 17.10.2023, the Appellant has deposited the entire amount with letters of lien marked in the favour of Registrar, NCLAT through Kotak Mahindra Bank and IDBI Bank, details of which have already brought on record by Compliance Affidavit. There is no occasion for the CoC to say that they are not ready to accept the amount. It is submitted that the **Hotel Hyatt, Mumbai** is a very valuable property which according to the Financial Creditor – Yes Bank was valued at Rs.479.07 Crores. The actions of UVARCL indicate that they are interested in hostile takeover of the hotel and handover to some PPA, which is best known to UVARCL. The Financial Creditors and all creditors are at best entitle to 100% of their dues in CIRP. No creditor can refuse 100% of their dues. 100% dues have been offered and have been deposited by Fixed Deposit Receipt. Non-acceptance of said amount of legitimate entire dues is clearly an abuse of process of law and arbitrarily acquiring asset of the Corporate Debtor by showing

highhandedness. In the affidavit filed on 04.12.2023, Now the UVARCL is finding fault with the amount deposited by Novak Hotels and Saraf Group. It is submitted that in the minutes of the 13th to 16th CoC it was very well noticed that it is 88% shareholders of the Corporate Debtor who have submitted the proposals and shareholders have every right to submit proposal for liquidating the debt of the Corporate Debtor to free the Corporate Debtor from CIRP. It is submitted that the objection now sought to be raised only indicate the intent of UVARCL to somehow reject the proposal of 12A to handover the assets to some Resolution Applicant of its choice for ungenuine purposes. Shri Kathpalia submits that present is a case where CoC having acted arbitrarily, which is apparent from minutes of its meeting dated 10.10.2023 and 13.10.2023, this Tribunal has every jurisdiction to accept the proposal and close the CIRP, the amount being already deposited, which amount may be directed to be released to the Resolution Professional for disbursement. Learned counsel relying on judgment in **“Swiss Ribbons Pvt Ltd. & Anr. vs. Union of India, (2019) 4 SCC 17”** submits that Hon’ble Supreme Court has categorically held that decision of the CoC on 12A proposal is not final and if the CoC arbitrarily rejects a just settlement, NCLT, and thereafter, NCLAT can always set aside such decision.

5. Shri Maninder Singh, learned senior counsel appearing for UV Asset Reconstruction Company Ltd (UVARCL) opposing the submission of the Appellant submits that the Appellant who were Suspended Directors, Sandeep Gupta and Sudhir Gupta have no right to submit any proposal under 12A. It is submitted that Section 29A has been enacted for keeping away the

management of the Corporate Debtor who led to the insolvency of the Corporate Debtor. It is submitted that principles underlying, Promoters cannot adopt a mechanism to circumvent Section 29A. It is submitted that the 12A remedy has to be bonafide and genuine. Section 12A proposal by Promoters is not a genuine or valid proposal, which need not be accepted. It is submitted that those who are third party cannot submit proposal under 12A. Suspended Director has joined hands with a third party to scuttle the process of resolution. It is submitted that assignment dated 21.06.2022 was under challenge and in view of the judgment dated 13.12.2022 in ***Company Appeal (AT) (Ins.) No.1449 of 2022, Siti Networks Ltd. vs. Assets Care and Reconstruction Enterprises Limited & Anr.*** such challenge has become unsustainable. It is submitted that in so far as debt and default are concerned, which is basis of Section 7 application, the Appellant themselves admitted their liability and there is no ground within meaning of Section 61 to entertain these appeals. It is submitted that the Appeals deserve dismissal, hence, proposal under 12A also need to be rejected. It is submitted that Section 12A proposal should be complaint to Section 12A and Regulation 30A of CIRP Regulations, 2016. It is submitted that Expression of Interest has been issued and several Prospective Resolution Applicants have submitted their Resolution Plans. Learned counsel Shri Maninder Singh relied on judgment of this Tribunal in ***“Avantha Holdings Ltd. & Anr. vs. Abhilash Lal & Ors., Company Appeal (AT) (Ins.) No.304 of 2022”*** decided on 04.07.2022 in support of his submission that the Promoters are disqualified

to submit any Settlement Plan. It is submitted that the CoC have full right and jurisdiction to consider all Resolution Plans received in CIRP.

6. Shri Navin Pahwa, learned senior counsel appearing for UVARCL submitted that there was an agreement dated 11.08.2023 with Saraf Group which was not disclosed in the application. Under the agreement the Promoters with the help of Robust Hotels Ltd. were to bring money. It is Saraf Group which is bringing entire money. Learned counsel has referred to MCA records to indicate the shareholding of Robust and Novak Hotels.

7. Shri Gopal Jain, learned senior counsel appearing for Applicant in I.A. No. 4520 of 2023 referring to order dated 21.11.2023 in Civil Appeal No.7581 of 2023 submits that the Resolution Plan submitted by the Applicant who is a Prospective Resolution Applicant need to be considered by the CoC. It is submitted that the proposal under 12A is an indirect attempt to tie the hands of CoC. Relying on Regulation 39 (2) of CIRP Regulation, it is submitted that the Resolution Professional has to place all plans including Resolution Plan of the Applicant before the CoC. It is submitted that the CoC wanted to consider the plans but cannot consider due to the interim order passed by this Tribunal. It is submitted that level playing field should be provided to all Resolution Applicants including the Applicant.

8. Shri Sumesh Dhawan, learned counsel appearing for Applicant in I.A. No.6049 of 2023 submits that there are now six Resolution Plans. It is submitted that as per Regulation 30A proviso there has to be reason for justifying withdrawal after Expression of Interest is issued.

9. Shri Arun Kathpalia, learned senior counsel for the Appellant in his Rejoinder submits that the proposal is now submitted by the Appellants Sandeep Gupta and Sudhir Gupta as well as Appellant – Asian Hotels (East) Ltd. and shareholders. The proposal under 12A is by 88% shareholders which fact is already noticed in the minutes of meetings of CoC. To the Promoters for closing CIRP, funds can very well be provided by the Shareholders. Saraf Group was erstwhile Promoter of the Corporate Debtor and is 18% shareholder of the Corporate Debtor. Shri Kathpalia has referred to details given in Counter Affidavit. It is submitted that Appellants are begging the CoC to accept their dues. Rejection of proposal is not commercial wisdom of the CoC but a malafide exercise. Section 29A has no application with regard to proposal under Section 12A. Prospective Resolution Applicants have no locus in the CIRP. It is submitted that this Tribunal may accept the proposal under 12A and direct for closure of the CIRP by distribution of all dues of all creditors along with interest. It is submitted that Resolution Professional has also communicated expenses of Rs.5,99,11,097/-, which has been claimed as expenses by UVARCL for which no details have been given, however, Appellant has expressed its willingness to pay the reasonable of above expenses, for which no details have been given.

10. We have considered the submissions of learned counsel for the parties and perused the record.

11. The main question to be considered and answered in these Appeals is as to whether decision of CoC, in which UVARCL has 98.84% voting share,

to reject the proposal under Section 12A dated 11.08.2023 as revised on 04.10.2023 is arbitrary and unsustainable?

12. We may first notice the statutory scheme which has been brought by insertion of Section 12A in the I&B Code by Act 26 of 2018 w.e.f. 06.06.2018. It is to be noted that prior to insertion of Section 12A there was no provision in the Code for withdrawal of CIRP except Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Hon'ble Supreme Court in **"(2018) 15 SCC 687, Uttara Foods and Feeds Private vs Mona Pharmachem"** made observations requiring amendment in the Rules. Section 12A was inserted by Act 26 of 2018 which provides as follows:

"12A. The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified."

13. Consequential amendments were also made in Insolvency and Bankruptcy Board of India. (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by inserting Regulation 30A by notification dated 25.07.2019. Regulation 30A provides as follows:

"30A. Withdrawal of application. - (1) *An application for withdrawal under section 12A may be made to the Adjudicating Authority -*

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent

voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.”

14. The Hon’ble Supreme Court had occasion to consider Section 12A in **“Swiss Ribbons Pvt Ltd. & Anr. vs. Union of India, (2019) 4 SCC 17”** in which various provisions of I&B Code including 12A were under challenge. In Para 83 of the judgment following has been laid down:

“83. *The main thrust against the provision of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus*

settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes constitutional muster.”

15. The Hon’ble Supreme Court categorically held that **“If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code.”**

16. Now we may first notice proposals which were submitted by the Appellants under 12A. The proposal was submitted by email dated 11.08.2023 to the Resolution Professional which was addressed to the CoC as well as the Resolution Professional. The proposal was submitted by both the Suspended Directors, Sandeep Gupta and Sudhir Gupta as well as Robust Hotels Ltd. and its associates and public Shareholders. The proposal dated 11.08.2023 is as follows:

"To,

1. *The Committee of Creditors
Asian Hotels (West) Limited (Under CIRP)*
2. *Mr. Sapan Mohan
Resolution Professional
(IBBI/ IPA-002/ IP-N00315/ 2017-2018/ 10903)
Asian Hotels (West) Limited
D-54, First Floor Defence Colony.
New Delhi-110024*

Also at: sapanio@yahoo.com

Sir,

Subject: Section 12A of IBC 2016 ("IBC") proposal for payment of entire dues of all the creditors and other admitted claims without any haircut and the entire CIRP costs enabling you to make the necessary application to the Adjudicating Authority in respect of Asian Hotels (West) Limited, New Delhi ("Corporate Debtor") for withdrawal of the application admitted under section 7 of IBC.

We, Sandeep Gupta and his associates (Promoter holding beneficial interest in approx. 45% of equity shares), Sudhir Gupta and his wife (Promoter holding beneficial interest in approx. 25% of equity shares), and Robust Hotels Limited and its associates (Public shareholder having approx. 18% equity shares), holding together approx. 88% shareholding in the Corporate Debtor are hereby making this proposal for payment of entire dues and entire CIRP Costs for withdrawal of the pending section 7 Insolvency Application in respect of the Corporate Debtor in order to revive its operations.

We request you to kindly make the necessary application to the Adjudicating Authority under the

prescribed time frame and manner for withdrawal of the application admitted under section 7 of IBC.

The terms of the proposal for payment of dues are as under:-

- 1. To pay the entire admitted outstanding dues of the financial creditors (inclusive of up-to-date interest amount), operational creditors and other creditors, without any haircut, within 45 (forty-five) Business Days from approval of the Withdrawal Application.*
- 2. To pay off the entire CIRP costs in accordance with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, as amended (CIRP Regulations).*

In this connection, we also undertake to provide you with bank guarantee towards estimated expenses (as furnished by the RP) as detailed in Reg. 30A(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 within 7 days of the receipt of your consent so that you through the RP can make necessary application under Form FA with the Hon'ble Adjudicating Authority along with the required bank guarantee.

In order to show our bonafide, we enclose herewith a copy of the bank guarantee in favour of the Corporate Debtor of INR 40 crores. The same shall be furnished immediately upon receipt of your consent for acceptance of our proposal.

Since we are paying the entire admitted dues without any haircut and the entire CIRP costs, we request you

to give your consent to the proposal immediately and urgently file the withdrawal application under section 12A of IBC to get the Corporate Debtor out of the CIRP.

As per our understanding, the total admitted dues are INR 324,28,87,563/- (Rupees Three Hundred and Twenty-Four Crores, Twenty-Eight Lakhs, Eighty-Seven Thousand, Five Hundred and Sixty-Three only). However, you are also requested to let us know the exact amount of admitted dues and the entire CIRP cost as of today so that we can meet up the differences, if any, and pay the same.

This is without prejudice to the pending proceedings before the Hon'ble NCLT and Hon'ble NCLAT.

Thanking you,

Yours truly,

<i>Sandeep Gupta (Promoter/Member of Suspended Board of Directors)</i>	<i>Sudhir Gupta (Promoter/Member of Suspended Board of Directors)</i>	<i>Mr. Saumen Chatterjee (on behalf of Robust Hotels Limited and its associates, Public Shareholders)</i>
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CC:

1. YES Bank Limited
garima.kothari@vesbank.in
2. JM Financial Asset Reconstruction Company
Nirav.parekh@jmil.com
Anil.bhatia@jmfl.com
Vivek.grover@jmfl.com
3. UV Asset Reconstruction Company Limited
uvarcl@gmail.com
ceo@uvarcl.com
gurpreet@uvarcl.com
ritesh@uvarcl.com
4. PTC India Limited
abhina.panda@ptcfinancial.com

Date: 11th August, 2023

Place: New Delhi”

17. The proposal submitted on 11.08.2023 came for consideration before the 13th meeting of CoC held on 18.08.2023 where it was noted in Agenda Item No. A5 that RP apprised the CoC that Promoters and its associates and Robust Hotels and its associates holding together approx. 88% shareholding in the Corporate Debtor have submitted proposal along with copy of Bank Guarantee of INR 40 Crore. In Item No. A5 following was stated:

“ITEM NO. A5

**TO CONSIDER AND DELIBERATE ON THE
PROPOSAL RECEIVED UNDER SECTION 12A OF
CODE IN RESPECT OF CORPORATE DEBTOR**

*The RP apprised the CoC that by an email dated 11 August 2023. Mr. Sandeep Gupta and his associates (Promoter holding beneficial interest in approx. 45% of equity shares), Mr. Sudhir Gupta and his wife (Promoter holding beneficial interest in approx. 25% of equity shares), and Robust Hotels Limited and its associates (Public shareholder having approx. 18% equity shares) (together, "**Relevant Shareholders**"), holding together approx. 88% shareholding in the Corporate Debtor have submitted a settlement proposal under section 12A of the Code along with a copy of bank guarantee in favour of the Corporate Debtor of INR 40 Crore.”*

18. After deliberation and discussion and the queries asked by UVARCL, it was stated on behalf of the UVARCL that they are willing to accept

the proposal upon receipt or original Bank Guarantee and its verification and the Resolution Professional was requested to verify the original Bank Guarantee. In the concluding part of Minutes of Item No. A5 following has been stated:

“Concluding the discussions, RP stated that once the original bank guarantee is received from the Relevant Shareholders, the RP shall proceed with the verification process of the bank guarantee as requested by CoC members and apprise the members of CoC about outcome of such verification of bank guarantee to take the process forward.”

19. As noted above, applications were filed by both Suspended Directors in the company appeals, where the applicants after referring to the proposal under 12A dated 11.08.2023 and Minutes of CoC held on 18.08.2023 has prayed for following reliefs:

- “a. Pass an interim order, thereby restraining the CoC and the RP to take any other steps or actions in the Corporate Insolvency Resolution Process till such time as the CoC considers and decides the 12A proposal filed by Applicants, including the Appellant;*
- b. Pass an order directing the CoC to accept the 12A proposal filed by the applicants including the Appellant;*
- c. Set aside the impugned orders dated 16.09.2022 passed by the Ld. Adjudicating Authority in CP (IB)-571/2021;*

d. Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present matter and in the interest of justice.”

20. IAs were filed on 25.08.2023. After filing of IAs, Respondent was asked to obtain instructions by order of this Tribunal dated 29.08.2023. The 14th meeting of CoC was held on 14.09.2023 where in Agenda Item No.5 proposal received under 12A was deliberated. The Minutes note that original Bank Guarantee was submitted on 21.08.2023 which was verified by the Resolution Professional. In the CoC, it was stated on behalf of the UVARCL that 12A proposal does not provide for upfront payment to the creditors of the Corporate Debtor, therefore, proposal is not acceptable in current form. However, it was submitted that they would be happy to consider a proposal positively if there is a new proposal backed by deposit of 100% outstanding till date and legal expenses with the RP which can be distributed instantly upon CoC approval. The minutes of meeting dated 14.09.2023 records following in Agenda Item No. A5:

“Both the members of the CoC were of the opinion that the entire settlement amount should be deposited upfront and therefore the present 12A proposal was not acceptable to the members of the CoC. However, it was reiterated that if the entire money is deposited with the RP upfront along with the new proposal, the members of the COC will consider the proposal positively.

It was also mutually decided that the figure to be deposited by the proposers shall be estimated considering the time period till 30 September 2023 which shall include all costs incurred up till that time in conducting the CIRP of the Corporate Debtor and interests accruing up till that time and if there shall be any adjustments to the amount arrived at, the same shall also be considered by the proposers.”

21. After minutes of meeting dated 14.09.2023, a revised proposal was submitted by the Appellants the said proposal was forwarded to both the CoC and the Resolution Professional. The revised proposal dated 04.10.2023 proposed to deposit the entire admitted outstanding dues of the financial creditors, operational creditors and other creditors without any haircut i.e. INR 361,69,75,766/- as furnished by the Resolution Professional by email dated 28.09.2023 detailed in Schedule I. With regard to expenses to the tune of Rs.5,99,11,097/-, it was mentioned that the Appellant would be willing to pay reasonable legal expenses for which necessary details were asked for. It is useful to extract the proposal, which is to the following effect:

““To,

1. *The Committee of Creditors
Asian Hotels (West) Limited (Under CIRP)*
2. *Mr. Sapan Mohan
Resolution Professional
(IBBI/ IPA-002/ IP-N00315/ 2017-2018/ 10903)
Asian Hotels (West) Limited
D-54, First Floor Defence Colony.
New Delhi-110024*
*Also at: sapanio@yahoo.com
cirp.asianhotelswest.com*

Sir,

Subject: Proposal under Section 12A of IBC 2016 ("IBC") in terms of order dated 27.09.2023 of the Hon'ble NCLAT, for payment of entire dues of all the creditors and other admitted claims without any haircut and the entire CIRP costs enabling you to make the necessary application to the Adjudicating Authority in respect of Asian Hotels (West) Limited, New Delhi ("Corporate Debtor") for withdrawal of the application admitted under section 7 of IBC.

We, Sandeep Gupta and his associates (Promoter holding beneficial interest in approx. 45% of equity shares), Sudhir Gupta and his wife (Promoter holding beneficial interest in approx. 25% of equity shares), and Robust Hotels Limited and its associates (Public shareholder having approx. 18% equity shares), holding together approx. 88% shareholding in the Corporate Debtor are hereby making this proposal for payment of entire dues and entire CIRP Costs for withdrawal of the pending section 7 Insolvency Application in respect of the Corporate Debtor in order to revive its operations.

The terms of the proposal for payment of dues are as under:-

1. To deposit the entire admitted outstanding dues of the financial creditors (inclusive of up-to-date interest amount), operational creditors and other creditors, without any haircut, INR 361,69,75,766 (Rupees Three Sixty One Crores, Sixty Nine lakhs, Seventy Five thousand seven hundred and Sixty Six only) (as furnished by the RP vide his email dated 28.09.2023) as detailed in Schedule I,

within 6 weeks from approval of the proposal by the CoC.

- 2. To pay off the entire balance CIRP costs of INR 2,80,13,124 (Rupees two crores eighty lakhs forty three thousand one hundred and twenty four only) (as furnished by the RP vide his email dated 28.09.2023) in accordance with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, as amended ("CIRP Regulations").*
- 3. To provide you with bank guarantee towards estimated CIRP Costs (as above) as detailed in Reg. 30A(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*
- 4. In order to show our bonafide, we have already deposited with you, the addressee no. 2, the original bank guarantee in favour of the Corporate Debtor of INR 40 crores. The same has already been verified by you in terms of the minutes passed in the 13th meeting of the CoC.*
- 5. The RP has also intimated that the Lead member of the COC, Le. UV Asset Reconstruction Company Limited, has, for the purpose of 12A Application, claimed expenses to the tune of INR 59,911,097 as detailed in Schedule II annexed herewith. Neither the details or description of the said expenses has been furnished to us nor the rationale to include the same for the purpose of*

the proposal for withdrawal. We would be willing to pay reasonable legal expenses and in that regard, we request you to provide the necessary details and description.

We request you to:

- a. kindly convene the CoC for consideration and approval of this proposal. We undertake to deposit the entire INR 361,69,75,766 (Rupees Three Sixty One Crores, Sixty Nine lakhs, Seventy Five thousand seven hundred and Sixty Six only) along with balance CIRP costs of INR 2,80,43,124 within 6 weeks of approval by the CoC of the proposal.*
- b. You, addressee no. 2, is requested to file an application under Section 12A of the IBC for the withdrawal of the application admitted under e section 7 of IBC, immediately upon the deposit of the entire amount by us in the above manner.*
- c. Furnish us the details and description of the expenses of INR 59,911,097 claimed by the lead member of the CoC, i.e. UVARCL.*

This is without prejudice to the pending proceedings before the Hon'ble NCLT and Hon'ble NCLAT.

Thanking you,

Yours truly,

Sandeep Gupta

Sudhir Gupta

*Mr. Saumen Chatterjee
(on behalf of Robust
Hotels Limited and its*

(Promoter/ Member of Suspended Board of Directors) (Promoter/ Member of Suspended Board of Directors) associates, Shareholders) Public

CC:

1. UV Asset Reconstruction Company Limited
uvarcl@gmail.com
ceo@uvarcl.com
gurpreet@uvarcl.com
ritesh@uvarcl.com
2. PTC India Limited
abhina.panda@ptcfinancial.com

Date: 04th October, 2023

Place: New Delhi”

“Schedule I”

S. No.	Creditor		Amount Admitted	Interest Accrued	Total	Amount proposed to be paid u/s 12A
1.	Financial Creditor	UVARC	2,92,24,48,724	36,90,33,300	3,29,14,82,024	3,29,14,82,024
2.		PTC	3,43,03,189	39,83,935	3,82,87,124	3,82,87,124
3.	Operational creditor		11,61,51,053	NA	11,61,51,053	11,61,51,053
4.	Employees & Workmen		16,15,08,052	NA	16,15,08,052	16,15,08,052
5.	Government dues		1,72,934	NA	1,72,934	1,72,934
6.	Other creditor		93,74,579	NA	93,74,579	93,74,579
	Total		3,24,50,29,499	37,30,17,235	361,69,75,766	361,69,75,766

* All amounts are as per the details shared by the Resolution Professional

Sandeep Gupta

(Promoter/ Member of Suspended Board of Directors)

Sudhir Gupta

(Promoter/ Member of Suspended Board of Directors)

Mr. Saumen Chatterjee

(on behalf of Robust Hotels Limited and its associates, Public Shareholders)

“Schedule II”

S. No.	Creditor	Amount Admitted	Interest Accrued	Total	Amount proposed to be paid u/s 12A
1.	Other dues**	-	NA	59,911,097	59,911,097

**Expenses claimed by the Lead Member of the CoC, i.e. UVARC

<i>Sandeep Gupta</i>	<i>Sudhir Gupta</i>	<i>Mr. Saumen Chatterjee</i>
<i>(Promoter/Member of</i>	<i>(Promoter/Member of</i>	<i>(on behalf of Robust Hotels</i>
<i>Suspended Board of</i>	<i>Suspended Board of</i>	<i>Limited and its associates,</i>
<i>Directors)</i>	<i>Directors</i>	<i>Public Shareholders)</i>

22. Aforesaid proposal came for consideration before 15th CoC meeting held on 10.10.2023, where Item No. A9 was to deliberate on the proposal received under Section 12A of Code in respect of Corporate Debtor. The minutes noted the order dated 27.09.2023 and the proposal dated 04.10.2023 received from the Appellant. In the minutes after elaborate discussion following decision is recorded in the minutes:

“After detailed deliberation among the CoC members and the proposers it was decided that Proposers will deposit the entire amount within six weeks and only thereafter the CoC will consider the 12A proposal of the Relevant Shareholders.”

23. Further in the same Item following was recorded:

“The RP sought final clarity on the decision from the CoC members. Both the CoC members agreed to keep the current Revised 12A Proposal in abeyance until the money was deposited and asked the RP to record the same in the minutes that the proposal is being kept under abeyance as per the request of proposers and the CoC will consider it once the monies are deposited.”

24. Although by the minutes dated 10.10.2023 it was decided that Appellant may deposit entire amount within six weeks, however, on

13.10.2023 16th CoC meeting was held in which under Item No. B1 three resolutions were noted for consideration. The CoC members took the view that in view of the order dated 27.09.2023 of the NCLAT, the Revised 12A Proposal has to be decided and the same cannot be kept in abeyance. The Member of the CoC decided to put the Revised 12A Proposal for e-voting. Resolutions which were to be put for e-voting as noticed in the Item No. B1 are as follows:

“Resolution:

To consider and if thought fit, to pass with or without modification the following resolution:

“RESOLVED THAT in terms of Section 12A of Insolvency and Bankruptcy Code, 2016, read with the Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the consent of committee of creditors, be and is hereby accorded to approve the revised proposal received on 04 October 2023 from the Relevant Shareholders under Section 12A of the Code in respect of Asian Hotels (West) Limited (Corporate Debtor).

RESOLVED FURTHER THAT in terms of Section 12A of Insolvency and Bankruptcy Code, 2016, read with the Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Resolution Professional, Mr. Sapan Mohan Garg is instructed to file an application, for withdrawal of application admitted under Section 7 of the Code, upon the deposit

of the entire amount by the 12 A proposers, on behalf of the applicant.

RESOLVED FURTHER THAT *the expenses so incurred by the Resolution Professional in connection to the afore-stated application and such other ancillary expenses connected thereto which shall form part of the insolvency resolution process cost be and is hereby approved.”*

25. On the basis of the voting held on 13.10.2023, the proposal was not approved. The UVARCL dissented with 98.84% vote share and other Financial Creditor was absent. Hence, the proposal was not approved with 100%. The matter came before this Tribunal on 17.10.2023 thereafter, on which date the Appellant state that the Appellant is ready to deposit the amount in the Court within four weeks. Following order was passed on 17.10.2023:

“ORDER

17.10.2023: *By our order dated 27.09.2023, we had directed following:*

“27.09.2023: I.A. No. 3897 & 3898 of 2023: This application has been filed by the Appellant. Appellant's case is that Appellant is ready to pay the entire 100% dues of the Creditors and CIRP Cost. Learned counsel for the Appellant submits that Appellant has already given Bank Guarantee of Rs.40 Crores which after resolution of the CoC has been verified. It is submitted that Appellant only requires approval of the CoC for deposit of the entire amount within six weeks so that application under 12A can be filed by the Resolution Professional after approval of the CoC.

Let the Applicant/ Appellant submit proposal offering the entire amount which is being

offered to be deposited alongwith interest upto 30.09.2023. The said proposal be placed before the CoC by the Resolution Professional to take a decision. In event CoC accepts the proposal, the Resolution Professional shall file an application, after deposit of the entire amount by the Appellant, under Section 12A for closure of the CIRP.

The decision of CoC shall be taken within two weeks. The Resolution Professional may communicate the amount of interest and CIRP cost so that Appellants proposal may include the same.

List this Application on 17.10.2023.

Other connected Appeals may also be listed on 17.10.2023.”

2. Learned Sr. Counsel-Mr. Arun Kathpalia for the Appellant submits that Appellant has submitted an offer that they will deposit the entire amount in six weeks and thereafter the Application under Section 12A may be filed.

3 Learned Sr. Counsel appearing for the Respondents submits that the Appellant have not deposited the amount although they are making such statement since August, 2023,

4. Learned Counsel for the Appellant submits that Appellant is ready to deposit the amount in the Court within four weeks from today. It is submitted that Rs.40 Crores Bank Guarantee is already with the Respondent.

5. Let the Appellant deposit the entire outstanding amount less 40 Crores which is already deposited as Bank Guarantee within four weeks from today in the Court in a Fixed Deposit Receipt to the Registrar of NCLAT.

6. Appellant may file an affidavit bringing on record the proof of payments as directed above on or before 23rd November, 2023.

*List this Appeal again on **24th November, 2023.**
Interim Order to continue.”*

26. After aforesaid order dated 17.10.2023, the Appellant filed an Affidavit of Compliance. This Tribunal after noticing the Affidavit of Compliance passed following order on 24.11.2023:

“ORDER
(Hybrid Mode)

24.11.2023: Heard Mr. Arun Kathpalia, Learned Sr. Counsel for the appellant and Mr. Pahuwa appearing for the Financial Creditor.

2. An affidavit on behalf of the appellant has been filed in compliance of 2 the order dated 17.10.2023. In affidavit in paragraph 7 & 8 following has been stated:

“7. I say that, on 16 November 2023, two (2), FDRs i.e.. Term Deposit Receipt bearing no. 5099 for an amount of INR 316,00,00,000/- (Rupees Thren Hundred Sixteen Crore) and Fixed Deposit Receipt bearing serial no. 8043812 for an amount of INR 15,00,00,000/- (Rupees Fifteen Crores) along with the letters dated 15 November 2023 from the lien with respect to the said FDRs in favour of the learned Registrar, National Company Law Appellate Tribunal were e filed before this Hon'ble Tribunal. A copy of the list of documents filed on behalf of the Appellant along with e-filing receipts are annexed herewith and marked as Annexure A-5 (Colly).

8. I say that the original FDRs along with the original letters dated 15th November 2023

confirming the lien in favour of the Ld. Registrar, National Company Law Appellate Tribunal has also been deposited with the Ld. Registrar of this Hon'ble Tribunal, on 17.11.2023 vide diary no.48465, along with the covering letter of the same date. A copy of the covering letter dated 17 November 2023 evidencing the proof of deposit of the two (2) original FDRs and the two (2) original letters dated November 2023 is annexed herewith und marked as Annexure A-6.”

3. Learned Counsel for the appellant submits that under the order of this Tribunal dated 17.10.2023 amount was to deposit in a FDR is the name of the Registrar within four weeks.

4. Learned Counsel for the appellant has referred to letter dated 15.11.2023 issued by Kotak Mahindra Bank where it is stated that lien is marked to the Registrar, NCLAT, New Delhi for lien amount of Rs. 316 crores and at page 53 is the letter dated 15.11.2023 by IDBI Bank with regard to confirmation Delhi. of lien of 15 crores in favour of the Registrar NCLAT, New Delhi.

5. Learned Counsel for the appellant submits that amount deposited along with Rs. 40 Crores already given by the way of bank guarantee are 100% debt of the financial creditor and by the said amount the 100% debt of the financial creditor can be liquidated and it is further submitted that said amount also includes the CIRP cost as well as amount payable to the operational creditor.

6. Learned Sr. Counsel Mr. Gopal Jain appearing for the prospective resolution applicant submits that he has already filed an appeal against the order dated 17.10.2023 passed in Company Appeal (AT) (Ins.) No.

1192 & 1193 of 2022 in which an order has been passed by Hon'ble Supreme Court dated 21.11.2023. He seeks time to bring the said order on record. Let him bring the copy of the order of the Hon'ble Supreme Court within a week from today.

7. He also submits that LA. No. 4520 of 2023 which I.A. may also listed on the next date.

8. Mr. Pahwa submits that the amount deposited is not by the appellant but by the third entity.

9. Learned Counsel for the financial creditor may obtain instruction, whether the financial creditor is willing to accept the amount deposited to liquidate their debt or not and the said statement shall be made by an affidavit before the next date.

*10. List the appeals on **05.12.2023**.*

11. Financial creditor may file Affidavit within a week.

12. Learned Counsel for the respondent submits I.A. No. 3897, 3898 of 2023 is not maintainable.

13. Interim order to continue.”

27. It was after the order dated 24.11.2023 that the Financial Creditor – UVARCL filed an Affidavit dated 04.12.2023 stating that the Financial Creditor is not ready to accept the amount deposited. In the affidavit dated 04.12.2023 UVARCL has also raised certain other submissions to support their decision not to approve the 12A proposal.

28. When we look into the sequence of events and proposal under 12A, it is clear that proposal which was submitted by the Appellant clearly indicated the persons who were proposing the proposal and the proposal

clearly mentioned that entire dues of Financial Creditors, Operational Creditors, Employees, Workmen, Government Dues and other creditors are proposed to be paid. The Resolution Professional communicated the details vide email dated 28.09.2023, hence, in the Revised Proposal dated 04.10.2023, the Appellant has proposed to make payment of entire outstanding amount i.e. INR 361,69,75,766/-. We have already noted the proposal dated 04.10.2023 and the details of Creditors as contained in Schedule I. Proposal clearly covered 100% dues of all creditors including Financial Creditors. The aforesaid proposal was in addition to payment of entire balance CIRP cost of Rs.2,80,43,124/-.

29. We have already looked into minutes of meeting of the CoC held on 18.08.2023, 14.09.2023, 10.10.2023 and 13.10.2023. In the 13th CoC meeting, the UVARCL resolved to first verify the Bank Guarantee given along with the proposal, which was verified and noted in the minutes dated 14.09.2023. In minutes dated 14.09.2023 proposal was not accepted on the ground that it do not provide for upfront payment. The minutes clearly mentioned that if entire money is deposited with the RP upfront, the members of the CoC will **consider the proposal positively**. Fresh proposal was given on 14.10.2023. On 10.10.2023, the CoC decided to give six weeks' time to the Appellant to deposit the entire amount and thereafter to take a decision on the 12A proposal and proposal was to be kept in abeyance. However, within three days to said decision, voting was held on 13.10.2023 and proposal was dissented by the Financial Creditors.

30. Shri Maninder Singh, learned senior counsel appearing for UVARCL has first raised objection on the ground that Section 12A cannot circumvent Section 29A. Section 29A contains a provision which deals with persons not eligible to submit a resolution plan. The eligibility is clearly to submit a Resolution Plan which is clear from the opening words of Section 29A:

“29A. Person not eligible to be resolution applicant. – A person shall not be eligible to submit a resolution plan, if such person,...”

31. Section 12A provides for withdrawal of the application admitted under Section 7 or 9, on an application made by the applicant with the approval of 90% voting share of the Committee of Creditors. Application has to be filed as per procedure provided under Regulation 30A. The objective of Section 12A and Section 29A are totally different. Section 29A is a provision which debars certain categories of applicants from submitting Resolution Plan whereas Section 12A is entirely different provision where CIRP can be withdrawn after admission. The proposal is submitted by Applicant before the CoC and if the proposal is approved by 90% CoC, Regulation 30A provides for procedure for withdrawal. If the CoC approval is granted with 90% vote share, an application has to be filed by the IRP/RP in Form FA. The question of ineligibility of Promoters to submit the proposal does not arise under Section 12A.

32. We, thus, are of the view that submission of Shri Maninder Singh that by proposal under Section 12A the Appellants are trying to circumvent Section 29A cannot be accepted.

33. Another submission pressed by learned counsel for UVARCL is that the proposal submitted by Suspended Directors is with the aid of third parties. It is relevant to notice that proposal dated 11.08.2023 as well as Revised Proposal dated 04.10.2023 clearly mentions the details of persons on whose behalf the proposal is submitted. Proposal dated 11.08.2023 came for consideration before the CoC in its 13th CoC meeting on 18.08.2023, where it was noted that the RP has appraised the details of Applicants who have submitted the proposal and Robust Hotels and its associates, public shareholders having approx. 88% equity shareholding were clearly noticed in the minutes, which we have extracted above in this order. The CoC being satisfied of the Applicants, first decided to get the original Bank Guarantee verified and after verification when the matter was considered in meeting dated 14.09.2023 the proposal was not approved on the ground that it does not provide for upfront payment. We have already noticed the resolution that in event 100% amount is deposited, the proposal shall be positively considered. Again in the 15th CoC meeting, no issue was raised with regard to locus of the Applicants who have submitted the proposal and the CoC also unanimously resolved to give six weeks' time to the Applicants to deposit entire amount. During the oral submissions objections are sought to be raised which did not find any consideration in the CoC meeting, rather the CoC has not shown to have any objection with regard to consideration of any proposal on such ground, which is now sought to be advanced. The submission advanced by learned counsel for the UVARCL clearly indicate that

the whole intent is to somehow find one or other reason to support its decision to not approve the 12A proposal.

34. All creditors including the Financial Creditors under the scheme of IBC are only entitled to receive 100% of their admitted debt. The proposal which has now been submitted after receipt of email from Resolution Professional giving details of admitted claim and CIRP dues clearly indicate that entire dues are offered to be deposited by the Appellant. As noted above, on 10.10.2023, time was given to deposit, however, within three days voting was held in which proposal was dissented, which clearly shows anxiety of the CoC to somehow reject the proposal.

35. After the order of this Tribunal dated 17.10.2023, now when the amount has been deposited by the Appellant although with delay of one or two days, the objection sought to be raised on the ground of deposit by third party is not acceptable. It is very much clear that the deposit has been made by the Promoters and Shareholders of the Corporate Debtor who are the same parties who have submitted the proposal. The Promoters and Shareholders are fully entitled to arrange finances for making deposit and in the present case the finances are all deposited by shareholders and their group companies. The objection of the UVARCL that Novak Hotel who has deposited the amount in the FDR has nothing to do with the Appellants has been denied and all details have been given in the Counter Affidavit. The delay in deposit of one day as explained in Para 7 of the Counter Affidavit, which is as follows:

“7. That the contents of Paras 6 and 7 of the Affidavit are wrong, incorrect and hence denied. It is denied that there is non-compliance of the order passed by this Hon'ble Tribunal dated 17.10.2023, as alleged. The said four weeks granted by this Hon'ble Tribunal elapsed on 14.11.2023. However, due to the occasion of Diwali on 12.11.2023, and other festivals, the Appellants were unable to deposit the aforesaid amount by 14.11.2023 as the banks and other Financial Institutions were closed for business. Even the registry of this Hon'ble Tribunal was observing holidays from 11th November 2023 to 15th November 2023. Immediately upon the reopening of the Banks, the banks made disbursement on 15.11.2023. The Appellants immediately upon the receipt of the said money deposited the entire amount less INR 40 crores in a Fixed Deposit Receipt ("FDR") with the Ld. Registrar of NCLAT. A true copy of the said receipt dated 17.11.2023 evidencing the said deposit is annexed herewith and marked as Annexure 'C'. The Appellant has also filed an application for condonation of the said delay bearing IA No.5407 & 5409 of 2023 and the same is pending before this Hon'ble Tribunal. The delay in complying with the orders dated 17.10.2023 passed by this Hon'ble Appellate Tribunal in deposit of the entire outstanding amount less INR 40 Crores is neither deliberate nor intentional but bonafide due to the reasons stated hereinabove. Moreover, no prejudice is caused to the Respondents or the COC.

It is submitted that the FDRs along with lien letters were obtained from the Kotak Mahindra Bank (INR 316

Crores) and IDBI Bank Ltd. (INR 15 Crores) on 15.11.2023 itself and the same were duly e-filed before this Hon'ble Tribunal on 16.11.2023 and after taking permission of this Hon'ble Tribunal by way of mentioning the matter on 17.11.2023, original FDRs were physically filed with the office of the Ld. Registrar, NCLAT on the same day i.e. on 17.11.2023. A true copy of the list of documents filed by the Appellant along with e-filing receipts is annexed herewith and marked as Annexure 'D (Colly). The alleged understanding of UVARCL that only Mr. Sandeep Gupta and Mr. Sudhir Gupta were given the liberty vide order dated 17.10.2023 is ex-facie wrong. It is submitted that it is a matter of record that the order dated 17.10.2023 were common orders passed in the following matters:

- i. Comp. Appeal (AT) (Ins.) Nos. 1192 & 1193 of 2022 titled Sandeep Gupta vs. JM Financial Asset Reconstruction Company Limited & Another;*
- ii. Comp. Appeal (AT) (Ins.) Nos. 1338-1339 of 2022 titled Sudhir Gupta vs. JM Financial Asset Reconstruction Company Limited;*
- iii. Comp. Appeal(AT) (Ins.) Nos. 1271 of 2022 titled Asian Hotels (East) Limited & Others vs. Yes Bank Limited & Another;*
- iv. Comp. Appeal(AT) (Ins.) Nos. 1341 of 2022 titled Asian Hotels (East) Limited & Another vs. JM Financial Asset Reconstruction Company Limited & Others;"*

36. We do not find any non-compliance of the order dated 17.10.2023 in depositing amount. Delay of 1 or 2 days deserves to be condoned in view of the reasons as detailed in the Counter Affidavit. In Para 7 itself the details of deposit by Novak Hotels and shareholding pattern of Novak Hotels has been mentioned and further in Para 7 following has been stated:

It is further denied that Novak Hotels Pvt. Ltd has nothing to do with the Appellants. It is submitted that Novak Hotels Pvt. Ltd. is a Wholly Owned Subsidiary of Asian Hotels (East) Limited, Appellants in Company Appeal (AT) (Ins.) No. 1271 and Company Appeal (AT) (Ins.) No. 1341 of 2022. A true copy of the shareholding pattern of Novak Hotels Pvt. Ltd. as on 29.11.2023 is annexed herewith as Annexure 'E'. Moreover, Robust Hotels Ltd. and Asian Hotels (East) Limited are Saraf Group Companies and the shareholding of both these companies is mirror image of each other. A true copy of the shareholding pattern of Robust Hotels Ltd. and Asian Hotels (East) Limited are annexed herewith as Annexure 'F' (Colly). It is submitted that earlier Asian Hotels (East) Limited was the shareholder of the Corporate Debtor and thereafter pursuant to a scheme of demerger approved by the Hon'ble NCLT, Kolkata vide its orders 05.09.2022 and Hon'ble NCLT Chennai vide its orders dated 24.01.2022, the shares of the Corporate Debtor, held by Asian Hotels (East) Limited, were transferred to Robust Hotels Limited. It is further pertinent to mention herein that Robust Hotels Limited has also e-filed an application for substitution, vide e-filing number 9910110/06935/2023, in their appeal bearing Company Appeal (AT) (Ins.) No.1341 of 2022.

Even otherwise all the three Companies are Saraf Group Companies.”

37. We are of the view that after considering the submissions made by counsel for the parties and the materials brought on the record there is no non-compliance in the deposit made by the Appellant in the Court as per order dated 17.10.2023 nor there is any shortcoming or infirmity in the amounts deposited in the FDR and anxiety of UVARCL to somehow for one or other reason reject the proposal under 12A is more than apparent. From the record it is clear that the UVARCL was assigned the debt after filing of present appeals on 30.11.2023 for a consideration of Rs.295 Crores. Whatever claim is admitted in the CIRP is being paid full and the UVARCL is being proposed total payment of Rs.329,14,82,024/-. It is also to be noted that all creditors including Operational Creditors, Employees and Workmen and Government dues are getting 100% of their dues under the Proposal. We find substance in the submission of learned counsel for the Appellant that intent of UVARCL is to somehow take over prime prized asset of the Corporate Debtor i.e. **Hyatt Regency, Mumbai** and handover the assets to some Prospective Resolution Applicant which is known to UVARCL only.

38. We may also notice, the order of the Hon'ble Supreme Court dated 21.11.2023 passed in “Civil Appeal No.7581 of 2023, Panchshil Corporate Park Pvt. Ltd. vs. Sandeep Gupta & Ors.”. One of the Prospective Resolution Applicant – Panchshil Corporate Park Pvt. Ltd. which has submitted a Resolution Plan has filed Civil Appeal No.7581 of 2023 challenging order

dated 17.10.2023. The Hon'ble Supreme Court passed following order on 21.11.2023:

"ORDER

The sole plea raised by the learned counsel for one of the resolution applicant is that there are seven plans submitted which have remained in abeyance and ought to be put to the Committee of Creditors. The same is not being done on account of an interdict by the NCLAT dated 29.9.2022.

We may notice that the appeal is listed before the NCLAT on 24.11.2023 and since the NCLAT is in seisen of the issue, we feel that this issue is best addressed by the NCLAT on the next date.

The appeal stands disposed of."

39. The Hon'ble Supreme Court disposed of the appeal leaving the issue to be addressed by NCLAT (this Tribunal). As noted above, an interim order was passed in this Appeal to the effect that in the CIRP CoC will not take any final resolution. The order was passed as early as on 29.09.2022 and the UVARCL obtained assignment much after i.e. on 30.11.2023. The Resolution Plans were also invited by the Resolution Professional with the aforesaid interim order operating. The Prospective Resolution Applicants have only right for consideration of their Resolution Plan by the CoC in accordance with the CIRP process. Mere fact that they have submitted a Resolution Plan does not give them any right to get their plan approved, especially when CoC was interdicted from not considering plan by interim order passed in these Appeals. We may also notice the resolution which was passed by the CoC in

15th CoC meeting held on 10.10.2023 by which one of the Resolution Applicant was allowed to withdraw its EMD. CoC granted its consent to approve the request of the consortium to withdraw from CIRP process and to refund the earnest money. It is useful to notice decision of the CoC at Item No. B2:

“ITEM NO. B2

**TO CONSIDER AND APPROVE THE REQUEST FOR
WITHDRAWAL FROM THE CIRP PROCESS
RECEIVED FROM THE CONSORTIUM OF MAYANK
WELFARE SOCIETY (LEAD MEMBER), AMALTAS
HOTEL PRIVATE LIMITED, SURESH SINGH
BHADORIA AND AMALTAS RESORTS PRIVATE
LIMITED AND REFUND OF THE EARNEST MONEY
DEPOSITED OF INR 2 CR.**

Based upon the deliberations held under agenda no. A8, the following resolution, to consider and approve the request for withdrawal from the CIRP process and refund of the earnest money deposited by them of INR 2 Cr., will be put up for e-voting before the CoC-

Resolution:

To consider and, if thought fit, to pass with or without modification the following resolution:

“RESOLVED THAT, the consent of committee of creditors, be and is hereby accorded to approve the request of the Consortium of Mayank Welfare Society (Lead Member), Amaltas Hotel Private Limited, Suresh Singh Bhadoria and Amaltas Resorts Private Limited for withdrawal from the CIRP process in respect of Asian Hotels (West) Limited (Corporate Debtor).

RESOLVED FURTHER THAT, the consent of committee of creditors, be and is hereby accorded to refund the earnest money deposited by the PRA of INR 2.00 Crore.”

40. The CoC having decided to refund the EMD of one of the Prospective Resolution Applicant, there cannot be any difficulty in refunding EMD of all of the Prospective Resolution Applicants in event the Proposal under 12A is ultimately found to be acceptable. We, thus are of the view that in view of the aforesaid, we at the instance of Prospective Resolution Applicant cannot direct the CoC to evaluate the Resolution Plan which it has received. The said course cannot be allowed to be directed since the Proposal under 12A has to be finally determined as to whether it deserves to be accepted and the decision of the CoC to refuse to accept Proposal is arbitrary and unsustainable.

41. We having noticed the relevant facts and sequence of events and minutes of 13th to 16th CoC meetings as well as Proposal submitted by the Appellant dated 11.08.2023 and Revised Proposal dated 04.10.2023, we are satisfied that the decision of the CoC is arbitrary in not approving 12A Proposal which Proposal offered to pay entire debt of Financial Creditors as well as all other creditors. From the minutes of 14th and 15th CoC, it is clear that CoC has expressed its willingness to accept the proposal if entire amount is deposited, however, opportunity was not granted by the CoC and within three days from 10.10.2023 meeting i.e. on 13.10.2023 they dissented the proposal although they initially granted six weeks' time to deposit the amount. When in pursuance of order dated 17.10.2023, the entire amount has been deposited, the UVARCL refused to accept the amount which shows its

malafide intent. Thus, the facts and circumstances and sequence of events clearly proves that decision of the CoC not accepting the proposal for payment of 100% dues is arbitrary and unsustainable. We, thus, hold the Proposal submitted by the Appellant on 11.08.2023 as revised on 04.10.2023 acceptable to liquidate the debt of the Corporate Debtor and close CIRP and to make payment of debts of all Creditors.

42. In result, I.A. No. 3987-3988 of 2023 in Company Appeal (AT) (Ins.) No.1192-1193 of 2022 as well as I.A. No.3903-3904 of 2023 in Company Appeal (AT) (Ins.) No.1338-1339 of 2022 and I.A. No. 3905 of 2023 in Company Appeal (AT) (Ins.) No. 1341 of 2022 deserve to be allowed and are hereby allowed. While allowing the aforesaid IAs, we decide all the Appeals in following manner:

- (i) The Proposal under 12A submitted by the Appellant dated 11.08.2023 as revised on 04.10.2023 is accepted. The CIRP is closed. The order dated 16.09.2022 admitting Section 7 application is set aside.
- (ii) The amount deposited by the Appellant in pursuance of order dated 17.10.2023 in which lien is marked to the Registrar, NCLAT is directed to be remitted to the Resolution Professional for distribution of 100% dues of all Creditors. Resolution Professional may also invoke the Bank Guarantee of Rs.40 Crore already deposited. The Registrar, NCLAT shall intimate both the Banks; Kotak Mahindra Bank and IDBI Bank in reference to FDR in which lien is marked to the Registrar, NCLAT to discharge the lien and remit amount to the Resolution

Professional in the bank account as to be communicated by the Resolution Professional to both Kotak Mahindra Bank and IDBI Bank in which remittance shall be made in one week from today. The Resolution Professional shall distribute the amount so deposited within further period of three weeks.

- (iii) Company Appeal (AT) (Ins.) No.1192-1193 of 2022, Company Appeal (AT) (Ins.) No.1338-1339 of 2022 and Company Appeal (AT) (Ins.) No. 1341 of 2022 are disposed of as above.
- (iv) In view of orders passed in above Appeals, no orders are required in Company Appeal (AT) (Ins.) No.1271 of 2022, which is dismissed having become infructuous.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

09th January, 2024.

Archana