

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 342 of 2022 & I.A. No. 890, 891, 892 of 2022

(Arising out of the Order dated 04.02.2022 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati in I.A. No. 10 of 2021 in C.P. (IB) No. 37/GB/2019)

IN THE MATTER OF:

Bank of India

Having its office at:

Branch office at Killa Building,
1st Floor, Christian Basti, GS Road,
P.O. Dispur, Guwahati-781005

Rep.by Nishi Kant Gaur

Deputy Zonal Manager

Having its office at star house,
Bank of India, Zonal Office, H2,
Connaught Circus, New Delhi-110001.

...Appellant

Versus

1. **Pradeep Kumar Goenka,**
Resolution Professional of Agnipa Energo Pvt. Ltd.

Having its office at:

AV Insolvency Professionals Pvt. Ltd.,
Bajrang Kunj, Room No.412 & 413,
2B Grant Lane, 4th Floor,
Kolkata – 700012.

Email: cirp.agnipa@gmail.com

...Respondent No. 1

2. **Mr. Anil Jaina**
Suspended Director,
Agnipa Energo Pvt Ltd.

Having its office at:

5th Floor, Shine Towers, Sati Jaimati Road,
Arya Chowk, P.O. Rehabari, Kamrup Guwahati
Guwahati – 781008

Email: aniljaina@gmail.com

...Respondent No. 2

3. **Mr. SRI GAURAV JAINA**
Suspended Director

5th Floor, Shine Towers,
Sati Jaimati Road, Arya Chowk,
P.O. Rehabari, P.S. Paltan Bazar,
District: Kamrup(M),
Guwahati-781008, Assam
Email: gauravjaina@gmail.com

...Respondent No. 3

4. SRI ASHOK KUMAR JAIN

Suspended Director 302-303 South Ex. Plaza I,
Leela Ram Market, Masjid Moth,
South Extn. Part - II, New Delhi- 110049
Email: akjain.nv@gmail.com

...Respondent No. 4

Present

For Appellant: Mr. Ashish Rana, Mr. Anurag Singh, Mr. Ritik Anmol, Mr. Gaurav Raj, Advocates.

For Respondents : Mr. Gaurav Kejriwal, Mr. Anmoldeep Singh, Advocates for R-2 to 4.
Mr. Pranay Agarwal for RP.

J U D G E M E N T

(12.07.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by Bank of India (in short **Appellant**) against the Impugned Order dated 04.02.2022 passed by the National Company Law Tribunal, Guwahati Bench, Guwahati (in short '**Adjudicating Authority**') in I.A. No. 10/2021 in CP (IB) No. 37/GB/2019, whereby the Adjudicating Authority rejected the liquidation application filed by the Resolution Professional for liquidation of the Corporate Debtor as recommended by the Committee of Creditors (in short '**CoC**'). The appeal has been filed under 61 of the Insolvency & Bankruptcy Code, 2016 (in short '**Code**').

2. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

3. Mr. Anil Jaina is the Suspended Director of the Corporate Debtor is Respondent No. 2 along with other two suspended directors i.e., Sri Gaurav Jaina who is Respondent No. 3 and Sri Ashok Kumar Jain who is Respondent No. 4.

4. It has been brought out that Rs. 10 Crores were sanctioned by the Appellant on 04.03.2013 in favour of the Corporate Debtor out of which Rs. 8,51,67,362.75/- was disbursed as term loan. It has been reported that there was continuous deferments of Date of Commencement of Commercial Operation (in short '**DCCO**') of the project and subsequently on 30.04.2018 the Corporate Debtor failed to service the debts of the Appellant i.e., non payment of dues and the term loan was classified as NPA on 30.04.2018.

5. The Appellant followed up payment with few reminders calling upon the Corporate Debtor to make the payments and in absence of any payments, the Appellant filed CP (IB) No. 37/GB/2019 under Section 7 of the Code which was admitted by the Adjudicating Authority vide its order dated 12.02.2020 and the Corporate Debtor was taken into CIRP, and Mr. Pradeep Kumar Goenka, was appointed as Resolution Professional of the Corporate Debtor who is Respondent No. 1 in the present appeal.

6. It has been brought out that the Respondent No. 1 gave the public announcement calling for the claims on 14.02.2020 with the last date to submit

the claims to be 26.02.2020 and after verification of the claims, the Respondent No. 1 constituted the CoC wherein only one Financial Creditor i.e., the Appellant was nominated as a sole member of the CoC having 100% voting shares. The Respondent No. 1 invited Expression of Interest (in short '**EOI**') and four EOI were received and only two Resolution Plans were received and one of Resolution Plan happened to be Seema Holding Pvt. Ltd. who did not submit Earnest Money Deposit (in short '**EMD**') as per terms and conditions of the EOI and therefore the same was not considered responsive by the CoC.

7. The other Resolution Plan of Rare Asset Reconstruction Ltd. (Resolution Applicant) (Promoters of the Corporate Debtor) was discussed in 5th CoC Meeting held on 03.12.2020 and CoC advised the Resolution Applicant to improve its Resolution Plan size and also informed that the Resolution Applicant's conditions for foregoing personal and corporate guarantees given by the promoters and other Resolution Applicant cannot be accepted.

8. The Revised Resolution Plan of the Resolution Applicant for Rs. 196.64 Lakhs was discussed in 8th CoC Meeting held on 18.12.2020 and also 9th CoC Meeting held on 06.01.2021 and CoC unanimously voted with 100% voting shares to reject the Resolution Plan of Rare Asset Reconstruction Ltd.

9. The Appellant submitted that in 10th CoC Meeting held on 12.01.2021, the CoC decided with 100% voting rights to liquidate the Corporate Debtor and directed the Respondent No. 1 to file suitable application before the Adjudicating

Authority. The Appellant submitted that the Respondent No 1 filed an application under Section 33 of the Code bearing I.A. No. 10/2021 in CP (IB) No. 37/GB/2019 for liquidation of the Corporate Debtor which was listed on 10.02.2021 before the Adjudicating Authority, wherein the following order was passed :-

"The major portion of CIPP period starting from 12.02.2020 to 06.01.2021 from the date of admission till the date of passing the resolution for liquidation by the CoC is under lockdown/ Shutdown restrictions and there is no clarity about the approval of the Resolution plan in the 8th CoC meeting and rejection of approval of the Resolution plan in the 9th CoC meeting, consent to assign debt but not guarantee, when CD is MSME Unit.

The Resolution Professional is hereby directed to ensure another CoC meeting Inviting the Promoter of the CD under CIRP, the said Resolution Applicant for negotiation in clear terms to find out any Viable Resolution Plan, if any.

The CoC shall discuss 'in details in the light of the recent amendment in IBC with regard to MSME Unit. This meeting is to be convened before 01. 03.2021 preferably at the office of the CD maintaining Covid Protocol.

The Resolution Professional is to submit the detailed report along with the Compliance Report Form H by 05.03. 2021. "

(Emphasis Supplied)

10. The Appellant submitted that the Adjudicating Authority gave specific directions to the Respondent No. 1 to negotiate with the Promoters of the Corporate Debtor to find viable Resolution Plan and the meeting was directed to be held preferably at the office of the Corporate Debtor. The Adjudicating Authority also directed the Respondent No. 1 to submit compliance report. The Appellant stated that this was in contrast to the I.A. No. 10/2021 in CP (IB) No. 37/GB/2019 which was filed for liquidation of the Corporate Debtor based on the commercial wisdom exercised by the CoC with 100% voting rights.

11. The Appellant submitted that the Respondent No. 1, nevertheless, complied with the order of the Adjudicating Authority dated 10.02.2021 and filed his report pointing out that the Rare Asset Reconstruction Ltd. had expressed inability to improve the Resolution Plan. The Respondent No. 1 also informed the Adjudicating Authority that the Resolution Plan was found non-compliance of Section 25(2)(h) of the Code with regard to EMD to be and few other requirements of the Code and related regulations.

12. It has been brought out that on 23.03.2021, based on the Respondent No. 1's report and after noting the submissions of the parties, the Adjudicating Authority permitted the Suspended Management i.e., Promoters of the Corporate Debtor to submit the Resolution Plan after depositing EMD as required and also directed the CoC not to adjust EMD in case the Resolution Plan of the Corporate Debtor is not accepted.

13. In the 15th CoC Meeting held on 16.07.2021, the Appellant decided to initiate the process of declaring the Corporate Debtor and its Directors as ‘Willful Defaulter’ and the matter is pending before the Hon’ble High Court of Guwahati. In the said 15th CoC Meeting it was also advised by the Appellant that the Promoters of the Corporate Debtor were not eligible to submit Resolution Plan in terms of Section 29A(b) of the Code.

14. The Appellant informed that in the 16th CoC Meeting held on 19.10.2021 detailed objections against acceptance of Resolution Plan of the Promoters were recorded in the minutes especially regarding objection relating to cancellation of personal/ corporate guarantees and several other reliefs being sought by the promoters which were against the Code.

15. The Appellant submitted that in the 17th CoC Meeting held on 27.12.2021, the negative mandate against the Resolution Plan by the competent authority of the Appellant bank was communicated keeping in view conditions put by the Promoters/ Resolution Applicant for release of personal and corporate guarantees and regarding viability of the project.

16. The Appellant submitted that on 11.01.2022, I.A No. 10/2021 was listed before the Adjudicating Authority who rejected the application for liquidation of the Corporate Debtor holding that there was no commercial wisdom or commercial decision by the CoC to reject a Resolution Plan of the Promoters of

the Corporate Debtor which offered them 20 times more than the liquidation value.

17. The Appellant emphasised that Adjudicating Authority is obligated under section 33(2) of the Code to accept the recommendations of the CoC like in present case where the CoC recommended for liquidation of the Corporate Debtor.

18. The Appellant submitted that the Resolution Applicant who were Promoters of the Corporate Debtor were not agreeable for removing the condition of release of personal and corporate guarantee of the Corporate Debtor. The Appellant stated that against the claim amount Rs. 11.50 Crores, the acceptance of the plan of Rs. 3 Crores, would have resulted into loss of at least Rs. 8.5 Crores for the Appellant bank as the same could have been recovered from the guarantors, based on their guarantee assets. The Appellant submitted that these are more than fair chances for bank to recover their money from the guarantee amounts of the Corporate Debtor and its directors. The Appellant also stated that acceptance of the resolution plan of the Promoters of the Corporate Debtor would have required the Appellant to withdraw the recovery proceedings filed against the Corporate Debtor and its directors which is prejudicial to rights of the Appellant.

19. The Appellant submitted that the term given by the Promoters of the Corporate Debtor for extinguishment of all pending suits, enforcement actions,

SARFAESI Notices, suits, proceedings and cases by any person/agency against the personal and corporate guarantors are not acceptable.

20. The Appellant further submitted that they had strong doubt about the viability of the Final Resolution Plan submitted by the promoter of the Corporate Debtor and after excising their conscious and judicial commercial wisdom, the Committee of Creditors recommended for liquidation of the Corporate Debtor before the Adjudicating Authority through Respondent No. 1.

21. The Appellant alleged that the Adjudicating Authority exceeded its jurisdiction when the Adjudicating Authority decided to reject the decision taken by the committee of creditors in its commercial wisdom and rather the Adjudicating Authority imposed conditions. In support of his submission, the Appellant cited few judgments of the Apex Court especially the judgment of the Hon'ble Supreme Court of India in the case of ***K. Sashidhar v. Indian Overseas Bank & Ors***, Civil Appeal No. 10673 of 2018 and also of Civil Appeal Nos. 2943-2944 of 2020 ***Kalpraj Dharamshi & Anr Versus Kotak Investment Advisors Ltd. & Anr.*** The Appellant also made reference to the case of ***Amit Bharana and Ors vs. Gian Chand Narang*** [Company Appeal (AT) (Insolvency) No. 274 of 2020] of this Appellate Tribunal which held that the CoC has right to decide to liquidate the Corporate Debtor at any time before the confirmation of Resolution Plan.

22. Concluding his arguments, the Appellant requested to allow his appeal and set aside the Impugned Order.

23. Per contra, the Respondent Nos. 2,3 & 4 (in short **Respondents**) who are the Resolution Applicants and Suspended Directors of the Corporate Debtor have denied of the allegations of the Appellant labelling these as mischievous and misleading.

24. The Respondents defended the Impugned Order and submitted that the Adjudicating Authority has gone into every aspect of facts and law before pronouncing the Impugned Order dated 04.02.2022.

25. The Respondents submitted that the Appellant who is a sole Financial Creditor constituting 100% of CoC had acted in mala-fide way rather than exercising commercial wisdom. The Respondents also submitted that from time to time they have been offering the OTS/ Resolution Plan to settle the outstanding dues of the Appellant. The Respondents stated that even after CIRP was initiated, they offered Rs. 1.34 Crores as OTS which was 15.2% of the outstanding loan which was later enhanced to Rs. 3 Crores + CIRP Costs against outstanding loan of Rs. 11.5 Crores which tantamount to 26.08% of outstanding dues.

26. The Respondents submitted that in several cases, the Financial Creditors have taken rational decision and accepted the haircuts even up to 96% and cited the cases like Shiva Industries and Holdings Ltd. (93.25%), Ushdev International (94.6%), Videocon Group (95.85%), Alok Industries (83%), Deccan Chronicle Holdings Limited (96%), Ramsarup Industries Ltd. (94%).

27. The Respondents submitted that they were offering much more than the liquidation value despite their financial limitations and the Appellant should have been move gracious, graceful and accommodative to allow the Corporate Debtor function smoothly.

28. The Respondents submitted that to kill the Corporate Debtor, the Appellant on 11.02.2019 reported the accounts of the Corporate Debtor to be fraud account and on 06.03.2019 filed the Fraud Management Report in terms of the RBI Circular Dated 01.07.2018, consequent to which, the matter was reported to Central Bureau of Investigation for further investigation against the Corporate Debtor and its Promoters.

29. The Respondents submitted that even after initiation of CIRP against the Corporate Debtor, the Resolution Professional could not find any suitable Resolution Applicant and only Resolution Plan of the Promoters of the Corporate Debtor was viable and should have been accepted by the Appellant. The Respondents alleged that the wrong decision was taken by the Appellant to initiate liquidation of the Corporate Debtor.

30. The Respondents submitted that the Adjudicating Authority appreciated wrong intention of the Appellant and during hearing on 06.09.2021, as noted in its order found unreasonable stand of the Appellant. The order dated 06.09.2021 passed by the Adjudicating Authority reads as under :-

“ 2.. It is observed that the Applicant is the sole Member of the CoC and the Petition has been filed for liquidation of the CD. It is not clear on what basis the Resolution has been passed by the CoC and the Application for liquidation is filed before this Bench rejecting the Resolution Plan for MSME Unit submitted by the CD when the amount provided in the Resolution Plan submitted is more than Twenty (20) times of the Liquidation Value of the CD. It is further reported that there are certain issues like a Suit filed by the CD, a Writ pending before the Hon'ble High Court, FIR filed with an Investigating Agency, report to RBI etc. It is also not clear whether the Resolution Plan submitted by the CD is not approved by the CoC on account of such issues when such issues are apparently not related to acceptance of the Resolution Plan and rescue of the Stressed Assets with its employees from the Liquidation. It is made clear that the objectives of the IBC are very clear and liquidation of a MSME Unit is the last resort. Hence, CoC needs to clarify those points. The learned Counsel appearing for the CoC has sought two days' time to clarify the points.

3. List the matter on 09.09.21”

(Emphasis Supplied)

31. The Respondents also denied all the averments made by the Appellant like lack of viability of the project and lack of sources and submitted that the

Respondents would have brought the funds from their personal savings and other sources.

32. The Respondents also pleaded that their insistence on removing the conditions regarding proceedings against the Corporate Debtor and Directors for their guarantee given in favour of the Appellant, was only with the intention to revive the Corporate Debtor and generate funds from the market which was not appreciated by the Appellant. The Respondents denied that they are wilful defaulters.

33. The Respondents submitted that a single Financial Creditor constituting 100% of the CoC cannot take decisions to initiate the liquidation of the Corporate Debtor, who is offering 20 times more than the liquidation value.

34. The Respondents further refuted the application of ratio given by the Hon'ble Supreme Court of India in the case of *K. Sashidhar (Supra)* and tried to differentiate that when there is single Financial Creditor constituting 100% of CoC, the commercial wisdom cannot be treated as supreme since it gives unfettered arbitrary powers in hands of the individual.

Similarly, the Respondents also tried to differentiate from *Kalpraj Dharamshi (Supra)* where there were more than one Financial Creditor who took commercial decision as Members of the CoC in contrast to the present case where there is only sole Financial Creditor, who is Appellant, as Member of the CoC.

35. The Respondents alleged that the Appellant were not acting reasonably and rather acted against the spirit of the Code and never discussed the issues with the Respondents including viability of the projects which could have been clarified by them to the Appellant. The Respondents alleged that of the Corporate Debtor failed due to wrong action of the Appellant in advising wrong insurance policy which was for a completed project against the policy required by the Corporate Debtor for a project which was under implementation.

36. The Respondents submitted that the Appellant to protect itself and its officers from this goof-up on his part, took illegal decisions including initiating CIRP, rejecting various OTS of the Respondents, overlooking the judicial orders of the Adjudicating Authority, wrongful declaration the accounts of the Corporate Debtor as the fraud accounts and the Corporate Debtor as Promoters as wilful defaulters.

37. Concluding their arguments, the Respondents stated that there is nothing wrong in the Impugned Order and requested this Appellate Tribunal to dismiss the Appeal with an exemplary cost.

Finding

38. We note that the facts regarding the debt, default and subsequent initiation of CIRP by the Adjudicating Authority vide order dated 12.02.2020 are undisputed facts. Only two Resolution Plans were received by the Resolution Professional and one of which was rejected due to non-submissions of EMD and

only other plan of the promoters of the Corporate Debtor remained to be considered by the Appellant. We note that even this Plan was not in conformity to many requirements including EMD's and Adjudicating Authority had to pass orders for such rectification of defects.

39. We note that since Appellant is the sole Financial Creditor and therefore it constituted CoC having 100% voting rights. It is further observed that in various CoC meeting which was chaired by the Respondent No. 1 as Resolution Professional were attended by the representative of the Appellant as well as the representative of the promoters of the Corporate Debtor namely, Mr . Gaurav Jaina the Respondent No. 3 herein. We also observe that total 17 CoC Meetings were held from 2020 to 2021 and the last 17th CoC meeting was held on 27.12.2021. The crucial CoC Meetings which discussed various aspects affecting the present appeal were pertaining to 15th CoC Meeting held on 16.07.2021, 16th CoC meeting held on 19.10.2021 and the 17th CoC Meeting held on 27.12.2021.

40. We also note that the Resolution Professional advised that even in 2021, the cost of CIRP has already become Rs. 32,82,845.60/- and the Resolution Professional's monthly fee of Promoters was continuing at Rs. 1 Lakh per month.

41. The 15th CoC Meeting notes following points :-

“Representative of the Bank of India also pointed out that certain waivers and withdrawal of proceedings sought in the Resolution Plan needs to be removed which are according to

them should not be mentioned in the Resolution Plan as the same does not fall within the authority of Hon'ble NCLT to approve. Mr. Gaurav Jaina requested the CoC to specifically identify those points/clauses in the Resolution Plan to enable them to look into the same and address appropriately. Representative of the Bank of India, the sole member of the CoC agreed to forward their observations in this regard after getting the minutes of this meeting.”

(Emphasis Supplied)

42. We note from above 15th CoC Minutes that Resolution Applicants were asked to withdraw concessions and waivers sought, as these are not in power of the Adjudicating Authority.

43. We note that the Appellant recorded details of objections against acceptance of the Resolution Plan of the Promoters of the Corporate Debtor as well as regarding non-viability of the Resolution Plan, in the 16th CoC Meeting dated 19.10.2021 which reads as under

Minutes of Proceedings at the 16th meeting of the Committee of Creditors (CoC) of Agnipa Energo Private Limited, Corporate Debtor held on Tuesday, the 19th day of October, 2021 through videoconferencing at 10.30 A.M. via Google Meet link meet.google.com/rzn-jmco-war.

Present: In person via videoconferencing.

Sl. No.	Name	Representing	Mobile No.	Email ID
1.	<u>Mr. Pradeep Kr. Goenka</u>	<u>Resolution Professional</u>	9830119363	goenka.pradeep@gmail.com cirp.agnipa@gmail.com
2.	Mr. Pranay Agarwal, Advocate	Assisting the RP		
3.	Mr. Ramesh Kumar	<u>Bank of India</u>	9910921445	Ramesh.Kumar3@bankofindia.co.in
4.	Mr. Ring-tshaw D Daulangupu	Bank of India	7896205353	Ring-Tshaw.Daulagupu@bankofindia.co.in
5.	Mr. Vinay Dhaka	Bank of India	8955956722	Vinay.Dhaka@bankofindia.co.in
6.	Mr. R. N. Sarkar	Bank of India	7895907829	Rabindra.Sarkar@bankofindia.co.in
7.	Mr. Vijoy Kr. Verma	Bank of India	8392957504	Vijoy.Varma@bankofindia.co.in
8.	Mr. Amit Saha	Bank of India	9830879799	Amit.Saha@bankofindia.co.in
9.	Mr. Yeshi Sherpa	Bank of India	6294893913	Yeshi.Sherpa@bankofindia.co.in
10.	<u>Mr. Gaurav Jaina</u>	<u>Resolution Applicant and Director of CD</u>		

1. Discussion on the Resolution Plan submitted by Mr. Anil Jaina and others pursuant to Order dated 05.10.2021 of the Hon'ble NCLT Guwahati Bench

Mr. Ramesh Kumar, Zonal Manager, Guwahati Zone, Bank of India requested Mr. Vinay Dhaka, to narrate the observations of the CoC on the Resolution Plan submitted by the Directors of the Company which needed to be appropriately addressed. Mr. Vinay Dhaka, then narrated the observations of the Bank of India on the Resolution Plan submitted by the Directors as follows:

- a) Mr. Dhaka pointed out clause 2.4 on page 15 of the Resolution Plan relating to the extinguishment of pending suits etc. which is narrated as below:

"All the pending suits, enforcement actions, SARFAECI Notices, Suits, proceedings and cases by any person/agency against the Company / its erstwhile management and / or other personal and Guarantors of the Company, including proceedings in relation to willful defaulter shall stand settled, extinguished upon approval of the Resolution Plan by the NCLT."

CoC opined that this clause in the resolution plan is not acceptable to the CoC.

- b) Resolution Plan needs to be signed by all the Resolution Applicants.
- c) Resolution Plan does not provide for any interest for outstanding to be paid after 30 days from the approval of Resolution Plan by the Hon'ble NCLT.
- d) Resolution Plan does not include any provision towards the cost to be incurred by the Implementation and Monitoring Committee.
- e) Resolution plan does not provide for withdrawal of Bank's name as defendant from the Insurance case filed by the Company / Directors of the Company in the Court of Civil Judge, Kamrup (M).
- f) Bank cannot agree on withdrawal of enquiry by the CBI against the Company / Directors of the Company.

- g) Resolution Plan is not clear about the Sources of Funds for its implementation.
- h) Resolution Plan is not clear about its viability.
- i) Resolution Plan does not provide for Tripartite Agreement between the Bank, Resolution Applicant and the NBFC with regard to the funds to be brought in by the Resolution Applicants.

Mr. Pradeep Kumar Goenka, the Resolution Professional, requested Mr. Gaurav Jaina, one of the Resolution Applicants to address the issues one by one. Mr. Gaurav Jaina, the resolution applicant addressed the issues one by one as follows:

- a) *Resolution Applicants are agreeable to withdraw clauses relating to withdrawal of pending suits against the Company / Directors of the Company from the Resolution Plan. However, bank's insistence on continuance of proceedings against the personal/ corporate guarantors is not acceptable to the Resolution Applicants. Mr. Jaina clarified that the company being an MSME unit and the Resolution Applicants being the guarantors, continuance of actions against their guarantees will render hindrance in implementation of the resolution plan in case the proceedings in the matter of personal / Corporate guarantee continues. Mr. Vijoy Kumar Verma, representing Bank of India said that NCLT is a resolution court and is only concerned about resolution of the Company and not releasing personal and corporate guarantees and hence releasing personal and corporate guarantee and several other reliefs sought in the resolution plan should not be linked with the resolution of the CD. Mr. Gaurav Jaina again said that continuance of proceedings against their personal / corporate guarantees will result in barriers to their efforts in implementation of the Resolution Plan and the projects of the Company as the NBFC which has agreed to extend their support in the event the Resolution Plan is met with the approval of the Hon'ble NCLT will not*

extend their support to the Resolution Applicants in the event the proceedings against personal / corporate guarantors are not withdrawn as the applicants are the guarantors and as such legal and financial complications may arise.

b) ****

c) *As regards paying interest on the amount to be paid after 30 days from the date of approval of Resolution plan by the Hon'ble NCLT, Mr. Jaina said that initially, they have not submitted any Resolution Plan, however, on the direction of Hon'ble NCLT to explore for a viable resolution plan for an MSME unit, they have submitted their initial plan offering a sum of Rs. 190 Lakhs to the Bank of India which after certain rounds of negotiations with CoC was raised upto Rs. 300 Lakhs. He then said that he will have to calculate the interest part and see whether it is possible for them to include the same in the Resolution Plan.*

d) ***

e) ***.

f) ***

g) *As regards evidence for the source of funds, Mr. Jaina said that they have already provided the evidence regarding source of funds for implementation of Resolution Plan Mr. Vijoy Kumar Verma pointed out that only a comfort letter from an NBFC has been given in support of the same, but related financials and other relevant details of the NBFC is not furnished. He then requested the RP to primarily look into genuineness of the same and submit to the CoC for their approval.*

h) *FC opined that the viability is at the core of a resolution plan but the plan does not stipulate the comprehensive methodology for revival of the Company as the unit was closed since long and RA does not have any documentary evidence of source of funds required for revival of the Company to which Mr. Gaurav Jaina stated that the project is still viable as the electricity rates have been revised upwards by the State Electricity Board and they are having alternate sources of funds available for effective*

implementation of Resolution Plan including those from other VBFCs / FIs. Also, he pointed out the Business Plan narrated in page no 26 of the Resolution Plan which elaborates the alternate avenues available to the Directors to ensure effective implementation of the proposed Resolution Plan and viability of the project.

i) ***.

*Mr. Vijoy Kumar Verma representing the Bank of India asked Mr. Gaurav Jaina to ensure submission of an unconditional Resolution Plan as the present plan stipulates several conditions / reliefs sought from FC whereas these conditions / reliefs should not be linked with the Resolution of the CD.***.*

(Emphasis Supplied)

- From above minutes of the 16th CoC, it becomes very clear that along with the bank, Mr. Gaurav Jaina as Suspended director of the Corporate Debtor and Resolution Applicant attended meeting and participated in the discussion. Clause 2.4 of the Resolution Plan submitted by the Ex-Promoter of the Corporate Debtor wanted to remove all the pending suits, enforcement actions, proceedings against the Corporate Debtor and against the corporate guarantors and the personal guarantors.
- We also note that the minutes clearly brings out that the plan does not stipulate methodology for revival of the company keeping in view with the units were closed long back and the Resolution Applicant did not produce any documentary evidence for revival of the same including arrangement of the funds.

- Thus, the CoC found the Resolution Plan of the Respondents to be non responsive.

44. We will also go into the relevant portion of the 17th CoC Meeting held on 27.12.2021 which reads as under :-

“RP requested the representative of the sole member of the CoC to put forward their views on the reasons for their competent authority not agreeing to the revised Resolution Plan submitted by the directors of the Company. Mr. Vinay Dhaka informed the following reasons for which their competent authority has given negative mandate against the revised resolution plan.

- a) Bank is not agreeable to release the personal and corporate guarantees.*
- b) The revised Resolution Plan still lack clarity with respect to the viability of the Project post approval of the Resolution Plan.*

*Mr. Gaurav Jaina, representative of the resolution applicants said that they have already indicated the need for the release of guarantees in the previous meeting of the CoC which is very important for them to be able to arrange necessary funds for implementation of the Resolution Plan, ***.*

After a detailed discussion, the following resolutions were put for voting by the sole member of the Committee of Creditors:

"RESOLVED that the Resolution Plan submitted by Mr. Anil Jaina & Others in the matter of Corporate Insolvency

Resolution Process of Agnipa Energo Private Limited be and is hereby approved."

The resolution was declined with the Bank of India, the sole member of the CoC having voted against the Resolution Plan.

RP then informed the members / participants of the CoC that a total of Rs. 32,82,845.60 have been spent till date on account of CIRP Costs***"

(Emphasis Supplied)

- The minutes of the 17th CoC Meeting reveals that the Appellant Bank gave clear reasoning for not letting go the directors of the Corporate Debtor from their liability.

45. The moot question to be decided in present appeal as to whether the Adjudicating Authority can discard the recommendation of the CoC and rather give its own directives overriding the commercial wisdom of the CoC.

46. In this regard we would like to go through the rational given by the Adjudicating Authority in the Impugned Order overruling the recommendation of the CoC. The relevant portion of the Impugned Order reads as under :-

"32. We find that the CoC /FC has lost the sight of the prime objectives of the IBC. It does not show the Doctrine of Prudence to advance argument for Liquidation instead of Resolution of the Stressed Assets that it is a Commercial Wisdom/Commercial Decision to reject the amount offered to them in terms of the Resolution Plan is more than the twenty

times of the Liquidation Value. Issues like a Suit filed by the CD, a Writ pending before the Hon'ble High Court, FIR filed with an Investigating Agency, report submitted to the RBI for declaring the CD, Suspended Directors as Wilful Defaulters are apparently not related matter at this stage to be considered for rejection of the Resolution Plan and rescue of the Stressed Assets with its employees from the Liquidation. The objectives of the IBC are very clear and liquidation of a MSME Unit is the last resort. ***

33. In our considered opinion, it is neither Commercial Wisdom nor a Commercial Decision of the CoC/FC to reject a Resolution Plan which offer to them an amount of Twenty times more than the Liquidation Value. In view of this the prayer made by the Applicant for liquidation of the CD needs to be rejected in achieving the Objectives of the IBC and the interest of all Stakeholders including the sole FC and the stalled MSME Unit.

34. Hence this IA No. 10/2021 in CP (IB) No. 37/GB/2021 filed for Liquidation is hereby rejected with the observations mentioned above and the Directions given below for Compliance.

34.1 The RP/CoC is directed to start afresh the process of CIRP from today. The RP/CoC is directed to act in accordance with the provisions of the IBC and find out a viable Resolution Plan for the MSME Unit within the stipulated period of 180 days. Resolution plans may be

submitted by earlier Resolution Applicants including the present one, if otherwise they are eligible.

(Emphasis Supplied)

47. From above, it becomes clear that the Adjudicating Authority was lured by the fact that the Resolution Plan submitted by the Respondents was more than 20 times of the liquidation value of the unit and also that amount of EMD was more than the liquidation value. The Impugned Order relied on the doctrine of prudence to justify that resolution of the Corporate debtor is preferred option over the liquidation of the Corporate Debtor.

48. It is worth noting that according to the Adjudicating Authority the other issues like pending writ before the Hon'ble High Courts suits file by the Corporate Debtor, FIR filed by the investigation agencies (perhaps referred to CBI) report submitted to RBI for declaring the Corporate Debtor and the promoter directors as wilful defaulter are not related to the matter and cannot be grounds or factors relevant to decide about rejection of the Resolution Plan. Based on this analysis and reasoning the I.A. No. 10/2021 in CP (IB) No. 37/GB/2019 was rejected by the Adjudicating Authority vide the Impugned Order asking the Respondent No. 1 and the Appellant to start a fresh process of CIRP for the Resolution Plan from earlier applicant including from the promoters of the Corporate Debtor.

49. From reasoning recorded by the Adjudicating Authority, it is seen the Adjudicating Authority was not impressed by the commercial wisdom of the CoC and sought it fit to start fresh process for the resolution of the Corporate Debtor.

50. We will like to note decision of this Appellate Tribunal's earlier order in case of **Amit Bharana and Ors vs. Gian Chand Narang** [Company Appeal (AT) (Insolvency) No. 274 of 2020] w.r.t. commercial wisdom of CoC. The relevant portion reads as under :-

“24. Based on the above decision of the Committee of Creditors, with 87.30% of vote share, i.e. more than the required threshold 66%, passed the Resolution for Liquidation of the corporate debtor. Thus the decision of liquidation of the Corporate Debtor is a valid order. It is pertinent to mention that in the case of K. Sashidhar (supra) Hon'ble Supreme Court has clearly laid down the law that upon receipt of rejected Resolution Plan the Adjudicating Authority is not expected to do anything more, but is obliged to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to evaluate the commercial decision of the CoC. It is further held that NCLT or NCLAT has no jurisdiction to reverse to commercial wisdom of the Committee of Creditors. It is also held in the above case that in terms of Section 30 of the I&B Code, the decision is taken collectively after due negotiations between the Financial Creditors, who are constituents of CoC and they express their opinion on the proposed Resolution Plan in the form of Votes, as per their voting share. In the Meeting of CoC the proposed Resolution Plan is placed for discussion and after full interaction in the presence of all concerned and Resolution Professional, the constituents of CoC finally

proceed to exercise their option (Business/Commercial decision) to approve or not to approve the proposed Resolution Plan. In such a case, non-recording of reasons would not per se vitiate the collective decision of the Financial Creditors.

33. It is pertinent to mention that by amendment of Section 33 of the Code, explanation has been added to sub-section (2) of Section 33. CoC empowers to decide to liquidate the Corporate Debtor any time before the confirmation of the Resolution Plan. Relevant provision is as under:

"33. 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 Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

2[Explanation.--For the purposes 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.]"

34. Thus, it is clear the CoC was empowered to decide to liquidate the Corporate Debtor at any time before confirmation of the Resolution Plan, including any time before the preparation of Information Memorandum."

(Emphasis Supplied)

51. Above order of this Appellate Tribunal is crystal clear and settle the principle of paramount supremacy of the commercial wisdom of the CoC. We also note that in catena of judgements by the Hon'ble Supreme Court of India including **K. Sashidhar (Supra)** and **Kalpraj Dharamshi (Supra)**, it has been stipulated that there is hardly any scope for judicial interference on the part of the Adjudicating Authority or the Appellate Tribunal except ensuring that the Resolution Plan meets the requirements of the Code and the related regulations. We do not find any of such violation in the present case and therefore find that there were no occasion for judicial interference by the Adjudicating Authority.

Thus, we hold that the Impugned Order is not in consonance of law or in spirit of the Hon'ble Supreme Court of India judgements.

52. It is beyond doubt that the commercial wisdom of the CoC is required to be honoured in letter and spirit. There is no role for Adjudicating Authority to interfere on such unfounded reasoning as recorded in the Impugned Order. The Impugned Order is found to be perverse and illegal.

53. In view of all above, the Impugned Order deserves to be set aside. The Appeal succeeds. The concerned parties are directed to appear before the National Company Law Tribunal, Guwahati Bench, Guwahati on 22.07.2024. No costs. Interlocutory Applications, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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