

Dinesh Gupta vs Vikram Bajaj on 29 September, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, Principal Bench,
New Delhi
(APPELLATE JURISDICTION),
Company Appeal (AT) (Insolvency) No.276 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
[Arising out of the impugned order dated 01.03.2021 passed by the
Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench
in I.A. No. 412/2020 in CP(IB) No. 117/Chd/ChD/2017 filed by Respondent/
Petitioner / CoC/ Applicant Financial Creditor]

In the matter of:

Dinesh Gupta

....Appellant

Vs.

Vikram Bajaj Liquidator M/s Best Foods Ltd.

....Respondent

Present

Appellant:

Mr. Sumesh Dhawan and Ms. Vatsala Kak,
Advocates.

Respondent:

Mr. Abhishek Anand and Mr. Viren Sharma,
Advocates.

Coram:

Mr. Justice M. Venugopal, Acting Chairperson
Mr. V.P. Singh, Member (T)
Dr. Ashok Kumar Mishra, Member (T)

J U D G E M E N T

(Virtual Mode) M. Venugopal (J) Introduction:

1. The Appellant (Director of the Suspended Board of Directors of M/s Best Foods Ltd. - Corporate Debtor) has preferred the instant Appeal, as an 'Aggrieved Person' in respect of the impugned order dated 01.03.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Chandigarh Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 1 | 72 Bench, Chandigarh) in I.A. 412 of 2020 in CP (IB) No.117/Chd/CHD/2017 (filed by the 'Resolution Professional') praying for an order of liquidation of the 'Corporate Debtor' as per Section 33(1)(a) of the I&B Code, which was allowed by the 'Adjudicating Authority'.

2. The 'Adjudicating Authority' (National Company Law Tribunal, Chandigarh Bench, Chandigarh) while passing the impugned order in I.A. 412 of 2020 in CP (IB) No.117/Chd/CHD/2017(filed by the Resolution Professional) at paragraph Nos.10 to 17 had observed the following:

10. "Prescribed period for filing application - In the present case.....the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 was admitted on 02.02.2018 and the present application is filed by the Resolution Professional on 25.08.2020. The period of 180 days would be completed on 30.10.2018. The period of 180 days would be completed on 30.10.2018.

As per order dated 31.10.2019, RP has been directed to place the revised resolution plan before CoC and further directed to complete the process within 90 days. RP has also filed an application seeking additional time for concluding the CIRP process. However, during the pendency, the Resolution Applicant has withdrawn the resolution plan and the application for extension has been frustrated. Hence, no resolution has been passed by CoC and the present Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 2 | 72 application has been filed under Section 13(1)(a) on 21.08.2020 and the essential ingredients of the same stand satisfied.

11. Appointment of Liquidator - Section 34(1) of the Code provides that where the Adjudicating Authority passes an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process shall, subject to submission of written consent, act as the Liquidator for the purpose of liquidation. Mr. Vikram Bajaj, Resolution Professional with IBBI Registration No. IBBI/PA-002/IPN000013/2016/2017/10003 has filed his consent in form AA dated 18.05.2020 attached as Annexure 9 of the Petition. The Law Researcher of this Tribunal has checked the credentials of proposed Liquidator and nothing adverse has been found on record, therefore, Mr. Vikram Bajaj is appointed as the Liquidator.

12. Regulation 39B, 39C and 39D in CIRP Regulations, 2016, have been inserted by notification No. IBBI/2019/20/GN/REG/O/048 dated 25.07.2019. Relevant aspects in this respect are examined hereunder: -

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13. Liquidation Cost (Regulation 39B of CIRP Regulations, 2016) - The CoC has not made compliance of Regulation 39B of the CIRP Regulations, 2016 regarding meeting of liquidation costs. The Liquidator is, therefrom directed to take necessary action under Regulation 2A of the IBBI (Liquidation process), (2016) regarding contribution to liquidation costs.

14. Assessment of Sale as a going concern (Regulation 39C of CIRP Regulations, 2016) - The CoC has not made any recommendation regarding sale of the Corporate Debtor as a going concern. Therefore, the liquidator is directed to refer to Regulation 32A of the IBBI (Liquidation Process), Regulation 2016 and take necessary action.

15. Fees of the Liquidator (Regulation 39D of CIRP Regulations 2016) - The RP proposed to be appointed as Liquidator shall charge such fee for the conduct of liquidation proceedings and in such proportion to the value of liquidation estate assets as may be specified by the Board. Regulation 4 of Insolvency and Bankruptcy

Board of India (Liquidation Process) Regulations, 2016 provide for Liquidator's fee. Regulation 4(2) thereof Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 4 | 72 states that the Liquidator shall be entitled to such fee and in such manner as has been provided therein.

16. Pending applications, if any, and its effect -

The learned authorized representative for applicant has stated that an Application bearing CA No. 1077/2020 dated 20.11.2019 seeking additional time for completion of CIRP with certain other reliefs is pending before this Tribunal. In the instant IA, the applicant also seeks liberty for withdrawal of CA No. 1077/2019 has Resolution Applicant has withdrawn its resolution Plan.

17. In view of the satisfaction of the conditions provided under Section 33(1)(A) of the Code, the corporate debtor Best Foods Limited is directed to be liquidated in the manner as laid down in Chapter III of the Code. Some of the directions are noted as under:-

(i) That as per Section 33(5) of the Code and subject to Section 52 of the Code, no suit or other legal proceedings shall be instituted against the corporate debtor.

Provided that a suit or other legal proceedings may be instituted by the liquidator on behalf of the corporate Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 5 | 72 debtor, with the prior approval of the Adjudicating Authority.

(ii) That the provisions of sub-section (5) of Section 33 of the Code shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator; and

(iii) That this order of liquidation under Section 33 of the Code shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the liquidator, and

(iv) That all the powers of the Board of Directors, key managerial prescribed and the partners of the Corporate Debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator; and

(v) That the personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor and provisions of Section 19 of the Code shall apply in relation to liquidation process as they apply in relation to CIR process with the substitution of references Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 6 | 72 to the Interim Resolution Professional for references to the Interim Resolution for references to the Liquidator.

(vi) That the Liquidator shall publish public announcement in accordance with Regulation 12 of the IBBI (Liquidation Process) Regulations 2016 and in Form B of Schedule II of these Regulations

within five days from receipt of this order calling upon the stake holders to submit their claims as on liquidation commencement date and provide the last date for submission of claim which shall be 30 days from the liquidation commencement date.

(vii) That the announcement shall be published in accordance with Regulation 12(3) of the IBBI (Liquidation Process) Regulation, 2016.

(viii) That in accordance with Regulation 13 of the IBBI (Liquidation Process) Regulations, 2016, the 'Liquidator' shall file his preliminary report within 75 days and to file regular progress reports as per Regulation 15 every fortnightly thereafter."

and accordingly disposed of the said Interlocutory Application. Resume of Facts

3. According to the Learned Counsel for the 'Appellant' that the 'Appellant' is the Director of the Suspended Board of Directors of M/s Best Foods Ltd. (the 'Corporate Debtor'/ Company), engaged in the business of manufacturing and exporting food grains.

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4. It is represented on behalf of the Appellant that an Application/ Petition was filed by M/s Hajura Singh Bhim Singh 'Operational Creditor' (under Section 9 of the 'I&B' Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy Application to Adjudicating Authority) Rules, 2016 against the 'Corporate Debtor' and the said Application was admitted on 02.02.2018 for initiating the 'Corporate Insolvency Resolution Process' (CIRP) of the 'Corporate Debtor' etc. Also that Mr. Atul Kumar Kansal was appointed as the 'Interim Resolution Professional' for the 'Corporate Debtor'.

5. It comes to be known that the 'Interim Resolution Professional' of the 'Corporate Debtor' had constituted the 'Committee of Creditors' (CoC) of the 'Corporate Debtor' after collating and verifying all claims received from the creditors of the 'Corporate Debtor'. Later, an Application was filed by the 'Committee of Creditors' of the 'Corporate Debtor' (under Section 22 of the 'I&B' Code). The 'Interim Resolution Professional' was replaced by Mr. Vikram Bajaj, the Respondent as 'Resolution Professional' for the 'Corporate Debtor' as per order dated 17.04.2018 passed by the 'Adjudicating Authority'.

6. The 'Resolution Professional'/ Respondent published Form G and invited 'Expression of Interest' (EOI) from the prospective Resolution Applicants by advertising the same in the Newspapers (vide publication dated 05.05.2018). On 01.08.2018, this Tribunal passed an order of extending the CIRP period by another 90 days. Later, the Respondent/ 'Resolution Professional' of the 'Corporate Debtor' issued a fresh invitation calling for 'Expression of Interest' in respect of the 'Corporate Debtor' on 07.08.2019. The 'Resolution Professional' received the 'Expression of Interest' from a prospective Resolution Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 8 | 72 Applicant - Maritime Trade Corporation (MTC) and later, request for 'Resolution Plan' (RFRP) was issued to MTC/ Resolution Applicant for submission of 'Resolution Plan' in respect of the 'Corporate Debtor'.

7. The 'Resolution Applicant' (Maritime Trade Corporation) submitted its 'Resolution Plan' in respect of the 'Corporate Debtor' in terms of Section 30 of the 'I&B' Code, 2016 to the 'Resolution Professional', on 04.10.2018 together with Earnest Money Deposit of INR 10 crores. As a matter of fact, consequent to the review of the 'Resolution Plan' (submitted by the 'Maritime Trade Corporation') by the 'Resolution Professional' and the 'Committee of Creditors' of the 'Corporate Debtor' a revised 'Resolution Plan' was submitted by the 'Resolution Applicant' on 19.10.2018.

8. It is brought to the fore that in the 7th meeting of the 'Committee of Creditors' of the 'Corporate Debtor' dated 25.10.2018, the 'Resolution Plan' submitted by the 'Maritime Trade Corporation'/'Resolution Applicant' was discussed by the 'Committee of Creditors' of the 'Corporate Debtor'. Indeed, the Respondent ('Resolution Professional') through mail dated 26.10.2018 had informed the 'Resolution Applicant' / MTC about the decision of the 'Committee of Creditors' not to consider the 'Resolution Plan' of the 'Resolution Applicant', since the same was not in consonance with the provisions of the 'I&B' Code.

9. It is the version of the Appellant that the 'Resolution Applicant' furnished a revised 'Resolution Plan' to the Respondent/ 'Resolution Professional' as per email dated 26.10.2018, which was forwarded by the Respondent/ 'Resolution Professional' to the 'Committee of Creditors' as per mail dated 27.10.2018. Later, the 'Resolution Applicant' (Maritime Trade Corporation) submitted its Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 9 | 72 'Resolution Plan' to the 'Resolution Professional' as per email dated 28.10.2018. The Respondent/ 'Resolution Professional' after considering the changes effected in the 'Resolution Plan', shared it with the 'Committee of Creditors' for its consideration vide email dated 29.10.2019 with the observations that the Revised 'Resolution Plan' submitted by the 'Resolution Applicant'/ Respondent prima-facie appears to be in conformity with the 'I&B' Code, 2016 and the accompanying rules and Regulations thereunder, notwithstanding that there were certain inconsistencies that need to be sorted out by means of discussion with the 'Resolution Applicant'/ MTC, for which, the 'Resolution Applicant' was 'agreeable'.

10. Through email dated 29.10.2018, the 'Resolution Professional'/ Respondent had informed the 'Resolution Applicant'/ MTC that the 'Committee of Creditors' of the 'Corporate Debtor' was not inclined to consider the 'Revised Resolution Plan' of 'Maritime Trade Corporation', since the same was 'not found feasible' and further the time period for 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor' was almost over, there was no time left in the 'Resolution Process' of the 'Corporate Debtor' to entertain any further 'repetition of a process'.

11. The stand of the Appellant is that the 'Resolution Plan' of the 'Resolution Applicant' - 'Maritime Trade Corporation' was not put before the 'Committee of Creditors' of the 'Corporate Debtor' although inconsistencies in the Resolution in regard to the non-compliance of the provisions of the Code were also removed and that the 'Revised Resolution Plan' dated 28.10.2018 was found to be in agreement with particular rule(s) by the 'Resolution Professional'/ Respondent, Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 10 | 72 as stated by him in the email dated 29.10.2018 to the 'Committee of Creditors' of the 'Corporate Debtor'.

12. Being dissatisfied with the action of the 'Committee of Creditors' in not considering the 'Resolution Plan' Resolution Applicant/ 'Maritime Trade Corporation' projected an Application in CA NO.203 of 2018 before the 'Adjudicating Authority' questioning the arbitrary and illegal decisions of the 'Committee of Creditors' on 25.10.2018, whereby a decision was taken not to pursue the 'Resolution Plan' submitted by the Resolution Applicant/ 'Maritime Trade Corporation' and the illegal and arbitrary decision of the 'Committee of Creditors' on 29.10.2018 not to consider the 'Revised Plan' furnished by the 'Resolution Applicant'/ 'Maritime Trade Corporation' despite the 'Resolution Plan' was found to be 'in order' by the 'Resolution Professional'.

13. The CA No.603/2018 (filed by the Resolution Applicant) was allowed by the 'Adjudicating Authority' as per order dated 31.10.2019 in directing the 'Resolution Professional' to place the 'Revised Resolution Plan' submitted by the 'Resolution Applicant'/ 'Maritime Trade Corporation', for consideration before the 'Committee of Creditors' of the 'Corporate Debtor'.

14. Based on the order dated 31.10.2019 passed by the 'Adjudicating Authority' the 'Resolution Plan' furnished by the Resolution Applicant/ 'Maritime Trade Corporation' was evaluated by the 'Committee of Creditors' in the ninth meeting of the 'Committee of Creditors' dated 15.11.2019. In reality, the other members of the 'Committee of Creditors' with a voting share of 42.54% voted in favour of the 'Resolution Plan'. One of the members of the 'Committee of Creditors' i.e. the State Bank of India, having vote share of 53.87% abstain Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 11 | 72 from voting because of the 'pending approvals' from its 'higher ups' for 'voting' on the 'Resolution Plan' and the voting of 'State Bank of India' 'Resolution Plan' was deferred. In fact, the Resolution on the liquidation of the 'Corporate Debtor' was rejected by the Committee of Members by the requisite majority. Neither any resolution for approval/ rejection of 'Resolution Plan' nor any resolution for liquidation of the 'Corporate Debtor' was passed at the meeting of the 'Committee of Creditors' dated 15.11.2019.

15. With a view to complete the 'Corporate Insolvency Resolution Process' and pending vote of the State Bank of India on the Resolution Plan on 20.11.2019 the 'Resolution Professional'/ Respondent preferred an Application in CA No.1077 of 2019 before the 'Adjudicating Authority' praying for an additional time of 75 days for completion of the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor' and to permit the 'Committee of Creditors' of the 'Corporate Debtor' to abstain from voting viz the State Bank of India to submit their vote on approval of the 'Resolution Plan' on liquidation of the 'Corporate Debtor' as the case may be.

16. The State Bank of India (one of the 'Financial Creditors' of the 'Corporate Debtor') with a voting share of 53.87% through email dated 07.02.2020 had informed the 'Resolution Professional'/ Respondent that the proposal for approval of the 'Resolution Plan' was approved by the State Bank of India. In this connection it is pertinently pointed out that on 13.02.2020, during the hearing of CA 1077 of 2020 in CP (IB) No.117/Chd/CHD/2017 the 'Resolution Professional'/ Respondent while informing the 'Adjudicating Authority' about the approval of the State Bank of India to the 'Resolution Plan' of the Resolution Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 12 | 72 Applicant/ 'Maritime Trade Corporation' prayed for issuance of a direction from the 'Adjudicating Authority' for convening one more meeting of the 'Committee of Creditors' to consider the

'Resolution Plan' of the Resolution Applicant/ 'Maritime Trade Corporation' for passing appropriate Resolution and also for granting extension for further necessary period for this purpose.

17. When CA No.1077/2019 in CP (IB) No.117/Chd/CHD/2017 was sub-judice and pending before the 'Adjudicating Authority' the Resolution Applicant/ 'Maritime Trade Corporation' through email dated 19.03.2020 addressed to the 'Resolution Professional' unlawfully withdrew its 'Resolution Plan' which was approved by the 'Committee of Creditors' with requisite majority in effect in view of the approval communicated by the State Bank of India as per email dated 13.02.2020.

18. There is no provision under the 'I&B Code', for withdrawal of the 'Resolution Plan' by the 'Resolution Applicant' once the 'Resolution Plan' was approved by the 'Committee of Creditors'. The 'Committee of Creditors' of the 'Corporate Debtor' after examining the 'viability' and 'feasibility' of the 'Resolution Plan' submitted by the 'Resolution Applicant' and after applying its commercial wisdom had approved the 'Resolution Plan' of the 'Resolution Applicant' and the same ought not to have been interjected/ interfered by the 'Resolution Professional'/ Respondent, who had permitted the 'Resolution Applicant' to withdraw the 'Resolution Plan'.

19. The Respondent/ 'Resolution Professional' in breach of the order dated 31.10.2019 passed by the 'Adjudicating Authority' and in violation of the provisions of the I&B Code without securing the vote of the 'Committee of Company Appeal (AT) (Insolvency) No.276 of 2021 Page 13 | 72 Creditors' on the revised 'Resolution Plan' and a resolution to the effect and without securing a resolution on liquidation by the 'Committee of Creditors' of the 'Corporate Debtor' directly, out of his individual discretion filed an IA 412 of 2020 (under Section 33(1)(a) of the Code) for 'Liquidation' of the 'Corporate Debtor' before the 'Adjudicating Authority'.

20. On 01.03.2021, the 'Adjudicating Authority' in I.A. 412 of 2020 passed an order for 'Liquidation' of the 'Corporate Debtor' in directing the Liquidator to take steps for liquidation of the 'Corporate Debtor' as per Regulation 32(A) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 (Liquidation Regulations).

21. It is the plea of the Appellant that the 'Adjudicating Authority' had committed an error in directing the Liquidator to take steps as per Regulation 32(A) of the Liquidation Regulations without directing the Liquidator to take appropriate steps as per Regulation 2B and the judgment of this Tribunal in Y. Sivaram Prasad vs. S. Dhanapal & Ors. Vide Co. Appl (AT) (Ins) No.224 of 2018 in which the Liquidator is directed to first call for schemes of compromise and arrangement under Section 230 of the Companies Act, 2013 at the stage of liquidation proceedings of the 'Corporate Debtor' before the sale of 'Assets' of the 'Corporate Debtor' 'collectively' or on a standalone basis in order to keep the 'Corporate Debtor' as a 'going concern' even during the period when the 'Corporate Debtor' is undergoing liquidation proceedings. Appellant's Submissions

22. The Learned Counsel for the Appellant submits that the impugned order dated 01.03.2020 passed by the 'Adjudicating Authority' in I.A No.412 Company Appeal (AT) (Insolvency) No.276 of 2021 Page 14 | 72 of 2020 in CP (IB) No.117/Chd/CHD/2017 is in negation of the principles of natural justice and the same is legally untenable.

23. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to observe that the withdrawal of the 'Resolution Plan' subsequent to the approval of the 'Resolution Plan' by the Committee of Creditors of the 'Corporate Debtor' is impermissible in law and further that the action of the Respondent/ 'Resolution Professional' is an unlawful one, besides the same being in breach of the aims and objectives of the I&B Code, 2016.

24. The Learned Counsel for the Appellant projects an argument that the State Bank of India (having a voting share of 53.87%) through email dated 07.02.2020 had conveyed its 'approval' for the 'Resolution Plan' to the 'Resolution Professional' of the 'Corporate Debtor', and in fact, 'Resolution Plan' was approved by 96.04% of the voting share of the 'Committee of Creditors' of the 'Corporate Debtors'.

25. The Learned Counsel for the Appellant points out that the approval of the 'Resolution Plan' (conveyed by the State Bank of India - having 53.87% voting share) through email dated 07.02.2020 was to be taken into account as per the judgment dated 19.03.2019 of this Tribunal in the matter of 'Apollo Jyoti LIC and Ors. vs. Jyoti Structures Ltd. - Sharad Sanghi vs. Vandana Garg & Ors. - vide Company Appeal (AT) (Ins.) 461/2018 and etc. wherein it was held that if once voting on a 'Resolution Plan' by the 'Committee of Creditors' was over then the members of the 'Committee of Creditors', who had earlier either voted against the Plan or abstained on the voting on the Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 15 | 72 Plan can subsequently change their opinion in favour of the Plan, provided that the change of happened within the 270 days of the CIRP process.

26. According to the Learned Counsel for the Appellant the wisdom of the 'Committee of Creditors' reigns 'supreme' and if it was found that the majority of the 'Committee of Creditors' had voted in favour of the Plan but fell short of the requisite threshold of 75% and the alternative of the Plan not being approved is liquidation, the 'Committee of Creditors' can always change his opinion to being in favour of the Plan after the voting was first over, subject to the change of opinion taking place within the period of 270 days and the judgment of this Tribunal was upheld by the Hon'ble Supreme Court of India (vide Civil Appeal 3434-3436 of 2019 order dated 15.04.2019) wherein it was observed and held that the 'Committee of Creditors' is empowered to change its decisions on Rejection/ Abstention of 'Resolution Plan'.

27. The Learned Counsel for the Appellant projects an argument that the 'Adjudicating Authority' while passing the impugned order in disregard to the facts and circumstances of the instant case had encroached upon the majority decision of the 'Committee of Creditors', which it does not have the power to, except for the grounds mentioned as per sub-section (a) to (e) of Section 32 of the Code.

28. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had failed to observe in the impugned order that the 'Resolution Professional'/ Respondent had filed the application for liquidation of the 'Corporate Debtor' without securing the vote and resolution of the 'Committee of Creditors' neither on the revised Plan nor on the Liquidation of the Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 16 | 72 'Corporate Debtor', which is in breach of the necessary ingredients of the I&B Code and the directions issued by the 'Adjudicating Authority' as per order dated 31.10.2019 in CA No.603/2018.

29. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the 'Adjudicating Authority' had committed an error in not observing that the action of the 'Resolution Professional'/ Respondent permitting the withdrawal is in violation of the ingredients and against the aims and objects of the Code, since the 'Corporate Debtor' runs a huge risk of going into 'Liquidation' because the time spent in the 'Corporate Insolvency Resolution Process' is inversely proportional to the value of the assets of the 'Corporate Debtor' and there is a good chance that none of the rival 'Resolution Applicants' who are earlier interested would be willing to come forward subsequently. In short, if such 'withdrawal' is allowed and no new 'Successful Resolution Applicant' emerges, such 'Corporate Debtor' is sure to go into liquidation, which is contrary to the object of the I&B Code. It is to be remembered that the I&B Code aims to resolve 'insolvency' in a time bound manner and maximize the value of 'Corporate Debtor', which is in the interest of 'Corporate Debtor' and its stake holders at large.

30. Yet another contention advanced on behalf of the Appellant is that the IA 412 of 2020 filed by the Respondent/ 'Resolution Professional' for liquidation of the 'Corporate Debtor' does not satisfy the test/ conditions prescribed under Section 33 of the Code for initiation of the 'Corporate Debtor' and that the 'Adjudicating Authority' had failed to note down/ observe the Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 17 | 72 same in the impugned order. In fact, the IA 412 of 2020 filed by the Respondent/ 'Resolution Professional' is not maintainable.

31. The Learned Counsel for the Appellant points out that considerable time in respect of the 'Corporate Insolvency Resolution Process' was consumed on the approved 'Resolution Plan' and eventually when after multiple round of negotiations, approval of the majority of the 'Committee of Creditors' members was received, the 'Resolution Professional' permitted the 'Resolution Applicant' to withdraw the aforesaid plan which resulted in colossal of waste of 'CIRP' time period from 04.10.2018 when the 'Resolution Plan' was submitted by the 'Resolution Applicant' for the first time upto 19.03.2020, when the 'Resolution Applicant' withdrew the Resolution Plan subsequent to the approval of the 'Committee of Creditors' and that the aforesaid time period might have been otherwise utilized in exploring possibilities of Resolution of the 'Corporate Debtor', whereas on account of the acts and commission of the Respondent/ 'Resolution Professional', the 'Corporate Debtor' was pushed into Liquidation. Appellant's Citations

32. The Learned Counsel for the Appellant seeks in aid of the judgment of this Tribunal - dated 19.03.2019 (1) Mr. Sharad Sanghi vs. Vandana Garg and others (Com. App (AT) (Ins.) 461 of 2018); (2) Ashutosh Koul and Others vs. DBS Bank Limited and others (Com. App (AT) 464 of 2018); and (3) Appollo Jyoti LLC and others vs. Jyoti Structures Ltd. Through its Resolution Professional, M/s Vandana Garg and Others (Com. App. (AT) (Ins) No.548 of 2018) reported in 2019 SCC OnLine NCLAT page 148 (at Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 18 | 72 special page 7 and 8), wherein at paragraph 14 to 19, 23 to 26, it is observed as under:

"14. Whether a member who has already opined, after final decision, can change its opinion or not? It is the matter which can be decided by the 'Committee of Creditors', which may extend the period and allow to have fresh voting. Regulation 26(2) being directory cannot override the power of the 'Committee of Creditors', which is the final

decision making authority in accepting or rejecting a 'Resolution Plan'. The Insolvency and Bankruptcy Board of India also noticed that Regulation 26(2) is not workable and will amount to interference with the power of the 'Committee of Creditors' as vested under the Insolvency and Bankruptcy Code, 2016 and therefore, the Insolvency and Bankruptcy Board of India deleted Regulation 26(2) w.e.f. 4th July, 2018. If it would not have been 10 Company Appeal (AT) (Insol.) Nos. 461, 464 & 548 of 2018 deleted, one could have argued that Regulation 26(2) is arbitrary as it does not allow the 'Committee of Creditors' to form its final opinion.

15. A 'Resolution Plan' which may be viable, feasible and of acceptable financial matrix and which is not against the provision of Section 30(2), if majority of the Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 19 | 72 members having voting shares approve it but falls short of the 75% (now 66%) limit as has been prescribed and later on it comes to the notice of one or other members that because of the failure the 'Corporate Debtor' will be liquidated, it is always open to the members to change its opinion subsequently with the approval of the rest of the members of the 'Committee of Creditors' but it should be within 270 days.

16. In view of the aforesaid findings and the facts as emerges, we hold that the 'Resolution Plan' in question stands approved by the 'Committee of Creditors' with 81.39% voting shares.

17. In the case of "Quinn Logistics India Pvt. Ltd."

(Supra) which was affirmed by the Hon'ble Supreme Court, this Appellate Tribunal observed that the period of non-joining of the 'Interim Resolution Professional' should be excluded for the purpose of counting the total period of 180 days or 270 days.

18. In the present case, as the application was admitted on 4th July, 2017 and after signature it was uploaded on 12th July, 2017 i.e. eight days and the 'Interim Resolution Professional' joined much thereafter, we are of the view that the Adjudicating Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 20 | 72 Authority should have excluded at 11 Company Appeal (AT) (Insol.) Nos. 461, 464 & 548 of 2018 least eight days of period during which the order was passed, signed and subsequently uploaded. If the aforesaid period of eight days is excluded, then we find that the 'Resolution Plan' was approved within 270 days which the Adjudicating Authority has failed to notice.

19. We have not counted the actual period, taking into consideration the date when the 'Interim Resolution Professional' had joined. The order of admission having signed and uploaded on 12th July, 2017, after excluding eight days, we hold that the process was conducted within the period.

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23. However, the aforesaid submissions cannot be accepted as at the 'Resolution Process', 'Financial Creditor' claims are decided as per provision of the 'I&B Code'. All the 'Financial Creditors' are treated to be similar, if similarly situated.

24. We have noticed that the Adjudicating Authority has made certain observations with regard to the timeline given by the 'Resolution Applicant'. Learned counsel appearing on behalf of the 'Resolution Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 21 | 72 Applicant' submits that the total period of 15 years will be reduced to 12 years.

25. In view of the aforesaid findings and as we have already held that the 'Resolution Process' took place within 270 days and the 'Committee of Creditors' had the jurisdiction to change its opinion in favour of the 'Resolution Plan' to make it a success and Regulation 26(2) being directory which also stands deleted, we set aside the impugned order and hold that the 'Resolution Plan' being in conformity with Section 30(2) warranted approval by the Adjudicating Authority.

26. However, we make it clear that to make the 'Resolution Process' successful, though it is open to the 'Committee of Creditors' to change its opinion by assenting in favour of one or other plan, we further hold that 13 Company Appeal (AT) (Insol.) Nos. 461, 464 & 548 of 2018 the 'Committee of Creditors' once voted in favour of the 'Resolution Plan' cannot change its views".

33. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in 'Kalpraj Dharamshi and Another' vs. 'Kotak Investment Advisors Ltd. and Another' (vide judgment in Civil Appeal No.2943-2944 of 2020) reported in 2021 SCC OnLine SC 204, wherein at paragraph 155 to 160, it is observed as under:

Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 22 | 72

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.

156. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.

157. No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of clause (ii) of sub-section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G' could not be Company Appeal (AT) (Insolvency) No.276 of 2021 P a

g e 23 | 72 accepted. However, it has been the consistent stand of RP as well as CoC, that actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.

158. It is further to be noted, that after the resolution plan of Kalpraj was approved by NCLT on 28.11.2019, Kalpraj had begun implementing the resolution plan. NCLAT had heard the appeals on 27.2.2020 and reserved the same for orders. It is not in dispute, that there was no stay granted by NCLAT, while reserving the matters for orders.

Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 24 | 72 After a gap of five months and eight days, NCLAT passed the final order on 5.8.2020. It could thus be seen, that for a long period, there was no restraint on implementation of the resolution plan of Kalpraj, which was duly approved by NCLT. It is the case of Kalpraj, RP, CoC and Deutsche Bank, that during the said period, various steps have been taken by Kalpraj by spending a huge amount for implementation of the plan. No doubt, this is sought to be disputed by KIAL. However, we do not find it necessary to go into that aspect of the matter in light of our conclusion, that NCLAT acted in excess of jurisdiction in interfering with the conscious commercial decision of CoC.

159. It is also pointed out, that in pursuance of the order dated 5.8.2020 passed by NCLAT, CoC has approved the resolution plan of KIAL on 13.8.2020. However, since we have already held, that the decision of NCLAT dated 5.8.2020 does not stand the scrutiny of law, it must follow, that the subsequent approval of the resolution plan of KIAL by CoC becomes non-est in law. For, it was only to abide by the directions of NCLAT. We are of the view that nothing would turn on it. The Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 25 | 72 decision of CoC dated 13/14.2.2019 is a decision, which has been taken in exercise of its 'commercial wisdom'. As such, we hold, that the decision taken by CoC dated 13/14.2.2019, which is taken in accordance with its 'commercial wisdom' and which is duly approved by NCLT, will prevail.

Further, NCLAT was not justified in interfering with the stated decision taken by CoC.

160. In that view of the matter, we find that Civil Appeal Nos. 2943-2944 of 2020 filed by Kalpraj; Civil Appeal Nos. 2949-2950 of 2020 filed by RP and Civil Appeal Nos. 3138-3139 of 2020 filed by Deutsche Bank deserve to be allowed. It is ordered accordingly. The order passed by NCLAT dated 5.8.2020 is quashed and set aside and the orders passed by NCLT dated 28.11.2019 are restored and maintained."

34. The Learned Counsel for the Appellant seeks in aid of the decision of Hon'ble Supreme Court in 'Ebix Singapore Pvt. Ltd. V. 'Committee of Creditors of Educomp Solutions Limited and Anr.' reported in 2021 SCC online SC 707 wherein at paragraphs Nos. 145, 147, 159, 169, 172, 173, 175, 177, 178, 179 and 184 it is observed as under: -

145. "The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 26 | 72 Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority⁸⁸. However, this statutorily-enabled room for commercial negotiation is not enough to over-

power the other elements of regulation that detract from the view that ⁸⁸ "(3) The committee shall evaluate the resolution plans received under sub- regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit: Provided that the committee shall record its deliberations on Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 27 | 72 the feasibility and viability of the resolution plans"

PART H 112 CoC-approved Resolution Plans are contracts. CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3)⁸⁹ further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC⁹⁰. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 28 | 72 details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoCapproved Resolution Plans owing to the nature of the IBC. Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not

available 89"39....(3)The committee shall- (a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix; (b) record its deliberations on the feasibility and viability of each resolution plan;

and (c) vote on all such resolution plans simultaneously. (3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes. (3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved: Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting: Provided further that Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 29 | 72 where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code....." 90 available at accessed on 5 September 2021 PART H 113 to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the Adjudicating Authority. The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP⁹¹. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments.

However, if the intention was to view a CoC approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 30 | 72 transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and 91 Pages 55-56, Report of the Insolvency Law Committee (February 2020), Ministry of Corporate Affairs, available at accessed on 20 August 2021 PART H 114 distort the mechanism of the IBC altogether. This Court in *Laxmi Pat Surana v. Union Bank of India*⁹² has held that the IBC is a self- Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 31 | 72 contained Code. Thus, importing principles of any other law or a statute like

the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be of "such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor". Further, in the event that the CoC enters into Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 32 | 72 a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation. This Court in Amtek Auto (supra), had curbed a similar attempt by a 92 (2020) SCC OnLine SC 1187 PART I 115 successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. Principles of contractual construction and interpretation may serve as Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 33 | 72 interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC. I Statutory framework governing the CIRP

147. The decision in Essar Steel (supra) while reiterating the rationale of the IBC for ensuring timely resolution of stressed assets as a key factor, had to defer to the principles of *actus curiae neminem gravabit*, i.e., no person should suffer because of the fault of the court or the delay in the procedure. In spite of this Court's precedents which otherwise strike down provisions which interfere with a litigant's fundamental right to non-arbitrary treatment under Article 14 by mandatory conclusion of proceedings without providing for any exceptions, this Court refused to strike down the second proviso to Section 12(3) in its entirety. It noted that the previous statutory experiments for insolvency had failed because PART I 118 of delay as a result of extended legal proceedings and chose to only strike down the word 'mandatorily',

keeping the rest of the provision intact. Therefore, the law as it stands, mandates the conclusion of the CIRP - including time taken in legal Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 34 | 72 proceedings, within 330 days with a short extension to be granted only in exceptional cases. However, the Court has warned that this discretion must be exercised sparingly and only in the following situations: "127...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 Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 35 | 72 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."

159. The CoC has been given wide powers under the IBC. It can direct the Corporate Debtor into liquidation any time before the approval by the Adjudicating Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 36 | 72 PART I 126 Authority, under Section 33(2) of the IBC.

Further, under Section 12A of the IBC the Adjudicating Authority may allow withdrawal of the application submitted under Sections 7, 9 or 10 of the IBC for initiation of the CIRP (i.e., initiation of the CIRP by the financial creditor, operational creditor and the corporate applicant, respectively) if the withdrawal is approved by ninety per cent of the voting share of the CoC. Dealing with the question whether a successful Resolution Applicant can retreat through the route provided under Section 12A of the IBC, a threejudge Bench of this Court in Maharashtra Seamless v.

Padmanabhan Venkatesh⁹⁴ observed that, "[t]he exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code". However, this Court left the question whether a successful Resolution Applicant "altogether forfeits their right to withdraw from such process [CIRP] or not", open for subsequent judicial determination⁹⁵.

169. Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 37 | 72 of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy. A court may be inept in laying down a detailed procedure for exercise of the power of withdrawal or modification by a successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. In this case, if Resolution Applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a Resolution Plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective Resolution PART J 141 Applicants who are seeking to Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 38 | 72 participate in the process and the successful Resolution Applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry of litigation which would cause the delay that the IBC seeks to disavow.

172. In the wake of the COVID-19 pandemic, several Resolution Plans remained pending before Adjudicating Authorities due to the lockdown and significant barriers to securing a hearing. An Ordinance was swiftly promulgated on 5 June 2020 which imposed a temporary suspension of initiation of CIRP under Sections PART J 143 7, 9 and 10 of the IBC for defaults arising for six months from 25 March 2020 (extendable by one year). This was followed by an amendment through the IBC (Second Amendment) Act 2020 on 23 September 2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations 2020, which inserted Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 39 | 72 Regulation 40C on 20 April 2020, with effect from 29 March 2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. Recently, the IBC (Amendment) Ordinance 2021 was promulgated with effect from 04 April 2021 providing certain directions to preserve businesses of MSMEs and a fast-track insolvency process. There has been a clamor on behalf of successful Resolution Applicants who no longer wish to abide by the terms of their submitted Resolution Plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or renegotiations has been provided, in the last eighteen months. In the

absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by a successful Resolution Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door.

173. It is pertinent to note that even the UNCITRAL Guide does not contain any provisions for withdrawal Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 40 | 72 of a submitted Plan. It only discusses the possibilities of amending a Resolution Plan. The UNCITRAL Guide indicates that it PART J 144 contemplates that the Legislature should choose if it wants to allow any amendments to a submitted Resolution Plan. In the event, it does, it should lay down the detailed steps of proposing amendments to a submitted resolution plan¹⁰⁸. In fact, even the scope of negotiations between the Resolution Applicant and the CoC has to be specifically envisaged by the statute¹⁰⁹. Further, the UNCITRAL Guide envisages that amendments can be made to the Resolution Plan after it is approved by the creditors only in limited circumstances. It mentions that, "[a]n insolvency law may include limited provision for a plan to be modified after it has been approved by creditors (and both before and after confirmation) if its implementation breaks down or it is found to be incapable of performance, whether in whole or in part, and the specific problem can be remedied"¹¹⁰. If permitted by the statute, the recommendations strongly urge the establishment of a mechanism for amendment after approval by creditors which details requirements of, inter alia, approval by creditors of the modification and Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 41 | 72 consequences of failure to secure approval to the amendments¹¹¹. The BLRC Report has relied on the UNCITRAL Guide while designing the IBC¹¹² and it is a critical tool for ascertaining legislative choice and intent. Parliament has not introduced an explicit provision under the IBC for allowing any amendment of the Resolution Plan after approval of creditors, let alone a power to withdraw the ¹⁰⁸ IV.A.52., page 225, and Recommendation 155: "155. The insolvency law should permit amendment of a plan and specify the parties that may propose amendments and the time at which the plan may be amended, including between submission and approval, approval and confirmation, after confirmation and during implementation, where the proceedings remain open." of the UNCITRAL Guide, supra note 56 ¹⁰⁹ Ibid. ¹¹⁰ IV. A. 66, page 230 of the UNCITRAL Guide, supra note 56 ¹¹¹ Recommendation 156: "The insolvency law should establish the mechanism for approval of amendments to a plan that has been approved by creditors. That mechanism should require notice to be given to the creditors and other parties affected by the proposed modification; specify the party required to give notice; require the approval of creditors and other Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 42 | 72 parties affected by the modification; and require the rules for confirmation (where confirmation is required) to be satisfied. The insolvency law should also specify the consequences of failure to secure approval of proposed amendments.", UNCITRAL Guide, supra note 56 ¹¹² 3.3.1, supra note 55 PART J 145 Resolution Plan at that stage. At the same time, the Corporate Debtor and the CoC have been empowered to withdraw from the CIRP. If it intended to permit parties to amend the Resolution Plan after submission to the Adjudicating Authority, based on its specific terms of the Resolution Plan, it would have adopted the critical safeguards highlighted by the UNCITRAL.

175. The approval of the Adjudicating Authority under Section 31(1) of the IBC has the effect of making the Resolution Plan binding on all stakeholders. These PART J 146 stakeholders include the

employees of the corporate debtor whose terms of employment would be governed by the Resolution Plan, the Central and State Governments who would receive their tax dues on the basis of the terms of the Resolution Plan and local authorities to whom dues are owed. These stakeholders are not direct participants in the CIRP but are bound by its consequence by virtue of the approval Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 43 | 72 of the Resolution Plan, under Section 31(1) of the IBC. Section 31(1) ensures that the Resolution Plan becomes binding on all stakeholders after it is approved by the Adjudicating Authority. The language of Section 31(1) cannot be construed to mean that a Resolution Plan is indeterminate or open to withdrawal or modification until it is approved by the Adjudicating Authority or that it is not binding between the CoC and the successful Resolution Applicant. Regulation 39(4) of CIRP Regulations mandates that the RP should endeavour to submit the Plan at least fifteen days before the statutory period of the CIRP under Section 12 is due to expire along with a receipt of a PBG and a compliance certificate as Form H. It is pertinent to note that sub-Section (3) to Section 12 mandates that the CIRP process, including legal proceedings, must be concluded within 330 days. This three-hundred- andthirty-day period can be extended only in exceptional circumstances, if the process is at near conclusion and serves the object of the IBC, as held by a three judge Bench of this Court in Essar Steel (*supra*). Therefore, after accounting for all statutorily envisaged delays which the RP has to explain in its Form H and otherwise through Regulation 40B, the procedure Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 44 | 72 envisages a fifteen-day window between submission of Resolution Plan and its approval or rejection by the Adjudicating Authority. This clearly indicates that the statute envisages a certain PART J 147 level of finality before the Resolution Plan is submitted for approval to the Adjudicating Authority. Even the CoC is not permitted to approve multiple Resolution Plans or solicit EOIs after submission of a Resolution Plan to the Adjudicating Authority, which would possibly be in contemplation if the Resolution Applicant was permitted to withdraw from, or modify, the Plan after acceptance by the CoC. Regulation 36B(4A) requires the furnishing of a performance security which will be forfeited if a Resolution Applicant fails to implement the Plan. This is collected before the Adjudicating Authority approves the Plan. Notably, the regulations also direct forfeiture of the performance security in case the Resolution Applicant "contributes to the failure of implementation", which could potentially include any attempts at withdrawal of the Plan.

177. The binding nature, as between the CoC and the successful Resolution Applicant, of the Resolution Plan submitted for approval by the Adjudicating Authority is further evidenced from the fact that the CoC issues a Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 45 | 72 LOI to a successful Resolution Applicant stating that it has been selected as the successful Resolution Applicant and its Plan would be submitted to the Adjudicating Authority for its approval. The successful Resolution Applicant is typically required to accept the LOI unconditionally and submit a PBG. Sequentially, the issuance of an LOI is followed by its unconditional acceptance by the successful Resolution Applicant. In Amtek Auto (*supra*), this court thwarted a similar attempt by a successful Resolution Applicant who had relied on certain open-ended clauses in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Resolution Plan had been approved by the Adjudicating Authority and the Resolution Applicant's IA was not entertained. The Resolution Applicant had then sought to challenge the approval of the Resolution Plan under Section 61(3) of PART J 149 the IBC by seeking the same relief. This Court rejected the claim and observed that, "[t]o assert that there was any scope for negotiations and

discussions after the approval of the resolution plan by the CoC would be plainly contrary to the terms of the IBC".

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178. Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 47 | 72 Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only PART J 150 conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC.

179. If the appellants' claim were to succeed, a clause enabling a Resolution Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3). It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 48 | 72 Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in K Sashidhar (supra), while discussing the jurisdiction of the Adjudicating Authority under Section 31 to evaluate a Resolution Plan, has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the PART J 151 Code generally, assuring successful revival of the corporate debtor and disavowing

endless speculation"

114. Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 49 | 72 option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in all the three Resolution Plans that are in dispute in this present appeal.

184. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 50 | 72 unwilling to execute it, based on terms of its own Resolution Plan".

Respondent's Contentions

35. In response, the Learned Counsel for the Respondent submits that the Appellant is misrepresenting that the 'Committee of Creditors' had approved a 'Resolution Plan' and in fact, no 'Resolution Plan' was approved by the 'Committee of Creditors' within the 'Corporate Insolvency Resolution' period which came to an end on 15.11.2019. Apart from this, I.A. No. 1077/2019 for an extension of 'CIRP' period was 'Sub-Judice' when 'Sole Resolution Applicant' withdrew his 'Resolution Plan'. Moreover, the Learned Counsel for the Respondent brings it to the notice of this 'Tribunal' that the 'Adjudicating Authority' had noted that in view of the withdrawal of the 'Resolution Plan' by the 'Sole Resolution Applicant' the grounds on which CA No.1077/2019 claiming extension of time for completion of 'CIRP' process was filed by the 'Resolution Professional' were frustrated.

36. The Learned Counsel for the Respondent points out that since the 'CIRP' period had lapsed on 15.11.2019 and no 'Resolution Plan' was approved by 15.11.2019, thus the grounds for 'Sub-Judice' application for extension were frustrated and the 'Adjudicating Authority' passed the impugned order of 'Liquidation' of the 'Corporate Debtor'. From the date of 'CIRP' commencement and the date of impugned order there was a period of 37 months in directing the 'Liquidation' of the

'Corporate Debtor'. Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 51 | 72 It is significant to make a mention that the 'Committee of Creditors' had not approved any 'Resolution Plan' in respect of the 'Corporate Debtor'.

37. The Learned Counsel for the Respondent takes a stand that the Appellant has no 'Locus Standi' to assail the impugned order dated 01.03.2021 passed by the 'Adjudicating Authority' in reality, the 'Adjudicating Authority' had the power to pass an order for 'Liquidation' of 'Corporate Debtor' in the event no 'Resolution Plan' is received before the expiry of the 'CIRP' process as per Section 33(1)(a) of the Code.

38. According to the Learned Counsel for the Respondent, the 'State Bank of India' requested the 'Resolution Applicant' to make further amendments / changes to the 'Resolution Plan' and directed the Respondent to inform the same to the 'Resolution Applicants' for necessary modifications. Because of the changing economic situation i.e. due to COVID 19 pandemic the 'Resolution Applicant' withdrew from the 'CIRP' process of the 'Corporate Debtor'.

39. It is represented on behalf of the Respondent that the 'Insolvency & Bankruptcy Code Amendment Act', 2019 had commenced w.e.f. 16.08.2019 and calculating the 90 days' period as granted by the 'Adjudicating Authority' to consider and vote on the 'Plan' which came to an end on 15.11.2019. The main 'Financial Creditor' / 'State Bank of India' had abstained from voting on the 'Resolution Plan' while the same was approved by other members of the 'Committee of Creditors' having a vote of more than 44%.

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40. It is the stand of the Respondent that because of the fact that no 'Resolution Plan' was approved by the 'Committee of Creditors' within the 'CIRP' period with requisite majority in terms of the Code, consequent withdrawal of the 'Resolution Applicant' from the 'Resolution Process' through e.mail dated 19.3.2020 and further that the mandated period of 'CIRP' had lapsed on 15.11.2019, the Respondent was left with no option but to project an Application seeking 'Liquidation' of the 'Corporate Debtor' as per Section 33(1)(a) of the Code.

41. At this stage, Learned Counsel for the Respondent projects an argument that Section 12 of the 'I&B' Code, 2016 mandates that 'CIRP' of the 'Corporate Debtor' must conclude within 330 days from the 'Insolvency' commencement date. Also, it mandates that a 'CIRP' which was pending and not completed with the aforesaid period of 330 days, as on the date of commencement of the Amendment Act i.e. 16.8.2019, shall be completed within a period of 90 days from such date, i.e. by 15.11.2019.

42. The Learned Counsel for the Respondent submits that 'Corporate Insolvency Resolution Process' (CIRP) period expired on 15.11.2019 and that the 'Resolution Professional' could not convene a 'Committee of Creditors' Meeting (CoC) meeting and thereafter the CoC had become 'Functous Officio' (vide Judgement in 'Sanjay Kumar Ruia' V. 'Catholic Syrian Bank & Anr.' (Comp. App. (AT)(Ins.) 560/2018 Paragraph 17 and the judgement in 'ICICI Bank' V. 'Venkataranarao Nagarajan'

(Vide Comp. App. (AT)(Ins.) 772/2018).

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43. The Learned Counsel for the Respondent contends that the discussion on 'Resolution Plan' between the 'State Bank of India' and the 'Resolution Applicant' after expiry of 'CIRP' period was not through the 'Committee of Creditors' as the CoC was 'Functuous Officio', but based on a 'Bilateral Engagement' between the 'Resolution Applicant' and the 'State Bank of India' facilitated to build consensus in interests of 'Resolution' which did not fructify.

44. According to the Learned Counsel for the Respondent 'State Bank of India' through e.mail dated 07.02.2020 had conveyed the approval of its Authorities subject to certain changes being carried out by the 'Resolution Applicant' in the 'Resolution Plan'. Further, the 'Resolution Applicant' never submitted by 'Revised Plan' as advised by the 'State Bank of India'. Besides this, even if the 'Resolution Applicant' has submitted the 'Revised Plan'(incorporating changes indicated by the 'State Bank of India') the same would have required a voting by the 'Committee of Creditors', as the modified plan would have been different than the 'Resolution Plan' placed for voting before the 'Committee of Creditors' in the last CoC meeting dated 15.11.2019.

45. The Learned Counsel for the Respondent brings it to the notice of this Tribunal that any modification of the 'Resolution Plan' would also require a re-examination by the 'Resolution Professional' and certification that the 'Plan' is compliant before being placed before the CoC for voting. In fact, 'CIRP' period came to an end on 15.11.2019 and an 'Interlocutory Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 54 | 72 Application' No. 1077/2019 for extension of 'CIRP' period was 'Sub- Judice'.

46. It is the stand of the Respondent that the 'Resolution Professional' filed an 'Additional Affidavit' dated 11.2.2020 placing e.mail dated 07.02.2020 before the 'Adjudicating Authority' and sought reasonable time for completion of process:-

"(i) Incorporation of changes in Resolution Plan as advised by SBI and resubmission of the Resolution Plan by the Resolution Applicant Maritime Trade Corporation.

(ii) Review and certification on Compliance of Resolution Plan by the Applicant.

(iii)Conduct of CoC meeting for voting on the Resolution Plan

(iv)Issuance of Letter of Intent to Resolution Applicant

(v)Acceptance of Letter of Intent by Resolution Applicant and furnishing of Performance Security by the Resolution Applicant

(vi)Filing of Application under Section 30(6) by the Applicant."

Therefore, it is the clear cut stand of the Respondent that the 'State Bank of India' e.mail dated 7.2.2020 cannot be considered as approval of 'Resolution Plan' by the 'Committee of Creditors', because of the aforesaid Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 55 | 72 steps which were required to be fulfilled as per 'I&B' Code and Regulations made thereunder for taking approval of the 'Committee of Creditors' and making applications u/s 30(6) of the 'I&B Code', 2016 for approval of the 'Adjudicating Authority'.

47. The Learned Counsel for the Respondent points out that the 'Resolution Applicant' is not mentioned as a proper and necessary party in the 'Appeal', while the 'Appeal' is founded on the argument on the plea that the 'Resolution Applicant' could not have withdrawn the 'Resolution Plan' even after the lapse of 'CIRP' period on 15.11.2019 because of the SBI e.mail dated 7.2.2020. As such, it is the stand of the Respondent that the instant 'Appeal' is not maintainable because of 'Non-joinder of Parties' in so far as pleadings pertain to withdrawal of 'Resolution Plan' by the 'Resolution Applicant' after the expiry of 'CIRP' period as incidental and resultant directions saddling the 'Resolution Applicant' with 'Resolution Plan' cannot be issued without hearing the Applicant.

48. The Learned Counsel for the Respondent contends that the 'Resolution Plan' was not binding on the 'Resolution Applicant' after 15.11.2019 in view of the rejection by the 'Committee of Creditors' (CoC) in the meeting dated 15.11.2019 and the 'CIRP' period came to an end on 15.11.2019. In reality, the 'Resolution Applicant' acknowledged the decision of CoC by e.mail dated 19.11.2019 and claimed the refund of 'Earnest Money Deposit'.

49. The Learned Counsel for the Respondent submits that in the absence of any 'Resolution Plan' the premise for seeking extension of 'CIRP' Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 56 | 72 period through I.A. No. 1077/2019 i.e. possibility of 'Resolution' was lost and as the 'CIRP' period came to an end on 15.11.2019 and based on the direction issued by the 'Adjudicating Authority' on 30.10.2019 the 'Resolution Professional' had no option but to prefer an application for 'Liquidation' u/s 33(1)(a) of the 'I&B' Code.

50. The Learned Counsel for the Respondent points out that in the decision of Hon'ble Supreme Court in the matter of 'Ebix Singapore P. Ltd.' at the time of withdrawal of 'Resolution Plan', the 'Adjudicating Authority' had reserved its order on the application for approval of 'Resolution Plan' which was duly approved by the CoC. However, in the case on hand, it is undisputed that the 'Committee of Creditors' had not approved the 'Plan' till the last day of CIRP period i.e. on 15.11.2019. Also that, the CIRP period was not extended by the 'Adjudicating Authority' on the date of withdrawal i.e. on 19.3.2020 and further that the CoC was 'Functuous Officio' on the date of withdrawal.

51. The Learned Counsel for the Respondent contends that in the decision of Hon'ble Supreme Court in 'Ebix Singapore P. Ltd.' not only the application under Section 30(6) of the Code was filed, within the CIRP period, after acceptance of 'Letter of Intent' and deposit of performance guarantee by the 'Resolution Applicant' and that the 'Adjudicating Authority' had reserved its orders on the said application before the 'withdrawal', therefore, as there is no CoC approved 'Resolution Plan' in

the instant case on hand and the 'CIRP' period was over, the decision of Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 57 | 72 Hon'ble Supreme Court in the matter of 'Ebix Singapore P. Ltd.' is inapplicable.

52. The Learned Counsel for the Respondent submits that there is material irregularity or 'fraud' committed pertaining to the 'Liquidation' Order and hence prays for dismissal of the 'Appeal' filed by the Appellant. Respondent's Decisions

53. The Learned Counsel for the Respondent refers to the decision of Hon'ble Supreme Court in the matter of 'Committee of Creditors of Essar Steel Ltd. through Authorised Signatory V. Satish Kumar Gupta & Ors.' reported in 2020 8 SCC 531 wherein it is observed and held that while leaving the provision otherwise intact, the term 'Mandatorily' is struck down as being manifestly arbitrarily under 'Article 14 of the Constitution of India' and as being unreasonable restriction on the Litigant's right to carry on business under 'Article 19(1)(g) of the Constitution' and contends that the effect of this declaration is that ordinarily the time taken in relation to 'CIRP' must be completed within the outer limit of 330 days from the Insolvency commencement date including extensions and the time taken in legal proceedings. If the delay or large part thereof is attributable to the process of 'Adjudicating Authority' and/or the NCLAT itself, it may be open in such cases for the 'Adjudicating Authority' and / or NCLAT to extend the time beyond 330 days. It is only in exceptional cases that time can be extended, the general Rule being that 330 days is the outer limit within which the 'Resolution of the Stressed Assets of the Corporate Debtor' must take place beyond which Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 58 | 72 it is to be driven into 'Liquidation'. But in the present case, in the absence of any 'Resolution Plan' for the 'Corporate Debtor', even after 22 months (as on 15.11.2019-the last date of extended 'CIRP' period there being no exceptional circumstances, the consequence of expiry of time followed i.e. 'Liquidation of the Corporate Debtor'.

54. The Learned Counsel for the Appellant adverts to the judgement of this Tribunal dated 16.03.2021 in the matter of 'Kuldeep Verma' V. 'State Bank of India & Ors.' (Comp. App. (AT)(Ins.) 98/2021) where it is observed that while initiating Liquidation against the 'Corporate Debtor', inter alia made it clear that the object of the Code i.e. time is of the 'essence' has to be considered.

55. The contention projected on the side of the Respondent is that pursuant to the passing of the 'Liquidation' order by the 'Adjudicating Authority' the 'Liquidator' had received a scheme (u/s 230 of the Companies Act, 2013) from 'Equilibrated Venture C Flow P. Ltd.' and 'Shree Ambey Traders and Aggarwal Trading Co.', which was considered by the stakeholders of the 'Corporate Debtor' in terms of Regulation 2B of IBBI (Liquidation Process) Regulations and the same was rejected by the stakeholders, therefore, it is the plea of the Respondent that the decision of this Tribunal in 'Y Shivram's case is not being followed is contrary to facts, besides the same being a misconceived one.

56. The Learned Counsel for the Respondent submits that the 'Resolution Applicant' had submitted further revised 'Resolution Plan' dated 11.11.2019 on 12.11.2019 and that the Respondent convened a Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 59 | 72 ninth 'Committee of Creditors' (CoC) meeting dated 15.11.2019 for voting of the 'Resolution Plan'. The 'Resolution Plan' only secured 42.54% votes in favour and was not approved with requisite majority i.e. 66% as required

under the Code. In fact, the Appellant cannot assail the commercial wisdom of the 'Committee of Creditors' which paramount and supreme as held by the Hon'ble Supreme Court in catena of decisions in the case of 'Adhar' V. 'Indian Overseas Bank & Ors.' (Vide Civil Appeal No. 10673/2018) and further that the aforesaid view was affirmed in the decision of Hon'ble Supreme Court in the 'Committee of Creditors of Essar Steel India Ltd.' V. 'Satish Kumar Gupta & Ors.' (Civil Appeal No. 8766 - 67/19) and in the matter of 'Kalpraj Dharamshi & Anr.' V. 'Kotak Investment Advisors Ltd. & Anr.' (Vide Judgement in Civil Appeal No. 2943-2944 of 2020 dated 10.03.2021). Appraisal

57. It transpires that M/s. 'Hajura Singh Bhim Singh' had filed an application for petition as per Section 9 of the 'I&B' Code to initiate 'CIRP' against M/s. 'Best Foods Ltd.' (Corporate Debtor), which came to be admitted on 02.02.2018 and an 'Interim Resolution Professional' 'Mr. Atul Kumar Kansal' was appointed and later on 17.04.2008 through an order the said 'Interim Resolution Professional' was changed and one Mr. Vikram Bajaj came to be appointed as 'Resolution Professional'.

58. In fact, the 'Resolution Professional' of the 'Corporate Debtor' (M/s. Best Foods Ltd.) projected an 'Interlocutory Application' No. 412/2020(as Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 60 | 72 per Section 33(1)(a) of the 'I&B' Code praying for passing an order of Liquidation in the matter of M/s Best Foods Ltd. ('Corporate Debtor').

59. It is the plea of the Appellant that the 'Adjudicating Authority' while passing the impugned order on 01.03.2021 passed by the Adjudicating Authority initiating liquidation of the 'Corporate Debtor' (M/s Best Foods Ltd.) based on the I.A. 412/2020 filed by the formal 'Resolution Professional' (under Section 33(1)(a) of the I&B Code) now appointed as Liquidator, on the ground that no Resolution Plan was passed by the Committee of Creditors within the specified period and as such the requirement u/s 33(1)(a) stand fulfilled.

60. According to the Appellant, the 'Adjudicating Authority' at the time of passing an impugned order had failed to make an observation that the 'Resolution Plan' of the 'Resolution Applicant' was approved by 96.41% of voting share of the 'Committee of Creditors' of the 'Corporate Debtor' and added further, the 'Resolution Plan' once approved could not have permitted to be withdrawn by the 'Resolution Professional' of the 'Corporate Debtor' since it is in breach of the provisions of the 'I&B' Code, 2016.

61. It is brought to the forefront that resting upon the order dated 31.10.2019 passed by the 'Adjudicating Authority'(National Company Law Tribunal) Chandigarh Bench, Chandigarh the 'Resolution Plan' furnished by the 'Resolution Applicant'(Maritime Trade Corporation) was assessed by the 'Committee of Creditors' in its ninth meeting dated 15.11.2019. Indeed, the State Bank of India possessing 53.87% voting share - (one of Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 61 | 72 the members of the 'Committee of Creditors') refrained from voting because of pending approvals from its higher authorities for voting in respect of the 'Resolution Plan' and that the meeting was deferred. However, the fact of the matter is that other Members of the 'Committee of Creditors' (with a voting share of 42.54%) had voted in favour of the 'Resolution Plan'.

62. The Learned Counsel for the Appellant vehemently projects an argument that at the ninth meeting of CoC dated 15.11.2019, the Resolution on 'Liquidation of the Corporate Debtor' was rejected by the Committee of Creditors members with a requisite majority and hence, it is contended on behalf of the Appellant that neither any resolution for approval / rejection of Resolution Plan nor any Resolution for liquidation of the Corporate Debtor (Best Foods Ltd.) was passed at the meeting of the Committee of Creditors that took place on 15.11.2019.

63. The Learned Counsel for the Appellant puts forward a plea that later, through an e.mail dated 07.02.2020, the State Bank of India (possessing the voting share of 53.87%) expressed his approval and in fact, the 'Resolution Plan' was approved by 96.41% voting share, the Committee of Creditors only after applying its commercial wisdom had approved the Resolution Plan of the Resolution Applicant considering the viability and feasibility of the Resolution Plan. Therefore, it is a forceful stand of the Appellant that if a Resolution Plan was approved by the majority of the Committee of Creditors at a particular point of time, the same is not to be allowed to be withdrawn by the Resolution Applicant. Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 62 | 72

64. The other prime stand of the Appellant is that the Respondent / Liquidator filed IA 412/2020 before the 'Adjudicating Authority' praying for the liquidation of Corporate Debtor without securing the vote and resolution of the Committee of Creditors.

65. It is the version of the Appellant that the Resolution Professional had permitted the Resolution Applicant to withdraw the Resolution Plan which had led to a substantial waste of CIRP time period from 04.10.2019 when the Resolution Plan was submitted by the Resolution Applicant for the first time till 19.03.2020 when the 'Resolution Applicant' withdrew the Resolution Plan subsequent to the approval of the 'Committee of Creditors'.

66. It is represented on behalf of the Appellant that the 'Adjudicating Authority' had erred in allowing the Resolution Applicant to withdraw from the process when the CoC had already approved the Resolution Plan by 7.2.2020. Moreover, it is the stand of the Appellant when CA 1077/2019 filed by the Resolution Professional was pending for extension of time before the Adjudicating Authority, the aspect of preferring an application seeking liquidation of the Corporate Debtor does not arise.

67. According to the Respondent, the impugned order dated 01.03.2021 passed by the Adjudicating Authority in IA No. 412/2020 in CP(IB) No. 117/Chd/ChD/2017 filed by Respondent/ Petitioner / CoC/ Applicant Financial Creditor is free from error.

68. The plea of the Respondent is that in the event of no Resolution Plan is received before the expiry of the CIRP process, as per Section 33(1)(a) of Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 63 | 72 the Code, the Adjudicating Authority has necessary power(s) to pass a liquidation order in respect of the Corporate Debtor.

69. On the side of the Respondent it is emphatically submitted that the 'Resolution Applicant' withdrew from the 'Corporate Insolvency Resolution process' of the 'Corporate Debtor' in view of the changing economic situation and at the time of withdrawal by the Resolution Applicant on

19.3.2020 the CIRP period had already lapsed on 15.11.2019 and, therefore, the Resolution Applicant was not bound by the Resolution Plan. Purpose of I&B Code, 2016

70. It cannot be gainsaid that the aim of Resolution is for 'maximisation of value of 'Assets' of the 'Corporate Debtor' and thereby for the benefit of all 'Creditors'. The vital priority of objective is (i) Resolution (ii) maximisation of value of assets of the Corporate Debtor (iii) promoting entrepreneurship, availability of credit and balancing the interests. The Status of Resolution Plan

71. A 'Resolution Plan' is not a recovery / sale / auction / liquidation. Through a Resolution Plan no individual is purchasing or selling the 'Corporate Debtor' in fact, for selling the 'Corporate Debtor' there is no requirement of a 'Resolution Plan' in the considered opinion of this Tribunal. For approving a plan, there is no requirement of application of mind or voting as the case may be. No wonder, based on a 'Resolution Plan' few rights in the 'Corporate Debtor' or Assets and Liabilities are bartered, and that being an ancillary one as opined by this Tribunal. Submission of Resolution Plan Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 64 | 72

72. Be it noted, that the ingredients of Section 30 of the 'I&B' Code provides for the manner in which the Resolution Plan may be furnished by a 'Resolution Applicant'. A 'Resolution Applicant' may submit a 'Resolution Plan' to the 'Resolution Professional' who is to scrutinise the same with a view to find out that it fulfils of Section 30(2) of the Code. When the plan in issue, endorses the requirements as per Code, then it is to be projected before the 'Committee of Creditors' for its approval, in terms of the ingredients of Section 30(3) of the Code. Further, this can be approved by the 'Committee of Creditors' by a vote of not less than 66%(75% w.e.f 6.6.2018) as per Section 30(4) of the Code. Application of Judicial Mind

73. It is relevantly pointed out that if a 'Resolution Plan' is approved by the 'Committee of Creditors', the same is to be filed before the 'Adjudicating Authority' as per Section 31 of the Code and that the 'Adjudicating Authority' in such a situation is to take a decision after going through the Plan that it satisfies or does not satisfies the requirements mentioned in Section 30 and may either give a nod or reject the same as the case may be, in the teeth of the decision of Hon'ble Supreme Court in the 'Arcelor Mittal India Pvt. Ltd.' V. 'Satish Kr. Gupta', reported in 2018) 146 CLA 293 SC.

Approval of Resolution Plan

74. An 'Adjudicating Authority' prior to passing of an order is to see that the 'Resolution Plan' can be effectively implemented. The said Authority Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 65 | 72 if satisfied that the 'Resolution Plan' approved by the 'Committee of Creditors' as per Section 30(4) of the Code fulfils the requirement of sub- section 2 of Section 30 of the 'I&B' Code it shall approve the 'Resolution Plan' (after considering its feasibility and viability etc.) which will bind the 'Corporate Debtor', its Employees, Members, Creditors, Guarantors and others concerned with the 'Resolution Plan'. If the plan fails/does not meet the requirement of sub-section 2 of 30 then the 'Adjudicating Authority' is bound to reject the 'Resolution Plan'.

Discussions

75. At the outset, this Tribunal necessarily points out that in the instant case on 02.02.2018, the Insolvency had commenced and that the Respondent was appointed as 'Resolution Professional' on 17.04.2018. To put it precisely, the 180 days 'Corporate Insolvency Resolution Period' got expired on 01.08.2018. In fact, the 'Adjudicating Authority' by virtue of an order dated 01.08.2018 had granted extension of 90 days in respect of the CIRP period and that 270 days was over on 30.10.2018.

76. It is worthwhile for this Tribunal to make a significant mention that the 'Resolution Professional', on 06.11.2018 had submitted his final report mentioning that no Resolution Plan could be approved as per Section 30(6) of the I&B Code during the CIRP period, because of the fact that the 'Resolution Plan' of the Maritime Trade Corporation was nonconforming and sought resultant directions for initiation of liquidation, as per Section 33(1)(a) of the I&B Code.

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77. It transpires that the Applicant / Resolution Applicant (Maritime Trade Corporation) had filed CA No. 603/2018 in CP(IB)117/Chd/CHD/2017(u/s 60(5) of the I&B Code) before the 'Adjudicating Authority' (National Company Law Tribunal) Chandigarh Bench against the Corporate Debtor (M/s Best Foods) and on 31.10.2019 the 'Adjudicating Authority' had interalia directed the Resolution Professional to convene a meeting of CoC and to place the revised Resolution Plan three option one and option two before the CoC which shall consider the same, vote upon the same and to take appropriate decision either for approving the Resolution Plan or for reiterating its earlier decision for liquidation of the Corporate Debtor etc. Also, it was ordered by the 'Adjudicating Authority' that the entire exercise including filing of an application u/s 31 or conveying the decision of the CoC to reiterate initiation of liquidation process of the Corporate Debtor, as the case may be shall be completed within a period of 90 days from the commencement of the Insolvency and Bankruptcy Code (Amendment Act, 2019) as provided for in the third proviso to Section 12(3) of the Code.

78. In the present case, it cannot be brushed aside that the 'Committee of Creditors' had rejected the Resolution Plan in the meeting that took place on 15.11.2019. Moreover, the 'Corporate Insolvency Resolution Process' came to an end on 15.11.2019, which date 651 days rolled by from the commencement date of insolvency on 02.02.2018.

79. As a matter of fact, the Resolution Applicant, on 19.11.2019 had acknowledged the rejection of its Resolution Plan by the Committee of Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 67 | 72 Creditors and had prayed for the refund of 'Earnest Money Deposit' and subsequently had requested for a deliberation / discussion with the State Bank of India for mutual Resolution of the concerns of the Bank. Apart from that, the Resolution Professional filed CA 1077/2019 on 19.11.2019 and sought for an additional 75 days to complete the CIRP process.

80. It is to be remembered that the expression/discussion by means of exchange of views in respect of the 'Resolution Plan' between the 'State Bank of India' and 'Resolution Applicant' after the lapse of expiry of CIRP period was on account of the bilateral participation between the 'Resolution Applicant' and the 'State Bank of India' had only enabled to reach an agreement in the interests of Resolution and unfortunately, the same proved futile.

81. It is brought to the notice of this Tribunal that the State Bank of India through e.mail dated 7.2.2020 had conveyed its approval of Authorities with conditions of changes being carried out by the Resolution Applicant in the Resolution Plan. In this connection, it may not be out of place for this Tribunal to make a relevant mention that the 'Resolution Applicant' had not submitted the 'Resolution Plan' as envisaged by the State Bank of India.

82. Continuing further, any alteration / change to the Resolution Plan is to be once again examined by the Resolution Professional and due certification is required that the Plan is in conformity with the provisions of the Code, prior to placing of the same before the Committee of Creditors for voting.

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83. In the teeth of e.mail of the State Bank of India dated 07.02.2020 whereby and where under the Bank had conveyed his approval of its authorities in respect of the Resolution Plan subject to some changes been carried out by the Resolution Applicant, by no stretch of imagination, in the considered opinion of this Tribunal, it can be said that the Resolution Plan was approved by the CoC. Keeping in mind that many requirements are to be fulfilled as per I&B Code and Regulations for securing the approval of Committee of Creditors and filing an application as per Section 30(6) of the Code for an approval of the Adjudicating Authority.

84. In the instant Appeal, the Respondent has come out with a stand that the CoC became 'Functuous Officio' on 15.11.2019 pursuant to the lapse of CIRP period and in fact, the discussions on the 'Resolution Plan' after the 'Corporate Insolvency Resolution' period took place between the State Bank of India and the Resolution Applicant and not through the Committee of Creditors in and by which no accord/agreement was arrived at because of the fact the Resolution Applicant had not submitted the Resolution Plan incorporating the changes advised by the State Bank of India and had not accepted the terms for performance guarantee.

85. From the Respondent's point of view, a stand is taken that the 'Committee of Creditors' never approved the 'Resolution Plan', and hence there was no occasion for the issuance of 'Letter of Intent' to the Resolution Applicant / Deposit of performance security / acceptance of Letter of Intent by the Resolution Applicant and for preferring an application u/s 30(6) of the Code.

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86. In the present case, it is to be borne in mind that the Resolution Applicant had acknowledged the decision of the CoC in regard to the rejection of the Resolution Plan through an email dated 19.11.2019 and claimed the refund of the 'Earnest Money Deposit'. Further, it cannot be lost sight of that the Resolution Applicant had not furnished the revised Resolution Plan including the suggested changes and instead proposed, more modifications to the commercials and term of the Resolution Plan and later withdrew its interest in any Resolution Plan. Suffice it for this Tribunal to point out that on 19.3.2020 the Resolution Applicant withdrew its interest for pursuing the Resolution Plan, perceiving that the Committee of Creditors had not approved the Resolution Plan till date of withdrawal. To put it in a crystalline fashion, in the absence of any Resolution Plan, seeking an

extension of 'Corporate Insolvency Resolution Process' CIRP period through an Interlocutory Application No. 1077/2019 would not survive.

87. In the present case, indisputably, the CIRP period came to an end on 15.11.2019 and because of the direction dated 30.10.2019 issued by the 'Adjudicating Authority' the 'Resolution Professional' had no option but to file an IA. No. 412/2020 praying for a 'Liquidation Order' be passed as per Section 33(1)(a) of the Code. Moreover, liberty was prayed for to withdraw an application seeking extension of CIRP period as grounds were claiming extension and holding further CoC meeting for consideration of Resolution Plan had disappeared and the CIRP period got lapsed on 15.11.2019. Ultimately, the 'Liquidation Order' was passed on 01.03.2021 Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 70 | 72 of course, after 1123 days (making a calculation) from the date of commencement of insolvency date on 2.2.2018.

88. Be that as it may, in view of the detailed upshot, this Tribunal considering the facts and circumstances of the entire conspectus of the instant case in an encircling manner, bearing in mind a primordial fact that the 'Committee of Creditors' had not approved the 'Resolution Plan' till 15.11.2019(viz. the final day of CIRP), the CIRP period was not extended by the Adjudicating Authority on 19.03.2020 when the Resolution Applicant / Maritime Trade Corporation had withdrew its interest for pursuing the Resolution Plan, the CoC becoming 'Functuous Officio' and the Resolution Applicant despite the State Bank of India conveying the acceptance of Plan by its authorities subject to the inclusion of changes proposed by its legal team on 07.02.2020 and the 'Resolution Applicant' / Maritime Trade Corporation had not submitted the modified 'Resolution Plan' etc.; comes to a consequent conclusion that in the present case, there is no approved plan of the 'Committee of Creditors'. Looking at from that perspective the impugned order dated 01.03.2021 in IA No. 412/2021 in CP(IB) No. 117/Chd/ChD/2017 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Chandigarh Bench in directing the Corporate Debtor/Best Foods Ltd. to be Liquidated in the manner as laid down in Chapter III of the Code etc. and disposing of the aforesaid Interlocutory Application is free from any legal errors. Resultantly, the Appeal sans merits.

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89. Disposition In fine, the instant Company Appeal (AT) (Insolvency) No.276 of 2021 stands dismissed. No order as to costs. I.A. No. 638/2021 (for stay) and I.A. No. 639/2021 (claiming exemption from filing typed copies etc.) are closed. Before parting with the instant case, this Tribunal pertinently suggests that the 'Liquidator' may explore the possibility of selling the Company/business as a 'going concern', mainly with a view to see the livelihood of workers employed in Company/business.

[Justice M. Venugopal] Acting Chairperson [V.P. Singh] Member (T) [Dr. Ashok Kumar Mishra] Member (T) 29th September, 2021 Shashi Company Appeal (AT) (Insolvency) No.276 of 2021 P a g e 72 | 72