

GAHC010186562022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6003/2022

DYNA ROOF PRIVATE LTD. AND ANR.
A PRIVATE LTD. COMPANY DULY REGD. UNDER THE COMPANIES ACT,
1956 HAVING ITS REGD. OFFICE AT 10TH MILE, MAWSMAI VILLAGE,
G.S.ROAD, RIBHOI, MEGHALAYA 793101 REP. BY ITS DIRECTOR SAURABH
AGARWAL (DIN- 07334887)

2: ROHIN KUMAR HANSARIA
S/O- LT. VASUDEVHANSARIA
PROPRIETOR OF STEEL SALES CORPORATION
HAVING OFFICE AT S.J. ROAD
ATHGAON
GHY-01
OPERATIONAL CREDITOR OF R.S.H. AGRO PRODUCTS LTD

VERSUS

PURSHOTTAM GAGGAR AND 4 ORS. B
RESOLUTION PROFESSIONAL, REPRESENTING THE CORPORATE DEBTOR,
RH AGRO PRODUCTS LTD. HAVING OFFICE AT P. GAGGAR AND
ASSOCIATES, ADVIKA, 3RD FLOOR, M G ROAD, OPP. SUKRESHWARGHAT
GARDEN, PAN BAZAR, GHY-01, ASSAM

2:PUNJAB NATIONAL BANK
REP. BY MR. D P SINGH
AGM AND ZSH
BRANCH OFFICE LIC BUILDING
SS ROAD
FANCY BAZAR GHY 781001

3:HDFC BANK
REP. BY PRANJAL BHUYAN
BRANCH OFFICE JAIL ROAD
FANCY BAZAR
GHY-01

4:IIFL FINANCE LTD.
REP. BY MADHUL TUNGARE IIFL HOUSE
SUN INFOTECH PARK
ROAD NO. 16V
PLOT NO. B-23
MIDC THANE INDUSTRIAL AREA
WAGLE ESTATE
THANE- 400604
MAHARASHTRA

5:KAMAL KUMAR HARLALKA
DIRECTOR (SUSPENDED BOARD) OF R.S.H. AGRO PRODUCTS LTD.
REGD
OFFICE- VILLAGE AMBER
12TH MILE
JORABAT
GUWAHATI KAMRUP (M)
ASSAM 78102

Advocate for the Petitioner : DR. ASHOK SARAF

Advocate for the Respondent : MR. S DUTTA, SR. SC, PNB

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

JUDGMENT & ORDER (ORAL)

Date : 22-12-2022

Heard Dr. Ashok Saraf learned senior counsel for the petitioners. Also heard Mr. K N Choudhury learned senior counsel and Mr. S Chamaria learned counsel for the respondent no. 1, who is the Resolution Professional representing the Corporate Debtor, RSH Agro Products Limited and Mr. S Dutta learned counsel for the respondent no. 2 Punjab National Bank, Mr. M Sarma learned counsel for the respondent no. 3 HDFC Bank. None appears for the respondent no. 4 IIFL Finance Limited and proforma respondent no. 5 Kamal Kumar Harlalka.

2. The petitioner no. 1 namely Dyna Roof Private Limited is a private limited company having its registered office at 10th Mile at Mawsmal Village in the Ribhoi district of Meghalaya

and is represented by its Director Saurabh Agarwal, whereas the petitioner no. 2 Rohin Kumar Hansaria is the proprietor of a firm namely Steel Sales Corporation having its office at S J Road at Athgaon in Guwahati. Both the petitioners are unsecured financial creditors of the Corporate Debtor RSH Agro Products Limited.

3. At the instance of the Corporate Debtor RSH Agro Products Limited, an insolvency proceeding was initiated under Section 10 of the Insolvency and Bankruptcy Code, 2016 (in short IBC of 2016) before the National Company Law Tribunal (in short NCLT) at Guwahati, resulting in the registration C.P.(IB) No. 18/GB/2021, on the following grounds, as indicated in paragraph 5 of the writ petition :

- *Non-disbursement of sanctioned limits for the refinery project.*
- *Interest Loss.*
- *Fixed expenditure in Unit-II.*
- *Large quantity of raw materials purchased in anticipation of refinery completion.*
- *Constraint on Profitability faced due to lack of adequate need based Working Capital.*
- *Continuous losses since FY 2018-19*
- *Restrictions on import of Refined Palm Oil.*

4. In course of the proceeding before the NCLT Guwahati Bench, as per the order dated 11.02.2022 in IA (IBC)/07/GB/2022, the respondent no. 1 (in short R1) Purshottam Gaggar was appointed as the Resolution Professional (in short RP) for the Corporate Debtor. In course of the proceeding before the NCLT Guwahati Bench the proforma respondent no. 5 (in short R5) Kamal Kumar Harlalka made an application under Section 12 (2) of the IBC of 2016 for grant of one time extension of the Corporate Insolvency Resolution Process (in short CIRP). Accordingly by the order dated 13.05.2022 the NCLT Guwahati Bench granted an extension of 90 (ninety) days and directed the R1-RP to complete the CIRP within the extended period.

5. The R1-RP made another application being IA (IBC)/60/GB/2022 in CP(IB)/18/GB/2021 under Section 60 (5) of the IBC of 2016 for further extension of the CIRP period by another 30 (thirty) days as per the requirement of respondent no. 2 (in short R2) i.e. the Punjab National Bank.

6. While considering the said application the order dated 25.08.2022 had been passed by the NCLT Guwahati Bench by which the prayer for an extension of a further period of 30 (thirty) days beyond 270 (two hundred seventy) days already availed, was granted. The reason for granting the extension provided in the order dated 25.08.2022 is that a resolution with regard to extension of CIRP was approved with 87.26% voting by the Members of the Committee of Creditors (in short COC). Further, the order dated 25.08.2022 proceeded on the premises that the application was made under Section 60 (5) of the IBC of 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 (in short NCLT Rules of 2016). The order dated 25.08.2022 is assailed in this writ petition by the two unsecured creditors.

7. Dr. Ashok Saraf, learned senior counsel for the petitioners by referring to the first proviso to Section 12 of the IBC of 2016, which provides that any extension of the period of CIRP under Section 12 shall not be granted more than once, raises the contention that as in the instant case an extension of 90 (ninety) days was earlier granted as per the order dated 13.05.2022 of the NCLT Guwahati Bench in IA (IBC) 32/GB/2022 under Section 12(2) of the IBC of 2016, therefore, the subsequent extension by the impugned order dated 25.08.2022 would be impermissible in law and would also be beyond the jurisdiction of the NCLT Guwahati Bench.

8. A further contention is raised that as the subsequent extension granted by the impugned order is on an application made under Section 60(5) of the IBC of 2016, it would be impermissible to do so under the law inasmuch as although Section 60(5) of the IBC of 2016 can be invoked notwithstanding the provisions in any other law, but Section 60 (5) of the IBC of 2016 cannot be invoked against the provisions of any of the provisions of IBC of 2016 itself.

9. A contention is also raised that the reasons for granting the subsequent extension as provided in the impugned order dated 25.08.2022, that it was based on a resolution approved by 87.26% of the members of the COC for extension of the CIRP, would also be untenable under the law.

10. Mr. S. Chamaria, learned counsel for the R1-RP by referring to the provisions of the second proviso to Section 12 of the IBC of 2016 submits that

the law allows a period of 330 days to the RP, from the date of commencement of the CIRP, to complete the insolvency proceeding. Accordingly, the contention raised by Mr. S. Chamaria, learned counsel for the R1-RP is that in the instant case, the period granted to the RP to complete the CIRP was 270 days, including the extension of 90 days, and therefore, as under the law there is still a balance of 60 days the subsequent extension was also within the permissible limits of the law. To substantiate the said submission, it is the further submission of Mr. S. Chamaria, learned counsel for the R1-RP that the second proviso had been incorporated as per the amendment brought in by the Act of 2019 w.e.f. 16.08.2019 and therefore from the date the second proviso came into effect, irrespective of the number of extensions, the RP is entitled to have a total period of 330 days to complete the CIRP.

11. Mr. S. Chamaria, learned counsel for the R1-RP also refers to the third proviso to Section 12 of the IBC of 2016 to contend that in the event an insolvency resolution process is pending and had been not completed within 330 days referred in the second proviso, such CIRP shall be completed within a period of 90 days from the date of commencement of the IBC (Amendment) Act, 2019, meaning thereby, that if the resolution process was pending as on 16.08.2019, when the IBC (Amendment) Act, 2019 was given its effect, the RP is entitled to another 90 days to complete the proceeding.

12. Mr. K.N. Choudhury, learned senior counsel who also appeared on behalf of the R1-RP made a further submission that as per the pronouncement made by Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.*, reported in (2020) 8 SCC 531, wherein in paragraph 127 it had been provided that ordinarily the time taken in relation to the corporate resolution process of a corporate debtor must be completed

within the outer limit of 330 days from the insolvency commencement date, including the extensions and the time taken in legal proceedings, but however, considering the facts of the case before the Hon'ble Supreme Court it was also provided that if only a short period is left for completion of the insolvency resolution process beyond 330 days and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation, it would be open in such cases for the adjudicating authority or the appellate tribunal to extend time beyond 330 days. Mr. K.N. Choudhury, learned senior counsel by referring to the said proposition submitted that even a subsequent extension beyond the first extension would also be permissible under the law.

13. Heard the learned counsel for the parties.

14. In the conspectus of the facts involved in this matter as narrated above and also considering the rival submissions made, a question for determination would be whether upon an insolvency resolution proceeding being not completed within the period granted which also includes an extension, whether a subsequent extension would be permissible under the law. Further questions for determination would be whether the non-obstante provision in Section 60 (5) also includes the other provisions of the IBC of 2016 and whether irrespective of the provisions of the IBC of 2016 a subsequent extension can be granted on a resolution of approval by a majority of the members of the COC.

15. The first proviso to Section 12 of the IBC of 2016 provides in clear and unambiguous terms that any extension of the period of CIRP shall not be granted more than once. The expression '*shall not be granted more than once*' is structured in a negative language to the effect that no extensions are permissible under the first proviso after the first extension being granted.

16. Interpretation of the expression 'shall not be granted more than once' under the law, would have to be interpreted to mean that irrespective of any circumstance that may be put forward, the law prohibits that whatever is sought to be granted cannot be granted more than once, which again would be in contra distinction to the expression 'shall be granted once' wherein a given circumstance may also justify to grant it beyond once although ordinarily it should be granted only once. In *Laxman Lal and anr. vs. State of Rajasthan and others* reported in (2013) 3 SCC 764, while interpreting the Rajasthan Land Acquisition (Amendment and Validation) Act, 1981, wherein under Section 5 (2) it was provided that no declaration in respect of any land for acquisition shall be made after expiry of two years from the commencement of the Amendment Act, the Supreme Court held that the words 'no declaration' and 'shall be made' makes it clear that the two years time prescribed for making a declaration is mandatory and permits no departure. In *Ashraf Khan and another vs. State of Gujrat* reported in (2012) 11 SCC 606, while interpreting Section 20-A(1) of the Terrorist and Destructive Activities (Prevention) Act, 1987, the Supreme Court held that the legislature by using a negative word made its intention clear and that negative words can rarely be held to be directory.

17. In order to appreciate the rival contentions, the first, second and third proviso to Section 12 of the IBC of 2016 is extracted as below:

12. Time-limit for completion of insolvency resolution process- (1) *Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.*

(2) *The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee or creditors by a vote of [sixty-six] per cent of the voting shares.*

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not extending ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

[Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019]

18. A reading of the first proviso to Section 12 makes it explicit and unambiguous that no extension can be granted to complete the CIRP beyond the first extension that may have been granted. But Mr. S Chamaria, learned counsel for the R1-RP refers to Section 12 (3) of the IBC of 2016 which provides that if the adjudicating authority is satisfied that the subject matter of the proceeding is such that CIRP cannot be completed within 180 days, it may exceed the duration of such process beyond 180 days by a further period not exceeding 90 days meaning thereby a total of 270 days and contends that reading the said provision conjointly with the second proviso to Section 12 which provides that a total of 330 days is provided for mandatorily completing a CIRP, the word 180 days appearing in Section 12(3) would now have to be read as 330 days and, therefore, a subsequent extension of 90 days would be permissible on a conjoint reading of the two provisions.

19. As the second proviso has been incorporated by the IBC (Amendment) Act,

2019 w.e.f. 16.08.2019, therefore, from the said effective date, the reading now would be that the CIRP process has to be mandatorily completed within 330 days and a subsequent extension of 90 days.

20. Section 12(3) of the IBC of 2016 provides that if the adjudicating authority is satisfied that the subject matter of the case is such that the CIRP cannot be completed within a period of 180 days, it may order an extension not exceeding 90 days. The second proviso to Section 12 provides that the CIRP shall mandatorily be completed within a period of 330 days from the insolvency commencement date including any extension.

21. A harmonious reading of Section 12(3) with that of the second proviso brought in by the IBC (Amendment) Act, 2019 would be that the second proviso would have to be read to indicate what the Legislature had provided as the last intention, meaning thereby that irrespective of the provisions of Section 12(3) the total period mandatorily available to the RP to complete the CIRP would be 330 days which would also include any extension that may be granted. But the submission made that a conjoint reading provides the RP a period of 330 days plus another extension of 90 days, a total of 420 days would be unacceptable as the second proviso is explicit and unambiguous in providing that mandatorily the period would be maximum of 330 days including any such extension that may have been granted.

22. Having arrived at the aforesaid conclusion, a further consideration has to be made as to whether the second proviso in any manner has its effect on the first proviso which provides that no extension of the period of CIRP shall be granted more than once.

23. As already held the provision of the first proviso is explicit and

unambiguous with the expression 'shall not be granted more than once' to mean that no extension beyond once would be permissible. The second proviso provides that the CIRP is to be completed mandatorily within a period of 330 days including any extension. A conjoint reading of the first proviso and the second proviso does not make it discernible or enables the Court to read between the lines that the provisions that the CIRP would mandatorily have to be completed within a maximum period of 330 days has diluted the provisions of the first proviso in any manner, which otherwise is explicit and unambiguous that no extension beyond once would be granted. The second proviso merely provides that whatever extension would be permissible under the law including the extended period shall mandatorily not be beyond 330 days and it cannot be construed that the second proviso would dilute the provisions of the first proviso in any manner and allow the RP to avail the total of 330 days by taking recourse to successive extensions beyond the first extension to reach 330 days.

24. The principle of interpretation is that the proviso is normally in the nature of a qualification or exception, and, therefore it does not wholly nullify the enactment and exception cannot be allowed to swallow up the general Rule, which principle had been laid down in *Macbeth vs. Ashley reported in (1874) 2 Sc-and Div 352 (HL)*, which again had also been considered and accepted by the Supreme Court in *Sree Raghuthilakathirtha Vs The State Of Mysore And Ors.* reported in *AIR 1966 SC 1172* as well as the *Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & others (1998) 5 SCC 192*.

25. Going by the aforesaid principles even if we construe the second proviso to be a proviso to first proviso, in such circumstance, the first proviso would have to be understood to be the enactment and, therefore, the second proviso

cannot wholly nullify the first proviso to render it otiose or non-existent. Accordingly we are unable to accept the submissions made on behalf of the R1-RP that in view of the second proviso brought in by the IBC (Amendment) Act, 2019, the provisions of the first proviso that no extension can be granted more than once have been rendered otiose or have been obliterated in totality. As the first proviso is retained in the statute even after the IBC (Amendment) Act, 2019 and continues to have its effect and existence, we have to understand that although the total period available to complete the CIRP inclusive of the extension would now be 330 days, but the same would again be subjected to the restriction that the extension can be availed only once.

26. As submitted by Mr. S Chamaria, learned counsel for the R1-RP even the third proviso would not be of any consequence in the present matter, inasmuch as, the application under Section 10 of the IBC 2016 was made by the corporate debtor on 12.08.2021, whereas the provisions of the third proviso to Section 12 refers to a situation at the time of the commencement of the IBC (Amendment) Act, 2019. The date of commencement of the IBC (Amendment) Act, 2019 is 16.08.2019 whereas in the instant case the application under Section 10 of the IBC of 2016 was made on 12.08.2021 and therefore, the present proceeding could not have been a proceeding which was pending as on 16.08.2019.

27. As the third proviso refers to a situation where the CIRP process was pending and could not be completed within the total period of 330 days at the time of commencement of the IBC (Amendment) Act, 2019, the said provision cannot be made applicable to a situation where the present proceeding have been initiated after the commencement of the IBC (Amendment) Act, 2019. The third proviso is not a proviso perennial in nature which would have its effect

at all point of time beyond the date of the commencement of the IBC (Amendment) Act, 2019. Any interpretation to the contrary would again render the first proviso to be redundant and otiose, hence, would have been unacceptable in law.

28. Mr. KN Choudhury, learned senior counsel also appearing for the R1-RP refers to paragraph 127 of the judgment of the Supreme Court rendered in *Essar Steel India Ltd (supra)*, wherein it was provided that ordinarily the word 'mandatorily' appearing in the second proviso to Section 12 was held to be arbitrary under Article 14 of the Constitution of India being excessive, arbitrary and therefore, to be an unreasonable restriction under Article 19(1)(g) of the Constitution of India, and that the effect of the declaration is that ordinarily the time taken in relation to the CIRP of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings having recourse to its decision and accordingly the word 'mandatorily' appearing in the second proviso was struck down, but it was provided in the facts of the given case before the Supreme Court that if it can be shown to the adjudicating authority and/or appellate authority and or appellate Tribunal under the IBC that only a short period is left for completing the CIRP beyond 330 days and that it would be in the interest of all stake holders that the corporate debtor would be put back on its feet instead of being sent into liquidation, the extension beyond 330 days would also be permissible. By referring to the provision in paragraph 127 of the *Essar Steel India Ltd (supra)*, Mr. KN Choudhury, learned senior counsel for R1-RP submits that it is also permissible under the law to grant an extension even beyond 330 days.

29. Relevant paragraph 127 of Essar Steel India Ltd (supra) is extracted as below:

127. *Both these judgments in Atma Ram Mittal [Atma Ram Mittal v. Ishwar Singh Punia, (1988) 4 SCC 284] and Sarah Mathew [Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] have been followed in Neeraj Kumar Sainy v. State of U.P. [Neeraj Kumar Sainy v. State of U.P., (2017) 14 SCC 136 : 8 SCEC 454] , SCC paras 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date — without any exception thereto — may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from Madras Petrochem [Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478] . Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of*

commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

30. A reading of the provisions laid down by the Supreme Court in paragraph 127 of Essar Steel India Ltd (supra), makes it discernible that although the word mandatorily appearing in the second proviso to Section 12 had been struck down to be in violation of Article 14 of the Constitution meaning thereby the period beyond 330 days can also be contemplated, but any such period beyond 330 days would have to be subject to the condition precedent of being satisfied that only a short period beyond 330 days is left to complete the CIRP and secondly the extension beyond 330 days would be in the interest of all stake holders that the corporate debtor would be put back on its feet instead of being sent into liquidation. The proposition laid down by the Supreme Court makes it clearly discernible that such extension beyond 330 days would be permissible upon satisfaction of the condition precedent that it would be in the interest of all stake holders that the corporate debtor would be put back on its feet instead of being sent into liquidation. By following the aforesaid proposition of law laid down by the Supreme Court we required the R1-RP to produce from the records as to what resolution plan is in place which if implemented would lead to a situation where the R2 corporate debtor would be put back on its feet instead of being sent into liquidation. The minutes of the 14th meeting of the COC of R2 corporate debtor dated 12.08.2022 is produced before the Court, the relevant portion of which is extracted as below:

The RP called that the revised resolution plans submitted by both the resolution applicants were circulated to all the participants of the meeting. The RP asked the CoC

members if they want to have further discussion on the plan or if the discussions are concluded the plans can be put for voting by the CoC members.

The representative of PNB stated that they need some more time for taking decisions on the resolution plans. As there are various issues related to the land of the CD, the issues are being considered and the bank is taking legal opinion on the matter. Moreover, the decision on the approval of the plan shall be taken by the head office through the concerned committee authorised for taking such decisions.

The RP stated further time cannot be allowed as CIRP period will be over by 20.08.2022.

However, the bank insisted the RP to make an application to adjudicating authority requesting for further extension of 30 days, within which they are expecting to come up with a decision on the approval of the resolution plans.

The RP clarified that CIRP period has already been extended by 90 days and as per the IBC code, onetime extension for a period not extending 90 days can be allowed by the adjudicating authority.

The CoC insisted the RP to approach the adjudicating authority for further extension of the CIRP process for a period of 30 days as the same is allowed in many cases. Moreover, resolution plans are received and only decision is pending for approval of the same.

31. A reading of the afore-extracted minutes of the resolution of the COC dated 12.08.2022 makes it discernible that there is a revised resolution plan submitted by the resolution applicant and circulated in the meeting and further that one of the secured creditor Bank has insisted upon to make an application to the adjudicating authority requesting for further extension of 30 days and in the said situation, the COC through its resolution had required the RP to approach the adjudicating authority for extension of the CIRP process by another 30 days.

32. In response thereof, the resolution plan for the corporate debtor RSH Agro Product Limited prepared by an entity NK Power and Infrastructure Pvt Limited dated 29.07.2022 is produced before the Court. One of the provisions of the resolution plan at clause C(iii) under the heading operational business plan is extracted as below:-

C(iii) Operational Business Plan

- a) *The Resolution Applicant submits the Resolution Plan with the strategic vision to provide outstanding quality services to its customers by reviving the operations of the Corporate Debtor. Resolution Applicant submit the business plan for 8 years, the details of which has already been provided. The plan is based on the information in the given Information Memorandum.*
- b) *As per the current scenario both the units were given on lease to NK Agro & Foods, a partnership firm belonging to NK Power and Infrastructure Pvt Ltd vide unregistered LEASE/RENT OF BUSINESS PREMISES AGREEMENT dated 07.05.2021 between the CD and NK Agro & Foods and subsequently SUPPLEMENTARY DEED FOR LEASE/RENT OF BUSINESS PREMISES AGREEMENT dated 17.05.2021 between the CD and NK Agro & Food and NK Power & Infrastructure Pvt Ltd.*
- c) *Shall maintain the time schedule to implement the plan and to complete the project to make it economically viable and financially sound.*

33. Another provision of the resolution plan at clause 12(D) under the heading control and supervision is extracted as below:-

12(D) Control & Supervision

- (i) The New Company Management shall define organisation structure, policies, procedures, records and methods of reporting that are necessary to collectively ensure that the financial and non-financial operations of the Corporate Debtor is conducted in an orderly and efficient manner to achieve the Corporate Debtor's objectives.*
- (ii) Assessing and containing the risks faced by the Corporate Debtor to acceptable level.*
- (iii) Preventing and correcting irregularities.*
- (iv) Safeguarding assets against the loss/misuse.*
- (v) Ensuring financial and other records are complete in all respects and accurately and reliably reflect the conduct of the Corporate Debtor.*
- (vi) Preventing the misuse or appropriation of resources.*
- (vii) Resources are acquired economically and employed sufficiently, qualify business processes and continuous improvement are emphasised.*
- (viii) The actions of all officers of the Corporate Debtor including Directors, Key Managerial Personnel, Senior Management and Staff are in compliance with the Corporate Debtor's policies standard compliance and*

procedures and also relevant laws and regulations.

(ix) These systems are not only related to accounting and reporting but also relate to the organisation's culture, communication process both internal and external, which include, handling of funds received and expenditure incurred by the Corporate Debtor, preparing appropriate and timely financial report to the Board and Officers, conducting the annual audit of the Corporate Debtor, Corporate Debtor's financial statements, evaluating staff and progress, maintain inventory records and properties and their whereabouts and maintaining personal and conflict of interest policies.

(x) The Corporate Debtor shall always maintain the highest governance standards and practices by formulating "Corporate Governance Policies and Code of Conduct".

34. It is stated that the aforesaid provisions in the resolution plan are being projected to be a part of the resolution proceeding to put the corporate debtor back on its feet. A reading of the afore-extracted portion of the resolution plan makes it discernible that the resolution plan is more of corporate takeover by means of lease/rent of the corporate debtor rather than it being a plan to bring the corporate debtor back to its feet. Taking over a corporate management under the law is governed by a different set of provision and it cannot per-se be said to be a part of a resolution plan to bring the corporate debtor back to its feet. If the corporate debtor intends to have a change of management, the same may be processed under the relevant and appropriate provisions of law under the Companies Act rather than it being presented as a resolution plan to bring a corporate debtor back to its feet where a CIRP process has already been initiated.

35. Accordingly, as the reading of the resolution plan produced before the Court does not make it discernible that it is a resolution plan to bring the corporate debtor back to its feet, it cannot be accepted that the proposition laid down by the Supreme Court in paragraph 127 of its judgment in Essar Steel

India Ltd Committee of creditors (supra) would be applicable in the facts and circumstance of the present case so as to arrive at a conclusion that an extension for the CIRP can be granted by referring to paragraph 127 of the judgment in Essar Steel India Ltd Committee of creditors (supra).

36. Further, the resolution plan also does not make it discernible that only a short period is left for completion of the CIRP process to bring the corporate debtor back to its feet. All that the resolution plan placed before the Court indicates is that it is an attempt by another entity to take over the corporate debtor in the form of a lease/rent without there being any indication that only a short period is left for completion of the CIRP process.

37. A further issue is raised is that the application made by the R1-RP before the NCLT was under section 60(5) of the IBC of 2016. Section 60(5) of the IBC of 2016 is extracted below:-

“Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

38. A reading of section 60(5) makes it discernible that it is a provision with a non-obstante clause that ‘notwithstanding anything contrary contained in any other law’ gives a jurisdiction to the NCLT to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate

person; any claim made by or against the corporate debtor or corporate person including claims by or against any of its subsidiaries situated in India; or any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code. The non-obstante clause providing for 'notwithstanding anything to the contrary contained in any other law for the time being in force', would have to be understood to be notwithstanding any provisions in any other law and not understand it to be notwithstanding also the provisions of the other provisions of the IBC of 2016 itself.

39. A non-obstante clause providing for 'notwithstanding anything to the contrary contained in any other law for the time being in force' has been interpreted by the Supreme Court in *P. Virudhachalam and others –vs- Management of Lotus Mills and another*, reported in (1998) 1 SCC 650. In *P. Virudhachalam and others (supra)*, the Supreme Court was interpreting the provisions of Section 25-J of the Industrial Disputes Act, which amongst others, provided as extracted:-

“25-J Effect of laws inconsistent with this Chapter (1) the provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).”

40. In respect of the expression 'notwithstanding anything inconsistent therewith contained in any other law', a submission was made that any other law as provided in section 25-J(1) would also include even the provisions of the Industrial Disputes Act itself. The Supreme Court expressed its view that it would be difficult to agree to such a proposition by further providing that the section nowhere provides that the provision of the Chapter concerned shall have

effect notwithstanding anything inconsistent contained in any other chapter of the Industrial Disputes Act as well as any other law. The relevant provision of the judgment of the Supreme Court is extracted:-

“The submission of learned counsel for the appellants in this connection was to the effect that ‘any other law’ as provided in Section 25-J(1) would include even the Industrial Disputes Act, specially the provisions contained that the provision of Chapter V-A shall have effect notwithstanding anything inconsistent contained in any other chapter of the Industrial Disputes Act as well as in any other law.”

41. Accordingly, section 60(5) of the IBC of 2016 would now have to be understood that an application under section 60 (5) to be maintainable notwithstanding anything contained in any other law would not also mean notwithstanding anything contained in the other provisions of the IBC of 2016 itself, but any other law other than the IBC of 2016. From such point of view when there is a specific provision on the question of maintainability of a claim for subsequent extension under the first proviso to section 12, we are of the view that the provisions of section 60(5) cannot be invoked to take advantage of the non-obstante clause to make an application for subsequent extension maintainable in spite of the specific bar on its maintainability provided in the first proviso to section 12.

42. From such point of view also, the order impugned dated 25.08.2022 having been passed in an application made under section 60(5) would have to be understood to be not maintainable under the law and as such the resultant order thereof would also be unsustainable.

43. As regards the third contention raised by Dr. A Saraf, learned senior counsel for the petitioners that the impugned order is passed by accepting the reason that there is a resolution of the members of the COC with an approval of

87.26% to seek the extension for the CIRP and that such reason cannot be an acceptable reason for granting a subsequent extension, we are of the view that an extension beyond the initial extension would be permissible as provided by the Supreme Court in paragraph 127 of its pronouncement in *Essar Steel India Limited Committee of Creditors (supra)* only in a situation when there is a very short period left for completion of the CIRP and that the resolution process would lead to the corporate debtor being brought back to its feet. The permissibility of an extension provided in paragraph 127 of its pronouncement in *Essar Steel India Limited Committee of Creditors (supra)* in our view do not include for an extension to be made on a resolution being passed by the members of the COC seeking such extension which again would be beyond the statutory provision of the first proviso to section 12 of the IBC of 2016.

44. In view of the conclusions arrived, the order dated 25.08.2022 of the NCLT in IA(IBC) No. 60/GB/2022 in C.P.(IB) No. 18/GB/2021 is set aside.

45. An interference with the order dated 25.08.2022 of the NCLT in IA(IBC) No. 60/GB/2022 in C.P.(IB) No. 18/GB/2021 shall not preclude the corporate debtor or the creditors thereof, including the unsecured creditors, as well as the resolution professional from pursuing the matter further under the law as may be permissible.

The writ petition is allowed to the extent as indicated.

JUDGE

Comparing Assistant