

Excel Engineering Through Prop Nikhil ... vs Mr. Vivek Murlidhar Dabhade, ... on 16 November, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COMPANY APPEALS (AT) (INSOLVENCY) NO. 85-86 of 2020
(Arising out of the Orders dated 04th & 11th November, 2019 passed by National
Company Law Tribunal, Mumbai Bench, Mumbai, in C.P. (IB) No.-
2956(MB)/2018)

IN THE MATTER OF:

1. Excel Engineering
Through Prop. Nikhil Bhav
A-10/6, Meeranagar,
Lane No. 7, Koregaon Park,
Above Uncles Kitchens,
Pune - 411001. ...Appellant No. 1
2. Shree Kurmdas Industries
Through Nikhil Bhav
Plot No. 90/4, Sector No. 10,
PCNTDA, Bhosari,
Pune - 411026. ...Appellant No. 2
3. Lotha Trading Company
Through Rajesh Kr. Jain
Lotha Colony, Sewak Road,
Dimapur - 797112,
Nagaland. ...Appellant No. 3
4. Priyanka Enterprises
Through Nikhil Bhav
At Post Wadhe,
Tal-Dist-Satara ...Appellant No. 4
5. M/s. Alfa Technology and Services
Through Nikhil Bhav
Plot No. M-38, Additional MIDC
Satara - 415004. ...Appellant No. 5
6. Satara Minerals
Through Nikhil Bhav

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- At Post Wadhe,
Tal-Dist-Satara ...Appellant No. 6
7. Sky Sales Corporation
Through Nikhil Bhav,

A1-402, Dhavalgiri Apts.,
Sneh Paradise, MIT College Road,
Pune - 411038.

...Appellant No. 7

8. Rahul Electricals
Through Nikhil Bhawe,
Shop No. 3, Metkari Complex,
Moti Chowk, Phaltan,
Dist.-Satara 41552.

...Appellant No. 8

Versus

1. Mr. Vivek Murlidhar Dabhade
Resolution Professional of
New Phaltan Sugar Works Ltd.
B-13, Trupti Garden, Wadgaon BK,
Pune - 41105,
Maharashtra.

And having Office at:
B-203, Devgiri, Ganeshmala,
Above Hotel Sawai,
Deshpande Garden,
Sinhgad Road,
Pune - 411030.

...Respondent No. 1

2. Shri Dutt India Pvt. Ltd.

Through Managing Director Office No. - 205, Second Floor, PS Aviator, New Town Road, Atghora Chinar Park, Rajarhat, Kolkata, West Bengal - 700136. ...Respondent No. 2 Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 Present For Appellant: Mr. R.K. Ruhil & Mr. Abhijit Sinha, Advocates. For Respondent No. 1/ Mr. Agam H Maloo, Advocate for R-1/RP. RP:

For Respondent No. 2: Mr. Krishnendu Datta, Sr. Advocate along with Mr. Arshit Anand, Ms. Geetika Sharma, Ms. Mansi Taneja & Mr. Shivam Shukla, Advocates for R-2.

(JUDGEMENT) [Per; Shreesha Merla, Member (T)]

1. Challenge in these Appeals is to the Impugned Orders dated 04.11.2019 & 11.11.2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) in C.P. (IB) No. 2956/2018, whereby the Adjudicating Authority has accorded approval to the Resolution Plan.

2. MA 3432/2019 was preferred by 'M/s. Alfa Technology & Services', in his representative capacity seeking intervention of the Applicants in MA 3271/2019, which was dismissed by the Adjudicating Authority on the ground that the Applicant has no locus standi to represent the other Petitioners in the absence of a proper

Power of Attorney. MA 3271/2019 was preferred by the Resolution Professional seeking approval of the Resolution Plan under Section 30 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code').

Rejecting the Intervention Application, MA3432/2019, the Adjudicating Authority has observed as follows:

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3. It is submitted by the Learned Counsel for the Appellants that they are the 'Operational Creditors' of the 'Corporate Debtor' who had filed MA 3432/2019 seeking intervention in the Application MA 3271/2019 preferred by the Resolution Professional seeking approval of the Resolution Plan. It is contended by the Learned Counsel that the total aggregate amount of the 'Operational Debt' from 'Operational Creditors' other than Employees, Workmen and Farmers is Rs.63,45,09,539/- as against the total debt of Rs.193,58,53,515/- which is 32.78% of the total debt. It is argued that the share of 'Operational Creditors' other than Workmen, Employees and Farmers being 32.78% of the total debt, no notices of the Meeting of the CoC was ever given to the Appellants and other 'Operational Creditors' thereby denying them an opportunity to participate in the Meetings; that no copy of the Resolution Plan, Valuation Report or the Information Memorandum has ever been furnished to the 'Operational Creditors' that the fair Liquidation Value of the 'Corporate Debtor' is not the correct value; that the Resolution Plan approved by the Adjudicating Authority vide Order dated 11.11.2019 is discriminatory in nature as 54.29% of the admitted Claim is to be distributed to 'Secured Financial Creditors', 11.42% of the admitted Claim to 'Unsecured Financial Creditors', 20% to Workmen and Employees, 100% to Farmers as against mere 1% of the total admitted Claim of the Appellants, which is unfair discriminatory and illegal; that Farmers do not form a class by themselves under the Code and that being so, the approved Resolution Plan Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 provides for only 1% of the total debt owed to the Appellants as against 100% of the dues distributed to the Farmers.

4. It is strenuously contended by the Learned Counsel for the Appellants that the Impugned Order is in contravention of the ratio laid down by the Hon'ble Supreme Court & this Tribunal in the following Judgements:

- o 'Vijay Kumar Jain' Vs. 'Standard Chartered Bank & Ors.'1.
- o 'Rajputana Properties Pvt. Ltd.' Vs. 'Ultra Tech Cement Ltd.'2.
- o 'ANG Industries Ltd.' Vs. 'Shah Brothers Ispat Pvt. Ltd. & Anr.'3.
- o 'Binani Industries Ltd.' Vs. 'Bank of Baroda & Ors.'4.
- o 'J.R. Agro Industries P. Limited' Vs. 'Swadisht Oils P. Ltd.'5.

o 'Committee of Creditors of Essar Steel India Ltd.' Vs. 'Satish Kumar Gupta'6.

o 'Amit Goel' Vs. 'Piyush Shelters India Private Limited & Ors.'7.

o 'IDBI Bank Ltd.' Vs. 'Mamta Binani & Ors.'8.

o 'Bank of Maharashtra' Vs. 'Videocon Industries Limited & Ors.'9.

5. It is the case of the second Respondent/Successful Resolution Applicant ('SRA') that the Adjudicating Authority approved the Resolution Plan vide Order (2019) 20 SCC 455 I.A. No. 594/2018 in Comp. App. (AT) (Ins.) No. 188/2018 2018 SCC OnLine NCLAT 270 2018 SCC OnLine NCLAT 521 CA No. 59/2018 in C.P. No. (IB)-13/ALD/2017 (2020) 8 SCC 531 Comp. App. (AT) (Ins.) No. 700/2021 Comp. App. (AT) (Ins.) No. 553/2019 Comp. App. (AT) (Ins.) No. 503/2021 Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 dated 11.11.2019 and it is today successfully implemented. It is submitted that the 'Operational Creditors' were entitled to 'NIL' payment as per Section 30(2)(b) of the Code. The only grievance of the Appellant that 100% of the payment has been made to the Farmers cannot be considered as this was done to ensure that the 'Corporate Debtor' which is a Sugar Plant remains 'a Going Concern'. In fact, the Resolution Applicant amended the nature of payment to the Farmers from upfront and cash payment of Rs.10 Crores/- and Redeemable Preference Shares of Rs.15 Crores/- to complete cash payment and even furnished Bank Guarantees to secure these payments because these Farmers were the backbone of the industry. It is also contended that the Commercial Wisdom of Committee of Creditors ('CoC') determining what amounts to be paid to different classes and subclasses of Creditors in accordance with the provisions of the Code and the Regulation therein cannot be questioned as laid down by the Hon'ble Apex Court in 'Committee of Creditors of Essar Steel India Ltd.' (Supra).

6. It is submitted that the Resolution Plan was unanimously approved by 100% vote of the Members of the CoC. Learned Sr. Counsel for the second Respondent placed reliance on paras 38, 39, 44 & 45 of 'K. Sashidhar Vs. Indian Overseas Bank & Ors.'10, paras 54, 70 & 97 of 'Committee of Creditors of Essar Steel India Ltd.' (Supra), and paras 21-24 & 29 of 'Maharashtra Seamless (2019) 12 SCC 150 Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 Limited' Vs. 'Padmanabhan Venkatesh & Ors.'11, in support of their argument that the Commercial Wisdom of the CoC is non-justiciable.

7. It is further submitted that the Appellant's Claim in respect of the total debt constitutes only 8 to 9% and that at no point of time were any payments made for invitation to the Meetings. In fact, RP had received their Claims as early as February and March, 2019 but never approached the RP as a group or as a consortium. The Claims were filed in the individual capacity. Even after filing of the Claims no Application was made to the RP that they should be treated as one group. The Appellant had failed to inform the RP, the name of the authorized representatives who should be given notice for attending the CoC Meetings. The Adjudicating Authority vide Order dated 11.11.2019 recorded its satisfaction with the valuation given by the registered valuers. Assessment

8. Learned Counsel for the Appellant placed reliance on the ratio of the Hon'ble Supreme Court in 'Vijay Kumar Jain' (Supra), in support of his contention that the copy of the Resolution Plan and

other valid documents like the Information Memorandum had to be given to the 'Operational Creditors'/Applicants in MA 3432/2019. In 'Vijay Kumar Jain' (Supra), the issue was with respect to the erstwhile Board of Directors who are not Members of the CoCs and yet have a right to participate in each and every Meeting held by (2020) 11 SCC 467 Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 the CoC and also have a right for 'Notice' of every Meeting together with copies of all documents relevant for the issues to be voted upon. The issue in the instant case is different in as much as the Applicants are not erstwhile or suspended Directors but 'Operational Creditors' who have not filed an Application forming a group at the appropriate time and whose Claims have been individually filed before the RP. Section 24(4) shows that Directors, Partners, Representatives of 'Operational Creditors' may attend the Meetings of CoC but have no Right to Vote in such Meetings. Section 24 has to be read with Section 30. It is clear that following persons can take part in the Meeting of CoC at the time of approval of a Resolution Plan:

- (i) Members of CoC;
- (ii) Members of suspended Board of Directors or Partners of the Corporate Persons;
- (iii) The representatives of the 'Operational Creditors' if the amount of their aggregate due is not less than 10% of their debt; and
- (iv) Resolution Applicant when Resolution Plan of such Applicant(s) are placed for consideration [Section 30(5)].

The Prayers in MA 3432/2019 filed on 22.10.2019 is listed as hereunder:

Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 In the instant case, the Application itself was filed without proper Power of Attorney and further it is significant to mention that the Applicants have exercised this right of filing an Intervention Application in the Application Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 preferred by the RP seeking approval of the Resolution Plan after a lapse of several months from the date of initiation of CIRP which is 20.02.2019.

9. The principle in 'Amit Goel' (Supra), is with respect to discrimination in the Resolution Plan between two classes of Creditors, who are similarly placed. In the instant case, we are of the earnest view that the Farmers who form the main backbone of the Sugar Industry cannot be said to be on an equal footing with respect to the Appellants specifically having regard to the fact that the 'Corporate Debtor' is an agriculturally dependent industry.

10. 'Bank of Maharashtra' (Supra), which was relied upon by the Learned Counsel for the Appellant is also not applicable to the facts of this case as the finding in that matter was that Section 30(2)(b) of the Code has not been adhered to as approval of the CCI was not taken prior to the approval of the Resolution Plan. Once again, the facts in the instant case are unrelated. The Appellants ought to have been more vigilant in pursuing their rights at the right time as stipulated under the Code.

11. Hence, the contention of the Appellants that the Adjudicating Authority has erroneously dismissed their Application without going into the merits, cannot be sustained as the Adjudicating Authority has recorded in the Order dated 04.11.2019 that the Applicant has not filed the proper Power of Attorney representing the other Petitioners.

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12. It is the main argument of the Learned Counsel for the Appellant that the Farmers were given 100% of the dues whereas the Appellant has given only 1% of the dues and therefore the Resolution Plan is discriminatory and is in violation of Section 30(2) of the Code.

13. It is seen from the record that the 'Corporate Debtor' is a Sugar Industry and the Farmers are an integral part of the Sugar Industry. We find force in the contention of the Learned Sr. Counsel for the Respondent that more than 4500 Farmers and their families are dependent on the 'Corporate Debtor' factory for their survival and the Plan would not be implementable without making payments to the Farmers as the dues have been pending for the last two years. The Minutes of the CoC Meeting shows that even the 'Secured Financial Creditors' accepted that 100% payment should be made to the Farmers who are the backbone of the Sugar Industry. Section 53 of the Code categorically provides different priorities of payments for Employees, Statutory Dues and other 'Operational Creditors'. Such a classification would depend upon the facts and circumstances and the nature of the industry, and the Modus Operandi of the functioning of the 'Corporate Debtor'. A brief perusal of the Resolution Plan shows that the Workers and the Employees have been paid Rs.2 Crores/-. Payment of Rs.4.40Crores/- towards Provident Fund dues was also taken care of.

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14. It is an admitted fact that the Resolution Plan was approved way back on 11.11.2019 and the following steps have been taken by the SRA subsequent to the approval of the Resolution Plan:

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15. There is no evidence on record to substantiate that indeed the Applicants seeking to intervene had formed a group and given the representation to the RP at the appropriate time to consider them as one class. Their Claims were filed in an individual capacity and there is no Application on record seeking to treat all of them in one group, at that point of time and therefore their contention that they were not included in the Meeting of the CoC, is untenable. This Tribunal is of the considered opinion that there is no embargo for the classification of the 'Operational Creditors' into separate/different classes for deciding the way in which the money is to be distributed to them by the CoCs. We are of the view that the 'Operational Creditors' were paid as per Section 30(2)(b) of the Code coupled with Regulation 38 of the Corporate Insolvency Process Regulations as the 'Operational Creditors' are entitled to receive only such money that are payable to them as under Section 53 of the Code.

16. We are conscious of the fact that we have a limited judicial review lying with in the four corners of Section 30(2) of the Code and the material on record does not show that the Plan was lacking any equitable perception with respect to any criterion as envisaged under the Code. We place reliance on the decision of the Hon'ble Supreme Court in 'Kalpraj Dharamshi & Anr.' Vs. 'Kotak Investment Advisors Ltd. & Anr.' 12, the Hon'ble Apex Court has observed as follows:

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146. The view taken in the case of K. Sashidhar (supra) and Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) has been reiterated by another three Judges Bench of this Court in the case of Maharashtra Seamless Limited (supra).

147. In all the aforesaid three judgments of this Court, the scope of jurisdiction of the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) has also been elaborately considered. It will be relevant to refer to paragraph 55 of the judgment in the case of K. Sashidhar (supra), which reads thus:

"55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force,

(vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established Under Section 188 of the I&B Code.

The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 to exercise their commercial wisdom during the voting on the resolution plan Under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not

be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan Under Section 30(4) of the I&B Code."

148. It has been held, that in an enquiry Under Section 31, the limited enquiry that the Adjudicating Authority is permitted is, as to whether the resolution plan provides:

- (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor,
- (ii) the repayment of the debts of operational creditors in prescribed manner,
- (iii) the management of the affairs of the corporate debtor,
- (iv) the implementation and supervision of the resolution plan,
- (v) the plan does not contravene any of the provisions of the law for the time being in force,
- (vi) conforms to such other requirements as may be specified by the Board.

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149. It will be further relevant to refer to the following observations of this Court in K. Sashidhar (supra):

"57. ...Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" Under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional"

during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds--be it Under Section 30(2) or Under Section 61(3) of the I&B Code--are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision."

150. It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

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151. The position is clarified by the following observations in paragraph 59 of the judgment in the case of K. Sashidhar (supra), which reads thus:

"59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors....."

152. This Court in Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra) after reproducing certain paragraphs in K. Sashidhar (supra) observed thus:

"Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar."

153. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.

154. In the case of Maharashtra Seamless Limited (supra), NCLT had approved the plan of Appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, NCLAT directed, that the Appellant therein should increase upfront payment to Rs. 597.54 crore to the "financial creditors", "operational creditors" and other creditors by paying Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 an additional amount of Rs. 120.54 crore. NCLAT further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs. 120.54 crore in addition to Rs. 477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the 'resolution plan' was to be treated to be set aside. While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:

"30. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the

scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of Sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in *Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta]*, MANU/SC/1577/2019 : (2020) 8 SCC 531], the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the Comp. Apps. (AT) (Ins.) No. 85-86 of 2020 successful resolution applicant to enhance their fund inflow upfront."

155. This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront."

17. We are conscious of the fact that the Plan was approved by 100% Voting Share way back on 11.11.2019 almost three years ago and has also been implemented. This Tribunal is of the considered opinion that the 'Operational Creditors' were paid as per Section 30(2)(b) of the Code and read together with Regulation 38 of the CIRP Regulations, the 'Operational Creditors' are entitled to receive only such money that are payable to them as per Section 53 of the Code. It is the final discretion of the 'Collective Commercial Wisdom' in relation to (1) The amount to be paid (2) The quantum of money to be paid, to a certain category or the incidental category of Creditors, balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code.

18. For all the foregoing reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

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19. We are of the earnest view that some minimum entitlement to the 'Operational Creditors' may be examined by the Government and the IBBI, based on the amount realised in the Resolution Plan over and above the liquidation value.

[Justice Anant Bijay Singh] Member (Judicial) [Ms. Shreesha Merla] Member (Technical) Principal Bench, New Delhi 16th November, 2022 himanshu