

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

**Company Appeal (AT)(Insolvency) No. 513 of 2023**  
**& IA No.1666 of 2023**

**[Arising out of order dated 15.05.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench Court-II in IA No.1415/2023 in CP(IB) No. 1474/MB/C-II/2019]**

**IN THE MATTER OF:**

**Anil Kumar,  
Suspended Director,  
SK Elite Industries India Ltd.  
Flat No. 1701, Building No.47,  
NRO Complex, Phase 2,  
Sector 54, 56, 58 Navi Mumbai  
Maharashtra - 400615**

**...Appellant**

**Versus**

**Jayesh Sanghrajaka,  
Resolution Professional,  
SK Elite Industries India Ltd.  
405-407, Hind Rajasthan Building,  
D.S. Phalke Road, Dadar East,  
Mumbai - 400014**

**...Respondent No.1**

**Committee of Creditors  
Piramal Capital and Housing Finance Ltd.  
4<sup>th</sup> Floor, Piramal Tower,  
Peninsula Corporate Park,  
Ganpatrao Kadam Marg, Lower Parel,  
Mumbai**

**...Respondent No.2**

**Metro Realty Group  
(Previously known as Turbhe Properties LLP)  
Floor -1-2, Metro House,  
Mahatma Gandhi Road,  
Dhobi Talao, Mumbai**

**...Respondent No.3**

**Present:**

**For Appellant:** Mr. Abhijeet Sinha, Mr. Amar Vivek, Ms. Damini Srestha, Mr. Aditya Gauri, Advocates

**For Respondent:** Mr. Tisampati sen, Ms. Riddhi Sancheti, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand, Mr. Himanshu Kaushal, Advocates for R-1

Mr. Krishnendu Datta, Sr. Advocate with Mr. Pranaya Goyal, Mr. Dharav Shah, Mr. Dhawal Desai, Mr. Shubham Saini, Advocates for R-2

Mr. Arpan Behl, Mr. Kustubh Singh, Advocates for R3

**With**  
**Company Appeal (AT)(Insolvency) No. 753 of 2023**

**IN THE MATTER OF:**

**Anil Kumar,  
Suspended Director,  
SK Elite Industries India Ltd.**

**...Appellant**

**Versus**

**Jayesh Sanghrajaka,  
Resolution Professional,  
SK Elite Industries India Ltd. & Ors.**

**...Respondent No.1**

**Committee of Creditors  
Piramal Capital and Housing Finance Ltd.  
4<sup>th</sup> Floor, Piramal Tower,  
Peninsula Corporate Park,  
Ganpatrao Kadam Marg, Lower Parel,  
Mumbai**

**...Respondent No.2**

**Metro Realty Group  
(Previously known as Turbhe Properties LLP)  
Floor -1-2, Metro House,**

**Present:**

**For Appellant:** Mr. Abhijeet Sinha, Mr. Amar Vivek, Ms. Damini Srestha, Mr. Aditya Gauri, Advocates

**For Respondent:** Mr. Tisampati sen, Ms. Riddhi Sancheti, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand, Mr. Himanshu Kaushal, Advocates for R-1

Mr. Krishnendu Datta, Sr. Advocate with Mr. Pranaya Goyal, Mr. Dharav Shah, Mr. Dhawal Desai, Mr. Shubham Saini, Advocates for R-2

Mr. Arpan Behl, Mr. Kustubh Singh, Advocates for R3

**J U D G M E N T**

**[Per: Barun Mitra, Member (Technical)]**

These two appeals have been filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by Mr. Anil Kumar, Suspended Director of Corporate Debtor – Appellant. The appeals arise out of the Orders dated 06.03.2023 and 15.05.2023 (hereinafter referred to as (“**First Impugned Order** and **Second Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench Court-II) in IA No.1826/2022 and 1415/2023 of CP(IB) No. 1474/MB/C-II/2019]. By the first impugned order, the Adjudicating Authority allowed placing of the resolution plan of the Corporate Debtor for consideration by the Committee of

Creditors while the second impugned order approved the said resolution plan submitted by Metro Realty Group (previously known as M/s Turbhe Properties LLP), present Respondent No.3. Being aggrieved thereby, the present appeals have been preferred by the present Appellant-Mr. Anil Kumar, Suspended Director, SK Elite Industries.

2. The factual matrix of the case and the salient decisions taken in the meetings of the Committee of Creditors (“**CoC**” in short) meetings leading to the impugned orders which are necessary to be noted are as follows: -

- SK Elite Industries-Corporate Debtor was brought under Corporate Insolvency Resolution Process (“**CIRP**” in short) on 07.05.2021. CIRP was commenced and claims were invited.
- Following claims received by the Interim Resolution Professional, the CoC/Respondent No.2 was constituted which later appointed the Resolution Professional/Respondent No.1.
- In the 2<sup>nd</sup> meeting of the CoC, the eligibility criterion of the Potential Resolution Applicants (“**PRA**” in short) was agreed upon.
- Form G was thereafter issued with the last date for submission of Expression of Interest (“**EoI**” in short) as 05.08.2021. Subsequently, a fresh Form G was published with the last date for submission of EoI as 22.08.2021. Due to poor response on account of Covid-19, the 4<sup>th</sup> CoC meeting decided to publish fresh Form G with extended timeline.
- Pursuant to the issue of fresh Form G, three EoIs were received from PRAs. The 6<sup>th</sup> CoC meeting noted that no resolution plans had been

received from PRAs and therefore the timeline for submission of Resolution Plan was extended up to 27.11.2021.

- The Resolution Professional also filed IA No. 2730/2021 seeking extension of CIRP period by 90 days with effect from 25.11.2021 which was allowed by the Adjudicating Authority.
- In the 7<sup>th</sup> CoC meeting, the Resolution Professional informed the CoC that two resolution plans had been received from PRAs while one PRA had withdrawn.
- In the 9<sup>th</sup> CoC meeting, the Resolution Professional informed the CoC that the present Appellant desired to submit a settlement proposal under Section 12A. The CoC allowed time for submission of proposal until 17.01.2022. However, the Section 12A proposal was received only on 24.01.2022 immediately before the 11<sup>th</sup> CoC meeting.
- The 12<sup>th</sup> CoC meeting held on 24.02.2022 discussed the resolution plans submitted by the PRAs and as the offers made were not found to be satisfactory, the CoC gave them opportunity to revise their offer by 16.04.2022.
- During the 14<sup>th</sup> CoC meeting held on 18.04.2022, it was noted that the PRAs had not submitted revised resolution plans. The Appellant had also not submitted a concrete Section 12A proposal and instead sought more time.
- The 15<sup>th</sup> CoC meeting was on 05.05.2022 noted that the Appellant had failed to submit a Section 12A withdrawal proposal and hence decided not to allow any further time. Moreover, the PRAs had also not

submitted revised offers to the satisfaction of CoC. The resolution plans were neither found compliant with requirements of IBC. Hence, their resolution plans were rejected and the CoC resolved to take steps to liquidate the Corporate Debtor.

- The Resolution Professional filed IA No. 1826/2022 before the Adjudicating Authority seeking initiation of liquidation of the Corporate Debtor.
- In the 16<sup>th</sup> CoC meeting held on 31.12.2022, a proposal received from the Appellant for purchase of premises was considered by CoC but not found satisfactory. The Resolution Professional also informed CoC that a proposal had been received from Metro Realty Group-Respondent No.3 on which legal opinion was being solicited. The CoC also decided to withdraw the liquidation application.
- The 17<sup>th</sup> CoC meeting held on 25.01.2023 after going through the commercials of the Resolution Plan of Respondent No.3, decided to consider the resolution plan subject to approval and directions from the Adjudicating Authority in view of the pendency of IA No. 1826/2022 for liquidation of the Corporate Debtor. The Respondent No.3 was found to meet the eligibility criteria which had been agreed upon in the 2<sup>nd</sup> CoC meeting. The CoC also decided not to go ahead with the Section 12A proposal of the Appellant.
- The Resolution Professional accordingly filed IA No. 820/2023 before the Adjudicating Authority seeking withdrawal of liquidation application filed under IA No.1826/2022 and to permit CoC to consider

the resolution plan submitted by Respondent No.3. The Adjudicating Authority on 06.03.2023 kept the liquidation application in abeyance; allowed consideration of the Resolution Plan of Respondent No.3 by the CoC and exclusion from 18.04.2022 to 06.04.2023 from the CIRP period. The Resolution Professional was also given liberty to file application for approval of the resolution plan submitted by Respondent No.3, if approved by the CoC.

- The Appellant challenged the order of 06.03.2023 and filed an appeal before this Tribunal by way of Appeal No. 513/2023 praying that the order passed by the Adjudicating Authority in IA No.1826/2022 be set aside and all actions taken in pursuance thereof be nullified. The appeal was however not pressed.
- In the 18<sup>th</sup> CoC meeting held on 16.03.2023, the Respondent No.3 was allowed to place the financial proposal before the CoC which decided to take the proposal for final consideration in the next CoC meeting.
- In the 19<sup>th</sup> CoC meeting held on 25.03.2023, the resolution plan of Respondent No.3 was approved by the CoC by 100% majority and it was decided to place the application for approval of resolution plan before the Adjudicating Authority for approval before 06.04.2023. The CoC also took the view that liquidation of the Corporate Debtor would not be in the interest of any stakeholder including the promoters.
- The Appellant was present during the 19<sup>th</sup> CoC meeting and did not raise any objections to the directions of the Adjudicating Authority for

consideration of the resolution plan by the CoC. However, it had made mention of the need to issue Public Notice for inviting resolution plans.

- The Adjudicating Authority vide its order dated 15.05.2023 approved the resolution plan having found the same to be in compliance with the provisions of IBC, the CIRP Regulations and not being in contravention with provisions of any law.
- Aggrieved by these two impugned orders, the present Appellant has preferred the two appeals which have been heard together.

3. Since both the Impugned Orders arise out of the same set of facts and the second impugned order is a sequel to the first impugned order, we propose to deal with both conjointly. Assailing the impugned orders, the Learned Counsel for the Appellant submitted that the Adjudicating Authority had failed to take notice that there were serious procedural irregularities on the part of the Resolution Professional in the conduct of CIRP. It was submitted that the resolution plan of the Respondent No.3 was not submitted in pursuance to Form G. Thus, by dispensing with the publication of Form G by the Resolution Professional, the entire resolution process was vitiated. It was also pointed out that by considering the resolution plan of the Respondent No.3 in the absence of fresh Form G, other interested parties were denied a fair opportunity thereby prejudicing their rights and interests. The approval of the resolution plan of Respondent No.3 was akin to the case of a Private Sale which is only permissible in case of liquidation of a Corporate Debtor and hence deserves to be set aside. Commercial wisdom of CoC cannot



condone a material irregularity in the conduct of the CIRP process. The Appellant also contended that the Resolution Professional denied access to the other competing resolution plan submitted by others. It was also mentioned that the Adjudicating Authority should have determined whether the requirement of Section 30(2) had been met before approving the said plan.

4. It is also submitted that though the Appellant wished to present a plan before the CoC, the same was not considered and thus denied fair opportunity. It was also pointed out that the Resolution Professional did not share the resolution plan submitted by the Respondent No.3 with the Appellant and thus did not act in consonance with the procedure laid down under the IBC Code. It was contended that by approving this resolution plan, the fair value of the Corporate Debtor was not realized and this militated against the principle of value maximization of the assets of the Corporate Debtor which is one of the primary objectives of IBC.

5. The Learned Senior Counsel for the Respondent No.2 and the Learned Counsel for the Respondents No. 1 and 3 having raised overlapping defence against the contentions raised by the Appellant, the same is being collectively summarized hereinafter. It has been submitted that the resolution plan received from Respondent No.3 was considered by the CoC in the interest of revival of the Corporate Debtor. At the point of time of receipt of this resolution plan, no other resolution plan was available for consideration and in fact the Resolution Professional had already filed a liquidation application before the Adjudicating Authority. It is vehemently contended that the procedural

deviation alleged by the Appellant of non-publication of Form G has no material bearing. It was submitted that the Hon'ble Supreme Court in ***M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder & Anr 2023 SCC OnLine SC 574*** ("**Gounder**" in short) had disregarded the technicality of non-compliance of non-publication of Form G and instead assigned primacy to the commercial wisdom of the CoC. Buttressing their arguments, it was submitted that the Hon'ble Supreme Court has held in catena of judgments that the commercial wisdom of CoC is sacrosanct and cannot be interfered with.

6. It is also been contended that the Appellant was not genuinely interested in submitting Section 12A proposal. The CoC had given extended time to the Appellant to submit their proposal but the Appellant was not found to be serious. Even the PRAs were given sufficient opportunity to improve their offers. Hence, neither the Appellant nor PRAs can claim that their interests were jeopardized. It was also stated that denial of access to the Appellant to other competing resolution plans by the Resolution Professional was justifiable since sharing the resolution plans would be a breach of confidentiality under the Code. Holding the conduct of the Appellant mala-fide, it was argued that he was endeavouring to derail the resolution process and push the Corporate Debtor into liquidation.

7. Advancing other rival contentions, it was added that it is settled law that the primary objective of IBC is resolution and revival of the Corporate Debtor and liquidation must be resorted to at last. It was therefore within the

ambit of commercial wisdom of CoC to explore resolution of the Corporate Debtor even after it had resolved to liquidate the Corporate Debtor. In the present case, the Resolution Professional had acted in a transparent manner of placing the resolution plan of the Respondent No.3 before the CoC for its consideration. Further the resolution plan of the Respondent No.3 was considered and deliberated by the CoC only after receipt of the consent of the Adjudicating Authority since a liquidation proposal was pending before it. Further, by considering the resolution plan of the Respondent No.3, the Resolution Professional and the CoC were furthering the objective of the IBC of maximization of value of asset of the Corporate Debtor. In support of their contention, it was pointed out that as against the liquidation value of the Corporate Debtor of Rs.36 crore, the resolution plan of Respondent No.3 had offered Rs.50 crore. Moreover, the entire plan stood implemented with payments having been made to the CoC and the assets of the Corporate Debtor having been handed over to the successful resolution applicant.

8. It was contended that the allegation made by the Appellant that the resolution plan of Respondent No.3 was akin to a private sale was unfounded. The allegation of closed-door dealings between Respondent No.2 and 3 was denied as unsubstantiated for the reason that the resolution plan proposal from Respondent No.3 was placed before CoC on 31.12.2022 and later followed by a detailed plan on 25.01.2023. The resolution plan was deliberated at length by the CoC in its 19<sup>th</sup> meeting and approved with 100% voting share. It was also submitted that during all the meetings of the CoC,

the Appellant was invariably present but never raised any objections. In fact, during the 19<sup>th</sup> CoC meeting held on 25.03.2023, the Appellant expressly stated that it respected the decision of the Adjudicating Authority to consider the resolution plan of Respondent No.3. Thus the Appellant does not have any cause to feel aggrieved and agitate before the Appellate Tribunal at such a belated stage.

9. We have duly considered the arguments advanced by both the parties and perused the records carefully. The narrow compass for our consideration is whether in the facts and circumstances of the present case, the exercise of commercial wisdom of the CoC in approving the resolution plan of Respondent No.3 is sustainable in the teeth of material irregularity alleged by the Appellant.

10. To appreciate the entire issue at hand, it would be useful to notice the following relevant provisions of the IBC and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**” in short) as under: -

**25. Duties of resolution professional. –**

**25(2)** *For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -*

*(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.*

### **30. Submission of resolution plan. –**

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

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

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

*(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*

*(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53.....*

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

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

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

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

**(3)** *The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).*

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

### **Section 31: Approval of resolution plan.**

**31. (1)** *If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.....*

### **61. Appeals and Appellate Authority. –**

**61(3)** *An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:*

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
- (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*
- (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or*
- (v) the resolution plan does not comply with any other criteria specified by the Board.*

### **CIRP Regulation: 36A. Invitation for expression of interest.**

- (1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule-I at the earliest, not later than sixtieth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.*

11. It would also be relevant and constructive to note the overarching objectives of the IBC as adumbrated in the Preamble which reads as follows:

*“An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership persons and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”*

*(Emphasis supplied)*

The same aspirations have also been reflected in the Statement of Objects and Reasons of this legislative enactment. It is needless to add that this mandate of the IBC serves as a prism for evaluating the tenability of decisions taken by various stake-holders in insolvency resolution process.

12. Now coming to the issue of procedural deviation and material irregularity in the CIRP, it is the case of the Appellant that Section 25(2)(h) of IBC read with Regulation 36A(1) of the CIRP Regulations makes it mandatory for publication of Form G by the Resolution Professional. Emphasis was laid on the fact that the aforementioned CIRP Regulation uses the term “shall” thereby making it mandatory to publish Form G.

13. Elaborating further on this aspect, it is contended by the Appellant that in the present case, the resolution plan proposal of Respondent No. 3 was not submitted pursuant to the Form G published on 28.08.2021 wherein the last date for submission of EoI which had been fixed as 27.09.2021 already stood lapsed. Yet the Resolution Professional allowed Respondent No.3 to submit

their resolution plan without issue of Form G. It was also pointed out that the Appellant had made a specific mention during the 19<sup>th</sup> CoC meeting held on 25.03.2023 that while it respected the first impugned order issued by the Adjudicating Authority on 06.03.2023 to consider the resolution plan of Respondent No.3, it had also articulated that there should be a public notice issued for inviting the resolution plans. Bypassing of publication of Form G was a violation of the procedure laid down by the IBC in terms of 36-A(1) of the CIRP Regulations. Under such circumstances, the Adjudicating Authority before approving the resolution plan, in exercise of its powers under Section 31 of the IBC, ought to have first ensured that the resolution plan did not contravene the provisions of the IBC as contemplated under Section 30(2)(e) of IBC.

14. It is further the case of the Appellant that the purpose of Form G publication is to ensure a fair opportunity to all interested parties participating in the CIRP. However in the present case Form G had been dispensed with by the Resolution Professional and the CoC. The fallout of this procedural deviation, as contended by the Appellant, is that it amounted to according preferential treatment to Respondent No.3 and inflicting private sale upon the resolution process which is not permissible. The process having become vitiated, what resulted out of such vitiated procedure cannot be termed as fair and just.

15. For better appreciation of the issue at hand, we may focus on the minutes of the CoC meetings. We notice from the minutes that Form G was



published thrice. Thereafter, EoIs were received from 3 PRAs. However, resolution plans were received from only 2 PRAs. These plans came to be deliberated by the CoC from the 8<sup>th</sup> CoC meeting onwards until the 15<sup>th</sup> CoC meeting and adequate opportunity was given to PRAs to make their plans IBC compliant as well as satisfactory. As regards the Appellant, interest was expressed in the 9<sup>th</sup> CoC to submit a Section 12-A settlement proposal and was allowed repeated opportunities. However, until the 15<sup>th</sup> CoC meeting, no concrete proposal was received.

16. The CoC in the 15<sup>th</sup> CoC after detailed discussion recorded that the Appellant having failed to come up with “a concrete and better offer” and the offers of the PRAs being “far below the expectations of the CoC”, it decided to go for the liquidation of the Corporate Debtor. At this stage, it would be in order to reproduce relevant excerpts of the 15<sup>th</sup> CoC meeting:-

**15<sup>th</sup> CoC-dated 05.05.2022**

**Item No. 7**

**To discuss and approve the Resolution Plan for the Corporate Debtor:**

*The Chairman informed the COC that the suspended director of the Corporate Debtor i.e., **Mr. Anil Kumar has proposed a 12A withdrawal proposal since a long time but no concrete offer has been received from him even after providing sufficient time.** He further stated that he had first received a 12A proposal from Nandkamal Infotech Private Limited, on behalf of the suspended director of the Corporate Debtor i.e., Mr. Anil Kumar, on November 29, 2021 however, since offer was not upto the expectation of the COC, the COC had asked Mr. Anil Kumar to reconsider and submit a better offer. However, Mr. Anil Kumar failed to submit the same in due time and in the 12<sup>th</sup> CoC meeting held on February 24, 2022 Mr. Anil Kumar requested for further time till April 30,*

2022 to submit the revised offer. **Later, again in the 14<sup>th</sup> CoC meeting dated held on April 18, 2022, Mr. Anil Kumar had sought further time for submitting a Section 12A withdrawal proposal but failed to do so and had not provided any offer to the COC.**

Mr. Anil Kumar again requested the COC to provide some time for submitting an offer. **However, considering the above, the CoC felt that sufficient time has been provided to Mr. Anil Kumar to submit a concrete and better offer but he has failed to do so and hence no further time should be granted for withdrawal process and the COC should consider the resolution plans received from respective resolution applicants.** Also, as a result of the 12A withdrawal process, the COC felt that substantial time period in the CIRP, which is a time bound process, has been lost.

The representative of Piramal stated that despite providing more than sufficient time to improve the offer, **none of the RAs have submitted revised offer to the satisfaction of the sole member of CoC and since the CD has no ongoing business and the offer is far below the expectations of the CoC, it would be prudent to reject both the Resolution Plans and go for liquidation of the Corporate Debtor. Accordingly, the CoC after detailed discussion and deliberation rejected both the Resolution Plans.**

**(Emphasis supplied)**

17. The above records of the 15<sup>th</sup> CoC meeting clearly establishes that the Appellant as well as the PRAs were given ample time and opportunity to submit satisfactory proposals but they faltered. Left with no choice, the CoC in the exercise of its commercial wisdom, directed the Resolution Professional to file a liquidation application. We do not find any material on record which show that either the PRAs or the Appellant raised any voice of protest of having been denied an opportunity to participate in the resolution process.

18. While the liquidation application was pending before the Adjudicating Authority, the 16<sup>th</sup> CoC meeting records that a proposal was again received from the Appellant and another one from Respondent No.3 of which we are cognizant that this proposal was not in pursuance to Form G publication. The Appellant's proposal was considered by the CoC and allowed more time to revise as it was not found to be satisfactory. As regards the proposal of Respondent No.3, the Resolution Professional initiated the process of taking a legal opinion besides apprising the CoC of the need to obtain appropriate directions from the Adjudicating Authority before placing the plan for the consideration of the CoC. We must note here that even at this stage, the Appellant was yet again allowed a chance.

19. During the 17<sup>th</sup> CoC meeting held on 25.01.2023 it is noticed that the Appellant failed to submit a detailed plan. On the resolution plan of Respondent No.3, the CoC decided to seek the directions of the Adjudicating Authority. The relevant minutes is extracted below: -

*"The Chairman further mentioned that based on the directions from CoC, **since no detailed plan was received by RP from Mr. Anil Kumar (erstwhile promoter) till date, RP has considered filing a petition before Hon'ble NCLT for their directions on the Resolution Plan received from Metro Realty Group in response to the liquidation petition already filed before the said Bench.**"*

**(Emphasis supplied)**

20. When the matter came up before the Adjudicating Authority, vide the first impugned order, it directed that the liquidation be kept in abeyance;

ordered exclusion of certain period from CIRP and directed the resolution plan to be taken up for consideration by the CoC. The relevant excerpts of the order dated 06.03.2023 is as below:

*“During the pendency of IA.No.1826/2022, Respondent No.2 approached the applicant with an intent to submit a resolution plan for the corporate Debtor, subject to the appropriate directions of NCLT granting/allowing them to submit the same. **Respondent No.1 informed the Applicant that it is willing to consider the said proposal and the resolution plan of Respondent No. 2, subject to NCLT allowing it to examine/consider the resolution plan.** The applicant has also received a Resolution Plan along with supporting documents from Respondent No. 2. However, the same have not been placed before the CoC for their consideration in view of the pendency of IA.No.1826/2022 and necessary approval/directions from this Tribunal. Previously this Tribunal had allowed the extension of the CIRP period till 18.04.2022 vide order dated 25.11.2021.*

***In view of the aforesaid developments and the instructions of the CoC, the applicant has approached this Tribunal with a view to obtain appropriate directions given the current stage of the CIRP.***

***In view of the aforesaid facts and circumstances narrated hereinabove we are satisfied with the reasons stated by the applicant** in the application and we hereby exclude the period commencing from 18.04.2022 till the expiry of one month from the date of this order from the CIRP of the Corporate Debtor.....*

***The applicant is directed to place the Resolution Plan submitted by Respondent No.2 before the CoC i.e. Respondent No.1 for their consideration.....***

*The interim application IA.No. 1826/2022 filed by the applicant for initiating liquidation of the Corporate Debtor shall be kept in abeyance.”*

**(Emphasis supplied)**

21. It may not be out of place to mention here that the Adjudicating Authority, while passing the first impugned order dated 06.03.2023, took notice of all developments since filing of liquidation application including the fact that the CoC desired to shelve its earlier decision to liquidate the Corporate Debtor so as to take up for consideration the resolution plan of the Respondent No.3. The CoC through the Resolution Professional has taken abundant precaution to keep the Adjudicating Authority duly apprised of the developments since the filing of the liquidation application. Thus, there is no lack of transparency on the part of the Resolution Professional or the CoC in updating the Adjudicating Authority of the new resolution plan before it and reasons for seeking its fresh directions. And on its part, the Adjudicating Authority allowed the CoC the opportunity to deliberate upon the resolution plan thereby not infringing on the commercial wisdom of the CoC.

22. Coming to the subsequent developments, it is noticed from the minutes of the 18<sup>th</sup> and 19<sup>th</sup> CoC meetings that the resolution plan of Respondent No.3 was deliberated in details by the CoC including examining its feasibility and viability as well as confirming the commercials of the plan. EMD amount was also received and performance guarantee terms were also stipulated. The 19<sup>th</sup> CoC meeting minutes are also reproduced below for easy reference: -

***19<sup>th</sup> CoC - dated 25.03.2023***

***Item No. 6***

***To discuss and approve the resolution plan for the corporate debtor.***

*The Chairman informed the COC member that a detailed plan as well as EMD of Rs.25,00,000(Rupees twenty-five lakhs only) was received from Mr. Atul Richard Rawat and the Resolution Plan was circulated to the CoC. As mentioned in the minutes of the 18<sup>th</sup> CoC meeting dated 16<sup>th</sup> March 2023 vide item No. 5; the Hon'ble NCLT has vide order dated 6<sup>th</sup> March 2023 allowed the CoC to consider the Resolution Plan received from Mr. Atul Richard Rawat.*

*Following that, certain preliminary observations with regard to the Resolution Plan were communicated to the Resolution Applicant including but not limited to the amount of performance bank guarantee of Rs.5,00,00,000 (Rupees five crores only). The Resolution Applicant submitted a revised Resolution Plan on 24<sup>th</sup> March 2023 and the same was circulated to the COC for their further consideration.*

***The CoC discussed and considered the Resolution Plan for the feasibility and viability as per the requirements of Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Chairman further informed that on the approval of the Resolution Plan by the COC; an application for approval of Resolution Plan along with Form H, obtaining the Performance Bank Guarantee and other relevant documents shall be submitted with the Hon'ble NCLT, Mumbai Bench on or before 6<sup>th</sup> April 2023 as per the directions of the Hon'ble NCLT vide its order dated 6<sup>th</sup> March 2023.***

***Mr. Anil Kumar, the suspended Director mentioned that he respects the NCLT Order dated 6th March 2023 for considering the Resolution Plan submitted by Mr. Atul Richard Rawat. However, he felt that there should be a Public Notice issued for inviting the Resolution Plans. It is pertinent to note that COC has given ample opportunities to the Promoters to submit the Resolution Plan. However, the promoter has failed to do so till date. It is further pertinent to note that despite various opportunities given to the Promoters in the past two years, no viable plan has been received from the Promoters or any other Resolution Applicant.***

***It was discussed that liquidation is not in the interest of any stakeholder including the Promoters as the public money is involved. Hence, the Resolution Plan received from Mr. Atul Richard Rawat should be considered as directed by the Hon'ble NCLT. In this***

*situation the Promoters and the COC should co-operate in the interest of the Resolution of the Corporate Debtor.*

**(Emphasis supplied)**

23. The 19<sup>th</sup> CoC meeting clearly notes that multiple opportunities given to the Appellant to submit resolution proposal went futile. No viable resolution plans had been received from the PRAs in last two years. It is pertinent to note that the Appellant even at this stage did not make a murmur of protest of being denied a fair opportunity or level playing field in the CIRP process. On the contrary, the Appellant had supported the consideration of the resolution plan of Respondent No.3. We therefore do not find any genuine ground for the Appellant to claim that they were denied a fair play in the resolution process.

24. The only reservation expressed in the 19<sup>th</sup> CoC meeting was that there should have been a public notice seeking resolution plans. Interestingly we note that the Appellant even after filing an appeal against the Adjudicating Authority's order dated 06.03.2023, the matter was not seriously pressed before this Appellate Tribunal. The issue of non-publication of Form G has now been agitated only after the resolution plan was approved by the Adjudicating Authority in its second impugned order of 15.05.2023.

25. It has been contended by the Appellant that procedural deviation by way of non-publication of Form G is an act of material irregularity. The Adjudicating Authority erred in not taking cognizance of this lapse while approving the resolution plan which was in contravention of the IBC provisions. In support of their contention, it has been submitted by the

Appellant that the Hon'ble Supreme Court in ***Secy State of Karnataka vs. Uma Devi (3) 2006 4 SCC 1*** and in ***J. Jayalalitha & Ors. Vs. State of Karnataka & Ors. (2014) 2 SCC 401*** held that when a statute provides for a particular procedure, the authority has to follow the same and that following any other course is not permissible and amounts to be an illegality.

26. We have no quarrel with the above observations made by the Hon'ble Supreme Court but note that these were not made in the context of IBC. The Appellant has also relied on the judgment delivered by the Hon'ble Supreme Court in ***Gounder*** supra but that does not come to the aid of the Appellant since it has been held therein that a statutory provision regulating a matter of practice or procedure will generally be read as directory and not mandatory. In that case the procedural irregularity in terms of non-publication of Form G on the designated website was disregarded by the Hon'ble Supreme Court on the ground that technicality of non-compliance to CIRP Regulations cannot annul the resolution process which had reached an advanced stage wherein the Resolution Professional has taken all requisite steps in consonance with the provisions of IBC.

27. Present is a case where the Appellant having been given multiple opportunities to submit a Section 12-A proposal and having consistently failed to do so, there does not appear to be any sufficient ground for the Appellant to claim that prejudice has been caused to their interest in allowing Respondent No.3 to submit their resolution plan. We have also noticed that PRAs had also been afforded reasonable opportunity to submit plans after



having issued Form G thrice. The principle of fairness and equity have been reasonably met well. Since, no settlement offer from the Appellant or resolution plan from PRAs was available before the CoC and the extended CIRP period was also coming to an end, in the given circumstances, the decision of the CoC to entertain the resolution plan from Respondent No.3 without publication of Form G cannot be viewed to be such a grave procedural non-compliance that the integrity of the entire resolution process was undermined. Quite apart from the fact that no consequence of non-compliance to CIRP Regulation 36A has been provided for in the statutory construct of IBC, we are cognizant of the fact that the Resolution Professional did not rush in for consideration of the resolution plan but did so only after apprising the CoC and taking the approval of the Adjudicating Authority. Additionally, the language of CIRP regulation has to be read along with mandate and objective of the Code which clearly emphasizes reorganization and insolvency resolution of corporate debtor in a time bound manner.

28. We have no hesitation in concurring in the findings of the Adjudicating Authority in the first impugned order, given the facts and circumstances of the present case, where despite lapse of two years and issue of Form G on three occasions, no viable resolution plans had cropped up compelling the CoC to recommend liquidation of the Corporate Debtor and a resolution plan having come up seeking to provide substantially much more than the liquidation value does merit consideration rather than be stifled on grounds of a minor procedural deviation not of much material bearing. To our mind,

the Appellant has clearly failed to substantiate that the plan does not meet requirements of Section 30(2).

29. This now brings us to the other aspect raised by the Appellant that the Adjudicating Authority had failed to exercise the jurisdiction conferred on it by Section 31 of IBC in having approved the resolution plan inspite of being in contravention of Section 30 of IBC. It is the case of the Appellant that the exercise of commercial wisdom by the CoC cannot condone the irregularity in the conduct of the CIRP process and, therefore, the Adjudicating Authority ought not to have approved a resolution plan suffering from procedural irregularity.

30. Undisputedly, in the statutory framework of IBC, the grounds on which the decision of approval of the resolution plan by the CoC can be interfered with by the Adjudicating Authority has been set out in Section 31 read with Section 30 of IBC. In terms of Section 31 of IBC, the scope of enquiry by the Adjudicating Authority is confined to scrutinizing whether Section 30(4) has been complied with or not. In the present case, admittedly, the CoC after considering the viability and feasibility of the resolution plan has approved the same with 100% vote share thus fairly and squarely meeting the conditionalities laid down in Section 30(4) of the IBC. The decision as to whether the Corporate Debtor is to be revived or not by acceptance of a particular resolution plan is essentially a business decision and hence should be left to the CoC so long as it musters more than 66% vote share. Further the IBC provides that a plan which meets the conditions laid down in Section

30(2) and is approved by the CoC can be submitted to the Adjudicating Authority for its approval.

31. And it is here that primacy of the commercial wisdom of the CoC comes into play. The Adjudicating Authority must work within the framework of IBC which broadly aims at timely resolution of the Corporate Debtor for realising the maximum value while respecting the commercial wisdom of the CoC. The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the Hon'ble Supreme Court.

32. Adverting attention to the judgment of the Hon'ble Supreme Court in **CA No. 3665-3666 of 2020-“Ngaitlang Dhar v. Panna Pragati Infrastructure Private Limited**, this Tribunal in **Jindal Stainless Ltd. Vs. Mr. Shailendra Ajmera, RP of Mittal Corp Ltd. & Ors. 2023 SCC OnLine NCLAT 44** has adequately clarified this position which is to the effect:

“24. The Hon'ble Supreme Court has also emphasized on the completion of the process within the timeline prescribed by the IBC.

In para 31, following has been held: -

*31. It is trite law that ‘commercial wisdom’ of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into consideration any*

*other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC.*

*It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, is the collective business decision and that the decision of the CoC's 'commercial wisdom' is non justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of the IBC. This position of law has been consistently reiterated in a catena of judgments of this Court, including:*

*(i) K. Sashidhar v. Indian Overseas Bank*

*(ii) Committee of Creditors of Essar Steel India Limited through authorized signatory v. Satish Kumar Gupta,*

*(iii) Maharashtra Seamless Limited v. Padmanabhan Venkatesh,*

*(iv) Kalpraj Dharamshi v. Kotak Investment Advisors Limited,*

*(v) Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director”*

***(Emphasis supplied)***

33. When we come to the facts of the present case, it is relevant to notice that after offer of a resolution plan was received from Respondent No.3, the

said factum was brought to the notice of the CoC in its 16<sup>th</sup> CoC meeting. In the 17<sup>th</sup> CoC meeting, CoC deliberated on how to proceed further. In the 18<sup>th</sup> and 19<sup>th</sup> CoC meetings, the details of the resolution plan were deliberated before sending to the Adjudicating Authority for approval. It has already been noticed that adequate opportunity was accorded to the Appellant and the other PRAs. Thus CoC by its actions did not cause undue gain or advantage to any party. There has been no suppression of material facts by the Resolution Professional in informing the CoC or the Adjudicating Authority on the proposal received from Respondent No.3 as PRA. Further, the CoC has approved all his actions including seeking the prior permission of the Adjudicating Authority. We also notice that the CoC while reviewing its earlier liquidation decision, had assigned good reasons for revisiting their earlier decision and this was accepted by the Adjudicating Authority in the first impugned order. Thereafter the CoC had duly considered and accepted the Resolution Plan for placing before the Adjudicating Authority and this was approved by the Adjudicating Authority vide the second impugned order.

34. When the CoC has approved a Resolution Plan by 100% voting share after considering its feasibility and viability, such decision of CoC is a commercial decision. There can be no fetters on the commercial wisdom of the CoC. It is settled law that commercial wisdom of CoC in approving the Resolution Plan is not to be interfered in the exercise of jurisdiction of judicial review either by the Adjudicating Authority or by this Tribunal in the exercise of its appellate powers. We are of the view that the Adjudicating Authority did

not commit any error and therefore concur in the second impugned order of the Adjudicating Authority approving the resolution plan.

35. Having regard to the foregoing discussion, we are of the view that the Adjudicating Authority did not err in approving the resolution plan. In result, both impugned orders do not warrant any interference. Appeals being devoid of merit are dismissed. No order as to costs.

**[Justice Ashok Bhushan]**  
**Chairperson**

**[Barun Mitra]**  
**Member (Technical)**

Place: New Delhi

Date: 03.08.2023

**PKM**