NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 1058 of 2022

In the matter of:

Jindal Stainless Ltd. .....Appellant

Vs.

Mr. Shailendra Ajmera, ...Respondents
Resolution Professional of Mittal Corp Ltd. & Ors.

For Appellant:	Mr. Ramji Srinivasan, Sr. Advocate with Mr. Rahul Kumar, Mr. Bishwajit Dubey, Ms. Neha, Advocates Ms. Madhvi Divan, Mr. Vikas Mehta, Mr. Sahil Monga, Mr. Apoorv Khator, Ms. Rashi Rampal, Advocates for IBBI.
For Respondents:	Mr. Sumesh Dhawan, Ms. Shweta Dubey, Ms. Kanishka Prasad, Advocates for R-1/RP. Mr. Abhijit Sinha, Mr. Anuj Tiwari, Mr. Kaustubh Rai, Mr. Rahul Kumar, Mr. Saurabh Kumar Mishra, Mr. Aditya Shukla, Ms. Tuhina Mishra, Advocates for R-2. Mr. Gaurav Mitra, Mr. Piyush Beriwal, Ms. Ankit Raj, Advocates for R-3. Mr. Ritin Rai, Sr. Advocate with Mr. Udit Mendiratta, Ms. Niharika Sharma, Mr. Tejas Jha and Mr. Shivkrit Rai, Advocates for ACRE (Intervenor)

JUDGMENT
(18th January, 2023)

Ashok Bhushan, J.

This Appeal has been filed against the order dated 11.08.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-II in I.A 2193/2022 in C.P.(IB)/434(MB)2018. The brief facts of the case necessary to be noticed for deciding this Appeal are:-

The Adjudicating Authority vide order dated 10.11.2021 initiated Corporate Insolvency Resolution Process (CIRP) against 'Mittal Corp Limited'- (Corporate Debtor). Form G was issued on 20.01.2022 and thereafter again on 17.03.2022. On 11.04.2022, the Resolution Professional issued Request for Resolution Plan (RFRP). On 31.05.2022 which was the last date for receiving the plans, the Resolution Professional received six Resolution Plans including the Resolution Plan submitted by the Appellant- 'Jindal Stainless Limited' as well as by Respondent No.2- 'Shyam Sel and Power Limited'. The Committee of Creditors (CoC) in 12th meeting held on 04.07.2022 decided to undertake a Challenge Process in order to give an opportunity to the Resolution Applicants to improve their plans. The Resolution Professional issued a process note on the Challenge Process mechanism. All the Resolution Applicants were required to submit their unconditional acceptance of the rules of the said Challenge Process in the interest of maximising the value of assets of the Corporate Debtor. All the Resolution Applicants were communicated the rules of the Challenge Process and after receipt of the unconditional acceptance, Challenge Process was conducted in the 13th CoC meeting held on 15.07.2022. All the Resolution Applicants were invited in the 13th CoC meeting. The Challenge Process continued for seven rounds until there was only one competing Resolution Applicant remaining in the Challenge Process. All the Resolution Applicants were notified that the signed and compliance Resolution Plan must be submitted by 18.07.2022. The Appellant, Respondent No.1 as well as two other Resolution Applicants submitted their amended Resolution Plans by 18.07.2022. On 19.07.2022, the Respondent No.1 sent an e-mail to the Resolution Professional stating that

it is willing to submit the entire NPV offered as upfront payment within 30 days. 15th CoC meeting was held on 25.07.2022 where communication received from Respondent No.1 dated 19.07.2022 was discussed. Again on 27.07.2022, 16th CoC meeting was held where deliberation upon the Resolution Plans took place. On 25.07.2022, Respondent No.2 had sent another e-mail in continuation of his earlier e-mail dated 19.07.2022. On 29.07.2022, Respondent No.2 sent another e-mail further improving his offer. On 03.08.2022, 17th CoC meeting took place, where after considering the report on the qualitative or quantitative evaluation of the Resolution Plans, CoC resolved to put four plans to vote. Voting was to commence from 05.08.2022 till 26.08.2022. The Respondent No.2 filed an IA 2193/2022 before the Adjudicating Authority seeking a direction that Resolution Professional to consider the offer dated 29.07.2022 and place the same before the CoC. Further prayer was made that the Resolution Professional be restrained from continuing with CIRP. In the Application only Resolution Professional was impleaded as one of the Respondents. The Adjudicating Authority heard the said Application on 11.08.2022 and passed following order:-

> *"Having heard the submissions of the Counsel appearing for the applicant and on perusal of the averment made in the application, this Bench is satisfied, accordingly Committee of Creditors is directed to consider the revised resolution plan on the applicant and take an informed decision. With the aforesaid observations,* ***IA No. 2193/2022*** *is* ***allowed*** *and* ***disposed of.***"

The Resolution Professional in pursuance of the order passed by the Adjudicating Authority stopped the voting process which was underway in pursuance of the 17th CoC meeting dated 03.08.2022. The Appellant aggrieved by the impugned order has come up in this Appeal.

2. Shri Ramji Srinivasan, Learned Senior Counsel and Shri Bishwajit Dubey, Advocate appearing for the Appellant submits that the Adjudicating Authority committed error in issuing the impugned direction for considering the revised plan of Respondent No.2. It is submitted that the CoC having taken decision to adopt Challenge Process for obtaining the optimum value which process culminated on 15.07.2022 with participation of the Appellant as well as Respondent No.2. Respondent No.2, who in the Challenge Process has made its highest offer, had no right or jurisdiction to further revise his plan. After going through the Challenge Process, the Respondent No.2 cannot be permitted to revise its plan which is against the Challenge Process rules as has been approved by the CoC. The Respondent No.2 in his Application did not even implead the CoC nor any of the Resolution Applicants including the Appellant who may be affected by the prayers made by the Respondent No.2. It is submitted that the adoption of Challenge Process by the CoC is in accordance with Regulation 39(1A)(b) as has been substituted w.e.f. 30.09.2021. The CIRP has to be completed in the timeline and any interdiction by the Adjudicating Authority as has been done by the impugned order is bound to delay the completion of the process which is not object and purpose of the IBC.

3. An Application has been filed on behalf of the 'Asset Care & Reconstruction Enterprise Limited' to seek intervention in the Appeal. An Affidavit along with the Intervention Application has also been filed. We have permitted the CoC to be impleaded as Respondent No.3.

4. Shri Gaurav Mitra, Learned Counsel appearing for the Committee of Creditors submits that the Adjudicating Authority ought to have given liberty to all the Resolution Applicants to revise their plans. It is submitted that the objective of the Code is to maximise the value of the assets of the Corporate Debtor within the stipulated timeline. It is submitted that the CoC has full jurisdiction to take any decision to permit the Resolution Applicants to further revise the Resolution Plan. Regulation 39 (1A) is only directory. The legislative intent of the provisions of the Code is to ensure that most commercially viable plan is to be chosen to encourage value maximisation of the Corporate Debtor.

5. Shri Abhijit Sinha, Learned Counsel appearing for Respondent No.2 submits that the object of the Code is maximisation of the assets of the Corporate Debtor. The Adjudicating Authority has rightly issued direction to the Resolution Professional to place the revised offer of the Respondent No.2 before the CoC. It is submitted that looking to the object of the Code which is maximisation of the assets of the Corporate Debtor, the direction issued by the Adjudicating Authority cannot be faulted. Revised offer of the Respondent No.2 was required to be placed before the CoC. It is submitted that in the meeting of the CoC, it was noticed that even the Appellant has sent some oral communication to the IDBI Bank that it also intends to increase its offer. It is submitted that the Regulation 39(1A) is only directory and CoC is fully

empowered to permit revision of the Resolution Plan, negotiate with Resolution Applicants and make endeavour to receive the maximum value.

6. Learned Counsel appearing for the Resolution Professional submits that after completion of the Challenge Process on 15.07.2022, all Resolution Applicants has to submit their revised and updated plan by 18.07.2022 which was the last date fixed. Appellant received e-mail dated 29.07.2022 from Respondent No.2 which was placed before the CoC in 15th CoC meeting held on 25.07.2022. The Regulation do not empower the Resolution Professional to permit the revision of plan more than once.

7. We have considered the submissions of the Counsel for the parties and perused the record. The question to be answered in this Appeal is as to whether after closure of Challenge Process on 15.07.2022 and consequent receipt of Resolution Plan by 18.07.2022, the Adjudicating Authority could have directed for consideration of the revised plan submitted by the Respondent No.2 thereafter.

8. Before we proceed to consider the rival submissions of the parties, we need to notice the relevant clauses of RFRP and the Challenge Process rules. Para 2 (viii) & (ix) of the RFRP reserves the right of CoC to negotiate with the Resolution Applicant and to determining the mechanism of such negotiation. Para 2 (viii) and (ix) are as follows:-

> *"(viii) The CoC has the right to negotiate (if required) the terms of such Resolution Plans with the relevant*

Resolution Applicant(s) including but not limited to determining the mechanism of such negotiation.

(ix) The CoC reserves the right to negotiate concurrently or separately with more than one Resolution Applicants of aspect of the Resolution Plan submitted by such Resolution Applicants. The timelines for negotiation will be determined and/or communicated if necessary, at a later date. The Resolution Applicants may be required to re- submit their revised proposals on basis of the discussions and negotiations, if so required by the CoC."

9. In pursuance of the aforesaid power reserved to the CoC in the RFRP, the CoC in its 12th meeting decided to adopt the challenge mechanism for negotiation with the Resolution Applicants. In the 12th CoC meeting, CoC has approved the Challenge Process rules and Resolution Professional was directed to proceed to take the vote. After approval of the rules of process by CoC, 13th CoC meeting was convened for 15.07.2022 where all Resolution Applicants were invited. The Resolution Professional in his reply filed in this Appeal has given details of 15th CoC meeting. It is useful to extract para 4 (g), (h) & (i) to the following effect:-

"g) The challenge process was conducted in the 13th CoC meeting held on 15-07-2022, wherein the Answering Respondent, with the permission of the CoC, invited all the Resolution Applicants who have submitted unconditional acceptance in participating in the challenge process. In the said meeting, the Answering Respondent informed the CoC Members

that despite giving its acceptance to participate, Kalyan Toll, one of the prospective Resolution Applicants, was not present in the meeting.

h) The challenge process continued for seven rounds until there was only one competing Resolution Applicant remaining in the challenge process. The Appellant herein did not improve his offer and bowed out of the challenge process in the third round.

i) At the end of the challenge process, Rimjhim Ispat emerged as the highest bidder with the highest NPV proposal. Thereafter, the Resolution Applicants were notified that the signed and compliance resolution plan must be submitted by 18-07-2022. The Appellant, Saarloha, Rimjhim Ispat, and Shyam SEL submitted their amended Resolution Plans accordingly."

10. Now, we need to notice the Regulation 39 (1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which has been substituted in the Code w.e.f. 30.09.2021, which is to the following effect:-

"39. Approval of resolution plan ..... (1A) *The resolution professional may, if envisaged in the request for resolution plan-*

(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or

(b) use a challenge mechanism to enable resolution applicants to improve their plans."

11. Prior to the aforesaid amendment in the CIRP Regulation, there was no provision for adopting challenge mechanism. Insolvency Law Committee has submitted its Report dated 20.05.2022 recommending amendment in the regulation for inserting a mechanism and CoC to opt Swiss Challenge Method. Para 2.44, 2.45 & 2.46 of the Insolvency Law Committee Report dated 20.05.2022 is as follows:-

"2.44. Considering the above, the Committee decided that the regulations should clearly lay down a mechanism for reviewing late submissions of (or revisions to) resolution plans. Further, suitable amendments should be made in the Code to ensure that the procedure provided in the regulations has due sanctity.

2.45. The Committee agreed that the CIRP Regulations may allow the CoC to opt for a Swiss challenge method for considering plans and revisions to plans submitted after the deadline in the RFRP. Through this challenge method, the COC may consider any unsolicited plans or revisions based on a decided criteria that is based on the commercial viability of the plan. The decision to allow Swiss challenge method and the details thereof should be recorded in the RFRP. Further, the CIRP Regulations may require the CoC to specify, in the RFRP, the number of revisions that are permissible by prospective resolution applicants and the timeline

for such revisions. 'Revisions', in this respect, would not include any clarifications or modifications made pursuant to negotiations with the CoC. Further, the RFRP should provide the last date by which any plans or revisions may be submitted and the CoC not be permitted to consider any plans or revisions after such date. Additionally, the Committee noted that the Coc should provide a reasonable time-period in the RFRP for the submission of resolution plans, in order to provide participants with a fair opportunity to submit their plans before the deadline. This may aid in reducing the number of participants who seek to submit their plans after the deadline in the RFRP.

2.46. Pursuant to the above discussions, it may be noted that the IBBI issued a discussion paper in August 2021, aligned with some of the recommendations made by the Committee. Based on this, amendments have been carried out in the CIRP regulations in September, 2021 which incorporate certain recommendations made by the Committee. This includes amendments to Regulations 36A, 36B and 39 which govern the invitation for EoI, RFRP and approval of resolution plans, respectively. The amendments have clarified the manner in which modification to the invitation of Eol, the RFRP and the evaluation matrix may be made and to provide a limit on such modifications. The resolution professional has been enabled to allow modification of a resolution plan submitted under this provision if the RFRP so envisages, but not more than once. Additionally, the manner of

making revisions using a challenge mechanism and preventing late and unsolicited plans from being considered by the CoC have also been provided for in the regulations."

12. The IBBI has also issued Discussion Paper on 27.08.2021 where use of Swiss Challenge in CIRP was recommended.

13. Consequent to recommendation of Insolvency Law Committee Report, the Regulation was amended as noticed above. The Regulation has been brought in place to enable the CoC to negotiate with all the Resolution Applicants by one alternative mechanism to find out the best Resolution Plan. In the present case, the Challenge Process continued in seven rounds and all Resolution Applicants who participated were given opportunity to revise and better their plans. The Respondent No.2 who was part of the Challenge Process gave his best plan in the Challenge Process which had been recorded. In the 15th CoC meeting held on 25.07.2022, the communication received from the Respondent No.2 was noticed. The revised communication from Respondent No.2 was deliberated. The Resolution Professional's statement was recorded in the minutes that pursuant to the Challenge Process, revised Resolution Plans were submitted by the Resolution Applicants. Deliberation took place regarding the future course of action. Some of the members suggested to conduct another round of negotiation after obtaining an order from NCLT, ultimately it was decided to hold another meeting on 27.07.2022. It is useful to notice paras 9 to 13 of the Item No.B:-

*"**B. <u>Update on Resolution Process</u>***

9) The Members of the CoC sought to discuss the communication from SSPL regarding their revised commercial offer. The members of the CoC inquired if another round of negotiation can be held with the Resolution Applicants pursuant to which they can submit a revised Resolution Plan. The RP in this regard stated that pursuant to the Challenge Process, the revised resolution plans have been submitted by the Resolution Applicants and that the CIRP Regulations stipulates that the Resolution Plan can only be modified once, The CoC Members deliberated if the NCLT can be approached on the ground of value maximisation seeking a relaxation on the restriction to the modification of the resolution plan. The CoC Members discussed that SSPL's revised commercial offer will lead to a modification in the scoring on the evaluation matrix. Further discussions were also held on the fact that the source of funds as provided by Rimjhim Ispat Limited is not conclusive considering that the funds deposited as Contributed Cash were withdrawn on the same day by the RA, as confirmed by PNB.

10) The representative of IDBI Bank stated that they have been orally informed by JSL that they seek an opportunity to better their bid. The Legal Counsel of the RP stated that the CoC can undertake negotiations as it is their inherent right under the Code to do so. However, the law only provides for a one-time modification of the resolution plan. Accordingly, NCLT can be approached seeking a relaxation on the restriction to modify the resolution

plans. The representative of PNB inquired if the RAS can be asked to revise the resolution plans pursuant to another round of negotiation before filing the application before the NCLT. The RP counsel in this regard stated that revised plans should only be called after the order of NCLT is obtained by the RP.

11) The representative of SBI stated that the CoC in its commercial wisdom can conduct another round of negotiation and post the NCLT Order, the respective Resolution Applicants can be asked to submit the revised resolution plans. The Members of the CoC stated that the actions of the Resolution Applicants have adversely affected the Challenge Process wherein two of the RAs have effectively not adhered to their final offer made under the Challenge Process i.e. Rimjhim Ispat Limited has changed the terms of commercial offer post closure of challenge process and SSPL has submitted a revised commercial offer on email. Accordingly, in light of the aforesaid developments, new negotiations may be considered as a continuation of the Challenge Process since the conduct of the bidder with the highest NPV in the challenge process itself has caused uncertainty. The representative of ACRE stated that the CoC has the inherent right to negotiate and accordingly, the CoC may run negotiations and subsequently inform the NCLT if basis the results of the new negotiations, revised resolution plans can be called from the Resolution Applicants.

12) The representative of SBI proposed that CoC Members can ascertain if the proposal of the Resolution Applicants seeking to submit revised commercial offers are genuine subsequent to which a decision can be taken on the going forward strategy. The representative of SBI proposed that CoC Members can reach out to SSPL to ascertain their interest and IDBI Bank may also approach JSL (without disclosing any confidential information) to ascertain their seriousness and interest in submitting an improved offer. Further, Rimjhim Ispat Limited can be asked to provide a firm source of funds to back the commitment made under their resolution plan commitment.

13) The RP stated that the CoC Members can deliberate and another CoC Meeting can be held preferably on Wednesday i.e. July 27, 2022 (with a shorter meeting notice considering the limited timelines) to discuss the way forward. The CoC Members were in agreement with the same."

14. 16th CoC meeting held on 27.07.2022 where with regard to all Resolution Plans, comments were submitted by 'Resurgent India'. In para 8 of Item No.A, following was recorded:-

"8) The representative of IDBI Bank queried if the Resolution Plan of SSPL has an enabling clause which allows them to submit the revised commercial offer after the Challenge Process. The Legal Counsel of the RP stated that once the Resolution Plans have been submitted post the Challenge Process, the RAS

cannot make any changes to their commercial bids. The Representative of IDBI proposed that in view of the e-mails from SSPL and informal communications with JSL regarding the revised commercial offer, all RAS may be asked to send their consent for participating in another negotiation process. The RP in this regard stated that calling for revised resolution plans after a second negotiation process shall violate Regulation 39(1A)(a) of the CIRP Regulations which provides that the resolution plans cannot be modified more than once. The Legal Counsel of the RP was also in agreement with the assessment of the RP. The representative of Indian Bank stated that if all RAS consent for a new negotiation then the same will not violate the provisions of the Regulations. The legal counsel of the RP stated that even if all the RAS consent for a fresh negotiation and submit revised resolution plans pursuant to such negotiation, the same will be in violation of the CIRP regulations as the CIRP Regulations provide that the resolution plan can be amended only once. The representative of ACRE proposed that the RP may approach NCLT seeking a relaxation on the restriction to modify the resolution plan only in the event that a positive confirmation is received from JSL to the effect that they want to improve their offer. The of Indian Bank proposed that the CoC may obtain a legal opinion to ascertain if a fresh negotiation can be entered into and revised plans can be obtained. The representative of PNB proposed that another CoC may be re-convened at a later date and during this time the lenders can convene a lenders meeting and discuss the way

forward to ensure that value maximisation can take place pursuant to which a decision can be taken in the subsequent CoC. The RP also stated that they will deliberate with the legal counsel the manner in which such value maximisation can take place without violating any provisions of the Code or Regulations made thereunder."

15. The last meeting of the CoC was held on 03.08.2022 when qualitative and quantitative evaluation as per evaluation matrix filed by 'Resurgent India' was placed before the members of the CoC, following decision was taken in Agenda Item No. D- 'Voting on Resolution Plans':-

"D. Voting on Resolution Plans

19) The Members of the CoC were of the view that since the Resolution Plan of Kalyan Toll is not in compliance with the provisions of the Code, the Resolution Plan may not be considered further for the purposes of approval.

Accordingly, in compliance with Regulation 39(3)(c) and in exercise of their commercial wisdom, the Members of the CoC decided to vote simultaneously on the Resolution Plans submitted by Jindal Stainless Limited, Rimjhim Ispat Limited, Shyam SEL & Power Limited and Saarloha Advanced Material Private Limited."

16. Consequent to the decision of the CoC dated 03.08.2022 voting process begun w.e.f. 07.08.2022 and it was due to the order passed by the Adjudicating Authority voting was disrupted.

17. The Respondent No.2 herein who had filed an Application before the Adjudicating Authority was part of Challenge Process. Challenge Process which was finalised by the CoC to which all Resolution Applicants have given their unconditional consent. Paras 3 to 9 of the Challenge Process are relevant and as follows:-

*"**Annexure I-Rules of Challenge Process***

A. Process

xxx xxx xxx

3. The challenge process shall be conducted in the following manner;

(a) All Eligible RAs will attend the virtual meeting at the designated time and provide confirmation through a show of hands as well as through written intimation in the chat box regarding their readiness to submit their bids/commercial offers.

(b) All Eligible RAs will at the specified time, as communicated at the meeting submit their password protected bids/commercial offers in the format as per the Ms-Excel utility attached in Annexure III in pdf version to the Resolution Professional vide an email and the receipt of the same shall be displayed during the meeting. For each round, the subject of the Email should provide- Round No. [*]- Financial Proposal. The

name of the file containing the Financial Proposal should be [Name of the Eligible Resolution Applicant] [Round Number].

(c) The Resolution Professional will call upon each Eligible RA individually to share the password to the email containing their bids/commercial offers and only then the password shall be shared with the Resolution Professional via email upon such time.

(d) The Eligible RAs will then be requested by the Resolution Professional to leave the virtual meeting or wait in the virtual lobby, during which the bids/commercial offers shall be perused and evaluated, post which the NPV of the bid/commercial offers will be displayed on the screen in the virtual meeting to the participants in the meeting.

The NPV of all commercial offers will be disclosed to the Resolution Applicants (without the disclosure of identity of Resolution Applicants) whereafter they will be required to submit their fresh bid, should they choose to participate further in the Challenge Process. However, it must be noted that no such correspondence shall be made in the last bidding round of the process.

(e) H1 bidder of each round will have immunity from elimination in the next round even if it does not increase its bid.

(f) In case any participating Eligible RA does not submit an improved bid, their last submitted bid will be considered as the final binding bid and such Eligible RA shall stand eliminated from this Challenge Process.

4. The aforementioned process shall be followed for each bidding round up-till all the participating Eligible RAs express their inability to improve their commercial bids i.e. if no improved commercial bid is received by any of the Eligible RAs in a Round, then the Challenge Process will come to a closure. Such closure will be intimated to all the Eligible RAs over their respective emails. However, after any given round, the CoC may declare that only one more round shall be conducted.

5. In any given round:

(a) an Eligible ***RA cannot decrease his total fixed/unconditional/committed amount to the creditors****, vs previous round; and*

(b) the minimum increment by an RA in any given round for the payment to all creditors shall be at least Rs. 5,00,00,000/- (Rupees Five Crores only).

(c) H1 bidder will have immunity from elimination in next round, should it choose not to increase its bid amount.

6. Closure - The contents of the last Revised Financial Proposal submitted by the Eligible Resolution Applicant in the Challenge Process shall be binding on the Eligible Resolution Applicant and are required to be subsequently incorporated in the resolution plan. The final signed Resolution Plan post incorporation of Financial proposal shall be submitted vide an email to RP on or before 6:00 PM on July 13, 2022 or as per the instructions to be provided by the RP separately in this regard. Please note that failure to incorporate the last Revised Financial Proposal in the Resolution

Plan may lead to disqualification of the Resolution Applicant from the resolution plan process.

7. Notwithstanding anything to the contrary contained anywhere, after conclusion of the challenge process stipulated herein, the Eligible RAS shall not revise their bid/commercial offer other than as stipulated in above paragraph, and any failure in complying with the criteria stipulated herein shall attract consequences stipulated in Clause 33(d) of the RFRP published on April 11, 2022.

8. CoC reserves the unconditional right to cancel/ modify/ withdraw/ abandon/amend the process of the challenge process at any stage (including when the challenge process is underway and/or in progress), and/or in that event at its absolute discretion and to follow any other method as it may deem fit subject to applicable law. Upon such action, CoC's decision in this regard shall be final and binding on all parties without any recourse whatsoever.

9. CoC may, at any time and for any reason, without giving any reason thereof, change/extend the deadlines/ time-lines and will communicate such change/ extension to all parties."

18. Clause 7 of the Challenge Process clearly contemplates that after conclusion of the Challenge Process, the eligible Resolution Applicants shall not revise their bid/commercial offer. It is relevant to notice that Challenge Process also reserves the unconditional right of the CoC to cancel/ modify/

withdraw/ abandon/ amend the process of the Challenge Process at any stage. The approval of the plan submitted in CIRP is in the domain of the CoC. Under Regulation 39 of the CIRP Regulations, the Committee is entitled to record its deliberation and vote on such Resolution Plan simultaneously. Challenge Process also reserves the unconditional right of the CoC to cancel/ modify/ withdraw/ abandon/ amend the process of the Challenge Process.

19. When we come to the facts of the present case, it is relevant to notice that after revised offer was received from Respondent No.2, the said factum was brought into the notice of the CoC in its 15th CoC meeting held on 25.07.2022. In 15th and 16th CoC meeting, CoC deliberated how to proceed further. Suggestions were also received that NCLT be approached for permitting modification. The present is a case where CoC did not finally took any decision to permit the Respondent No.2 to revise its bid after close of Challenge Process. CoC ultimately in the 17th CoC meeting held on 03.08.2022 in spite of earlier suggestions received in the earlier CoC meeting proposing different course of action decided to vote all the Resolution Plans received in the process. We had already noticed the resolution of the 17th CoC meeting. The CoC did not exercise any power reserve to it under the Challenge Process Rules to undo the Challenge Process rather CoC decided to go ahead with the voting on the final plans received after the Challenge Process. The CoC also received their detailed report of 'Resurgent India' on the qualitative and quantitative evaluation on each plan which has been noticed in para 10 of Item B, which is to the following effect:-

"10) The RP and his Team also presented the below quantitative and qualitative evaluation as per the Evaluation Matrix finalised by Resurgent India in its report for each Resolution Applicant for the benefit of the Members of the CoC:

Parameters	Max Marks	JSL	RIL	SSPL	Trishakti Consortium	Saarloha	Kalyan Toll
Quantitative	80	64.50	60.62	51.73	27.11	39.90	33.20
Qualitative	20	20.00	18.00	18.00	2.00	16.00	10.00
Total	**100**	**84.50**	**78.62**	**69.73**	**29.11**	**55.90**	**43.20**

20. There can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard. CoC, in the facts of the present case, did not take any decision to disregard the Challenge Process completed in 13th CoC meeting held on 15.07.2022 and it decided to vote on the plan which voting process has begun.

21. The Respondent No.2 who had filed an Application before the Adjudicating Authority relying on its e-mails dated 19.07.2022 and 29.07.2022 by which it modified its financial proposal clearly admitted that in pursuance of bidding process held on 15.07.2022, it had submitted its Resolution Plan on 18.07.2022. The Adjudicating Authority in the impugned order, as noted above, has not given any reason as to why direction is being issued to consider the revised Resolution Plan of Respondent No.2. There is a reference of judgment of the Hon'ble Supreme Court in ***"Ajay Gupta vs. Pramod Kumar Sharma- Civil Appeal No. 1358 of 2022"*** but we failed to see that how the said judgment helped the Respondent No.2 in seeking the direction to modify his Resolution Plan which he had submitted after

completion of Challenge Process. Order of the Adjudicating Authority does not give any reason as is clear from the order itself.

22. We may also notice a judgment of the Hon'ble Supreme Court in Civil Appeal Nos. 3665-3666 of 2020- ***"Ngaitlang Dhar vs. Panna Pragati Infrastructure Private Limited & Ors."***. In the above case, the CoC has adopted the Swiss Challenge Method and after finalisation of the negotiation by Swiss Challenge open biding method plans were considered for approval and was approved on 12.02.2020. The Respondent No.1 who was also Resolution Applicant and filed Application before the Adjudicating Authority had sent revised Resolution Plan dated 14.02.2020. An I.A No. 27 of 2020 was filed by Respondent No.1 to the Adjudicating Authority seeking direction to the Resolution Professional to take on record the revised Resolution Plan which Application was rejected by the Adjudicating Authority on 18.03.2020 against which Appeal was filed by Respondent No.1 before NCLAT which Appeal was allowed by order dated 19.10.2020. The judgment of this Appellate Tribunal was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court after considering the facts of the said case and after noticing that Resolution Plans were approved adopting Swiss Challenge open biding method allowed the Appeal, setting aside the order passed by this Appellate Tribunal. It is useful to extract paras 25, 26 & 27 of the judgment of the Hon'ble Supreme Court:-

> *"25. The minutes of the 5th meeting of the CoC would further reveal that the CoC thereafter invited Ngaitlang Dhar for negotiation of the bid and*

requested him to enhance the bid amount. Ngaitlang Dhar agreed to enhance the bid amount from Rs.63 crore to Rs.64 crore. Thereafter again, the representative of PPIPL returned back and requested to adjourn the meeting for a few days. The said request was specifically rejected by the CoC informing the representative of PPIPL that they were bound to follow the IBC timeline and wanted to conclude the matter by next day. The said 5 th meeting of the CoC was adjourned to next day and was held on 12th February, 2020. The minutes of the said meeting would further reveal that the representative of PPIPL had informed the CoC/RP that the Directors of their Company will not be available for the meeting to be held on 12th February, 2020 and the meeting should be deferred by one or two days. The minutes of the meeting would further reveal that all the prospective Resolution Applicants present in the meeting sought clarification from the CoC members and the RP about the status of Resolution Applicant, who was absent in the meeting, as to whether it would be allowed to participate in the further bidding process or not. The CoC members specifically replied that since they were at the neck of the timeline (i.e. 180 days were to get over on 24th February, 2020), it was decided to exclude the respondent No.1PPIPL, who was not present in the said meeting. The proceedings commenced after lunch break, wherein only two prospective Resolution Applicants, i.e., Ngaitlang Dhar and Mr. Abhishek Agarwal were present. Thereafter, the CoC adopted Swiss Challenge open bidding method. In the said bidding

process, both prospective Resolution Applicants present increased their offer. In the said open bidding process between the two prospective Resolution Applicants present, Ngaitlang Dhar was found to be the highest bidder/prospective Resolution Applicant having offered the bid of an upfront amount of Rs.64.30 crore plus CIRP costs. The said Resolution Plan of Ngaitlang Dhar was approved unanimously by Allahabad Bank having 68.34% voting rights and the Corporation Bank having 31.66% voting rights.

26. It is thus clear that the respondent No.1PPIPL was very much aware that the CoC has decided to finalise the proceedings by 12th February, 2020. It is also clear that though PPIPL was first called upon by the CoC to enhance the bid amount, it had specifically rejected the same. It insisted on disclosing the basis of score. In the proceedings of the 5th meeting of the CoC dated 11th February, 2020, post lunch, though Ngaitlang Dhar had enhanced his bid from Rs.63 crore to Rs.64 crore, the representative of PPIPL subsequently came and requested for adjourning the meeting for few days. The said request was specifically rejected by the CoC by informing the representative of PPIPL that it had to adhere to the IBC timeline and would have to conclude the matter by next day. On the next day, i.e., 12th February, 2020, when the adjourned proceedings of the CoC were held, the respondent No.1PPIPL had sent an email, stating therein that the Directors of its Company will not be available for the said meeting and requested for deferring the

meeting by a day or two. On the insistence of all the prospective Resolution Applicants present, the CoC clarified that since the timeline was coming to an end, it had decided to exclude the prospective Resolution Applicants who were not present in the said meeting. In the said meeting, Ngaitlang Dhar came to be declared as the highest bidder after he improved his bid in the open bidding held between him and Mr. Abhishek Agarwal.

27. It could thus be seen that the RP as well as the CoC had acted in a totally transparent manner. An equal opportunity was accorded to all the prospective Resolution Applicants. However, the respondent No.1PPIPL, without improving his bid amount, went on insisting for more time, which request was specifically rejected by the CoC."

23. The Hon'ble Supreme Court has also emphasised on the completion of the process within the timeline prescribed by the IBC. In para 31, following has been held:-

"31. It is trite law that 'commercial wisdom' of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC.

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

(i) K. Sashidhar v. Indian Overseas Bank and Others

(ii) Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Others,

(iii) Maharashtra Seamless Limited v. Padmanabhan Venkatesh and others,

(iv) Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another.

(v) Ghanashyam Mishra and Sons Private Limited Through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited Through the Director & Ors."

24. The above judgment of the Hon'ble Supreme Court fully supports the case of the Appellant that after adoption of Swiss Challenge Method to find out the best plan one Resolution Applicant cannot be allowed to submit a revised plan.

25. It is well settled that the timeline in the IBC has its salutary value and it was the wisdom of the CoC which decided to vote on the Resolution Plan

after completion of Challenge Process and not to proceed to take any further negotiation or further modification of the plan, that decision ought not to have been interfered with. The Application was filed by the Respondent No.2 on 07.08.2022 by which date CoC has already decided to resolve the vote on all the plans and voting has also commenced w.e.f. 07.08.2022.

26. We have gone through the whole Application filed by the Respondent No.2. There is not even mention of the fact that voting has already commenced w.e.f. 07.08.2022. The Adjudicating Authority without there being any valid reason ought not to have been interfered with the voting on the Resolution Plans which had already commenced w.e.f. 07.08.2022. As result of the order of the Adjudicating Authority the process of voting which had commenced on 07.08.2022 was abandoned by the Resolution Professional.

27. In view of the foregoing discussion, we are of the view that the order passed by the Adjudicating Authority dated 11.08.2022 is unsustainable and deserves to be set aside. When this Appeal was heard on 01.09.2022, we have already passed an interim order that no further steps shall be taken in pursuance of the impugned order.

28. CoC having already resolved to vote on all the Resolution Plans including the Resolution Plan submitted by the Appellant and the Respondent No.2 which voting process having commenced and was disrupted due to impugned order, we are of the view that the voting process in pursuance of the CoC decision dated 03.08.2022 may commence afresh and be completed in a time bound manner.

29. In result, this Appeal is allowed with following directions:-

(i) The order dated 11.08.2022 passed by the Adjudicating Authority is set aside.

(ii) As per the decision of the CoC dated 03.08.2022, the Resolution Professional may initiate fresh voting process on the Resolution Plans received in the process which may be completed within the period of one month.

30. The CIRP of the Corporate Debtor is extended till 28.02.2023 by which date the Resolution Professional may file an appropriate Application before the Adjudicating Authority bringing relevant facts and development in the CIRP on record.

Parties shall bear their own cost.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Anjali