

Amit Goel vs Ms. Piyush Shelters India Pvt.Ltd. & Ors on 18 January, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 700 of 2021

IN THE MATTER OF:

Amit GoelAppellant
Through Power of Attorney Holder
Ms. Pooja Chaudhary,
D/o Mahipal Singh,
R/o 176m Shyam Colony, Ballabgarh,
Faridabad

Versus

Piyush Shelters India Private Ltd. ... Respondent No.1
Through Resolution Professional
Shri Swami Deen Gupta,
Registered Office:
2/64, VisheshKhand, Gomti Nagar,
Lucknow.

Committee of Creditors, ... Respondent No.2
M/s. Piyush Shelters India Private Ltd.,
Service to be effected through Resolution Professional,
Shri Swami Deen Gupta,
Registered Office:
2/64, Vishesh Khand, Gomti Nagar,
Lucknow.

Shri Naveen Kumar Gupta ... Respondent No.3
R/o H. No. 744, Pocket-E,
Mayur Vihar, Phase II,
Patparganj, Delhi.

M/s. Maya Buildcon Private Limited ... Respondent No.4
Registered Office:
H. No. 744, Pocket-E,
Mayur Vihar, Phase II,
Patparganj, Delhi.
Authorized Signatory Shri Naveen Kumar Gupta,
Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021

R/o H. No. 744, Pocket-E, Mayur Vihar, Phase-II,
Patparganj, Delhi.

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Geotech Homz Private Limited ... Respondent No.5
Having its Registered Office at:
H. No. 744, Pocket-E,
Mayur Vihar, Phase II,
Patparganj, Delhi - 110092.
Authorized Signatory Shri Naveen Kumar Gupta,
R/o H. No. 744, Pocket-E, Mayur Vihar, Phase-II,
Patparganj, Delhi.

Present:

For Appellant: Mr. Sanchit Garg, Advocate
For Respondent: Ms. Babita Jain, Advocate (RP-R1)
Mr. Sanjeev Panda, Advocate (R3-5)

With

Company Appeal (AT) (Ins) No. 761 of 2021

IN THE MATTER OF:

Harjeet Kaur ...Appellant
W/o Sh. S. Sukhwant Singh,
Financial Creditor of
Piyush Shelters India Private Limited,
R/o 5-B/1 (B.P.), N.I.T. Faridabad.
Haryana

Versus

Mr. Swami Deen GuptaRespondent No. 1
Resolution Professional,
Piyush Shelters India Private Limited,
R/o 2/64, Vishesh Khand, Gomti Nagar,
Lucknow. Uttar Pradesh - 226010.

Shri Naveen Kumar GuptaRespondent No. 2
R/o H. No. 744, Pocket-E,
Mayur Vihar, Phase II,
Patparganj, Delhi - 110091.

Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021

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M/s. Maya Buildcon Pvt. Ltd.Respondent No. 3
Having its Registered Office at:
744, Pocket-E, Mayur Vihar - II,
New Delhi - 110092.

Geotech Homz Private Limited,Respondent No. 4
Having its Registered Office at:

H. No. 744, Pocket-E,
Mayur Vihar, Phase II,
Patparganj, Delhi - 110092.

Present:

For Appellant: Dr. Amit Geroge, Mr. Piyo Harold, Mr.
Amol Acharya, Mr. Bharat, Mr. Sahil
Garg and Mr. Prateek Vats, Advocates
For Respondent: Ms. Babita Jain, Advocate (RP-R1)
Mr. Sanjeev Panda, Advocate (R2-4)

With

Company Appeal (AT) (Ins) No. 925 of 2021

IN THE MATTER OF:

Shri Bala PareekAppellant No. 1
H.NO. 1361, Sector 9,
Faridabad - 121006

Shri Yogesh ChandanAppellant No. 2
R/O 882, Sector 21 C, PART - II
Faridabad - 121001.

Ms. Pushpa DwivediAppellant No.3
R/O A-403, Kesar Garden, Sector 48
NOIDA - 201301

Versus

Mr. Swami Deen Gupta Respondent No.1
Resolution Professional
Piyush Shelters India Private Limited
Address :- 2/64, Vishesh Khand, Gomti Nagar,
Lucknow - 226010 UP

Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021

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CONSORTIUM OF MEMBERSRespondent No. 2
(Represented by Lead Authorized Representative
Naveen Kumar Gupta)
Address :- H.No. 744, Pocket E,
Mayur Vihar, Phase II, Patparganj
Delhi - 110091

Present:

For Appellant: Mr. Jayprakash B Somani, Mr. Videh
Vaish and Mr. Lalit Mohan, Advocates
For Respondent: Ms. Babita Jain, Advocate (RP-R1)

JUDGMENT

(Date: 18.01.2022) (Virtual Mode) [Dr. Alok Srivastava, Member (Technical)] This judgment relates to three appeals, namely Company Appeal (AT)(Ins) No.700/2021, Company Appeal (AT)(Ins) No. 761/2021 and Company Appeal (AT)(Ins) No. 925/2021, which have been filed under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (hereafter called "IBC") assailing the judgment dated 14.7.2021 passed in CA No. 371/2019 in Company Petition No.322/ALD/2018 (hereafter referred to as "Impugned Order") by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench). All the three appeals have been filed against and assailing the common Impugned Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Order. Therefore, these appeals are being disposed off through this common judgment.

2. By the Impugned Order dated 14.7.2021, the Adjudicating Authority has approved the resolution plan submitted by Mr. Naveen Kumar Gupta as lead member of the consortium of Maya Buildcon Private Ltd., Geotech Homz Private Ltd. and Naveen Kumar Gupta, which is the successful resolution applicant.

3. The brief facts of the case as presented and argued by the appellants is that CIRP was initiated with respect to the corporate debtor Piyush Shelters India Pvt. Ltd. vide order of Adjudicating Authority on 03.12.2018 and Shri Swami Deen Gupta was appointed as the IRP. In August 2019 the final resolution plan was submitted and before the e-voting could take place on 25.08.2018 the Maya Group withdrew its resolution plan citing some defects in the lease deed that would hamper the execution of the resolution plan, if approved. The RP thereafter filed application before the Adjudicating Authority for rejection of this resolution plan.

4. The Appellants have stated that later, in the 8th CoC meeting which took place on 25.09.2019, it was decided to publish Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 the 4th Expression of Interest (EOI) which was published in Jansatta and Financial Express newspapers on 01.10.2019 with last date for submitting EOI on 07.10.2019. It is claimed by the appellants that Maya Buildcon, which had earlier withdrawn its resolution plan, filed CA no. 282/2019 before Adjudicating Authority that it be allowed to submit a revised resolution plan. This application remained pending but the RP allowed a consortium which included Maya Buildcon to submit a resolution plan and place it before the CoC for consideration. A revised plan was subsequently approved by the CoC in e-voting held on 6/7 November 2019. While the resolution plan was pending consideration of the Adjudicating Authority an applicant Vishal Saxena, who could not file his claim in time. obtained order of the Adjudicating Authority in CA No. 12/2020 on 3.2.2020, for admission and consideration of his claim. The appellants have further stated that while Vishal Saxena's claim and other claims that were filed after delay were admitted/accepted by the RP, the resolution plan approved by the CoC and the Adjudicating Authority the Impugned Order has created two separate categories of financial creditors in class - one of „claimants who filed their claims in time, and the other of „non-claimants who could not file their claims in time. The two categories have received

different shares in the approved resolution plan, and so while the Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 „claimants have received possession of the booked properties, the „non-claimants have got just 10% of their booked amount after verification of their claims within one month, and thereafter all such claims would stand extinguished.

5. The appellants have also stated that the Authorized Representative of the Homebuyers/allottees, who are financial creditors in class did not seek the views of the allottees prior to CoC meeting as is required in Section 25A, but the voting by allottees took place alongside the e-voting on the resolution plan in CoC thereby flouting the provision of section 25A in letter and spirit and as a result, the interests of the majority of homebuyers/allottees have been compromised.

6. The Appellants in the three appeals have assailed the Impugned Order on the following grounds: -

(i) The Learned Adjudicating Authority has passed the Impugned Order in CA No. 371/2019 while an earlier CA No. 282/2019 filed by the Resolution Applicant for consideration of his resolution plan was pending before the Adjudicating Authority. Since no orders have been passed in CA No. 282/2019, the Committee of Creditors (CoC) could not have considered the Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 resolution plan submitted by the consortium.

(ii) In the ninth meeting of CoC held on 1.11.2019, the CoC failed to consider the circumstances under which the earlier resolution plan of the Maya Group was withdrawn and revised resolution plan was being considered

(iii) Section 25-A of the IBC clearly stipulates that the authorized representative of the financial creditors in class (in this case homebuyers) shall attend the meeting of CoC on their behalf and vote in accordance with prior instructions of the financial creditors in class. In the present case the e-voting of the financial creditors in class took place along with e-voting on the resolution plan by the CoC which is evident from the results of e-voting. Thus, no prior voting by the financial creditors in class was organized by the authorized representative, thereby contravening provisions of Section 25A of the IBC.

(iv) The Resolution Professional should have considered maximization of value of the assets of the Corporate Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Debtor which was not done and the liquidation value is not sufficient to cover the amounts owed to financial creditors and other creditors.

(v) Only 222 homebuyers/allottees, out of a total of 473 homebuyers/allottees, have filed claims before the RP and claims of remaining 251 allottees have been almost extinguished with the approval of the resolution plan. The 251 homebuyers/allottees could not file their claims because wide publicity was not given to the CIRP as the newspapers in which the public notices appeared are published from New Delhi, whereas the project is situated in District Faridabad(Haryana) and registered office

of Corporate Debtor is in Meerut (UP).

7. The arguments presented by Learned Counsels for Appellants, RP and Successful Resolution Applicant were heard by us and records perused.

8. The Appellant-Harjeet Kaur in Company Appeal (AT) (INS) No. 761 of 2021, is an allottee in the project of the Corporate Debtor. Similarly, the Appellant in Company Appeal (AT) (Ins) No. Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 925 of 2021, Shri Bala Pareek and others are also allottees of the Corporate Debtor. The Learned Counsels for Appellants in CA 761 of 2021 and CA 925 of 2021 have claimed that the approved resolution plan gives unequal treatment to the same category of financial creditors thus discriminating between financial creditors of the same class. The final resolution plan provides as follows in its Para V(7) (at Pg. 153 of the Appeal Paperbook in Company Appeal No. 700 of 2021):-

"The allottees with MOU, who have not filed their claim till the last date of filing resolution plan, shall not be entitled for any relief or claim for possession over the property, whether paid in full or part. However, resolution applicant make an offer for them to take 10% of the verified amount within a period of one month and thereafter their claim shall be treated as abandoned."

9. The Learned Counsels for Appellants in all the appeals have argued that the authorized representative of financial creditors in class did not follow the provision of Section 25A of the IBC in letter and spirit and so he held the e-voting for financial creditors in class alongwith e-voting on the resolution plan in the CoC, which did not allow the homebuyers/allottees to consider and discuss Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 between themselves various aspects of the proposed resolution plan as a class of financial creditors. They have also argued that CoC, in the ninth meeting, while considering the revised resolution plan submitted by the resolution applicant, issued notice on 5th November 2019 for e-voting to take place on 6th and 7th November 2019, and thus there was insufficient time provided to the financial creditors in class for giving due consideration to various aspects of the resolution plan. He has also argued that the resolution plan is based on liquidation value of Rs. 40 Crores, which is approximately 30% of the total resolution debt and, therefore, insufficient to cover the amount owed to financial creditors in full and any payments to operational creditors or other creditors, including statutory due holders would be nil. Such meager or no payments would be gross injustice to the creditors.

10. Thus, The Ld. Counsels for Appellants Harjeet Kaur, Bala Pareek and others have claimed, the plan imposes a 90% haircut on the legitimate claims of Appellant Harjeet Kaur and 33 similarly based allottees solely on the ground that the claims of the Appellant were received after approval of the resolution plan by the CoC. He has also claimed that even though the Appellants Harjeet Kaur, Bala Pareek and others had filed their claim belatedly, they were accepted and admitted by the Resolution Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Professional and included in the list of claims of financial creditors. He has further adverted to the order dated 3.2.2020 passed by the Adjudicating Authority in CA No. 12/2020, which is an application filed by an investor Vishal Saxena whose claim had earlier been rejected by the Resolution Professional on the ground of delay

by which the Adjudicating Authority directed the RP to admit and consider the claim stating that a claim cannot be rejected by RP solely on the ground of delay by the Applicants in filing their claim. He has argued that all similarly situated claimants should be get their due claims.

11. The Ld. Counsel for Appellants in CA No. 761/2021 has further claimed that thus no information was given to the Appellants regarding the CIRP, and moreover the approved resolution plan is not fair and equitable to financial creditors of the same class and unequal treatment has been meted out to them. He has referred to the judgment of Hon ble Supreme Court in Committee of Creditors of Essar Steel India Limited versus Satish Kumar Gupta (Civil Appeal No.8766-67 of 2019) that equitable treatment has to be given to creditors who are similarly situated.

12. The Learned Counsels for Appellants Harjeet Kaur, Bala Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Pareek and others have also claimed that the publication of the public announcement was done in two newspapers, namely „Financial Express and „Jansatta , both published from New Delhi, which do not have wide circulation in either Meerut (where the registered office of Corporate Debtor was located) or Faridabad (where the project under question was being developed) and therefore, more than 50% of the homebuyers/allottees could not file their claims before the Resolution Professional in time. While clarifying, he has further stated that out of 473 number of allottees, only 222 have filed their claims before the RP while the claims of 251 allottees could not be filed in time leading to the extinguishing of their claims in the resolution plan. He has also claimed that the e-voting of the financial creditors in class has taken place along with e-voting on the resolution plan on 6th and 7th of November 2019, which is not in accordance with the requirement of Section 25-A of the IBC, where financial creditors in class have to be consulted „prior to the actual voting in the CoC, where the Authorized Representative has to present the views of the financial creditors in class. Since all the financial creditors voted alongside the CoC members, a legal fiction was created which was against the spirit of Section 25A. Therefore, grave injustice will be caused to the large number of homebuyers/ allottees, who have more than 79% vote share in the CoC, and Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 hence the Impugned Order should be set aside.

13. In arguments, the Learned Counsel for RP has claimed that the appeals have been filed after the stipulated period of 30 days after passing of the Impugned Order on 14.7.2021 and, therefore, they are barred by limitation. The Learned Counsel for the Resolution Professional has also argued that the Appellant Amit Goel(in Company Appeal (AT)(Ins) No. 700 of 2021) is not an aggrieved person as he is a suspended director of the erstwhile Corporate Debtor, and hence does not have locus standi for filing this appeal. She has further claimed that Impugned Order approving the resolution plan can only be appealed against under Section 61(3) of the IBC on grounds of material irregularity but the Appellant has not been able to show any material irregularity in the resolution plan. She has further argued that the extended CIRP period was coming to end on 13th November 2019, and therefore, the resolution process had to be completed within this time period. She has added that the reason why the CoC did not await the decision of the Learned Adjudicating Authority in CA No. 282 of 2019 filed by Maya Buildcon was because RP s efforts were focused on obtaining a workable resolution plan rather than to put the corporate debtor in liquidation and RP was working under constraint of time in the extended CIRP. She has further claimed Company Appeal (AT) (Ins) Nos.

700, 761 & 925 of 2021 that the resolution plan has been approved by the CoC in its commercial wisdom, and therefore, such action of CoC is beyond judicial review.

14. In support of this contention, she has cited the judgment of Hon ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited versus Satish Kumar Gupta (2020 8 SCC 531). She has also cited Hon ble Supreme Court's judgment in Swiss Ribbons (P) Ltd. versus Union of India (2019 4 SCC 17) to emphasize that liquidation of the Corporate Debtor should be allowed only as a last resort and all efforts should be made for obtaining a successful resolution plan.

15. The Learned Counsel for Resolution Professional has further stated that after the approval of the resolution plan by the CoC, it has been accorded approval by the Adjudicating Authority, and hence all claims, that are not included in the resolution plan stand extinguished, as has been held by the Hon ble Apex Court in Ghanshyam Mishra and Sons Pvt. Ltd. versus Edelweiss Asset Reconstruction Company Ltd. (Civil Appeal No. 8129 of 2019, decided on 13.4.2021). She has further clarified that the resolution plan, which was earlier withdrawn, was actually submitted by a consortium of "One City Infrastructure Private Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Limited" and "APM Infrastructure Private Limited" and not submitted by the Maya Group as has been alleged by the Appellant, and hence no special favour is being shown to the Maya Group.

16. The Learned Counsel for the Resolution Professional has with regard to appeals CA Nos. 761 of 2021 and 925 of 2021, stated that the CoC, which includes real estate allottees being creditors in class has approved the resolution plan by giving more than 50% votes in e-voting held on 6/7th November 2019, and so the creditors in class do not now have any locus to challenge the approved plan as has been held by Hon ble Supreme Court in the matter of JP Kensington Boulevard Apartments Welfare Association and Others versus NBCC (India) Limited and Others (Civil appeal no. 3395 of 2020). Moreover, the Learned Counsel has urged that the real issue before the Resolution Professional was to avoid liquidation of the Corporate Debtor as that would mean certain corporate death of the Corporate Debtor, and therefore the Resolution Professional took quick steps to obtain a workable resolution plan and get it approved by the CoC and thereafter put it up before the Adjudicating Authority for final approval before the extended CIRP would be over on 13 November 2019.

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17. He has also urged that the Adjudicating Authority, in application CA 12/2020, filed by Vishal Saxena, has directed that the claim of Applicant was to be accepted and verification and determination based on material produced before it was to be done by the Resolution Professional. Thus 33 belated claims, including the claim of the Appellant, was accepted by the Resolution Professional as per directions of Adjudicating Authority in order dated 3.2.2020 in application CA 12/2020. But since they were included as non-claimants in the information memorandum, which was the basis for preparation of resolution plan, the Resolution Professional offered 10% of the claim amount, and this provision was approved by the CoC in its commercial wisdom in e- voting held on 6/7.11.2019.

18. All the three appeals under consideration assail the Impugned Order dated 14.7.2021, and all were filed before 2.10.2021. Hon ble Supreme Court in Miscellaneous Application No. 665/2021 in SMW (C) No. 3/2020 has passed a suo moto order that in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.3.2020 till 2.10.2021 shall stand excluded from limitation period. Since the Impugned Order was passed on 14.7.2021 and all the appeals were filed Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 before 2.10.2021, therefore, they are all within limitation by virtue of the above stated suo moto order of Hon ble Supreme Court.

19. It is admitted by the Resolution Professional in its reply to Company Appeal (AT)(Ins) 700/2021 that even though the Resolution Applicant (Consortium led by Naveen Kumar Gupta) had not submitted its resolution plan within the stipulated time limit, the Resolution Professional went ahead to seek CoC approval of its resolution plan through e-voting on 6/7 November 2019 since the CIRP period was to come to an end on 13.11.2019. He has also admitted in sub-para (xiv) in para-wise reply (page 39 of reply of Resolution Professional in CA No. 700/2021) that CA 282/2019, which was filed by Maya Buildcon seeking permission to submit a resolution plan since it had not participated in the process of invitation of EOI, was pending before the Adjudicating Authority. Thus, it is quite clear that having once refused to allow the consortium, of which Maya Buildcon was a partner, to participate in the resolution process, and on which Maya Buildcon filed CA 282/2019 to seek Adjudicating Authority's order for permission to participate in the resolution process, the Resolution Professional decided on his own to obtain resolution plan from a consortium which had not through the EOI route in time and place it before the CoC for consideration. This plan was later approved Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 by the CoC vide voting on 6th and 7th November 2019. Thus we do not think that the way this entire process was carried out was in accordance with legal provisions. We feel that a new round of Expressions of Interest should have been invited, which should have been done after wide publicity with sufficient time for resolution applicants to apply. Short-circuiting the process to include an applicant who did not apply in the EOI stage is not in accordance with legal provisions.

20. We also consider the objections raised by the Learned Counsel for Resolution Professional regarding there being no locus or entitlement of the suspended director Amit Goel, who is Appellant in CA No. 700 of 2021, in preferring the appeal. We feel that a suspended director of the former Corporate Debtor does have interest in the successful resolution of the corporate debtor with which he was earlier connected. Company Appeal No. 761 of 2021 and Company Appeal No. 925 of 2021, both of which are filed by the homebuyers/allottees who are financial creditors in class but whose claims have not been accepted, are interested parties who have stake in successful resolution of the Corporate Debtor and therefore they are entitled to prefer appeal.

21. In Company Appeal (AT)(INS) Nos. 761/2021 and 925 of Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021, the Appellants Harjeet Kaur, Bala Pareek and others are Memorandum of Understanding holders (also called „MoU holders“) of the erstwhile Corporate Debtor and Shri Bala Pareek has been appointed as authorized representative of the Appellants for filing the appeal. The Appellants have claimed that as MoU holders of the Corporate Debtor they have been placed in the category of „Non- Claimants“ in the approved resolution plan. Their claim is that the „Non-Claimants“ category has been decided without the Appellants being made a part of the

resolution process. Thus, their claim as well as debt owed by the Corporate Debtor has been extinguished in the successful resolution plan. They have further claimed that the effect of the approved resolution plan would be that the Appellants shall lose their right over the properties which were supposed to be handed over to Appellants as the documents such as the MoU executed by the Corporate Debtor and the amounts received by the Appellants for depositing various amounts have been declared null and void with the approval of the resolution plan, and within one month, the properties that were supposed to be handed over to the Appellants will automatically become an asset of the Successful Resolution Applicant. Even otherwise, if the non-claimants submit their documents for verification within one month of the approval of plan they will receive just 10% of their deposited amount. The Appellants have Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 claimed that this is denial of natural justice to them as the rights for their properties called their properties has been extinguished without hearing them in the preparation/approval of the resolution plan. The Appellants have further claimed that there has been a differential treatment in the resolution plan wherein claimants have been given their properties subject to certain conditions and MoU holders have been made non-claimants with just no requests to the properties booked by them.

22. We now examine the allegation of the Appellants that the provisions of Section 25A were not complied with in letter and spirit of the IBC. Section 25A of the IBC is as hereunder -

"Section 25A: Rights and duties of authorised representative of financial creditors.

25A. (1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means. (2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents. (3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-

section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote:

Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3).] (4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

Explanation.- For the purposes of this section, the "electronic means" shall be such as may be specified."

23. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereafter called "Insolvency Process Regulations") lays down the following regarding Authorised Representative, circulation of agenda to creditors in a class and Meetings of the Committee of Creditors:

Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 "16A. Authorised representative Xxx xxxxxx (5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorized representative as and when the list is updated.

Clarification: The authorized representative shall have no role in receipt or verification of claim of creditors of the class he represents.

xxx xxxxxx (9) The authorized representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

19. (1) Subject to this Regulation, a meeting of the committee shall be called by giving not less than five days notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post, but in any event, be served on every participant by electronic means in accordance with Regulation 20."

24. As the provision under sub-section 3 of section 25A clearly lays down, the Authorized Representative shall always act with the „prior instructions of the financial creditors he represents. Furthermore, sub-section 4 of section 25A provides that the Authorized Representative shall file with the Committee of Creditors any instructions received from Financial Creditors to Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 ensure that appropriate instructions of the financial creditors he represents is correctly recorded by the Resolution Professional. The import of

sub-sections 3 and 4 of section 25A is very clear that the views of financial creditors in class should be sought in an appropriate manner by the Authorized Representative prior to the CoC Meeting. Provision for receiving "prior instructions", and filing them with the Committee of Creditors beforehand so that it is recorded properly, is included in the procedure to ensure that the views of creditors in class are appropriately sought, received and conveyed to the Committee of Creditors through the Resolution Professional. Furthermore, the use of word "prior" also implies that the financial creditors in class shall have sufficient time to consider collectively the issue/s before them and after voting which is recorded by the Authorized Representative, the result is conveyed to the Committee of Creditors.

25. In the present case, we further find that the instructions for e-voting on the agenda item relating to the approval of the resolution plan was sent by the RP vide e-mail dated November 5, 2019 addressed to the Authorized Representative of financial creditors in class (attached at pp. 248 - 250 of the Appeal paperbook in Company Appeal 700/2021). The instructions include information about the voting period, which is to begin on 6th Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 November 2019 at 6 pm and close on 7th November 2019 at 1 pm (page 249 of appeal paper book, Company Appeal 700/2021). Thus an e-mail was sent to the Authorised Representative by the RP at 4:35 pm on November 5, 2019 informing of the start of voting on 6th November at 6 pm was hardly 25.5 hours in advance. Regulation 19 of Insolvency Process Regulations stipulates that notice of the CoC meeting shall be given at least five days in advance which was not done in the present case. Furthermore, sub-regulation (9) of Regulation 16A requires the authorized representative to circulate the agenda and give voting instructions to creditors in class he represents at least twenty hours in advance and keep the voting window for creditors in class open for at least twelve hours. In the present case separate voting among the financial creditors in class was not organized by the authorized representative. Thus the provisions laid down for organizing voting among financial creditors in class of homebuyers /allottees were not followed. We thus find that neither the RP organized the CoC meeting in the manner laid down in Insolvency Process Regulations and the Authorized Representative also failed to organize prior consultation with the homebuyers/allottees as is required under Section 25A.

26. We find that on the contrary the e-voting on the proposed Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 resolution plan by the financial creditors in class was held simultaneously with the e-voting on the resolution plan by the members of the CoC, as is clear from pp. 238 - 240 of the Appeal paperbook in Company Appeal of 700/2021. The e-voting among homebuyers/allottees was thus carried out but not in accordance with the provisions of Insolvency Process Regulations, in a fashion which can be called vitiated and against the letter and spirit of law. It did not provide sufficient time to the financial creditors to consider the various aspects of the proposed resolution plan, meet together to discuss and vote upon it and thereafter for the Authorized Representative to present the views of financial creditors in class to the CoC. Moreso, when the financial creditors in class (homebuyers/allottees) constitute more than 79% of total voting rights in the CoC, following such a slipshod procedure is nothing short of creating a legal fiction without conforming to the letter and spirit of section 25A of IBC and Insolvency Process Regulations.

27. We now turn our attention to the allegation of the Appellants that due to inadequate publicity regarding the initiation of CIRP of the Corporate Debtor, they were not aware of the public announcement, and hence could not file their claims with Resolution Professional in time. The replies on behalf of Resolution Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 Professional submitted in CA No. 700 of 2021 at page 26, para 30 mentions that, "That it is respectfully submitted, that, the erstwhile resolution professional did not get any cooperation from the Appellant as was statutorily required from him for discharge of duties by the resolution professional during the CIRP of Corporate Debtor, further, the registered office of the Corporate Debtor at Meerut was closed and the only principal place of business at Faridabad as per MCA records -Piyush Global situated at Plot 5, YMCA Chowk, Delhi Mathura Road, Faridabad (HR) which was sealed by the secured financial creditor - HDB Financial Services Limited (HDBFS) under SARFAESI Act, 2002 and Municipal Corporation of Faridabad (MCF) since prior to start of CIRP on 3rd December, 2018. Further, all the employees of the Corporate Debtor had left and no employees of the Corporate Debtor were on the rolls of the corporate debtor as on insolvency commencement date on 3rd December 2018. All the business operation of the Corporate Debtor was also closed."

28. Thus we see that the homebuyers/allottees could not have had access to either the registered office of the corporate debtor or Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 the principal place of business at Faridabad since both were closed. Moreover, without the meeting/getting together by the homebuyers/allottees, it was not easy for them to discuss and convey their views to the Authorized Representative who would then represent their views in the CoC. When we see that out of a total of 473 home buyers/allottees only 222 allottees could file claims in time before the Resolution Professional and 251 allottees could either not do so or did so belatedly, we feel that exclusion of more than 251 i.e. about 53% of total homebuyers/allottees cannot lead to a fair and just resolution of the Corporate Debtor. We also feel that the providing 10% of the claimed amounts to homebuyers/allottees who could not file their claims in the circumstances of this case is an unfair and inadequate treatment of the financial creditors.

29. The Learned Counsel for Appellant in Company Appeal No. 761 of 2021 has stated that the Adjudicating Authority had through an order dated 3.2.2020 in CA No. 12/2020 in CPIB 322/ALD/2018 directed the Resolution Professional to accept the claim of the Applicants and consider them on merits subject to proper verification. He has further claimed that since this order was not appealed against, it has become final, and therefore it was incumbent upon the Resolution Professional to admit claims which Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 had been submitted with delay for consideration. The Learned Counsel has also contended that the approved resolution plan considers such financial creditors in class who have filed claim within the prescribed time limit and those financial creditors in class who could not, for various reasons, file their claims inside as "claimants and non-claimants" and such a discrimination is not in keeping with the judgment passed by this Hon ble Tribunal in the matter of Rajputana Properties Pvt. Ltd versus Ultratech Cements Ltd. and Others [Company Appeal AT INS No. 188 of 2018] wherein it is held that the resolution plan that discriminates some of the financial creditors were equally situated and not balance the other stakeholders, such as operational creditors is discriminatory and, therefore liable to be rejected.

30. A perusal of the order dated 3.2.2020 in CA No. 12 of 2020 in CP (IB) 322/ALD/2018 (attached at pp. 57 - 59 in the reply of Respondent No.1 in Company Appeal (AT) (INS) No. 761 of 2021), that the Adjudicating Authority has passed an order as follows: -

"7. In view of the facts of the case on hand and of the judgments referred, this Adjudicating Authority is of the view that it is the settled law that a claim cannot be rejected by RP solely on the ground of delay by the Applicants in filing their claims. Moreover, sufficient reason has been shown for delay occurred in filing claim by the Applicants before RP and the RP can be directed to accept claim of the Applicants to be considered by it on its merits and subject to proper Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 verification, which will only be in consonance with purpose sought to be achieved by the IBC."

This Tribunal has taken the view in the matter of Rajputana Properties Pvt. Limited (supra), which is as follows: -

"43. From the two „resolution plans , it will be clear that the „Rajputana Properties Pvt. Ltd. in its „resolution plan has dissimilated some of the „financial creditors who are equally situated and not balanced the other stakeholders, such as „operational creditors . Therefore, the Adjudicating Authority has rightly held the „resolution plan submitted by „Rajputana Properties Pvt. Ltd to be discriminatory."

31. A perusal of the resolution plan shows that the MoU/agreement holders who could not file their claim within the prescribed time have been labeled as „non-claimants whereas those that have filed their claims in time have been labeled as „claimants . It is also clear that both these categories of financial creditors in class (homebuyers/allottees) have been treated differently in that the claimants have been offered possession of the allotted premises, whereas non-claimants have been given only 10% of their total amount deposited, that too after due verification and within one month of the approval of the resolution plan.

32. The order of the Adjudicating Authority dated 3.2.2020 (supra) and the treatment meted out to the claimants and non- claimants among financial creditors in class of Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 homebuyers/allottees, we find that the order of 3.2.2020 has not been complied with by the Resolution Professional in an appropriate manner. The claims that were filed belatedly were admitted and considered but thereafter the „claimants and „non- claimants have been accorded different treatment under the resolution plan. If the claims filed with delay had been admitted and considered in the spirit of order dated 32.2020 in CA No. 12/2020, different treatment of two different categories i.e. claimants and non-claimants in the approved resolution plan would not have resulted. The judgment of this Hon ble Tribunal in the matter of Rajputana Properties Pvt. Limited (supra) also lays down that there should be no discrimination between financial creditors belonging to the same class. Hence, once the question of filing claims even with delay is accepted, there should not be two different categories of claimants and non-claimants. This issue also gains significance because only 222 out of 473 homebuyers/allottees have filed their

claims in time, whereas 251 allottees have seen their claim being extinguished with the approval of the resolution plan as their claims were either not filed or filed with delay. When more than 53% of homebuyers/allottees are thus left out, we cannot consider the resolution of the Corporate Debtor to be done in the spirit of the IBC. Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021

33. The Learned Counsel of Resolution Professional has cited the judgments of Hon ble Supreme Court in the following cases:

(i) Committee of Creditors Essar Steel India Limited versus Satish Kumar Gupta (Supra),

(ii) Kridhan Infrastructure Private Limited (Supra) and

(iii) K Sashidhar versus Indian Overseas Bank and Ors (Civil Appeal No. 10673 of 2018) wherein the principle, that the commercial wisdom of CoC is not subject to judicial review and shall be binding and applicable on the other creditors, is laid down. In the instant case, we are not questioning or reviewing the commercial decision of the CoC but rather the procedure adopted by the Resolution Professional in organizing e-voting as well as eliciting the views of the financial creditors in class on the revised resolution plan by the Authorized Representative. We have also noted that since the e-voting of the financial creditors in class which is a requirement of section 25A and the e-voting by the CoC have taken place simultaneously we do not feel such a procedure takes care of the use of the financial creditors in an appropriate and adequate manner.

34. The Ld. Counsel for RP has cited the judgment of Hon ble Supreme Court in India Resurgence ARC Private Limited vs M/S Amit Metaliks Limited &Anr (Civil Appeal No. 1700 of Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 2021) wherein it is held that „what amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors, and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest. This judgment can be distinguished from the present case in that we are not questioning the payments to be made in the approved resolution plan to various creditors but the question raised in these appeals is about Section 25A and how it was put in operation. We have found lacunae in the way the provision of Section 25A was operationalized. Therefore, what has resulted from the erroneous operation of Section 25A has been found to be erroneous. Thus we have found the actions of the RP and Authorized Representative of Financial Creditors in Class falling foul of law and we are not questioning the commercial decision of the CoC.

35. We also note the judgment of Hon ble Supreme Court in Ghanshyam Mishra and Sons Private Limited (supra)cited by the Ld. Counsel for RP wherein it is held that all statutory dues etc. would stand extinguished once the resolution plan is approved. In the present case since we are looking at the way that Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 the Section 25A was operationalized and submission of claims by financial creditors took place, leading to simultaneous

e-voting on the final resolution by the financial creditors in class and the members of CoC, we feel that due procedure was not followed. Thus the process was vitiated and what has resulted out of such vitiated procedure as approved resolution plan cannot be termed as fair and just to the creditors.

36. The Ld. Counsel for RP has also cited the judgment of Hon ble Apex Court in Maharashtra Seamless Limited vs Padmanabhan Venkatesh & Ors (Civil Appeal no. 4242 of 2019) wherein it is held as follows:

"28.....Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which the Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation...."

37. The Maharashtra Seamless judgment (supra) is distinguished on the basis that there were flaws in operationalizing the provision of Section 25A which is for the benefit of financial creditors in class when the Authorized Representative did not do Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 „prior consultation with the homebuyers/allottees who he sought to represent. Thereafter, the RP allowed e-voting on the final resolution plan wherein all the homebuyers participated, not as a class represented by the Authorized Representative alongwith the other members of CoC. All this means that section 30(2)(e) of the IBC was infringed and the resolution plan is therefore liable to be rejected on such a ground.

38. The argument of the Learned Counsel of Resolution Professional that liquidation of the Corporate Debtor, which implies corporate death, should be the last resort as is held by Hon ble Apex Court in the matter of Swiss Ribbons Pvt. Ltd. (Supra). We, therefore, feel that once the procedure is properly followed, there is a realistic possibility of getting a successful resolution which would take care of the interests of the stakeholders and creditors leading to avoidance of liquidation of the corporate debtor and hence there is no conflict with the Swiss Ribbons judgment.

39. In light of the aforementioned discussion, we set aside the impugned order dated 14.7.2021 and direct that the process be started afresh with claims of homebuyers/allottees accepted by the Resolution Professional by giving them realistic time limit for Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021 submission of claims, in keeping with the order of the Adjudicating Authority in CA 12/2020, leading to a revised information memorandum, which should then be used for inviting Expressions of Interest. In the CIRP, the views of the financial creditors in class should be elicited by the Authorized Representative prior to CoC meetings in letter and spirit of section 25A of IBC. Thereafter, the CoC shall consider the resolution plans so received in accordance with the provisions laid down in law. For this entire exercise, we allow a period of 90 days to the CoC from the date of this order to complete the entire exercise.

40. With the above-stated directions to the Committee of Creditors, these appeals are disposed off.
No order as to costs.

[Justice Ashok Bhushan] Chairperson [Justice Jarat Kumar Jain] Member (Judicial) [Dr. Alok Srivastava] Member (Technical) New Delhi 18th January, 2022 /aks/ Company Appeal (AT) (Ins) Nos. 700, 761 & 925 of 2021