REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3395 OF 2020

JAYPEE KENSINGTON BOULEVARD APARTMENTS WELFARE ASSOCIATION & ORS. ..... APPELLANT(S)

VERSUS

NBCC (INDIA) LTD. & ORS. ..... RESPONDENT(S)

WITH

CIVIL APPEAL No.3396 of 2020, T.C (C) Nos. 234, 235, 236, 237, 238, 239, 240, 241, 242, 243 of 2020, Civil Appeal No. 1056 of 2021 @ SLP(C) No. 5144 of 2021@ Diary No. 18129 of 2020, Civil Appeal No. 1057 of 2021 @ SLP(C) No. 10543 of 2020 and Diary No. 20274 of 2020

JUDGMENT

Dinesh Maheshwari, J.

Introductory

Permission to file special leave petition(s) and leave granted in respective Petition(s) for Special Leave to Appeal.

This batch of civil appeals, special appeals and transfer cases essentially relate to the resolution plan[1] in the corporate insolvency resolution process[2] under the Insolvency and Bankruptcy Code, 2016[3]

1 Hereinafter, at some places, it has also been referred to as 'the plan'.
2 'CIRP' for short.
3 Hereinafter also referred to as 'the Code' or 'IBC'.

concerning the corporate debtor, Jaypee Infratech Limited[4], whose activities do impact a large number of persons/entities, including the buyers of flats/apartments[5] in its real estate development projects.

2.1. As shall be noticed hereafter, CIRP in relation to the corporate debtor JIL has been entangled in various disputes in the past and even when the resolution plan submitted by the resolution applicant, NBCC (India) Limited[6] has been approved by the Committee of Creditors[7] by a substantial majority of 97.36% of voting share of the financial creditors, several disputes/objections have come up from various stakeholders and role players, voicing the concerns of their own, like dissenting financial creditors, dissatisfied homebuyers, displeased land providing agency, disillusioned creditor of a wholly-owned subsidiary of the corporate debtor and disappointed minority shareholders. Apart from all these, the holding company of the corporate debtor, namely, Jaiprakash Associates Limited[8] and its stakeholders have several questions over the resolution process in question and are particularly concerned with the sum of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the first round of litigation.

Looking to a multiload of issues arising from variegated propositions/objections put forward by different parties, it appears appropriate to draw a brief outline and sketch of the matter at the outset.

4 Hereinafter also referred to as 'JIL'.
5 Hereinafter generally referred to as 'the homebuyers'.
6 Hereinafter also referred to as 'NBCC'.
7 'CoC' for short.
8 Hereinafter also referred to as 'JAL'.

Brief outline and sketch

The cases involved in this batch have got assimilated in this Court in the following circumstances:

1. The corporate insolvency resolution process in relation to the corporate debtor JIL got initiated on 09.08.2017 when the National Company Law Tribunal[9], Allahabad Bench admitted the petition filed by one of the financial creditors, IDBI Bank Limited, under Section 7 of the Code. However, when the Interim Resolution Professional[10] invited claims in this CIRP, the treatment of homebuyers became an issue contentious, because they were treated only as 'other creditors', not at par with financial and operational creditors.

2. The aforesaid position led to the proceedings in this Court, which were dealt with in a batch of petitions led by **Writ Petition (Civil) No. 744 of 2017: *Chitra Sharma and Ors. v. Union of India and Ors.*[11]** wherein, several orders were passed by this Court from time to time, *inter alia*, with directions to JAL, the holding company of JIL, for making deposits in the Court, particularly looking to the claim of refund being made by some of the homebuyers. While finally disposing of the matters on 09.08.2018, this Court took note of several factors, including the nature of projects, interests of a large number of homebuyers and unanimity amongst all the

concerned that liquidation of the corporate debtor shall not be in the

9 Hereinafter also referred to as 'the Adjudicating Authority' or 'NCLT'. As shall be noticed, the matter before the Allahabad Bench was later on transferred to the New Delhi Bench of the Tribunal. These expressions 'the Tribunal' or 'NCLT' or 'the Adjudicating Authority' refer to the said transferee Bench too, as per the given context.

10 'IRP' for short.

11 Final judgment therein has since been reported as **(2018) 18 SCC 575.**

interest of any stakeholder. This Court also took note of the fact that even the statutorily extended period for concluding the CIRP was over but, there had been a relevant supervening event where, by way of an Amendment Ordinance that came into force on 06.06.2018, the doubts about the status of homebuyers were removed and they were expressly recognised as financial creditors. Having regard to the facts and circumstances, this Court issued a slew of directions for ensuring complete justice in the cause, while exercising its powers under Article 142 of the Constitution of India, by providing for further extended period for conclusion of CIRP; for constitution of CoC afresh; and permitting the IRP to invite fresh expressions of interest for the submission of resolution plans. This Court also provided that the amount of INR 750 crores, '*which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon*' be transferred to NCLT, which would abide by the directions as may be issued by NCLT.

4.3. While the proceedings thus restored by this Court were pending, further question cropped up as to the manner of reckoning the voting percentage of homebuyers in CoC. Two members of NCLT differed in their opinion and the matter was referred to the third member. In the meantime, IDBI Bank sought exclusion, of the period of pendency of the application for such clarification as to the voting percentage, from the period of 270 days for completion of CIRP. While this application was pending, NCLT called upon the concerned parties to file reply on the

necessity to proceed further with the CIRP, for considering the resolution plan received from the bidder, subject to the outcome of the pending application. The orders passed by NCLT in relation to these aspects were challenged before the National Company Law Appellate Tribunal, New Delhi[12]. The Appellate Authority, by its judgment dated 30.07.2019, provided for exclusion of 90 days for the purpose of counting the total period of 270 days and disposed of the appeals with some more observations. This gave rise to further appeals in this Court, led by **Civil Appeal No. 8437 of 2019 [@ D No. 27229 of 2019]: *Jaiprakash Associates Limited and Anr. v. IDBI Bank Ltd. and Anr.*[13]**, which were decided on 06.11.2019. Therein, this Court found that delay in completion of CIRP was attributable to the process of law and neither the homebuyers nor any other financial creditor was to be blamed for pendency of the proceedings; and under the plenary powers, this Court passed yet further orders so as to ensure that an attempt was made for revival of the corporate debtor by submission of revised resolution plans.

4.4. Running parallel to the proceedings noticed hereinabove, there had been another set of proceedings involving two issues: one, relating to an application filed by IRP before the Adjudicating Authority seeking orders for avoidance of the certain transactions, whereby several parcels of land were put under mortgage with the lenders of JAL, the holding company of JIL; and second, involving the claim of two of the lender

12 Hereinafter also referred to as 'the Appellate Authority' or 'NCLAT'.
13 Final judgment therein has since been reported as **(2020) 3 SCC 328.**

banks of JAL to be included in the category of financial creditors of JIL. These two aspects eventually came up for adjudication of this Court in another batch of appeals led by **Civil Appeal Nos. 8512-8527 of 2019:** ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited etc. etc.,*** which were decided on 26.02.2020[14]. This Court held that six out of seven transactions in question were preferential within the meaning of Section 43 of the Code and the directions by NCLT for avoidance of such transactions were upheld. On the second issue, this Court held that the applicant banks were not the financial creditors of the corporate debtor JIL and the respective orders passed in that regard by NCLT were restored.

4.5. We shall be dilating on the relevant attributes of the aforesaid previous rounds of litigation at the appropriate stage and juncture hereafter. Suffice it to notice for the purpose of brief outline that the resolution plans submitted by two applicants were put to vote of the Committee of Creditors and finally, the resolution plan submitted by NBCC (India) Limited was approved by the CoC on 17.12.2019, by a vast majority of over 97% of voting share of the financial creditors. Thereafter, on 19.12.2019, the Interim Resolution Professional moved an application before the National Company Law Tribunal, Allahabad Bench, being C.A. No. 5 of 2020 in CP (IB) No. 77/ALD/2017, for submission and approval of the resolution plan in terms of Section 30(6) read with Sections 31 and

14 Final judgment therein has since been reported as ***Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd. and Ors.*****: (2020) 8 SCC 401.**

60(5) of the Code and Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[15]. Later on, the proceedings pending before the Allahabad Bench of the National Company Law Tribunal were transferred to its Principal Bench at New Delhi wherein, several objections/suggestions/propositions were submitted by different stakeholders, going for or against the resolution plan or even off on a tangent.

4.6. By its order dated 03.03.2020, the Adjudicating Authority (NCLT), proceeded to approve the resolution plan with some modifications and certain directions while accepting some of the objections like those of the dissenting financial creditor bank and the land providing agency but while rejecting some other, including those of the holding company of JIL and while leaving a few propositions open for adjudication in the appropriate forum[16].

4.7. The resolution applicant NBCC preferred an appeal against the aforesaid order dated 03.03.2020 before the National Company Law Appellate Tribunal, New Delhi, being Company Appeal (AT) (Insolvency) No. 465 of 2020 wherein the Appellate Authority, while issuing notice to the unrepresented parties, made an interim order dated 22.04.2020 that the approved resolution plan may be implemented subject to the outcome of appeal but at the same time, also provided that IRP may constitute an

15 Hereinafter also referred to as 'the CIRP Regulations'.

16 A few typographical errors in this order dated 03.03.2020 were corrected by NCLT by its order dated 17.03.2020.

'Interim Monitoring Committee' comprising of the successful resolution applicant (NBCC) and three major institutional financial creditors, who were the members of CoC.

4.8. As against the aforesaid order dated 22.04.2020, six associations of homebuyers in the real estate development projects of the corporate debtor and a few individual homebuyers approached this Court seeking permission to maintain their appeals under Section 62 of the Code. Notices were issued on the prayers so made, returnable on 06.08.2020.

4.9. On 06.08.2020, it was urged before us that several appeals against the said order dated 03.03.2020 were pending before NCLAT; and the parties agreed that those appeals may be withdrawn to this Court and be heard alongwith the aforesaid appeals of the associations and homebuyers to avoid the likelihood of further delay in the matter. Acceding to the request, we had withdrawn the mentioned appeals for analogous hearing with the matters pending before us. By way of interim, while staying the operation of the impugned order dated 22.04.2020, we had provided that the IRP shall continue to manage the affairs of the subject company i.e., JIL. Accordingly, the appeals pending before the NCLAT, being Company Appeal (AT) (Insolvency) Nos. 486, 488, 475, 478, 480, 489, 506, 547, 544 and 630 of 2020 have been transferred to this Court and are registered as transferred cases. Further to this, three more matters have been filed directly in this Court, with the respective petitioners/appellants having different sets of grievances against the

NCLT's order dated 03.03.2020. A few impleadment/intervention applications have also been filed in these matters with the applicants seeking to project their own propositions/viewpoints and/or objections in relation to the resolution plan in question.

It is, therefore, apparent that the resolution plan, as approved by the CoC on 17.12.2019 and the order dated 03.03.2020, as passed by the Adjudicating Authority (NCLT) in approval of the resolution plan with certain directions and modifications, are the pivots of the present litigation and a subsidiary of these pivots is the interim order dated 22.04.2020, as passed by NCLAT in the appeal filed by the resolution applicant NBCC, providing for composition of an 'Interim Monitoring Committee' while implementing the resolution plan.

The parties and their respective roles and interests in the matter

For what has been noticed in the outline, and in view of the adjudication required of various issues raised and different reliefs claimed in these matters, with several parties carrying different roles and status, worthwhile it would be to narrate, in brief, the relevant particulars of the key parties involved, with their feasible classification in terms of their respective interests.[17]

6.1. The main parties before us in this batch, in terms of their respective stands, contentions and viewpoints vis-à-vis the aforementioned pivots could be broadly divided in two categories. One

17 This introduction of persons/entities is to broadly co-relate the parties with the points to be taken up for determination; and is not intended to be an exhaustive list of the parties involved.

category is of the parties who stand for the resolution plan, as approved by the CoC but who state grievance against a few parts of the aforesaid orders dated 03.03.2020 and 22.04.2020, insofar as providing for modification of the resolution plan and modified mechanism for its implementation. The other category is of the parties who carry grievances against the resolution plan for one or more of its prescriptions or omissions; and/or who are dissatisfied with the order dated 03.03.2020 insofar as their objections have either been rejected or not taken into account; and/or who are dissatisfied with the order dated 22.04.2020 for the reasons different than those of the parties of first part.

The parties standing for the resolution plan

The two entities who need not, as such, be aligned with any of the other contesting parties but for practical purposes, stand for the resolution plan as approved by CoC are: (i) the corporate debtor company in whose relation the resolution plan has been adopted and approved; and (ii) the Interim Resolution Professional. They may be introduced as under:

1. *Jaypee Infratech Limited (JIL):*

It is the corporate debtor company in whose relation CIRP has been taken up and the resolution plan has been made and approved. This company was essentially set up as a special purpose vehicle[18] after its holding company Jaiprakash Associates Limited (JAL) was awarded the rights for construction of an Expressway from Noida to Agra; and a

18 'SPV' for short.

Concession Agreement[19] was entered into with the Yamuna Expressway Industrial Development Authority[20]. With setting up of this company JIL, apart from other projects, housing plans were envisaged for construction of real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur. A substantial mass of disputes in the present matters has its roots in the dealings of this company JIL with the real estate development projects as also in its dealings with the homebuyers and the lending institutions.

7.2. *The Interim Resolution Professional Anuj Jain (IRP):*

He is the Interim Resolution Professional in CIRP concerning JIL. He has taken steps and proceedings from time to time as envisaged by the Code, including dealing with the claims of a variety of creditors; making an application for avoidance of certain transactions as being preferential, which was finally dealt with and accepted by this Court in the aforementioned judgment dated 26.02.2020; presenting the resolution plans for voting by CoC; and submitting the approved resolution plan to the Adjudicating Authority. In relation to the order dated 03.03.2020 as passed by NCLT, the appeal filed by him before NCLAT, essentially questioning the jurisdiction of NCLT to modify the resolution plan and to change the mode of payment to the dissenting financial creditors, being Company Appeal (AT) (Insolvency) No. 486 of 2020, stands transferred to

19 'CA' for short.
20 'YEIDA' for short.

this Court and is registered as T.C. (C) No. 234 of 2020. He is respondent in almost all other cases.

The major set of parties who stand for the approved resolution plan and seek its implementation while stating objections/grievances against the modification parts of the order dated 22.04.2020 as passed by NCLAT and the order dated 03.03.2020 as passed by NCLT are the following:

1. *NBCC (India) Limited (NBCC):*

NBCC (India) Limited is the resolution applicant and had prepared the resolution plan for JIL, which was approved by a majority of 97.36% of the voting share of the CoC. NBCC seeks setting aside of those parts of the order dated 03.03.2020 where the NCLT has modified some of the terms of resolution plan and/or has issued certain directions. The appeal filed by this company, being Company Appeal (AT) (Insolvency) No. 475 of 2020, stands transferred to this Court and is registered as T.C. (C) No. of 2020. This company is also the respondent in various other appeals/petitions and has comprehensively opposed the objections raised against the resolution plan.[21]

8.2. *IDBI Bank Limited:*

This bank is standing in the capacity of an institutional financial creditor of the corporate debtor JIL. The corporate insolvency resolution process in relation to the corporate debtor JIL, which has culminated in

21 This company has introduced itself in its resolution plan as “Navratna” status Central Public Sector Enterprise, under the aegis of Ministry of Housing and Urban Affairs, Government of India, having diversified its areas of operation in various segments including real estate.

the approval of the resolution plan submitted by NBCC, got initiated pursuant to an application moved by this bank under Section 7 of the Code before the NCLT. This bank leads a set of nine institutional financial creditors including itself, who have voted in favour of the resolution plan in question; and stands in support of the resolution plan while opposing the contentions urged on behalf of the parties on the other side.

8.3. *Jaypee Kensington Boulevard Apartments Welfare Association and 5 others:*

They are the associations of homebuyers who have invested in the housing projects floated by JIL. They are appellants in Civil Appeal No. 3395 of 2020[22], questioning the order dated 22.04.2020 as passed by NCLAT and essentially submit that the resolution plan as approved by NCLT deserves to be implemented.

8.4. *Ishwar Jha and 6 others:*

They are individual homebuyers of the flats in the development projects initiated by JIL. They are appellants in Civil Appeal No. 3396 of 2020[23], questioning the order dated 22.04.2020 as passed by NCLAT and they also essentially submit that the resolution plan as approved by NCLT deserves to be implemented without further delay.

8.5. *Krishna Dev Mishra and 2 others:*

They are also individual homebuyers of the flats in the development projects initiated by JIL. They are applicants of I.A. No. 87967 of 2020 in Civil Appeal No. 3395 of 2020 and similarly submit that

22 @ Civil Appeal Diary No. 14741 of 2020.
23 @ Civil Appeal Diary No. 15061 of 2020.

the resolution plan as approved by NCLT deserves to be implemented without further delay.

8.6. *Major General Praveen Kumar and Colonel V.S. Gaur:*

They are the homebuyers who have moved applications for impleadment/intervention in Civil Appeal No. 3395 of 2020, being I.A. Nos. 73323 of 2020 and 73330 of 2020 respectively, essentially seeking directions to NBCC to complete the remaining works on priority basis in Tower Nos. 5 to 12 and 14 to 16 in Kensington Park – 1, Jaypee Greens, Noida so that the possession of flats could be handed over to the buyers.

The objectors

The persons/entities who carry grievance/s against the resolution plan for one reason or the other; and/or who are dissatisfied with the order passed by the NCLT and/or by the NCLAT, may be grouped with reference to the objections/propositions they stand for.

The first set of objectors consists of such persons/entities who otherwise belong to the class of 'homebuyers' but have their own grievances in relation to the resolution plan and the subsequent orders. This set of parties could be introduced as follows:

Wish Town Home Buyers Welfare Society:

This is a society of homebuyers in the projects of JIL who seeks implementation of the projects but carries reservations on some of the terms of the resolution plan, where the requisite compensation in relation to the delayed implementation of the projects by JIL has not been

provided, particularly in terms of Section 18 of the Real Estate (Regulation and Development) Act, 2016[24]. It has also been suggested that the plan of another resolution applicant Suraksha Realty was far better than that of NBCC. This society also has the grievance that NBCC has failed to specify in the resolution plan the treatment and utilisation of the sum of INR 750 crores received from JAL as also 758 acres of land that had come to JIL after the judgment of this Court dated 26.02.2020. This society had filed Company Appeal (AT) (Insolvency) No. 506 of 2020 before NCLAT against the said order dated 03.03.2020 that stands transferred to this Court and is registered as T.C. (C) No. 243 of 2020. This society has also moved an application, I.A. No. 72707 of 2020 in Civil Appeal No. 3395 of 2020 with the submissions against continuation of NBCC in the proposed 'Interim Monitoring Committee'.

10.2. *Jaypee Aman Owners Welfare Association:*

This is an association of homebuyers in one of the projects of JIL namely, Jaypee Greens Aman in Sector 151 Noida. This association maintains that in substance, 'Project Aman' stands completed; that Offer of Possession[25] has already been issued to the allottees of 22 Towers; that delayed penalty ought to be allowed in relation to Tower Nos. 23 and 24 for which, OOP has been issued by IRP; and that IRP ought to take steps for OOP for flats in Tower Nos. 25 and 27 for which, the application for Occupancy Certificate[26] has already been moved. This association is

24 Hereinafter also referred to as 'RERA'.
25 'OOP' for short.
'OC' for short.

aggrieved of the projected date/s of completion and proportional increase in delay, as provided in the resolution plan. As against the said order dated 03.03.2020, this association had filed Company Appeal (AT) (Insolvency) No. 480 of 2020 before NCLAT that stands transferred to this Court and is registered as T.C. (C) No. 240 of 2020.

10.3. *Ashish Mohan Gupta & Anr.:*

These are the homebuyers who seek to oppose the resolution plan while raising questions over the proceedings of the Committee of Creditors as also on various other grounds, which may be running common to the grounds urged by the homebuyers/associations who are objecting to the plan and its approval. They had filed Company Appeal (AT) (Insolvency) No. 489 of 2020 before NCLAT that stands transferred to this Court and is registered as T.C. (C) No. 242 of 2020.

10.4. *Jaypee Orchard Resident Welfare Society:*

This is another society of homebuyers in the projects of JIL who seeks implementation of the projects of JIL but has its own reservations on the terms of the resolution plan where the requisite compensation in relation to the delayed implementation of the projects by JIL has not been provided in terms of RERA. This society has not filed the appeal before NCLAT but in view of other appeals having been withdrawn to this Court, has preferred the petition for special leave to appeal, being SLP Diary No. 18129 of 2020 in this Court, seeking to challenge the said order dated 03.03.2020.

10.5. *Ishwar Kewalramani and 76 Others:*

These are the applicants of another impleadment application being I.A. No. 88795 of 2020 in Civil Appeal No. 3395 of 2020; they are homebuyers of the projects undertaken by JIL and are aggrieved by the order dated 03.03.2020 insofar as NCLT has failed to specify the use of 758 acres of unencumbered land now available with JIL; and another grievance is that NBCC has violated the statutory provisions by not providing compensation to the homebuyers due to delayed possession.

10.6. *Ashok Chandra:*

He is another homebuyer who has moved I.A. No. 84309 of 2020 in Civil Appeal No. 3395 of 2020 and seeks direction to determine adequate and fair amount of compensation to be paid to the homebuyers due to the unreasonable delay in completion. He has also suggested that different mechanism is required to be provided for dealing with the CIRP in question, in displacement of the resolution plan of NBCC.

Other objectors to the resolution plan and the order of NCLT dated 03.03.2020 could be broadly sub-divided into three: one being the holding company of the corporate debtor JIL and the persons/entities related with these companies; second being the dissenting institutional financial creditor of the corporate debtor JIL; and third being the other stakeholders.

In the first sub-sect of objectors, the main parties before us are as follows:

12.1. *Jaiprakash Associates Limited (JAL):*

It is the holding company of the corporate debtor JIL; it had approximately 71.64% equity shareholding in JIL as on 31.03.2017. This company had deposited the sum of INR 750 crores as per the orders passed by this Court in the case of ***Chitra Sharma*** (supra). Apart from a few other objections, this company JAL is seeking refund of INR 750 crores with accrued interest; and it is contended that the said amount is not the property of the corporate debtor JIL and it cannot be utilised for the CIRP of JIL. This holding company had filed Company Appeal (AT) (Insolvency) No. 478 of 2020 before NCLAT against the said order dated 03.03.2020 that stands transferred to this Court and is registered as T.C. (C) No. 238 of 2020.

12.2. *Pankaj Sharma and 3 others:*

They are homebuyers of the projects being developed by JAL and are similarly contending that the said sum of INR 750 crores with accrued interest cannot be utilised for the CIRP of the corporate debtor JIL. They too had filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT) (Insolvency) No. 544 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 237 of 2020.

12.3. *Knights Court Social Welfare Association:*

This is an association representing the homebuyers in the 'Knights Court' project of JAL who are aggrieved by the fact that the project has

been left incomplete by JAL and who are equally aggrieved by the provision made in the resolution plan of JIL for utilisation of the said amount of INR 750 crores. This association has directly challenged the said order of NCLT dated 03.03.2020 in this Court by way of Special Leave Petition (Civil) No. 10543 of 2020.

12.4. *Manoj Gaur, suspended MD of corporate debtor JIL:*

He is the suspended Managing Director of the corporate debtor JIL and has also stated himself to be the Executive Chairman of JAL. He has been arrayed as third respondent in the appeal filed by IRP. It is also noticed that he, along with the holding company JAL, filed an impleadment application (I.A. No. 1508 of 2020) in the appeal filed by NBCC that was allowed by NCLAT on 15.07.2020 and that is how he became the seventh respondent in the appeal of NBCC. According to his submissions, the IRP failed to ensure that the resolution plan did not contravene the law for the time being in force; and that approval by CoC leaves much to be desired. Several of the stipulations and prescriptions in the resolution plan of NBCC are put to question by him.

The second sub-sect of objectors to the resolution plan consists of the institutional financial creditor of the corporate debtor JIL, being *ICICI Bank Limited.*

13.1. The directions issued by NCLT in modification of the resolution plan in regard to the claim of this bank for payment, in its capacity as the dissenting financial creditor of JIL, is one of the major grounds of

challenge by the persons/entities standing in favour of the resolution plan in question. This bank has also objected to the clauses in the resolution plan in regard to the treatment of the said sum of INR 750 crores. In its another capacity as the lender of JAL and having mortgage over the land of JIL in security of such lending to JAL, this bank has levied another challenge to the resolution plan in regard to the release of its security interest. This bank had challenged the said order dated 03.03.2020 before NCLAT in Company Appeal (AT) (Insolvency) Diary No. 21936 of 2020 and has moved Transfer Petition (C) Diary No. 20274 of 2020 in this Court, seeking transfer of its appeal before NCLAT for analogous hearing with the present batch of matters.

The third sub-sect of the objectors to the resolution plan comprises of different entities/persons, mostly carrying their own claims/grievances. They are as follows:

Yamuna Expressway Industrial Development Authority:

This Authority, constituted under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976[27] was initially called Taj Expressway Industrial Development Authority[28]; subsequently it was renamed as Yamuna Expressway Industrial Development Authority[29] by a notification dated 11.07.2018. It had been the land provider for execution of various projects by JAL/JIL under the Concession Agreement. The provisions in the resolution plan for dealing with the available parcels of

27 Hereinafter also referred to as the 'U.P. Act of 1976'.
28'TEA' for short.
29 'YEIDA' for short.

land and for meeting with the contingent liability (as regards payment of additional compensation towards acquisition of land) are the main areas of concern of this Authority, who had filed its objections to the resolution plan. The directions issued in modification of the resolution plan in regard to YEIDA is also one of the major grounds of challenge by the persons/entities standing in favour of the resolution plan.

14.2. *YES Bank Limited:*

This bank is the financial creditor of a wholly-owned subsidiary of JIL, being Jaypee Healthcare Limited[30]. This bank asserts that the assets of JHL, said to be mortgaged with it, are not within the purview of CIRP of JIL to be disposed by NBCC; and it seeks modifications in the resolution plan accordingly. This bank filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT) (Insolvency) No. 488 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 235 of 2020.

14.3. *Rajesh Gupta and 2 others:*

These three persons, said to have entered into respective agreements with the corporate debtor, carry their own grievance against the prescription in the resolution plan where the resolution applicant has reserved its right to cancel such agreements/sub-lease deeds. They seek direction for entering into sale deed/s of plot/s in Jaypee Greens Wish Town or for refund. They had also filed an appeal before NCLAT against the said order dated 03.03.2020, being Company Appeal (AT)

30 'JHL' for short.

(Insolvency) No. 547 of 2020 that stands transferred to this Court and is registered as T.C. (C) No. 241 of 2020.

14.4. *Raman Prakash Mangala and 29 others:*

They are minority shareholders of JIL and their assertion is that the resolution plan approved by CoC ought to consider the interests of minority shareholders by giving fair market value of the equity shares held by them. Their appeal against the order dated 03.03.2020 before NCLAT, being Company Appeal (AT) (Insolvency) No. 630 of 2020, also stands transferred to this Court and is registered as T.C. (C) No. 239 of 2020.

14.5. *Gyanendra Kumar Raveendra:*

He is also a minority shareholder of JIL and has moved an application for impleadment in Civil Appeal No. 3395 of 2020, being I.A. No. 89429 of 2020. He is similarly aggrieved by the action of NBCC to extinguish the right of the minority shareholders without giving them a 'fair value' of their shares.

Points for determination

Having drawn a brief sketch and outline of the matter and having introduced the principal parties to this litigation with their respective interests, we may now indicate the major points, which arise for determination in view of diverse propositions advanced before us, coupled with the stipulations in the resolution plan in question and the modifications ordered by NCLT and NCLAT by way of the orders impugned. The principal points calling for determination in this batch are:

A. What is the extent of, and limitations over, the powers and jurisdiction of the Adjudicating Authority while dealing with the resolution plan approved by the Committee of Creditors?

B. As to whether approval of the resolution plan of NBCC is vitiated because of simultaneous voting over two resolution plans in the Committee of Creditors?

C. (i) As to whether the Adjudicating Authority has erred in not approving the stipulations in the resolution plan for meeting with the contingent liability of additional amount of land acquisition compensation; and has also erred in modifying these stipulations?

As to whether the Adjudicating Authority has erred in not approving the mechanism provided in the resolution plan for transfer, of the concessionaire's rights and obligations under the Concession Agreement with YEIDA, to the SPVs proposed to be incorporated; and has also erred in modifying the relevant stipulations?

As to whether the Adjudicating Authority has erred in not approving the reliefs and concessions sought for in the resolution plan in relation to YEIDA?

D. As to whether the Adjudicating Authority has erred in not approving the treatment of dissenting financial creditor like ICICI Bank Limited in the resolution plan, as being not in

accord with Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and has erred in modifying the terms of resolution plan and in directing payment to the dissenting financial creditor in monetary terms?

E. As to whether the Adjudicating Authority has erred in modifying the step provided in the resolution plan in regard to the fixed deposit holders and in directing the resolution applicant to make provision towards the dues of unclaimed fixed deposit holders also?

F. (i) As to whether the resolution plan unauthorisedly purports to deal with the assets of Jaypee Healthcare Limited?

As to whether the Adjudicating Authority has erred in assuming that YES Bank Limited had agreed for constitution of a committee to take forward the disinvestment process of Jaypee Healthcare Limited?

G. As to whether the stipulation in the resolution plan for cancellation of certain agreements/sub-leases is unfair and the Adjudicating Authority has erred in not modifying the same?

H. As to whether the minority shareholders are entitled to state their claims/objections despite having not approached

the Adjudicating Authority; and as to whether the resolution plan does not provide fair treatment to the minority shareholders?

I. (i) As to whether, after approval of the resolution plan of NBCC by the Committee of Creditors, where homebuyers as a class assented to the plan, any individual homebuyer or any association of homebuyers could maintain a challenge to the resolution plan and could be treated as a dissenting financial creditor or an aggrieved person?

As to whether the stipulations in the resolution plan stand in violation of the provisions of the Real Estate (Regulation and Development) Act, 2016?

As to whether the resolution plan is violative of the requirements of CIRP Regulations?

As to whether any housing project which has been completed or is nearing completion ought to be kept out of the purview of the resolution plan?

J. (i) As to whether the amount of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the case of ***Chitra Sharma,*** and accrued interest thereupon, is the property of JAL and stipulation in the resolution plan concerning its usage by JIL or NBCC is impermissible?

As to whether any amount is receivable by JIL and/or its homebuyers from JAL; and the accounts between JAL and JIL need reconciliation?

K. (i) As to whether Clause 23 of Schedule 3 of the resolution plan providing for extinguishment of security interest of lenders of JAL could not have been approved by the Adjudicating Authority?

As to whether adequate provision is required to be made in the resolution plan as regards utilisation of the land bank of 758 acres, that has become available to JIL in terms of the judgment dated 26.02.2020 by this Court?

L. What should be the appropriate orders on the other issues raised by the resolution applicant seeking clarification/directions?

M. As to whether the Appellate Authority was justified in providing for an Interim Monitoring Committee for implementation of the resolution plan in question during the pendency of appeals?

N. What should be the final order and relief?

Relevant factual and background aspects

For determination of the points so arising, we need to examine the relevant provisions contained in IBC and CIRP Regulations and apply the same to the process related with consideration and approval of the

resolution plan in question; and to the terms, prescriptions and stipulations of the impugned resolution plan as also to the modifications, as ordered (or as declined) by the Adjudicating Authority (NCLT) in the impugned order dated 03.03.2020. However, in the given set of facts and circumstances, before examining the relevant provisions and before dilating on the relevant features of the resolution plan and the order impugned, it is expedient to take note of the crucial background aspects relating to the present CIRP and key attributes of the orders passed by this Court in previous rounds of litigation concerning this very CIRP.

For a clearer picture of the subject matter of this litigation, a few glimpses of the relevant history shall be apposite.

By way of a notification dated 24.04.2001, the Government of Uttar Pradesh, in exercise of its powers under Section 3 of the U.P. Act of 1976, proceeded to set up Taj Expressway Industrial Development Authority ('TEA') for anchoring development of Taj Expressway Project, being that of a six-lane 160 km long Super Expressway with service roads and associated facilities connecting Noida and Agra, passing through a so-called virgin area along the river Yamuna.

At the initial stages, the said Taj Expressway Industrial Development Authority invited bids for selecting the entity for execution of the project. In this process, ultimately, the company known as Jaiprakash Industries Limited came out as the successful bidder. This company,

Jaiprakash Industries Limited, is now named as Jaiprakash Associates Limited ('JAL').

17.3. After the said bidding process, a Concession Agreement dated 07.02.2003 was executed between the principal TEA and the successful bidder Jaiprakash Industries Limited, who came to be referred to as the "concessionaire". Various terms and stipulations of this Concession Agreement form the subject matter of one segment of dispute in the present litigation, as discussed at the relevant stages hereafter. At the present stage, worthwhile it is to notice that under this CA, the concessionaire was to be provided land for constructing Expressway and its allied facilities; and was also to be provided other land for development. In this regard, the concessionaire was given lease of Expressway land with a right to collect toll from the users of the road for 36 years; and the land adjacent to the road was provided to the concessionaire for commercial exploitation on a lease for 90 years. As regards premium for the land being so transferred, the stipulations in the CA had been to the effect that such premium shall be equivalent to acquisition cost plus a lease rent of INR 100 per hectare per year. In Clause 18.1 of CA, it was also agreed to between the parties that in case the concessionaire and TEA would consider it necessary to transfer the rights and obligations of concessionaire to a special purpose vehicle ('SPV'), the concessionaire would do so in a reasonable time for which, documents as may be required shall be executed amongst the

concessionaire, the TEA and the SPV. For accomplishment of the project, the Government of Uttar Pradesh proceeded to acquire land for laying of the Expressway; and also proceeded to acquire additional land along the road for development of the same for commercial, amusement, industrial, institutional and residential purposes.

17.4. Coming on the heels of this project and in terms of the said Clause 18.1 of CA, the corporate debtor Jaypee Infratech Limited ('JIL') was set up as a special purpose vehicle by the concessionaire and thereafter, the rights and obligations under CA were transferred to JIL by way of an assignment agreement dated 19.10.2007 and deed of agreement dated 27.11.2007. In this manner, the corporate debtor JIL came to be accepted as the concessionaire. Later on, by way of a notification dated 11.07.2008, Taj Expressway Industrial Development Authority was renamed as Yamuna Expressway Industrial Development Authority ('YEIDA'). The net result of the dealings aforesaid has been that the rights and obligations under the said Concession Agreement dated 07.02.2003 now relate to the corporate debtor JIL as the concessionaire and YEIDA as the land providing agency.

17.5. As noticed, the corporate debtor JIL was set up as the SPV by the original concessionaire JAL; and JAL had approximately 71.64% equity shareholding in JIL as on 31.03.2017. Admittedly, JAL had been the holding company of JIL. When JIL was set up as an SPV for the purpose of execution of the project/s under the said CA, finances were obtained

from a consortium of banks against the partial mortgage of land acquired and a pledge of 51% of the shareholding held by JAL. Accordingly, JIL took up those two projects; the Expressway was laid and JIL also started developing real estate projects in two locations of the land acquired, one in Wish Town, Noida and another in Mirzapur.

17.6. However, JIL defaulted in several of its obligations, including those in completion of the real estate projects as proposed and in payment of dues of the lender financial institutions.

The default on the part of JIL in payment of its dues led the lender bank, IDBI Bank Limited, instituting a petition under Section 7 of the Code before the NCLT, for initiation of the corporate insolvency resolution process against JIL. The applicant bank alleged that JIL had committed a default in repayment of its dues to the tune of INR 526.11 crores. JIL filed its objections to the petition but later on, withdrew the objections and furnished its consent for resolution plan under the provisions of the Code.

In view of the above, on 09.08.2017, NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under Section 14 of the Code by which, the institution of suits and continuation of pending proceedings, including execution proceedings, were prohibited and an Interim Resolution Professional was appointed. On 14.08.2017, IRP, in pursuance of the order of NCLT, called for submissions of claims by financial creditors in Form-C, by operational creditors in Form-B, by the workmen and employees in Form-E and by other creditors in Form-F. On

16.08.2017, the Insolvency and Bankruptcy Board of India[31] made an amendment to its Regulations whereby, Regulation 9(a) was inserted to include the claims by other creditors; and then, on 18.08.2017, the Board released a press note that the homebuyers could fill in Form-F, as they could not be treated at par with financial and operational creditors.

The aforesaid position led to several petitions in this Court, particularly by the aggrieved homebuyers. As noticed, those petitions were dealt with by this Court as a batch, led by the case of ***Chitra Sharma*** (supra). Several orders were passed by this Court in the said batch of petitions from time to time, *inter alia*, to the effect that IRP was permitted to take over the management of JIL and was directed to ensure that necessary provisions were made to protect the interests of homebuyers. Various orders were also made with directions to JAL, as holding company of JIL, for making deposits in the Court, particularly looking to the claim of refund being made by some of the homebuyers. While finally disposing of the matters, this Court took note of the interests of homebuyers as also the creditors of JAL and JIL; and also took note of the status of proceedings and the statutory provisions as then obtaining, including the fact that the statutory period of 180 days, and even the extended period of 90 days, for concluding the CIRP had come to an end but then, by way of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, which came into force on 06.06.2018, the doubts about the status of homebuyers were removed and they were expressly

31 Hereinafter also referred to as 'the Board'.

recognised as financial creditors of the corporate debtor. In the given set of facts and circumstances, this Court provided a reprieve to the CIRP in question while making further orders in the interests of homebuyers and other creditors.

19.1. The proceedings and the orders passed by this Court in the said case of ***Chitra Sharma*** are of material bearing in the present case and, therefore, may be usefully recounted in necessary details.

Orders and directions in the case of *Chitra Sharma*

As noticed, this Court was moved in the case of ***Chitra Sharma*** (supra) essentially for the reason that a large number of homebuyers, who had invested in the real estate projects proposed by JAL and JIL, were feeling distressed in the wake of the proposed CIRP concerning JIL and who were likely to be left in the lurch because, at the given stage, while IBC recognised three categories of stakeholders namely, (i) corporate debtors; (ii) financial creditors; and (iii) operational creditors but, the homebuyers, otherwise having a direct and substantial interest in CIRP with investment of lifetime, were being treated only as 'other creditors'. In the given scenario, on being moved, this Court issued notice on 04.09.2017 in the said batch of petitions; the proceedings before the NCLT at Allahabad were stayed until further orders; a copy of the proceedings was ordered to be served on the office of the learned Attorney General for India; and the applications for impleadment and intervention were allowed.

20.1. Thereafter, on 11.09.2017, while dealing with an application moved by IDBI Bank Limited for vacation of the ad-interim order dated 04.09.2017, several facets of the matter and ramifications of the stay order passed by this Court were projected with reference to the scheme of the provisions contained in the Code. On the other hand, it was argued on behalf of the homebuyers that they were of lower and middle income groups, who had invested their life savings with JIL and JAL and their interests were required to be protected. It was argued that if CIRP was restored, there should be a representative from the homebuyers or the Court may appoint someone on CoC to espouse the interests of the homebuyers.

20.1.1. Taking note of the submissions so made and in order to safeguard the interests of stakeholders, this Court modified the earlier order dated 04.09.2017 and issued material directions, *inter alia*, to the effect that: (i) IRP shall take over the management of JIL and formulate interim resolution plan with necessary provision to protect the interests of homebuyers; (ii) Mr. Shekhar Naphade, learned senior counsel along with Ms. Shubhangi Tuli, AOR shall participate in the meetings of CoC to espouse the cause of the homebuyers and to protect their interests; the Director or Managing Director of JIL or JAL on the date of institution of insolvency proceedings as also on the date of order, except the nominee Directors of lending institutions, shall not leave the country without prior permission of the Court; and all the suits and proceedings against JIL

shall remain stayed in terms of Section 14(1)(a) of the Code. In addition, this Court also directed JAL to deposit a sum of INR 2,000 crores and provided that if any assets or property of JAL had to be sold for the purpose, that should be done after obtaining prior approval of this Court. For its relevance, the aforesaid order dated 11.09.2017, carrying significant observations and material directions of this Court, which are of bearing on a substantial part of the present litigation, could be extracted, *in extenso*, as under: -

> "All the applications for intervention/impleadment are allowed.
>
> *IA No. 87575 of 2017 in SLPs (C) Nos. 24001- 24002 of 2017 (D. Nos. 27277, 27579 and 27624 of 2017)*
>
> The present interlocutory application has been filed by the IDBI Bank Ltd. in the special leave petitions which have been registered as SLPs (C) Nos. 24001 and 24002 of 2017.
>
> This is an application for vacating/modification of the order dated 4-9 -2017. On that day, this Court while issuing notice, had passed the following order:
>
> > "2. …..In the meantime the impugned order(s) passed by the National Company Law Tribunal, Allahabad shall remain stayed until further orders. A copy of the special leave petition be served on the office of learned Attorney General for India. All applications for impleadment/intervention stand allowed."
>
> Mr K.K. Venugopal, learned Attorney General for India appearing for Respondents 1 and 2 submitted that the order passed by this Court on 4-9-2017 needs to be vacated or modified because the consequence of the stay would be that the Management of Respondent 3, Jaypee Infratech Ltd. would stand restored. This was not a consequence intended by this Court. It is urged by him that if the erstwhile Management of the said company continues, it will affect the rights of the creditors and the consumers as well.
>
> In the course of the hearing, we have been informed that after the order of stay was passed by this Court, the Interim Resolution Professional (IRP) has handed over records to Respondent 3, Jaypee Infratech Ltd. ("JIL"). It is submitted by Mr K.K. Venugopal, learned Attorney General that some time should be granted to the

IRP to formulate at least a preliminary scheme so that the interest of all stakeholders is protected. He has also shown his concern for the interest of the homebuyers.

Dr Abhishek Manu Singhvi, learned Senior Counsel appearing for IDBI Bank Ltd., (Respondent 6 in the writ petition) submits that under the statutory scheme, the IRP has to take over otherwise the letter and spirit of the Act is likely to be affected.

The learned counsel appearing for the homebuyers, in contra, submits that they belong to the lower and middle income group and have invested life savings with JIL and with its holding company, Jai Prakash Associates Ltd. ("JAL"). It has been assiduously urged that the investments of flat purchasers are with JIL and JAL and, therefore, the interest of the purchasers may be protected. It is also argued that if the IRP is restored, there should be a representative from the homebuyers or this Court may appoint someone on this Committee of Creditors and espouse the interests of the homebuyers.

Having heard the learned counsel for the parties at length, in modification of the order dated 4-9-2017, we issue the following directions:

The IRP shall forthwith take over the Management of JIL. The IRP shall formulate and submit an interim resolution plan within 45 days before this Court. The interim resolution plan shall make all necessary provisions to protect the interests of the homebuyers;

Mr Shekhar Naphade, learned Senior Counsel along with Ms Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the Committee of Creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the homebuyers and protect their interests;

The Managing Director and the Directors of JIL and JAL shall not leave India without the prior permission of this Court;

JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs 2000 crores (Rupees two thousand crores) before this Court on or before 27-10-2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this Court. Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ICICI/SBI);

> All suits and proceeding instituted against JIL shall in terms of Section 14(1)(*a*) remain stayed as we have directed the IRP to remain in Management.
>
> Be it clarified that we have passed this order keeping in view the provisions of the Act and also the interest of the homebuyers.
>
> IA stands disposed of accordingly.
>
> The matter be listed at 2.00 p.m. on 13-11-2017.
>
> The prior date given by this Court i.e. 10-10-2017 stands cancelled."
>
> (emphasis in bold supplied)

20.1.2. It could be readily noticed that in formulating the directions aforesaid, this Court initiated steps to protect the interests of homebuyers essentially for the reason that, at the given stage, homebuyers were not regarded as financial creditors and they were not represented in the CoC. Significantly, while evolving a workable and protective mechanism, this Court also took note of the crucial background aspects and the fact that JIL was essentially an alter ego of JAL; and thus, even while consciously noting that JAL was not a party to the insolvency proceedings, directed that JAL shall deposit a sum of INR 2,000 crores and restraints were also put over disposal of assets or property of JAL and over the movement of the Directors/Managing Directors of JIL or JAL away from the country.

20.2. JAL moved an application (I.A. No. 102471 of 2017) for modification/recall of the aforesaid direction for deposit of INR 2,000 crores or for a modification that would enable it to transfer the rights under the Concession Agreement in respect of the Yamuna Expressway. This application was considered and rejected by the Court on 25.10.2017 after

noticing the submissions in opposition by the learned Attorney General as also by the learned counsel appearing on behalf of IDBI Bank and YEIDA. It was also submitted by the counsel for IRP that the rights under the Concession Agreement belonged to JIL, which was subject to proceedings under the IBC and therefore, such a request could not be granted. However, the time for depositing INR 2,000 crores was extended until 05.11.2017. The relevant part of order dated 25.10.2017 reads as under: -

> "It is submitted by Mr Kapil Sibal and Mr Mukul Rohatgi, learned Senior Counsel appearing for the applicant that JAL may be permitted to transfer its rights under the concession agreement in respect of Yamuna Expressway. The same is seriously opposed by Mr K.K. Venugopal, learned Attorney General for India, Dr Abhishek Manu Singhvi, learned Senior Counsel appearing for the IDBI Ltd. and Mr Ravindra Kumar, learned counsel appearing for the Yamuna Expressway Industrial Development Authority.
>
> It is also submitted by Mr Parag P. Tripathi, learned Senior Counsel representing the Interim Resolution Professional (IRP) that the rights under the concession agreement in respect of Yamuna Expressway are of Jaypee Infratech Ltd. (JIL), which is subject to proceeding under the Insolvency and Bankruptcy Code and, therefore, it cannot be transferred. Mr Ravinder Kumar, learned counsel appearing for the Authority has submitted that the rights under the concession agreement, are non-transferable.
>
> We have also heard Mr Ajit Kumar Sinha, learned Senior Counsel appearing for some of the homebuyers. There are other counsel who are representing the homebuyers who are interested in having their flats. We do not want to address the said aspect today.
>
> We are not inclined to entertain the application for modification of the order dated 11-9-2017. However, we extend the time to deposit the sum of Rs 2000 crores (Rupees two thousand crores) till 5-11-2017."

20.3. Then, on 13.11.2017, this Court appointed learned counsel Mr. Pawanshree Agarwal as the *amicus curiae*, who was to open a web portal on which details of homebuyers could be uploaded. All the Directors of

JAL, except institutional Directors were ordered to remain present before the Court on the next date with the affidavits disclosing their personal assets. This order dated 13.11.2017 reads as under: -

> "All the applications for impleadment/intervention stand allowed. The homebuyers are directed to approach Mr Pawanshree Agarwal, learned counsel, who is appointed as the Amicus Curiae in the matter to assist the Court and he shall open a web portal so that the homebuyers can give their details to Mr Pawanshree Agarwal. Let the matter be listed on 22-11-2017. On that day, all the Directors except institutional Directors of Jaiprakash Associates Ltd. (JAL) shall remain personally present in the Court with the affidavits disclosing their personal assets."

20.4. On the next date, 22.11.2017, eight independent Directors and five promoter Directors were present before the Court. On a statement made on behalf of JAL, this Court permitted JAL to deposit INR 275 crores during the course of the day and directed further deposit, of INR 150 crores by 13.12.2017 and INR 125 crores by 31.12.2017. A restraint was imposed on the alienation of properties and assets of the Directors and their families while maintaining the earlier direction for the deposit of INR 2,000 crores; and the Directors concerned were directed to remain present on the next date. The *amicus curiae* was asked to create a web portal within a week; and for that matter, learned counsel appearing for JAL was to provide all the details as required by the *amicus* and also to provide him a sum of INR 5 lakhs. The relevant part of order dated 22.11.2017 reads as under: -

> "It is submitted by learned Senior Counsel appearing for Jaiprakash Associates Ltd. (JAL) that the company is ready with Rs 275 crores. The homebuyers raised their concern about the realisation of the amount. This Court appreciates the grievance and the concern of the homebuyers.

> We think it would be appropriate to direct as follows:
>
> (*a*) A demand draft of Rs 275 crores be deposited by Mr Anupam Lal Das, learned counsel appearing for the company, before the Registry of this Court, today.
>
> (*b*) A sum of Rs 150 crores be deposited by 13-12-2017.
>
> (*c*) A further sum of Rs 125 crores be deposited by 31-12-2017. (*d*) Neither the independent Directors nor the promoter Directors shall alienate their personal properties or assets in any manner, and if they do so, they will not only be liable for criminal prosecution but contempt of the court.
>
> (*e*) That apart, we also direct that the properties and assets of their immediate and dependent family members should also not be transferred in any manner, whatsoever.
>
> Needless to say that direction for deposit of Rs 2000 crores shall remain as it is. The only indulgence is to pay the same in instalments.
>
> Mr Pawanshree Agrawal, who had been appointed as Amicus Curiae on an earlier date, shall create a portal within a week and do the needful as he has done in similar matters. Mr Anupam Lal Das, learned counsel shall provide all the details as required by Mr Pawanshree Agrawal. Mr Anupam Lal Das shall provide a sum of Rs 5 lakhs to Mr Pawanshree Agrawal for creation of the portal and to carry on the consequential activities. Matters be listed on 10-1-2018. On that day, all the independent Directors and promoter Directors of Jaiprakash Associates Limited, shall remain present. Copies of the affidavits deposed by all the five promoter Directors, shall be served on the Central Agency, so that the learned Attorney General can be made aware of that. Call on the date fixed."

20.5. Next to the above, the matter was considered on 15.12.2017, when the deposited INR 150 crores were ordered to be kept in a short-term deposit and the time (for further payment) was extended until 25.01.2018. Further to that, on 10.01.2018, this Court took note of the submissions made on behalf of the homebuyers of JAL as also an application made by Reserve Bank of India[32] seeking leave to move the NCLT against JAL and issued the directions, *inter alia*, to the effect that JAL shall file an affidavit disclosing its housing projects throughout the

32 'RBI' for short.

country and the stage of their construction; the *amicus* shall open an independent web portal for the homebuyers of JAL; the application of RBI shall be considered at a later stage; and the Directors concerned need not remain personally present before the Court unless so directed but shall not leave the country. The relevant part of this order dated 10.01.2018 reads as under: -

> "Having heard the learned counsel for the parties, we are inclined to pass the following directions:
> (*i*) Jaiprakash Associates Ltd. (JAL) shall file an affidavit stating therein as to how many housing projects it has throughout the country and the stage of their construction. The said affidavit shall be filed within a week hence.
> (*ii*) Mr Pawanshree Agarwal, learned Amicus Curiae shall create an independent web portal in respect of the homebuyers of JAL, which shall reflect the details of the homebuyers.
> (*iii*) The web portal created by Mr Pawanshree Agarwal qua Jaypee Infratech Ltd. (JIL) shall be kept alive.
> (*iv*) The application filed by Reserve Bank of India seeking permission to move NCLT shall be considered at a later stage.
> (*v*) The independent Directors of JAL need not remain personally present on every date of hearing unless so directed by this Court. The independent Directors shall not leave the country without leave of this Court.
> (*vi*) The earlier order of injuncting JAL to create any kind of third-party interest in the assets is reiterated.
> (*vii*) The applications for impleadment/intervention and directions filed before this Court shall be served on Mr Pawanshree Agarwal."

20.6. Further effective proceedings took place on 21.03.2018 when it was stated on behalf of JAL that INR 550 crores had already been deposited and that only about 8% of homebuyers were interested in seeking refund while others were desirous of seeking possession of their flats. This Court indicated that at the given stage, only the matter in relation to the homebuyers seeking refund was being examined and other grievances shall be examined in the next phase of proceedings. Since the

order for deposit of INR 2,000 crores had not been complied with despite the end of deadline, the Court issued directions for further deposit of INR 200 crores, as agreed to by the Managing Director of JAL present in the Court, where the first instalment of INR 100 crores was to be deposited by 15.04.2018 and the second instalment in the like amount was to be deposited by 10.05.2018. The *amicus curiae* informed the Court, with reference to his portal and the record of JAL, that a sum of INR 1,300 crores was required to be refunded by way of principal alone to the homebuyers who were seeking refunds, whereupon the *amicus* was requested to submit a project-wise chart, indicating the number of persons and the stage of completion. Taking note of the grievances of the homebuyers that the developer was demanding monthly instalments despite being unable to complete construction, the developer was restrained from raising demands towards outstanding or future instalments in respect of those buyers who had expressed a desire to obtain refunds. Further to that, the IRP was permitted to finalise the resolution plan, to be implemented only with the leave of the Court. This Court also took note of the inability expressed by the learned senior counsel, who was earlier requested to espouse the cause of homebuyers in CoC and, in his place, Mr. Gaurav Agarwal Advocate was appointed for the purpose. This order dated 21.03.2018 reads as under: -

> "Heard Mr Anupam Lal Das, learned counsel appearing for Respondent 4 Jaiprakash Associates Ltd. (JAL). Though many a contention has been raised by Mr Das, yet, we are not inclined to entertain the same keeping in view our orders dated 11-9-2017

and 25-10-2017. We have been told by Mr Das that JAL has deposited a sum of Rs 550 crores before the Registry of this Court. It is submitted by Mr Das that only 8% of the homebuyers/allottees are inclined to take refund whereas others have expressed their inclination to have the flats.

We would intend to make it absolutely clear that, for the present, we are only concerned with those homebuyers who intend to have refund. In the next phase, we may consider the grievances, if any, of the homebuyers who intend to have the flats. In that regard, we think it appropriate to hear Mr Parag P. Tripathi, learned Senior Counsel appearing for Interim Resolution Professional (IRP) and Mr Jayant Bhushan and Mr Sanjay Hegde and others, learned Senior Counsel appearing for some Associations of homebuyers who intend to have their flats.

As our order for deposit of Rs 2000 crores has not been complied with, we intend to pass the following directions:

JAL shall deposit a further sum of Rs 200 crores in two instalments, as agreed by the Managing Director who is present in Court today. The first instalment of Rs 100 crores shall be deposited by 15-4-2018 and the second instalment of Rs 100 crores shall be deposited by 10-5-2018;

It is submitted by Mr Pawanshree Agrawal, learned Amicus Curiae that as per his portal an amount of Rs 1300 crores, at present, is required to be refunded towards the principal sum for those homebuyers who, as of today, seek refund. The figure of Rs 1300 crores is as per the record of JAL.

In view of the aforesaid, we would require Mr Agrawal to prepare a projectwise chart indicating the number of persons in respect of that project and the stage of completion of the respective projects so that appropriate order can be passed for disbursement of the amount on pro rata basis to the homebuyers;

Mr Agrawal, learned Amicus Curiae shall keep the portal operational. However, **the requests of only those persons on the portal who have sought refund, as of today will be considered at this stage**;

The submission of the homebuyers who are seeking refund is that the developer is making demands towards monthly instalments. We direct that no demand towards outstanding or future instalments shall be raised by the developer to the flat buyers who have, as of today, expressed the option to obtain refund. The demands raised by the developer in respect of the homebuyers who have already opted for refund till today, shall remain stayed;

The IRP may proceed to finalise the resolution plan but the same shall be implemented after taking leave of this Court.

The National Company Law Tribunal (NCLT) shall decide subject to the directions which we have given hereinabove.

> Before we fix the next date, we must note that we have been apprised that Mr Shekhar Naphade, learned Senior Counsel who was appointed to espouse the cause of the homebuyers before the Committee of Creditors has expressed his inability to continue as such.
>
> In view of the aforesaid, a need has arisen to appoint someone else in place of Mr Shekhar Naphade and accordingly we appoint Mr Gaurav Agrawal, Advocate. It is further clarified that Mr Gaurav Agrawal shall be guided by our previous orders.
>
> Let the matter be listed on 16-4-2018 so that this Court can take note of whether the developer has complied with the direction of depositing the first instalment and to pass directions with regard to disbursement of the amount deposited on pro rata basis on the basis of the report submitted by Mr Pawanshree Agrawal."
>
> (emphasis in bold supplied)

20.7. On 16.04.2018, apart from dealing with two applications filed by the Managing Director and the Joint Managing Director of JAL seeking permission to travel abroad, this Court took note of the deposit of INR 100 crores by JAL and directed that the second instalment of INR 100 crores be deposited by 10.05.2018. While reiterating liberty to IRP to finalise the resolution plan in terms of the earlier order, this Court also extended liberty to JAL to submit a representation to the competent authority without expressing any opinion on that count and leaving the representation to be considered in accordance with law.[33]

20.8. Thereafter, on 16.05.2018, apart from dealing with another application filed by an independent Director of JAL seeking permission to travel abroad, this Court took note of the fact that a sum of INR 750 crores was lying in deposit and it was observed that the same '*has to be disbursed on pro rata basis amongst the homebuyers'*. It was also

33 As discussed a little later, it has appeared in the final judgment passed in the case of ***Chitra Sharma*** that the referred representation had been in relation to the prayer of JAL to participate as one of the intending bidders in the resolution plan which was being formulated by the IRP; and such a participation by JAL was impermissible in view of Section 29A introduced to the Code.

directed that JAL, the holding company of JIL, shall deposit a further sum of INR 1,000 crores '*jointly and severally'* by 15.06.2018 subject to which, stay was granted over further proceedings, only insofar as concerning the liquidation. The relevant part of this order dated 16.05.2018 reads as under: -

> "Having heard the learned counsel for the parties at length, **it is directed that Jaiprakash Associates Ltd. (JAL), the holding company of Jaypee Infratech Ltd. (JIL) shall deposit a further sum of Rs 1000 crores jointly and severally by 15-6-2018.** Subject to the said deposit, there shall be a stay of further proceedings only insofar as the liquidation is concerned. In the meantime, Interim Resolution Professional (IRP) shall remain in management. If the amount is not deposited by 15 -6-2018, the statutory proceedings shall continue. **As far as Rs 750 crores, which is lying in deposit is concerned, it has to be disbursed on pro rata basis amongst the homebuyers**."
>
> (emphasis in bold supplied)

20.9. Thereafter, on 13.07.2018, this Court took note of certain proposals made by JAL, which were opposed by the petitioners. While observing disinclination to entertain such proposals, this Court posted the matters on 16.07.2018 *'exclusively for the purpose of considering the issue of the rights of the homebuyers and the capability of JAL and JIL to construct the projects'.*

After the aforesaid proceedings, the petitions were finally heard and disposed of by this Court by way of the judgement dated 09.08.2018. Before taking note of the significant features and attributes of the final judgement in the case of ***Chitra Sharma***, but to keep feasible track of the chronology of events, we may indicate that parallel to the proceedings in

this Court, NCLT continued with CIRP concerning the corporate debtor JIL and in that process, passed orders on 09.05.2018 and 15.05.2018, approving the decision of IRP rejecting the claims of two lenders of JAL to be recognised as financial creditors of the corporate debtor JIL on the strength of the mortgage created by the corporate debtor JIL as collateral security of the debts of its holding company JAL. Thereafter, on 16.05.2018, NCLT accepted an application, that was moved by IRP on 06.02.2018, for avoidance of certain transactions whereby the corporate debtor JIL had mortgaged its properties as collateral securities for the loans and advances made by the lender banks and financial institutions to JAL, as being preferential, undervalued and fraudulent. These aspects were finally dealt with by this Court in the judgement dated 26.02.2020, as shall be noticed later.

We may now revert to the final judgement dated 09.08.2018 in the case of ***Chitra Sharma,*** and take into account the relevant features, which do have a bearing on the issues raised in the present litigation.

22.1. In final judgement dated 09.08.2018 in the case of ***Chitra Sharma*** (supra), this Court took note of the past proceedings and also the fact that when resolution plans were considered and examined by the CoC, JAL too submitted its proposals which were rejected in view of the bar contained in Section 29A IBC as also for the reason that JAL failed to convince the CoC of its ability to tie up the funds for construction. However, even the other plans could not muster the support of the

requisite majority in CoC. Accordingly, IRP informed NCLT that no resolution plan was approved by the CoC even within the extended period for completing the CIRP, which came to an end on 12.05.2018. This Court took note of the mandate of Section 33 IBC whereby liquidation follows upon rejection of a resolution plan but then, noticed unanimity of the parties during the course of hearing that the liquidation of JIL was not going to subserve the interests of the homebuyers who had made valuable investments by contributing their hard-earned money in the hope of obtaining a roof over their heads. This Court also observed that a home for the family was considered to be a part of the right to life and took note of the appeal made by the homebuyers to ensure complete justice rather than leaving them at the mercy of the liquidation process. While appreciating the substance of that plea, this Court nevertheless indicated the need to abide by the discipline of law and thereafter, proceeded to take a comprehensive view of the scheme of IBC; and also underscored the fact that though IBC, as originally enacted, did not contain express provisions in relation to the interests of homebuyers but, their concerns were sought to be assuaged in the amendment brought about by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, which came into force on 06.06.2018 and whereby, the homebuyers were expressly brought within the purview of financial creditors under the IBC. This Court pointed out that now being duly recognised as financial creditors, the homebuyers were necessarily a part of the CoC, constituted in terms of

Section 21 IBC. This Court also took note of the relevant provisions in the Regulations relating to the voting share of the respective financial creditors in CoC and selection of an authorised representative[34] to represent financial creditors in a particular class.

22.2. Proceeding further, this Court extensively referred to a variety of submissions made on behalf of JAL, seeking to explain the perspective of the developers with reference to the projects already accomplished by them and the projects being under execution; and their proposal to deposit post-dated cheques to the tune of INR 600 crores with the registry of this Court, if they were allowed to dispose of some of the assets. The Court also took note of the fact that JAL had sought directions to NCLT to decide an application for sanctioning the scheme of arrangement, propounded pursuant to a restructuring agreement accepted by 32 creditors. The request of JAL was to continue with the stay of liquidation proceedings against its deposit of post-dated cheques of INR 600 crores and also to stay the directions of this Court whereby IRP was allowed to remain in management of the corporate debtor. The Court recorded the propositions of JAL as follows: -

> "36. …..JAL has sought to assure that it would double the strength of existing workers for the construction of its projects. JAL has also stated that it would deposit postdated cheques of Rs 600 crores with the Registry of this Court. However, this is subject to the condition that the Court should allow it to dispose of "identified cement assets" including its cement plan (*sic*) at Rewa in Madhya Pradesh. In order to enable it to do so, JAL has sought a direction to the NCLT at Allahabad to decide the application filed before it for sanctioning a scheme of arrangement, propounded pursuant to a

34 'AR' for short.

> master restructuring agreement signed and accepted by the 32 creditors. JAL seeks to continue the stay of liquidation proceedings against its deposit of postdated cheques of Rs 600 crores. JAL also seeks a stay on the direction of this Court allowing the IRP to remain in management."

22.2.1. After careful consideration, this Court rejected the proposal submitted on behalf of JAL while explaining that accepting any such proposal on behalf of JAL would cause serious prejudice to the discipline of IBC. In that regard, this Court referred to the provisions contained in Section 29A of the Code and the background in which certain specified persons were made ineligible to be the resolution applicants.[35] This Court, *inter alia*, observed and explained as under: -

> "39. Clauses (*c*) and (*g*) of Section 29-A would operate as a bar to the promoters of JAL/JIL participating in the resolution process. Under clause (*c*), a person who at the time of the submission of the resolution plan has an account which has been classified a non-performing asset under the guidelines of RBI or of a financial regulator is subject to a bar on participation for a stipulated period. Under clause (*g*), a person who has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the adjudicating authority under the IBC is prohibited from participating. The Court must bear in mind that Section 29-A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a backdoor entry to erstwhile managements in the CIRP. Section 30 IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29-A will not be considered by the CoC:"

35 We may point out that Section 29A was inserted to the Code along with a few other amendments by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, promulgated on 23.11.2017. The Ordinance stated in its Preamble, *inter alia,* that the same was being promulgated because it was considered necessary to provide for prohibition of certain persons from submitting a resolution plan who, on account of their antecedents, may adversely impact the credibility of the process under the Code. This Ordinance later on took the shape of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (No. 8 of 2018) that came into force with retrospective effect from 23.11.2017.

22.3. Apart from the above, this Court also took note of various grounds urged on behalf of the homebuyers in opposition to the proposal so submitted and, after examining the matter in its entirety, this Court was convinced that JAL/JIL were lacking in financial capacity and resources to complete the unfinished projects; and allowing them to participate in the process of resolution would render the statutory provisions nugatory.

22.3.1. Having regard to the issues involved herein, we are impelled to take note of the grounds so urged on behalf of the homebuyers and their due acceptance by this Court as follows: -

> "40. Mr Anand Grover appearing on behalf of the homebuyers has opposed the proposal submitted by JAL/JIL on the following grounds:
> 40.1. Loans given to JAL have been classified as non-performing assets which renders JAL ineligible as a resolution applicant/new promoter under Section 29-A(*b*) IBC;
> 40.2. In addition to Section 29 -A(*b*), JAL is also disqualified under Section 29-A(*g*) IBC. Section 29-A(*g*) provides that a person who is engaged in a fraudulent transaction should not be allowed to bid for another company as such a person may again engage in fraudulent transactions. In May 2018, the NCLT, Allahabad set aside a fraudulent transaction involving a mortgage of around 750 acres of JIL's land in favour of the lenders of JAL. This mortgage was without any consideration and the land of 750 acres may be worth INR 5000 crores. The matter is now before the NCLAT, which has specifically framed an issue in this regard;
> 40.3. RBI is already before this Court seeking initiation of insolvency proceedings against JAL. JAL's proposal, although presented under the garb of protecting the interest of homebuyers, is aimed at the twin benefits of avoiding insolvency of JAL and regaining control of JIL, thereby defeating RBI's application for insolvency proceedings of JAL as well as Section 29-A IBC;
> 40.4. The reasons pleaded by JAL/JIL to excuse their failure to complete the housing projects such as the stay order granted by the National Green Tribunal have been rejected by the orders of the National Consumer Disputes Redressal Commission as there was no stay. One such order was passed by NCDRC on 2-5-2016, in *Developers Township Property Owners Welfare Society v. Jaiprakash Associates Ltd.;*
> 40.5. The contention of JAL that they faced impediments on account of the purported stay imposed by NGT is patently incorrect

as the stay by NGT was only on handing over possession without an occupation certificate, which had no bearing on the construction. Moreover, JAL carried out construction during that period as is evidenced inter alia by the fact that they raised demands for construction linked payments during this period;

40.6. During the pendency of the CIRP from 9-8 -2017, construction work was done under the aegis of the IRP under whom JAL was a mere contractor;

40.7. The claim by JAL that flats have been delivered is a fractured claim as flats have been delivered in incomplete stages and are not in accordance with the allotment letters. The flooring is not complete, doors and windows are missing, no-objection certificates have not been obtained from the Fire Department and the offer of possession is being made without the occupation certificate;

40.8. JAL does not have the capacity to deliver the flats and 22,000 homebuyers are suffering due to delays of more than four years in completion of various projects of JAL and JIL;

40.9. Under the contracts, JAL and JIL are jointly and severally liable to deliver the flats. If JAL was serious about delivering the flats, the present situation would not have arisen. Further, JAL would have avoided the insolvency process of JIL and would not have cast the homebuyers to the uncertainties of insolvency;

40.10. There are serious doubts about the credentials of JAL which has diverted funds from JIL towards its other businesses. The applicant associations had appointed ASA Financial Services to conduct an audit of JIL's financials and the audit report demonstrates that JAL may have diverted more than INR 10,000 crores from JIL;

40.11. JAL is undergoing a serious financial crisis. This is clear from the following facts:

40.11.1. JAL has not yet honoured the order of this Court asking it to deposit Rs 2000 crores for protection of the interest of the homebuyers. JAL has paid only Rs 750 crores out of Rs 2000 crores, after the expiry of almost 10 months from 11-9-2017 which was the date of the initial order of this Court;

40.11.2. JAL has failed to pay even the latest instalment of Rs 1000 crores by 15-6-2018 in accordance with the order of this Court dated 16-5-2018;

40.11.3. JAL is a defaulter of more than 30 banks to the extent of around Rs 30,000 crores. JAL has also defaulted on fixed deposits, foreign currency convertible bonds and payments to Noida Authority;

40.11.4. Even in the latest proposal, the proposal to deposit Rs 600 crores is spread over time indicating that JAL has no resources; and

40.11.5. The proposal of doubling the strength of workers from 4000 to 8000 would only mean doubling the strength from 17

> workers per tower to 35 workers per tower (228 towers to be built by 8000 workers). This would amount to 2 workers in each floor of 4 flats (21,532 flats in 228 towers by 8000 workers). At this rate, completion of flats may take several years.
>
> Similar submissions have been urged on behalf of the homebuyers by other learned counsel.
>
> **The bar under Section 29-A would preclude JAL/JIL from being allowed to participate in the resolution process. Moreover, the facts which have been drawn to the attention of the Court leave no manner of doubt that JAL/JIL lack the financial capacity and resources to complete the unfinished projects. To allow them to participate in the process of resolution will render the provisions of the Act nugatory. This cannot be permitted by the Court**."
>
> (emphasis in bold supplied)

22.4. It was, however, submitted on behalf of JAL/JIL that with expiry of timelines for CIRP, the only option would be to liquidate the corporate debtor which may not be in the interest of homebuyers and in that situation, the only way out would be to provide for an arrangement outside the provisions of IBC. It was also submitted that unless a group of independent professionals came to a conclusion that it was not financially viable for JAL/JIL to complete the remaining work in a time-bound manner, their role as developers should not be discounted. Hence, it was submitted that an independent committee of experts be constituted by the Court to evaluate the financial capability of JAL/JIL to continue executing the ongoing projects. It was also submitted that only 8% of the homebuyers had opted for refunds while 92% had chosen not to claim refunds, thereby implying a confidence in the ability of JIL/JAL to complete the project. However, on the other hand, the homebuyers uniformly opposed the submissions so made and it was urged before the Court that they had no confidence in the ability of either JIL or JAL to

complete the outstanding projects. In the third dimension, it was submitted on behalf of the IRP that Court may revive the CIRP by extending the time specified in IBC in order to enable fresh consideration to be made of the prospect for a resolution which would take into account the interests of homebuyers under the amended IBC; and the second option would be to appoint a committee under the supervision of the Court to explore the possibility of a resolution which would obviate the need for liquidation. Having pondered over the diverse propositions, the requirement of balancing the discipline of the Code, to do complete justice and to secure the interests of all the concerned, this Court found it just and proper to accept the suggestion that CIRP be revived and CoC be reconstituted as per the amended provisions of IBC with recourse to the powers under Article 142 of the Constitution of India. This Court observed and held as under: -

> "47. In considering the rival submissions, several important facets of the case need to be underscored.
>
> 47.1. First and foremost, the CIRP was initiated on 9-8 -2017, following the order of NCLT admitting the proceedings. The period of 180 days for concluding the CIRP came to an end on 6-2-2018 and the extended period ended on 12 -5-2018. When the CIRP was initiated and until the period of 270 days concluded, the homebuyers did not have the status of financial creditors under the provisions of IBC. They had no statutory voting rights in the CoC. Under the interim directions of this Court, a workable arrangement was sought to be put into place by appointing a representative of the homebuyers on the CoC to facilitate their interests being duly borne in mind. But the point to be noted is that in the absence of a statutory recognition of the position of the homebuyers as financial creditors, the law did not allow for real and substantive entitlements to them in the CoC. These statutory entitlements have been brought in by the Ordinance in order to recognise the vital interests of the homebuyers in a real estate project and to allow

them a statutory status in the insolvency resolution process. Unfortunately by the time that the Ordinance came into being on 6-6-2018, the period of 270 days had expired; the resolution plan of Lakshdeep was rejected and the IRP informed NCLT that no resolution plan had been approved within the extended period of 270 days on 12-5-2018.

47.2. **Having regard to the material change which has been brought about by the amendment of the IBC by the Ordinance and the fact that this Court has been in seisin of the proceedings to ensure that the homebuyers are protected, we are of the view that it is but appropriate and to do complete justice to secure the interests of all concerned that the CIRP should be revived and CoC reconstituted as per the amended provisions to include the homebuyers.** In the facts of the present case, recourse to the power under Article 142 would be warranted to render complete justice. Parliament has undoubtedly provided a period of 180 days and an extended period of 90 days to complete the process. But in the present case a peculiar situation has arisen as a result of which the status of the homebuyers which had not been recognised prior to 6-6-2018 has now been expressly recognised as a result of the amending Ordinance.

47.3. The learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the homebuyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this Court should follow the discipline of IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The Court should not take upon itself the burden of supervising the intricacies of the resolution process. Accepting the suggestion of Mr Nariman (and one of the two options proposed by Mr Tripathi) of the Court appointing a committee to supervise the resolution process outside IBC will involve the Court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms.

47.4. We are emphatically of the view that it would not be appropriate for the Court to appoint a committee to oversee the CIRP and assume the task of supervising the work of the Committee. **We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions**. Such a course of action would in our view not be consistent with the need to ensure complete justice under Article 142, under the regime of law. Hence, the power under Article 142 should be

> utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated 9-8-2017 and resultantly renew the period which has been prescribed for the completion of the resolution process. We have furnished above, the reasons for doing so. Chief amongst them is the fact that in the present case the period of 270 days expired before the Ordinance conferring a statutory status on homebuyers as financial creditors came into existence. **In the circumstances, it would be necessary to revive the period prescribed by the statute by another 180 days commencing from the date of this order. During this period, the IRP shall follow the provisions of the IBC afresh in all respects. A new CoC should be constituted in accordance with the amended provisions IBC to enforce the statutory status of the allottees as financial creditors**. We also clarify that apart from the three bidders whose bids were found to be eligible by the IRP, it would be open to the IRP to invite fresh bids to facilitate a wider field of choice before the CoC. In that process, the offers made by the intervenors in these proceedings can also be considered by CoC anew. We are not inclined to evaluate the merits of the bids submitted by the bidders who were left in the fray, two of whom have intervened. **All bids must follow the discipline IBC. We have, however, not accepted the submission to allow JIL or JAL and the erstwhile promoters to participate in the process. Their participation is expressly prohibited by Section 29-A** and we decline to make any exception which would breach a salutary and express provision made in the IBC."
>
> (emphasis in bold supplied)

22.5. Thereafter, this Court also took into consideration the submissions made on behalf of some of the homebuyers for issuance of directions to facilitate *pro rata* disbursement of INR 750 crores lying in deposit pursuant to the interim directions. This Court observed that even when the claim of the refund seekers was to be considered with empathy, such request could not be acceded to and specified four major reasons for declining this prayer. The consideration of this Court in relation to the said sum of INR 750 crores, being also directly relevant for the present purpose, could be usefully extracted as under: -

"48. As we have stated earlier, an amount of Rs 750 crores is lying in deposit before this Court pursuant to the interim directions, on which interest has accrued. The homebuyers have earnestly sought the issuance of interim directions to facilitate a pro rata disbursement of this amount to those of the homebuyers who seek a refund. We are keenly conscious of the fact that the claim of the homebuyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason.

48.1. Firstly, during the pendency of the CIRP, it would as a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. For the present, we leave open the question as to whether the homebuyers are unsecured creditors (as was urged by Mr Tripathi) or secured creditors (as was urged by counsel appearing for them). **Directing disbursement of the amount of Rs 750 crores to the homebuyers who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors. Once we have taken recourse to the discipline IBC, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process**.

48.2. Secondly, the figures which have been made available presently, following the opening of the web portal by the Amicus Curiae, indicate that 8% of the homebuyers have sought a refund of their monies while 92% would evidently prefer possession of the homes which they have purchased. **We cannot be unmindful of the interests of 92% of the homebuyers many of whom would also have obtained loans to secure a home. They would have a legitimate grievance if the corpus of Rs 750 crores (together with accrued interest) is distributed to the homebuyers who seek a refund.** The purpose of the process envisaged by IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. **Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC**.

48.3. Thirdly during the course of the hearing, the Court has been apprised of the concerns of the secured creditors, chief among them being IDBI Bank Ltd. In its submissions before this Court, IDBI Bank has emphasised that one of the major reasons for the enactment of IBC was to protect the interest of lenders. The debt owing to the banks and financial institutions has been secured by the assets of JIL, to protect their interests. This debt originates in the public deposits of the banks and financial institutions, who are answerable to their stakeholders.

48.4. Fourthly, RBI has moved this Court for permission to initiate an insolvency resolution process. Parliament enacted the Banking

> Regulation (Amendment) Act 2017 by introducing Section 35-AA and Section 35-AB into the Banking Regulation Act 1949. The amendment empowers the Central Government to authorise RBI to issue directions to any banking company to initiate an insolvency resolution process in respect of a default as understood under the IBC. Such an order was issued by the Central Government on 5-5-2017. The RBI constituted an Internal Advisory Committee (IAC) consisting primarily of its independent Directors. The IAC took up for consideration accounts which were classified either partly or wholly non-performing from amongst the top 500 exposures in the banking system as on 31-3-2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstandings exceeding Rs 5000 crores. The IAC has initially taken up twelve accounts involving total exposure of Rs 1,79,769 crores. JIL was one of the twelve accounts in respect of which directions have been issued to banks for initiating insolvency resolution. Subsequently, the IAC recommended that in respect of those accounts where 60% or more had been classified as NPAs as on 30-6-2017, banks may be directed to implement a viable resolution plan within six months failing which the accounts may be directed for a reference under the IBC by 31 -12-2017. JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP. RBI has carried out this exercise as a matter of economic policy in its capacity as the prime banking institution in the country, entrusted with a supervisory role, and the power to issue binding directions……..”
>
> (emphasis in bold supplied)

22.6. Having said so, this Court acceded to the request made on behalf of the RBI to initiate a CIRP against JAL under IBC and thereafter proceeded to conclude on the matter with the following directions: -

> “50. We, accordingly, issue the following directions:
>
> 50.1. In exercise of the power vested in this Court under Article 142 of the Constitution, **we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders** in accordance with the provisions of the IBC;
>
> 50.2. We direct that **a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly**

> **the amended definition of the expression "financial creditors"**;
>
> 50.3. **We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three shortlisted bidders** whose bids or, as the case may be, revised bids may also be considered;
>
> 50.4. JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29-A;
>
> 50.5. RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;
>
> 50.6. **The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to NCLT and continue to remain invested and shall abide by such directions as may be issued by NCLT**."
>
> (emphasis in bold supplied)

Thus, the ternary, of anxiety on the part of stakeholders to avoid liquidation of the corporate debtor JIL; of due recognition by the legislature of the homebuyers as financial creditors; and concern of this Court to do complete justice in the cause while maintaining the discipline of law, led to the improvisation in ***Chitra Sharma***, as noticeable in the preceding paragraphs, with revival of CIRP in relation to the corporate debtor JIL and re-constitution of CoC with the basic aim to ensure the resolution of insolvency of the corporate debtor JIL by way of the methods envisaged by, and permissible under, the Code.

Another round in this Court and further enlargement of time for CIRP in question.

However, this resolution process concerning the corporate debtor JIL again landed in rough weather, now due to passage of time at different stages while dealing with another grey area i.e., method of counting of votes in the Committee of Creditors, which led to another round of

litigation; and this Court had to again invoke its plenary powers to salvage the situation in the judgment dated 06.11.2019 in the case of ***Jaiprakash Associates Ltd.*** (supra). For their relevance, the observations made and directions issued in that case may also be recapitulated.

The second round of litigation concerning this CIRP came up to this Court in the following circumstances:

Consequent to the aforesaid directions in the case of ***Chitra Sharma***, the matter proceeded before the NCLT being the Adjudicating Authority. The IRP issued public notice inviting claims from all the stakeholders of JIL, including the homebuyers and submitted his report on formation of the Committee of Creditors before the Adjudicating Authority on the following basis:

37.3% in case of financial institutions,

62.3% homebuyers, and

0.4% fixed deposit holders.

25.2. However, on 17.09.2018, an application came to be made before the Adjudicating Authority by one of the associations of homebuyers seeking clarification as to the manner in which the voting percentage of the homebuyers would be reckoned. The two members of NCLT expressed difference of opinion on the issue as a result of which, reference was made to the President of NCLT to place the matter before the third member. Eventually, an order was passed by the third member on 24.05.2019. This order was challenged by one of the associations of homebuyers before NCLAT. In the meantime, IDBI Bank filed an

application before NCLT for excluding the period of pendency of the said application for clarification regarding the manner of counting the votes of the concerned financial creditors, from the period of 270 days for completion of CIRP. However, during the pendency of such an application, the NCLT, by its order dated 06.05.2019, called upon the authorities, the representatives of allottees and others to file reply on the necessity to proceed further with CIRP for considering the resolution plan received from the concerned bidder. The IDBI Bank assailed this order of NCLT by way of another appeal before the NCLAT.

25.3. The aforesaid two appeals were decided together by NCLAT by way of its judgment dated 30.07.2019. The NCLAT took note of the fact that no regulation had been framed under the Code as to how the voting share of thousands of allottees (homebuyers) would be counted when all of them fell within the meaning of 'financial creditors' and hence, were the members of CoC. The NCLAT observed that this had been an extraordinary situation where the law was silent and there was no guideline which led to difference of opinion between the two members and the matter was finally decided by the third member. The NCLAT opined that in the given situation, certain period could be excluded while counting the total period of 270 days. In this judgement dated 30.07.2019, NCLAT provided for exclusion of 90 days for the purpose of counting 270 days of CIRP from the date of receipt of the copy of its judgement. The NCLAT also commented that the aforesaid exclusion was being provided to

enable calling of fresh resolution plans but reiterated that no liberty was available to JAL in view of the observations and decision of this Court in ***Chitra Sharma*** (supra).

25.3.1. Those observations and directions of NCLAT in its judgment dated 30.07.2019, as reproduced in the judgement of this Court dated 06.11.2019, could be usefully recounted as follows: -

> "22. In view of the aforesaid extraordinary situation, we are of the view that the period from 17-9-2018 i.e. the date of application filed by the association of the allottees for clarification for the order and till the final decision i.e. 4 -6-2019 i.e. the date the matter was finally decided by the Third Hon'ble Member (total 260 days), can be excluded for the purpose of counting the 270 days. However, as the matter is pending since long, we are not inclined to exclude the total period of 260 days and instead in the interest of the allottees, we exclude 90 days for the purpose of counting the period of 270 days of "corporate insolvency resolution process", which should be counted from the date of receipt of the copy of this order.
>
> The aforesaid period is excluded to enable the "resolution professional"/"committee of creditors" to call for fresh "resolution plans" and to consider them, if so required after negotiations pass appropriate order under sub-section (5) of Section 30 of the I&B Code preferably within a period of 45 days. Rest of the period of days margin is given to remove any difficulty and appropriate order as may be passed by the adjudicating authority.
>
> The voting share of the allottees should be counted in terms of "I&B Code" as existing on the date of voting/"Regulation" and/or in accordance with majority decision of the adjudicating authority.
>
> It is made clear that all the earlier "resolution plan(s)" including the plan submitted by the "NBCC", cannot be considered, having been rejected by the "committee of creditors". However, it will be open to the "NBCC" to file a fresh improved "resolution plan". It is informed that "Adani Infra (I) Ltd." also proposed to file "resolution plan" but we are not expressing any opinion with regard to the same. We have given opportunity to all the eligible persons to file "expression of interest"/(improved) "resolution plan", individually or jointly or in concert with any person, but those who are ineligible in terms of Section 29-A, are barred from filing such plan. No liberty is given to "Jaiprakash Associates Ltd.", in view of the aforesaid observation and decision of Hon'ble Supreme Court in *Chitra Sharma*."

The aforesaid judgement of NCLAT was assailed in this Court by JAL and by the Wish Town Homebuyers' Welfare Society. These appeals raised essentially two issues before this Court: one, as to whether NCLT or NCLAT had the power to exclude any period from the statutory period in exercise of inherent powers sans any express provision in the Code in that regard; and second, whether it was open to allow the bidder whose resolution plan had already been rejected by CoC, to submit revised plan or to invite fresh resolution plans to be considered by CoC after the statutory period specified for submission of such plans?

After cogitating over the submissions made in support of the appeals, it was clear that the inevitable fallout of accepting the stand taken by the appellants would be to set aside the impugned judgment and relegate the parties to a situation where the only option would be to proceed with the liquidation process concerning JIL on the premise that no resolution plan was received before the expiry of the period of CIRP or being a case of rejection of the resolution plan under Section 31 of the Code. However, during the arguments, there was complete unanimity (again) between all the stakeholders, including the appellants before this Court, that the liquidation of JIL must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of homebuyers.

In the given set of circumstances and considering the position taken by the stakeholders, this Court found it neither necessary nor

appropriate to dilate on the issues as urged and instead, proceeded to again exercise the plenary powers under Article 142 of the Constitution of India in order to ensure substantial justice in the cause. In the process, this Court, of course, rejected the suggestions given by a section of homebuyers to keep the entire process outside the dispensation under the Code with reference to the observations already made in the case of ***Chitra Sharma*** (supra), but found it justified to modulate a part of such directions, to the extent such modulation would not stand in conflict with the legislative intent and subserve the cause of justice, by providing a window to find out a viable solution. This Court also took note of various amendments brought about to the Code and the CIRP Regulations; and the overall circumstances of the case, where delay in completion of CIRP relating to JIL was attributable to law's delay and neither homebuyers nor other financial creditors were to be blamed for pendency of proceedings before NCLT and before NCLAT. In the peculiar, rather extraordinary, situation obtaining in the matter, this Court considered it appropriate to ensure that an attempt was made for revival of the corporate debtor JIL, lest it was exposed to liquidation process and for that matter, to permit IRP to reissue the request for resolution plan to the two bidders who had earlier submitted the plans and to call upon them to submit revised resolution plans, which could be placed before CoC. In the process, this Court also took note of the time limit for completion of insolvency resolution process as per third proviso to Section 12(3) of the Code,

which came into effect from 16.08.2019. The relevant observations of this Court could be usefully reproduced as under: -

> "16. Suffice it to note that an extraordinary situation had arisen because of the constant experimentation which went about at different level due to lack of clarity on matters crucial to the decision-making process of CoC. Besides that, in view of the recent legislative changes, the scope of resolution plan stands expanded which may now include provision for restructuring the corporate debtor including by way of merger, amalgamation and demerger and more so the power bestowed on CoC to consider not only the feasibility and viability of the resolution plan but also the manner of distribution proposed, which may take into account the order of priority amongst the creditors. Additionally, the recently inserted Section 12-A enables the adjudicating authority to allow the withdrawal of an application filed under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of 90% voting share of the CoC. Similarly, sub-clause (7) of Regulation 36-B inserted with effect from 4-7 -2018, dealing with the request for resolution plans unambiguously postulates that the resolution professional may, with the approval of the Committee, reissue request for resolution plans, if the resolution plans received in response to earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list. In the present case, finally only two bidders had participated and submitted their resolution plan which was placed before CoC and stated to have been rejected. However, applying the principle underlying Regulation 36-B(7), we deem it appropriate to permit IRP to reissue request for resolution plans to the two bidders (Suraksha Realty and NBCC) and/or to call upon them to submit revised resolution plan(s), which can be then placed before CoC for its due consideration.
>
> In the present case, as aforementioned, there is unanimity amongst all the parties appearing before this Court including the resolution applicant that liquidation of JIL must be eschewed and instead an attempt be made to salvage the situation by finding out some viable arrangement which would subserve the interests of all concerned.
>
> In view of the legislative changes referred to above, we are of the considered opinion that we need to and must exercise our plenary powers to make an attempt to revive the corporate debtor (AIL), lest it is exposed to liquidation process under Chapter III of Part II of the I & B Code. We are inclined to do so because the project has been implemented in part and out of over 20,000 homebuyers, a substantial number of them have been put in possession and the remaining work is in progress and in some cases at an advanced stage of completion. In this backdrop, it

would be in the interest of all concerned to accept a viable plan reflecting the recent legislative changes.

Indeed, the third proviso to Section 12(3) predicates time-limit for completion of insolvency resolution process, which has come into effect from 16-8-2019. The same reads thus:

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

Taking an overall view of the matter, we deem it just, proper and expedient to issue directions under Article 142 of the Constitution of India to all concerned to reckon 90 days' extended period from the date of this order instead of the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. That means, in terms of this order, the CIRP concerning JIL shall be completed within a period of 90 days from today.

We do not deem it necessary to dilate on the arguments of the respective counsel for the nature of order that we intend to pass, including about the locus standi of JAL which, in our opinion, already stands answered against JAL by virtue of Section 29-A of the Act as expounded in *Chitra Sharma*."

In the given circumstances, this Court passed the following order for the purpose of substantial and complete justice and in the interest of all the stakeholders: -

> "21. Accordingly, we pass the following orders to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL:
>
> 21.1. We direct the IRP to complete the CIRP within 90 days from today. In the first 45 days, it will be open to the IRP to invite revised resolution plan only from Suraksha Realty and NBCC respectively, who were the final bidders and had submitted resolution plan on the earlier occasion and place the revised plan(s) before CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time. In the second phase of 45 days commencing from 21-12-2019, margin is provided for removing any difficulty and to pass appropriate orders thereon by the adjudicating authority.
>
> 21.2. The pendency of any other application before the NCLT or NCLAT, as the case may be, including any interim direction given therein shall be no impediment for the IRP to receive and process the revised resolution plan from the above named two bidders and take it to its logical end as per the provisions of the I &

> B Code within the extended timeline prescribed in terms of this order.
>
> 21.3. We direct that the IRP shall not entertain any expression of interest (improved) resolution plan individually or jointly or in concert with any other person, much less ineligible in terms of Section 29-A of the I & B Code.
>
> 21.4. These directions are issued in exceptional situation in the facts of the present case and shall not be treated as a precedent.
>
> 21.5. This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of NCLT/NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I & B Code and the Regulations framed thereunder."

The passages above-quoted give insight as to what had been the concern of all and what had been the intent of the orders passed by this Court in its plenary powers. It is not far to seek that even where CIRP in relation to JIL had been facing one hurdle after another, the principal part of delay was not attributable to any of the stakeholders; and then, all through, there had been unanimity that liquidation of JIL was to be avoided and a viable solution ought to be searched. The aforesaid directions in the judgement dated 06.11.2019 ultimately led the revised resolution plans by the two applicants being placed before CoC and voting of CoC in favour of the resolution plan proposed by NBCC which is the bone of contention in this batch of matters.

For completion of the narrative in regard to the second round of litigation, we may also point out that after the judgment dated 06.11.2019, even though the process relating to the submission of revised plans and consideration by CoC took place, but culmination of the proposal in

approval of the resolution plan got delayed. Hence, IRP filed one miscellaneous application in this Court (M.A. No. 540 of 2020), pointing out various difficulties and unavoidable circumstances which had caused the delay though the proposal was submitted within the time frame prescribed. While accepting the reasons stated in the application so filed by the IRP, this Court, by another order dated 03.02.2020, extended the time by four weeks for approval of the resolution plan. This is how the process of approval of resolution plan culminated in the impugned order dated 03.03.2020 by the Principal Bench of NCLT at New Delhi.[36]

Before dilating on the resolution plan in question, it appears just and proper to narrate the features relating to yet another litigation directly impacting the CIRP concerning the corporate debtor JIL. As indicated, that litigation had been in relation to the application made by IRP for avoidance of certain transactions as preferential; and in relation to the claim of some of the lender institutions of JAL to be recognised as financial creditors of JIL on the strength of the mortgage transactions whereby the property of JIL was mortgaged to secure the debts of JAL.

Yet another litigation in this Court relating to preferential transactions and lenders of JAL

The other litigation concerning this CIRP, leading to the judgment dated 26.02.2020 in the case of ***Anuj Jain*** (supra), came up in the following circumstances:

36 It may be indicated in the passing that later on, a few miscellaneous applications as also interlocutory applications were filed in relation to the case of ***Chitra Sharma*** (supra), most of which were disposed of by this Court on 18.12.2019, in view of the aforesaid order dated 06.11.2019. Having regard to the points requiring determination herein, it is not necessary to dilate on those applications.

33.1. As already noticed, even during the pendency of proceedings in this Court in the case of ***Chitra Sharma*** (supra), the IRP had filed an application on 06.02.2018 seeking avoidance of certain transactions, whereby the corporate debtor had mortgaged several parcels of its land as collateral security for the loans and advances made by the lender banks and financial institutions to the holding company JAL. The IRP alleged that the transactions in question were preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the Code. By its order dated 16.05.2018, the NCLT accepted the application so made by IRP in relation to six out of seven transactions that were put in question and held that those transactions were to be avoided as being fraudulent, preferential and undervalued. In other words, in relation to such six transactions, the security interest was ordered to be discharged and the properties involved therein were vested in the corporate debtor, with release of encumbrances. In appeal, the NCLAT, however, took an entirely opposite view of the matter and by its judgement dated 01.08.2019, upturned the order so passed by NCLT, while holding that the transactions in question do not fall within the mischief of being preferential or undervalued or fraudulent; and that the lenders in question (the lenders of JAL) were entitled to exercise their rights under the Code. Aggrieved, the IRP as also one of the creditors of the corporate debtor JIL and the associations of homebuyers preferred appeals in this Court.

33.2. Apart from the above, during the course of CIRP, two of the lender banks of JAL sought inclusion in the category of financial creditors of JIL but IRP did not agree and declined to recognise them as such. Being aggrieved, the said banks preferred separate applications under Section 60(5) of the Code before NCLT while asserting their claim to be recognised as financial creditors of the corporate debtor JIL, on account of the securities provided by JIL for the facilities granted to JAL. The NCLT rejected the applications so filed by the said banks, by way of its orders dated 09.05.2018 and 15.05.2018, while concluding that on the strength of the mortgage created by the corporate debtor JIL, as collateral security of the debt of its holding company JAL, the lenders of JAL could not be categorised as financial creditors of JIL. The appeals filed by the aggrieved lenders of JAL against the said orders dated 09.05.2018 and 15.05.2018 were purportedly allowed as per the result recorded in the impugned order dated 01.08.2019. Aggrieved, one of the lenders of the corporate debtor JIL preferred an appeal in this Court, while asserting that such mortgagees could not be taken as financial creditors of the corporate debtor JIL.

The aforesaid two appeals, relating to avoidance of preferential transactions and the claim of lender banks of JAL to be recognised as financial creditors of JIL, were considered together and allowed by this Court by way of the common judgement dated 26.02.2020 in the case of ***Anuj Jain*** (supra).

34.1. As regards the transactions in question, this Court held that they had been of deemed preference to related party by the corporate debtor JIL during the look-back period of two years and were covered within the period envisaged by Section 43(4) of the Code. This Court also held that clause (a) of sub-section (3) of Section 43 of the Code called for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature; and therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and"; so as to be conjunctive of the two expressions i.e., "corporate debtor" and "transferee". Having interpreted the provision so, this Court held that the impugned transactions did not fall within the ordinary course of business of the corporate debtor JIL and hence, were not of excepted transfers in terms of Section 43(3) of the Code. Accordingly, this Court held as under: -

> "***Summation: The transactions in question are hit by Section 43 IBC***
>
> For what has been discussed hereinabove, we are clearly of the view that the transactions in question are hit by Section 43 of the Code and the adjudicating authority, having rightly held so, had been justified in issuing necessary directions in terms of Section
>
> of the Code in relation to the transactions concerning Properties Nos. 1 to 6. NCLAT, in our view, had not been right in interfering with the well-considered and justified order passed by NCLT in this regard."

34.2. As regards the second question concerning the status of the lenders of JAL, this Court observed that when the transactions in question were found preferential and hit by Section 43 of the Code, they were denuded of their value and worth; and the security interest created by the

corporate debtor JIL over the property involved in those transactions stood discharged in whole; and, therefore, such lenders of JAL cannot claim any status as creditors of the corporate debtor JIL much less as financial creditors. However, the question as regards the status of such lenders of JAL qua the corporate debtor JIL was examined independent of the findings that the transactions in question were hit by Section 43 of the Code, with the following observations: -

> "34.4. We may, of course, reiterate that in view of the conclusion that we have reached in relation to the principal issue, the transactions in question are denuded of their value and worth, per the force of the order by NCLT under Section 44 of the Code, which has been approved by us. To be most specific, the security interests created by the corporate debtor JIL over the properties in question stand discharged in whole. Therefore, the respondent lenders cannot claim any status as creditors of the corporate debtor JIL and there could arise no question of their making any claim to be treated as financial creditors as such. However, for its relevance, we deem it appropriate to determine the issue as to whether the lenders of JAL, because of creation of the mortgages in question, could be treated as financial creditors of JIL, independent of the finding that the transactions in question are hit by Section 43 of the Code."

34.3. Thereafter, this Court dealt with the rival submissions relating to the status of such lenders of JAL and held that they, on the strength of the mortgages in question, might fall in the category of secured creditors but, for the reason that the corporate debtor did not owe them any financial debt, such lenders of JAL were not falling in the category of financial creditors of the corporate debtor JIL. This Court summed up the conclusion on this issue in the following terms: -

> "***Summation on second issue***
>
> For what has been discussed hereinabove, on the issue as to whether lenders of JAL could be treated as financial creditors, we

> hold that such lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any "financial debt" within the meaning of Section 5(8) of the Code; and hence, such lenders of JAL do not fall in the category of the "financial creditors" of the corporate debtor JIL."

It would be relevant to notice that the parcels of land forming the subject of seven questioned transactions were admeasuring about 858 acres; and while leaving 100 acres of land forming the subject of seventh transaction, which was not declared as preferential, a chunk of 758 acres of land, which earlier carried encumbrances because of the mortgages in favour of the lenders of JAL, got released with the judgement delivered by this Court and stood vested in JIL free from encumbrances. The judgement was delivered by this Court on 26.02.2020, after voting by CoC on the resolution plan in question but before the impugned order of NCLT dated 03.03.2020.

The foregoing narrative in relation to the past litigations has essentially been to flag and accentuate those attributes of the decisions of this Court which carry their own relevance, bearing and implications on the issues involved in the present batch of matters.

Continuing with the narrative, we may now take up the impugned resolution plan, propounded by the resolution applicant NBCC and voted in favour by CoC with an overwhelming majority of 97.36%.

The Resolution Plan

As noticed, by the order dated 06.11.2019, this Court directed IRP to complete the CIRP within 90 days from the date of the order; and for that matter, it was provided that in the first 45 days, it would be open to the IRP to invite revised resolution plans only from the two applicants namely Suraksha Realty and NBCC, who were the final bidders and had submitted resolution plans on the earlier occasion, and to place the revised plan(s) before the CoC.

From the facts stated before us, it is borne out that the revised resolution plans were called from the said applicants and were placed for consideration in the 16th Meeting of CoC held on 07.12.2019. Having considered the resolution plans, the members of CoC requested the resolution applicants to improve their offers and thereupon, both the resolution applicants agreed to submit addendums to their revised resolution plans. Accordingly, Suraksha Realty submitted an addendum to the resolution plan on 07.12.2019 and NBCC submitted its addendum to the resolution plan on 08.12.2019. Then, with the certificate dated 08.12.2019 from IRP that the resolution plans submitted by Suraksha Realty and NBCC were fully compliant under Section 30(3) of the Code read with Regulation 39(2) of the CIRP Regulations, the plans along with the respective addendums were put to e-voting from 9 a.m. of 10.12.2019, until 11.59 p.m. of 16.12.2019.

In the voting by CoC, the resolution plan submitted by NBCC along with addendum was approved by a vote of 97.36% of voting share

of the financial creditors in favour. On the other hand, the plan submitted by Suraksha Realty could muster only a vote of 2.12% of voting share of the financial creditors. The voting results were circulated by the IRP to the members of CoC on 17.12.2019; and, on the instructions of CoC, the IRP issued the Letter of Intent on 17.12.2019, which was duly accepted by NBCC.

38.3. In compliance of the order dated 06.11.2019 passed by this Court, the IRP filed the application bearing C.A. No. 5 of 2020 in C.P. (IB) No. 77/ALD/2017 seeking approval of the resolution plan of NBCC under Section 30(6) read with Section 31 of the Code before the Allahabad Bench of NCLT on 20.12.2019. Later on, the Principal Bench of NCLT at New Delhi transferred the proceeding to itself and that is how the impugned order dated 03.03.2020 came to be passed by the Adjudicating Authority (NCLT, New Delhi) within the time allowed by this Court.

For its very nature and for various requirements of the provisions contained in the Code as also in the CIRP Regulations, the resolution plan in question is a vast document carrying business plans, financial proposals including that of treatment of creditors, equity commitment, projected steps and expected reliefs and concessions. We shall refer to the particular stipulation/s in this plan at the relevant stage while dealing with the specific issue related therewith. However, an overview of the resolution plan shall be apposite to take note of its concept and salient features. In this regard, we may usefully reproduce the summary of

resolution plan placed before us by the IRP. This summary is subdivided into different parts namely, (1) claims and their treatment; (2) implementation of the plan; (3) key reliefs sought for by NBCC; (4) status of project; and (5) annexure 1, being a part of the implementation process.

39.1. The summary of claims and their treatment under the resolution plan is as under: -

S. No.	Type of Creditor	Admitted Claim (INR Crores)	Treatment under the NBCC Resolution Plan
1.	Banks/ Financial Institutions	9,783	Transfer of ownership of 1526 acres in various land parcels of JIL. NBCC has estimated value of 1526 acres at INR 5,001 Cr. Transfer of 100% ownership of Yamuna Expressway including, the remaining concession rights of Yamuna Expressway. Yamuna Expressway will be hived off into a SPV. Expressway SPV will raise fresh borrowings of INR 2,200 Crore and pay it to JIL as part of the consideration for transfer of Expressway. This money will be used by NBCC for construction of units.
2.	Allottees of Real Estate	9,588 (Principal amount)	Allottees to get completed units as per Schedule A, which ranges from 9 months to 42 months from date of transfer to NBCC. No delay penalty to be paid for past delays units to be constructed and delivered by NBCC. NBCC will pay Delay Penalty @ INR 5 per sq. ft./per month only if there is delay in delivery of

			more than 1 year from the delivery dates mentioned in Schedule A subject to Force Majeure event. Allottees who have not filed their Claims (Approx. 2,100 in number) shall be treated in a manner similar to other allottees and will be provided units, subject to customary check for compliances and KYC of the customers.
	Fixed Deposit Holders	29 Note: FD holders of approx. 90 Crore did not file Claims.	100% upfront payment of FD Holders' (only such Claims of FD Holders as are forming part of the Admitted Financial Debt) principal dues amounting to INR 29 Cr within 90 days from the Approval Date. Liability for other FD holders (approx. INR 90 Crore) who have not filed their respective claims will be relinquished.
4.	Refund Seekers (Allottees and customers)	64 (Principal amount)	The entire admitted claim of the Refund Seekers shall be settled by payment of an amount not exceeding INR 62.40 Cr, of which 20% shall be paid upfront and the remaining amount shall be paid equally over a period of 4 years i.e. 20% each year in the manner provided under the Resolution Plan.
5.	Operational Creditors	464	The Total Operational Debt of 464 Crore is proposed to be settled by payment of INR 20 Cr. This includes Claim of Yamuna Expressway Industrial Development Authority (YEIDA) towards development charges, etc. Claim of YEIDA for approx. INR 6000 Crore has not been admitted by IRP since these pertain to future obligations for maintenance of toll road (which have not become due) and sub-judice matters relating to additional farmer compensation.
	Employees/ workmen of the Corporate Debtor	No Claim	All dues are paid upto date.
7.	Dissenting		Proportionate share in the equity of the

	Financial Creditors (other than allottees)	612	Yamuna Expressway SPV and land parcel of 1526 acres on liquidation value.
8.	Equity Shareholders	1,388	NBCC to become 100% shareholder of JIL. Rs. 1 crore to existing shareholders towards consideration. Delisting of equity shares of JIL.
9.	Jaypee Healthcare Limited (Subsidiary Company)	NA	Jaypee Healthcare Limited (JHL) is 100% subsidiary of Corporate Debtor. NBCC proposes to divest the entire shareholding of JHL or transfer to a Trust for the purpose of sale. The lenders of JHL shall not be entitled to deal with the assets or adversely interfere with the continued business operations of JHL in any manner whatsoever.

39.2. In the summary of the implementation process, by way of a flow chart, various steps have been indicated which include formation of different SPVs; raising of fresh debts of about INR 2,000 crores by securitisation of Yamuna Expressway; transfer of rights of Yamuna Expressway against equity shares and debt disbursement; transfer of 1,526 acres of land worth INR 5,001 crores, bank loan of INR 5,000 crores and issuance of equity of INR 1 crore; diversification of JHL; infusion of INR 120 crores equity etc. etc.

39.2.1. The IRP has, in this summary, also indicated other key implementation provisions, most of which are the matters of contention in this litigation. That summary reads as under: -

"Other key implementation provisions

Deemed approval of YEIDA for transfer of Land and Toll road to designated SPV's without incurring any cost such as stamp duty, transfer charges, Etc.

Liability for additional farmer compensation (presently sub-judice) not payable by JIL. Alternatively, if found payable, YEIDA to collect is directly from end user.

Transfer of INR 750 crores (plus interest) deposited by JAL, pursuant to the order of the Hon'ble Supreme Court to be transferred to JIL and to be used exclusively for construction of houses.

JAL to pay amount due to JIL (approx. INR 500) (INR 716 Crores on insolvency commencement date) to JIL."

39.3. The key reliefs sought for by NBCC in the resolution plan are summarised as under: -

Sl. No.	Matter	Key Reliefs sought
1.	INR 750 Crore (along with interest) deposited by Jaiprakash Associates Ltd. (JAL), holding company of JIL with the Hon'ble Supreme Court in Writ Petition (Civil) No. 744/2017.	NBCC has retained the right to withdraw its Resolution Plan in case INR 750 Cr along with interest accrued thereon is not made available to JIL.
2.	Enforcement Directorate has initiated investigation under the Prevention of Money Laundering Act, 2002 ("PMLA") against JIL.	JIL to be discharged from PMLA and other investigations. NBCC has retained the right to withdraw from its Resolution Plan in case the said relief is not granted.
	858 acres of JIL's land was with JAL lenders to of mortgaged land without any vested in JIL free of any consideration or counter guarantee to JIL (Transaction).	NBCC has sought relief that 858 acres mortgaged shall continue to be secure debt of JAL mortgage, charge and encumbrance subject to the orders of the Hon'ble Supreme Court. Note: In the meanwhile, out of 858 acres, the Hon'ble Supreme Court vide order dated 26.2.2020 have set aside mortgage of 758 acres as avoidance transaction.
	Deemed approval of YEIDA for business transfer	Approval of the Adjudicating Authority shall be binding on YEIDA and

		constitute adequate approval by YEIDA for any business transfer to be undertaken between the Corporate Debtor and Expressway SPV. As per NBCC, no separate approval will be required for 'carve-out' and transfer of lands to land bank SPV and toll road to Road SPV as contemplated in the plan.
5.	Income Tax Liability	On account of transfer of land parcels from YEIDA to JIL in terms of the Concession Agreement, the Income Tax authority has been making an addition to the income of approximately INR 3,000 Cr on an annual basis estimated by the Resolution Applicant to be a tax demand of INR 33,000 Cr. for a period of 30 years, treating the transfer of land parcels as the revenue subsidy. This amount is being treated as operational debt and is being settled in accordance with the Resolution Plan.
	INR 716 Cr advance to JAL on Insolvency commencement (subsequently this amount reduced to approx. INR 500 crore) JAL shall also be available to JIL	INR 716 Cr was advanced to JAL date towards construction work and has maintenance charges/deposit. This amount of INR 716 Cr outstanding from for the purpose of completion of flats to the Home Buyers and other associated purposes. In case the relief is not granted, the assets currently owned by the JIL and being used by the home buyers of JAL relating to maintenance, shall not be available to the home buyers of JAL with effect from the Approval Date.
7.	Additional FAR appeal by YEIDA	YEIDA to withdraw the appeal filed in the District Court, Gautam Budh Nagar challenging the award dated 23.1.2017 passed by arbitral tribunal pertaining to additional FAR and JIL to get the right to use additional FAR as per the Resolution Plan.
8.	Additional Compensation to erstwhile land owner (for both real	Any Claim/claim of YEIDA in future w.r.t. the land acquired and transferred to JIL

	estate parcels and land acquired for toll road)	by YEIDA (in terms of the Concession Agreement), if any, shall only be recoverable by YEIDA directly from the actual lease holders (i.e. the sub-lessees) on such date and no Claim/claim shall lie against JIL or NBCC.
9.	Extension of Concession Period	To ensure feasibility and viability of this Resolution Plan, YEIDA and other concerned authorities shall extend the concession period (currently 36 years) under the Concession Agreement for an additional period of ten years.
	Liability to repay of capital cost pertaining to Noida-Greater Noida Expressway	This liability shall stand extinguished, on account of failure of YEIDA to allow JIL to collect and retain toll/fee from the users of the Noida-Greater Noida Expressway during the term of the Concession Agreement.

39.4. The timelines and methods for implementation have been indicated in the annexure to this summary which reads as under: -

S. No.	Actions	Timelines
	Incorporation of NBCC SPV for acquisition of 100% shareholding of JIL	Within 90 days of Approval Date
	Infusion of Equity Commitment by NBCC SPV into the Corporate Debtor towards acquisition of 100% shareholding in the Corporate Debtor	Upto a maximum of INR 120 Cr within 90 days of taking over the Corporate Debtor in the form of Equity/Quasi-Equity/Debt.
	De-listing (with exit price of INR 1 Cr to the public shareholders) and extinguishment of the shares of Non-Promoter Shareholders and Existing Promoters	Within 90 days of Approval Date
	Incorporation of Expressway SPV by the Corporate Debtor	Within 90 days of Approval Date

	Transfer of Yamuna Expressway asset from the Corporate Debtor to the Expressway SPV by way of business transfer or any other tax efficient transfer mechanism for a consideration equal to the book value of the Yamuna Expressway in the books of the Corporate Debtor	Within 90 days of Approval Date
	Transfer/Novation of Institutional Financial Creditor's dues to an extent of INR [Fresh Debt – (less) 2000 Cr] from the Corporate Debtor to the Expressway SPV.	
	Issuance of optionally/non-convertible Debentures by Expressway SPV to the Corporate Debtor amounting to INR 2,200 Cr	
	Issuance of equity shares by Expressway SPV to the Corporate Debtor for the balance consideration (i.e. book value of the Yamuna Expressway in the books of the Corporate Debtor –(less) INR 2,200 Cr – (less) transferred/novated debt)	
	Expressway SPV to avail indebtedness in consultation with the CoC aggregating to a minimum of INR 2,000 Cr ("**Fresh Debt**") from the Expressway Lenders by securitizing future cash flows of the Expressway	
	Payment of unpaid CIRP Costs	Within 90 days of Approval Date
	Payment of the Operational Debt to Operational Creditors (other than the workmen dues as above) of the Corporate Debtor	INR 20 Cr or the liquidation value, if any due to the Operational Creditors in terms of Sections 30 and 53 of the Code (other than the workmen dues as above), whichever is higher, shall be paid in full before any payment to the Financial Creditors.
	Payment of transferred/novated debt of INR [Fresh Debt – (less) 2000 Cr] by Expressway SPV to the Institutional Financial Creditors	

	Payment of an amount not exceeding INR 29 Cr forming part of the Admitted Financial Debt to FD Holders subject to conditions as specified in the Resolution Plan	Within 90 days of Approval Date
	Payment of INR 2,000 Cr. by Expressway SPV to the Corporate Debtor towards part redemption of optionally/non-convertible debentures	Within 90 days of the Approval Date
	Conversion of Admitted Financial Debt (due to Institutional Financial Creditors) into equity shares of the Corporate Debtor and subsequent reduction of share capital to extinguish the shareholding of Institutional Financial Creditors in the Corporate Debtor in entirety	Within 90 days of the Approval Date
	Incorporation of Land Bank SPV and issuance of equity shares by the Land Bank SPV to the tune of INR 1 Cr which shall be subscribed to by the Corporate Debtor	Within 90 days of the Approval Date
	Transfer of land worth INR 5,001 Cr* Jaganpur-187 acres, Mirzapur- 170 acres, Tappal-550 acres and Agra-619 acres (the specific land parcels to be transferred to the Land Bank SPV at the aforesaid locations shall be at the discretion of the Resolution Applicant) total admeasuring 1,526 acres from the Corporate Debtor to the Land Bank SPV by way of a business transfer or any other tax efficient transfer mechanism	
	Transfer/Novation of Admitted Financial Debt (due to the Institutional Financial Creditors) to an extent of INR 5,001 Cr from the Corporate Debtor to Land Bank SPV	
	Transfer of 100% shareholding of the Land Bank SPV from the Corporate Debtor to the Institutional Financial Creditors	
	Transfer of equity shares from the Corporate Debtor to Institutional Financial Creditors equivalent to 100% equity share capital of Expressway SPV for a consideration equal to their then outstanding debt to be paid by way of settlement of the outstanding debt to the same extent	Within 90 days of the Approval Date
	Delivery of constructed flats to the Home Buyers towards satisfaction of their Claims	As per the Delivery Schedule set out in Annexure A.

	Payment of an amount not exceeding INR 62.40 Cr to the Refund Seekers towards their admitted claims	20% of INR 62.40 Cr. within 90 days of the Approval Date, remaining amount to be paid shall be paid equally over a period of 4 years i.e. 20% each year in the manner provided under this Plan
15.	Redemption of remaining amount of INR 200 Cr by the Expressway SPV to the Corporate Debtor	Any time prior to the monetization of the Expressway Asset by the Institutional Financial Creditors.

As noticed, on this resolution plan being presented for approval before the Adjudicating Authority, various objections were raised by various stakeholders. All such objections and the prayer for approval of the resolution plan were considered analogously; and the Adjudicating Authority has, by its order dated 03.03.2020, proceeded to approve the plan with a few modifications and with certain directions. This order dated 03.03.2020 is the matter of challenge for one reason or another by the parties before us. For their relevance, it would be appropriate to take note of the salient features of this order in necessary details.

Order dated 03.03.2020 by the Adjudicating Authority in approval of the resolution plan with modifications

The order dated 03.03.2020, as passed by NCLT in exercise of its jurisdiction under Section 31 of the Code, could be reasonably divided in five segments. In the first place, the NCLT recounted the relevant

background aspects leading to the CIRP in question and the orders passed by this Court in the aforementioned three rounds of litigation in the cases of ***Chitra Sharma, Jaiprakash Associates Ltd.*** and ***Anuj Jain*** (supra). Secondly, the NCLT dealt with the issue relating to the said INR 750 crores deposited by JAL in terms of the interim orders passed by this Court in the case of ***Chitra Sharma*** and which was to abide by the directions of NCLT in terms of the final judgement in ***Chitra Sharma.*** Thirdly, the NCLT examined the resolution plan and summarised its propositions, projections and stipulations. Thereafter, in the fourth segment, the NCLT dealt with the objections against the resolution plan by several persons/entities, including JAL and its stakeholders, ICICI Bank, YEIDA, some of the aggrieved homebuyers, YES Bank and the agreement holders. In the fifth segment, the NCLT generally dealt with the clauses relating to the reliefs and concessions in the resolution plan as also various other applications filed by different stakeholders. For their relevance, the material observations and findings of the Adjudicating Authority (NCLT) in its order dated 03.03.2020 could be relayed sequentially.

In the first part of the order dated 03.03.2020, the NCLT referred to the very same background aspects which we have already recited hereinbefore, namely, the award of contract for construction of Expressway to JAL, incorporation of JIL as special purpose vehicle, the Concession Agreement extended by YEIDA, taking up of the projects by

JIL for laying of Expressway and developing residential flats, JIL having collected money from homebuyers but having failed to deliver flats to them and having also defaulted in payment of loan instalments, initiation of CIRP and litigation in this Court in the case of ***Chitra Sharma*** (supra). The NCLT traversed through all the aforementioned relevant interim orders and final judgment in ***Chitra Sharma.*** The NCLT also took note of the directions of this Court in the judgment dated 06.11.2019 in the case of ***Jaiprakash Associates Ltd.*** and in the judgment dated 26.02.2020 in the case of ***Anuj Jain***.

In the second part, in relation to the said amount of INR 750 crores and accrued interest thereupon, the NCLT took note of a vast variety of submissions made by different claimants, which may also be usefully recounted as follows.

It was submitted on behalf of JAL, who moved an application seeking return of the said sum of INR 750 crores, that when the Supreme Court had declined the request of homebuyers for *pro rata* distribution of the said amount and had transferred the same to NCLT, the amount could not be appropriated for any purpose other than refunding it to JAL. It was submitted that the said deposit of INR 750 crores had acquired the character of constructive trust and this amount was required to be refunded to JAL on the principles enshrined in Sections 77 and 83 of the Indian Trusts Act. It was further submitted that since the Supreme Court had nowhere directed either to pay the remaining balance or to utilise this

money towards refund of homebuyers' money, it had to be treated as the money of JAL and returned accordingly. It was also submitted that as per CIRP Regulations 36 and 37, only the properties of the corporate debtor were subject to the resolution process and the amount deposited by JAL, being not the asset of the corporate debtor, was required to be returned. Such submissions of JAL were duly supported by ICICI Bank, the leader of the consortium of banks, who had lent money to JAL and it was further submitted that in the case of ***Chitra Sharma*** (supra), the Supreme Court directed the promoters of JAL to deposit INR 2,000 crores in order to ensure that the homebuyers were not left remediless and their money could be refunded but after amendment to IBC, the Supreme Court neither ordered such refund nor insisted upon the promoters of JAL to deposit the remaining balance of INR 1,250 crores, but simply delegated this work to the NCLT to proceed with CIRP and to approve the resolution plan in accordance with IBC. It was submitted on behalf of ICICI Bank that there being no specific direction by the Supreme Court to utilise this money for the financial creditors of JIL, the same was required to be returned to JAL. The promoter-directors of the corporate debtor also filed an affidavit stating that no part of this money was deposited by JIL and the same was not handed over to JIL for any purpose whatsoever; and that the Supreme Court had never held that JAL was legally bound to contribute funds required for completing the projects of JIL. On similar lines, the appellant Pankaj Sharma and other homebuyers of JAL also

prayed for release of the said amount to JAL so that it could be utilised for the homebuyers of JAL. It was submitted that JAL itself was in financial distress and if such a huge amount belonging to it was given to another company, the interests of the stakeholders of JAL would be jeopardised. It also submitted that the purpose for which the deposit was made had not been fulfilled and it was not meant for construction of the flats of JIL and this money, being not an asset of JIL, should be returned to JAL.

43.2. In opposition, it was submitted by the lenders of JIL, led by IDBI Bank that in the judgement dated 09.08.2018, the Supreme Court was conscious of the fact that this amount could not be disbursed only to one class of creditors and hence, it was not allowed to be used for the purpose of the refund seekers. It was further submitted that the corporate debtor was generating revenue through collection from Yamuna Expressway but this money, rather than being utilised for servicing the loans provided by the institutional lenders, was being utilised towards construction work and for running the corporate debtor as a going concern; and in this scenario, the said amount of INR 750 crores with interest should be distributed on *pro rata* basis to the lenders of JIL in accordance with the voting share in the CoC. Along with others, IRP also made submissions that there were 32,754 allottees to whom flats were sold as per the records of JIL and as on 05.10.2018, 24,296 of them were waiting for possession of their flats; and if the money was ordered to be released for construction and development of the projects of the

corporate debtor, it would provide a boost to the construction activity and serve the larger purpose. It was submitted by IRP that as per the orders passed by this Court in ***Chitra Sharma*** (supra), this money was intended to protect the interests of homebuyers only. It was also pointed out that as per the tripartite agreement involving JAL, JIL and homebuyers, JAL was the developer of the project and was responsible for delivering possession of flats to the homebuyers. The IRP also referred to various orders passed by this Court in the course of proceedings in the case of ***Chitra Sharma*** as also a settlement proposal given by JAL on 15.02.2019, stating that the said sum of INR 750 crores was to be utilised towards revival of the business of JIL irrespective of the outcome of legal proceedings. In the backdrop of these facts and circumstances, it was submitted that the said amount being for the cause of homebuyers, it was not open to JAL or its lenders or promoters or homebuyers to seek reopening of the issue concluded by the decision of this Court.

43.3. Having noticed the length and breadth of the arguments on the two sides, where one was supporting for utilisation of the said amount of INR 750 crores and accrued interest for the benefit of the homebuyers of JIL and where other side was arguing for return of the money to JAL, the NCLT proceeded to consider as to how this money was to be dealt with.

43.4. The NCLT referred to the background in which this Court had passed the order for deposit of the said amount where promoter–directors of JAL and JIL were one and the same; and JIL/JAL had failed to deliver

flats to the homebuyers of JIL within the timelines given by them. The NCLT observed that in the orders of this Court, JIL/JAL were directed to deposit a sum of INR 2,000 crores towards refund of the money of homebuyers; the Court had never treated that money as the property of JAL; and the only reason for this Court not distributing the deposited amount to the homebuyers was that only 8% of them were seeking refund whereas 92% had asked for possession of the flats and, in order to avoid preferential treatment, this issue was relegated to the NCLT. The NCLT further observed that though JAL was per se not a debtor to the homebuyers but, when the money had come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, neither the person depositing it could subsequently say that he was the owner of the money nor the money could be construed as a trust money. The NCLT held that this money had to be utilised to the obligation owed to the creditors of the corporate debtor and any decision for refund of money to JAL would be overreaching the wisdom of the Supreme Court. The NCLT, accordingly, disposed of all the applications with respect to the issue of INR 750 crores and held that this money is to be treated as the asset of the corporate debtor. The relevant passages of the observations and findings of NCLT in regard to this issue could be extracted as under: -

> "51. On reading the judgments and orders of Hon'ble Supreme Court, it is evident that the Hon'ble Supreme Court is aware of the fact that JAL has deposited the money. It is aware of the fact that JIL money has gone to JAL for construction of the towers to the homebuyers of JIL, it is a fact that promoter-directors of JIL and JAL are one and the same. It is a fact that JIL/JAL failed

to deliver flats to the homebuyers of JIL within the timelines given by them. In all the orders of the Hon'ble Supreme Court, it has only been said that JIL/JAL shall deposit Rs. 2000 crore towards the refund of homebuyers money. It has not been treated that money as the money of JAL. On reading all the orders of the Hon'ble Supreme Court, all that could be ascertained is the Hon'ble Supreme Court endeavoured to claw back the homebuyers' money from JIL and JAL. In that pursuance, JAL deposited Rs. 750 crore. The only criteria for not distributing this Rs. 750 crore to the homebuyers is that only 8% of the homebuyers sought for refund of the money whereas 92% homebuyers have asked for flats, therefore to avoid preferential treatment, this issue has been relegated to the NCLT to deal with in accordance with IBC. One more fact is, though Hon'ble Supreme Court initially stayed the proceedings of CIRP, subsequently vacated the stay and allowed the IRP to proceed with CIRP.

In the backdrop of these facts and in the light of submissions made by either side, let us see what the Honourable Supreme Court held in Chitra Sharma "***Directing disbursement of the amount of Rs. 750 Crore to the Homebuyers who seek refund would be manifestly improper and cause injustice to the Secured Creditors since it would amount to preferential treatment to a class of creditors***" (Para 48.1 of Chitra Sharma case (2018) 18 SCC). This being the observation, now the point before us is how to go about it. It has not been said anywhere in the observation that this money should go back to JAL. Moreover the Hon'ble Supreme Court has not asked JAL/JIL to deposit the money on the condition that it would be returned to JAL in the event it has not been distributed to JIL homebuyers. It has not been said anywhere that it is the money of JAL.

It is a fact that if homes are not delivered within the time, the only recourse is either to complete the homes or to refund the money. Once a contract is not performed as stated under an agreement entered between the parties, if the party advanced money is entitled for refund of the money, the jural relation in between the person given the money and the person taken the money will become creditor and debtor relation. When such money has come back from the debtor to the creditor or to a person in between for the cause of the creditor, it can never be called as the money of the debtor, it has to be treated as money returned to the creditor.

In this case, JAL has admittedly failed to complete the projects as stated by JIL and JAL. It is not the case that this money was given for charitable purpose. It is not the case that this money was deposited with the Hon'ble Supreme Court on the condition that it would be returned to JAL in the event it has not been distributed to the homebuyers. As long as debtor is liable to pay

money to the creditor, once it has been deposited towards that payment, it can't be stated that money belongs to the debtor.

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ICICI Bank Counsel has argued that money is fungible, therefore unless money has gone out from JAL for repayment, it can't be said as money deposited by JIL is the money payable to JIL homebuyers.

No doubt money is fungible, but obligation to repay is not fungible, therefore when money is deposited or clawed back to repay it to the creditor, the money being fungible and there being an obligation for repayment, it can no more be considered as money owned by the debtor. Though JAL is per se not a debtor to the Homebuyers, when money has come on behalf of the debtor in relation to a debt obligation or for discharge of an obligation, the person deposited it towards that obligation cannot subsequently say that he is the owner of the money, therefore entitled for return of it.

If trust concept is examined, we will know that trust is a relationship where property/money held by one party for the benefit of another party. Trustee holds the property/money for the benefit of the trust beneficiaries. Trustee is under fiduciary duty to ensure that the property of the owner is maintained and the benefit thereof is reached to the persons to whom it is intended to. In the case of trust, the owner is under no obligation to pass on the benefit to the beneficiary, therefore, the owner/settler being the owner of the property, he is entitled to take it back in the event it is not utilized for the purpose the owner intended to. But that is not the case when money from the Debtor or on behalf of the Debtor has gone out towards discharge of an obligation. In the case of trust, ownership of that property or money remains with the owner as long as it is not utilized for the purpose intended to. That owner has no obligation to part with his property/money.

In case of homebuyers' issue, once homebuyers entered into an agreement with a developer and when their relations entered into turbulence and not in a position to become normal, the relation in between them will become creditor and debtor and the person under obligation shall refund the money of the homebuyers. In the given case, JAL deposited money on behalf of JIL for utilization of the same to the homebuyers of the Corporate Debtor. Therefore, it is evident that this deposit is made towards an obligation. When any money is received towards an obligation, it can neither be construed as trust money nor construed as governed by constructive trust, therefore we have not found any merit to say that this money is governed by trust concept.

In this case, the homebuyers' money has been lying with the Corporate Debtor and JAL, it is an admitted fact that money come from the Homebuyers has gone to JAL in the name of

construction. It is not the case of the JAL that JIL money has not come for construction. Moreover, JAL, by the time it has deposited, was aware that it was depositing that money towards the obligation owned to JIL homebuyers.

Here there could not be any assumption or presumption to say that JAL deposited this money before the Honourable Supreme Court with an assumption that it would come back to it in the event this money has not been utilized for the distribution of it to the homebuyers of JIL.

As long as the Hon'ble Supreme Court has not stated that this money has to be returned to JAL, it has to be construed that the Hon'ble Supreme Court has consciously retained the money within the custody of it and thereafter transferred this money to NCLT with a direction that the parties shall abide by the directions of NCLT. Had the Hon'ble Supreme Court has felt that it should go back to JAL, the Honourable Supreme Court would have returned it to JAL, but it has not been done. Whenever any payment is made towards any liability, it has to be treated as a payment made towards that liability. It does not matter who paid the money, it matters as to whether it has been paid towards an obligation or not. Since JAL has without any objection or condition paid to the homebuyers of JIL on behalf of JIL, it has to be treated that the payment is towards the obligation of JIL. Though it has not been explicitly explained that JAL paid on behalf of JIL, the matter pending before the Hon'ble Supreme Court being with regard to homebuyers of JIL, when money was asked to be deposited towards refund of JIL homebuyers, and the same being paid by JAL, now it is not open to JAL to say that it is JAL's money.

As to the argument saying that for Rs. 750 Crore has not gone into the books of Corporate Debtor (JIL), therefore it cannot be treated as the asset of JIL, when money has been deposited on the directions of Honourable Supreme Court and that has not been returned by Honourable Supreme Court, we are only limited to understand that the Honourable Supreme Court has not refunded the money because refunding to a few creditors in preference to other creditors would become a preferential treatment, therefore such observation cannot be extrapolated to say that the Hon'ble Supreme Court has refused to refund the money on the assumption that this money has to go back to JAL.

If we see the situation in the perspective of the historical facts, it is evident that homebuyers paid money, JIL and JAL failed to deliver homes to the homebuyers, therefore the obligation lies upon JIL to satisfy that obligation either by refunding the money or by delivering homes to the homebuyers, for neither of the things being done, the money having passed from JIL to JAL, and part of it having come back as per the orders of the Hon'ble Supreme Court, now it is not open either to JAL or its creditors to canvass that this money is belonging to JAL.

> In view thereof, we hereby consider that this money has to be utilized to the obligation owed to the creditors of the Corporate Debtor and in case this Bench for any reason passes any order for return of this money to JAL, it would be nothing but overreaching the wisdom of the Hon'ble Supreme Court and its directions. When money has been paid by JAL towards an obligation as per directions of the Hon'ble Supreme Court, it can no more be considered as the assets of JAL. As to whether it has been stated in the information memorandum that this Rs. 750 Crore is an asset of the Corporate Debtor or not, every case has to be seen in the context of its facts. If at all for any reason, this is not shown as the asset of the corporate Debtor in the information memorandum, can it be said that the Hon'ble Supreme Court transferring the deposit to NCLT has no meaning? Any order that has been passed by the Hon'ble Supreme Court, is binding on all Courts and Tribunals, for there being no direction to return this money to JAL or to determine as to whether it has to be paid to JAL or not, it is not open to this Bench to draw any inference other than an inference considering that this money is an asset of the Corporate Debtor. Since JAL is not under further obligation to complete construction of homes, there is no occasion to assume that if this money go back to JAL, it would be utilized for the cause of the creditors of the Corporate Debtor, in view thereof, we hereby dispose of all CAs related to Rs. 750 Crore issue by holding that this money is to be treated as the asset of the Corporate Debtor."

After having dealt with the issue of INR 750 crores, the NCLT took up the issue with regard to the approval of the resolution plan and for that matter, in the third segment of the impugned order, summarised the salient features of the resolution plan, which have already been noticed hereinbefore and need not be repeated. The objections dealt with by the NCLT in the fourth segment of its order dated 03.03.2020 could now be noticed with reference to the objector and the subject matter.

It was submitted on behalf of JAL that the resolution plan could not be approved for the reasons that it was being used as a device for enrichment of NBCC at the cost of the corporate debtor where NBCC was attempting to acquire JIL having worth of about INR 8,257 crores for a

petty sum of INR 120 crores; that the resolution plan was a contingent one where NBCC reserved its right to withdraw if the said sum of INR 750 crores was not treated as part of the resolution plan and JIL was not discharged of PMLA and other investigations; that the approval was inconsistent with Section 11(4)(g) of RERA; that simultaneous voting on two resolution plans was not permissible in law; that the resolution applicant wrongly suggested that there was no haircut in the proposed settlement of dues of financial creditors because the haircut was as far high as INR 6,101 crores which was 62.36% of the debt of INR 9,783 crores. These contentions were countered by IRP with the submissions that the promoters of JAL and JIL had no locus to question the offer accepted by the CoC and as per the decision of this Court in the case of ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.*** (C.A. No. 4242 of 2019)[37], no provision in the Code required the resolution applicant to match the liquidation value; that no provision in the Code prevented simultaneous voting over two plans; and that as per the decision of this Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr.* v. *Union of India & Ors.*: (2019) 8 SCC 416**, RERA and IBC co-exist and have to be interpreted harmoniously and in the event of a clash, RERA must give way to IBC. It was also submitted that when the homebuyers who were entitled to raise RERA objections had themselves voted in favour of the plan, the promoters/directors could not raise any grievance. There was a question of claim of the corporate

37 Since reported as **(2020) 11 SCC 467**.

debtor against JAL, being the amount given as mobilisation advance on which, there was a discrepancy in the accounting, but it was admitted on behalf of JAL that an amount of INR 274 crores was net receivable by JIL from JAL. To this, the NCLT directed payment of the said amount to JIL and for reconciliation of the account as regards the remaining dues. The NCLT had also brushed aside the submissions regarding the contingent nature of the plan with reference to its finding on the issue related to the said deposited sum of INR 750 crores and Section 32A inserted to the Code by way of amendment with effect from 28.12.2019. The relevant observations of NCLT read as under: -

> "69. With regard to these two issues, this Bench has already decided that Rs. 750 Crore lying with NCLT shall be utilized for the cause of the creditors of the Corporate Debtor and with regard to PMLA proceedings, for Section 32A being brought into existence by way of Amendment to the Code 28.12.2019, now there need not be any separate protection from the PMLA proceedings over the assets of the Corporate Debtor, therefore we have not dealt with this issue, therefore the argument saying that plan is conditional has no merit.
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> *** *** ***
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> Moreover, the calculation of figures given by JAL to say that figures placed by the Resolution Plan are not supported by material, in any event, this being an issue to be taken up by the CoC, this Bench cannot decide the fate of the resolution plan on the figures shown by the promoters of JIL and JAL, unless such plan is vitiated by fraud.
>
> Apart from this, it is not the case of promoter/directors that company has positive net worth entitling the promoters of the company to receive the residual proceeds in the event company is liquidated. As long as liabilities are more than the assets of the company, the promoters/directors' arguments cannot be seen as a point having bearing on the resolution plan approved by the CoC.
>
> 74…….This objection over simultaneous voting per se does not look as an act in violation of the Code or Regulations thereto. No provision has envisaged that two plans should not be put to voting. Moreover there is no mandate that if two plans are put to voting,

the plan voted in favour to be declared non est in law. Doctrine of severance could be applied by validating the action doable under the law as valid. If any excess has happened, such excess can be taken out. Besides this, both the plans are not approved. In addition to it, unsuccessful Resolution Applicant has no grievance to the plan present before us.

With regard to RERA issue, the IRP submits that the Hon'ble Supreme court in para 28 of ***Pioneer Urban Land & Infrastructure Limited & anr. Vs. Union of India & Ors. (WP (c) no. 43 of 2019)*** held that *RERA and IBC must be held to co-exist and be interpreted harmoniously and in the event of clash, RERA must give way to IBC*.

When the home-buyers, who are entitled to raise RERA objection themselves have voted in favour of the plan, RERA violation if any, it cannot be the grievance of the promoters/directors.

With regard to Rs. 716 Crores claim against JAL by the Corporate Debtor, the IRP submits that after setting off the amount paid to JAL, the amount to be refunded by JAL is a sum of Rs. 594 Crores as on 31.12.2019. It is an admitted fact that mobilisation advance of Rs. 586 Crores is due and payable by JAL and JIL as on 31.12.2019, out of which JAL says, after setting off, the amount due and payable to JIL by JAL is only Rs. 274 Crores. However, JAL counsel has not placed material supporting the figures shown as set off, since JAL Counsel himself has stated that net receivable by JIL from JAL amounts to Rs. 274 crores, JAL shall forthwith pay Rs. 274 crores to JIL, as to remaining money as sought by the Resolution Applicant, JIL and JAL shall draft a reconciliation statement, accordingly payment has to be made to whomever any outstanding is payable."

Another major part of objections, in terms of magnitude and implication, came up from the dissenting financial creditor ICICI Bank. It was submitted by this lender bank that being a dissenting financial creditor, it was entitled to receive payment as per the liquidation value in terms of Section 30(2)(b) of the Code read with Regulation 38(1)(b) of CIRP Regulations but in the resolution plan, it was sought to be provided only the land and equity in the SPVs proposed to be incorporated; and such a provision in the resolution plan was entirely impermissible. It was

also submitted that while the assenting financial creditors were allowed to receive upfront payment of INR 300 crores on the basis of fresh debts raised by Expressway but the same benefit was not being extended to the dissenting financial creditors. The NCLT noted the star argument of the learned counsel for ICICI Bank that distribution of equity or the land parcels to the dissenting financial creditors does not satisfy the requirement of "payment" under Section 30(2) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and such payment has to be a liquidated sum, as stated under Section 53 of the Code. *Per contra,* it was contended on behalf of the resolution applicant and the IRP that it was nowhere envisaged in Section 30(2) of the Code that payment of liquidation value to dissenting financial creditors has to be in cash; that even Regulation 38(1)(b) of the CIRP Regulations only provided for the priority of payment to the dissenting financial creditors before the assenting financial creditors and the mode of payment to be in cash was not mentioned; that when the assenting financial creditors were not being paid in cash and had accepted equity and land parcels, payment to the dissenting financial creditors in cash would cause prejudice to the rights of the assenting financial creditors. Meaning of the word "payment" in Black's Law Dictionary was also cited and it was argued that the money or other valuable thing delivered to discharge the obligation is to be construed as payment under Section 30(2) of the Code.

46.1. While dealing with the rival submissions in relation to this claim of the dissenting financial creditor, the NCLT referred to the binding nature of agreement between JIL and the said creditor as also the rights of a dissenting financial creditor in terms of Sections 30(2) and 53 of the Code and concluded that the only recourse available was payment in cash to such dissenting financial creditor a sum equivalent to the liquidated sum he would be entitled to receive under Section 53 of the Code. The NCLT said,-

> "91. If you come to the resolution under IBC, there are two outcomes in it. One is some creditors agreeing for a resolution to the existing situation. Another is, some creditors may not agree for the resolution. The persons agree for the resolution, they are no doubt bound by the arrangement they agreed upon. But as to the dissenting creditors, who have not agreed for the resolution, they are governed by sections 30(2) & 53 of the Code. In the case of dissenting creditor, the Corporate Debtor or the Resolution Applicant stepping into the shoes of the Corporate Debtor is bound by the earlier contract entered between the Corporate Debtor and the dissenting financial creditor and then by the pro rata distribution entitled u/s 53 of the Code. The only recourse available is, the dissenting creditor shall be paid in cash equivalent to the liquidated sum he is entitled to receive u/s 53 of the Code. It is a deeming fiction to calculate the liquidated sum payable to the dissenting financial creditor and pay the same to the dissenting creditor as if the company is liquidated. To make such payment, the company need not be factually liquidated."

46.2. The word "payment", as defined in Black's Law Dictionary was also analysed by NCLT and it was stated that the obligation has to be seen and in the instant case, the obligation was repayment of money lent along with interest. It was observed, that the dissenting financial creditors were to be paid in cash not just by virtue of Section 53 of the Code but

also by virtue of the terms and conditions of the agreement between JIL and the dissenting financial creditor, in the following words: -

> "92….Therefore this argument will not be ticking to say that payment in kind to the promise is discharge of obligation. If the promisee has agreed to give up the payment obligation, he is free to do so. In this case, for the dissenting financial creditor has not agreed to the approval of the resolution plan, they shall be paid in cash, not only by virtue of the mandate under Section 53 of the Code but also by virtue of terms and conditions of the agreement between the Corporate Debtor and the dissenting financial creditor."

46.3. The NCLT further observed that upon approval of the plan by the CoC, it was not open to the parties to say that, since the assenting creditors were not getting better treatment than the dissenting creditor, the dissenting creditor shall remain bound to the plan; and when a particular issue was governed by law, something not present in the law could not be thrust upon any party under the cover of equity. The NCLT, thereafter, proceeded to analyse the requirements of Section 30(2) of the Code with Section 53 and Regulation 38 of the CIRP Regulations; and also examined its powers to deal with those aspects of the resolution plan which were not compliant with Section 30(2) of the Code. Having examined and analysed thus, the NCLT held that when the resolution plan is found non-compliant with Section 30(2), the IRP or the resolution applicant cannot say that the approval being within the ambit of commercial wisdom of CoC, all what was decided by CoC was binding on the dissenting financial creditor; and it was within its (NCLT's) jurisdiction to modify the plan so as to make it compliant with the requirements of law

without altering its basic structure. The NCLT observed and held as under: -

> "98. If section 30(2) (b) (ii) is carefully examined, and read in the context of the said clause, it is clear that payment will be the amount to be paid to the financial creditors under Section 53 of the code, because it is for payment of the debts of the financial creditors, thereafter it has been further stated it shall be not less than the amount to be paid to them in accordance with Section 53 of the code.
>
> When all these provisions and IBBI specifications made clear payment to the dissenting financial creditors means payment of amount, the resolution professional or the resolution applicant cannot argue that the payment can, not only be in cash but also in kind.
>
> The persons agreeing for something, they may agree for anything, it does not mean that the persons disagreeing shall also be treated as the assenting financial creditors are treated. When any financial creditor disagreed for a resolution, he knows that he has to be compromised with the situation befall upon him under Section 53 of the code. It does not matter as to whether his entitlement under Section 53 is more or less than the treatment assenting financial creditors getting. Their rights are already compromised under section 53 slating them to their entitlement on pro rata basis. They cannot be put to further sufferance at the wish of the Resolution Applicant or the CoC. As Section 30 (2) has referred to section 53 entitlement, and this Bench being made custodian to verify as to whether section 30(2) compliance has been accomplished or not, the RP or the resolution plan applicant cannot say that plan approval is within the ambit of commercial wisdom of the CoC therefore what all that is decided by the CoC is binding upon the dissenting financial creditors. Whenever such compliance is not present in the plan, this Bench is authorised to examine the same and interfere with the plan despite the plan has been approved as contemplated under Section 30(4) of the code.
>
> Looking at the resolution plan treatment to the dissenting financial creditor in the light of the aforesaid legal proposition, since it has not been said in the Code that plan should be approved as submitted by the resolution professional under Section 30(6) of the code, we are of the view that this Bench has jurisdiction to approve the plan by modifying the plan to the extent that does not alter the basic structure of the plan."
>
> (underlining is in original)

46.4. Having thus held on the requirements of modification of the plan in relation to the treatment of the dissenting financial creditor while retaining

its basic structure, the NCLT observed that the two aspects which were made the basic conditions by the resolution applicant namely, getting the said sum of INR 750 crores and extinguishing of PMLA proceedings were duly taken care of, respectively by the decision in relation to the said corpus of INR 750 crores and by the amendment of law. The NCLT further observed that for the sake of viability and feasibility, the plan could be modified to make it compliant with Section 30(2) of the Code. Having said so, NCLT proceeded to modify the terms of resolution plan in the manner that the resolution applicant shall pay to the dissenting financial creditor the amount receivable in terms of Section 53 of the Code in twelve monthly instalments along with interest starting from six months from the date of order with default conditions of interest. The NCLT ordered as under: -

> "103. In view of the same, for the sake of viability and feasibility of the plan, we hereby modify this plan to make it in compliance with the section 30(2) (b) (ii) of the code by holding that the Resolution Applicant shall pay to ICICI an amount that it is entitled to receive u/s 53 of the code within 18 months from the date of approval of this plan, that is in 12 equal monthly instalments along with interest over the admitted claim starting from six months hereof. In the event, the Resolution Applicant has failed to repay as stated above, ICICI is entitled to claim commercial interest over the admitted claim from the date of default, that is from the first month of 12 monthly instalments."

Another major contentious issue before the Adjudicating Authority related to the objections of YEIDA. As noticed, YEIDA had been the land providing agency and had entered into Concession Agreement for leasing the land for construction of Expressway and also for the purpose of development of the surrounding parcels of land.

47.1. The NCLT noticed that as per the said CA, the concessionaire (JIL) was to bear the acquisition cost for the project land given to it and in consideration, the concessionaire would obtain the right to develop land for commercial exploitation and the right to operate the Expressway and collect toll for a period of 36 years; and after the expiry of 36 years from the grant of concession, the Expressway shall revert to YEIDA. As to the land for development, it was given on lease for 90 years. It was essentially submitted on behalf of YEIDA that the question, of additional compensation of the land acquired, cropped up with the directions of the Allahabad High Court; and that the liability in regard to the additional compensation in relation to the land acquired and leased to JIL was that of the corporate debtor JIL. It was also pointed out that the question of such additional compensation by JIL was subjected to arbitration proceedings where an award was made to the effect that the corporate debtor need not pay this amount of additional compensation but the award has been questioned by YEIDA in the proceedings under Section

of the Arbitration and Conciliation Act, 1996[38-39]. YEIDA stated its objection to the stipulation in the resolution plan that in case of the award being overruled, YEIDA would collect the amount of additional compensation from the end-users of the project land. It was submitted in this regard that in the CA, two payment components were present - one being of acquisition cost payable by the concessionaire and another being

38 Hereinafter also referred as to 'the Arbitration Act'.

39 It appears from the corrigendum dated 17.03.2020 and the submissions of the parties that the issue is pending before the Court of District Judge, Gautam Budh Nagar.

of lease rent, which could be paid by the sub-lessee/end-user as the case may be. It was submitted that given such components, the IRP or the resolution applicant could not insist that YEIDA has to collect the acquisition cost directly from the end-users. It was also submitted that even if the land utilised for Expressway was to revert to YEIDA after 36 years, the CA nevertheless provided as key components that the concessionaire would collect toll for this period and has to bear all the cost including the cost of acquisition; and there was no exemption as regards the land of Expressway. It was also submitted that the resolution applicant cannot split the transferred land into two and say that the payment of additional compensation would be applicable to the land used for development alone. It was further submitted that in view of Clause 18.1 of CA, in case of the necessity to transfer the concessionaire's rights and obligations to an SPV, there has to be necessary documentation involving YEIDA, the concessionaire and the SPV incorporated, so that YEIDA could keep exercising its rights over the SPV concerned; and the resolution applicant or CoC could not have unilaterally transferred the rights and obligations of the corporate debtor to an SPV without the consent of YEIDA. A decision of this Court in the case of ***Embassy Property Development Pvt. Ltd. v. State of Karnataka and Ors.:*** **2019 SCC OnLine SC 1542** was also referred to submit that IBC will not have overriding effect on every enactment which is applicable to the transactions related to the corporate debtor. It was further submitted that

the requirement of withdrawal of arbitration case could not be thrust upon YEIDA under the cover of the plan; and for the resolution plan having set out so many provisions curtailing the rights held by YEIDA, the same was required to be rejected. However, the Adjudicating Authority also noticed that despite such objections, the counsel appearing on behalf of YEIDA submitted that since the project was for public cause, it would have no objection for approval of the resolution plan provided necessary changes were made in it '*by removing the fall outs from the concession agreement'*.

47.2. In regard to this issue relating to the objections and submissions on behalf of YEIDA, the NCLT was of the view that CoC should not have approved the resolution plan stating that the additional compensation would be collected from the end-users; and proceeded to modulate the terms of the resolution plan to read that YEIDA shall have the right to collect the acquisition cost through the SPVs concerned. As regards the issue as to whether additional compensation need not be paid with regard to the Expressway for the same would revert to YEIDA after 36 years, the NCLT found it appropriate to read down the resolution plan as leaving it open to the parties to have proper recourse over this issue in the competent forum when occasion so arise. The NCLT also observed that the Concession Agreement was based on the statute created by the State Government and, therefore, any violation of terms and conditions of the same would be the violation of law in force. The NCLT, however, again

recorded the submissions on behalf of YEIDA that their endeavour was only for compliance of the terms and conditions of CA in order to ensure proper monitoring on realisation of dues and supervision over the work of corporate debtors or SPVs but not for rejection of the resolution plan. The relevant observations, findings and directions of YEIDA in regard to this issue read as under: -

> "118. On hearing the submissions of either side, with regard to payment of additional compensation, in the event any direction has been given in the arbitration proceedings to the Corporate Debtor to pay additional compensation, as per concession agreement, additional cost shall be paid by the concessionaire. We don't go into the point as to whether additional compensation is part of the acquisition cost because i.e. a point already Adjudicated by the Arbitral Authority and the issue is pending before the Hon'ble High Court of Delhi, now the limited point to be dealt with is, as to whether such compensation, if directed to be paid, is to be paid by the concessionaire or by the end users.
>
> As said above, there are two payment components come from the concessionaire one is acquisition cost, two is the lease rentals. In the concession agreement, it is obvious that acquisition cost (actual cost) shall be paid by the concessionaire, as to lease rentals are concerned, it has been dealt with in detail that lease rentals could be collected either from sub-lessee or from the end users, wherever the interest is transferred either to the sub-lessee or the end users. Therefore, CoC should not have approved the resolution plan stating that the compensation, if awarded, shall be collected from the end users.
>
> To iron out all these creases and to make this resolution plan viable, we hereby direct that the resolution plan shall be read as YEIDA has right to collect acquisition cost through the SPVs concerned.
>
> With regard to other objections that additional compensation need not be paid with regard to Expressway land on the premise that since Expressway will revert to YEIDA after 36 years, YEIDA counsel submits that this land has been given on consideration of collection of toll for about 36 years.
>
> In the backdrop of this factual scenario, we are of view that both are governed by concession agreement, therefore the Resolution Plan is to be read that it is left open to both the parties to have proper recourse over this issue before Competent Forum of law when time comes for payment of additional compensation.

> On transfer of concessionaire's rights and obligations to SPVs, as per the concession agreement, it is clear that this Corporate Debtor is a concessionaire, for the first time concessionaire having proposed to transfer its rights and obligations to the aforesaid two SPVs, we are of the view that documents shall be executed between the concessionaire, YEIDA and each of the SPVs. At last we must say that the concession Agreement is based on the statute created by the State Government, therefore any violation of the terms and conditions of the concession agreement is violation of the law in force as contemplated under section 30(2) of the Code, it has been decided as above.
>
> Despite YEIDA counsel representing the State Government Authorities with regard to its rights, the counsel has categorically mentioned that YEIDA's endeavour is only for compliance of the terms and conditions of concession agreement so that the State Agencies will have proper monitoring on realization of its dues and will have proper supervision over the works of the Corporate Debtor or its SPVs, but not to ensure that this resolution plan is rejected by this Bench on the grounds aforementioned."

After having dealt with the aforesaid major issues relating to INR crores, objections of JAL and its stakeholders, ICICI Bank and YEIDA, the NCLT proceeded to deal with the other issues relating to the fixed deposit holders, some of the aggrieved homebuyers, YES Bank and the agreement holders.

As regards fixed deposit holders, the NCLT provided that the resolution applicant shall make a provision to clear their dues as and when the unclaimed fixed deposit holder claims it, and this right will remain in force as long as they were entitled to claim under the Companies Act, 2013. These directions of NCLT in the impugned order read as under: -

> "125. Regarding FD holders payments who have not made claims which have been reflected in the records of the Corporate Debtor, the Plan Applicant shall make a provision to clear their dues as and

> when the unclaimed FD holder claims it, and this right will remain in force as long as they are entitled to claim under Companies Act 2013."

48.2. The NCLT also took note of the submissions of some of the homebuyers who were not agreeing with the resolution plan in question. Those dissatisfied homebuyers submitted that the timelines given in the resolution plan for completion of flats were not workable; there was no clause for refund of money in the event flats not being completed within the timelines envisaged, except to the extent of nominal interest; and that the voting share of homebuyers being only 57.66%, it cannot be said that cent percent consent had been given for approval of the resolution plan by CoC. The NCLT declined to recognise such objectors as dissenting financial creditors because authorised representative of this class of creditors had voted in favour of the resolution plan. The NCLT observed and held as under: -

> "126. One Rashmi Singhal and another applicant calling themselves as dissenting home -buyers, filed IA 871/2020, stating that the time lines given in the Resolution Plan for completion of flats are not workable and for there being no clause for refund of money in the event flats are not completed within the time lines envisaged, except to the extent of nominal interest mentioned in the plan, these two submit that they have dissented for the approval of the Resolution Plan. They have further relied upon voting share saying homebuyers voting share is only 57.66% therefore, it cannot be called that cent percent consent has been given for approval of the Resolution Plan by CoC. For there being a rule under IBC, whenever more than 50% voting has come from a class of creditors represented by an authorized representative, the approval given to the authorized representative for more than 50% will become 100% approval, therefore it cannot be said that dissenting homebuyers before authorised representative to be considered as dissenting financial creditors against the total voting of CoC. If the authorized representative dissented in the CoC, then the respective class of creditors would be considered as dissenting financial creditors. Moreover, if at all any dissenting financial

> creditor is there, his only look out is as to whether he has been paid as per Section 30(2) of the Code or not but not to see whether the Resolution Plan is workable or not."

48.3. As regards the objections raised by YES Bank, which had given loan to Jaiprakash Healthcare Ltd., a wholly-owned subsidiary of JIL, against dealing with the shares of its borrower (JHL) in the resolution plan, the NCLT observed that the resolution applicant and the said Bank having agreed for constitution of a Committee to deal with the shares and assets of JHL, that issue was not required to be discussed. The NCLT said, -

> "127. YES Bank, which has given loan to Jaiprakash Health Care subsidiary of JIL, has also raised an objection against dealing with the shares of the Health Care belonging to the Corporate Debtor. However, since the Resolution Applicant and YES Bank having agreed for constitution of a Committee to deal with the shares and assets of the subsidiary company, we are under no obligation to discuss this issue any further."

48.4. As regards the right reserved by the resolution applicant to cancel the transactions where certain parcels of land were transferred by the corporate debtor without proper agreement/sub-lease deed, NCLT noticed the submission made by such agreement holders that the agreements were executed by the corporate debtor in the normal course of its business prior to the commencement of CIRP and monies were also advanced; and therefore, such agreements could not be terminated unilaterally. The NCLT also noticed the counter submissions by IRP and NBCC that the agreements allegedly executed between the corporate debtor and the agreement holders had not been determined, but the

resolution applicant has reserved its right to cancel such instruments wherever the corporate debtor had entered into deals without proper agreements and without support of consideration. In this regard, the NCLT observed that if an agreement was not valid in law and suffered from want of consideration, it was not even required to be said that such agreement could be cancelled by the party concerned. However, the NCLT further observed that even when such a clause had been mentioned, the agreement holders had not lost their right to seek remedy in the competent forum; and determined this part of the matter in the following words: -

> "132. It is a trite law when an agreement is not valid in the eyes of law and consideration has not been paid, then it need not be separately said that such agreement could be cancelled by the effected party.
>
> Though such clause has been mentioned, it does not mean that the agreement holders have lost their rights to seek remedy for its grievances before Competent Forum, in view thereof, this clause need not be considered as clause effecting the rights of the alleged agreement holders."

48.5. The NCLT also made observations as regards the objections raised by JAL and other objectors against inclusion of 858 acres[40] as part of the resolution plan and pointed out that such an objection lost its relevance after the decision of this Court dated 26.02.2020 in the case of ***Anuj Jain*** (supra).

Having thus dealt with the relevant objections, the NCLT entered into the fifth segment of its order and generally dealt with the provisions

40 This figure was corrected on 17.03.2020 by NCLT as '758 acres' in terms of the order of this Court dated 26.02.2020.

relating to the reliefs and concessions with the observations/directions as under: -

> "134. The clauses already covered in the aforesaid discussion will not be discussed again, but as to the clauses not covered above are hereby dealt with as follow: -
>
> Clauses 1 to 5 have already been covered in the above discussion.
>
> Clause No. 6:- With regard to the past liabilities of income tax authority, they shall stand extinguished.
>
> Clause No. 7:- Since reduction of the share capital of the corporate debtor is not part of this resolution, this Adjudicating Authority cannot waive the procedure for reduction of share capital in relation to the companies not yet incorporated.
>
> Clause No. 8 & 10:- Payment of stamp duty mentioned in clause 8 is waived to the extent permissible under law.
>
> Clause No. 9:- Any non-compliance arising out of past claims prior to CIRP initiation shall not have any bearing on this corporate debtor from hereof.
>
> Clause No. 11:- The lenders to the corporate debtor shall regularise all the accounts and ensure that such classification of the loan account is standard in their books with effect from the transfer dates.
>
> Clause No. 12:- All claims which have been placed before the RP and any criminal proceedings appurtenant to those claims are hereby extinguished.
>
> Clause No. 13:- As to the contracts relating to the development of land by JAL, the Resolution applicant can reserve its right to terminate the same, as to the claims, if any, the resolution applicant has right to take appropriate action against JAL.
>
> Clause No. 14:- With regard to liability arising out of concession agreement in relation to YEIDA, since those issues are governed by concession agreement, this Bench cannot nullify the rights of YEIDA against the corporate debtor emanating from the concession agreement.
>
> Clause No. 15:- The agreements for subleases executed between the corporate debtor and the third parties, which are not in accordance with law and not supported by material proof, the Resolution applicant will have a right to terminate in accordance with law.
>
> Clause No. 16 to 18:- The resolution applicant is granted 12 months' time from the approval date to ensure compliances in

relation to the non-compliance of applicable laws by the corporate debtor or of its subsidiary pertaining to any period up to the approval date and licenses if any, to be obtained.

Clause No. 19:- In respect to the lands shown as transferred to JAL for real estate development, where the title and ownership is still lying with the corporate debtor, the resolution applicant is at liberty to proceed in accordance with law.

Clause No. 20:- It goes without saying that the IRP will not be held responsible with regard to discharge of his duties during CIR Process. The IRP and the Resolution Applicant will not be liable for any transactions carried out by the ex-management of the corporate debtor.

Clause No. 21:- This point has already been dealt with in the above discussion.

Clause No. 22:- For the purpose of consolidation of the books of the CD with the resolution applicant, the effective date shall be treated as the first day of the quarter immediately succeeding quarter in which the resolution applicant completes the takeover of the CD.

Clause No. 23:- This point is not clear as to whether it is referring to the land of the Corporate Debtor mortgaged to the lenders of JAL, if that is so, since it has been decided by the Honourable Supreme Court, it need not be reiterated.

Clause No. 24:- This generalization of cancellation of all agreements cannot be granted unless each transaction is specifically dealt with.

Clause No. 25:- The resolution applicant cannot modify the resolution plan once it is approved by the CoC.

Clause No. 26:- As to the claims placed before the IRP and other liabilities of the CD which are shown in the records of the company and where notice has been given to such creditors, they can be construed as withdrawn after the approval date.

Clause No. 27:- With regard to extension of concession period by YEIDA, it is YEIDA to decide as to whether such extension should be given or not.

Clause No. 28:- This Adjudicating Authority can only direct the Central Government and Reserve Bank of India to accord permissions to the extent permissible under law."

As regards other applications/objections, the NCLT disposed them of with comments wherever required. We need not elaborate on all such

observations but could usefully point out the rejection of two such applications.

50.1. One such application was filed by a financer of one of the homebuyers seeking its induction in the CoC. This application was dismissed as misconceived in the following words: -

> "CA-74/2019 filed by PNB Housing Finance Ltd. for directions to the IRP to induct this applicant in the CoC and if any amount is refunded to the home-buyers, the amount due to the applicant ought to be paid to this applicant because it is the lender to the home-buyers. This application is dismissed as misconceived, as the lender to the home-buyers will not have any right to be financial creditors of the CD."

50.2. Another application was filed by three homebuyers seeking the relief of quashing the minutes of CoC dated 01.03.2019; for direction to conduct a forensic land audit of the corporate debtor; and for various directions to IRP, like those for taking legal opinion on Concession Agreement, analysis of Expressway cost escalation, providing information and answers to the queries of homebuyers etc. etc. The NCLT noted the propositions of these applicants and dismissed the application with the observations that they were three persons out of thousands of homebuyers and if such issues were to be examined and decided, the resolution process could never be completed; and at the stage of approval of the resolution plan, if objections of this kind were allowed, there would be no end to it. The NCLT said, -

> "It is an application filed by Mr. Hemant Kumar & two others, who do not have direct voting in the CoC, because there are thousands of home-buyers, out of them these three are minuscule in number, if at all these issues are to be examined and decided, and remain waiting for the remedies, this resolution process will not complete

> even after two years from hereof. Moreover, at the time of approval of this resolution plan, if objections of this kind are allowed there cannot be any end to it, therefore, this application is hereby dismissed."

With the aforesaid, the Adjudicating Authority (NCLT) concluded on the matter while disposing of all the applications and while holding that all the stakeholders shall remain bound by the order so passed. However, various stakeholders have various submissions to make and various objections to take against the order so passed by the Adjudicating Authority.

Having taken note of the relevant contents of the order dated 03.03.2020, as passed by the Adjudicating Authority (NCLT) in exercise of its jurisdiction under Section 31 of the Code, it would be worthwhile to summarise the significant attributes of, and takeaways from, this order because a substantial part of the forthcoming discussion shall be revolving around the findings recorded and directions given therein. The relevant aspects could be summarised as follows:

As regards the said sum of INR 750 crores, the Adjudicating Authority, with reference to the orders passed by this Court in the case of ***Chitra Sharma*** (supra), held that the deposit made by JAL became an asset of the corporate debtor JIL; and the said money was to be utilised towards securing the interests of homebuyers. As regards the question of the amount payable by JAL to JIL, it was directed that JAL shall make payment of the admitted amount of INR 274 crores; and after

reconciliation of accounts, further payment shall be made to whomsoever outstanding was found payable.

As regards the objections by the dissenting financial creditor ICICI Bank, the Adjudicating Authority held that payment to such dissenting financial creditor shall be made in cash, as per the amount it would be entitled to under Section 53 of the Code, in the form of twelve monthly instalments with interest to be accrued six months post the order. It was also observed by the Adjudicating Authority that it had the necessary jurisdiction to modify the resolution plan to make sure it complied with Section 30(2) of the Code, so long as its basic structure was not altered.

As regards the objections by YEIDA, the Adjudicating Authority held that YEIDA shall have the right to collect the acquisition cost through the SPVs proposed to be incorporated so as to make the resolution plan compliant with the terms of the Concession Agreement; however, the Adjudicating Authority refrained from adjudicating on the issue of additional compensation in relation to the land under Expressway and left it for the parties to take appropriate action at the appropriate stage. The Adjudicating Authority also held that for transfer of rights and obligations to the two SPVs, necessary documents shall be executed involving the concessionaire (JIL), YEIDA and the SPV concerned. These alterations were ordered by the Adjudicating Authority '*to iron out all these creases and to make this resolution plan viable*'.

As regards the issue relating to the fixed deposit holders, the Adjudicating Authority provided that the resolution applicant shall make a provision to clear the dues even of those fixed deposit holders who had not made the claims. In other words, the Adjudicating Authority directed for another modification of the resolution plan, for satisfying the dues of unclaimed fixed deposit holders.

The Adjudicating Authority brushed aside the objections sought to be taken by some of the aggrieved homebuyers, while holding that they could not be categorised or treated as dissenting financial creditors.

As regards the objections by YES Bank, the Adjudicating Authority pointed out that no intervention was required since YES Bank agreed to settle its objections with NBCC by forming a Committee.

As regards the agreement holders, the Adjudicating Authority observed that if an agreement was not valid in law and suffered from want of consideration, it was not even required to be said that such agreement could be cancelled by the party concerned. However, the Adjudicating Authority also observed that even when such a clause had been mentioned in the resolution plan, the agreement holders had not lost their right to seek remedy in the competent forum.

The Adjudicating Authority generally dealt with the clauses relating to the ‘reliefs and concessions’ in Schedule 3 of the resolution plan as also various other applications filed by different stakeholders. Some of the reliefs and concessions sought for by the resolution applicant were not

granted or were declined, for the reasons specified against the relevant clauses. The other applications/objections were disposed of with a few comments.

Order dated 22.04.2020 by NCLAT making interim arrangement

As noticed at the outset, the aforesaid order dated 03.03.2020 was challenged in various appeals before the Appellate Authority (NCLAT), which have since been withdrawn to this Court after we took note of all the factors concerning this litigation and accepted the requests made by the parties concerned. Such requests were made when the matters first appeared before us in challenge to an interim order dated 22.04.2020 passed by NCLAT, whereby the NCLAT made an interim arrangement of constitution of an Interim Monitoring Committee for implementation of the plan in question. The said order dated 22.04.2020, being also a subject of challenge in this batch, could be usefully noticed to complete the narrative.

The resolution applicant NBCC preferred an appeal against the aforesaid order dated 03.03.2020 insofar as it felt aggrieved of the modifications in the resolution plan. In that appeal, the NCLAT, while issuing notice to the unrepresented parties, directed that the approved resolution plan may be implemented subject to the outcome of appeal but at the same time, it was also provided that IRP may constitute an Interim Monitoring Committee comprising of the successful resolution applicant (NBCC) and three major institutional financial creditors, who were the

members of CoC. This impugned interim order dated 22.04.2020 reads as under: -

> "**22.04.2020** The Appellant – NBCC (India) Ltd., which has emerged as the Successful Resolution Applicant in 'Corporate Insolvency Resolution Process' initiated against Jaypee Infratech Ltd. (JIL) is aggrieved of modifications made by the learned Adjudicating Authority in the 'Resolution Plan' submitted by it and as approved by the 'Committee of Creditors' to the extent it allows objections of ICICI Bank Ltd. and Yamuna Expressway Industrial Development Authority and directs payment to unclaimed Fixed Deposit Holders. It is submitted that the learned Adjudicating Authority could not intercede the business decision of the 'Committee of Creditors' taken by the prescribed voting shares and the learned Adjudicating Authority exceeded its jurisdiction in making such modifications.
>
> Issue notice to the Respondents through Speed Post in the main appeal as well as in the Interim Application.
>
> On behalf of ICICI Bank Ltd., Ms. Misha, learned Counsel accepts notice. On behalf of Respondent No.4 – Interim Resolution Professional, Mr. Sumant Batra, learned Counsel accepts notice. On behalf of Respondent No.5 – IDBI Bank, Mr. Bidhwajit Dubey, learned Counsel accepts Notice. No further notice be served upon these Respondents. The above Respondents may file their reply affidavits within two weeks. Rejoinders, if any be filed within one week thereof.
>
> Let notice be served upon Respondent Nos.2 and 3. Requisites along with process fee be filed within three days. If the Appellant provides email addresses of the Respondents, let service be effected through email also.
>
> Mr. Sumant Batra, learned Counsel representing the 'Resolution Professional' intends to file an Appeal in regard to some observations made in paragraph 103 of the impugned order.
>
> We are told that the implementation of the 'Successful Resolution Plan' would involve participation of the 'Successful Resolution Applicant', i.e. NBCC (India) Ltd. as also the three major Institutional Financial Creditors, who are Members of the 'Committee of Creditors' i.e., IDBI Bank Ltd., IIFCL and LIC.
>
> Meanwhile, till further orders, the approved 'Resolution Plan' may be implemented subject to outcome of this Appeal. The Interim Resolution Professional may constitute 'Interim Monitoring Committee' comprising of the 'Successful Resolution Applicant', i.e., the Appellant and the three major Institutional Financial Creditors, who were Members of the 'Committee of Creditors' as named above.

> Mr. Sumant Batra, learned Counsel submits that as of now he is continuing and managing the affairs of the 'Corporate Debtor'. The Resolution Professional, who would be constituent of the 'Interim Monitoring Committee' shall continue to be paid as may be deemed reasonable by the 'Interim Monitoring Committee' from the date of this order. If any fee is outstanding for the past services rendered by the Resolution Professional during the 'Corporate Insolvency Resolution Process', the same shall be paid as per the decision of the 'Committee of Creditors'. These directions will last till the disposal of this Appeal.
>
> List the matter for 'admission after notice' on **15th May, 2020**."

The relevant statutory provisions

Having taken note of the parties and their respective interests; the principal points for determination; the relevant factual and background aspects, particularly with reference to the three decisions of this Court dated 09.08.2018, 06.11.2019 and 26.02.2020; the salient features of the resolution plan; and key aspect of the orders impugned, we may now go through the provisions that would be relevant for determination of the points arising in this batch of matters.

While the expressions generally used in the Code are defined in Section 3 but then, the expressions employed for the purpose of Part II of the Code, dealing with insolvency resolution and liquidation of corporate persons, are defined in Section 5 thereof.

The relevant definitions as occurring in Section 3 are as under: -

> "**Section 3(8):** "corporate debtor" means a corporate person who owes a debt to any person;
>
> **Section 3(10):** "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

Section 3(11): "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(12): "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

Section 3(30): "secured creditor" means a creditor in favour of whom security interest is created;

Section 3(31): "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

56.2. The relevant definitions occurring in Section 5 for the purpose of Part II of the Code are as under: -

"Section 5(1): "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);

Section 5(7): "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8): "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

money borrowed against the payment of interest;

any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease

under the Indian Accounting Standards or such other accounting standards as may be prescribed;

receivables sold or discounted other than any receivables sold on non-recourse basis;

any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[41][*Explanation.*- For the purposes of this sub-clause,-

any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(20): "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Section 5(21): "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

Section 5(25): "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25;

Section 5(26): "resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II

41 This *Explanation* was inserted by Act 26 of 2018 w.r.e.f. 06.06.2018.

> [42][*Explanation.*- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;]
>
> **Section 5(27):** "resolution professional", for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; and
>
> **Section 5(28):** "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor."

As already indicated, and which is not far to seek, the *Explanation* inserted to sub-clause (f) of clause (8) of Section 5 with effect from 06.06.2018 made it clear that any amount raised from an allottee under a real estate project is deemed to be having the commercial effect of a borrowing and thereby, it answers to the description of a "financial debt". The pertinent consequence of this clarificatory amendment is that such an allottee under a real estate project stands in the capacity of a financial creditor of the corporate debtor. Prior to this amendment, such an allottee was sought to be regarded only as an 'other creditor' and that had been the principal cause behind the litigation in this Court in ***Chitra Sharma*** (supra). For a complete and meaningful understanding of this *Explanation* inserted to Section 5(8)(f) of the Code, it would be in concordance to take note of the meanings assigned to the expressions "allottee" and "real estate project" in RERA. The referred clauses (d) and (zn) of Section 2 of RERA read as under: -

42 Inserted by Act 26 of 2019, sec. 2 (w.e.f. 16.08.2019).

> **"Section 2(d):** *"*allottee*"* in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;
>
> **Section 2(zn):** "real estate project" means the development of a building or a building consisting or apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

We may now take note of the relevant provisions contained in the Code, as amended from time to time and as applicable to the case at hand, particularly Section 18 relating to the duties of interim resolution professional; Section 21 specifying the composition of the Committee of Creditors and matters related with it; Section 24 laying down the norms for meeting of the Committee of Creditors; Section 25 relating to the duties of the resolution professional; Section 25A, as inserted with effect from 06.06.2018 and as amended with effect from 16.08.2019, in regard to the rights and duties of the authorised representative of the financial creditors; Section 30 on the essentials of a resolution plan and its submission to the Committee of Creditors by the resolution professional; Section 31 relating to the approval of resolution plan by the Adjudicating Authority; Sections

and 61 relating to the appeal against an order approving the resolution plan and grounds for such an appeal; Section 53 relating to distribution of assets in case of liquidation; and Section 238 on the overriding effect of the Code. These provisions read as under: -

"Section 18. Duties of interim resolution professional.- The interim resolution professional shall perform the following duties, namely:-

collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to-

business operations for the previous two years;

financial and operational payments for the previous two years;

list of assets and liabilities as on the initiation date; and

such other matters as may be specified;

receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

constitute a committee of creditors;

monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

file information collected with the information utility, if necessary; and

take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including-

assets over which the corporate debtor has ownership rights which may be located in a foreign country;

assets that may or may not be in possession of the corporate debtor;

tangible assets, whether movable or immovable;

intangible assets including intellectual property;

securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

assets subject to the determination of ownership by a court or authority:

to perform such other duties as may be specified by the Board.

Explanation.–For the purposes of this [section][43], the term "assets" shall not include the following, namely:-

43 Substituted by Act 26 of 2018, sec. 14, for "sub-section" (w.r.e.f. 06.06.2018).

assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

assets of any Indian or foreign subsidiary of the corporate debtor; and

such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

[44]**Section 21. Committee of creditors.-**(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub -section (6) or sub-section (6A) or sub -section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Where any person is a financial creditor as well as an operational creditor,-

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44 This Section 21 has undergone various changes in its amendment by Act 26 of 2018 w.r.e.f. 06.06.2018 which include substitution/omission of certain expressions as also insertion of certain provisions. While leaving aside all the minute details, we may, of course, indicate that by this very amendment, sub-sections (6A) and (6B) were also inserted and sub-sections (7) and were substituted. Before their substitution, sub-sections (7) and (8) stood as under:

"(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities under sub-section (6).

All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board."

such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

represent himself in the committee of creditors to the extent of his voting share;

appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6A) Where a financial debt—

is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of

creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6B) The remuneration payable to the authorised representative-

under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

under clause (b) of sub-section (6A) shall be as specified which shall form part of the insolvency resolution process costs.

The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).

Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

[45]**Section 24. Meeting of committee of creditors.-**(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

All meetings of the committee of creditors shall be conducted by the resolution professional.

The resolution professional shall give notice of each meeting of the committee of creditors to-

members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);

members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

45 This Section 24 has also undergone a few changes in its amendment by Act 26 of 2018 w.r.e.f. 06.06.2018 which are essentially of sequel to the amendment of Section 21.

operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

Subject to sub-sections (6), (6A) and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

The meetings of the committee of creditors shall be conducted in such manner as may be specified.

Section 25. Duties of resolution professional.- (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-

take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, *quasi*-judicial or arbitration proceedings;

raise interim finances subject to the approval of the committee of creditors under section 28;

appoint accountants, legal or other professionals in the manner as specified by Board;

maintain an updated list of claims;

convene and attend all meetings of the committee of creditors;

prepare the information memorandum in accordance with section 29;

[46][(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.]

present all resolution plans at the meetings of the committee of creditors;

file application for avoidance of transactions in accordance with Chapter III, if any; and

such other actions as may be specified by the Board.

[47]**Section 25A. Rights and duties of authorised representative of financial creditors.-**(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.

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.

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 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

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46 This clause (h) was substituted by Act 8 of 2018, sec. 4, w.r.e.f. 23.11.2017. Clause (h), before substitution, stood as under:

"(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;".

47 This Section 25A was inserted by Act 26 of 2018 (w.r.e.f. 06.06.2018). Herein, sub-section (3A) was inserted by Act No. 26 of 2019 (w.e.f. 16.08.2019).

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).

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.

[48]**Section 30. Submission of resolution plan**.-(1) A resolution applicant may submit a resolution plan [49][along with an affidavit stating that he is eligible under section 29 A] to the resolution professional prepared on the basis of the information memorandum.

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan-

provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [50][payment] of other debts of the corporate debtor;

[51][(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

48 This Section 30 has undergone various changes in its amendments by Acts 8 of 2018, 26 of 2018 and 26 of 2019. Several aspects relating to the requirements of Section 30 have formed the matters of contention herein. For their relevance, all the concerned amendments are being indicated.

49 Inserted by Act 26 of 2018, sec. 23(i) (w.r.e.f. 06.06.2018).

50 Substituted by Act 26 of 2018, sec. 23 (ii)(A), for "repayment" (w.r.e.f. 06.06.2018).

51 Substituted by Act 26 of 2019, sec. 6(a), for clause (b) (w.e.f. 16.08.2019). Earlier clause (b) was amended by Act 26 of 2018, sec. 23(ii)(A) (w.r.e.f. 06.06.2018). Clause (b), before substitution, stood as under:

"(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;"

the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

where a resolution plan has not been approved or rejected by the Adjudicating Authority;

where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

the implementation and supervision of the resolution plan;

does not contravene any of the provisions of the law for the time being in force;

conforms to such other requirements as may be specified by the Board.

[52][*Explanation.*—For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]

The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

52 Inserted by Act 26 of 2018, sec. 23(ii)(B) (w.r.e.f. 06.06.2018).

[53][(4) The committee of creditors may approve a resolution plan by a vote of not less than [54][sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [55][the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]

[56][Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018).]

The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

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53 Substituted by Act 8 of 2018, sec. 6, for sub-section (4) (w.r.e.f. 23.11.2017). Sub-section (4), before substitution, stood as under:

"(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors.".

54 Substituted by Act 26 of 2018, sec. 23(iii)(a) for "seventy-five" (w.r.e.f. 06.06.2018).

55 Inserted by Act 26 of 2019, sec. 6(b) (w.e.f. 16.08.2019).

56 Inserted by Act 26 of 2018, sec. 23(iii)(b) (w.r.e.f. 06.06.2018).

The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

[57]**Section 31. Approval of resolution plan.-**(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, [58][including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan:

[59][Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

After the order of approval under sub-section (1),-

the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

[60][(4) The resolution applicant shall, pursuant to the resolution plan approved under sub -section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]

57 This Section 31 has also undergone various changes in its amendments by Act 26 of 2018 and 26 of 2019. For their relevance, all the concerned amendments of this Section 31 are also indicated.

58 Inserted by Act 26 of 2019, sec. 7 (w.e.f. 16.08.2019).

59 Inserted by Act 26 of 2018, sec. 24(a) (w.r.e.f. 06.06.2018).

60 Inserted by Act 26 of 2018, sec. 24(b) (w.r.e.f. 06.06.2018).

Section 32. Appeal.-Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61.

Section 61. Appeals and Appellate Authority .-(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.

An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:–

the approved resolution plan is in contravention of the provisions of any law for the time being in force;

there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

the resolution plan does not comply with any other criteria specified by the Board.

An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

Section 53. Distribution of assets. –(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

the insolvency resolution process costs and the liquidation costs paid in full;

the following debts which shall rank equally between and among the following:-

workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

financial debts owed to unsecured creditors;

the following dues shall rank equally between and among the following:-

any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

any remaining debts and dues;

preference shareholders, if any; and

equity shareholders or partners, as the case may be.

Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.–For the purpose of this section-

it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

Section 238. Provisions of this Code to override other laws.- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the

time being in force or any instrument having effect by virtue of any such law.

We may also take note of Regulations 16A, 37, 38, 39 and 39B in CIRP Regulations, as applicable at the relevant time as follows: -

"[61]**16A. Authorised representative.-**(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.

The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

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 authorised representative as and when the list is updated.

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

The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

61 This Regulation 16A was inserted w.e.f. 04.07.2018.

The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely:-

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	15,000
101-1000	20,000
More than 1000	25,000

The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

[62]**37. Resolution Plan.-**A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-

transfer of all or part of the assets of the corporate debtor to one or more persons;

sale of all or part of the assets whether subject to any security interest or not;

(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;

the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(ca) cancellation or delisting of any shares of the corporate debtor if applicable:

satisfaction or modification of any security interest;

curing or waiving of any breach of the terms of any debt due from the corporate debtor;

reduction in the amount payable to the creditors;

extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

amendment of the constitutional documents of the corporate debtor;

issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

62 This Regulation 37 was substituted for the earlier one w.e.f. 06.02.2018. Clause (ba) was inserted to this Regulation w.e.f. 28.11.2019; and clause (ca) was inserted w.e.f. 04.07.2018.

change in portfolio of goods or services produced or rendered by the corporate debtor;

change in technology used by the corporate debtor; and

obtaining necessary approvals from the Central and State Governments and other authorities.

[63]**38. Mandatory contents of the resolution plan.-**[64][(1) The amount payable under a resolution plan-

to the operational creditors shall be paid in priority over financial creditors; and

to the financial creditors, who have a right to vote under sub-section (2) of Section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.]

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.

A resolution plan shall provide:

the term of the plan and its implementation schedule;

the management and control of the business of the corporate debtor during its term; and

adequate means for supervising its implementation.

[65][(3) A resolution plan shall demonstrate that-

it addresses the cause of default;

it is feasible and viable;

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63 This Regulation 38 has also undergone several changes. The relevant amendments to sub-regulation (1) and (3) are separately indicated hereinbelow. That apart, sub-regulation (1A) was inserted w.e.f. 05.10.2017 and sub-regulation (1B) was inserted w.e.f. 24.01.2019

64 Sub-regulation (1) was amended w.e.f. 04.07.2018; then was substituted w.e.f. 05.10.2018; and then was again substituted w.e.f. 28.11.2019. Before the last substitution, this sub-regulation (1), stood as under:-

"(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors."

65 Sub-regulation (3) was inserted w.e.f. 07.11.2017 and then was substituted w.e.f. 04.07.2018. Before substitution, this sub-regulation (3), stood as under:-

"(3) A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.".

it has provisions for its effective implementation;

it has provisions for approvals required and the timeline for the same; and

the resolution applicant has the capability to implement the resolution plan.]

[66]**39. Approval of resolution plan.-**[67][(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with-

an affidavit stating that it is eligible under section 29A to submit resolution plans;

[68][***]

an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

(1A) A resolution plan which does not comply with the provisions of sub-regulation (1) shall be rejected.]

[69][(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him-

preferential transactions under section 43;

undervalued transactions under section 45;

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66 This Regulation 39 has also undergone wide ranging amendments, the relevant of which are indicated hereinbelow.

67 Sub-regulation (1) was substituted w.e.f. 01.01.2018 and that was replaced by sub-regulation (1) and (1A) w.e.f. 04.07.2018. Before 04.07.2018, sub-regulation (1) stood as under: –

> "(1) A resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and these regulations to the resolution professional within the time given in the invitation made under clause (h) of sub-section (2) of section 25."

68 Clause (b) was omitted w.e.f. 05.10.2018. Before omission, it stood as under:

> "(b) an undertaking that it will provide for additional funds to the extent required for the purposes under sub-regulation (1) of regulation 38; and".

69 Sub-regulation (2) was substituted w.e.f. 07.11.2017. Prior to this substitution, this sub-regulation (2) stood as under:

> "(2) The resolution professional shall present all resolution plans that meet the requirements of the Code and these Regulations to the committee for its consideration."

extortionate credit transactions under section 50; and

fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.]

[70]-[71][(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 the feasibility and viability of the resolution plans.]

[72][(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating

70 This sub-regulation (3) was substituted w.e.f. 04.07.2018; before its substitution it stood as under:

"(3) The committee may approve any resolution plan with such modifications as it deems fit"

Its proviso was substituted w.e.f. 25.07.2019; before its substitution it stood as under:

"Provided that the committee shall record the reasons for approving or rejecting a resolution plan."

There had also been an insertion of sub-regulation (3A) w.e.f. 06.02.2018 but the same was omitted w.e.f. 05.10.2018.

71 We may further indicate that w.e.f. 07.08.2020, entire of this sub-regulation (3) has been substituted and sub-regulations (3A) and (3B) have been inserted, essentially dealing with the eventuality of consideration of more than one resolution plans by the CoC.

Though the amendment w.e.f. 07.08.2020, would not directly apply to the present case but, for reference, we may reproduce the newly substituted sub-regulation (3),(3A) and (3B) as under:

"(3) The committee shall-

evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;

record its deliberations on the feasibility and viability of each resolution plan; and

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 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."

72 This sub-regulation was substituted for the earlier one w.e.f. 04.07.2018 and was also amended w.e.f. 24.01.2019.

Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in Form H of the Schedule and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B.]

The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained.

No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.

A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.

[73][(9) A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions.]"

[74]**39B. Meeting liquidation cost.-**(1) While approving a resolution plan under sub-section (4) of section 30 or deciding to liquidate the corporate debtor under sub-section (2) of section 33, the committee may make a best estimate of the amount required to meet liquidation costs, in consultation with the resolution professional, in the event an order for liquidation is passed under section 33.

The committee shall make a best estimate of the value of the liquid assets available to meet the liquidation costs, as estimated in sub-regulation (1).

Where the estimated value of the liquid assets under sub-regulation (2) is less than the estimated liquidation costs under sub-regulation (1), the committee shall approve a plan providing for contribution for meeting the difference between the two.

The resolution professional shall submit the plan approved under sub-regulation (3) to the Adjudicating Authority while filing the approval or decision of the committee under section 30 or 33, as the case may be.

73 This sub-regulation was inserted w.e.f. 24.01.2019.

74 This sub-regulation was inserted w.e.f. 25.07.2018.

> ***Explanation.-*** For the purposes of this regulation, 'liquidation costs' shall have the same meaning as assigned to it in clause (ea) of sub-regulation (1) of regulation (2) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

We would hasten to reiterate that in the foregoing extractions of the provisions, we have indicated the amendments/substitutions/insertions in the related footnotes to the extent relevant for the present purpose; and not necessarily all the changes as brought about from time to time.

JIL's CIRP: Chronicle of complications

The factual and background aspects relating to this batch of matters make it evident that the insolvency resolution of the corporate debtor JIL carries with it vexed and strikingly intricate issues where twice over this Court had exercised its plenary powers under Article 142 of the Constitution of India to ensure complete justice in the cause and yet, for a variety of reasons, the insolvency resolution is eluding the corporate debtor JIL; and even when the resolution plan is said to have been approved by a vast majority of 97.36% of the voting share of Committee of Creditors, several issues are still hovering over with an assortment of grievances of different stakeholders and role players. Even the very process taken up by the Committee of Creditors has been questioned apart from several questions over one or the other stipulation in the resolution plan. Further, several questions have spurt up on the order passed by the Adjudicating Authority, wherein some of the objections have been accepted and the plan has been modified while a few other

objections have been rejected. Modification of the resolution plan by the Adjudicating Authority has given the resolution applicant and even IRP several causes to be discontented with and at the same time, rejection of some of the objections has also been challenged by the objectors. This apart, some of the stakeholders, who did not raise objections before the Adjudicating Authority, have also raised their grievances against the plan. Put in a nutshell, this process of resolution is yet to pass through a maze of hurdles.

61.1. Having regard to the peculiar circumstances of this case, we had withdrawn all the appeals pending before NCLAT to this Court and have heard the entire matter at sufficient length, while extending opportunity of making oral and written submissions to practically all the parties who wished to put their say on record.

61.2. We have examined the submissions so made as also the material placed on record with reference to the law applicable and have given anxious consideration to the relevant submissions, which are reflected in the points for determination formulated hereinbefore.

Before proceeding further, we may also recapitulate that while entertaining these matters and transferring the cases pending before NCLAT to this Court by order dated 06.08.2020, we had directed that the IRP shall continue to manage the affairs of the subject company i.e., JIL. We may point out that the IRP has filed an affidavit dated 05.09.2020, stating the status of the corporate debtor and the major part of activities

relating to construction of flats and issuing Offers of Possession which, according to the IRP, has resulted in reduction of liability to the real estate allottees. The relevant paragraphs of this affidavit read as under: -

> "I state that as part of management of the affairs of the Corporate Debtor, the Deponent inter alia is continuing the construction of residential and commercial dwelling units forming part of the real estate projects of the Corporate Debtor. I further state during the corporate insolvency resolution process (hereinafter, "**CIR Process** "), the IRP continued construction of residential and commercial dwelling units and has issued Offer of Possessions (OOPs) for 7996 units based on occupancy certificates received from the NOIDA Authority, from time to time. That out of these OOPs issued, sub-lease registration of 6,429 has been completed. The process of issuance of OOPs as started by the Deponent after the receipt of such occupancy certificates continues.
>
> I further state that for approximately 2,688 allottees to whom OOPs providing for delay rebate was issued prior to 17.12.2019, either the Sub-Lease Deed is still to be executed or the Sub-Lease Deed is pending for registration before the Registrar of Assurances of Noida.
>
> I state that the delivery of units and their transfer by way of sub-lease registration has resulted in a reduction of Financial Creditors' (Real-Estate Allottees) liability by more than Rs. 2,250 Crores since commencement of the CIR Process in the Corporate Debtor."

The objectives and scheme of IBC

For dealing with the questions involved, worthwhile it would be to begin the discussion broadly on the scheme of the Code and assignments of some of the relevant role players in the corporate insolvency resolution process.

As noticed from the Preamble, the Code came to be enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner; the objectives, *inter alia*, being for maximisation of

the value of assets of such persons and balance of interests of all the stakeholders. The Preamble reads as under: -

> "*An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto*."

63.2. In the judgment delivered on 25.01.2019 in the case of ***Swiss Ribbons Private Limited and Anr. v. Union of India and Ors.*: (2019) 4 SCC 17**[75], this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between 'financial creditor' and 'operational creditor' was discriminatory and violative of Article 14 of the Constitution of India. This ground as also several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, *inter alia*, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor

75 Hereinafter also referred to as the case of ***'Swiss Ribbons'***.

on its feet, and not a mere recovery legislation for the creditors. This Court said, -

> **"**27**.** As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. **When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment**. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal*[76] at para 83, fn 3)
>
> 28**. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors**. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution

76 ***ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta & Ors*: (2019) 2 SCC 1.**

process is not adversarial to the corporate debtor but, in fact, protective of its interests….."

(emphasis in bold supplied)

Keeping in view the objectives of the Code and observations of this Court, we may now take an overview of the scheme and structure of the relevant parts of the Code. Part I thereof contains the provisions regarding title, extent, commencement and application of the Code as also the definition and meaning of various expressions used in the Code. Different provisions have come into force on different dates, as permissible under proviso to sub-section (3) of Section 1. Part II of the Code deals with insolvency resolution and liquidation for corporate persons. Chapter I of Part II makes provision for its applicability and also defines various expressions used in this Part (Sections 4 and 5). Chapter II of Part II contains the provisions for corporate insolvency resolution process in Sections 6 to 32 whereas Chapter III of this Part II contains the provisions for liquidation process in Sections 33 to 54[77].

A glance at Chapter II of Part II would inform that it contains the blueprint for the process of insolvency resolution in relation to the corporate debtors to whom this Part applies, while specifying the persons who could initiate the process; the manner and impact of such initiation; the roles and rights as also duties of key persons and entities to be involved in the resolution process like the resolution professional, the

Committee of Creditors, the authorised representative of financial

77 Sections 4 to 32 came into force on 01.12.2016 whereas Section 33 to 54 came into force on 15.12.2016.

creditors and the resolution applicant; the matters essential for preparation of the resolution plan; the submission and approval of the resolution plan; and the appeal against approval of the resolution plan.

Approval of resolution plan: Crucial steps and role players

As noticed, as per the requirements of the Code read with the orders passed by this Court in the cases of ***Chitra Sharma*** and ***Jaiprakash Associates Ltd.*** (supra), the insolvency resolution process in relation to the corporate debtor JIL has already passed through the stages of initiation, appointment of interim resolution professional, constitution and reconstitution of the Committee of Creditors, submission and resubmission of resolution plans, approval of the resolution plan of NBCC by the Committee of Creditors, submission of the said resolution plan to the Adjudicating Authority, and its approval by the Adjudicating Authority, albeit with some modifications.

65.1. The issues now raised before us basically relate to the contents of the resolution plan in question; its approval by the Committee of Creditors; and the order passed by the Adjudicating Authority in its approval with modifications. Thus, on the issues raised and points arising for determination, the focus in the present case is on the dispensation governing the process of approval of the resolution plan by CoC who, under Section 30(4) of the Code, considers and votes at the resolution plan after it has been verified by the resolution professional as being compliant with the statutory requirements specified in Section 30(2) of

the Code; and on the approval of resolution plan by the Adjudicating Authority in terms of Section 31 of the Code. Having regard to the issues involved, we may usefully take note of the relevant principles enunciated by this Court in relation to these crucial steps of CIRP.

The relevant aspects relating to the steps in CIRP for approval of the resolution plan have come up for interpretation before this Court in at least three major decisions, in the cases of ***K. Sashidhar v. Indian Overseas Bank and Ors.*: (2019) 12 SCC 150** (decided on 05.02.2019), ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.*: (2020) 8 SCC 531** (decided on 15.11.2019), and ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.*: (2020) 11 SCC 467** (decided on 22.01.2020). The contesting parties have also relied upon these decisions in support of their respective contentions. We shall be referring to these cases in a little detail in the later part of this judgment while determining Point **A** concerning the scope of the jurisdiction of the Adjudicating Authority in dealing with the resolution plan approved by the Committee of Creditors. At this juncture, we may only indicate the importance of a few essential role players in the process, as discernible from the relevant provisions of the Code and as exposited by this Court.

66.1. In the scheme of IBC, the script of corporate insolvency resolution process, to a large extent, revolves around the resolution professional. When CIRP gets initiated with admission of the application by the

Adjudicating Authority as per Sections 7, 9 or 10, as the case may be, an interim resolution professional is appointed by the Adjudicating Authority in terms of Section 13(1)(*c*) and in the manner laid down in Section 16. Collating and admitting the claims of all creditors; appointing and convening the meetings of the Committee of Creditors; and running the business of the corporate debtor as a going concern during the intermediate period are the key tasks assigned to the interim resolution professional, as distinctly appears from Sections 15, 17, 18 and 20 of the Code. Further, in the scheme of IBC, the Committee of Creditors, in its first meeting to be held within seven days of its constitution, has to resolve to appoint the interim resolution professional as a resolution professional or to replace him by another resolution professional (*vide* Section 22 IBC). In terms of Section 23, the resolution professional is to conduct the entire CIRP and manage the operations of the corporate debtor during the period of CIRP. His duties and responsibilities extend to the conduct of all the meetings of the Committee of Creditors, giving notice of such meetings to the members of CoC, to the members of the suspended Board of Directors and to the operational creditors, if amount of their aggregate dues is not less than 10% of the debt. Akin to the duties of the interim resolution professional under Section 18 of the Code, the resolution professional is also required to preserve and protect the assets of the corporate debtor while continuing with the business operations and while undertaking the actions contemplated by Section

25(2) of the Code. Significantly, the resolution professional is also required to prepare the information memorandum in terms of Section 29 of the Code; invite prospective resolution applicants; and present the resolution plans at the meeting of the Committee of Creditors, while duly examining them as required by Section 30 of the Code. These compliances are duly regulated by Regulations 35, 36, 36A and 36B of the CIRP Regulations.

66.1.1. Taking note of the relevant provisions, this Court in the case of ***Essar Steel*** (supra) summed up the key role of the resolution professional in the following terms: -

> "48**.** The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under Sections 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decided by the Committee of Creditors."

66.2. Further, the role of prospective resolution applicant has also been explained in ***Essar Steel*** with reference, *inter alia,* to UNCITRAL Legislative Guide as also Regulations 37 and 38 of the CIRP Regulations on the contents of a resolution plan, while pointing out the rights of a prospective resolution applicant to receive necessary information as also

its duty to prepare the resolution plan providing for necessary measures for insolvency resolution of the corporate debtor with maximisation of the value of its assets.

Committee of Creditors: the protagonist of CIRP

While in their representative roles, the resolution professional and the resolution applicant are duty bound to ensure that the resolution plan is prepared in conformity with the requirements of the Code and the CIRP Regulations and is properly presented for consideration, the central role in taking the decision as to whether a resolution plan be adopted or not, in the same form as presented to it or in a modified form; and as to whether the attempt for revival of corporate debtor be made or not, ultimately rests with the pivotal body, comprising of the financial creditors of the corporate debtor and termed as “Committee of Creditors”. As noticed from the provisions above-quoted, the final decision on a resolution plan is taken by the Committee of Creditors; and, for approval, a resolution plan is required to be voted in favour by not less than 66% of the voting share of the financial creditors, as per Section 30(4) of the Code. It is also relevant to point out that though the resolution professional is to run the business of the corporate debtor as a going concern during the corporate insolvency resolution process but, as per Section 28(3) of the Code, he cannot take certain decisions relating to

the management of the corporate debtor without prior approval of the Committee of Creditors by a vote of at least 66% of the voting shares[78].

67.1. It is, therefore, evident that corporate insolvency resolution, with approval of the plan of resolution, is ultimately in the exclusive domain of the Committee of Creditors. Even during the resolution process, major decisions as regards management and finances of the corporate debtor are in the control of the Committee of Creditors. As per the composition delineated in Section 21 of the Code, the Committee of Creditors is comprised of all financial creditors of the corporate debtor; and the frame of Section 21 puts it beyond doubt that the voting share of each financial creditor is determined on the basis of financial debt owed to it. It is also clear from Section 30(4) as also Section 28(3) that the major decisions of approval are to be taken by the Committee of Creditors by a vote of at least 66% of the voting share of the financial creditors and not by a simple majority. The reasons and purpose for assigning such a unique and decisive role in corporate insolvency resolution to the Committee of Creditors and for that matter, to a substantial block of not less than 2/3rd of voting share of the financial creditors, were extensively delineated in the report of the Bankruptcy Law Reforms Committee of November, 2015 while remarking on the essential theme that the '*appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it*'.

78 This percentage of minimum votes of CoC, for approval of resolution plan as also for prior approval of certain actions, was 'seventy-five' in the Code as originally enacted and was altered to 'sixty-six' by way of an amendment with effect from 06.06.2018.

67.2. In the case of ***K. Sashidhar*** (supra), while setting out the relevant extracts from the said Report, this Court exposited on the primacy of the commercial wisdom of the Committee of Creditors in the corporate insolvency resolution process in the following terms: -

> **"**52**.** As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. **There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.**
>
> 53**.** In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to CoC to evaluate the various possibilities and make a decision. It has been observed thus:
>
> "*The key economic question in the bankruptcy process*

> When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. *Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned*.
>
> *The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it*."
>
> (emphasis in bold supplied; emphasis in italics is in original)

67.3. In ***Essar Steel*** (supra), a 3-Judge Bench of this Court surveyed almost all the relevant provisions concerning corporate insolvency resolution process; and, as noticed above, explained the assignments of different role players in this process. In that context, this Court again explained the primacy endowed on the commercial wisdom of the Committee of Creditors and reasons therefor, with a further detailed reference to the aforesaid report of the Bankruptcy Law Reforms Committee of November, 2015. Apart from the passage from the said report that was noticed in ***K. Sashidhar*** (reproduced hereinabove), the Court noticed various other passages from this report in ***Essar Steel****;* and one part thereof, which further underscores the rationale for only financial creditors handling the process of resolution, could be usefully reproduced as under (part of paragraph 56 at p. 578 of SCC): -

"5.3.1. Steps at the start of the IRP

***

4. Creation of the creditors committee

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 per cent of the creditors committee by weight of the total financial liabilities. *The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained*. …

The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. *The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors*."

(emphasis in italics is in original)

67.4. In ***Essar Steel,*** the Court referred to the above-quoted and other passages from the judgement in ***K. Sashidhar*** (supra) and explained the decisive role of the commercial wisdom of the Committee of Creditors, *inter alia*, in the following passages: -

"54. **Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee**, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion.……

******* ******* *******

Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors…….

> **Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.**
>
> *** *** ***
>
> Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. **What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place**."
>
> (emphasis in bold supplied)

67.5. In the case of ***Maharashtra Seamless Ltd.*** (supra), again, a 3-Judge Bench of this Court referred extensively to the enunciations in ***Essar Steel*** (supra) and reiterated the primacy assigned to the commercial wisdom of the Committee of Creditors in the matter of corporate insolvency resolution.

For what has been noticed hereinabove, it would not be an exaggeration in terms that, in corporate insolvency resolution process, the role of Committee of Creditors is akin to that of a protagonist, giving finality to the process (subject, of course, to approval by the Adjudicating Authority), who takes the key decisions in its commercial wisdom and also takes the consequences thereof. As noticed, the process is aimed at bringing the corporate debtor back on its feet and it is acknowledged that appropriate disposition of a defaulting corporate debtor and the choice of solution, to keep the corporate debtor as a going concern or to liquidate it, is to be made by the financial creditors, who could assess the viability and may take decisions in modification of the terms of the existing liabilities. In other words, the decision as to whether the corporate debtor be resurrected or not, by acceptance of a particular resolution plan, is essentially a business decision and hence, is left to the committee consisting of the financial creditors, that is, the Committee of Creditors but, with the requirement that the resolution plan, for its approval, ought to muster not less than 66% votes of the voting share of the financial creditors.

The significance of primacy of the Committee of Creditors in the process of corporate insolvency resolution unfolds itself when we examine the contours of the jurisdiction of Adjudicating Authority dealing with a resolution plan after the same has been voted at by the Committee of Creditors. We have formulated the questions relating to such contours

as the first point for determination in view of the fact that most of the other questions involved in this batch of matters revolve around the order dated 03.03.2020 as passed by the Adjudicating Authority in approval of the resolution plan of NBCC with certain modifications. The decision on legality and validity of the order passed by the Adjudicating Authority on any particular objection or issue would largely depend on the question as to whether the Adjudicating Authority has acted within its jurisdiction or has overstepped its jurisdiction or has acted illegally or with material irregularity in exercise of its jurisdiction. In fact, contours of the jurisdiction of the Adjudicating Authority are also delineated by this Court in the aforesaid decisions, as shall be noticed *infra*.

With the foregoing observations and while keeping the aforementioned enunciations in view, we may now take up the points arising for determination in this case.

Point A

Contours of the jurisdiction of Adjudicating Authority in dealing with a resolution plan

As noticed, the resolution plan in relation to the corporate debtor JIL, as propounded by NBCC, has been approved by the Committee of Creditors with the votes of 97.36% of the voting share of financial creditors. However, the Adjudicating Authority (NCLT), while passing the impugned order dated 03.03.2020, has modified some of the terms of the resolution plan while also declining modification in relation to some other terms of the resolution plan. In relation to either of the events, whether of

modifying the terms of the plan or declining the prayer for modification, invariably the question pertaining to the jurisdiction of the Adjudicating Authority would arise for consideration.

The contours of the powers and jurisdiction of Adjudicating Authority dealing with a resolution plan approved by the Committee of Creditors have been clearly defined, delineated and described by this Court in the aforesaid decisions in ***K. Sashidhar***, ***Essar Steel*** and ***Maharashtra Seamless Ltd.*** Appropriate it would be to take note of the principles emanating from these decisions with a brief reference to the relevant factual aspects of each of these cases.

The first in this series of judgments relating to the process of approval of resolution plan in CIRP proceedings had been the case of ***K. Sashidhar*** (supra) where the matters in issue related to two different corporate debtors, *Kamineni Steel & Power (India) (P) Ltd.* ('KSPIPL') and *Innovative Industries Ltd.* ('IIL').

Shorn of unnecessary details, the relevant factual aspects of the case of KSPIPL had been that the said company had filed a petition under Section 10 of the Code seeking initiation of CIRP that was admitted on 10.02.2017 by NCLT, Hyderabad and IRP was appointed with directions to constitute CoC. Accordingly, CoC was constituted and there had been a few rounds of consideration of the matter by CoC, where different propositions were mooted for insolvency resolution. Ultimately, on 30.10.2017, the voting share of consenting banks

expressly approving the proposed resolution plan was 66.67% and the voting share of dissenting lender banks was 26.97%. Bank of Maharashtra, having 6.36% voting share, neither approved nor rejected the plan nor abstained from voting but conveyed that they remained 'open to consider the resolution plan'. Be it noted that at the relevant time, the requirement for approval of the resolution plan, as per Section 30(4) of the Code, was that it ought to be approved by a vote of not less than 75% of voting share of the financial creditors.

73.1.1. The position as obtainable after the aforesaid voting was that the resolution plan fell short of receiving minimum 75% votes of the voting share of the financial creditors. IRP filed an affidavit of the outcome before the Adjudicating Authority (NCLT, Hyderabad) on 03.11.2017. However, the Managing Director of the corporate debtor submitted before the Adjudicating Authority that the majority ought to be counted without taking into account the voting share of the financial creditor who chose not to participate in the voting. It was the submission that with such exclusion, the percentage of voting share in approval of the plan would be 78.63% and, therefore, the plan could be taken as approved by the CoC. The NCLT, by its order dated 20.11.2017, allowed the petition so filed and approved the resolution plan with certain directions. The three dissenting financial creditors, including the said Bank of Maharashtra, filed an appeal before NCLAT against the order of NCLT in approving the resolution plan despite the same having not received the approval of

minimum 75% votes of the voting share of financial creditors. The Managing Director of the corporate debtor also filed an appeal challenging the observation made by NCLT regarding the corporate guarantee to be proceeded with.

73.2. The factual aspects relating to the other corporate debtor IIL had been that its lender bank filed insolvency application that was admitted by NCLT, Mumbai on 17.01.2017. In the CoC meeting relating to this corporate debtor, the financial creditors holding 66.57% voting share voted in favour of approving the proposed resolution plan, whereas dissenting financial creditors, having 33.43% voting share, voted against. Resultantly, the proposed plan was not approved for want of support of the requisite percentage of voting share. The resolution applicant filed an application seeking permission to submit a revised resolution plan and to invite fresh votes. The impending liquidation proceedings were objected to by the workers' union too. The NCLT, however, rejected the applications and directed initiation of liquidation proceedings by its order dated 23.11.2017. An appeal was filed challenging the order so passed by the NCLT.

73.3. The Appellate Authority (NCLAT) took up both the appeals relating to KSPIPL and IIL together and the same were disposed of by a common judgment dated 06.09.2018, wherein it was held that the statutory requirement of approval of resolution plan by vote of not less than 75% of the voting share of financial creditors, as laid down under Section 30(4)

of the Code, was mandatory and the plans in question were not approved by the requisite majority. Therefore, the appeals were dismissed.

73.4. The common judgment so passed by NCLAT was in challenge before this Court. During the pendency of appeals in this Court, the aforesaid amendment to Section 30(4) was made and the requisite voting share for approval of resolution plan was reduced to 66% with effect from 06.06.2018.

73.5. After examining the long length of rival submissions, this Court proceeded to determine the questions as to whether the percentage of voting share of the financial creditors specified in Section 30(4) of IBC was mandatory; as to whether the votes of the financial creditors who had abstained from voting were required to be ignored for the purpose of computing the required percentage of voting share; as to whether the amendments brought into force during the pendency of appeals were applicable to those cases; and as to whether it was open to the Adjudicating Authority/Appellate Authority to reckon any factor other than those specified in Sections 30(2) or 61(3) of IBC, as the case may be, for rejection of the resolution plan?

73.6. This Court analysed the entire scheme of the Code, particularly concerning the resolution plan and its approval by the Committee of Creditors and then by the Adjudicating Authority; and held that the percentage of voting share was not directory and in the light of the provisions contained in the Code and the CIRP Regulations, the

approving votes must fulfil the requisite percentage of voting share. The Court also held that the amendment to Section 30(4), prescribing new qualifying standard for approval of resolution plan was neither retrospective in operation nor was having retroactive effect. The Court also rejected the suggestion for different percentage of voting share in the case of KSPIPL. These aspects are not much relevant for the present purpose. The aspects relevant are the enunciations in relation to the respective roles of the Committee of Creditors and the Adjudicating Authority. As already noticed, this Court explained in detail the primacy given to the commercial wisdom of the Committee of Creditors and such commercial wisdom being made non-justiciable. Having said so, this Court also proceeded to define the strict limits of the jurisdiction of NCLT/NCLAT while dealing with the matter relating to approval of resolution plan in the following passages: -

> **"**55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. **Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (*i*) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (*ii*) the repayment of the debts of operational creditors in prescribed manner, (*iii*) the management of the affairs of the corporate debtor, (*iv*) the implementation and supervision of the resolution plan, (*v*) does not contravene any of the provisions of the law for the time being in force, (*vi*) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers**

and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

For the same reason, **even the jurisdiction of NCLAT being in continuation of the proceedings would be circumscribed in that regard** and more particularly on account of Section 32 of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code…….

On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)", which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. **The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board.** Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the "approved"

> resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.
>
> Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. **Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers**."
>
> (emphasis in bold supplied)

A few months after the decision in the case of ***K. Sashidhar***, the aforesaid provisions relating to the approval of resolution plan came up for further exposition before a 3-Judge Bench of this Court in the case of ***Essar Steel*** (supra).

74.1. On the background aspects, while omitting details, suffice it to notice for the present purpose that in the case of ***Essar Steel***, the NCLT, Ahmedabad admitted the petition filed by a lender bank and after a few rounds of proceedings, the negotiated resolution plan of *ArcelorMittal (India) (P) Ltd.* was approved by CoC by a majority of 92.24%. After several further proceedings, the Adjudicating Authority, by its order dated 08.03.2019, disposed of the application to approve the resolution plan. However, in the appeal, the NCLAT modified the terms of the resolution plan and proceeded to redistribute the proceeds while, *inter alia,* holding that financial creditors and operational creditors deserve equal treatment under a resolution plan and while further holding that CoC was not

empowered to decide the manner in which distribution was to be made between one or other creditors, as there would be a conflict of interest between financial and operational creditors. The order so passed by the NCLAT was in challenge before this Court.

74.2. In the given backdrop, the roles of resolution professional, resolution applicant and Committee of Creditors as also the jurisdiction of Adjudicating Authority and Appellate Authority came up for further and fuller exposition by this Court in ***Essar Steel*** (supra). We have already noticed the passages from this decision in regard to the scheme of IBC and the pivotal role of Committee of Creditors in the process of insolvency resolution of a corporate debtor. As regards the jurisdiction of Adjudicating Authority and Appellate Authority in this process of insolvency resolution, in ***Essar Steel***, this Court extensively referred to the principles laid down and explained in ***K. Sashidhar*** and thereafter held as under: -

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

74.3. In ***Essar Steel***, it was however argued that sub-section (5) of Section 60 was not considered in ***K. Sashidhar*** and in that context, this Court examined the rights of operational creditors and the reasons set forth in the Insolvency Committee Report, 2018 and then, reiterated the

primacy of Committee of Creditors while declaring the law in no uncertain terms that the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors; the limited judicial review available to it was to see that the Committee of Creditors had taken into account the requirement of keeping the corporate debtor as a going concern with maximisation of the value of assets and the interests of all stakeholders including operational creditors were taken care of. Significantly, in ***Essar Steel***, this Court laid down that if the Adjudicating Authority would find that the requisite parameters had not been kept in view, it may send the resolution plan back to the Committee of Creditors to resubmit the same after satisfying the parameters. This Court laid down as under: -

> **"**73. **There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors.** This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(*e*), as the provisions of the Code are also provisions of law for the time being in force. **Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back**

> **to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.** The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."
>
> (emphasis in bold supplied)

74.4. Thereafter, this Court dealt with the matter on merits in relation to certain claims and objections which need not be elaborated; suffice it would be to notice that this Court did not approve the impugned order of NCLAT and directed that CIRP of the corporate debtor shall take place in accordance with the amended resolution plan, as accepted by the Committee of Creditors.

Maharashtra Seamless Ltd. (supra) has been yet another decision in which interference with the decision of Committee of Creditors by NCLAT met with total disapproval of this Court.

In ***Maharashtra Seamless Ltd.,*** the matter related to CIRP concerning the corporate debtor *United Seamless Tubular Private Ltd.* where resolution plans of four different applicants were considered and CoC approved the resolution plan filed by the appellant *Maharashtra Seamless Ltd.* by a majority of 87.10% of the voting share of financial creditors. Certain differences arose with respect to the liquidation value of the assets of corporate debtor and the CoC took an average of the closest estimate. However, NCLAT ordered re-determination of liquidation value and accordingly, the revised value was arrived at. Thereafter, the CoC again approved the resolution plan of the appellant considering the

revised liquidation value. Then, NCLT approved the resolution plan submitted by the appellant which included an upfront payment of INR 477 crores for infusion in the capital of the corporate debtor. A promoter of the corporate debtor and a financial creditor filed appeals before NCLAT contending that the resolution plan gave unfair advantage to the resolution applicant whereupon, the Appellate Authority proceeded to give a direction to the resolution applicant to enhance its fund inflow upfront.

75.2. In the aforesaid backdrop, the matter was considered in appeal filed by the resolution applicant. After having examined the relevant provisions of the Code and the CIRP Regulations as also the enunciations in ***Essar Steel*** (supra), this Court observed that there was no provision in the Code or Regulations under which the bid of any resolution applicant has to match the liquidation value; that the object behind such valuation process was to assist the CoC to take a proper decision on the resolution plan; and once the plan was approved by CoC, the Adjudicating Authority was only to ascertain if the resolution plan was meeting the requirements of sub-sections (2) and (4) of Section 30. The Court observed that in the given case, the Appellate Authority had proceeded on equitable perceptions rather than commercial wisdom. Even while observing that release of assets at the value 20% below the liquidation value arrived by valuers appeared inequitable, this Court observed that the adjudicatory process ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan

on the basis of quantitative analysis. While disapproving interference by the Appellate Authority, this Court observed and held as under: -

> **"**27. Now the question arises as to whether, while approving a resolution plan, the adjudicating authority could reassess a resolution plan approved by the Committee of Creditors, even if the same otherwise complies with the requirement of Section 31 of the Code. The learned counsel appearing for Indian Bank and the said erstwhile promoter of the corporate debtor have emphasised that there could be no reason to release property valued at Rs 597.54 crores to MSL for Rs 477 crores. The learned counsel appearing for these two respondents have sought to strengthen their submission on this point referring to the other resolution applicant whose bid was for Rs 490 crores which is more than that of the appellant MSL.
>
> No provision in the Code or Regulations has been brought to our notice under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in *Essar Steel.* We have quoted above the relevant passages from this judgment.
>
> It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the adjudicating authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the adjudicating authority in approving the resolution plan.
>
> **The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code.** Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in *Essar Steel,* the relevant passage (para 54) of which we have reproduced in earlier part of

> this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront."
>
> (emphasis in bold supplied)

The expositions aforesaid make it clear that the decision as to whether corporate debtor should continue as a going concern or should be liquidated is essentially a business decision; and in the scheme of IBC, this decision has been left to the Committee of Creditors, comprising of the financial creditors. Differently put, in regard to the insolvency resolution, the decision as to whether a particular resolution plan is to be accepted or not is ultimately in the hands of the Committee of Creditors; and even in such a decision making process, a resolution plan cannot be taken as approved if the same is not approved by votes of at least 66% of the voting share of financial creditors. Thus, broadly put, a resolution plan is approved only when the collective commercial wisdom of the financial creditors, having at least 2/3rd majority of voting share in the Committee of Creditors, stands in its favour.

In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval.

77.1. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

77.2. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority;

or the resolution plan does not comply with any other criteria specified by the Board.

77.3. The material propositions laid down in ***Essar Steel*** (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC

has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. And,

if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for re-submission after satisfying the parameters. Then, as observed in ***Maharashtra Seamless Ltd.*** (supra), there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.

77.4. During the course of submissions, one of the parties (YEIDA), seeking to support modification of the resolution plan concerning some of the terms and stipulations, has referred to a decision by a learned Single Judge of the Allahabad High Court in the case of ***Pradumna Kumar Jain***

***v. U.P. Secondary Education Service Commission, Allahabad and Ors.*: (1997) 30 ALR 339** to submit that the power to approve or disapprove includes the power to modify; and it has been strongly argued that the power to modify is inherent in the power of approval in terms of Section 31 of the Code. It is noticed that the questions involved in the cited decision related to the powers under Regulation 8 of the U.P. Secondary Education Services Commission (Procedure for Approval of Punishment) Regulations, 1985, which provided that '*the Commission shall after due consideration approve or disapprove the punishment proposed or may issue any other directions deemed fit in the case*'. While interpreting the said provision, where the Commission was to act as a superior authority and the provision itself postulated that the said authority could '*issue any other directions deemed fit'*, the Court held that the expressions indicated the existence of the power to modify. We are afraid, the principles stated in the said decision or in other decisions of like nature cannot be imported to read the power to modify the resolution plan into Section 31 of the Code.

77.5. In fact, the power of approval conferred on the Adjudicating Authority in Section 31 of the Code is required to be visualised with reference to the overall scheme of the Code and the purposes for which such powers have been conferred. The power of judicial review in Section 31 is not akin to the power of a superior authority to deal with the merits of the decision of any inferior or subordinate authority. As succinctly stated in

Essar Steel (supra), the limited judicial review available is to see that the Committee of Creditors has adhered to the specified parameters, of keeping the corporate debtor going as a going concern during the resolution process; maximisation of the value of its assets; and taking care of the interests of all stakeholders. This Court has, in no uncertain terms, held that if the specified parameters have not been kept in view, the Adjudicating Authority may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the parameters. The reasons given by the Committee of Creditors are, thus, looked at by the Adjudicating Authority only from this point of view. It is not a jurisdiction to decide as to what ought to be the terms of the resolution plan. That jurisdiction, in the scheme of IBC, is conferred on the Committee of Creditors alone, who has to take such a decision in its commercial wisdom, while keeping in view the applicable provisions and the specified parameters; of course, its decision of approval has to be by the requisite majority of minimum 66% of the voting share.

77.6. In yet another set of submissions, on behalf of the erstwhile director of JIL and JAL, it has been repeatedly asserted that the Committee of Creditors had failed in its statutory duty to ensure maximisation of JIL's assets and protecting the interests of all stakeholders; and it is submitted that the Committee of Creditors failed to visualise that there was no justification for NBCC seeking to acquire JIL

on a meagre amount of INR 120 crores despite the net worth of JIL being much higher.

77.6.1. The assessment about maximisation of the value of assets, in the scheme of the Code, would always be subjective in nature and the question, as to whether a particular resolution plan and its propositions are leading to maximisation of value of assets or not, would be the matter of enquiry and assessment of the Committee of Creditors alone. When the Committee of Creditors takes the decision in its commercial wisdom and by the requisite majority; and there is no valid reason in law to question the decision so taken by the Committee of Creditors, the adjudicatory process, whether by the Adjudicating Authority or the Appellate Authority, cannot enter into any quantitative analysis to adjudge as to whether the prescription of the resolution plan results in maximisation of the value of assets or not. The generalised submissions and objections made in relation to this aspect of value maximisation do not, by themselves, make out a case of interference in the decision taken by the Committee of Creditors in its commercial wisdom.

To put in a nutshell, the Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In

the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposited by this Court.

The other points arising in this batch of matters, particularly with reference to the findings and directions by the Adjudicating Authority in the impugned order dated 03.03.2020 and with reference to the other related aspects, may now be examined within the framework of the parameters aforesaid and the principles laid down by this Court.

Point B

Simultaneous voting over two resolution plans by CoC

While dealing with a plethora of disputes and objections concerning the resolution plan of NBCC and the process of its approval, we deem it appropriate to deal, first of all, with a part of objections that approval of the resolution plan of NBCC by CoC is vitiated because of the fact that two resolution plans, of Suraksha Realty and NBCC, were put to simultaneous voting whereas such simultaneous voting on the resolution

plans was not permissible. If this part of objections is accepted, perhaps, nothing more would require consideration.

It has been argued on behalf of the objectors that at the time of voting by CoC in the present matter, there was no provision in the Code permitting the voting by CoC at more than one resolution plan at a time and in the very scheme of the Code and the requirements of due consideration, it was necessary that one plan was considered at one point of time. The process of simultaneous voting in the present case has vitiated the decision of CoC. It has also been argued that Regulation 39(3B), permitting the CoC to put more than one resolution plan to vote, was inserted to CIRP Regulations only with effect from 07.08.2020 and being prospective in operation, would not apply to the present process.

Per contra, it is contended by the parties standing with the approval of the plan in question that there had not been any prohibition or restriction in the Code for putting more than one resolution plan to vote at the same time. On behalf of IRP, it has also been contended that in terms of sub-section (3) of Section 30, he was required to present the CoC such resolution plans, which were conforming to the conditions referred in sub-section (2); and as per sub-section (4) of Section 30, the CoC *'may approve a resolution plan'*. It is, therefore, submitted that in the present process, both the plans were rightly placed before the CoC; and the CoC rightly voted on such plans and approved one of them. It is submitted that the amendment brought about with effect from 07.08.2020 is clarificatory

in nature and only gives out the methodology for putting more than one resolution plan to vote.

Having examined the objection against simultaneous voting with reference to the material on record and the law applicable, we are unable to find any substance whatsoever in this objection.

It is noteworthy that there has not been any prohibition in the scheme of IBC and CIRP Regulations that CoC could not simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available options. It has rightly been contended on behalf of IRP that in terms of sub-section (3) of Section 30 of the Code, he was obliged to place both the plans before CoC when they were found conforming to the conditions referred to in sub-section (2) of Section 30; and thereafter, it was for the CoC to consider the plans and to vote upon the same. Of course, the CoC could have approved only one resolution plan; and that has precisely been done in the present case. There does not appear any flaw or fault in the process adopted in the present case as regards voting over the resolution plans by the CoC.

Moreover, as noticed, the legislature itself has made the position clear by way of a later amendment with effect from 07.08.2020, by specifically making stipulations for simultaneous voting over more than one resolution plan by the CoC, particularly with amendment of sub-regulation (3) of Regulation 39 of CIRP Regulations and insertion of sub-regulations (3A) and (3B) thereto.[79] Such an amendment could only be

79 *vide* second footnote to sub-regulation (3) of Regulation 39 of CIRP Regulations, *ibid.*

visualised as clarificatory in nature; and, in any case, even before amendment, there had not been any prohibition in putting two or more conforming resolution plans to vote simultaneously.

It is also noticeable that when the matter was considered in the second round of litigation and this Court issued various necessary directions in the order dated 06.11.2019 in exercise of its plenary powers under Article 142 of the Constitution of India, it was specifically provided that the two applicants viz., Suraksha Realty and NBCC would be invited to submit revised plans for consideration. The minutes of CoC meeting have also been placed before us by IRP and it appears that this very aspect was duly deliberated in the meeting where IDBI Bank proposed for simultaneous voting over the two plans and this suggestion was accepted by almost all CoC members except ICICI Bank Ltd. and Axis Bank Ltd., who were having together the voting share of only about 2.3%. Due deliberations in this regard, in the meeting of Committee of Creditors dated 07.12.2019, read as under: -

> "The IRP enquired from CoC about the Resolution Plan that need to be put for voting by CoC. IDBI Bank on behalf of lenders proposed that given the unique nature of this case both plans should be put to vote as this will provide equal opportunity for individual members of COC to select their preferred Resolution Plan. The main reason for proposing joint vote on both plans was -
>
> -Specific directions of Hon'ble Supreme Court under its special powers (Article 142) where COC/IRP was required to consider Resolution Plans from only NBCC and Suraksha in accordance with law and regulation.
>
> -Ideally it would like to propose the H1 Resolution Plan to vote, but since the total overall evaluation scores were very close and there is no consensus amongst members of COC on the evaluation methodology used.

-Giving equal opportunity to all members of COC (including Home buyers and FD holders) to approve the plan most preferred by them.

-Given the unique and complex nature of this Resolution process.

All CoC members except ICICI Bank Limited, Axis Bank Limited (together having vote share of approx. 2.3%) agreed with the suggestion made by IDBI Bank and decided to put both the Resolution Plans simultaneously to vote. Accordingly, it was decided that both the Resolution Plans will be put to vote simultaneously and in the event both secure the minimum threshold of 66% votes, the plan securing overall higher vote will be considered as the preferred resolution plan. The IRP agreed to follow the COC's instructions and organise the voting.

It was pointed out by CAM in the CoC meeting that since both the Resolution Plans are being put to vote, we might end up in a situation where both the Resolution Plans will receive more than 66% votes, thus creating doubts as to whether both resolution applicants are equally entitled to have their plans submitted to the adjudicating authority for approval. Therefore, to avoid such a situation, the CoC members should be allowed to vote on either of the two Resolution Plans only. The Authorised Representative of the Home Buyers informed that almost all home buyer does not want liquidation of the corporate debtor. In case there is a spilt of vote between Home Buyers and other members of COC, there are more chances of no resolution plan getting approved and situation of liquidation may arise. Majority of home buyers who have written to AR of Home Buyers have indicated NBCC as its preferred choice. Home Buyers are also fully aware that without support of other members of COC, none of the resolution plan will get approved by COC. Para 21(i) of Hon'ble Supreme Court judgment dated 06.11.2019 also directed to "*place the revised plan(s) before the CoC, if so required, after negotiations and submit report to the adjudicating authority NCLT within such time*."

To avoid scenario of liquidation or non-compliance of Hon'ble Supreme Court direction, AR of Home Buyers insisted that both the Resolution Plans should be put to vote and the CoC members should be allowed to vote on both the Resolution Plans and in the event that both the Resolution Plans receive more than 66% votes, then the successful Resolution Applicant will be decided basis (*sic*) the Resolution Plan that has received higher number of votes."

In view of the above, we are unable to find any fault in simultaneous consideration and voting over two resolution plans by CoC for electing one of them; and we would have no hesitation in giving our

imprimatur to such a process. The baseless objection in this regard has rightly been rejected by the Adjudicating Authority.

Point C

Matters related with the land providing agency YEIDA

We may now enter into the first major point for determination in this batch of matters; and that relates to the stipulations in the resolution plan concerning the land providing agency YEIDA. The frontal aspect of this issue is about the provision made in the resolution plan for meeting with the contingent liability of additional compensation for land acquisition. The other aspect pertains to the directions by the Adjudicating Authority for execution of tripartite agreement amongst YEIDA, the corporate debtor JIL and the SPVs proposed to be set up in terms of the resolution plan. An ancillary aspect relates to certain reliefs and concessions sought for by the resolution applicant.

As noticed, the rights under the land in question were provided to the original concessionaire under the Concession Agreement dated 07.02.2003 and later on, JIL was recognised as the concessionaire. In the broad framework, one chunk of land was provided to the concessionaire for constructing the Expressway and its allied facilities, for which the CA provided, *inter alia*, as under: -

> "4.1 Land for construction of Expressway shall be provided by TEA to the Concessionaire, generally in a width of 100 meters along the alignment of the Expressway with additional land width, where required, for developing other facilities like Toll Plazas etc., on following terms & conditions.
>
> *** *** ***

b. The land shall be leased for a period starting from the date of transfer till the end of the Concession Period through such lease deed as may be mutually agreed between the Parties.

*** *** ***

d. The sole premium of the transferred land shall be equivalent to the acquisition cost plus a lease rent of Rs. 100.00 (Rupees one hundred) only per hectare per year. The acquisition cost shall be the actual compensation paid to the land owners without any additional charge and shall be payable by the Concessionaire as per applicable rules. The lease rent shall be payable annually."

Another chunk of land was provided to the concessionaire for commercial exploitation, for which the CA provided, *inter alia*, as under: -

"4.3 Land for development shall be transferred by TEA to the Concessionaire free from all Encumbrances on following terms & conditions:

a. It shall be on lease for a period of 90 (ninety) years from the date of transfer through such lease deeds as may be mutually agreed between the Parties.

*** *** ***

c. The sole premium of the transferred land shall be equivalent to the acquisition cost plus a lease rent of Rs. 100.00 (Rupees one hundred) only per hectare per year. The acquisition cost shall be the actual compensation paid to the land owners without any additional charge and shall be payable by the Concessionaire as per applicable rules. The rent shall be payable annually for 90 (Ninety) years from the date of transfer of land.

d. The Concessionaire shall be entitled to further sub-lease developed / undeveloped land to sub -lessees / end-users in its sole discretion without any further consent or approval or payment of any charges / fee etc. to TEA or any other relevant authority.

e. After sub-lease of part of the land by the Concessionaire, the same can be transferred / assigned without requiring any consent or approval of or payment of any additional charges, transfer fee, premiums etc. to TEA or to any other relevant authority and/or there can be subsequent multiple sub-leases of the land in smaller parts. The lease rent of the respective sub-leased portion of land shall be paid by the sub-lessees / transferees to TEA directly on pro-rata basis @ Rs. 100.00 (Rupees one hundred) per hectare per year. The Concessionaire shall be required to pay lease rent to TEA for

the portion of land remaining in its possession after sub-lease, on pro-rata basis at the aforesaid prescribed rate. Total lease rent paid by the Concessionaire and various sub-lessees / transferees shall be Rs. 100.00 (Rupees one hundred) per hectare per year.

*** *** ***

g. The Concessionaire may make a request to TEA to execute the lease deed directly in favour of Concessionaire's subsidiaries, assigns, transferees etc. in respect of any portion of the land on the same terms and conditions as mentioned above, and on receipt of such request TEA shall execute the lease deed in respect of such portion of land directly in favour of such subsidiaries, assigns and transferees.

h. In case TEA and the Concessionaire consider it appropriate, tripartite agreement for sub-lease deed may be executed between the TEA, Concessionaire and the Sub-Lessee.

4.4 The Concessionaire shall be free to decide the purpose for which transferred land will be used i.e. for commercial, amusement, industrial, institutional, residential etc. and also for the area of land to be allocated for different uses. The Concessionaire shall also be free to decide whether the sub -leased land shall be in the form of plots or constructed properties. No permission of TEA shall be required either for the land use or for transfer of leasehold sub-leasing / multiple sub-leasing of land. The land use shall however be as per applicable Master Plan and other regulations."

Another stipulation, in Clause 18.1 of the CA, which has its own relevance to the present case, may also be taken note of as under: -

"TRANSFER OF CONCESSIONAIRE'S RIGHTS AND OBLIGATIONS TO SPV

18.1 In case the Concessionaire and the TEA consider it necessary to transfer Concessionaire's rights and obligations under this Agreement to a SPV, the Concessionaire shall, in a reasonable time, transfer all its rights and obligations under this Agreement to a SPV for which documents as may be required shall be executed between the Concessionaire, the TEA and the SPV without additional cost to the Concessionaire or the SPV."

87.1. It is not in dispute that under the said Concession Agreement, JIL got the rights: (a) to construct and operate the Expressway and collect toll

for a period of 36 years; and (b) to use the land along the Expressway for commercial exploitation for a period of 90 years.

The issue pertaining to additional amount of land acquisition compensation cropped up in the wake of a decision of the Full Bench of Allahabad High Court dated 21.10.2011 in the case of ***Gajraj and Ors. v. State of U.P. and Ors.*: 2011 SCC OnLine All 1711,** wherein the High Court ruled in favour of payment of additional compensation to the land owners involved therein. The said decision in ***Gajraj*** was upheld by this Court in the case of ***Savitri Devi v. State of U.P. & Ors.*: (2015) 7 SCC** . In sequel, a spate of litigation in Allahabad High Court concerning other parcels of land came up and several other land owners, including whose land stood acquired for the project in question, demanded additional compensation. It is stated by YEIDA that looking to such litigations and agitations, the Government of U.P. proceeded to set up a committee called the 'Chaudhary Committee'; and the said committee recommended for grant of additional compensation (to the extent of 64.7%) to the land owners whose land had been acquired. While accepting these recommendations, the Government of U.P. proceeded to issue G.O. dated 29.08.2014, directing YEIDA to ensure payment of additional compensation to all the land owners. In this turn of events, YEIDA demanded the amount of additional compensation from JIL to the tune of INR 2591.78 crores by its communication dated 20.01.2015 and

yet another amount of approximately INR 247 crores by its communication dated 31.05.2017.

88.1. The aforesaid communications of YEIDA and the said G.O. dated 29.08.2014 were challenged by JIL by way of a writ petition before the High Court of Allahabad but, later on, JIL sought permission to withdraw with a view to seek recourse to the alternative remedy of arbitration, as provided in the CA. The High Court of Allahabad, by its order dated 03.11.2016, permitted JIL to withdraw and to pursue the alternative remedy of arbitration[80]. Thereafter, the concessionaire JIL took up the matter in arbitration which led to the arbitral award dated 02.11.2019 in its favour, holding that the demand made by YEIDA was not sustainable. This award has been challenged by YEIDA under Section 34 of the Arbitration and Conciliation Act, 1996 and those proceedings, being Arbitration Case No. 3 of 2020, are pending in the Court of District Judge, Gautam Budh Nagar. It has also been pointed out that the said G.O. was struck down by the Allahabad High Court in other petitions; and the order so passed by the High Court has been challenged in SLP (Civil) No. 10015-10034 of 2020, pending in this Court.

At the stage of drawing up the resolution plan in question, the said arbitral award had been made with the result that the liability towards the amount of additional compensation was not standing against JIL. However, for the reason that the matter was *sub judice*, the resolution

80 As per the facts stated, the said order of High Court was challenged by YEIDA in this Court in D. No. 15058 of 2017, which was dismissed on 01.09.2017.

applicant considered it appropriate to make a provision for meeting with the contingency, in case this liability would ultimately get fastened on JIL; and proposed in the resolution plan as under: -

> "1.2 **Treatment of creditors**
>
> As part of the Resolution Plan, it is proposed that:
>
> As mentioned in this Plan, this Resolution Plan assumes that no amount is payable by the Corporate Debtor in relation to the Landowner Compensation Debt in view of the Award. However, if the said position changes on account of the Award being overruled then in relation to the Landowner Compensation Debt, the amounts payable to the landowners shall be collected directly by YEIDA in the following manner for the following parcels of lands (in relation to which such debt accrues), from the ultimate end-users:
>
> Land under development (real estate projects) – the compensation in this regard shall be collected by YEIDA from the Home Buyers;
>
> Land already subleased to other entities by the Corporate Debtor – the compensation shall be collected from the respective sub-lessees to whom the lands have been subleased by the Corporate Debtor either directly or indirectly;
>
> Unutilized land parcels – the compensation shall be collected from the end users in whose favour such land shall be transferred/subleased by the Corporate Debtor; and
>
> Yamuna Expressway – Yamuna Expressway is a project of public utility and the ultimate owner of the project land is YEIDA, who will get the ultimate ownership of the Yamuna Expressway after the expiry of the concession period under the Concession Agreement and accordingly the compensation in this regard shall be payable by YEIDA."

Apart from the above, the resolution applicant also proposed to set up two separate SPVs, one being Expressway SPV and another being Land Bank SPV. It was proposed that the assets and liabilities pertaining to Expressway shall be transferred to the Expressway SPV by way of transfer of 100% shareholding and the concession rights under the CA;

and that out of the unutilised parcels of land available with the corporate debtor, 1,526 acres shall be transferred to Land Bank SPV; and that Land Bank SPV will also take over the admitted financial debt to the tune of INR 5,100 crores. In the resolution plan, the applicant also stated about the approvals required and its assumptions in that regard in the following terms: -

> "**BUSINESS PLAN / FINANCIAL PROJECTIONS**
>
> *** *** ***
>
> ***Provisions for the Approvals required and the timeline for the same***
>
> *** *** ***
>
> The Resolution Applicant is of the view that the approval of this Resolution Plan by the Adjudicating Authority shall be deemed to have waived all the requirements in relation to transfer of Yamuna Expressway and land bank asset by way of business transfer and no approval/consent shall be necessary from any other person (including Yamuna Expressway Industrial Development Authority ("**YEIDA**") or any other Governmental Authority), in this regard."

Moreover, in Clauses 4, 14 and 27 of Schedule 3 of the resolution plan, while seeking 'reliefs and concessions', the resolution applicant mooted a few more propositions concerning YEIDA and the Concession Agreement, which have also contributed to the intricacies of the matter.

In Clause 4 of Schedule 3 of the resolution plan, NBCC expected that YEIDA shall withdraw its challenge to another award dated 23.01.2017, pertaining to the issue of additional FAR, in the following terms: -

> "4. YEIDA to withdraw the appeal filed in the District Court, Gautam Budh Nagar being Arbitration Case No. 69 of 2017 challenging the award dated January 23, 2017 passed by arbitral tribunal pertaining to additional FAR and the Corporate Debtor to

> get the right to use additional FAR as per details contained in Annexure-P at all five land parcels immediately (on withdrawal of such appeal) without any additional payment for the same. However, the Resolution Applicant shall make a payment of INR 1 Cr in consideration of full and final settlement of YEIDA's claim if any arising out of such appeal, considering YEIDA's claim as Operational Debt in terms of IBC and to ensure equitable treatment to all the Operational Creditors."

91.2. Further, in Clause 14 of Schedule 3 of the plan, the resolution applicant sought extinguishment of liability towards capital cost pertaining to Noida-Greater Noida Expressway in the following terms: -

> **"**14. The liability arising out of the Concession Agreement, to repay the capital cost pertaining to Noida-Greater Noida Expressway (treated as interest free loan from YEIDA to the Corporate Debtor) shall stand extinguished, on account of failure of YEIDA to allow the Corporate Debtor to collect and retain toll/fee from the users of the Noida-Greater Noida Expressway during the term of the Concession Agreement, as agreed under Clause 3.7 of the Concession Agreement."

91.3. Yet further, in Clause 27 of Schedule 3, the resolution applicant expected an extension of the period under the CA by 10 years. This Clause reads as under: -

> "27. To ensure feasibility and viability of this Resolution Plan, YEIDA and other concerned authorities shall extend the concession period (currently 36 years) under the Concession Agreement for an additional period of ten years."

YEIDA took exception to several parts of the stipulations aforesaid before the Adjudicating Authority and essentially submitted that the liability towards the amount of additional compensation, in relation to the land acquired and leased to JIL, was that of JIL, although such a question was *sub judice* in challenge to the arbitral award under Section 34 of the Arbitration Act. It was submitted on behalf of YEIDA that in case the

liability is ultimately mulcted on JIL, YEIDA cannot be driven to collect the amount of additional compensation from the end-users as proposed in the plan. It was asserted that the terms of CA provided for two payment components: one being of acquisition cost payable by the concessionaire and other being of leased rent to be paid by the sub-lessee/end-user; and given such components, it could not have been provided that YEIDA would collect the acquisition cost directly from the end-users.

92.1. It was also submitted that the resolution applicant was not entitled to split the transferred land into two, and to say that the payment of additional compensation would be applicable only towards the land used for development and not for the land used for Expressway.

92.2. As regards the expected exemption to pay the acquisition cost pertaining to the land utilised for Expressway, it was submitted that even if Expressway was to revert to YEIDA after 36 years, JIL was allowed to collect toll for this period and there could be no exemption as regards cost of acquisition for the land of Expressway.

Another part of objection was that if the concessionaire's rights and obligations were proposed to be transferred to SPVs, proper documentation was required, so that YEIDA could exercise its rights over the SPVs concerned. It was yet further submitted that withdrawal of the arbitration case could not be thrust upon YEIDA.

As noticed, the Adjudicating Authority observed in regard to these issues concerning YEIDA that looking to the terms of CA, the Committee

of Creditors should not have approved the resolution plan stating that the compensation, if awarded, shall be collected from the end-users. However, the Adjudicating Authority proceeded to modulate such terms 'to make the plan viable' and provided that the resolution plan be read to mean that YEIDA shall have a right to collect acquisition cost through the SPVs concerned. With regard to the issue of additional compensation concerning the land of Expressway, the Adjudicating Authority considered it appropriate to read the resolution plan in the way that it is left open to both the parties to have proper recourse over this issue before a competent forum when the time would come for payment of additional compensation. As regards transfer of concessionaire's rights and obligations to SPVs, the Adjudicating Authority was of the view that, when JIL as concessionaire was, for the first time, proposing to transfer its rights and obligations to SPVs, the documents involving the concessionaire JIL, YEIDA and the SPV concerned were required to be executed. The NCLT also observed that the CA was based on the statute created by the State Government and, therefore, violation of its terms and conditions would be a violation of the law in force and would not be permissible in terms of Section 30(2) of the Code.

94.1. Interestingly, the other reliefs and concessions in regard to YEIDA, as sought for in the aforementioned Clauses 14 and 27, were specifically declined by the Adjudicating Authority (*vide* the comments on these clauses in paragraph 134 of the order dated 03.03.2020). However, as

regards Clause 4 of the 'reliefs and concessions' that YEIDA shall withdraw the arbitration case filed under Section 34 of the Arbitration Act, though the Adjudicating Authority noticed this aspect in the arguments of the parties but, did not make any specific order in that regard and in paragraph 134 of the impugned order dated 03.03.2020, merely observed that Clauses 1 to 5 were covered by the previous discussion.

On behalf of the resolution applicant (NBCC), while questioning the directions and observations of the Adjudicating Authority in relation to the dealings with YEIDA and particularly in relation to the contingent liability of additional compensation, a detailed reference has been made to all the background aspects and extensive arguments have been made in support of the stipulations in the resolution plan.

It is submitted on behalf of the resolution applicant that as on date, there is no claim of YEIDA against JIL in relation to the additional amount of compensation but, keeping the larger interests in view, the resolution plan has provided for this eventuality in the manner that YEIDA would be able to collect the amounts from the end-users. While taking exception to the observations in the order impugned, it is submitted that the Adjudicating Authority has seriously erred in seeking to construe the CA because that was an issue pending in the arbitration case. It is further submitted that in terms of Regulation 37 of CIRP Regulations, the resolution plan can propose modifications/alterations of contracts of the corporate debtors and in fact, all the contracts are being modified under

the plan, of course, subject to the approval by the CoC with requisite majority. As regards legal status of the Concession Agreement, it is submitted that the Adjudicating Authority has erred in assuming as if it were a statutory contract. In this regard, with reference to Section 6-A of the U.P. Act of 1976[81], it is contended that YEIDA may by an agreement authorise any person to provide or maintain, or continue to provide or maintain, any infrastructure or amenities and therefore, once an agreement was reached between JIL and YEIDA, their relationship would be governed by that contract (Concession Agreement). It is submitted that while enacting Section 6-A of the U.P. Act of 1976, the intent of the legislature has been to carve out a contractual relationship distinct from the statute and this goes against the whole construct of 'statutory contract' which YEIDA is trying to project. The decisions of this Court in the cases of ***India Thermal Power Ltd. v. State of M.P. and Ors.*: (2000) 3 SCC 379** and ***Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors.*: (2000) 6 SCC 293** have been referred to submit that merely for YEIDA being a statutory body, the contract in question does not partake the character of a statutory contract. This issue relating to contingent liability of additional compensation, according to NBCC, is required to be

81 Section 6-A of U.P. Act of 1976 reads as under: -

> "6 -A Notwithstanding anything to the contrary contained in any other provisions of this Act and subject to such terms and conditions as may be specified in the regulations, the Authority may, by Agreement, authorize any person to provide or maintain or continue to provide or maintain any infrastructure or amenities under this Act and to collect taxes or fees, as the case may be, levied therefore."

settled for proper implementation of the resolution plan or else, it may lead to serious impediment in future.

95.2. As regards those observations of the Adjudicating Authority where the issue of additional compensation qua the Expressway land has been left open for decision in the competent forum, it is submitted that the observations are not in accord with the decision in ***Essar Steel*** (supra), that there ought to be finality of claims against the corporate debtor. According to YEIDA, if this issue is left to be decided in any other proceedings, the same would lead to 'hydra head' popping up in the future.

95.3. It is further submitted that Expressway land would admittedly revert to YEIDA after the end of concession period and, therefore, YEIDA is the end-user of the Expressway. It is submitted that since the plan proposed the payment by end-users and this principle was approved by CoC, YEIDA has to be the entity liable towards additional compensation in relation to the land of Expressway, for it being the end-user with the land reverting to it. It has also been submitted that YEIDA has otherwise stated no objection to the pass-through proposition as regards liability towards additional compensation to the end-users and hence, its objection towards this liability qua Expressway land remains unjustified. It is also submitted that in the resolution plan, a debt of INR 2,000 crores is proposed to be raised on the Expressway for the purpose of construction of flats; and in the event this liability of additional compensation on the

Expressway land is not passed on to the end-user, raising of the loan may become difficult.

95.4. NBCC has further stated its objection to the proposed tripartite agreement with reference to Clauses 4.3(d), 4.3(e) and 4.4 of CA and it is submitted that the right of transfer being available to the concessionaire, foisting of tripartite agreement with YEIDA is not justified. It is submitted that so far as the execution of tripartite agreement in relation to the Expressway SPV is concerned, this part of the order is not being challenged but as regards Land Bank SPV, there is no requirement of entering into a tripartite agreement because JIL has unfettered rights under CA to transfer the land to any person.

95.5. As regards decision of this Court in the case of ***Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and Ors.*****: (2019) SCC OnLine SC 1479,** which is relied upon by YEIDA, it is submitted that the said decision is not applicable to the facts of the present case because therein, MCGM had not entered into a binding lease agreement containing the terms similar to the CA applicable to the parties herein. Moreover, in the said decision, the statute, i.e., Municipal Corporation of Greater Mumbai Act, 1888, itself provided that the only way MCGM's properties could be dealt with was through lease or by way of creation of any other interest with the prior permission of MCGM, but there is no similar provision in the U.P. Act of 1976.

On behalf of the IRP, it has been submitted that granting or refusing the reliefs sought for under Schedule 3 of the resolution plan is a matter within the discretion of the Adjudicating Authority and even if the same have not been granted, they do not form a part of the commercial terms of the plan; and the referred clauses of 'reliefs and concessions' are not hit by Section 30(2)(e) of the Code.

The associations of homebuyers as also the individual homebuyers standing in support of the plan have contended that the alleged terms of the Concession Agreement and any alleged breach thereof does not amount to a breach under Section 30(2)(e) of the Code and therefore, the Adjudicating Authority has acted wholly without jurisdiction in dealing with such terms because they do not come within the scope of Section 31 of the Code.

However, one of the homebuyers, who has moved an application for intervention, I.A. No. 84309 of 2020, has made several submissions questioning the dealings of JIL and YEIDA and has submitted that the Concession Agreement having not been provided to the homebuyers, the CIRP proceedings are rendered void.

In response to the aforesaid submissions in favour of the resolution plan, several counter arguments have been made by different parties. To avoid prolixity and repetition, we take into account the submissions of the parties directly related with these issues namely, YEIDA. Added to that, we may also refer to the submissions made on

behalf of the erstwhile director of the corporate debtor JIL as also its holding company JAL.

It has been stated and reiterated, as had been the submissions before the NCLT, that YEIDA does not stand to oppose the resolution plan only for the sake of opposition; rather it would like the plan to succeed but, it has a public duty to ensure that the framework under CA is preserved; and the issues being raised by it are solely intended to preserve the CA and to enforce the terms therein. Again, a detailed reference has been made to the background aspects concerning the land in question and the Concession Agreement as also to the findings of NCLT and thereafter, the contentions urged on behalf of the resolution applicant have been refuted.

In the first place, YEIDA has submitted that the resolution applicant is not correct in suggesting that the Adjudicating Authority has dealt with the interpretation of CA to hold that compensation was to be paid by the concessionaire and by the proposed SPVs. Paragraph 118 of the impugned order dated 03.03.2020 has been referred wherein, the Adjudicating Authority stated that the question, as to whether additional compensation was a part of the acquisition cost, was not being examined because it had already been adjudicated in arbitration and is pending in the Court.

While supporting the other part of impugned order dated 03.03.2020, it is submitted that there being no privity of contract between

YEIDA and the end-users, the amount towards additional compensation could only be collected from the SPVs and not directly from the end-users. According to YEIDA, the Adjudicating Authority has rightly modified the mechanism in the resolution plan for collection of additional compensation in the manner that instead of collecting the amount directly from the end-users, YEIDA would now be collecting it through the SPVs concerned. This has, according to YEIDA, no impact on the commercial aspects of the resolution plan.

99.3. It is also submitted that the contract in question, that is, the Concession Agreement, is a statutory contract entered into by YEIDA for public purpose and it cannot be altered or modified through a resolution plan as an ordinary commercial contract. It is submitted that the CA grants and governs the rights of corporate debtor JIL over the land of YEIDA; that such rights are limited and distinct from ownership rights; and that the resolution applicant cannot unilaterally alter the CA and improve upon the rights granted thereunder to enhance the assets of the corporate debtor.

99.4. As regards the land falling under Expressway, YEIDA has questioned the contentions urged on behalf of NBCC and it is submitted that such a ground was not taken in the appeal filed against the impugned order and was raised for the first time in written submissions. Nevertheless, according to YEIDA, the argument is patently incorrect, for it ignores the fact that the corporate debtor JIL and its successor SPVs would derive the benefits of both, the toll collected from Expressway for

36 years as also from the other land for development. It has also been submitted that the additional compensation for Expressway, when to be passed on to the end-users, could only be passed on to the commuters in the form of appropriate adjustment in the toll, but not otherwise.

99.5. Moving on to the questions related with creation of SPVs, transfer of land to them and the aforesaid stipulations in the resolution plan, it is submitted that the project in question is an integrated and indivisible one, as held by this Court in the case of ***Nand Kishore Gupta & Ors. v. State of U.P. & Ors.*: (2010) 10 SCC 282** and hence, its bifurcation is impermissible.

99.6. It is also submitted that the assumption in the resolution plan, that the approval of NCLT would waive the requirement of YEIDA's approval, is misconceived. Regulation 37 of CIRP Regulations has been referred to submit that the plan has to provide for necessary measures for insolvency resolution including approvals from the Central and State Governments and other authorities. Therefore, according to YEIDA, such pre-emptory waiver as envisaged in the plan is contrary to the CIRP Regulations. A further reference has been made to Clause 18.1 of the CA and it is contended that in terms thereof, in case any SPV is to be set up, necessary documents involving the concessionaire JIL, YEIDA and SPV have to be executed. It is reiterated that despite such objections, YEIDA is taking a practical view of the matter so as to ensure the success of the resolution plan and, therefore, the Adjudicating Authority (NCLT) has also

rightly provided for such documentation without disturbing the commercial effect of the plan while ensuring that all the future dealings shall be in terms of the CA and thereby, fulfilling the requirements of Section 30(2) of the Code.

99.7. As regards the contentions on the part of the resolution applicant that Land Bank SPV is not governed by the CA or that there is no restriction on the corporate debtor's ability to sub-lease, it is submitted that the rights for development of the land along the proposed Expressway were to be provided at five or more locations with one location in Noida or Greater Noida in terms of Clause 3.3 of the CA. Therefore, the suggestion that this land may not be governed by CA is not correct. As regards the right to sub-lease, it is submitted on behalf of YEIDA that as per the terms of plan, it is not a mere sub-lease in favour of Land Bank SPV but the chunk of land for development is sought to be transferred to the Land Bank SPV by way of business transfer; and in any case, in terms of the referred clauses of CA, execution of tripartite agreement is a condition indispensable.

99.8. It has also been submitted that YEIDA has consistently taken the stand that it would be ready to do everything within its power to ensure that the plan is a success but even after long length of time, the resolution applicant has not even approached YEIDA for execution of necessary documents. While relying on the aforesaid decision in ***MCGM***, it has been argued that the provisions of the Code cannot override a public body's

right and duty to control and regulate as to how its properties are to be dealt with.

99.9. As regards the powers of the Adjudicating Authority to modify the plan, reliance is placed on the decision in ***ArcelorMittal*** (supra), where this Court has held that the Adjudicating Authority is to apply judicial mind to a resolution plan to satisfy itself that the plan meets the requirements under Section 30 of the Code. It is further submitted that even in ***Essar Steel*** (supra), this Court has recognised the Adjudicating Authority's power of judicial review. Further, with reference to the decision of Allahabad High Court in the case of ***Pradumna Kumar Jain*** (supra), it is submitted that the power to approve or reject a plan must necessarily include the power to modify a plan. According to YEIDA, such power of the Adjudicating Authority is implicit in Section 31; and if the Adjudicating Authority finds that a resolution plan does not conform to the Code but would do so by modifications, such modifications deserve to be upheld, lest the corporate debtor is pushed to liquidation. It is re-emphasised that the modifications provided in the impugned order dated 03.03.2020 have no commercial implications and they relate only to the mechanism prescribed by the resolution plan, which are required to be modified to uphold the CA, a statutory contract.

99.10. Apart from the above, it has also been submitted on behalf of YEIDA, that the resolution plan carries such other terms and stipulations which cannot be approved; and objections of YEIDA to such terms were

upheld but, NBCC has not appealed against that part of the order of the Adjudicating Authority. Therefore, those stipulations deserve not to be approved. In this regard, it has been pointed out that YEIDA has taken objection to Clause 4 of Schedule 3 requiring it to give up the litigation under the Arbitration Act; and this objection was noted by the Adjudicating Authority and NBCC has not challenged those observations. Such a relief, according to YEIDA, cannot be claimed in a resolution plan and ought to be declined. It has further been pointed out that the stipulations in the said Clauses 14 and 27 of Schedule 3 of the resolution plan, respectively for extinguishment of the liability arising under the CA and for extension of term of CA, have not been granted by the Adjudicating Authority; and these aspects having not been appealed against, the clauses in question deserve to be deleted from the resolution plan.

The submissions so made on behalf of YEIDA have been supported by the erstwhile director of JIL with reference to the decision in ***Embassy Property*** (supra) and with the submissions that YEIDA being a statutory body created under the U.P. Act of 1976, the agreement entered into between YEIDA and the corporate debtor is statutory in nature and this relationship is not just contractual but is statutorily governed. The requirement that YEIDA must collect compensation from the homebuyers or end-users in case it succeeds in the arbitration case, according to the erstwhile director, is in contravention of the law for the time being in force, for it violates the U.P. Act of 1976. It is further submitted that the

Adjudicating Authority has rightly ordered execution of tripartite agreement involving the proposed SPVs. In essence, the submission has been that the treatment of YEIDA in the resolution plan is not in conformity with the law and the order passed by the Adjudicating Authority calls for no interference.

While dealing with the rival submissions, we may indicate at the outset that some of the objections like questioning the dealings of JIL and YEIDA and want of availability of CA with the homebuyers have unnecessarily been raised and carry no meaning to the real questions in controversy. They require no discussion and are left at that.

Coming to the real questions in controversy, in the first place, we deem it appropriate to observe that the suggestion on behalf of YEIDA and erstwhile director of the corporate debtor, that the Concession Agreement in question is a statutory contract, is not correct and cannot be accepted. It has rightly been pointed out on behalf of the resolution applicant NBCC that the said CA is not a statutory contract; it has only been executed by YEIDA in exercise of its enabling powers conferred by the statute, that is, U.P. Act of 1976 but the same is neither an agreement provided by the statute nor executed under a statute. This Court has clarified the law in this respect in the case of ***India Thermal Power Ltd.*** (supra) in the following terms: -

> "11. It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some counsel appearing for other appellants that the appellant/IPPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as

such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43(1)(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. **Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.** Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory."

(emphasis in bold supplied)

102.1. Applying the principles aforesaid to the facts of the present case, we are clearly of the view that the agreement in question does not acquire the status of a statutory contract merely for having been executed in terms of the powers with YEIDA under Section 6-A of the U.P. Act of 1976.

102.2. Apart from above, another part of the submissions on behalf of YEIDA with reference to the case of ***Nand Kishore Gupta*** (supra) against incorporation of two SPVs cannot be accepted. The observations of this Court in the case of ***Nand Kishore Gupta*** (supra) came in the wake of challenge to the very acquisition process concerning the land parcels for the project in question, that is Yamuna Expressway Project. One of the arguments therein was that about 25 million square kilometres of land was being acquired for 5 parcels of land to be given for commercial exploitation. This Court found the High Court right in commenting that such creation of 5 zones for industry, residence, amusement etc. was going to be complementary to the creation of highway. However, the observations in ***Nand Kishore Gupta*** (supra), holding all the parcels of land to be part of integrated and indivisible project, cannot be read to mean that creation of two SPVs by the concessionaire, one for the Expressway and another for the remaining land for commercial development, can never be provided.

102.3. However, even if the submissions of YEIDA are not correct in regard to the aforesaid two aspects, all other submissions made on its behalf cannot be discarded and rather, on substance, they deserve acceptance to a large extent.

The contract in question, the CA, even though not a statutory one, is nevertheless a contract entered into between the concessionaire and statutory authority, that is, YEIDA. It is needless to observe that even if in

the scheme of IBC, a resolution plan could modify the terms of a contract, any tinkering with the contract in question, that is, the Concession Agreement, could not have been carried out without the approval and consent of the authority concerned, that is, YEIDA. Any doubt in that regard stands quelled with reference to Regulation 37 of CIRP Regulations that requires a resolution plan to provide for various measures including '*necessary approvals from the Central and State Governments and other authorities*'. The authority concerned in the present case, YEIDA, is the one established by the State Government under the U.P. Act of 1976 and its approval remains *sine qua non* for validity of the resolution plan in question, particularly qua the terms related with YEIDA. The stipulations/assumptions in the resolution plan, that approval by the Adjudicating Authority shall dispense with all the requirements of seeking consent from YEIDA for any business transfer are too far beyond the entitlement of the resolution applicant. Neither any so-called deemed approval could be foisted upon the governmental authority like YEIDA nor such an assumption stands in conformity with Regulation 37 of the CIRP Regulations.

Furthermore, the suggestion that Clause 18.1 of the CA had been a one-time measure and that stands exhausted with creation of JIL as SPV and transfer of original concessionaire's rights to JIL, has its own shortcomings. The concept and purport of Clause 18.1, of course, at the relevant time had been of the obligation on the original concessionaire to

execute the documents for creation of SPV and this clause came in operation when JIL was created as an SPV. However, it would be wholly unrealistic to say that once JIL was created as an SPV, the said Clause 18.1 stood exhausted and there remained no obligation on the part of JIL (as the substituted concessionaire) to execute the necessary documents if it would propose to transfer its rights and obligations under the CA to another SPV; and it could do so without the consent of YEIDA. This suggestion carries an inherent fallacy because if Clause 18.1 is removed from the CA, a serious question would arise as to how the rights and obligations of the substituted concessionaire JIL could at all be transferred to another SPV? Looking to the pith and substance of the CA, the said Clause 18.1 has to be applied for creation of any SPV by or on behalf of JIL.

104.1. The other clauses in CA permitting creation of sub-lease could hardly be applied for *en bloc* transfer of land to the SPVs, as proposed in the resolution plan. The referred Clauses 4.3(d) and 4.3(e) were essentially meant for creation of sub-leases when the land given to the concessionaire for development, or part thereof, was to be sub-leased to the end-user/s. Even in that regard, the provisions were made for the concessionaire to make a request to the land providing agency to execute the lease-deed directly in favour of its subsidiaries, assigns or transferees; and in case the agency and the concessionaire would consider it appropriate, tripartite agreement for sub-lease may be

executed. Taking all the relevant clauses together with the substance and purport of CA, it is difficult to countenance that the proposed transfer to SPVs could be treated as an ordinary sub-lease for which, no documentation involving YEIDA would be required.

104.2. Although, as urged, the proposal to create two separate SPVs may not be impermissible looking to the framework of the CA, where different stipulations were made in relation to the land for constructing Expressway with its allied facilities and the land for commercial exploitation, respectively in Clauses 4.1 and 4.3 of the CA, but the question is as to the method of transfer of concessionaire's rights and obligations to such SPVs. That could only be in accordance with the approval of YEIDA and with the execution of necessary tripartite documents as envisaged by CA.

104.3. As observed hereinbefore, looking to the terms and purport of the CA, creation of two SPVs, one for Expressway and another for the remaining land for commercial development, is not altogether prohibited but then, it cannot be suggested by NBCC that such creation of SPVs could be even without necessary documentation involving YEIDA. In this regard, YEIDA seems to be right in its contentions that such documentation is even otherwise required for avoiding any ambiguity about the rights and obligations and also for itself (YEIDA) to properly monitor the functioning of SPVs, each of which would stand in the

capacity of concessionaire and would be carrying the rights and obligations under the CA.

104.4. For what has been discussed above, we need not delve into the decision of this Court in ***MCGM*** (supra), where the statutory provision itself required prior approval of the local body before dealing with its properties through lease or by creation of any other interest. Though in the present case, there is no such statutory embargo but for that matter, all the terms of the Concession Agreement cannot be forsaken. Any alteration in the essentials of the Concession Agreement would require the consent of YEIDA.

104.5. The Adjudicating Authority (NCLT), while disapproving the stipulations in the resolution plan whereby documentation for such transfer was sought to be avoided, proceeded to order execution of such documents. According to YEIDA, this modification has no commercial effect and therefore, has rightly been ordered by NCLT. Although this modification, *prima facie*, does not appear to be having any commercial effect, for it being only a matter of proper documentation but, interlaced with this process of documentation are the other stipulations, which do impact the commercial terms of the resolution plan, particularly those relating to the amount of additional compensation, if payable.

With the observations foregoing, we may now take up another important aspect of the objections, which relates to the provisions in the

resolution plan towards the amount of additional compensation, if payable.

105.1. Concisely put, as per the resolution plan, the contingent liability concerning additional amount of land acquisition compensation is proposed to be dealt with in the manner that in the event any such amount of additional compensation is to be paid, YEIDA would collect the same from the end-users; and as regards the land of Expressway, such additional compensation shall be payable by YEIDA because YEIDA will be the end-user on getting ownership of the land of Expressway after expiry of the concession period. NBCC has justified these propositions on various grounds as noticed hereinabove. YEIDA takes serious exception to them and particularly to the stipulation that additional compensation in regard to the land of Yamuna Expressway would be payable by it. The Adjudicating Authority has made two-fold modifications in this regard. In paragraph 120 of the impugned order dated 03.03.2020, the Adjudicating Authority has said that to iron out creases and to make the resolution plan viable, it would direct that the plan shall be read to mean that YEIDA has a right to collect acquisition cost through the SPVs concerned. On the other hand, concerning the Expressway land, the Adjudicating Authority has provided in paragraph 122 of the impugned order that the resolution plan would be read to mean that it is left open to both the parties to have proper recourse before competent forum when the time comes for payment of additional compensation. In the submissions of YEIDA, such

modifications were necessary to make the plan compliant with the rights and obligations under the CA.

105.2. We find the prescriptions in the resolution plan in regard to the contingent liability of additional compensation to be questionable on more than one count.

The question is yet to be finally determined as to whether such a liability towards additional amount of compensation rests with the corporate debtor JIL or with YEIDA, because the arbitral award made in favour of JIL is the subject matter of challenge in the Court. However, the contingency was required to be provided in the plan in case liability would be ultimately fastened on the corporate debtor JIL. It has not been suggested that any such bifurcation of liability, qua the land under Expressway on one hand and other parcels on the other, is a subject matter of the arbitration proceedings. However, going by the terms of the CA, prima facie, we are unable to find any indication therein that the liability for compensation with reference to the land under Expressway is not of the concessionaire. In any case, while making a provision for meeting with this contingent liability of additional amount of compensation, the resolution applicant could not have decided of its own that there will not be any liability of the concessionaire or its assigns towards the land under Expressway.

It appears that while proposing to create two different SPVs, the resolution applicant stumbled on an idea that the liability for additional

compensation as regards Expressway land could be simply deflected to YEIDA with reference to the fact that YEIDA will get this land back after 36 years; and reflected this idea by way of the questioned proposition in the resolution plan. The Adjudicating Authority has chosen to leave this issue open, for being litigated at the appropriate time and before the competent forum. In our view, such a prescription as regards Expressway land amounts to alterations of the material terms of CA and cannot be made without the consent of YEIDA. This aspect could have only been disapproved.

106.2. Similarly, the resolution applicant, of its own, could not have decided that end-user would mean sub-lessee and thereby deflect even collection of the amount towards this liability on YEIDA and that too when YEIDA was not going to be a party in creation of any sub-lease. The structuring of these propositions regarding contingent liability turns out to be wholly illogical, apart from being at loggerheads with the terms of the Concession Agreement.

106.3. It needs no great deal of discussion to find that the said aspect concerning the provision for additional compensation, if not approved on material terms, is of significant commercial impact. Even the other modification by the Adjudicating Authority, that YEIDA shall have a right to collect acquisition cost through SPVs concerned, carry their own commercial implications. These are not the terms which could be taken up for modification without disturbing the financial proposal of the resolution

plan. While these prescriptions could not have been approved, in our view, the Adjudicating Authority could not have entered into any process of modification. The only course open for the Adjudicating Authority (NCLT) was to send the plan back to the Committee of Creditors for reconsideration.

Apart from the aforesaid, the reliefs and concessions as sought for by the resolution applicant in relation to YEIDA in Clauses 4, 14 and 27 of Schedule 3 are also required to be disapproved. We are unable to countenance the proposition that by way of a resolution plan, it could be enjoined upon an agency of the government like YEIDA to give up or withdraw from a pending litigation. Similarly, extinguishment of existing liability qua YEIDA is not a relief that could be given to the resolution applicant for askance. For the same reason, the resolution applicant cannot seek extension of time period of the Concession Agreement by way of a clause of 'relief' in the resolution plan without the consent of a governmental body like YEIDA.

Before concluding on this point for determination where we have accepted the major parts of the objections of YEIDA, we may, in fairness to all the parties concerned, reiterate that despite stating its objections, YEIDA has consistently maintained before the NCLT as also before this Court[82] that it does not stand to oppose the resolution plan only for the sake of opposition; rather it would like the plan to succeed but, it has a public duty to ensure that the framework under CA is preserved and else,

82 *vide* paragraphs 47.2, 99 and 99.8 (supra)

it would be ready to do everything within its power to ensure that the plan is a success. Thus, it would not be out of place to add a sanguine hope that being the owner of the land in question and public authority, YEIDA, who had envisaged and promoted the entire project, would, in future dealing with the matter, act with caution and circumspection, while earnestly reflecting upon the practical impact of its propositions/decisions on various stakeholders, including the homebuyers.

For what has been discussed hereinabove, we are constrained to hold that the stipulations in the resolution plan, as regards dealings with YEIDA and with the terms of Concession Agreement, have rightly not been approved and the stipulations in question, when not being consented to by YEIDA, are required to be disapproved. Further, in the cumulative effect of the stipulations which have not been approved, the only correct course for the Adjudicating Authority was to send the plan back to the Committee of Creditors for reconsideration.

Point D

Treatment of the debt of dissenting financial creditor ICICI Bank Limited

Now, we need to enter into another area of major dispute, which relates to the objections of a dissenting financial creditor, ICICI Bank Limited.

For dealing with the issue concerning dissenting financial creditor, we need to look closely at the relevant prescriptions in the resolution plan of NBCC. As noticed, in Schedule 2 of the resolution plan, detailed steps

are mentioned for acquisition of control of the corporate debtor and implementation of the resolution plan. Steps 6A and 6B relate to the institutional financial creditors. The preceding steps, in their chronology, are (1) incorporation of NBCC SPV and acquisition of the corporate debtor by the resolution applicant through that SPV; (2) incorporation of Expressway SPV by the corporate debtor and transfer of Yamuna Expressway to that SPV and securitisation of toll cash flow; (3) payment of unpaid CIRP costs; (4) payment of total operational debt; and (5) incorporation of Land Bank SPV. The sixth step is divided in two parts, being Step 6A concerning upfront payment to the institutional financial creditors and 6B concerning treatment of institutional financial creditors for the remaining amount. In the second part of Step 6B, specific stipulations are contained as regards the dissenting financial creditors. For comprehension of the gamut of such prescriptions, we may reproduce Steps 6A and 6B in the resolution plan as under: -

> **"STEP 6A: UPFRONT PAYMENT TO THE INSTITUTIONAL FINANCIAL CREDITOR**
>
> Part of the Admitted Financial Debts of the Institutional Financial Creditors shall be settled to an extent of INR [Fresh Debt- 2,000] Cr by making upfront Payment of ~ INR [Fresh Debt - (less) 2,000] Cr by the Expressway SPV, to be incorporated by the Corporate Debtor under Step 2 above. No prepayment penalty shall be payable to the Institutional Financial Creditors, in the event of any upfront payment of debt of as provided above.
>
> In this regard, it is clarified that upon payment of upfront amount aggregating to INR [Fresh Debt - (less) 2,000] Cr to the Institutional Financial Creditors, their charge over the Yamuna Expressway and toll cash flow shall be automatically released, without any further deed or act by the parties.
>
> **"STEP 6B: TREATMENT OF INSTITUTIONAL FINANCIAL CREDITORS FOR THE REMAINING AMOUNT**

After upfront payment is made to the Institutional Financial Creditors as contemplated under Step-6A above, the remaining Admitted Financial Debt due to the Institutional Financial Creditors shall be settled in its entirety in the following manner.

Conversion of part of Admitted Financial Debt (due to Institutional Financial Creditors) into equity shares of the Corporate Debtor and subsequent reduction of share capital to extinguish the shareholding of Institutional Financial Creditors in the Corporate Debtor in entirety;

Transfer of 100% shareholding of Land Bank SPV from the Corporate Debtor to the Institutional Financial Creditors;

Transfer of 100% shareholding of Expressway SPV from the Corporate Debtor to the Institutional Financial Creditors for a consideration equal to their then outstanding debt to be paid by way of settlement of the outstanding debt to the same extent; and

It is also proposed that the Resolution Applicant shall enter into:

a management agreement with the Land Bank SPV (to be owned by the Institutional Financial Creditors) for the purpose of monetizing the land held by the Land Bank SPV for an initial tenure of 5 years subject to a fixed/success-based fee to be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Detailed terms and conditions of such management agreement, including any escrow mechanism may be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Additionally, the Resolution Applicant reserves its first right to buy back the land held by the Land Bank SPV, at the then prevailing market rate.

an operations & maintenance agreement with the Expressway SPV (to be owned by the Institutional Financial Creditors) to operate and maintain the Expressway for a tenure of 5 years subject to a fee to be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant. Detailed terms and conditions of such O&M agreement, including any escrow mechanism may be mutually agreed between the Institutional Financial Creditors and the Resolution Applicant.

We have structured the transaction in a tax efficient manner to the best of our knowledge. However, in the event any income tax liability or goods and services tax (GST) liability, arises in future on account of transfer of land parcels, same shall be borne by the Institutional Financial Creditors in a pro rata manner without any recourse, express or implied, to the Resolution Applicant.

As per IBC, Dissenting Financial Creditors are required to be paid a minimum of amounts in the nature of liquidation value due to

them in terms of Sections 30(2) and 53 of the IBC. However, as per the amendment to the CIRP Regulations on 31 December 2017, the requirement for disclosing the Liquidation Value of a corporate debtor undergoing resolution to the resolution applicants has been dispensed with and accordingly, the Liquidation Value for the Corporate Debtor is currently not available with us. However, as per our estimate, the liquidation value owed to the Dissenting Financial Creditors, in terms of Sections 30 and 53 of the IBC read with Regulation 38 of the CIRP Regulations is expected to be nil.;

However, in the event the Dissenting Financial Creditors are entitled to some amount in the nature of liquidation value in terms of Sections 30 and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations, then the Dissenting Financial Creditors would be provided the liquidation value owed to them in terms of Section 30(2) and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations in the form of proportionate share in the equity of the Expressway SPV and transfer of certain land parcels belonging to the Corporate Debtor. For avoidance of doubt it is clarified that on account of the transfer of equity and transfer of land parcels in favour of Dissenting Financial Creditors as stipulated above there will be a corresponding decrease in the equity and area of land parcels being transferred to the Institutional Financial Creditors (through the Land SPV) who vote in favour of the Plan. Further the Resolution Applicant shall have the sole discretion to determine the location of the land parcels to be transferred to the Dissenting Financial Creditors and the value of such land parcels being transferred shall be same as that proposed under this Resolution Plan for the Institutional Financial Creditors who vote in favour of the Plan.

Provided further that the Dissenting Financial Creditors shall bear the stamp duty, registration costs, and other applicable taxes including goods and services tax (GST) involved in the transfer of land parcels in their favour as stipulated hereinabove.

Notwithstanding anything contained in this Resolution Plan, the Dissenting Financial Creditors shall neither be entitled to nor shall they receive any other amounts other than the amounts due to them in the nature of liquidation value as stipulated hereinabove."

111.1. Thus, the proposal in the resolution plan is to the effect that, if the dissenting financial creditors would be entitled to some amount in the nature of liquidation value in terms of Sections 30 and Section 53 of the IBC read with Regulation 38 of the CIRP Regulations, they would be provided such liquidation value *'in the form of proportionate share in the*

equity of the Expressway SPV and transfer of certain land parcels belonging to the Corporate Debtor'.

The dissenting financial creditor of JIL, namely, ICICI Bank Limited, took exception to the stipulations aforesaid and submitted before the Adjudicating Authority that being a dissenting financial creditor, it was entitled to receive cash payment as per the liquidation value in terms of Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations; and providing for land and equity in the proposed SPVs in lieu of the requisite payment was entirely impermissible. These objections were countered by IRP and NBCC with the submissions that it was nowhere provided in the scheme of the Code and CIRP Regulations that payment of liquidation value to the dissenting financial creditor has to be in cash. It was also submitted that when mode of discharge of obligation towards dissenting financial creditor was not envisaged only by way of cash payment, money or other valuable thing delivered to discharge the obligation would be construed as "payment", fulfilling the requirement of Section 30(2) of the Code. It was also submitted that when the assenting financial creditors were not being paid in cash, any such payment to the dissenting financial creditors would cause prejudice to the rights of the assenting financial creditors. As noticed, the Adjudicating Authority rejected the stand so taken by IRP and NBCC and observed that all the provisions and specifications of the Board made it clear that payment to dissenting financial creditors means payment of the amount; and it cannot

be argued that the payment could also be in a manner other than cash. The Adjudicating Authority also rejected the contention made with reference to the treatment assigned to the assenting financial creditors while observing that a person agreeing might agree for anything but the same may not be acceptable to the person disagreeing. Accordingly, the Adjudicating Authority (NCLT) did not approve the proposal in the resolution plan as regards treatment of the dissenting financial creditors.

112.1. However, after disapproving, the Adjudicating Authority proceeded on the lines that this objectionable part of the resolution plan could be modified without altering the basic structure of the plan. Having said so, the Adjudicating Authority proceeded to modify the resolution plan in the manner that the resolution applicant shall pay to the dissenting financial creditors the amount, that was receivable in terms of Section 53 of the Code, in twelve monthly instalments together with interest with other stipulations, as contained in paragraph 103 of its order, which we have reproduced in paragraph 46.4 hereinbefore. This part of the order of the Adjudicating Authority has been challenged by NBCC as also by IRP in their respective appeals. The assenting financial creditors, including IDBI Bank and the assenting homebuyers have also supported this challenge. Their submissions have been countered by the dissenting financial creditor ICICI Bank as also by the erstwhile director of the corporate debtor.

We may now summarise the essential contents of extensive submissions made by the parties in challenge to this part of the order of the Adjudicating Authority, while avoiding repetition of the same contention by different parties.

1. It has been strenuously contended on behalf of the IRP that the Adjudicating Authority has acted wholly without jurisdiction in modifying the terms of the resolution plan that was approved by 97.36% of the voting share of the Committee of Creditors. It is submitted that the resolution plan in question is duly compliant with the requirements of Section 30 of the Code and if the Adjudicating Authority was at all of the view that the plan did not meet with any particular requirement, it could have only sent it back to CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same. It is submitted that the Adjudicating Authority, by itself, could not have made any modification in the resolution plan, particularly on any commercial aspect of the plan which remains exclusively within the domain of the CoC.

1.1. It has also been submitted on behalf of IRP that in the meeting of CoC dated 28.11.2019, ICICI Bank did not raise any objection to the mode of payment and only objected to the amount provided by the resolution applicant and that being the position, it could not have raised any objection at a later stage.

113.1.2. It is further submitted that the requirements in Section 30(2)(b) of the Code stress upon the 'value' a dissenting financial creditor is entitled to receive but, it has nowhere been provided that the manner of payment has to be in cash; rather the manner of payment has been left to be specified by the Board and the Board has also not specified that such payment has to be in cash only.

113.1.3. Further, according to IRP, if the word "payment" is given a prescriptive meaning, it would result in clause (b) of sub-section (2) of Section 30 prescribing the manner of distribution and that would amount to amending the word "creditor" in sub-section (4) of Section 30. It is submitted that in the scheme of the Code, dissenting financial creditors are bound to accept the manner of distribution in the resolution plan as approved by the majority of 66% or more of the voting share in the CoC and if they are not held so bound, the provisions permitting the CoC to take decisions with requisite majority would be rendered nugatory.

113.2. The resolution applicant NBCC has also made long ranging submissions in challenge to the directions in paragraph 103 of the order of the Adjudicating Authority while defending the terms and stipulations in the resolution plan. It is submitted that Step 6B in the resolution plan has been formulated in due compliance of the requirements of Section 30(2) of the Code and Regulation 38(1) of the CIRP Regulations. It is stated in its written submissions that the requirements of law are duly satisfied as follows:

> "3. Thus, the requirements of law have been met in the following manner:
>
> Payment of liquidation value in terms of payment of proportionate share in the Land Bank SPV and Expressway SPV; and
>
> b. the payment to the Dissenting Financial Creditors shall be made in terms of Regulation 38 of the CIRP Regulations and further states that on account of the payments to the Dissenting Financial Creditors in the form of proportionate equity in the Expressway SPV and transfer of certain land parcels, there would be corresponding decrease in the equity and land parcels being transferred to the lenders who vote in favour of the plan."

113.2.1. As regards the expression "payment" for the purpose of Section 30(2) of the Code, the meaning of this term stated in Black's Law Dictionary (9th Edition) has been referred. Further, reliance is placed on the decisions of this Court in the case of ***Pioneer Urban*** (supra), ***Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana*****: (2012) 4 SCC 505**; and on the decision of the Court of Appeal for the 6th Circuit, USA in the case of ***Samuel Katkin and Doris Katkin v. Commissioner of Internal Revenue***: **570 F.2d 139** as also on a decision of the High Court of Calcutta wherein, a decision of the Court of Appeal of England in ***White v. Elmdene Estates Ltd.*****: 1959 ALL ER 605** has been relied upon. With reference to the Dictionary meaning and the cited decisions, the contention has been that "payment" means the discharge of an obligation by delivery of money or its equivalent; and the expression "payment" is not restricted to delivery of money or legal tender only.

113.2.2. It is argued that Section 8 of the Code, as relied upon by ICICI Bank, uses the term "payment" to denote the payment of amounts that

are “operational debts” before commencement of the insolvency resolution process, whereas the same term is used under Section 30(2) to denote the payment under a resolution plan. The language employed under Section 8(2)(b) of the Code includes payment by way of electronic transfer or by cheque. On the other hand, Section 30(2) of the Code is in relation to payment under a resolution plan, and does not in any manner stipulate the mode of payment.

113.2.3. It is also contended that the word ‘payment’ is required to be interpreted with reference to its context and placement; and to support the submissions on contextual interpretation, reliance is placed on the decisions in ***Commissioner of Income Tax, Madhya Pradesh & Bhopal v. Shrimati Sodra Devi*****: AIR 1957 SC 832;** ***Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal and Anr.*****: (2011) 9 SCC 207;** ***Indian Handicrafts Emporium and Ors. v. Union of India and Ors.*****: 2003 (7) SCC 589;** ***CIT, Bangalore v. Venkateswara Hatcheries (P) Ltd.*****: (1999) 3 SCC 632;** and ***Union of India v. Sankalchand Himatlal Sheth and Anr.*****: (1977) 4 SCC 193.**

113.2.4. It has also been submitted that the context in relation to the word “payment” needs to be examined in terms of the object and purpose of resolution of insolvency and not in terms of recovery of debt; and in the light of the fact that for the purpose of insolvency resolution, a resolution plan may provide for various ways of settlement of claims. On the scheme of the Code and object and purpose of resolution, the decisions in

ArcelorMittal and ***Swiss Ribbons*** (supra) have been referred. Regulation 37(1) of the CIRP Regulations has also been referred wherein it is provided that a resolution plan may provide for securities in exchange of claims. It is also submitted that limiting the word "payment" only to mean cash would defeat the purpose of resolution and would rather incentivise dissent. It is submitted that such mode of payment by cash should not be read in the statute, when not provided therein. The decision of this Court in the case of ***State through Central Bureau of Investigation v. Parmeshwaran Subramani and Anr.*****: (2009) 9 SCC 729** has been referred.

113.2.5. It has also been submitted that the "value" under Section 53 is only a guiding factor for the CoC to exercise its commercial wisdom and the reference to "value" in Section 53 does not mean that the dissenting financial creditor has to be paid such value only in cash. It is also submitted that the liquidation value is not known to the resolution applicant and there is no requirement of mentioning the liquidation value in the resolution plan. It is pointed out that earlier, sub-clauses (j) and (k) of Regulation 36(2) provided for inclusion of liquidation value of the corporate debtor and liquidation value due to the operational creditors as part of information memorandum, but these clauses were deleted w.e.f. 31.12.2017 and the resolution applicant is not given access to the liquidation value of the corporate debtor. It is also submitted that as per the decision in ***Maharashtra Seamless Ltd.*** (supra), there is no

requirement for a resolution applicant to match the liquidation value of a corporate debtor. It has been vehemently contended that all the amounts being raised or made available to NBCC are going to be utilised for construction of homes and any requirement of payment in cash would be detrimental to the object of completing the construction on time, which would cause prejudice to the homebuyers. It is also submitted that 'payment in kind' is accepted under banking norms and in this regard, it is also indicated that on an earlier occasion, the objector ICICI Bank itself had accepted land-debt swap as a method of payment for discharge of the debt of JIL.

113.2.6. Apart from above, NBCC has also referred to its affidavit filed during the course of hearing while submitting that the admitted debt of ICICI Bank is INR 304.1 crores which is 1.31% of total financial debt and as per the final statement available, the proportionate liquidation value payable to this bank would be about INR 238.84 crores. Thereafter, particulars of the parcels of land proposed to be offered to ICICI Bank and their estimated value as also the estimated value of equity in Expressway have been stated to suggest that adequate provision is being made for payment of debt of this bank while indicating that the bank would also be entitled to its proportionate share under Step 6A of the resolution plan.

113.3. The assenting financial creditor, IDBI Bank, has also supported the submissions aforesaid. The additional parts of its submissions are that ICICI Bank is using its dissent to obtain an advantage over the assenting

financial creditors, by seeking to be paid in cash purely by virtue of dissent. It is also submitted that resolution plan was approved by 97.36% of the voting share of the creditors in CoC in its commercial wisdom after assessing the viability and feasibility of the resolution plan; and if the other institutional financial creditors also wanted to receive their money, they would have simply voted for liquidation which would have deprived thousands of homebuyers of any chance of getting their homes. It is also submitted that if cash payment is considered to be the only mode of payment available to the dissenting financial creditors, it would incentivise the financial creditors to go for dissent, leading to more liquidations and fewer resolutions and thereby defeating the theme and spirit of the Code. It has also been submitted in the alternative that if at all, this Court upholds the related part of the order of NCLT and permits cash payment, the interests of the assessing financial creditors need to be safeguarded and such payment should not result in any dilution or reduction in the amount payable to the assenting financial creditors.

While opposing the submissions so made and supporting the modification of the resolution plan by NCLT, it has been emphatically argued on behalf of the dissenting financial creditor, ICICI Bank, that the resolution plan in question had been non-compliant with the requirements of law and had it not been amended to provide for payment of the amounts admittedly owed to it by the corporate debtor, the only course would have been of rejection of the plan; and that would have jeopardised

the entire resolution process carried out for more than two years under exceptional circumstances and would have pushed the corporate debtor to liquidation, much to the disappointment of homebuyers.

114.1. With reference to Section 30(2)(b) of the Code and Regulation 38(1)(b) of the CIRP Regulations, it is submitted that as per the statutory mandate, a resolution applicant is required to pay a minimum of liquidation value [in terms of Section 53(1) of the Code] to the dissenting financial creditors in priority over the assenting financial creditors; and if a resolution plan does not provide for this mandatory payment in priority, the same cannot be approved.

114.2. It is submitted that, admittedly, the corporate debtor owed an amount of INR 304.1 crores to ICICI Bank as on the insolvency commencement date; and this bank, holding 1.3% voting share in the CoC, voted against the resolution plan proposed by NBCC and therefore, came to be categorised as a dissenting financial creditor. Consequently, this bank has the right and entitlement to be paid, and in priority over the assenting financial creditors, the amount against its dues, which shall be not less than the amount payable in accordance with Section 53(1) of the Code, that is, the liquidation value; and this payment could only be made in terms of cash and not by any other mode or method.

114.3. It is contended that Section 53 contemplates the proceeds from the sale of the liquidation assets to be utilised to pay the dissenting financial creditors and there is no such conceivable possibility that the

assets of a corporate debtor would be liquidated in any other consideration, apart from cash. The payment, for the purpose of Section 30(2)(b) of the Code, would only be in terms of money or a legal tender; and it is entirely impermissible for a resolution applicant to pay such liquidation value to the dissenting financial creditor in kind, unless the latter accepts such form of payment. Various decisions on the process of interpretation have been referred on behalf of the objector bank including those in ***Sankalchand Himatlal Sheth*** (supra) and ***Rathi Khandsari Udyog and Ors. v. State of Uttar Pradesh and Ors.*****: (1985) 2 SCC 485.**

114.4. It is further submitted that in the resolution plan, the treatment of the dissenting financial creditors is inferior to the assenting financial creditors inasmuch as the latter is being provided an upfront payment of INR 300 crores, whereas the former is not provided with any cash at all. Such treatment defeats the purpose of Section 30(2)(b) of the Code, which has been amended to protect the interests of the dissenting financial creditors.

114.5. Yet further, it is submitted that the presumption of NBCC that the liquidation value towards the dissenting financial creditors shall be nil is baseless; and the treatment of dissenting financial creditors in the resolution plan is vague and incapable of precise valuation as it is based on speculation rather than current market figures.

114.6. While questioning the valuation suggested in the resolution plan, it is submitted that valuation of the land proposed to be transferred to the

Land Bank SPV is INR 5001 crores which is based on future potential. On the other hand, the valuations conducted by the IRP comes at INR 2509 crores and by the others equals to INR 3643 crores which is significantly less than the value arrived at by NBCC. The treatment under the plan also mentions that the land so transferred shall carry with it the liabilities attached and the dissenting financial creditor shall bear such uncertain and unquantified liabilities. This, it is submitted, raises a doubt as to whether this provision even satisfies the liquidation value payable to the dissenting financial creditors.

114.7. It is further submitted that the contention of NBCC, that the intent of the legislature while using the word “amount” cannot be restricted to only payment in cash, does not have any basis in law. ICICI Bank submits that even a look at the language of Section 8 of the Code makes it clear that when it comes to the requirement of payment in relation to corporate insolvency resolution, the same has to be in monetary terms. It is submitted that once the language of a statute is clear, the meaning of the provisions cannot be altered by judicial interpretation.

114.8. It is further submitted that the purpose of guaranteeing liquidation value to the dissenting financial creditors is to protect their interests so as to make sure that they are not in a worse position than they would have been in the event of liquidation but, the treatment provided in the resolution plan for dissenting financial creditors is done in a way that they get punished for their dissent.

114.9. It is further submitted that once the resolution plan is put forth before the Adjudicating Authority for its approval, judicial mind is applied to see as to whether such plan fulfils the mandatory requirements under the Code, which involves firstly, compliance with Section 30(2) of the Code; secondly, whether the plan is fair and equitable and balances the interests of all the stakeholders; and thirdly, whether the plan maximises the value of assets. Such approval of NCLT is never a formality, but a necessity. According to the objector bank, the Adjudicating Authority, while modifying the resolution plan, has made sure that the modifications do not alter the basic structure of the plan and hence, has not violated the principle of judicial review. Therefore, the contention that NCLT has acted beyond its jurisdiction and has overridden the commercial wisdom of CoC is incorrect.

114.10.It is also submitted that just because ICICI Bank has voted against the approval of both the resolution plans, it does not mean that the intention of the Bank would be the liquidation of the corporate debtor. Such contention of NBCC furthers its *mala fide* intentions and is placed only to undermine the dissentient bank.

The submissions so made on behalf of the dissenting financial creditor bank have also been supported by the erstwhile director of the corporate debtor JIL and JAL. It is submitted that the proposition in the resolution plan to satisfy the claim of the dissenting financial creditors in the form of share and equity or transfer of land parcels is not in conformity

with the requirements of Section 30(2)(b) of the Code. It is also submitted that proposing to satisfy the claim of the dissenting financial creditors by a mode other than monetary payment is tantamount to reading the word 'equivalent' in the relevant provision, which is entirely impermissible in law. The decision of this Court in the case of ***Dadi Jagannadham v. Jammulu Ramulu and Ors.*: (2001) 7 SCC 71**, has been referred. It is also submitted that reliance of NBCC on Regulation 37 of the CIRP Regulations, to justify the manner in which dissenting financial creditors are to be paid, is misplaced because instead of Regulation 37, the relevant provision which needs consideration is Regulation 38(1)(b), as it is directly related to Section 30(2)(b)(ii) of the Code. It is, therefore, maintained that the resolution plan, as regards prescription for the dissenting financial creditors, being violative of the requirements of law, could not have been approved.

Having examined the rival submissions with reference to the law applicable in relation to the treatment of the debt of dissenting financial creditor in CIRP under the Code, we find the objections taken by the dissenting financial creditor in the present case fully justified; and the interpretation suggested by the IRP, the resolution applicant and the assenting financial creditor cannot be accepted.

An overview of the Insolvency and Bankruptcy Code, 2016 gives the basic idea that even while the avowed objects of the Code are towards insolvency resolution in a time bound manner for maximisation of

value of assets of the corporate debtors and balance of interests of all the stakeholders, the core provisions of the Code, a comparatively new legislation, have already undergone several amendments from time to time. In fact, in ***Pioneer Urban*** (supra), this Court has recognised the legislature's right to experiment when coming to the economic legislation like the Code, while observing as under: -

> "***The Legislature's right to experiment in matters economic***
>
> 15**.** In *Swiss Ribbons*, this Court was at pains to point out, referring, inter alia, to various American decisions in paras 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgement in economic choices must be given a certain degree of deference by the courts. In para 120 of the said judgment, this Court held: (SCC p. 112)
>
> > "*120*. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both the code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."
>
> It is in this background that the constitutional challenge to the Amendment Act will have to be decided."

A few aspects of the vast variety of amendments to IBC have been noticed hereinbefore and are being dealt with in this judgment, to the extent relevant for the issues involved. One part of such amendments relates to Section 30, with which we are concerned in this point for determination. As noticed, the earlier clause (b) of sub-section (2) of Section 30 of the Code required that the resolution plan should provide for payment of debts of operational creditors, which should not be less than the amount to be paid to the operational creditors in the event of liquidation. The treatment of various classes of creditors in the scheme then existing had been a matter of debate at various levels and in several decisions. It acquired attention of the legislature that a balance was required to be brought about in treatment of different creditors and 'critical gaps' were noticed in the corporate insolvency framework, including those in the treatment of dissenting financial creditors. This led to the introduction of Bill No. XXVI of 2019, being the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, in the Rajya Sabha in July 2019. The Statement of Objects and Reasons for this Bill, giving a reasonable insight as to what was sought to be achieved, reads as under:

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"STATEMENT OF OBJECTS AND REASONS

The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all the stakeholders including alteration in the order or priority of

payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximization of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximization. **There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code.** Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorized representative.

In view of the aforesaid difficulties **and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend** certain provisions of the Insolvency and Bankruptcy Code. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019, *inter alia,* provides for the following, namely:-

(*a*) to amend clause (*26*) of section 5 of the Code so as to insert an *Explanation* in the definition of "resolution plan" to clarify that a resolution plan proposing the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger to enable the market to come up with dynamic resolution plans in the interest of value maximization;

(*b*) to amend sub-section (*4*) of section 7 of the Code to provide that if an application has not been admitted or rejected within fourteen days by the Adjudicating Authority, it shall provide the reasons in writing for the same;

(*c*) to amend sub-section (*3*) of section 12 of the Code to mandate that the insolvency resolution process of a corporate debtor shall not extend beyond three hundred and thirty days from the insolvency commencement date, which will include the time taken in legal proceedings, in order to prevent undue delays in the completion of the Corporate Insolvency Resolution Process. However, if the process, including time take in legal proceedings, is not completed within the said period of three hundred and thirty days, an order requiring the corporate debtor to be liquidated under clause (*a*) of sub-section (*1*) of section 33 shall be passed. It is clarified that the time taken for the completion of the corporate insolvency resolution process shall include the time taken in legal proceedings;

(*d*) to insert sub-section (*3A*) in section 25A of the Code to provide that an authorized representative under sub -section (*6A*) of section 21 will cast the vote for all 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, in order to facilitate decision making in the committee of creditors, especially when financial creditors are large and heterogeneous group;

(*e*) to amend sub-section (*2*) of section 30 of the Code to provide that –

(*i*) the operational creditors shall receive an amount that is not less than the liquidation value of their debt or the amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priorities in section 53 of the Code, whichever is higher;

(*ii*) the financial creditors who do not vote in favour of the resolution plan shall receive an amount that is not less than the liquidation value of their debt;

(*iii*) the provisions shall apply to the corporate insolvency resolution process of a corporate debtor-

(*A*) where a resolution plan has not been approved or rejected by the Adjudicating Authority; or

(*B*) an appeal is preferred under section 61 or 62 or such appeal is not time barred under any provision of law for the time being in force; or

(*C*) where a legal proceeding has been initiated in any court against the decisions of the Adjudicating Authority in respect of a resolution plan;

(*f*) to amend sub-section (*1*) of section 31 of the Code to clarify that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities;

(*g*) to amend sub-section (*2*) of section 33 of the Code to clarify that the committee of creditors may take the decision to liquidate the corporate debtor, in accordance with the requirements provided in sub-section (*2*) of section 33, any time after the constitution of the committee of creditors under sub-section (*1*) of section 21 until the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

4. The Bill seeks to achieve the above objectives."

(emphasis in bold supplied)

118.1. The aforesaid Bill ultimately took the shape of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, being Act 26 of 2019. This Amendment Act of 2019 not only provided that operational creditors would receive an amount that is not less than liquidation value of their debts or the amount that would have been received if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priorities in Section 53 but, in addition to that, this amendment ensured that the dissenting financial creditors would also be paid a certain minimum amount, which would not be less than the amount to be paid in the event of liquidation; and the *Explanation* clarified that the distribution in accordance with clause (b) would be fair and equitable to all the creditors. The purport and connotation of this amendment came to be tersely explained by this Court in the case of ***Essar Steel*** as under: -

> "128. When it comes to the validity of the substitution of Section 30(2)(*b*) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(*b*) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (*i*) and (*ii*) of sub-clause (*b*) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (*b*) which refers to dissentient financial creditors. Ms Madhavi Divan is correct in her argument that Section 30(2)(*b*) is **in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount**, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (*i*) and (*ii*) of clause (*b*), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have

been possible to have done this but **after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2)** . Ms Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(*b*) as amended. **Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors** in accordance with the provisions of the Code and the Regulations made thereunder.

As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment."

(emphasis in bold supplied)

118.2. As noticed, the decision of this Court in ***Essar Steel*** was delivered on 15.11.2019. A few days after this decision, i.e., on 28.11.2019, amendment was carried out in clause (1) of Regulation 38 of the CIRP Regulations, which has direct co-relation with the aforesaid amended clause (b) of Section 30(2) of the Code. By way of this amendment of Regulation 38(1), the priority for the amount payable came to be specified, not only to the operational creditors but also to the dissenting financial creditors over their assenting counterparts. The aforesaid amendments and the expositions of this Court in ***Essar Steel*** make it clear that the interests of dissenting financial creditors are duly taken care

of, while providing for the minimum amount they are entitled to and, for that matter, in priority over the assenting financial creditors.

118.3. Even when the legislature has filled in the gaps in IBC, particularly qua the dissenting financial creditors; and their interests are sought to be taken care of by making it mandatory to provide for the payment of their dues in terms of liquidation value, another grey area has surfaced in the present case. It is concerning the mode of translating such assured returns to reality. Putting it differently, there is no doubt that now the dissenting financial creditors shall get payment and that too, in priority over the assenting financial creditors but, the question remains about the mode of fulfilling such obligations towards dissentient financial creditors.

In the present case, the resolution plan has, in the first place, stated that according to the estimate of the resolution applicant, the liquidation value to be received by the dissenting financial creditors was likely to be nil but then, has provided for discharge of any likely obligation towards them in the manner that they shall be provided a proportionate share in the equity of Expressway SPV and land parcels but not any payment in terms of money. The dissenting financial creditor, ICICI Bank, is thoroughly dissatisfied with such a prescription whereby its dues shall be satisfied by a mode other than direct payment in cash. On the other hand, the IRP, the resolution applicant and even the assenting financial creditor would assert that such a prescription satisfies all the essential requirements of Section 30(2)(b) and Regulation 38(1)(b). Both these

provisions essentially use the expressions “payment”; “the amount to be paid”; “the amount payable”; and “shall be paid”. ICICI Bank asserts that these expressions refer only to the payment in monetary terms, whereas the submissions are countered with the assertions that the term “payment” is with reference to discharge of obligation and that could be brought about by any of the methods permissible in law and not necessarily by way of payment in terms of money alone. This takes us to the principles of interpretation and assigning appropriate meaning to the expressions used.

119.1. The principles in the decisions cited by the learned counsel for the contesting parties are not of much debate and hence, we need not elaborate on every cited decision. The contextual interpretation remains one of the fundamental guiding principles; and the relevant observations in paragraph 54 of the decision in ***Sankalchand Himatlal Sheth*** (supra), which have been referred to by the contesting parties, would suffice for the purpose, which read as under: -

> “54. Now, it is undoubtedly true that where the language of an enactment is plain and clear upon its face and by itself susceptible to only one meaning, then ordinarily that meaning would have to be given by the Court. In such a case the task of interpretation can hardly be said to arise. But language at best is an imperfect medium of expression and a variety of significations may often lie in a word or expression. It has, therefore, been said that the words of a statute must be understood in the sense which the legislature has in view and their meaning must be found not so much in a strictly grammatical or etymological propriety of language, nor in its popular use, as in the subject or the occasion on which they are used and the object to be attained. It was said by Mr. Justice Holmes in felicitous language in *Town* v. *Eisner* that “a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to

the circumstances and the time in which it is used". **The words used in a statute cannot be read in isolation: their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context.** And when I use the word 'context', I mean it in its widest sense "as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which – the statute was intended to remedy". **The context is of the greatest importance in the interpretation of the words used in a statute.** "It is quite true", pointed out Judge Learned Hand in *Helvering* v*. Gregory* "that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can every obviate recourse to the setting in which all appear, and which all collectively create". Again, it must be remembered that though the words used are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, be it a statute, or contract, or anything else, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that a statute always has some purpose or object to accomplish, whose sympathetic and imaginative discovery, is the surest guide to its meaning. The literal construction should not obsess the Court, because it has only prima facie preference, **the real object of interpretation being to find out the true intent of the law maker and that can be done only by reading the statute as an organic whole, with each part throwing light on the other and bearing in mind the rule in *Heydon's case* which requires four things to be "discerned and considered" in arriving at the real meaning : (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy.** There is also another rule of interpretation which is equally well settled and which seems to follow as a necessary corollary, namely, where the words, according to their literal meaning "produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification", the Court would be justified in "putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear". Vide *River Wear Commissioners* v*. Admson*. It is in the light of these principles of interpretation that I must proceed to consider what is the true meaning and effect of clause (1) of Article 222: whether it permits transfer of a Judge from one High Court to another, irrespective of his consent."

(emphasis in bold supplied)

119.2. There is no doubt on the principles that, depending upon context, the same word may be used in different parts of the statute with different meanings, as observed in ***Kolkata Metropolitan Development Authority*** (supra); and the same word in the context of one provision of the enactment may convey one meaning and another meaning in different context, as pointed out in ***Venkateswara Hatcheries*** (supra). However, it is also fundamental that construction of a statute leading to absurdity is required to be rejected and if more than one meaning or interpretation is possible, the one which favours the objects of the statute ought to be adopted. When it comes to the world of business and commerce, the observations of the majority in ***Rathi Khandsari Udyog*** (supra) are pertinent where, in paragraph 34 of the decision, this Court observed that in the legislations pertaining to the world of business and commerce, the dictionary to be referred to is the dictionary of the inhabitants of that world. It is also a settled principle of statutory interpretation that the statute is required to be read as a whole; and for that matter, it would be rather pre-elementary to say that for understanding the meaning and connotation of a particular expression in a particular statutory provision, the provision itself is required to be read as a whole. When we look at the 'context' for the purpose of a particular expression, which has otherwise not been defined in the statute elsewhere, a comprehension of the sentence or phrase in which the expression occurs coupled with the frame of the provision taken as a whole and, on the broad sphere, the

entire statute with its objects and intents would lead to the true construction of the expression under reference; of course, while also keeping in view the other relevant principles, including the basics that natural and ordinary meaning of a word or expression is not ignored, unless there be any reason therefor.

Keeping the principles aforesaid in view, we may embark upon the interpretation required in this case, of the expressions used in the relevant provisions of Section 30(2)(b) of the Code and Regulation 38(1)(b) of the CIRP Regulations.

The expression “payment” occurs in Section 30(2) of the Code, which lays down certain basics which the resolution professional has to find in the resolution plan before he presents the same to the Committee of Creditors. As per clauses (a) and (b) of sub-section (2) of Section 30, the resolution plan ought to provide for: (a) payment of insolvency resolution process costs; and (b) payment of debts of operational creditors as also dissenting financial creditors. Such payment has to be in the manner specified by the Board and the resolution process costs rank top in priority. This provision, read with Regulation 38(1), makes it clear that the next priority is of operational creditors who are followed by the dissenting financial creditors. The question is as to what is intended by these provisions and as to how the action of “payment” is to be performed?

120.2. The referred observations in the case of ***Pioneer Urban*** that the expression "payment" is elastic enough to include "recompense" and "repayment" had been with reference to following passages in the case of ***Ranjit Singh Rana*** (supra): -

> "13. *Webster Comprehensive Dictionary* (International Edn.) Vol. 2 defines "payment":
> *"Payment*.- (1) the act of paying.
> (2) Pay; requital; recompense."
> *The Law Lexicon* by P. Ramanatha Aiyar, 2nd Edn. Reprint, inter alia, states:
>
> "payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfaction of claim; recompense; the fulfilment of a promise or the performance of an agreement; the discharge in money of a sum due".
>
> The word "payment" may have different meaning in different context but in the context of Section 37(1)(*b*); it means extinguishment of the liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24-5-2001, the liability of post-award interest from 24-5-2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond 24-5-2001."

120.3. We need not enter into the other observations regarding the words "pay" and "payment", made in the context of different statutes and different provisions but, we may profitably look at the meaning assigned to these expressions in the relevant dictionaries and lexicons. In Black's Law Dictionary (Tenth Edition, page 1309), the verb "pay", which leads to the derivative "paid" is defined as follows: -

> "**Pay**, *vb.* (13c) **1.** To give money for a good or service that one buys; to make satisfaction <pay by credit card>. **2.** To transfer money that one owes to a person, company, etc. <pay the utility bill>. **3.** To give (someone) money for the job that he or she does; to compensate a person for his or her occupation; COMPENSATE

> <she gets paid twice a month>. **4.** To give (money) to someone because one has been ordered by a court to do so <pay the damages>. **5.** To be profitable; to bring in a return <the venture paid 9%>."

On the same page in Black's Law Dictionary (Tenth Edition, page 1309), the expression "payment" is defined in the following terms: -

> "**Payment.** (14c) **1.** Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation. **2.** The money or other valuable thing so delivered in satisfaction of an obligation."

120.4. In the Law Lexicon by P. Ramanatha Aiyar (Fifth Edition, Volume 3 at page 3796), several connotations of the expression "payment" have been mentioned. We may reproduce the relevant part thereof as under: -

> "Payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation, or duty; satisfaction of claim; recompense; the fulfilment of a promise or the performance of an agreement; the discharge in money of a sum due.
>
> In legal contemplation, payment is the discharge of an obligation by the delivery of money or its equivalent, and is generally made with the assent of both parties to the contract."

120.5. Significantly, the "payment", as envisaged by clause (b) of Section 30(2) as also Regulation 38(1), is of the "amount". The word "amount" in its noun form is defined in Webster's Third New International Dictionary (at page 72) in the parlance of accounting as under: -

> "**3** *accounting:* a principal sum and the interest on it"

Taking up the provisions under debate, it is but clear that as per sub-section (2) of Section 30, the resolution plan ought to provide for certain payments; and first of that is the insolvency resolution process costs. An action of "payment" being that of discharge of an obligation by delivery of money or other valuable thing accepted in discharge of

obligation, one could at once notice that proposing to pay the insolvency resolution process costs in any form other than money would be an exercise in absurdity. Such a payment has to be in terms of money alone. Then comes clause (b) whereby and whereunder, the resolution plan is to provide for payment of debts of operational creditors and the minimum quantum is specified in terms of 'amount to be paid' or 'amount that would have been paid' with reference to the event of liquidation and/or distribution in terms of Section 53 of the Code. Here again, if any proposition is suggested for payment of debts of operational creditors by way of something other than money, and that too in the form of equities in the other corporate entities to be carved out of the corporate debtor, that would not be shunning off the debts of operational creditors but would only be keeping them glued to the corporate debtor or its successor entities. Such a method of payment could least be a step towards insolvency resolution. The same features, with necessary variations, would apply to the second part of clause (b) of sub-section (2) of Section 30 in regard to the dissenting financial creditors. The operational creditors as also the dissenting financial creditors are to be paid in terms of the amount to be determined with reference to Section 53 of the Code and are to be paid in priority, as described in Regulation 38(1) of the CIRP Regulations.

121.1. Therefore, when, for the purpose of discharge of obligation mentioned in the second part of clause (b) of Section 30(2) of the Code,

the dissenting financial creditors are to be “paid” an “amount” quantified in terms of the “proceeds” of assets receivable under Section 53 of the Code; and the “amount payable” is to be “paid” in priority over their assenting counterparts, the statute is referring only to the sum of money and not anything else. In the frame and purport of the provision and also the scheme of the Code, the expression “payment” is clearly descriptive of the action of discharge of obligation and at the same time, is also prescriptive of the mode of undertaking such an action. And, that action could only be of handing over the quantum of money, or allowing the recovery of such money by enforcement of security interest, as per the entitlement of the dissenting financial creditor.

121.2. We would hasten to observe that in case a dissenting financial creditor is a secured creditor and a valid security interest is created in his favour and is existing, the entitlement of such a dissenting financial creditor to receive the “amount payable” could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. Obviously, by enforcing such a security interest, a dissenting financial creditor would receive “payment” to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code[83]. In any case, that is, whether by direct payment in cash or by allowing recovery of amount via the mode of enforcement of security interest, the dissenting financial

83 Though it is obvious, but is clarified to avoid any ambiguity, that the “security interest” referred herein for the purpose of money recovery by dissenting financial creditor would only be such security interest which is relatable to the “financial debt” and not to any other debt or claim.

creditor is entitled to receive the “amount payable” in monetary terms and not in any other term.

The indications as emerging from the text of other provisions as also from the scheme of the Code, are to the effect that the resolution applicant, with approval of resolution plan, is to proceed on a clean slate rather than carrying the cargo of such debts which need to be satisfied (to the extent required) and then jettisoned. The expressions “payment” and “amount to be paid”, when read in the context and on the canvass of the objects and purposes of the Code, in our view, these expressions only convey their ordinary meaning, as understood in ordinary business parlance, that is, delivery of money alone; and there is no reason to construe these expressions to be conveying the meaning of ‘delivery of money or its equivalent’.

A good length of arguments on behalf of IRP are devoted to the stand that, what CoC considers in sub-section (4) of Section 30 is the manner of distribution proposed; and such manner of distribution ought to be fair and equitable, as explained in *Explanation* 1 to clause (b) of Section 30(2). It is contended that if legislature intended the word “payment” to have a prescriptive meaning, that is, payment by way of payment of money only, there would have been no need to add

Explanation 1 to clause (b) which provides that distribution under clause to operational and dissenting financial creditors shall be fair and equitable because in such a case, the distribution would only mean a

crystallised sum of money with no room to test if distribution was fair and equitable. The argument is, again, of stretching the plain words beyond their real intent and meaning. The said *Explanation* is for removal of doubts and for clarification that distribution in terms of clause (b) shall be fair and equitable to the creditors covered thereunder that is, operational and dissenting financial creditors. This *Explanation* appears to have been necessitated for the reason that quantification of the minimum amount payable under clause (b) of Section 30(2) is in the realm of certain guesswork or estimate with reference to the distribution envisaged by Section 53 of the Code. This *Explanation* cannot and does not provide meaning to the expressions “payment” and “amount to be paid”. These and other arguments of similar nature, could only be rejected.

123.1. A submission made on behalf of IRP suggesting estoppel against the dissenting financial creditor for having not raised the issue in the meeting of the Committee of Creditors also remains baseless. This is for the simple reason that no estoppel could operate against the statutory right of the dissenting financial creditor to receive payment in terms of Section 30(2)(b) of the Code.

123.2. The submission that commercial banks are permitted by the Banking Regulations Act, 1949 to swap the debt for land and equity has its own shortcomings, rather shortfalls. The expressions “payment” and “amount to be paid” and “amount payable” as occurring in Section 30(2) and Regulation 38(1) cannot be interpreted only for the purpose of banks

as financial creditors; the provisions refer to “financial creditors” as such and it would be too far stretched to say that these expressions may have different meanings for different financial creditors in the manner that a financial creditor who could accept payment by any mode other than money could be “paid” by that mode and the other financial creditors who cannot accept anything except money shall be receiving payment in cash. This kind of interpretation would not only be reading words but even phrases and provisos in the statutory provisions, which is entirely impermissible.

123.3. Similarly, the suggestion that the Government and the Governmental bodies, which are not permitted by law to swap debt with equity or land will have to be paid by way of money and to that extent, the meaning of “payment” in the first part of clause (b) of Section 30(2) will have contextually different meaning, is, again, seeking to provide multiple sub-sects of the mode of payment, whereas no such differentiation or classification is indicated in the provisions under reference or in any other provision contained in the Code.

123.4. The suggestion about prejudice being caused to the assenting financial creditors by making payment to the dissenting one has several shortcomings. As noticeable, in the scheme of IBC, a resolution plan is taken as approved, only when voted in favour by a majority of not less than 66% of the voting share of CoC. Obviously, the dissenting sect stands at 34% or less of the voting share of CoC. Even when the financial

creditors having a say of not less than 2/3rd in the Committee of Creditors choose to sail with the resolution plan, the law provides a right to the remainder (who would be having not more than 34% of voting share) not to take this voyage but to disembark, while seeking payment of their outstanding dues. Even this disembarkment does not guarantee them the time value for money of the entire investment in the corporate debtor; what they get is only the liquidation value in terms of Section 53 of the Code. Of course, in the scheme of CIRP under the Code, the dissenting financial creditors get, whatever is available to them, in priority over their assenting counterparts. In the given scheme of the statutory provisions, there is no scope for comparing the treatment to be assigned to these two divergent sects of financial creditors. The submissions made on behalf of assenting financial creditors cannot be accepted.

123.5. The other submissions and counters with reference to the phraseology of Section 8 of the Code do not require much dilation because, the said provision essentially relates to the dues of an operational debtor and the steps envisaged before commencement of insolvency resolution process. Nevertheless, “payment” for the purpose of the said provision is also of money transfer; and not by any other mode.

To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section

could only be payment in terms of money and the financial creditor

who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of sub-clause of clause (b) of sub-section (2) of Section 30 (read with Section 53), in our view, the expression “payment” only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution. We are not commenting on the scenario if the dissenting financial creditor himself chooses to accept any other method of discharge of its payment obligation but as per the requirements of law, the resolution plan ought to carry the provision as aforesaid.

For what has been observed and held hereinabove, we have no hesitation in rejecting the contentions urged in challenge to that part of the decision of NCLT where the proposition in the resolution plan, concerning the method of meeting with the liability towards dissenting financial creditors, has been disapproved. That part of the decision of NCLT is unexceptionable and is approved.

However, as noticed, after disapproving the terms of the resolution plan concerning dissenting financial creditors, the Adjudicating Authority proceeded on the assumption that the offending terms could be modified without changing the basic structure of the plan; and then proceeded to make such modifications by providing that payment shall be made to the dissenting financial creditor bank in instalments. The question is as to whether the Adjudicating Authority could have done so? The answer is simply in the negative.

As noticed and held in Point **A** (supra), the Adjudicating Authority has no jurisdiction to enter into the commercial aspects of the resolution plan and to interfere with the wisdom of the Committee of Creditors. The terms as provided in the resolution plan for discharging the obligations towards the dissenting financial creditors were clearly and directly pertaining to the financial model proposed by the resolution applicant and accepted by the requisite majority of the Committee of Creditors. The submissions made on behalf of the IRP in this regard are correct that if the Adjudicating Authority was of the view that the plan did not meet with any particular requirement, it could have only sent it back to the CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same.

In other words, the Adjudicating Authority, of its own, could not have made any modification in the resolution plan, particularly on any

commercial aspect thereof. The suggestions that in carrying out the requisite modifications by the Adjudicating Authority, the basic structure of the resolution plan is not altered do not merit acceptance, particularly because the terms taken up for modification by the Adjudicating Authority belong to the thick of commercial aspects of the resolution plan; and any alteration thereof goes to the very root of the financial model propounded by the plan.

The upshot of the discussion foregoing is that though the Adjudicating Authority has not erred in disapproving the treatment of dissenting financial creditor like ICICI Bank in the resolution plan but, has erred in modifying the terms of the resolution plan and in not sending the matter back to the Committee of Creditors for reconsideration while extending an opportunity to the resolution applicant to make the necessary modifications.

For what has been discussed and held hereinabove, we see no reason to enter into the other area of suggestions and disputes concerning the particular parcels of land being offered by the resolution applicant to the objector bank. These aspects are rendered redundant once we have held that the payment envisaged by Section 30(2)(b) read with Section 53 of the Code has to be in monetary terms and not in any other mode.

Point E

Matters related with fixed deposit holders

As regards payment to the fixed deposit holders, it is noticed that the resolution plan has provided for 100% upfront payment to the fixed deposit holders whose claims were forming part of the admitted financial debt in the following terms (Schedule 2 to the plan relating to the steps for implementation): -

> "**VIII. STEP 7: PAYMENT TO FD HOLDERS**
>
> Following the Approval Date, the Admitted Financial Debt of the FD Holders shall be settled by making 100% upfront payment of their principal dues within 90 days from the Approval Date but after payment of the CIRP Cost and the Admitted Operational Debt.
>
> It is clarified that other than the Claims of FD Holders forming part of the Admitted Financial Debt, no other payment shall be made to any other FD Holder."

It is also noticed from the minutes of CoC meeting dated 07.12.2019 that the authorised representative of the fixed deposit holders made the submissions for honouring the claims received until the date of approval of the resolution plan, which was recorded as under: -

> "**Payment to FD Holders**: Authorised Representative ("AR") of Fixed Deposit ("FD") holders submitted to CoC that FD claims have increased to INR 29 Crores as per the latest CoC reconstitution dated 30.11.2019 and both the Resolution Applicants have fixed the amount to FD holders at INR 28 Crores which shall be paid on pro rata basis, therefore the principal amount to FD holders shall be reduced proportionately. AR of FD holders requested CoC that all the claims received from FD holders till the Resolution Plan approval date should be honored by the Resolution Applicants to avoid any sort of litigation by FD holders."

However, the NCLT, in paragraph 125 of its order has proceeded to modify the said term of the resolution plan as approved by CoC and has provided that the resolution applicant shall make provision to clear even the dues of unclaimed fixed deposit holders when they would make

a claim and such a right will remain in force as long as they were entitled to make a claim under the Companies Act, 2013.

The aforesaid modification of the terms of resolution plan has been challenged by NBCC with the submissions that such directions of the Adjudicating Authority are wholly unjustified and are beyond the mandate of this Court in ***Essar Steel*** (supra). In our view, the submissions of NBCC deserve to be accepted.

In the scheme of the process for corporate insolvency resolution, it is preliminarily provided in Section 13 of the Code that, after admission of an application for corporate insolvency resolution process, the Adjudicating Authority, apart from declaring moratorium and appointing an interim resolution professional, is also required to cause a public announcement of the initiation of CIRP and '*call for submission of claims under Section 15*'. As per Section 15, the material information in the public announcement is to contain, *inter alia, 'the last date for submission of claims, as may be specified'*. The IRP is enjoined with several duties under Section 18 and as per clause (b) thereof, he is to '*receive and collate all the claims submitted by the creditors to him, pursuant to the public announcement made under sections 13 and 15'.* CIRP Regulations make the position clearer still, where, by virtue of Regulation 12, a creditor is required to submit his claim with proof '*on or before the last date mentioned in the public announcement*'; and a creditor who fails to submit the claim within the stipulated time, may yet submit the claim with

proof *'on or before the ninetieth day of the insolvency commencement date'*. As per Regulation 13, the resolution professional concerned is to verify the claims within seven days of the last date of receipt of claims.

135.1. Due adherence to the timelines provided in the Code and the related Regulations and punctual compliance of the requirements is fundamental to the entire process of resolution; and if a claim is not made within the stipulated time, the same cannot become a part of the Information Memorandum to be prepared by IRP and obviously, it would not enter into consideration of the resolution applicant as also of the Committee of Creditors. In the very scheme of the corporate insolvency resolution process, a resolution applicant cannot be expected to make a provision in relation to any creditor or depositor who has failed to make a claim within the time stipulated and the extended time as permitted by Regulation 12. In ***Essar Steel*** (supra), while dealing with the topic *'Extinguishment of Personal Guarantees and Undecided Claims'*, this Court disapproved that part of the NCLT judgment which held that other claims, that might exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal, could be decided in an appropriate forum in terms of Section 60(6) of the Code. This Court specifically held that a resolution applicant cannot be made to suddenly encounter undecided claims after resolution plan submitted by him has been accepted; and in the scheme of the Code, all claims must be submitted to, and decided by, the resolution

professional so that the resolution applicant could proceed on a fresh plate. This Court, *inter alia*, held as under: -

> "107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

135.2. It has not been the case of anyone that in the process in question, any of the requirements of Sections 13, 15 and 18 had not been complied with. It has also not been anybody's case that any claim made by any fixed deposit holder within the stipulated time was not taken into account by IRP.

In the given fact situation and in view of the law declared by this Court, we find no justification for the directions contained in paragraph of the order passed by NCLT. Those directions are required to be annulled.

Point F

Objections of the financial creditor of subsidiary of the corporate debtor

Indisputably, the corporate debtor JIL owns 100% equity shareholding in JHL which is having three operational hospitals in the State of Uttar Pradesh. Substantial part of the shareholding of JHL is pledged with its lenders. In the resolution plan, NBCC has proposed in regard to JHL as follows: -

> "Since, majority of shareholding of Jaypee Healthcare Limited is already pledged to the lenders to the hospitals to secure the indebtedness of Jaypee Healthcare Limited, it is proposed to divest the entire shareholding of Jaypee Healthcare Limited by inviting bids for the same and utilize the divestment funds for settlement of outstanding debt obligations of Jaypee Healthcare Limited, without any additional payment by the Corporate Debtor. In this regard, the pledge over shareholding of JIL (shares of Jaypee Healthcare Limited held by JIL) created in favour of the lenders of Jaypee Healthcare Limited shall stand released in terms of this Resolution Plan immediately upon the approval of this Resolution Plan by the Adjudicating Authority. Such release would *inter alia* be in consideration of the proposed repayment of the outstanding debt of the lenders of Jaypee Healthcare Limited. Such repayment would not include levy of any penalties or charges including prepayment penalty, penal charges, etc. In furtherance of the aforesaid objective the lenders of Jaypee Healthcare Limited shall not be entitled to deal with the assets of Jaypee Healthcare Limited or adversely interfere with the continued business operations of Jaypee Healthcare Limited in any manner whatsoever including enforcement of any security created in their favour by the Corporate Debtor or by Jaypee Healthcare Limited (pledge, mortgage, etc.), entering into operation and maintenance agreements or any other agreements with any person which has an effect of selling, leasing or otherwise disposing off the whole or substantially the whole of the undertaking of Jaypee Healthcare Limited, take any action which would otherwise require the consent of the shareholders of Jaypee Healthcare Limited or take any other steps which may be contrary to the treatment proposed for Jaypee Healthcare Limited under this Resolution Plan.
>
> Further, the Resolution Applicant also reserves its right to cause the Corporate Debtor to transfer its entire shareholding in Jaypee Healthcare Limited into a trust. Such trust would be settled by the Corporate Debtor, the beneficiary of the trust would be the Resolution Applicant and the trustee would be a professional entity (to be appointed by the Resolution Applicant). The trust property would comprise *inter alia* of the entire shareholding of the Corporate Debtor in Jaypee Healthcare Limited."

The objector YES Bank Limited, as being the financial creditor of JHL, had raised objections as regards such stipulations and proposals while asserting that the assets of its debtor JHL could not have been dealt with in this resolution plan. The Adjudicating Authority, though took up such objections for consideration but observed that the resolution applicant NBCC and YES Bank having agreed for constitution of a committee to deal with the shares and assets of the subsidiary company, this issue was not required to be discussed.

The objector YES Bank has taken exception to the aforesaid part of the order impugned with the submissions that no such settlement was drawn out with NBCC and the Adjudicating Authority has failed to consider the objections on rather incorrect assumptions. It is submitted that the resolution plan interferes with the statutorily protected rights of the lenders of JHL, who are effectively the third parties and not the members of CoC of JIL. It is also submitted that the transfer of the entire undertaking and business of JHL, a wholly-owned subsidiary of JIL, under the garb of sale of equity is not permissible as per the Section 18(f) read with its *Explanation* (b) and Regulation 37(a) of the CIRP Regulations whereby, the resolution plan is only limited to the assets of the corporate debtor. With reference to various decisions, including that in the case of

***Vodafone International Holdings BV v. Union of India and Anr.*:**
(2012) 6 SCC 613, it is submitted that holding company does not own the undertaking or business of subsidiary company even if it holds all the

shares therein. It is also contended that the CIRP of JHL must be independently conducted as the sale of business or undertaking in the manner suggested by NBCC severely prejudices the rights of the creditors of JHL to recover their legitimate dues. It is yet further submitted that the shares of JIL, the corporate debtor, are subject to the pledge created by them to secure the debts of JHL and the resolution plan cannot unilaterally extinguish the security interest provided to the lenders of JHL, who are not the creditors of JIL and therefore, not the part of the CoC of JIL. This objector bank submits that the resolution plan does not account for the total debts incurred by JHL and the securities or encumbrances, to the extent of 63.65% of the shares, as created by JHL over its assets. It has, therefore, been prayed that this objector bank be allowed to continue with its appeal before the Allahabad Bench of NCLT against JHL and the portion of resolution plan dealing with JHL and its assets be deleted.

139.1. It is noticed that without prejudice to the aforesaid and other submissions, the objector YES Bank has given out its proposition for evolving a workable mechanism with certain stipulations in sub-paragraphs “ff” and “gg” of paragraph 7 of the memo of appeal, which read as under: -

> “ff. Without prejudice to any of the above and the following legal grounds raised in the present proceedings, the Appellant in the best interest of all the interested parties including the interests of the Resolution Applicant and in spirit of reconciliatory approach is still willing to work with the Resolution Applicant in finding a working solution so that JHL assets can be monetized in a timely manner. Provided, the Respondent No. 2 / Resolution Applicant is

willing to accept the proposals and the safeguards as requested by the Appellant. For brevity's sake, the Appellant's proposal for a workable mechanism is set out in the Written Submissions filed before the Ld. Adjudicating Authority, which is reiterated below:

The lenders of JHL led by YBL will take all necessary preparatory measures required for finding a viable buyer to take over the JHL units in a completely transparent manner.

To the above cause, JHL lenders shall be permitted to prepare an information memorandum, seek bids from prospective buyers, appoint independent, impartial and reputed investment bankers to run the process of JHL monetisation.

This is proposed to be done through fullest co-operation from RP of JIL as well as Board and Management of JHL as information and engagement will be critical to run an efficient and effective sale process.

JHL lenders shall liaise with the IRP, Mr. Jain and share the status of the steps periodically with IRP and NBCC.

A Sale Committee to bet set up with participation of lenders of JHL and NBCC, for sale of JHL;

The decision to accept the bid of a particular buyer shall be taken by a unanimous vote of NBCC and YBL (on behalf of the lenders of JHL);

The sale process shall be finalised within a period on 3 months from the date of approval of the resolution plan by Hon'ble NCLT and latest by June 30, 2020 and until such time rights of lenders of JHL vis-à-vis assets of JHL as well as pledge of JHL Shares (held by JIL as investment) in favour of JHL lenders shall be kept intact;

In the event of successful disinvestment of JHL, the disinvestment funds shall be utilized for settlement of debt of JHL lenders in priority, in accordance with existing Resolution Plan;

During the period above, until June 30, 2020, there shall be a moratorium on the rights of the JHL lenders to enforce its securities held in JHL including the share pledge by JIL;

Should the sale still not be finalised before June 30,2020, for any reason whatsoever (including any delay due to legal proceedings), then the moratorium over enforcement of pledged shares as well as other assets of JHL, shall stand lifted; and

Thereafter, JHL lenders will have all rights to enforce its securities against JHL to recover its outstanding dues including but not limited to enforcement of pledge, and, or continuation of CIRP against JHL.

> gg. If the Respondent No. 2 is agreeable to accept the above mechanism then the Appellant shall not press its remedies for challenging the Resolution Plan. Failing which the entire Resolution Plan insofar as it relates to JHL Assets is required to be severed and set aside."

In response, it is submitted that as a resolution applicant, NBCC is entitled to get the management of the corporate debtor on a clean slate (as observed by this Court in the case of ***Essar Steel***); and when NBCC under its plan is extinguishing all the contingent liabilities, disinvestment of JHL shares cannot be taken exception of. It has also been submitted that in the resolution plan, it was made clear that NBCC does not possess the expertise to run the operation of a healthcare business and, therefore, seeks to divest the entire shareholding of JHL to a third party and/or a trust who would have the requisite expertise to deal with the requirements of healthcare business. It is also submitted, with reference to Section 18(f)(v) of the Code, that the assets of the corporate debtor include securities and shares held in any subsidiary; and shares of a subsidiary company are held as the assets of the parent company in its books, as held by this Court in the case of ***Vodafone*** (supra).

140.1. Apart from the above, NBCC has referred to the proceedings before the Adjudicating Authority before passing of the order dated 03.03.2020 and it is pointed out that the Adjudicating Authority, in its order dated 04.02.2020 observed that a settlement may be reached between NBCC and YES Bank and pursuant thereto, YES Bank and NBCC held a meeting on 06.02.2020 to discuss the mechanism for sale of shares of JHL and thereafter, on 07.02.2020, a proposal for sale of shares of JHL

was given by YES Bank to which NBCC, in its email dated 14.02.2020 stated that *"NBCC is agreeable for constitution of a committee which will take forward the disinvestment process of JHL after approval of the resolution plan as submitted by NBCC."* Thus, according to NBCC, there has been an agreement between the parties on the manner of sale to be carried out of JHL shares. This apart, NBCC has also referred to the aforesaid proposal stated in the memo of appeal and while reproducing the first part of the above-quoted paragraph "gg", has stated its acceptance of the proposal so made by YES Bank subject to the approval of resolution plan.

We have carefully examined the submissions made by the parties. In the totality of circumstances of the case and the stance of respective parties, when it is noticed that the aforesaid proposal of YES Bank, as stated in sub-paragraphs "ff" and "gg" of paragraph 7 of the memo of appeal, is acceptable to NBCC, subject to approval of the resolution plan, we do not find any reason to say anything further on this score and would leave the parties to work out a viable solution in the best interest of all the stakeholders; and for that purpose, the parties concerned, if necessary, may seek appropriate orders from NCLT, as regards mode and modalities of the process to be carried out.

In view of the above, we do not consider it necessary to render any other finding in this point for determination except the observation that the resolution plan essentially deals with the assets of the corporate

debtor JIL and not that of its subsidiary JHL. Differently put, what the resolution plan deals with are the shares in JHL, which are regarded as assets of the corporate debtor JIL. As observed, no further comments are required and we leave this aspect of the matter at that only.

Point G

Grievance of agreement holders

As regards certain transfers without proper agreement/sub-lease deed and without consideration, the resolution applicant had reserved a right in itself to cancel such instruments or term sheets without any corresponding obligation to the counter party in the following terms (Clause 21 Schedule 3 of the resolution plan): -

> "21. With respect to any alleged transfer of land parcels by the Corporate Debtor to third parties without any proper agreement/sub-lease deeds and where the consideration amount has not been paid to the Corporate Debtor *inter alia* including the land parcels listed in **Annexure G**, the Resolution Applicant reserve a right to cancel such instruments/agreements/term sheets and upon cancellation the title in such land parcels will continue to be legally vested in the Corporate Debtor without any liability/obligation to the counter-party."

The NCLT has observed that when an agreement is invalid and consideration has not been paid, no separate stipulation is required to be made that such agreement could be cancelled. However, at the same time, NCLT has also observed that even though such a clause has been mentioned in the resolution plan, that did not mean that the agreement holders have lost their right to seek remedy before the competent forum.

The agreement holders, while questioning this part of the resolution plan in their appeal, have given the details of five term

sheets/agreements with the corporate debtor between 01.05.2017 to 08.08.2017 i.e., before the date of initiation of CIRP (09.08.2017). It is submitted that those term sheets were rectified by CoC in its meetings dated 10.11.2017 and 28.11.2017 and upon assurances of IRP for external development and providing of other services, the appellants had made further part payment, in addition to the amounts already paid. It is further submitted that the resolution plan is contrary to Section 30(2)(e) of IBC as the term sheets/agreements were found valid during the CIRP by the CoC and they cannot become improper agreements overnight on the mere saying of the resolution applicant. The grievance of the appellants is that even after holding that the appellants have not lost their right to seek remedy before a competent forum, the questioned Clause 21 (in 'reliefs and concessions') of the resolution plan was not modified by NCLT. According to the appellants, the approved resolution plan carrying such a clause purports to take away their rights without due process of law in contravention of Article 300-A of the Constitution of India and hence, is violative of Section 30(2)(e) of IBC. The appellants also submit that the Development Plan of the concerned area has not yet been renewed by the Noida Authority and the status of the development is also uncertain.

145.1. With these submissions, the appellants have stated their prayer in the manner that they are willing to pay the balance amount within 1 year in respect of the property at C-1/E, Sector 133 Noida, which is in their possession and to cancel the other 4 term sheets/agreements relating to

the land at Sector 151 Noida with adjustment of the payments made therein towards the property at Sector 133 Noida; and to execute the sale deed and get the master plan sanctions for the next 5 years. Alternatively, the appellants pray for the refund of the amount deposited by them, to the tune of INR 24.03 crores approximately, with appropriate interest.

Per contra, NBCC maintains that the resolution plan as approved by CoC and the Adjudicating Authority is binding on all the stakeholders including the appellants and in any case, the relief in question, as provided in the resolution plan, is limited to such instances where no proper agreements/sub-lease deeds have been executed by the corporate debtor with counter parties and therefore, Article 300-A of the Constitution is not violated and the relief provided in the resolution plan is not arbitrary or unfair. It is also submitted by NBCC that while dealing with the segment of 'reliefs and concessions', the Adjudicating Authority has not passed any favourable order in regard to the said relief; and even while granting the right to NBCC to cancel the agreement, has kept intact the right of an affected party to seek remedy in a competent forum.

In our view, looking to the nature of dealings and the propositions advanced by agreement holders, the observations made by the Adjudicating Authority, in addendum to Clause 21 of 'reliefs and concessions' in the resolution plan but, without encroaching upon the commercial wisdom of CoC, only work towards viability of the plan while extending a fair treatment to the agreement holders, by keeping their right

to seek remedy in a competent forum intact. The resolution applicant, NBCC, also does not appear to be having any qualms about it.

Thus, in the overall scheme of the resolution plan, the stipulation in question cannot be said to be unfair; and the observations of the Adjudicating Authority in paragraphs 132 and 133 of the impugned order dated 03.03.2020 remain just and proper. No further orders are required in this regard. This point stands determined accordingly.

Point H

Grievance of minority shareholders

The other set of objectors is of the non-promoter shareholders of the corporate debtor, who are also referred to as the minority shareholders. Their grievance is that the resolution plan does not deal with their interests and they have not been provided with a fair exit option. It is submitted that such non-promoter shareholders have invested their hard-earned money in the equity of the corporate debtor much before initiation of CIRP; that they had made the investment on the basis of the financial statements filed by the corporate debtor, suggesting the valuation of various assets including the Expressway and other land parcels; and the corporate debtor has adequate and appreciating assets

to take care of all the liabilities and interests of the stakeholders.

These shareholders have referred to a valuation report, said to have been prepared by India Infrastructure Finance Co. Ltd., on 31.03.2017 suggesting that even after accounting for liabilities, net worth

of the corporate debtor was about INR 7,377 crores. It is submitted that the IRP itself had valued the corporate debtor at INR 8,257 crores but NBCC is attempting to acquire the company for a meagre sum of INR 120 crores and extinguishing the entire public shareholding of the corporate debtor by paying a sum of INR 1 crore in total, as against the fair value per share at INR 56.68; and the offer of NBCC is unconscionable, is against the principles of proportionality, results in misappropriation of funds of these shareholders, and is being used as a device to enrich the resolution applicant at the cost of stakeholders.

150.1. It is also submitted that the plan is in contravention of Section 230 of the Companies Act, 2013, which provides for the power to compromise or make arrangements with any creditor or member of a company; that the minority shareholders, even if not a part of the CoC, have a right to know and participate in any compromise or arrangement which affects their rights; that they have a right to dissent with any terms of the compromise or arrangement which affects their rights and for that matter, they would be deemed to be dissenting shareholders, who need to be provided a reasonable exit option or opportunity. It is further submitted, while referring to the decision in ***Essar Steel*** (supra), that the ultimate decision of what amount to pay may rest with the CoC, but the decision should be made by taking into account the maximum value of the assets of the corporate debtor and after adequately balancing the interests of all stakeholders including operational creditors.

150.2. These minority shareholders further contend that when the intent of the IBC is to keep the corporate debtor as a going concern, the action of delisting the public shareholding of the corporate debtor totally defeats the objective. It is also submitted that the resolution plan has not been formulated in accordance with the procedure envisaged by the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009[84] which require that an exit opportunity ought to be provided for de-listing of shares from the stock exchange.

150.3. It is submitted that though the said shareholders were not part of CoC and did not get the opportunity to attend the meetings of CoC, they made all efforts to voice their concerns and even got issued the notice dated 19.02.2020 to IRP and the resolution applicant but the notice failed to evoke any response. According to these objectors, the resolution plan, as approved by the NCLT, is not in accord with Regulation 38(1A) of the CIRP Regulations and is contrary to the intent of IBC inasmuch as it has failed to maximise the value of assets of corporate debtor and to protect the interests of all the stakeholders. It is also contended that the interests of all the stakeholders ought to have been protected but the Adjudicating Authority has not even considered the matter relating to the interests of the minority shareholders.

150.4. With the aforesaid submissions, it has been prayed that appropriate orders are required to safeguard the interests of minority shareholders and the respondents deserve to be directed to device a reasonable exit scheme for them whereby, they are given a price at least

84 Hereinafter also referred to as 'Delisting Regulations'.

as per the book value of shares at the time of initiation of CIRP or an order be issued to swap the shares of existing minority shareholders with the shares of NBCC.

The contentions so urged are opposed by NBCC with the submission that these shareholders have, for the first time, approached in appeal though they were aware of the proceeding before the Adjudicating Authority, as is evidenced by the letter sent by their advocate on 19.02.2020; and the issue has been raised at this stage only to create unnecessary hindrances and to cause prejudice to the entire process.

As regards fairness of the treatment given to the minority shareholders, it is submitted that the resolution plan provides an exit option to the existing public shareholders at a price which is higher than the liquidation value; and they are being paid an exit price of INR 1 crore, which is in contrast to the treatment being accorded to promoter shareholders, whose shareholding is being extinguished and cancelled in its entirety without any consideration.

It is submitted that the liquidation value as determined by the valuers appointed by the IRP under the Code is approximately INR 17,876 crores (as per RBSA) and INR 17,658 crores (as per GAA), whereas the total debt owed to financial creditors is approximately INR 23,247 crores. In the aforesaid scenario, according to NBCC, where the minority shareholders are not entitled to any value, the resolution plan, with offer of exit at a price of INR 1 crore, is neither unfair nor arbitrary.

151.3. It has further been submitted that in the scheme of IBC, specific and novel method of insolvency resolution is provided wherein, by way of amendment brought about by Act 26 of 2018 w.e.f. 06.06.2018, the *Explanation* to Section 30(2)(e) has been inserted, providing for deemed approval of shareholders and, therefore, the submissions on behalf of the minority shareholders do not deserve consideration.

Having given anxious consideration to the rival submissions, we are clearly of the view that objections sought to be taken by the minority shareholders must fail.

It is noticed from the resolution plan that the Delisting Regulations, as amended on 31.05.2018, have been duly taken note of; and the step for delisting and extinguishment of existing shareholding is provided in Schedule 2 thereof, in the following terms: -

> **"IX. STEP 8: DELISTING AND EXTINGUISHMENT OF EXISTING SHAREHOLDING**
>
> As an integral part of the Resolution Plan, post implementation of Step 1, the shares of the Corporate Debtor shall be de-listed, in terms of SEBI (Delisting of Equity Shares) Regulations, 2009. ("**Delisting Regulations**"), as amended by Amendment to Delisting Regulations dated May 31, 2018, which prescribes that the procedure under the Delisting Regulations are not applicable for any delisting pursuant to an approved resolution plan under the Code, if:
>
> the resolution plan sets out a specific delisting procedure; ***or***
>
> the resolution plan provides an exit option to existing public shareholders at a price which is higher of the liquidation value (as applied in the order of priority of claims prescribed under Section 53 of IBC) and the exit price being paid to the promoters.
>
> In this regard, the Non-Promoter Shareholders (i.e. the public shareholders) shall be paid an exit price aggregating to INR 1 Cr and pursuant to the same, their shareholding shall be extinguished.
>
> In terms of the definition of Public Shareholders under the Delisting Regulations, Existing Promoters are specifically carved

out. Accordingly, simultaneous to the de -listing, the issued equity share capital of the Corporate Debtor as held by the Existing Promoters i.e. 84.70 Cr equity shares of face value of INR 10 (Rupees Ten each) shall be extinguished and cancelled in its entirety without any consideration.

Extinguishment of shares of Corporate Debtor may be done through Capital Reduction or selective Capital Reduction.

Extinguishment of shares of Corporate Debtor may be done through credit to Capital Reserve Account.

The equity shareholding of the Corporate Debtor post De-listing and Capital Reduction shall be as follows:

Category of shareholder	**% of Equity Shareholding**
NBCC SPV (New Promoter)	100%
Existing Promoters	Nil
Non-Promoter Shareholder (public shareholder)	Nil
Total Issued, subscribed and Paid up equity Capital	**100.00%"**

It cannot be said that the resolution plan is not compliant with the requirements of Regulation 38(1A) of the CIRP Regulations.

153.1. As noticed, by way of *Explanation* to Section 30(2)(e) of the Code, it has been made clear by the legislature that if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law. The attempt on the part of minority shareholders to raise objection against the resolution plan simply flies in the face of this *Explanation* to Section 30(2)(e) of the Code.

153.2. Needless to reiterate that in the scheme of IBC, only the CoC is entrusted with the task of dealing with and approving the plan of

insolvency resolution; and the shareholders of a corporate debtor, who is already reeling under debts, have not been provided any participation in the insolvency resolution process. It goes without saying that in the case of a corporate debtor like JIL, if the process of liquidation is resorted to under Chapter III of the Code, there is a very little likelihood of the shareholders getting even dewdrops out of the waterfall of distribution of assets, as delineated in Section 53 of the Code, where the preference shareholders and equity shareholders stand last in the order of priority. In the totality of circumstances, when the promoters' shareholding is extinguished and cancelled in toto without any consideration, even nominal exit price of INR 1 crore for minority shareholders cannot be termed as unfair or inequitable. In any case, a decision in regard to the aforesaid step in the resolution plan had been that of the commercial wisdom of the Committee of Creditors and is not amenable to judicial review.

153.3. Reference to Section 230 of the Companies Act, 2013, which deals with power to compromise or make arrangements with creditors and members is entirely inapt in the context of the present case because no such proceedings for compromise or arrangements are in contemplation. On the contrary, in the present case, the proceedings of CIRP under the Code have reached an advanced stage with approval of resolution plan by the CoC and the Adjudicating Authority.

153.4. Apart from the above, NBCC also appears right in contending that once the resolution plan stands approved by the Adjudicating Authority,

the objecting shareholders, who did not even raise any grievance before the Adjudicating Authority, cannot now, for the first time, object to the arrangement arrived under the resolution plan, in view of Section 31 read with Section 238 of the Code which provide that the approved resolution plan shall be binding on all stakeholders and that the provisions of IBC shall prevail not only over the laws but also the instruments having effect by virtue of any such law.

Viewed from any angle, in our view, it cannot be said that the resolution plan does not adequately deal with the interests of minority shareholders. The grievances as suggested by these shareholders cannot be recognised as legal grievances; and do not provide them any cause of action to maintain their objections. The objections by the minority shareholders stand rejected.

Point I

Matters related with dissatisfied homebuyers of JIL

We may now take up the issues raised by a section of homebuyers of JIL against the resolution plan of NBCC. For dealing with this segment of disputes, a bit of prelude concerning the status and position of homebuyers in CIRP shall be apposite.

Not much of discussion is required to notice that the largest block of stakeholders, who are likely to bear the brunt in the event of liquidation of JIL and conversely, who are likely to find succor in case of resolution of insolvency of JIL, is that of the homebuyers, who have invested their hard-earned money in the projects of JIL. In the first two rounds of

litigation, they had been the focal point of consideration where this Court invoked its powers under Article 142 of the Constitution of India to ensure that the insolvency resolution process of JIL is taken ahead within the discipline of IBC while obviating the likelihood of liquidation. As narrated in sufficient detail hereinbefore, during the pendency of the case of ***Chitra Sharma***, by the amendment of IBC with insertion of *Explanation* to Section 5(8)(f), the doubts about the status of homebuyers got clarified and, for being duly recognised as financial creditors of the corporate debtor, the homebuyers got their say in the Committee of Creditors. In fact, such an amendment and inclusion of homebuyers in the Committee of Creditors had far-reaching and ground-breaking effects in the present case for the reason that the homebuyers, as a class, acquired a dominant status in the Committee of Creditors, with more than half of the voting share with them. Obviously, no effective decision of the Committee of Creditors could have been taken without the involvement and assent of the homebuyers. As noticed, the resolution plan in question had been approved by CoC of JIL with more than 97% of the voting share in its favour. In this voting, the homebuyers had the voting share of more than 57%. It goes without saying that if the homebuyers were not to vote for this plan, the same would have not seen its approval with minimum 66% of the voting share of financial creditors, as required by the Code. The other plan of Suraksha Realty got less than 3% votes. If both the plans were unable to muster the requisite (not less than 66%) voting share, the

only consequence would have been liquidation of JIL, which every stakeholder wanted to avoid.

In the process envisaged by the Code, where the CoC may approve a resolution plan by a vote of not less than 66% of voting share, there remains an obvious possibility of some of the financial creditors not voting for approval of the plan but by the very nature of process, they would be having the voting share of not more than 34% and could be conveniently described as 'dissenting financial creditors'. The resolution plan is required to carry specific provision for payment of debts of such dissenting financial creditors, more particularly in view of the requirements of the second part of Section 30(2)(b) of the Code. All the features related with such provisions and their operation have been examined in Point **D** (supra) concerning the dissenting financial creditor, who has indeed not voted in favour of the plan in question.

The relevant aspect for the present point for determination is that apart from such dissenting financial creditors, a few of the associations of homebuyers and some of the individual homebuyers carry their own grievances against the resolution plan and seek to submit that their interests have not been safeguarded and they are being denied of their legal rights. These dissatisfied associations and individual homebuyers seek to contend that the resolution plan is lacking in various requisite arrangements; is violative of the CIRP Regulations; and is also violative of the provisions of RERA and therefore, it could not have been approved.

One block of such objectors is rather differently dissatisfied for the reason that according to them, the housing projects which have been completed or are nearing completion ought to be kept out of the purview of this plan of resolution. In counter, it is contended on behalf of the resolution applicant that these dissatisfied homebuyers or associations have no right to maintain any objection as if being the dissenting financial creditors because the homebuyers have voted as a class in favour of the resolution plan and are bound as a class with 'drag along' provisions in the Code. The objections have been refuted on merits too. These rival submissions have led to the formulation of four different questions in this point for determination.

The associations and the individual homebuyers who are dissatisfied with the resolution plan and the process of its approval have made various overlapping and repeat submissions; we may summarise the substance thereof, while avoiding prolixity, as far as possible.

It is contended on behalf of the association of homebuyers, who has filed the appeal (in T.C. No. 243 of 2020) and has also filed an intervention application in the appeal filed by other associations, that the homebuyers have the locus standi to file an appeal even though they belong to a class of creditors represented through an authorised representative, who voted in favour of the resolution plan of NBCC. This association of dissatisfied homebuyers submits that sub-section (3A) of Section 25A of the Code is only intended to iron out the logistical issues

and technical difficulties which arise due to the large number of creditors; and the mere fact that more than 51% of the homebuyers voted in favour of the resolution plan cannot take away the statutory right of appeal.

159.1.1. As regards the major part of grievances, it is contended on behalf of this association that the resolution plan in question is patently illegal and is in contravention of the provisions of RERA and its rules. With reference to Section 30(2)(e) of the Code, it has been argued that the resolution plan must be in conformity with other laws in force and merely because IBC has a non-obstante provision over other laws would be no ground to hold that a resolution plan framed under the scheme must also be elevated to such status; that RERA is one such legislation which expressly deals with the rights of the homebuyers and if there is any inconsistency between IBC and RERA, the former would prevail but, the same cannot be said about a resolution plan under IBC. It is submitted that Sections 13(2), 18 and 19(4) of RERA as also U.P. RERA (Agreement for Sale/Lease) Rules, 2018 are in violation as the resolution plan does not provide an option to the homebuyers to seek refund in case the flat is not delivered within the time period prescribed in the revised schedule; and does not provide interest as well as compensation on the amounts already paid by homebuyers, in case they seek refund. Therefore, according to this association, if the resolution plan as existing is approved, it would take away all the rights bestowed upon the homebuyers under RERA and homebuyers will be at the mercy of ‘one

sided agreements' made by NBCC with no future remedies available to them. It is also submitted that the resolution plan actually recognises the interest amount to be paid to the homebuyers as part of the 'Admitted Amount' but does not pass on this amount to the homebuyers.

159.1.2. In another line of submissions, it has been contended that 758 acres of land is returned to JIL as per the judgment of this Court dated 26.02.2020 in the case of ***Anuj Jain*** (supra) but NBCC has failed to specify anything in the resolution plan regarding the treatment and utilisation of this big parcel of land though the same ought to be put to use for the purpose of providing delay penalty/interest to the homebuyers. It is submitted that NBCC cannot be allowed to unjustly enrich itself at the cost of the corporate debtor's unencumbered assets and ought to use this land bank to make its resolution plan compliant with the provisions of RERA.

159.1.3. In yet another line of submissions, it has been contended that the IRP, while filing Form-H along with the approval application, has not placed on record the liquidation costs; and this cost is required for assessing the feasibility and viability of the resolution plan. Therefore, there had been complete violation of Regulation 39B of the CIRP Regulations. It is also submitted that the resolution plan in question, being a conditional one in terms of Clauses 1 and 2 of Schedule 3 thereof, could not have been taken as a resolution plan standing in conformity with the requirements of Regulation 36A(7) of the CIRP Regulations.

159.1.4. Of course, as regards the said amount of INR 750 crores deposited by JAL, this association maintains that the same was to protect the interests of homebuyers of JIL and forms the part of corpus of JIL but, it is also submitted that if there be any ambiguity with respect to the homebuyers of JAL and they are also to be covered under the deposit so made by JAL, then the amount may be used by the corporate debtor and JAL on a *pro rata* basis so as to secure the interests of the homebuyers of both these companies. It has also been prayed that NBCC be directed to start the construction within 30 days and to complete the entire project within 3 years; that NBCC be barred from withdrawing; and that NBCC be prohibited from charging the homebuyers with any extra amount towards arbitrary increase in the name of 'Super Built-Up Area', which would be illegal without corresponding increase in the carpet area.

159.2. Another society of homebuyers of the projects undertaken by JIL has directly approached this Court against the order dated 03.03.2020 passed by NCLT, and is essentially aggrieved that the resolution plan does not provide for the interest to be accrued to the homebuyers or compensation for delay period on their deposits.

159.2.1. On behalf of this society also, the aforesaid submissions relating to 758 acres of land, violation of the provisions of RERA and proposed changes in 'Super Built-Up Area' are re-emphasised. This apart, it is submitted that the resolution plan provides for unfair treatment to the homebuyers of JIL inasmuch as they are liable to pay interest at 18% p.a.

in the event of default to pay the remaining instalments but, on the other hand, a meagre delay compensation, amounting to INR 5/- per square feet per month, is offered to them in case of delay in construction and the same is stated to be due only after the expiry of one year from the date of delivery of possession. It is submitted that the "financial debt" in terms of Section 5(8) of IBC is that of "disbursal against the consideration for the time value of money", which means compensation for the length of time for which the money has been disbursed. Thus, the provisions for the homebuyers in the resolution plan ought to mandatorily include a just and fair interest to account for the period of delay.

159.3. As noticed, in paragraph 126 of the order dated 03.03.2020, the Adjudicating Authority rejected the submissions sought to be made by a few other homebuyers, who asserted themselves to be the "dissenting" homebuyers, because the authorised representative on behalf of the homebuyers had assented to the resolution plan while observing that '*it cannot be said that dissenting homebuyers before authorised representative to be considered as dissenting financial creditors against the total voting of CoC*'. These homebuyers have filed a separate appeal (in T.C. No. 242 of 2020) with many a submissions running common to those of the contesting associations. While avoiding repetition, we may take note of the other material submissions on behalf of these appellants-homebuyers.

159.3.1. It is contended on behalf of these homebuyers that they and several other homebuyers have consistently dissented from the resolution plan as the proposed timelines for completion are not workable and there is no clause for refund of money in a situation that the construction is not completed within time; and cent percent approval has not been given for effectuating the resolution plan. The grievance is that their application was rejected by NCLT on the ground that AR on behalf of the homebuyers had assented to the resolution plan but without dealing with the specific objection raised by the appellants with regard to the proceedings before the CoC and the procedure adopted by it; and they were not even allowed to make all their submissions before NCLT. According to these appellants, NCLT has applied two standards while dealing with objections of two dissenting financial creditors i.e., ICICI Bank on one hand and the appellants on the other, which amounts to unfair discrimination amongst the same class of creditors; and the findings in paragraph 126 of the impugned order are in the teeth of NCLT's findings in paragraphs 100 and 101 of the same order.

159.3.2. It is submitted that in the 16th meeting of CoC, there was no consensus with regard to the resolution plan to be adopted; and on evaluation of the resolution plans, it was found that the plan of Suraksha Realty was better than that of NBCC considering the scores given by the experts. The appellants have submitted that in the resolution plan by Suraksha Realty, provision was made for delay penalty pertaining to

previous period in the form of fixed compensation by way of transfer of land worth INR 250 crores at Mirzapur and for this purpose, creation of a Trust was proposed; and it was also proposed that the said resolution applicant shall endeavour to monetise the land for 4 years and the sale proceeds would be distributed amongst the eligible homebuyers. According to the appellants, the plans were put to vote contrary to the provisions of IBC and yet, IRP moved an application for approval of the plan submitted by NBCC, which was objected by them and various other parties with the submissions that the resolution plan of NBCC was unfairly adopted through illegal voting; and that the plan of NBCC was in contravention of RERA.

159.3.3. It is submitted that in the resolution plan in question, Schedule 2 Step 9 provides for treatment of homebuyers and refund seekers in the manner that the claim of homebuyers shall be satisfied by ensuring delivery of flats in accordance with the schedule at Annexure A, whereby project completion period is provided as 42 months with moratorium period of one year and therefore, for 54 months, the appellants and other homebuyers would not get any compensation and thereafter only a delay penalty of INR 5/- per square feet per month is provided, which is also subject to non-occurrence of any *force majeure* event.

159.3.4. While questioning the process of voting and the proposition that homebuyers have as a class assented to the plan of NBCC, these

appellants have submitted that the voting percentage in respect of NBCC's plan was distributed in the following manner:

Home Buyers voting share	57.66%;
Assenting	34.10%;
Dissenting	1.05%;
Abstained	22.51%

Therefore, according to the appellants, the claim that 97.02% homebuyers have voted for NBCC's plan is misleading; and as per the voting percentage, rough ratio is that for every 3 homebuyers who voted for NBCC, 2 have dissented/abstained. The appellants have further contended that the authorised representative of homebuyers made two wrong statements before the Committee of Creditors: one, that both the resolution plans of Suraksha Realty and NBCC would be put to vote and second, that the majority of homebuyers had written to him indicating NBCC as the preferred choice. It is submitted that both these statements on behalf of the homebuyers were grossly incorrect and contrary to record and as such, the entire voting process of the CoC, as contemplated under Section 21(8) of the Code, is vitiated. There had been no such written instruction to the authorised representative of the homebuyers and he could not have determined what was the majority mark of homebuyers. It is further submitted that even if the said authorised representative could have consented to put both the resolution plans to vote contrary to the mandate of Regulation 39(3), CoC could not

have acted contrary to the provisions of IBC as there could be no waiver of the statute. It is submitted that these objections could have been, and had rightly been, raised before the Adjudicating Authority because there is no other forum to raise these concerns; but the Adjudicating Authority has not addressed them at all.

159.3.5. The issue relating to the said land parcel of 758 acres has also been raised by these appellants with the submissions that after the judgment of this Court dated 26.02.2020, the said land ought to have been included in the resolution plan and used in the interest of homebuyers but the Adjudicating Authority has not examined this aspect of the matter either.

159.4. The submissions on behalf of yet another association of homebuyers (appellant in T.C. No. 240 of 2020) are considerably different, where it is prayed that the project related with its members being substantially complete, deserves to be separated from the resolution plan.

159.4.1. It is submitted on behalf of this association that the construction of all 4228 flats in 26 towers of the project “Jaypee Greens Aman” is complete and only the finishing works for Tower Nos. 23, 24, 25 & 27 are pending due to delay in execution of the agreements. It is also submitted that out of 18153 homebuyers of the corporate debtor forming part of the financial creditors, only 459 homebuyers in Project Aman (which amount to 2.53 %) were part of the creditors at the time of voting for the resolution

plan. According to this association, “Jaypee Greens Aman” is an inhabited project where more than 1500 families have already started living and it is situated over 10 kms away from the location of “Wish Town” and hence, should be considered as an independent housing colony and ought to be separated from the resolution plan; and any order on the resolution plan should not have an adverse impact on this project. It is submitted that in relation to the project in question, the resolution applicant is only to complete the finishing work which could be carried out by the IRP himself to avoid further delay whereas, if the resolution plan is followed, these homebuyers shall have to wait for another 18 months to receive possession of the completed flats which would add to their mental agony. 159.4.2. It has also been submitted that the members of this association had deposited an Interest Free Maintenance Deposit (‘IFMD’) and a Maintenance Advance and also executed Maintenance Agreements with JAL; and even though this refundable security deposit was not a part of the information memorandum, the resolution plan in question stakes claim over this amount while ignoring the basic rules of business and to siphon off the hard-earned/borrowed money of the allottees. According to the association, this amount ought to be refunded to the allottees concerned. 159.4.3. It is also submitted that the approved resolution plan only talks about the date of completion of the construction of flats but does not indicate the completion date of the entire project of “Jaypee Greens Aman”; and as construction of flats of this project is carried out, specific

directions need to be issued for completion of the project with all amenities and finishing works.

159.4.4. This association has also relied upon decision of this Court in the case of ***Wg. Cdr. Arifur Rahman Khan & Ors. v. DLF Southern Homes Pvt. Ltd. & Ors.*: (2020) SCC OnLine SC 667** and has prayed for a relief of 6% p.a. simple interest which shall be attached to the allottees of the project "Jaypee Greens Aman" on the total amount paid towards the purchase of the flats in addition to the delay period penalty. It is also submitted that the allottees of Tower Nos. 23, 24, 25 & 27 should not be discriminated and must be treated at par with other allottees, who have already received the penalty for delayed period.

159.4.5. This association has also prayed for directions to IRP to release the payments in a time bound manner to keep the project and its activities as a going concern as the work at the project "Jaypee Greens Aman" has come to a standstill for want of requisite payment of bills of contractors. This association has made yet another prayer for directions to the Noida Authority to issue the necessary Occupancy Certificate.

159.5. Apart from the above-mentioned appellants, a few more homebuyers have filed intervention applications in the leading appeal while essentially reiterating the same contentions that the resolution plan of NBCC is not compliant with the requirements of RERA and that the homebuyers would be put to prejudice in relation to their rights under

RERA. The issue relating to the said 758 acres of land has also been raised.

159.6. For completing the panorama of diverse submissions, we may take note of the fact that the applicant of I.A. No. 84309 of 2020 has filed separate written submissions and has contended that there had been diversion of the money deposited by homebuyers to YEIDA and the same was accepted by JIL and the lenders constituting the CoC without considering that it was a wrongful and fraudulent diversion against accepted norms; that JIL and YEIDA have remained silent on the issue and allowed homebuyers' money to be used in Yamuna Expressway, which acted as an interest free loan to JIL for almost 10 years and therefore, the homebuyers ended up funding 25% of the project of Expressway and the said investment ought to be returned to the homebuyers; that the provisions of the Concession Agreement regarding curing the defaults were never addressed before NCLT and before this Court; that when JIL caused a delay in delivering possession of the flats to the homebuyers, the material adverse effect clause should have been invoked, rather than initiation of the CIRP; that the homebuyers were made aware of liquidation of JIL as the only possibility; that the homebuyers were not provided with the Concession Agreement and even when it was demanded from the IRP, it was not furnished. Therefore, not sharing CA and not providing any such legal advice on CA has put the CIRP proceedings under the scanner and the same be held null and void.

It has further been contended that the resolution plan of NBCC ought to have been rejected as it contravenes several of the provisions of law including that of RERA. It is also contended that the homebuyers to whom flats were delivered could not have been taken out of CoC once it had been constituted; and such taking out has impacted a few thousand homebuyers and thereby, the voting weightage by about 10%. The applicant has further submitted that the present one is an exceptional case requiring innovative approach and has even suggested the alternative that Government of Uttar Pradesh takes over the full project as it is, provided it meets all rights of the homebuyers! It is submitted that this could be a possibility under Article 142 of the Constitution of India.

The submissions so made have been duly opposed by the persons/entities standing in favour of the resolution plan as approved by the Adjudicating Authority. For avoiding unnecessary expansion, we deem it appropriate to take note of the submissions made on behalf of IRP and NBCC as also the financial creditor of JIL in this regard.

It is submitted on behalf of IRP and NBCC that these associations and homebuyers have no locus standi to challenge the approved resolution plan because, in terms of Section 25A(3A) read with Section 21(6A) of the Code, the homebuyers vote in the CoC as a class; even a dissenting individual within the class is bound by the decision of the majority of that class; and as such, this decision operates as a statutory estoppel against the members of the entire class. It is submitted that the

manner of voting by homebuyers has been extensively dealt with by this Court in ***Pioneer Urban*** (supra) and the Adjudicating Authority has, in accordance with Section 25A(3A) and the law laid down in ***Pioneer Urban***, rightly dealt with the issue of 'dissenting homebuyers' in paragraph 126 of the order impugned. It is further submitted that the legislature has recognised the likelihood of conflicting interests among the groups of homebuyers and accordingly, the IBC amendment dated 16.08.2019 has provided a 'drag along' mechanism so far as voting by homebuyers in relation to the approval of a resolution plan is concerned, by way of insertion of sub-section (3A) to Section 25A of the Code. It is, therefore, evident that the minority shall be dragged along with the majority in voting on approval of a resolution plan and hence, the appellants are bound by the decision taken by the collective majority of the homebuyers.

160.2. It is also submitted that as per Section 61 of the Code, an appeal can be filed by a person who is aggrieved by the approval of the resolution plan but, considering that homebuyers as a class have assented to the resolution plan of NBCC, individual homebuyers cannot be treated as dissenting creditors or even aggrieved persons within the meaning of Section 61 of the Code. It is, therefore, submitted that such appeals ought to be dismissed for having been filed without any locus.

160.3. It is yet further submitted that the appellant Wish Town Society attempted to submit an application and objections that were rejected by

the Adjudicating Authority on 31.01.2020, essentially on the grounds that the society had failed to implead itself as the party to the application; that only 448 homebuyers had voted against the resolution plan but the society was claiming to represent 1500 homebuyers without mentioning as to who were the persons who authorised filing of the objections; and that the society had no locus to raise objections. It is submitted that now the society is seeking to place on record a list of alleged 1248 members but no such list was produced before the Adjudicating Authority and cannot be allowed to be introduced at the appellate stage.

160.4. As regards the questions related with RERA, it is submitted that the alleged violation of RERA has been contended by these homebuyers without demonstrating the manner in which any provision under RERA is being violated; and that the resolution plan, at no instance, states that it would not comply with the applicable laws. However, it is submitted that in the event there is any conflict between the approved resolution plan and the provisions of RERA, the approved resolution plan shall remain binding on all stakeholders under Section 31 of the Code and would override the provisions of RERA in accordance with Section 238 of the Code.

160.5. It is also submitted that resolution plan can alter the contracts with financial creditors and the Code gives wide powers to the resolution applicant to modify financial and operational contracts so as to best serve the interests of all the stakeholders. It is submitted that, as per the proposal under the resolution plan, NBCC would construct and deliver the

flats to homebuyers but would not be paying outstanding interests to any homebuyer, and such a proposition is permissible under Regulation 37(f) of CIRP Regulations, that permits a resolution plan to reduce any debts due to any creditors; and such an amendment to the contracts having been agreed to by the overwhelming majority of the CoC, remains binding on all the homebuyers.

160.6. As regards liquidation costs, it is submitted that under Regulation 39B of the CIRP Regulations, CoC has been given a discretion to ascertain the liquidation costs at the time of approval of a resolution plan or deciding to liquidate a company; and, as per the *Explanation* to Regulation 39B, liquidation costs have the same meaning as given to it under Regulation 2(1)(ea) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, whereunder 'liquidation costs' have been defined to mean, *inter alia,* the costs in the liquidation process of a company. It is submitted that non-submission of liquidation costs under Form-H is not an irregularity that is fatal to the CIRP or the resolution plan; that the liquidation costs have no bearing on the feasibility and viability of a resolution plan; and liquidation costs are different from liquidation value, which has been defined under Regulation 2(k) of the CIRP Regulations to mean '*the estimated realisable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date'.* The IRP under Form-H has mentioned the fair value and liquidation value of the corporate debtor.

160.7. As regards the objections raised by Jaypee Aman Owners Welfare Association for exclusion from resolution plan, it is submitted that the NBCC's resolution plan is intended to cover all the homebuyers of JIL, where the creditor-debtor relationship continues to subsist i.e., where the final settlement between the homebuyer and JIL, through execution of sub-lease deed, has not been achieved. With reference to the provisions in the resolution plan, it is submitted that the plan specifically provides that "Aman Project" shall be completed within a period of 15 months from the date resolution applicant acquires the shareholding of the corporate debtor; and such an indicative period has been provided in respect of all the pending projects of JIL, which are to be completed by NBCC in terms of the resolution plan. It is further submitted that the contents of the plan including the indicative delivery schedules were available to all homebuyers and they had, in full cognizance of the same, chosen to approve the plan in question which would remain binding on all the stakeholders of the corporate debtor in terms of Section 31 of the Code once it is approved; and therefore, the said association is estopped from challenging, or seeking an exit from, the resolution plan as the plan stands approved. In regard to the submission that the IRP may be directed to do certain things like apply for OCs in respect of certain towers or issue OOPs, it is submitted that the IRP has disclosed in an affidavit before the Court that during the CIRP process, he has been managing JIL as a going concern and has continued construction of residential and

commercial dwelling units and has issued OOPs for 7996 units based on the OCs received from the Noida Authority; and out of the OOPs issued, sub-lease registration of 6429 has been completed. It is submitted that the claims of a homebuyer vis-à-vis JIL stand settled on execution of the sub-lease deed and, therefore, all those homebuyers whose sub-lease deeds have not been executed shall be bound by the resolution plan approved by the CoC of JIL.

160.8. Again, as regards IFMD, Step 9 in Schedule 2 has been referred and it is submitted that the above provision is only in relation to the monies paid by the homebuyers to JAL (either directly or indirectly, including payment through JIL) as the resolution applicant does not and will not have any control over JAL.

160.9. Apart from the above, it has also been submitted on behalf of IRP that Regulation 36A(7) applies only to expression of interest which cannot be conditional but that provision does not apply to the resolution plan and it is no one's case that the expression of interest submitted by NBCC was conditional. The amendment to the Code with effect from 28.12.2019, that is, before passing of the order by NCLT has also been referred to submit that with Section 32A having been inserted to the Code, NBCC would be entitled to claim the protection thereunder and the question of withdrawing from the resolution plan for the reason stated in Clause 2 of Schedule 3 does not arise.

160.10. The financial creditor of JIL has also opposed the submissions made by these dissatisfied homebuyers and it is submitted that they have erroneously identified ICICI Bank to be similarly situated with them. It is submitted that this bank is a dissenting financial creditor in terms of the resolution plan unlike those dissatisfied homebuyers; and this bank is entitled to a different treatment in terms of Section 30(2)(b) of the Code.

We have given anxious consideration to the wide variety of submissions made by dissatisfied homebuyers and the counters thereto.

Before proceeding further, it appears appropriate to point out that the contentions urged in regard to simultaneous voting over two resolution plans have already been discussed and rejected in Point **B** hereinbefore. These contentions, in our view, have unnecessarily been taken by the persons who wish to remain on the dissenting side of the fence by carving out every possible objection, whether of substance or not. The issue relating to 758 acres of land, that is now available to JIL after the judgment of this Court in the case of ***Anuj Jain***, is being considered separately in Point **K** *infra*. Likewise, the issue relating to the amount of INR 750 crores deposited by JAL pursuant to the directions in the case of ***Chitra Sharma*** as also other areas of accounting between JAL and JIL including the issue relating to IFMD are being considered separately in Point **J** *infra*. These issues, thus, would require no comment herein.

Taking up other aspects of the rival submissions and having examined the scheme of the Code in relation to a plan of insolvency resolution, we are clearly of the view that the propositions of some of the associations and individual homebuyers to claim themselves as 'dissenting homebuyers' and thereby, 'dissenting financial creditors' do not stand in conformity with the scheme of the Code and the manner of voting on a plan of resolution by the Committee of Creditors.

As noticed, for the purpose of approval of a resolution plan in CIRP, what is required is its approval by a vote of not less than 66% of the voting share of financial creditors; and what is counted for the requisite percentage (66) is the voting share of the financial creditors and not the individual votes of financial creditors. The expression 'voting share' has been precisely defined in clause (28) of Section 5 to mean the voting rights of a single financial creditor in the Committee of Creditors, which is based on the proportion of the financial debt owed to such a financial creditor vis-à-vis the financial debt owed by the corporate debtor. In the scheme of the Code with *Explanation* to Section 5(8)(f), the debt owed by the corporate debtor towards allottees of the real estate project is considered to be a financial debt but for that matter, every individual allottee does not become an independent financial creditor of the corporate debtor, if the number of allottees are 10 or more, in terms of the meaning assigned to the expression "class of creditors" in CIRP

Regulations[85]. The allottees, like the homebuyers of JIL, falling within clause (f) of sub-section (8) of Section 5, do carry the status of financial creditors but they would be falling in a class collectively; and the voting share of that class would be in terms of the financial debt owed to that class as a whole.

164.1. Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated in Section 25A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3A) to Section 25A, which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR 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'*.

164.2. At this juncture, we may usefully take note of the enunciation of this Court in the case of ***Pioneer Urban*** (supra) that has direct bearing on the questions raised herein. The decision in ***Pioneer Urban*** was rendered by this Court in the backdrop of challenge to the said amendment made to the Code whereby, the allottees of real estate

85 The relevant definition clause in CIRP Regulations, inserted with effect from 04.07.2018 reads as under: -

"(aa) "class of creditors" means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, "creditors in a class" shall be construed accordingly;"

projects were provided the status of financial creditors by way of insertion of *Explanation* to sub-clause (f) of clause (8) of Section 5 of the Code and with corresponding insertion of Section 25A as also sub-section (6A) to Section 21. While dealing with such a challenge, in ***Pioneer Urban*** (supra), this Court extensively referred to the objects and reasons for these amendments as also their meaning, connotation and effect. The relevant part of the matter, in regard to the issue at hand, is that along with the aforesaid amendment, this Court also examined the amendment of Section 25A with insertion of sub-section (3A) by Act 26 of 2019. This Court explained the connotation of the said amendment and its logic, while rejecting the challenge to Section 21(6A) and 25A of the Code, in the following: -

> "**63**. **Given the fact that allottees may not be a homogeneous group, yet there are only two ways in which they can vote on the Committee of Creditors—either to approve or to disapprove of a proposed resolution plan. Sub-section (3-A) goes a long way to ironing out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision.** As has been stated by us in *Swiss Ribbons*, the legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later. Thus, any challenge to the machinery provisions contained in Sections 21(6-A) and 25A of the Code must be repelled."
>
> (emphasis in bold supplied)

164.3. In the face of clear language of sub-section (3A) of Section 25A of the Code, read with the law declared by this Court in ***Pioneer Urban***

(supra), the suggestion on behalf of the dissatisfied homebuyers that the said provision was only intended to iron out the logistical issues and technical difficulties is required to be rejected altogether. The said provision, as held by this Court, is to iron out the creases that might have been felt in the proper working of Section 25A; and it is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.

164.4. Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the

Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorised representative on the entire class of the financial creditor/s he represents.

164.5. To put it in more clear terms qua the homebuyers, the operation of sub-section (3A) of Section 25A of the Code is that their authorised representative is required to vote on the resolution plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.

In the present case, on one hand, it has consistently been submitted by the stakeholders, particularly the homebuyers, that liquidation of JIL should be eschewed, but on the other hand, some of the associations and homebuyers have attempted to find faults with the resolution plan to which their majority, who voted, took the decision for approval. There is no scope for any homebuyer suggesting himself to be

a dissenting financial creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

165.1. A rather overambitious attempt has been made by the homebuyers who have filed separate appeal (T.C. No. 242 of 2020) to refer to the percentage of voting share of homebuyers and it has been suggested that out of the total voting share of homebuyers i.e., 57.66%, the assenting voting share was only 34.10%, whereas 22.51% abstained and 1.05% dissented. It is submitted that roughly, for every 3 homebuyers who voted for NBCC, 2 had dissented/abstained. Even assuming the percentage as stated by these appellants to be correct, we are at a loss to find any logic in the submissions so made. A re-look at sub-section (3A) of Section 25A would make it clear that '50%' for the purpose of the said provision is of those homebuyers who cast their vote. On the percentage figures as given before us, out of the total voting share of homebuyers at 57.66%, the persons carrying 22.51% voting share simply abstained and of the persons casting their votes, ayes were having the voting share of 34.10% whereas nays were having the voting share of 1.05%. Obviously, 50% would be counted only of the persons who chose to vote where, much higher than 50% of the homebuyers who cast their vote, stood for approval of the resolution plan of NBCC[86]. Such a voting cannot be set at

86 The IRP has given the details of voting by the allottees in the following terms (in paragraph 4 of its written submissions under the heading- 'Issues raised by homebuyers'): -

> "…. In the present case, out of 21781 allottees forming the class of allottees, 12147 cast their vote on the Resolution Plan. (It is pertinent to mention that through the resolution plan process of JIL, around 9000 allottees have always remained non-responsive and abstained from voting at any time.) Out of 12147

naught for the purported dissatisfaction of a miniscule minority, which was about 3.69% in terms of the number of persons voting; and about 1.05% in terms of the voting share. They have to sail along with the overwhelming majority. That is the purport and effect of 'drag along' or 'sail along' provisions in the scheme of the Code.

For what has been discussed hereinabove, the suggestions that there was no cent percent approval of the resolution plan, or that there was no consensus amongst homebuyers, or that the plan of Suraksha Realty was considered better, are required to be rejected. It is not the case that the AR of homebuyers has not voted in accordance with the decision taken by a vote of more than 50% of the voting share of homebuyers who did cast their vote. In the given set of facts, we have no hesitation in thoroughly disapproving the unnecessary imputations made by one set of homebuyers against the AR that he made any incorrect statement before the CoC. That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way

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allottees who cast their vote (present and voting), 11699 allottees voted in favour of the Resolution Plan while 448 voted against the Resolution Plan. Thus, the number of allottees who voted in favour of the Resolution Plan, this 11699, comprise 96.31% of the total number of allottees present and voting…."

of appeal. All such objections and appeals are required to be rejected on this ground alone.

The suggestion about the so-called statutory right of appeal has only been noted to be rejected. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval.

The misplaced assumptions on the part of dissatisfied homebuyers have gone to the extent that they have attempted to put themselves at par with the dissenting financial creditors like ICICI Bank, who carry an entirely different legal status in CIRP, for being not within the class of homebuyers and being of a different class of financial creditors. The said financial creditor has rightly opposed these submissions and has rightly pointed out that its rights in terms of Section 30(2)(b) of the Code stand at an entirely different footing.

Another attempt has been made as regards calculation of voting weightage by suggesting that the homebuyers to whom flats have been delivered could not have been taken out of CoC. Even this suggestion remains bereft of substance. When a person does not stand in the capacity of a financial creditor i.e., to whom no financial debt is owed by

the corporate debtor, he could only be taken out of the block of financial creditors. We are impelled to observe that consideration and voting at the resolution plan is not a process or event where any objection or grievance could be raised even by a person who does not stand in the capacity of a financial creditor. His remedies, in accordance with law, could be elsewhere but not in this process of approval of resolution plan under the Code.

169.1. For the same reasons as above, the suggestion to keep any housing project which is already complete or nearing completion out of the purview of the resolution plan is required to be rejected. When approval of the resolution plan is to be voted by CoC; and its composition is specified by the Code, there is no such concept of keeping any particular homebuyer out of CoC even if the relationship of creditor and debtor subsists between him and the corporate debtor.

To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.

Once we have held that these dissatisfied homebuyers and associations are not entitled to put up any challenge to the resolution plan contrary to the decision of the requisite majority of their class, all their objections are required to be rejected outright. Yet, in the interest of

justice, we have examined these objections to find if there be any aspect worth consideration within the periphery of Section 30(2) of the Code. We find none.

171.1. The major part of the objections of these dissatisfied homebuyers relate to the purported rights under RERA. We are afraid, even such propositions do not stand in conformity with law. The interplay of RERA and IBC also came up for fuller exposition in the case of ***Pioneer Urban*** (supra) and this Court rejected the contentions urged on behalf of the petitioners that RERA being a special enactment dealing with real estate development projects must be given precedence over the Code. In ***Pioneer Urban***, this Court noticed Section 238 of the Code and held as under: -

> "25. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject-matter is concerned. Also, the non obstante clause of RERA came into force on 1-5-2016, as opposed to the non obstante clause of the Code which came into force on 1-12-2016. Further, the amendment with which we are concerned has come into force only on 6-6-2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of the learned Senior Counsel for the petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the Explanation to Section 5(8)(*f*) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is *in addition to and not in derogation of* the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1-5-2016, remedies before those authorities would come into effect only on and from 1-5-2017 making it clear that the provisions of the Code,

which came into force on 1-12-2016, would apply in addition to RERA."

*** *** ***

It is clear, therefore, that even by a process of harmonious construction, RERA and the Code must be held to co-exist, **and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute viz. the Code**.

As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor. This is to take place by replacing the management of the corporate debtor by means of a resolution plan which must be accepted by 66% of the Committee of Creditors, which is now put at the helm of affairs, in deciding the fate of the corporate debtor. Such resolution plan then puts the same or another management in the saddle, subject to the provisions of the Code, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. It is only as a last resort that winding up of the corporate debtor is resorted to, so that its assets may be liquidated and paid out in the manner provided by Section 53 of the Code. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. At the same time, recalcitrant allottees are not to be tolerated, as they must also perform their part of the bargain, namely, to pay instalments as and when they become due and payable. Given the different spheres within which these two enactments operate, different parallel remedies are given to allottees under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection Fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88. In similar circumstances, this Court in *Swaraj Infrastructure (P) Ltd.* v. *Kotak Mahindra Bank Ltd.* has held that the Debts Recovery Tribunal proceedings under the Recovery of

> Debts Due to Banks and Financial Institutions Act, 1993 and winding-up proceedings under the Companies Act, 1956 can carry on in parallel streams (see paras 21 and 22 therein)."
>
> (emphasis in bold supplied)

171.1.1. In view of the above, all the contentions regarding operation of RERA and claim thereunder or any other claim for compensation or interest, when not standing in conformity with the approved resolution plan, deserve to be rejected. In fact, the question as to what kind of agreement should be entered into with financial creditors like homebuyers is essentially a matter falling within the arena of commercial decision; and needless to repeat that in the process of approval of a resolution plan, the factors related with commerce are left to the wisdom of the Committee of Creditors. When the Committee of Creditors has approved the proposals of NBCC in the resolution plan, the same cannot be tinkered with reference to the grievance of some of the homebuyers about deprivation of adequate interest or compensation. In this view of the matter, the decision of this Court in the case of ***Wg Cdr. Arifur Rahman Khan*** (supra) needs no discussion because that would not apply to the issues presently under consideration.

Yet another objection as regards liquidation costs has rightly been clarified by the IRP and NBCC that under Regulation 39B of the CIRP Regulations, the CoC has been given a discretion to ascertain liquidation costs at the time of approval of the resolution plan or deciding to liquidate the company. This aspect, essentially lying within the arena of commerce, is also required to be left to the commercial wisdom of the Committee of

Creditors. In any case, this aspect cannot be said to have a bearing on the decision as regards feasibility and viability of the resolution plan of NBCC and is required to be rejected. Similarly, the objections with reference to Regulation 36A(7) are also required to be rejected because there had not been any condition imposed by NBCC in expression of interest. As regards the conditions in the resolution plan, particularly Clauses 1 and 2 of Schedule 3 thereof, as already indicated, the matter relating to the said amount of INR 750 crores deposited by JAL pursuant to the directions of this Court in ***Chitra Sharma*** (supra) is being considered separately; and the stipulation in Clause 2 of Schedule 3 is even otherwise redundant in view of insertion of Section 32A to the Code, as discussed by the Adjudicating Authority, which need not be repeated. Suffice it to observe for the present purpose that the process of approval of the resolution plan is not vitiated because of such stipulations. Needless to say that these observations are not to be construed as our approval of Clause 1 of Schedule 3 of the resolution plan, because its legality and validity is being examined separately in Point **J** *infra*.

We have summarised the major aspects of multifarious submissions, objections and suggestions projected before us but find that the attempt to raise such objections is itself baseless for being not in conformity with the provisions of the Code read with the law declared by this Court in ***Pioneer Urban*** (supra). The objections and submissions do not carry any merits either. In this view of the matter, we are not entering

into the other submissions made by NBCC as regards the number of members of one of the appellant-association because nothing turns upon that.

Before concluding on this segment of discussion, we are impelled to indicate that the objections and suggestions by dissatisfied homebuyers have gone to the extent of suggesting that IRP should be directed to release funds for raising construction; the Noida Authority be directed to issue the necessary Occupancy Certificate; and NBCC be directed to complete the entire project within 3 years and be prohibited from charging the homebuyers with any extra amount towards arbitrary increase in the name of 'Super Built-Up Area'. An objection is stated that there had been diversion of the money deposited by homebuyers to YEIDA; and the suggestion has gone to the extent that the project may be taken over by the Government of Uttar Pradesh. These and other similar nature submissions, which do not relate to the real questions in controversy, neither carry any meaning nor any substance; they have only been noted to be rejected.

For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016

does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for the reason that the same has been completed or is nearing completion.

Point J

INR 750 crores and accounting between JAL and JIL

We now need to enter into another area of serious dispute in these matters, which relates to the claim over the amount of INR 750 crores (which was deposited by JAL pursuant to the directions of this Court in the case of ***Chitra Sharma***) and the interest accrued thereupon. On one hand, JAL and the persons/entities related with it, including its homebuyers and institutional financial creditor, assert that this money is the property of JAL and ought to come back to JAL but, on the other hand, the resolution applicant NBCC as also the persons/entities related with the corporate debtor JIL, including its homebuyers and the institutional financial creditor, assert that this money is a part of the assets of JIL and the Adjudicating Authority has rightly held so. In a third angle, an association of homebuyers of JAL submits that a part of this amount be designated to complete the construction work in relation to their project. Yet another angle is projected by some of the dissatisfied homebuyers of JIL, who suggest that NBCC is simply aiming at profiteering by getting hold of this money but without making any

corresponding provision in the resolution plan for its appropriate use for the benefit of homebuyers. Added to these rival claims are the other disputes of accounting, in relation to the advance made by JIL and its homebuyers to JAL towards special advance and Interest Free Maintenance Deposit etc. In fact, it has been the submission on behalf of JAL that either the entire amount of INR 750 crores with accrued interest be returned to it or in the alternative, after reconciliation of accounts, its liability towards JIL be adjusted from this corpus and balance be refunded to it. In this scenario, we have formulated separate questions regarding the treatment of this amount of INR 750 crores and accrued interest and regarding reconciliation of accounts between JAL and JIL but, for being interlaced, these questions are taken up for determination together.

Indisputably, this sum of INR 750 crores was deposited by JAL pursuant to the orders passed by this Court in the case of ***Chitra Sharma*** (supra). While finally deciding the case of ***Chitra Sharma*** by the judgment dated 09.08.2018, this Court took note of myriad features of the case and also took note of the claim of some of the homebuyers to allow this money to be utilised for making refunds but declined such a prayer and transferred this money to the NCLT.

177.1. In the process taken up thereafter, the relevant facts concerning this amount were spelt out by IRP in the information memorandum. Thereafter, in the resolution plan, NBCC rather made the availability of

this corpus a condition precedent for implementation of the plan in the very first clause of its 'reliefs and concessions' in the following terms: -

> "INR 750 Cr was deposited by JAL with the Hon'ble Supreme Court and which amount (with the interest accrued thereon) was transferred to the Adjudicating Authority as per directions of the Hon'ble Supreme Court, with a direction that such monies shall continue to remain invested and parties shall bide by such directions as may be issued by the Adjudicating Authority.
>
> This amount of INR 750 Cr along with the interest accrued thereon will be made available to the Corporate Debtor/Resolution Applicant. Post receipt by the Corporate Debtor, this amount of INR 750 Cr will be treated in the books of accounts of the Corporate Debtor as equity infusion by the Existing Promoters and the corresponding equity of the Existing Promoters shall subsequently be extinguished in a manner similar to that adopted for extinguishment of other equity holding of the Existing Promoters under this Resolution Plan including by way of Capital Reduction or selective Capital Reduction. In the event, the said amount of INR 750 Cr along with the interest accrued is not made available to the Resolution Applicant/Corporate Debtor then the Resolution Applicant has the right to withdraw from this process without any liability of any nature on the Resolution Applicant."

177.2. The resolution plan was approved by the Committee of Creditors; meaning thereby that the aforesaid clause was accepted by the Committee of Creditors. However, the claim towards this amount of INR 750 crores with accrued interest became a bone of contention when the Adjudicating Authority (NCLT) took up the process of approval of the resolution plan, particularly for JAL staking its claim over this amount as being the rightful owner thereof. In this regard, the Adjudicating Authority, after taking note of the orders passed by this Court in the case of ***Chitra Sharma*** (supra), concluded that the deposit made by JAL was always meant for the benefit of the homebuyers of JIL and became an asset of the corporate debtor JIL; and the said amount was to be utilised towards

securing the interests of homebuyers and fulfilling the obligations made to them, i.e., offering possession of the residential units after completing necessary construction or making refunds, as the case may be.

While questioning the aforesaid stipulation in the resolution plan and this part of the order impugned, vast variety of submissions have been made on behalf of JAL, its institutional financial creditor and its homebuyers.

It has been contended on behalf of JAL that the said sum of INR

crores undisputedly belongs to JAL, as the same was deposited by it on the directions of this Court in the order dated 11.09.2017 in ***Chitra Sharma*** (supra). It is submitted that this Court ordered the deposit to be made by JAL so as to provide an interim workable arrangement and relief to the homebuyers, who were, at the relevant time, not recognised as financial creditors of the corporate debtor and had no say in the resolution process of a company in which, they had made deposits for their future homes. However, it is submitted, the purpose of this deposit was not aimed at resolving the insolvency of JIL so as to make it an asset of JIL; and it was clearly mentioned in the information memorandum that the sum of INR 750 crores was deposited by JAL and was not an asset of JIL. Moreover, the interest payable would also accrue to JAL and would be an asset of JAL.

It has been forcefully contended that the assets belonging to a third party cannot be utilised towards the resolution of insolvency of a

corporate debtor, as held by this Court in the case of ***Embassy Property*** (supra). The decision in ***Anuj Jain*** (supra) has also been referred to submit that therein too, this Court disallowed JIL's assets from being utilised for securing the dues owed by JAL.

178.1.2. With reference to the proceedings in the case of ***Chitra Sharma***, it is submitted that the purpose for which this deposit was ordered has been achieved due to the amendment of IBC and there is no reason for allowing this amount to be treated as an asset of JIL. It is also submitted that in ***Chitra Sharma***, this Court directed opening of the web-portals for the homebuyers of both JIL and JAL; and this makes the position clear that the said amount was meant for the homebuyers of JAL too. Hence, the Adjudicating Authority (NCLT) proceeded on an erroneous premise that the amount was only for the refund of JIL's homebuyers, thereby seriously prejudicing the homebuyers of JAL.

178.1.3. It is submitted that JAL is committed to make the pending homes for its own homebuyers for which it requires funds; and utilisation of the deposit made by JAL towards the insolvency resolution of JIL would result in a 'Domino Effect' and would expose JAL to the risk of insolvency and, on the other hand, would result in unjust enrichment of the resolution applicant (NBCC).

178.1.4. In another limb of arguments, it is submitted that JAL is conscious of its liability towards JIL, which was INR 195 crores as on 31.03.2020; and since JAL is not in a position to make this payment

unless the amount of INR 750 crores is refunded to it, in all fairness, JAL offers that this admitted liability towards JIL could be discharged by appropriating from the said amount of INR 750 crores and the balance be refunded to JAL. It is submitted that the said payable amount may be verified by IRP or by a chartered accountant appointed by him. In this regard, while referring to the background facts relating to the construction contracts given to JAL and advance payment on that account made by JIL, the term in the resolution plan providing for termination of construction contracts has also been referred and it has been prayed that the balance due from JAL could be adjusted from the said amount of INR 750 crores, if NBCC makes a formal submission to the effect that it would be terminating the construction agreements. The written submissions on behalf of JAL in this regard could be reproduced as under: -

> "***G. <u>AMOUNTS DUE FROM JAL TO JIL</u>***
>
> JIL has entered into various agreement(s)/ work contract(s) for development of Yamuna Expressway and development/maintenance of other land parcels located at Noida, Jaganpur, Mirzapur, Tappal & Agra. Pursuant thereto, at the request of JAL, JIL has advanced to JAL a sum aggregating to Rs. Crores (as on 31.03.2018) which was recoverable from JAL's RA Bill as also when construction work was carried out.
>
> The said sum was accordingly been recovered from JAL's RA Bill since August 2017 leaving an outstanding of Rs.274 Crores as on 31.12.2019. This has further reduced to a sum aggregate of Rs.195 Crores as on 31.03.2020 (as per the audited accounts), and is likely to be reduced by approx. Rs.165 Crores within a period of 12 months as per the work plan drawn by the RBSA (Advisors to the CIRP) ***[@Pg.143 of JAL's Additional Affidavit].***
>
> Therefore, JAL is conscious of the fact that liability towards JIL now stands to Rs.195 Crores (as on 31.03.2020 and is reducing per the construction work). Since JAL is not in a position to make this payment independently unless the Rs.750 Crores is refunded back to it, hence, in all fairness and *bonafide*, JAL offers that this

admitted and undisputed liability towards JIL can be discharged by appropriating the said liability from the Rs.750 Crores and the balance may be directed to be refunded. This amount may be verified by the RP or by a chartered accountant appointed by him.

However, it is pertinent to mention herein that NBCC's Resolution Plan treats the contracts for construction (between JIL and JAL) in the following manner ***[@Pg.47of JAL's Additional Affidavit dated 12.05.2020]*:**

> *"(vi) Resolution Applicant shall have a right to terminate the current construction contracts with Jaiprakash Associates Limited, ("**JAL**"), which are on cost plus basis and enter into fresh construction contracts with the vendors as may be selected by the Resolution Applicant in accordance with its business policies and such contracts shall be entered into on arms' length basis as per the market standard. Provided that JAL shall not be entitled to terminate such construction contracts for a period of 12 months from the Approval Date." (Emphasis Supplied)*

The above clearly shows that JAL is at the mercy of NBCC wherein NBCC is free to terminate the contracts for construction unilaterally, whereas JAL cannot. Therefore, it is submitted that the aforementioned balance of Rs.195 Crores (which was to be appropriated towards the construction of JIL's Projects) can only be adjusted/ set off from the sum of Rs.750 Crores if NBCC makes a formal submission to the effect that it would be terminating the construction agreements."

(emphasis is in original)

178.1.5. It has, therefore, been prayed that the said sum of INR 750 crores along with accrued interest be ordered to be refunded to JAL or in the alternative, the refund may be ordered after appropriating the amount of liability of JAL towards JIL, in terms of above-quoted paragraph 30 of the written submissions.

178.2. While supporting the submissions for return of INR 750 crores, the homebuyers of JAL have contended that the said deposit was not meant to finance construction, or to grant equity, or loan, or for any charitable purpose; that the Supreme Court ordered the deposit to be made by JAL

only to provide an interim workable arrangement and for relief to the homebuyers, as they were not having the status of a financial creditor under the Code; that the purpose of the deposit was not for resolving the insolvency of JIL; and that the information memorandum did not show this sum of INR 750 crores as an asset of the corporate debtor JIL. With reference to the condition precedent mentioned in the resolution plan involving the transfer of INR 750 crores in favour of NBCC, it is submitted that the question requiring consideration is as to whether NBCC could have laid a claim over the said sum of INR 750 crores as a condition of its bid? Further, an unjustified deprivation of the rightful amount to JAL and deprivation of the right of utilisation of the amount by the developer acts as a serious prejudice and detriment to the legal rights and interests of the homebuyers of JAL. It is submitted that the reasoning and findings of NCLT in the order dated 03.03.2020 are flawed and without any basis. The amount deposited has not been shown in the books of accounts of JIL as its asset and the NCLT had no authority to allow the same to be claimed by NBCC under a conditional resolution plan. It is further submitted that the order of the NCLT puts the homebuyers of JIL at an advantageous position at the cost of the interests of the homebuyers of JAL, which is contrary to the provisions and spirit of the CIRP Regulations and the Code as a whole. The homebuyers of JAL have prayed that this amount of INR 750 crores with accrued interest be released to JAL so as to secure the interests of its homebuyers.

178.3. An association of homebuyers of JAL has also challenged the said order of NCLT dated 03.03.2020 directly in this Court and has submitted that “Knights Court Project” was supposed to be completed by 2015 and the homebuyers have already paid 95% of the sale consideration to JAL. It is submitted that the sum of INR 750 crores was deposited by JAL for the benefit of homebuyers of JAL and JIL and it was stated that 92% of the homebuyers wanted to obtain possession of the flat, which is possible only after necessary construction takes place. It is further submitted that the money of the contributors of JAL ought to be first utilised for the construction of the flats of “Knights Court Project” and not towards the resolution plan of JIL or for returning to JAL. This association has stated its own grievance that in the simultaneously held proceedings under RERA, JAL has demanded from its members another sum of INR 98 crores and it is submitted that the liability for completion and development of flats of the aforesaid project was of JAL but there was an unexplained delay of 5-7 years on the part of JAL; and therefore, it was onerous that JAL was demanding such an amount from its members.

178.3.1. It has been submitted on behalf of this association of homebuyers of JAL that only an amount of INR 160 crores is required to finish the aforesaid project and it has been prayed that the same be made available from the said INR 750 crores deposited by JAL, for completing the houses of the members of this association.

178.4. The institutional financial creditor of JAL has contended that the deposit of INR 750 crores was made by JAL out of its own money and has continued to be its asset; and that in the absence of any direction by the Supreme Court or any legal transfer, the ownership of this deposit would not change, and this money is required to be returned to JAL. It is submitted that this Court has consistently laid down that an act of the Court cannot prejudice any party before it and in case it happens, the Court is bound to revert the party to the position prior to such an act of the Court. The decision in the case of ***ONGC and Anr. v. Association of Natural Gas Consuming Industries and Ors.*: (2001) 6 SCC 627** has been referred. It is submitted that JAL deposited the money on the directions of this Court for securing the interests of homebuyers but, since the Court did not make any direction for the utilisation of this deposit and simply transferred the fund to NCLT, JAL is entitled to be restored to its original position with return of this amount. It is reiterated that the IRP cannot lay a claim over the assets of a third party, held in trust or in possession of the corporate debtor. It is also re-emphasised that the directions to JAL for making this deposit was to arrive at an interim workable arrangement and to protect the interests of the homebuyers; but when the purpose became moot after the amendment of IBC, the money is supposed to be returned to its owner, i.e., JAL. It is submitted that JAL itself is in financial distress and is unable to meet with the obligations towards its stakeholders and an application under Section 7 of the Code

for the CIRP of JAL is pending. With these submissions, it has been prayed that the deposited amount with accrued interest be ordered to be returned to JAL and be further ordered to be kept in an escrow account under the control of the lenders of JAL, led by ICICI Bank.

The submissions aforesaid, for refund of INR 750 crores with accrued interest to JAL, have been duly countered by the persons/entities standing for the resolution plan, while supporting the order passed by the Adjudicating Authority. We may take note of the leading submissions in this regard.

It has been contended on behalf of the resolution applicant NBCC that the resolution plan introduced by it, which got approved by the CoC and by the Adjudicating Authority, included this deposit of INR 750 crores by JAL to be treated in the CIRP of JIL and utilisation of this amount has been a condition precedent to the implementation of the resolution plan.

NBCC has elaborated on the submissions that the stipulation in its resolution plan as regards this sum of INR 750 crores was essentially based on the orders of this Court in the case of ***Chitra Sharma***; and on the fact that JAL was directed to deposit this money in the proceedings which were filed in relation to CIRP of JIL. It is submitted with reference to various orders passed in the case of ***Chitra Sharma*** that this money was clearly meant for the benefit of homebuyers and though this Court initially discussed the proposition of *pro rata* disbursement among the refund seekers but no such disbursement was ordered after the Court noticed

that an overwhelming majority of homebuyers was desirous of seeking possession of flats and disbursement to refund seekers was going to cause prejudice to others. It is submitted that intention of the Court, that the aforesaid amount shall inure to the benefit of homebuyers, is also apparent from the fact that even after amendment of the Code with effect from 06.06.2018, whereby the homebuyers were included as financial creditors, this Court deemed it appropriate to retain the deposit for the benefit of JIL homebuyers and did not pass any modification order in respect thereof or any order for release of said amount to JAL.

179.1.2. With reference to the contents of the information memorandum under sub-heading '*Unique Investment/financing opportunity for the Resolution Applicant with adequate value to be unlocked'* in the 'Investment Highlights', NBCC would submit that the financial model of the resolution plan is based on the availability of this sum of INR 750 crores, and if the same is not made available, it would be handicapped in completing the flats of the homebuyers. NBCC has reiterated that availability of this amount being a condition precedent, it would have a right to withdraw from the resolution plan in the event this amount is not made available to it.

179.1.3. It has also been submitted that the deposit made by JAL pursuant to the orders of this Court in ***Chitra Sharma*** was to secure and protect the interests of homebuyers of JIL and in order to act on the lines of the order of this Court, the deposit ought to be permitted to be used to

achieve the purpose namely, the construction of dwelling units. NBCC submits that the said sum of INR 750 crores did not remain an asset of JAL after the same was deposited in this Court.

179.1.4. Apart from the aforesaid submissions and without prejudice, NBCC has also stated, with reference to the observations made by this Court during the course of hearing, that if any reconciliation of accounts has to be carried out before approval of the plan by this Court, NBCC ought to be involved in such an exercise, for being the successful resolution applicant and a part of the erstwhile Interim Monitoring Committee.

179.1.5. NBCC has also referred to paragraph 77 of the impugned order dated 03.03.2020, wherein the NCLT has recorded an admission on behalf of JAL about its liability towards JIL to the tune of INR 274 crores and ordered that JAL shall make this payment to JIL; and regarding the remaining amount, JAL and JIL shall draft a reconciliation statement and proceed according to the outcome of such reconciliation.

179.1.6. Long drawn submissions have been made on behalf of NBCC in regard to the alleged liabilities of JAL towards JIL on various scores. These aspects of accounting would not, as such, require adjudication herein but have some bearing on the issues raised before us and hence, a part of the written submissions on behalf of NBCC in this regard are reproduced as follows: -

> "2. JAL has claimed by way of an additional affidavit filed in the JAL Appeal claimed that as on 31 March 2020, the amount owed

by JAL to JIL has reduced to INR 218 Crores. It needs to be highlighted that under the Resolution Plan, NBCC has reserved its right to terminate all existing contractual arrangements with JAL.

It is submitted that as per the records of JIL provided by the IRP and seen by NBCC during its presence in the IMC, it has been observed that:

The Home Buyer of JIL are required to pay amounts in the nature of Interest Free Maintenance Deposit ("**IFMD**") towards the flat units purchased by them, and after the formation of recognized Residents Welfare Associations (RWAs) this IFMD is required to be transferred to RWA as per provisions of the UP Apartments Act.

Since JAL is the designated maintenance agency for such flat units as per the existing contractual arrangement between JIL, JAL and the Home Buyers, this payment of IFMD was to be paid by Home buyers to JAL and thereafter the transfer of IFMD was to be made by JAL to the RWAs.

In the year 2016, on the request of JAL, JIL has paid to JAL an advance amounting to INR 381 crore towards Interest Free Maintenance Deposit (IFMD, with the understanding that these amounts would be later on recovered by JIL form the Home Buyers at the time of taking over of possession of their flat units by the Home Buyers and the advance paid will get adjusted. However, JAL will transfer the IFMD to the RWAs.

Accordingly, during course of handing over of the flats, an amount of approximately INR 115 Crores has been collected from Home Buyers by JIL and same stands adjusted from the advance amount of INR 381 Crores but is now payable/transferable to the RWAs of the Home Buyers by JAL.

Therefore, an amount of INR 266 Crore (INR 381-INR 115 Cr) is still recoverable by JIL from JAL as per audited accounts of JIL as on 31 March 2020. Overall, the Amount of Rs 115 Crore (ultimately to be transferred to RWA) along with 266 crores (pertaining to JIL) i.e. 381 crores is recoverable from JAL towards Interest Free Maintenance Deposit (IFMD) of Home Buyers. This needs to be seen in the context that NBCC may terminate all existing contractual arrangements with JAL and thus INR 115 Crores which is money belonging to Home Buyers ought to be paid by JAL to JIL for further transfer to the Home Buyers.

Further, JIL has paid to JAL an advance amounting to INR 450 crore towards special advance in the year 2016, which was being recovered on pro-rata basis from the JAL running bills. Till 31 Mar 2020, an amount approx. of INR 146 Crores is adjusted from running bills of JAL and an amount of INR 304 Crore is still recoverable from JAL as on 31 March 2020 as per audited accounts of JIL as on 31 March 2020.

Apart from the above, an amount of INR 71 Crore is also recoverable from JAL in respect of Land Swap Deal with JAL lenders.

> From above details, it is apparent that a cash amount of INR 756 Cr (381 + 304 + 71 Cr) is payable by JAL to JIL as on 31.3.2020.
>
> It is pertinent to mention that the Hon'ble Court by judgment dated 26.02.2020 in Civil Appeal No. 8512-8527 of 2019 ***Anuj Jain vs. Axis Bank Limited etc. etc.*** (2020 SCC Online SC 237) ("**758 Acres Judgment**") has set aside mortgage created on 758 acres of land belonging to JIL to secure the debts of JAL on the ground that the same were preferential transactions. However, apart from the said 758 acres of land, mortgage of 100 acres of land of JIL to secure JAL's debts could not be set aside as the same was beyond the look back period. Thus, at present a mortgage of 100 acres of land of JIL still exists to secure the debts of JAL. Hence, an amount equivalent to the market value of the 100 acre mortgaged land (mortgaged against 1500 crore loan) could be payable by JAL to JIL, subject to JIL exercising the remedies available to it under the law in this regard. The equivalent value of the said land as per the valuation taken for the purpose of the Resolution Plan (land proposed to be transferred through land SPV) is INR 328 crores.
>
> Hence it is submitted that for effective implementation of the Resolution Plan and to ensure that the strict timelines prescribed therein are met, JAL shall pay to JIL immediately upon the disposal of these appeals and under the aegis of this Hon'ble Court a total Amount of Rs 1084 Crores (756 crores + 328 Cr).
>
> The same shall be utilised for the construction in terms of the NBCC Resolution Plan."

179.1.7. Apart from the above, the resolution applicant NBCC has also indicated various other aspects of accounting in regard to the defect liability of JAL as the master developer; and charging of excess profit by JAL. However, it is also submitted that the suggested amounts are subject to final reconciliation and verification. With these submissions, the prayer on behalf of NBCC is stated in the following terms: -

> "9. Needless to state that the above amounts are subject to final reconciliation and verification of accounts. In this regard it is requested that such reconciliation should be carried out by an independent third party to be nominated by the Hon'ble Court which would ensure that the rightful entitlement of JIL is provided to it and the Resolution Plan is successfully and effectively implemented."

179.2. The associations of homebuyers of JIL, while supporting the submissions of the resolution applicant, have contended that returning the said sum of INR 750 crores deposited by JAL would be contrary to the orders of this Court, as the intention of the Court in ***Chitra Sharma*** was to safeguard the interests of homebuyers and rehabilitation of JIL. Moreover, direction by the Court to JAL for making such deposit, even when it was aware that JAL was not a party to the CIRP of JIL, shows that the refund shall not be made to JAL. It is submitted that any such refund may cause reduction of readily available funds to start the construction of unfinished projects.

179.2.1. It has been prayed that the Court may confirm that the said sum of INR 750 crores is to protect the interests of the homebuyers and forms a part of the assets of JIL. Alternatively, it has also been prayed that reconciliation of accounts between JAL and JIL be done in a time bound manner; and the refund of leftover funds be not permitted until NBCC completes the construction of apartments and the homebuyers get the possession of the flats. The homebuyers have also prayed for an injunction against NBCC, barring it from withdrawing and for direction to NBCC to expedite the process of implementation. Yet further prayers have been made to direct an audit of the quality of construction by NBCC to make sure that it conforms to the quality agreed upon by the homebuyers at the time of booking the apartments.

179.3. The other homebuyers of JIL, while supporting the submissions aforesaid, have reiterated that the directions of this Court in ***Chitra Sharma*** to JAL for making the said deposit was primarily to safeguard the interests of the homebuyers and rehabilitation/restitution of JIL; that it was a conscious decision of this Court keeping the interests of the homebuyers in mind; that if the intention of this Court was to revert this deposit to JAL, an express direction would have been made in that behalf but, despite multiple pleas of JAL, this Court did not do so; that the application of JAL seeking recall of the directions for depositing INR 2,000 crores was dismissed by the order dated 25.10.2017 and it is against the principles of *res judicata* for JAL to seek the same relief in the present proceedings; that the IRP was conscious of the intention of this Court regarding the fate of the deposit made by JAL and that is why included this amount in the information memorandum with a caveat that it is subject to the order of the NCLT. It is further submitted that any direction for refund of this money to JAL would cause shortage of readily available funds to start the construction, which may jeopardise the fate of the entire project.

179.4. Even those associations of homebuyers of JIL, who have attempted to project themselves as 'dissenting' homebuyers, are *ad idem* on this issue that the said sum of INR 750 crores is the property of JIL and ought not be refunded to JAL. However, it is submitted by them that NBCC is aiming at profiteering by getting hold of this money without

corresponding provision in the resolution plan for its use for the benefit of homebuyers.

179.5. The other persons/entities standing with JIL have also opposed the submissions made on behalf of JAL for return of this sum of INR 750 crores. It is submitted that even while permitting RBI to allow the banks to initiate CIRP against JAL, this Court did not issue any direction for refund of the deposit made by JAL and rather allowed this amount to be utilised for the CIRP of the corporate debtor JIL. Therefore, this amount has rightly been taken in the resolution plan for being utilised for the purposes of JIL.

From the long range of submissions aforesaid, two aspects emerge for determination: one, as regards the treatment of the said amount of INR 750 crores and accrued interest; and second, as regards the amount receivable by JIL from JAL and reconciliation of accounts between these two companies. For dealing with extensive submissions concerning the said amount of INR 750 crores and accrued interest, worthwhile it would be to recapitulate the basic facts related with this deposit.

A comprehensive look at what had transpired during the course of consideration of the matter involved in ***Chitra Sharma*** and what had culminated in the final judgment dated 09.08.2018, a few pertinent features come to the fore, which essentially relate to the concern of this Court towards homebuyers of JAL and JIL taken as a whole. As noticed,

when the proceedings were taken up by this Court in ***Chitra Sharma*** in the month of September, 2017, the homebuyers were facing critical predicaments inasmuch as, at that point of time, they were not recognised as financial creditors of the corporate debtor. The matter, of course, arose from the insolvency proceedings relating to JIL but the submissions before the Court did not remain limited to the homebuyers of JIL alone; rather the predicaments were placed before the Court on behalf of the homebuyers of JAL and JIL as a whole lot and it was submitted that the interests of the 'flat purchasers', who had invested with JAL and JIL, need to be protected. On 11.09.2017, after noticing several facets of the matters, including the fact that JAL, the holding company, was not a party to the insolvency proceedings concerning JIL, this Court issued a slew of directions, including that for deposit of INR 2,000 crores by JAL.

181.1. JAL made an avid effort to wriggle out of the rigour of the direction for deposit of INR 2,000 crores while seeking recall of the order passed by this Court or for a modification that would enable it to transfer the rights under the Concession Agreement in respect of the Yamuna Expressway. This attempt on the part of JAL failed after this Court noticed the submissions in opposition that the rights under the Concession Agreement belonged to JIL. The directions of this Court, for deposit as made from time to time in the course of proceedings in ***Chitra Sharma***, resulted in JAL depositing INR 750 crores in instalments.

181.2. The fact of the matter remains, and unfolds from various interim orders passed in the case of ***Chitra Sharma***, that basic concern of the Court was regarding the claim of the homebuyers of JAL and JIL taken as a whole; and it was not stated at any stage by this Court that JAL was to part with this money exclusively for the purposes of JIL and, for that matter, for the purposes of the homebuyers of JIL alone. As noticed, during the course of proceedings, this Court appointed *amicus curiae,* who was directed to open web-portal for the homebuyers of JIL and an independent web-portal for the homebuyers of JAL. As per the order dated 22.11.2017, the learned counsel appearing for JAL was to provide the requisite details to the *amicus* as also the amount for creation of the portal and for carrying on the consequential activities.

181.3. On 21.03.2018, it was stated on behalf of JAL that an amount of INR 550 crores had already been deposited and that only about 8% of the homebuyers were interested in seeking refund while others were desirous of seeking possession of their flats. This Court indicated that at the given stage, only the matter in relation to the homebuyers seeking refund was being examined and other grievances would be examined in the next phase of proceedings. Since the order for deposit of INR 2,000 crores had not been fully complied with, the Court issued directions for further deposit of INR 200 crores in instalments. At that stage, the Court was informed by the *amicus curiae* that as per his portal and *as per the record*

of JAL, an amount of INR 1,300 crores was required to be refunded by way of principal alone to the homebuyers who were seeking refunds.

181.4. Thereafter, on 16.05.2018, this Court took note of the fact that a sum of INR 750 crores was lying in deposit and it was observed that the same '*has to be disbursed on pro rata basis amongst the homebuyers'*. On that date, it was also directed that **'***Jaiprakash Associates Ltd. (JAL), the holding company of Jaypee Infratech Ltd. (JIL), shall deposit a further sum of Rs. 1000 crores jointly and severally by 15.06.2018'.*

181.5. Lastly, on 13.07.2018, this Court, while expressing disinclination to entertain the proposals advanced on behalf of JAL, posted the matters on 16.07.2018 *'exclusively for the purpose of considering the issue of the rights of the homebuyers and the capability of JAL and JIL to construct the projects'*. Thereafter, the matters were finally heard and decided by way of the judgment dated 09.08.2018.

181.6. Even at the final consideration of the matter, further proposals were mooted on behalf of JAL but were rejected by this Court while explaining that accepting any such proposal on behalf of JAL would cause serious prejudice to the discipline of IBC; and this Court particularly observed that clauses (*c*) and (*g*) of Section 29A operated as a bar to the promoters of JAL/JIL participating in the resolution process. This apart, after taking note of various grounds urged on behalf of the homebuyers in opposition to the proposal, this Court was convinced that JAL/JIL were lacking in financial capacity and resources to complete the unfinished

projects. The reasons that were stated on behalf of the homebuyers in opposition to the proposal of JAL were aplenty where it was, *inter alia,* alleged that there had been questionable transactions involving mortgage of around 758 acres of JIL's land worth INR 5,000 crores in favour of the lenders of JAL without any consideration and the same were set aside by NCLT[87]; that the claim by JAL of delivering the flats was also a fractured one because the flats were delivered incomplete and OOP was being made without OC; that about 22,000 homebuyers were suffering due to delays of more than four years in completion of various projects of JAL and JIL; that under the contracts, JAL and JIL were jointly and severally liable to deliver the flats; that there were serious doubts about the credentials of JAL, who had diverted huge funds from JIL towards its other businesses; JAL had been unable to honour the order of this Court for depositing INR 2,000 crores, where only INR 750 crores were deposited after about 10 months from the initial order dated 11.09.2017 and where the instalment of INR 1,000 crores, as ordered on 16.05.2018, was not forthcoming. The aforesaid and all other facts and factors indeed formed the basis of the conclusion by this Court that JAL/JIL were lacking in financial capacity and resources to complete the unfinished projects. There was, of course, a common refrain that liquidation of the corporate debtor JIL would not be in the interest of homebuyers.

87 The said order of NCLT was ultimately approved by this Court in the judgment dated 26.02.2020 in the case of ***Anuj Jain***.

181.7. In ***Chitra Sharma*** (supra), having pondered over diverse propositions, the requirement of balancing the discipline of the Code, to do complete justice and to secure the interests of all the concerned, this Court considered it just and proper to revive the CIRP of JIL and to reconstitute the CoC as per the amended provisions of IBC with recourse to the powers under Article 142 of the Constitution of India.

181.8. However, before concluding on the matter, this Court also took into consideration the submissions made on behalf of some of the homebuyers for issuance of directions to facilitate *pro rata* disbursement of the amount of INR 750 crores lying in deposit pursuant to the interim directions. This Court observed that even when the claim of the refund seekers was required to be considered with empathy, such a request could not be acceded to; and specified four major reasons for declining this prayer, which included the reason that there were other creditors too and if the amount was utilised only for refund seekers, the homebuyers who were seeking their flats would have a legitimate grievance. Another reason was that the insolvency resolution process qua JAL was also being permitted. This was coupled with the position that this Court was reviving the CIRP in relation to JIL.

181.9. It is also noteworthy that though the homebuyers were earlier not recognised as financial creditors, the doubts about their status as financial creditors were removed with amendment of the statute (IBC) with effect from 06.06.2018 and that was a major reason that this Court considered it

appropriate, while deciding ***Chitra Sharma*** on 09.08.2018, to revive the resolution process but while making it clear that it would follow the discipline of IBC. However, this Court did not order that the said sum of INR 750 crores shall stand forfeited to JIL but only transferred the same together with accrued interest to NCLT, so as to abide by the directions of NCLT.

Taking all the factors and the orders of this Court into account cumulatively, it is difficult to find if the sum in question was ever ordered by this Court to be deposited by JAL in discharge of its obligations towards JIL or towards homebuyers of JIL alone; and equally difficult it is to accept the submissions made by the resolution applicant and other persons standing with JIL that this corpus of INR 750 crores together with accrued interest has become an asset of JIL.

In an overall analysis, it appears that at the relevant time of consideration of the matter in ***Chitra Sharma***, the grievances that were projected before this Court were not confined to the homebuyers of JIL alone but they related to the homebuyers of JAL as well; and the agreements with the homebuyers were also of a composite nature, with both JAL and JIL being the parties thereto. It had been in that hodgepodge of the interwoven transactions that the homebuyers of JAL and JIL projected their grievances as a whole lot before the Court in ***Chitra Sharma***. As noticed, at the initial stages, *pro rata* disbursement to the refund seekers was under contemplation of the Court (as twice over

stated in the interim orders) but even those refund seekers were not the homebuyers of JIL alone. The figure of INR 1,300 crores, as being the amount required for refund, was stated by the *amicus curiae* as per his portal and '*as per the record of JAL'*.

183.1. Therefore, it is apparent that at the given stage, the said deposit was taken for the purpose of the refund seeking homebuyers of JAL and JIL both; and at the final stage, when this Court found that the interests of various other stakeholders were to be taken into account, the money was transferred to NCLT. It is difficult to deduce from the said proceedings and from the final order of this Court in ***Chitra Sharma*** that the corpus comprising of INR 750 crores with accrued interest is to be treated as the property of JIL.

183.2. The NCLT essentially proceeded on the considerations that JAL had indeed received money from the homebuyers of JIL; that JAL was asked by the Court to deposit the amount towards refund of JIL homebuyers; and that there was no direction from the Court to return this money to JAL. It appears that all the relevant facts and background aspects concerning this deposit did not surface before NCLT, which led it to draw an inference not standing in conformity with the meaning and purport of the directions of this Court in the case of ***Chitra Sharma*** (supra).

183.3. While deducing that the money in question became the property of JIL in view of the directions for deposit to JAL by this Court, the NCLT

omitted to consider that the directions to JAL by this Court were not backed by any finding that in law JAL was liable to make good the said some of money for the purpose of refund seeker homebuyers of JIL alone. The directions and observations of this Court in the case of ***Chitra Sharma*** when read *ad seriatim* with their context, it is clear that such directions for deposit to JAL were that of an attempt by this Court to deal with the demands of refund seeking homebuyers of JAL and JIL. Even such a tentative proposition did not reach its finality in ***Chitra Sharma***; and after taking note of the other factors and interests of various other stakeholders, the money was transferred to NCLT. In a comprehensive view of the matter, the inference drawn by NCLT in its impugned order dated 03.03.2020, that this money is an asset of the corporate debtor JIL remains unsustainable.

Before switching over to the other leg of discussion in regard to this sum of INR 750 crores, it may also be observed that the contentions urged on behalf of the homebuyers of JIL, that this Court having rejected the application of JAL for recalling the directions for depositing the amount of INR 2,000 crores, the claim for refund of deposited amount by JAL is against the principles of *res judicata*, is also baseless. As noticed, during the course of consideration of the matter in ***Chitra Sharma*** (supra), this Court not only declined the prayer for recall of the directions for deposit but, even reiterated such directions on more than one occasion. However, all such orders and directions were interim in nature and from none of

those interim orders or from the final judgment in ***Chitra Sharma***, it could be deduced that the issue concerning entitlement to the deposited amount was finally decided by this Court against the depositor JAL.

Coming to the resolution plan, in our view, NBCC could not have prepared the same by assuming that this amount was the property of JIL when it was neither stated so in the orders passed by this Court nor by IRP in the information memorandum. The overt reliance by NBCC on the contents of the information memorandum is also misplaced because IRP never stated in the information memorandum that this amount of INR 750 crores was a part of the assets of JIL. In the relevant heading of 'Investment/Financing Opportunity', the IRP stated thus: -

> "***Unique investment/financing opportunity for the Resolution Applicant with adequate value to be unlocked***
>
> Unutilized land parcels (mortgaged and unencumbered land) of ***3502 Acres***
> ***4,602 units (6.39 Mn sqft)*** of unsold inventory in LFD 1 (Noida), LFD 3 (Mirzapur), LFD 5 (Agra).
> More than INR 3,758 cr receivable (including amount not due) as at Sep 30, 2018, against sold inventory, further approximately INR 184.45 cr is due against bulk sale of land
> **Rights over the toll fee** (along with revenue from road side facilities and advertisement) to be collected on Yamuna Expressway over the balance concession period of 30 years as at date
> 25% CAGR in toll revenue up to H1FY19
> Opportunity to exploit 3.4 mn sqft of road side facility area across express way
> 100% equity shareholding in Jaypee Healthcare Limited, having two fully operational hospitals in Noida & Chitta and one semi operational hospitals in Anoopshahr, UP
> Jaypee Hospital, Noida with 525 beds (338 operational beds) is expandable to 1200 beds

> 750 Crores deposited by JAL lying with Hon'ble NCLT, utilization/ end use of same pending directions and decisions of Hon'ble NCLT."
>
> (underlining supplied for emphasis)

185.1. Therefore, even though various aspects relating to other assets and their potential utilisation were indicated in the information memorandum but, as regards this sum of INR 750 crores, the information memorandum made it absolutely clear that the same was deposited by JAL and was lying with NCLT; and that its end use was pending decision of NCLT. In the face of such unequivocal expressions, it cannot be accepted that in the information memorandum, any declaration was made that this sum of INR 750 crores was readily available to the resolution applicant. The submissions in this regard as made on behalf of NBCC are required to be rejected.

We may observe that the decisions cited by the parties do not require much discussion. The principles in the cited decisions including those in the case of ***Embassy Property*** (supra) that the assets belonging to a third party cannot be utilised towards resolution of a corporate debtor remain fundamental and beyond cavil. Equally, the reference to the maxim *actus curiae neminem gravabit*, and to the decision in ***ONGC*** (supra) has been rather unnecessary because the said principle is essentially employed for the purpose of restitution and putting a party in the position where he would have been but for intervention or lapse of the Court.[88] The principle underlying this maxim is also fundamental to all the

88 This principle has been succinctly explained by this Court in the case of ***South Eastern Coalfields Ltd. v. State of M.P. & Ors.:*** **(2003) 8 SCC 648** in the following

rules of administration of justice and hence, an unintended result of any act or omission on the part of the Court, which occurs for whatever reason, is not allowed to operate to the prejudice of any person. However, this principle would not apply to the present case for the reasons that this Court consciously directed the holding company JAL to make a deposit but, added to that were the other conscious decisions where this amount was not ordered to be forfeited to JIL nor there was any decree that this amount had become property of JIL or the homebuyers of JIL. For what has been found and held hereinabove, we do not consider it necessary to dilate further on these principles.

The upshot is that the said amount of INR 750 crores and accrued interest thereupon, is not the property of JIL. In regard to this amount, neither the stipulation in the resolution plan could be countenanced nor the order of NCLT could be approved.

Accordingly, we hold that the amount of INR 750 crores, which was deposited by JAL pursuant to the orders passed by this Court in the case of ***Chitra Sharma,*** and accrued interest thereupon, is the property of JAL; and stipulation in the resolution plan concerning its usage by the

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words: -

> "28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party……."

resolution applicant of JIL cannot be approved. The part of the impugned order dated 03.03.2020 placing this amount in the asset pool of JIL is set aside.

After we have found that the impugned order dated 03.03.2020 placing the said amount of INR 750 crores and accrued interest in the asset pool of JIL is unsustainable, the question is as to what orders in sequel be made regarding this money? In ordinary circumstances, the consequence of the findings in the preceding paragraphs would have been of direct refund of this money to JAL but the present matter carries with it several entangled features relating to the amount otherwise payable by JAL to JIL; and these features cannot be ignored altogether.

As noticed, even when JAL and JIL are two separate corporate entities, JIL is an alter ego of JAL, for having been set up as an SPV and having been substituted as concessionaire in the Concession Agreement aforesaid. The agreements with homebuyers had also been of such a nature where JAL and JIL both were signatories thereto. Additionally, JAL had been extended construction contracts by JIL and, as per the submissions made before us [*vide* paragraph 178.1.4 (supra)], JAL had been carrying out the construction work and taking steps to reduce the liability towards JIL that stood at a sum of INR 716 crores as on 31.03.2018 and was purportedly reduced to INR 195 crores as on 31.03.2020. Various homebuyers have allegedly made payments towards IFMD to JAL. Moreover, JAL has submitted that balance of INR 195

crores, which was to be appropriated towards the construction of JIL's project, could be adjusted from the said sum of INR 750 crores, if the resolution applicant makes a formal submission of terminating the construction agreement. NBCC, on the other hand, has suggested several other amounts to be recoverable from JAL.

189.2. Having comprehensively taken note of the complex and interwoven features, even while we are not inclined to countenance the other claims against JAL in these proceedings[89], so far as the admitted amount towards construction advance is concerned, in our view, the process had been a continuing one and admittedly an amount of INR 195 crores was due to JIL as on 31.03.2020. In the given circumstances, it would serve the interests of all stakeholders, if the proposition for reconciliation of accounts, as stated in the alternative submissions by JAL as also by the resolution applicant, be partly accepted and after reconciliation, the payable amount be made over to JIL before refunding the remainder to JAL.

189.3. On behalf of JAL, it is submitted that verification/reconciliation could be carried out by IRP or by a chartered accountant appointed by him, whereas NBCC would submit that such reconciliation should be carried out by an independent third party to be nominated by this Court. However, as noticed, the said sum of INR 750 crores stood transferred to NCLT in terms of the final directions in the case of ***Chitra Sharma***

89 This is because insolvency resolution of JAL itself is looming large and in case of insolvency resolution or liquidation of JAL, such claims against JAL shall have to stand in the queue as per the discipline of IBC.

(supra). Having regard to all the relevant features of this case, it appears appropriate that the process of reconciliation of accounts between JAL and JIL be taken up under the supervision of NCLT.

For the aforesaid purpose of reconciliation of accounts between JAL and JIL, the NCLT shall, within 7 days of receipt of copy of this judgment, nominate an independent accounting expert; and the accounting expert so nominated by NCLT shall carry out the process of reconciliation while involving IRP of JIL and one representative of JAL. Looking to the underlying urgency, the accounting expert shall complete the entire process of reconciliation of accounts and submission of his report to NCLT within 10 days of his nomination. The professional charges and expenses for the task assigned to the accounting expert shall be determined by NCLT and shall be borne equally by JAL and JIL.

After receiving the report from the accounting expert, the NCLT shall pass appropriate orders in the manner that, if any amount is found receivable by JIL/homebuyers of JIL, the same shall be made over to JIL from out of the said amount of INR 750 crores and accrued interest; and remainder thereof shall be returned to JAL in an appropriate account and that shall abide by the directions of the competent authority dealing with the proceedings concerning JAL. The NCLT would be expected to pass appropriate orders within 2 weeks of submission of report by the accounting expert.

190.2. However, we need to make it clear that this process of reconciliation is not meant for determination of any claim otherwise sought to be levied against JAL by IRP or homebuyers of JIL or by the resolution applicant; and only the accounts concerning the amount/s advanced to JAL by JIL towards construction contracts (*vide* paragraph 178.1.4.) are to be examined and reconciled with reference to the extent of liabilities discharged by JAL and then to find the extent of excessive amount, if any, available with JAL which is receivable by JIL/homebuyers of JIL.

In regard to the aforesaid directions concerning reconciliation of accounts and disposal of the said amount of INR 750 crores and accrued interest, a few more comments and observations appear necessary. We have taken note of the submissions made on behalf of NBCC as also on behalf of various homebuyers of JIL that this money is required for construction of houses and if it goes to JAL, there would be acute shortage of funds for construction. We are also aware of the facts that have come on record that JAL is itself in distress and CIRP in its relation is looming large. We have further taken note of the submissions made by the financial creditor of JAL to place this sum of money within their control in an escrow account. However, we have not accepted any of these submissions in entirety.

As observed hereinabove, after having found that the said money is the property of JAL, ordinarily, the consequence would have been of

directing its refund to JAL but the other entangled features of the case relating to the amount otherwise payable by JAL to JIL cannot be ignored altogether, particularly when it was an admitted position on behalf of JAL before NCLT that an amount of INR 274 crores was payable by it to JIL and even before this Court, this obligation to pay has been admitted on behalf of JAL, albeit to the tune of INR 195 crores as on 31.03.2020; and it appears that JAL has been taking steps (maybe crippled steps) to carry out construction and to reduce its liability. We are not determining the extent of amount payable by JAL to JIL because that would be a matter of reconciliation of accounts but, having regard to the background in which, and the purpose for which, JAL made the said deposit pursuant to the orders of this Court and also having regard to the present position of these two companies, adopting this course appears to be in the balance of the legal rights of the respective stakeholders as also in the balance of equities. We would hasten to observe that ordinarily, the equitable considerations do not directly come into play in corporate insolvency resolution process but the matter concerning this amount of INR 750 crores and accrued interest thereupon is a convoluted and stand-alone issue, having the peculiarities of its own and hence, we have adopted the course as contemplated above. This process is otherwise not of determination of the claims of individual stakeholders, be it operational creditors or financial creditors. In the interest of justice, it is also made clear that disposal of the said sum of INR 750 crores shall otherwise not

be treated as determinative of the rights and obligations of any stakeholder in any of these two companies, JAL and JIL.

Before closing on this point for determination, we may indicate that a few of the arguments on this point have gone off on a tangent, as could be noticed from the submissions made by an association of homebuyers of JAL, who has directly approached this Court against the order of NCLT, that INR 160 crores be designated out of the said amount of INR 750 crores for completing the houses of the members of that association; and that in RERA proceedings, JAL was demanding money from its members, though, there was unexplained delay of 5 to 7 years in completion of project by JAL. We are unable to find any logic in the submission of this nature against JAL by its homebuyers having been made in these proceedings. It goes without saying that the dealing between JAL and its homebuyers is not the subject matter of the present proceedings. Similarly, the submission by some of the dissatisfied homebuyers of JIL, that NBCC is aiming at profiteering by getting hold of this money but without making corresponding provision in the resolution plan for the appropriate use of this money for the benefit of homebuyers, also remains baseless and redundant in view of what has already been discussed hereinbefore. Another block of submissions on behalf of some of the homebuyers of JIL, like seeking directions against NBCC that it shall not withdraw and should expedite construction as also seeking audit over the quality of construction, have gone far too beyond the real issues

requiring determination in the present litigation. In regard to these and other submissions of similar nature, we would only leave the parties to take recourse to appropriate remedies in accordance with law, in case of any legal grievance existing or arising in future.

Point K

Security interest of the lenders of JAL and effect of judgment dated 26.02.2020

Two separate questions formulated in this point for determination carry their intrinsic correlation and hence are taken up for determination together.

The genesis of these questions lies in seven such transactions whereby, the financial facilities obtained by JAL were secured by way of mortgages created over various parcels of JIL's land, aggregating to 858 acres. During the present CIRP proceedings, the IRP questioned these transactions as being preferential, undervalued and fraudulent within the meaning of Sections 43, 45 and 66 of the Code. An application moved by IRP for avoidance of these transactions was accepted in part by the Adjudicating Authority in its order dated 16.05.2018 and directions were issued for avoidance of six of these transactions. However, one such transaction was found by the Adjudicating Authority to be not falling within relevant time, as provided in Section 43 of the Code and hence, the same was not avoided. The order so passed by the Adjudicating Authority (NCLT) was, however, reversed by the Appellate Authority (NCLAT).

Hence, the matter came in appeal before this Court and was dealt with in the case of ***Anuj Jain*** (supra), decided on 26.02.2020.

In the judgment dated 26.02.2020 in ***Anuj Jain*** (supra), this Court took note of all the relevant particulars of the said seven transactions and the one, which was not found falling within relevant time, was noticed by this Court as follows: -

> "7.5. Yet another transaction was questioned by IRP as being avoidable but the adjudicating authority held the same to be not falling within the relevant time as provided under Section 43 of the Code. The particulars of this transaction are as follows:
>
> > Mortgage deed dated 12-5-2014 for 100 acres of land situated at Village Tappal, Tehsil Khair, District Aligarh, Uttar Pradesh executed by JIL in favour of ICICI Bank Ltd. against the facility agreement dated 12-12-2013 granting term loan of Rs 1500 crores and overdraft amount of Rs 175 crores to JAL (hereinafter also referred to as "Property No. 7") (As regards this description, it is pointed out on behalf of the respondent ICICI Bank that it had been of "term loan of Rs 1500 crores under the corporate rupee loan facility agreement and general conditions dated 12-12-2013 and mortgage deed was dated 10-3-2014")."

194.1. As noticed, in final determination of the relevant issues, this Court disapproved the order of NCLAT; and the order of NCLT was upheld in relation to six of these transactions with the finding that the transactions in question were hit by Section 43 of the Code and the Adjudicating Authority (NCLT) was justified in issuing necessary directions in terms of Section 44 of the Code. However, as noticed, the above-noted seventh transaction pertaining to the mortgage dated 12.05.2014 and relating to 100 acres of land, remained intact. The property involved in the said transaction, which was not covered under avoidance provisions is

referred to as 'Tappal Property 1', for being situated at village Tappal for which, the mortgage was created on 12.05.2014.

194.2. We have also noticed hereinbefore that in the case of ***Anuj Jain*** (supra), this Court had examined another issue, that is, as to whether the lenders of JAL could be categorised as financial creditors of JIL. In this regard, this Court though observed that when the transactions in question were hit by Section 43 of the Code, they were denuded of their value and worth and the security interest created over the property of JIL involved in those transactions stood discharged in whole; and, therefore, such lenders of JAL were not entitled to claim any status as creditors of the corporate debtor JIL much less as financial creditors but then, this Court examined the question as regards the status of such lenders of JAL qua the corporate debtor JIL independent of the findings that the transactions in question were hit by Section 43 of the Code. Ultimately, on this issue relating to the status of such lenders of JAL, this Court held that they, on the strength of the mortgages in question, might fall in the category of secured creditors but, for the reason that the corporate debtor did not owe them any financial debt, such lenders of JAL would not fall in the category of financial creditors of the corporate debtor JIL.[90]

194.3. The judgment dated 26.02.2020 in the case of ***Anuj Jain*** (supra) was delivered by this Court after the voting by CoC on the resolution plan

90 The relevant conclusions in the case of ***Anuj Jain*** have been reproduced in paragraphs 34.1 to 34.3, hereinbefore.

in question but before passing of the impugned order dated 03.03.2020 by the Adjudicating Authority.

In the resolution plan, apart from various stipulations in regard to the land of JIL and creation of two SPVs with transfer of certain parcels of land, the resolution applicant stated in Clause 23 of Schedule 3 relating to 'reliefs and concessions' as under: -

> "23. The JAL Lenders Mortgaged Land shall continue to be vested in the Corporate Debtor free of any mortgage, charge and encumbrance."

The Adjudicating Authority, in its impugned order dated 03.03.2020, while noticing the terms of the resolution plan and key reliefs, summarised the matter relating to the land mortgaged with JAL lenders in the following part of tabulation: -

"Sl. No.	**Matter**	**Relief Sought**	**Remarks**	**Cross Reference in Resolution Plan**
3	858 acres of Corporate Debtor's land was mortgaged with JAL lenders to secure debt of JAL without any consideration or counter guarantee to JIL (Transaction).	NBCC has sought relief that 858 acres of mortgaged land shall continue to be vested in Corporate Debtor free of any mortgage, charge and encumbrance.	RP filed an application for avoidance of Transaction which was allowed by that Hon'ble NCLT vide order dated 16.05.2018 and 758 acres out of 858 acres was	Page 72 clause 1 of Schedule 3 of the Resolution Plan"

			avoided. However, appeals were filed against the NCLT order dated 16.05.2018 and Hon'ble Supreme Court vide order dated 26.02.2020 has upheld the NCLT order dated 16.05.2018 . **The Hon'ble SC has pronounced the order with respect to the same on 26.02.2020 in Civil Appeal No. 8512-27 of 2019.**	

(bold is in original)

196.1. As regards the land under mortgage, the Adjudicating Authority stated its consideration in paragraph 128 of the order impugned in the following terms: -

> "128. With regard to the objections raised by JAL and other objectors for inclusion of ₹858 acres as part of the resolution plan, for the Hon'ble Supreme Court on 26.02.2020 held that mortgaged of ₹858 acres of JIL land to the lenders of JAL is an avoidance transaction, it can no more be an objection from JAL or from consortium of ICICI Bank to say that land cannot be part of the resolution plan for it has been mortgaged to the financial creditors of JAL."

However, while concluding on Clause 23 of Schedule 3 of the resolution plan, the Adjudicating Authority observed (in paragraph 134) thus: -

> "Clause No. 23:- This point is not clear as to whether it is referring to the land of the Corporate Debtor mortgaged to the lenders of JAL, if that is so, since it has been decided by the Honourable Supreme Court, it need not be reiterated."[91]

196.2. Noteworthy it is that 'cross-reference' in the table above-quoted, to '*Clause 1 of Schedule 3 of the resolution plan'* as also the figure of extent of land pertaining to avoidance transactions at '*858 acres'* in paragraph 128 of the impugned order were incorrect and the Adjudicating Authority corrected these errors in the corrigendum dated 17.03.2020 in the manner that the cross-reference is to '*Clause 23 of Schedule 3 of the resolution plan*' and the extent of land held by this Court to be of avoidance transactions is '*758 acres'*.

To put it in clear terms, the net outcome of the propositions, proceedings and findings noticed in the preceding paragraphs is as follows: 858 acres of JIL's land was mortgaged with the lenders of JAL; in the resolution plan, NBCC sought the relief that such land shall continue to remain vested in the corporate debtor JIL free from any mortgage, charge and encumbrance; 758 acres, out of this 858 acres, of land got released from mortgage in terms of the judgment in ***Anuj Jain*** (supra);

acres of land, being 'Tappal Property 1', however, continued to

91 The aforesaid observations, as occurring in paragraphs 128 and 134 of the impugned order dated 03.03.2020, have been extracted hereinbefore in the narratives but we have re-extracted them for continuity of the present discussion.

remain under mortgage with ICICI Bank; and, as regards this mortgage, ICICI Bank was not recognised as a financial creditor of JIL even if falling in the category of secured creditors; the Adjudicating Authority has not rendered any specific decision as regards such mortgaged land and as regards the relief claimed by the resolution applicant while assuming that the entire matter stands concluded with the judgment of this Court dated 26.02.2020 in ***Anuj Jain*** (supra).

Now, the aforesaid terms of the resolution plan and the order of the Adjudicating Authority have given rise to two major issues. The first one is the grievance of ICICI Bank, who is the mortgagee in the said mortgage transaction relating to 'Tappal Property 1', that was not hit by Section 43 of the Code for having been entered into beyond the look-back period.

The mortgagee bank would submit that in terms of the judgment of this Court in ***Anuj Jain***, the said mortgage in relation to 'Tappal Property 1' continues to remain in force and thereby, the bank is a secured creditor of the corporate debtor JIL; and this mortgage cannot be taken away through a resolution plan without assigning any value. It is submitted that the stipulations in the resolution plan in regard to this mortgage remain invalid where the resolution applicant has erroneously assumed that the effect of implementation of the plan would be that all encumbrances and charges on the property of the corporate debtor for the loans given to third party shall stand extinguished. It is contended that a legal right in the

property cannot be taken away except by due process of law; that the process under the Code provides for reckoning and accounting of claims against the corporate debtor; and that only those claims which are accounted for and dealt with as a part of this process could possibly be dealt with in a resolution plan but, the claims which have not been accounted for and reckoned in this process cannot stand extinguished. It is submitted that this bank, in its capacity as mortgagee of the said 'Tappal Property 1', is left to suffer from double whammy where its claim under the mortgage has not been reckoned in the CIRP and then, the approved resolution plan proceeds to go ahead and extinguish the mortgage itself. It is argued that all these aspects have not been examined by the Adjudicating Authority and hence, its order, in regard to this issue, cannot be approved. This bank had filed a belated appeal before NCLAT, being D. No. 21936 of 2020 and has sought transfer of the same in this Court by way of Transfer Petition - D. No. 20274 of 2020.

In response to the aforesaid submissions of ICICI Bank, the resolution applicant has contended, with reference to the findings and conclusion of this Court in the case of ***Anuj Jain*** (supra), that the said bank is not a financial creditor of JIL and hence, has no locus in the matter and cannot claim payment of liquidation value of the debt owed by JAL. Without prejudice, it is also submitted that the resolution plan adequately deals with the treatment of the terms of securities, guarantees, indemnities, pledge, charge or encumbrances of any kind in

relation to any debt and in this regard, the prescription in the resolution plan at page 362 of the appeal filed by NBCC has been referred. That part of the resolution plan pertains to the terms/stipulations under the sub-heading, '*Effects of Settlement of Admitted Financial debt due to Financial Creditors'* which in turn, occurs under the heading *'1.2. Proposal for Financial Creditors'*. The referred term provides for release and discharge of all liabilities under such securities etc., other than continuation of guarantee benefits with the institutional financial creditors as laid down in the resolution plan.

Apart from the issue raised by ICICI Bank in relation to the said mortgaged land of 100 acres, another issue raised by some of the homebuyers is that adequate provisions have not been made in the resolution plan in relation to 758 acres of land, that was earlier covered by the other six mortgage transactions but now stands released from encumbrance.

Having examined the matter in its totality, we find force in the submissions so made by the mortgagee bank as also by the homebuyers.

The resolution applicant has overtly relied upon the fact that the objector bank was not accepted as a financial creditor of JIL by this Court in ***Anuj Jain*** (supra) and has contended on this basis that the objections so raised by this bank are required to be rejected. These submissions of the resolution applicant NBCC suffer from several shortcomings. Even when the said bank has not been recognised as a financial creditor

because the mortgage in question was not relating to any financial debt of the corporate debtor JIL, its capacity as a secured creditor, for being the holder of security in the form of mortgage which has not been avoided and which remains existing, cannot be denied; and has not been denied by this Court in ***Anuj Jain*** (supra).

203.1. This bank appears right in its contention that when the security in question was not even taken up as a part of the resolution process, it could not have been extinguished on the *ipse dixit* of the resolution applicant. Unfortunately, Adjudicating Authority totally missed out the real issue before it in regard to this mortgage transaction because, in the order as originally passed on 03.03.2020, the Adjudicating Authority assumed that all the mortgages in favour of the lenders of JAL (covering the entire 858 acres of JIL land) were annulled by this Court in ***Anuj Jain*** (supra) as avoidance transactions. Of course, in the corrigendum dated 17.03.2020, the Adjudicating Authority rectified the error of the figure '858', as occurring in paragraph 128 of the original order dated 03.03.2020, and corrected it to '758' but, did not examine the consequences thereof. In other words, while making the correction on 17.03.2020, the Adjudicating Authority failed to advert to the relevant question as to what would be the proper order as regards the remaining 100 acres of land, if only 758 acres was released in terms of the judgment in ***Anuj Jain*** (supra).

203.2. The fact that the Adjudicating Authority dealt with this segment rather cursorily is yet further seen from the part of the table reproduced

hereinabove where, while making reference to the mortgages in favour of the lenders of JAL, an incorrect cross-reference was made to Clause 1 of Schedule 3 of the resolution plan. This error was also corrected in the order dated 17.03.2020 and correct reference was made to Clause 23 of Schedule 3 but, again, the implication of this correction totally escaped the attention of the Adjudicating Authority.

203.3. As noticed, in the said Clause 23, a fleeting suggestion on the part of the resolution applicant had been that '*JAL lenders mortgaged land shall continue to be vested in the corporate debtor free from any mortgage, charge and encumbrance*'. The Adjudicating Authority dealt with the said clause of the resolution plan in an equally cursory manner by observing that the point was not clear but, if it was referring to the land mortgaged with the lenders of JAL, the issue had already been decided by the Supreme Court and need not be reiterated. In this entire process of mistakes/errors (might be accidental) and corrections as also cursory observations, the Adjudicating Authority totally missed out that one transaction relating to 100 acres of land, being 'Tappal Property 1', remained unaffected by the judgment in ***Anuj Jain*** (supra); and that the security creating over this land could not have been annulled in the manner suggested in the plan.

It cannot be denied that the claim of ICICI Bank pertaining to the said mortgage over 100 acres of land was not reckoned in the CIRP of JIL and without any specific provision in that regard, the resolution applicant

merely suggested by way of the Clause 23 of Schedule 3 as if such mortgage shall stand annulled and the land shall vest in the corporate debtor free from any encumbrances. To say the least, the said Clause 23 does not appear to be standing in conformity with any principal of law for discharge of a security interest, particularly of a third party who is not included in the insolvency resolution process of a corporate debtor. We would hasten to make it clear that the capacity of ICICI Bank in relation to the said mortgage of 100 acres of land of 'Tappal Property 1' is entirely different than its status as the dissenting financial creditor of JIL, to the extent JIL directly owed a financial debt to it. Those aspects pertaining to its capacity as dissenting financial creditor, to the extent of its share of financial debt, have already been discussed in Point **D** hereinbefore.

For what has been discussed above, neither the said Clause 23 of Schedule 3 of the resolution plan relating to 'reliefs and concessions' could be approved nor the order of the Adjudicating Authority in this regard.

Similarly, the grievance voiced by some of the homebuyers is also justified that adequate provisions are required for dealing with the other chunk of 758 acres of land (that now stands released from mortgage in consequence of the judgment of this Court in ***Anuj Jain***). This is another aspect which is required to be examined by the Committee of Creditors for ensuring viability of the plan and maximisation of the value of the assets of the corporate debtor JIL. We need not make much comment in

this regard but it cannot be gainsaid that availability of this chunk of land free from encumbrances has its own bearing on the entire gamut of insolvency resolution of JIL. The other aspects arising from the availability of this chunk of land shall be dealt with, when examining the question of final orders to be passed in these matters in Point **N** *infra.*

Point L

Other issues requiring clarification/directions

In its detailed submissions, NBCC has also raised an issue that in Clause 7 Schedule 3 of the resolution plan, reduction of share capital is being sought for the corporate debtor and '*not for the companies yet incorporated*' but the Adjudicating Authority has erroneously made the observations in its order that such reduction was not a part of this resolution. The resolution applicant NBCC has sought clarification in this regard. The relevant clause in the resolution plan reads as under: -

> "7. The approval of this Plan by the Adjudicating Authority shall be deemed to have waived all the procedural requirements in terms of Section 66, Section 42, Section 62(1), Section 71 of the CA, 2013 and relevant rules made thereunder, in relation to reduction of share capital of the Corporate Debtor, issuance of shares by Expressway SPV, Land Bank SPV, conversion of Admitted Financial Debt due to the Institutional Financial Creditors to equity, subscription of debentures by the Corporate Debtor or transfer of shares of the Land Bank SPV from the Corporate Debtor to Institutional Financial Creditors."

The observations by the Adjudicating Authority as regards this clause are that since reduction of the share capital of corporate debtor is not a part of the resolution plan, the Adjudicating Authority '*cannot waive*

the procedure for reduction of share capital in relation to the companies not yet incorporated'.

When the resolution plan with all its reliefs and concessions was approved by CoC and the plan was otherwise being approved by the Adjudicating Authority (albeit with modifications), the aforesaid observations in regard to Clause 7 of 'reliefs and concessions' cannot be said to be of apt dealing with the relief sought. Be that as it may, having regard to the purport and purpose of the said Clause 7 and its approval by CoC, we find no reason as to why the same may not be approved. Hence, the impugned order of the Adjudicating Authority dated 03.03.2020 shall be read as modified and in approval of the said Clause 7 of 'reliefs and concessions'.

In the last, NBCC has also prayed for directions to JAL and its sub-contractors or any other person having control over the project sites/lands of JIL to immediately hand over possession/control thereof to JIL and has also prayed for directions to the local administration for necessary support in that regard. We do not find any reason to make any such generalised observations or directions but would leave it open for the resolution applicant to take recourse to the appropriate proceedings in accordance with law, whenever occasion so arise.

Point M

Modified mechanism for implementation by the Appellate Authority

We have formulated this point for determination only in view of the fact that the interim order dated 22.04.2020, as passed by NCLAT while dealing with the appeal filed by NBCC against the said order dated 03.03.2020, has been challenged by the associations and individual homebuyers before this Court. Although in view of what has been discussed and held hereinbefore, all the issues related with the resolution plan and the impugned order of NCLT dated 03.03.2020 stand determined comprehensively and the related appeals before NCLAT, already withdrawn to this Court, shall also come to an end. Therefore, not much of discussion is required on this point but, a few comments in regard to the proposition adopted by the Appellate Authority appear necessary.

It appears that the proposition, of providing for Interim Monitoring Committee comprising of the representatives of three institutional financial creditors and the resolution applicant as also the resolution professional, was picked up by the Appellate Authority with reference to the stipulation in Point No. 2(a) of Part A of the resolution plan, where it was provided under the heading '*Management Team'* and sub-heading '*Appointment of Monitoring Agency*' that on and from the approval date and until the transfer date, the corporate debtor will be managed by a monitoring agency or any other person appointed by the resolution applicant in consultation with a Steering Committee comprising of three major institutional financial creditors.

212.1. In our view, even if the resolution plan carried such a management framework, the Appellate Authority, while dealing with the appeal against approval of the resolution plan, could not have provided for such a mechanism which is not envisaged by the Code.

The Code lays down detailed procedure for corporate insolvency resolution process and such a proposition, for constitution of any Interim Monitoring Committee during the pendency of appeal before the Appellate Authority (NCLAT) is neither envisaged by law nor appears justified. It is apparent on a bare perusal of sub-section (3) of Section 61 of the Code that any challenge to the order approving a resolution plan under Section

could be maintained only on the grounds specified therein. Obviously, while dealing with such appeals, the Appellate Authority is required to remain within the confines of the boundaries delineated by the Code rather than seeking to provide for a mechanism, for implementation of the plan.

Moreover, looking to the peculiar features of this resolution process, which has its own complications, constitution of such a Committee, consisting only of the resolution professional, the resolution applicant and the institutional financial creditors while leaving aside the biggest chunk of stakeholders i.e., the homebuyers (having more than 57% of the voting share in the CoC), would have caused more difficulties in implementation of the resolution plan rather than serving any purpose.

While entertaining the captioned appeals and directing transfer of the related cases pending before NCLAT to this Court by our order dated 06.08.2020, we had stayed the operation of the impugned order dated 22.04.2020 while allowing the IRP to continue with the management of the affairs of the corporate debtor. While concluding on these matters, it appears appropriate and necessary that the said order dated 22.04.2020 by NCLAT be disapproved and set aside.

Point N

Summation of findings; final order and conclusion

For what has been discussed and held on the relevant points for determination, our findings and conclusions are as follows:

A. The Adjudicating Authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by Committee of Creditors. If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court.

B. The process of simultaneous voting over two plans for electing one of them cannot be faulted in the present case; and approval of the resolution plan of NBCC is not vitiated because of simultaneous consideration and voting over two resolution plans by the Committee of Creditors.

C. The stipulations in the resolution plan, as regards dealings with YEIDA and with the terms of Concession Agreement, have rightly not been approved by the Adjudicating Authority but, for the stipulations which have not been approved, the only correct course for the Adjudicating Authority was to send the plan back to the Committee of Creditors for reconsideration.

D. The Adjudicating Authority has not erred in disapproving the proposed treatment of dissenting financial creditor like ICICI Bank Limited in the resolution plan; but has erred in modifying the related terms of the resolution plan and in not sending the matter back to the Committee of Creditors for reconsideration.

E. The Adjudicating Authority has erred in issuing directions to the resolution applicant to make provision to clear the dues of unclaimed fixed deposit holders. Paragraph 125 of the impugned order dated 03.03.2020 is set aside.

F. The issues related with the objections of YES Bank Limited and pertaining to JHL, the subsidiary of the corporate debtor JIL, are left

for resolution by the parties concerned, who will work out a viable solution in terms of paragraphs 141 and 142 of this judgment.

G. In the overall scheme of the resolution plan, the stipulation in Clause 21 of Schedule 3 thereof cannot be said to be unfair; and the observations in paragraphs 132 and 133 of the order dated 03.03.2020 justly take care of the right of any aggrieved party (agreement holder) to seek remedy in accordance with law and ensures viability of the resolution plan.

H. It cannot be said that the resolution plan does not adequately deal with the interests of minority shareholders. The grievances as suggested by the minority shareholders cannot be recognised as legal grievances. Their objections stand rejected.

I. The homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the RERA does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project of the corporate debtor could be segregated merely for the reason that same has been completed or is nearing completion.

J. (i) The amount of INR 750 crores (which was deposited by JAL pursuant to the orders passed by this Court in the case of ***Chitra Sharma***) and accrued interest thereupon, is the property of JAL and stipulation in the resolution plan concerning its usage by JIL or the resolution applicant cannot be approved. The part of the order of NCLT placing this amount in the asset pool of JIL is set aside.

The question as to whether any amount is receivable by JIL and/or its homebuyers from JAL, against advance towards construction and with reference to the admitted liability to the tune of INR 195 crores as on 31.03.2020, shall be determined by NCLT after reconciliation of accounts in terms of the directions contained in paragraphs 189 to 191.1 of this judgment. The amount, if found receivable by JIL, be made over to JIL and the remaining amount together with accrued interest be refunded to JAL in an appropriate account. It is made clear that the present matter being related to CIRP of JIL, no other orders are passed in relation to the amount that would be refunded to JAL because treatment of the said amount in the asset pool of JAL shall remain subject to such orders as may be passed by the competent authority dealing with the affairs of JAL.

K. (i) Clause 23 of Schedule 3 of the resolution plan, providing for extinguishment of security interest of the lenders of JAL could not have been approved by the Adjudicating Authority, particularly in

relation to the security interest that has not been discharged. This part of the order dated 03.03.2020 is set aside.

Adequate provision is required to be made in the resolution plan as regards utilisation of the land bank of 758 acres, that has become available to JIL free from encumbrance, in terms of the judgment dated 26.02.2020 of this Court in the case of ***Anuj Jain*** (supra).

L. (i) The impugned order dated 03.03.2020 shall be read as modified in relation to Clause 7 of Schedule 3 of the resolution plan; and the said clause shall stand approved.

As regards possession/control over the project sites/lands of JIL, it is left open for the resolution applicant to take recourse to the appropriate proceedings in accordance with law, whenever occasion so arise.

M. The Appellate Authority was not justified in providing for an Interim Monitoring Committee for implementation of the resolution plan in question during the pendency of appeals. The impugned order dated 22.04.2020 passed by NCLAT is set aside.

The net result of the discussion and findings hitherto is that some of the terms and stipulations of the resolution plan of NBCC, which was voted for approval by 97.36% of the voting share of the Committee of Creditors, do not meet with approval. Although, barring such terms and stipulations, all other terms and propositions of the resolution plan stand

approved. To be specific, the terms and stipulations in the resolution plan which do not meet with approval are those concerning: (a) the land providing agency [as held in Point **C** (supra)]; (b) the dissenting financial creditor [as held in Point **D** (supra)]; (c) the undischarged security interest of the lender of JAL [as held in Point **K** (i) (supra)].

217.1. Apart from the above, we have also disapproved the decision of the Adjudicating Authority in relation to the said amount of INR 750 crores with accrued interest and have held that this amount is the property of JAL and the stipulations in the resolution plan concerning its usage by JIL or the resolution applicant cannot be approved [as held in Point **J** (i) (supra)]. However, the final treatment of the said amount of INR 750 crores with accrued interest shall be determined by NCLT after the reconciliation of accounts between JAL and JIL and in terms of the directions contained in this judgment.

217.2. The added feature of the matter is that adequate provision is required to be made by the resolution applicant for utilisation of the land bank of 758 acres on which, security interest of the lenders of JAL stands discharged in terms of the judgment of this Court in ***Anuj Jain*** (supra).

217.3. The matters aforesaid, one way or the other, relate to the commercial terms of the resolution plan and carry their own financial implications.

For what we have held hereinabove, when several shortcomings are found in the resolution plan approved by the Committee of Creditors

vis-à-vis the specified parameters, the plan cannot be approved and the matter is required to be sent back to the Committee of Creditors. But the course to be adopted in the present matter carries its own share of complications.

We have anxiously pondered over all the peculiarities and complications involved in this matter where twice over in the past, this Court had to invoke its plenary powers under Article 142 of the Constitution of India, so that the insolvency resolution process concerning JIL could be taken to its logical fruition but within the discipline of IBC. Having regard to the circumstances, this Court had provided windows for completion of CIRP while essentially discounting on the time spent in the course of litigations.

As noticed, in the judgment dated 09.08.2018 in ***Chitra Sharma*** (supra), this Court revived the CIRP after taking note of the peculiarities of the case and later amendment to IBC whereby, the doubts about the status of homebuyers were removed and they were duly accorded the recognition as financial creditors. Then, in the judgment dated 06.11.2019 in ***Jaiprakash Associates Ltd.*** (supra), this Court provided another period of 90 days for completion of the CIRP from the date of judgment, after observing that delay in completion of CIRP was attributable to the process of law and neither the homebuyers nor any other financial creditor was to be blamed for pendency of the proceedings. This Court also observed that extraordinary situation had arisen because of constant

experimentation at different levels due to lack of clarity on the matters crucial to the decision making process of CoC and besides, there had been further legislative changes whereby, the scope of resolution plan was expanded. This Court also took note of the fact that there was unanimity amongst all the parties appearing before the Court that liquidation of JIL must be eschewed and an attempt be made to salvage the situation by finding out some viable arrangement which could subserve the interests of all concerned. The Court further took into account the third proviso to Section 12(3) of the Code whereby, another period of 90 days was provided in relation to the pending insolvency resolution process. All these factors led this Court to issue directions under Article 142 of the Constitution of India for the second time in this matter, to do substantial and complete justice to the parties and in the interest of all the stakeholders.

Taking up the present position, it appears that the resolution applicant, as also a large number of homebuyers of JIL having substantial voting share in CoC, carried a misplaced notion that the said amount of INR 750 crores and accrued interest has become an asset of JIL. At the same time, it appears that there had been lack of clarity as regards the treatment of contingent liability of the additional amount of compensation. The lack of clarity percolated in the decision of the Adjudicating Authority too, where it was assumed by the Adjudicating Authority that some of the

questionable terms/stipulations of the resolution plan could be modified/modulated by it.

221.1. The consequence and impact of the judgment of this Court in ***Anuj Jain*** (supra) dated 26.02.2020 was also not properly taken in comprehension by the Adjudicating Authority and, as noticed, it was assumed by the Adjudicating Authority in its order dated 03.03.2020 that the entire '858' acres of land stood discharged from the burden of security. Although the so-called correction of errors was carried out by the Adjudicating Authority on 17.03.2020 and the figure was corrected to '758' acres but the consequences of such a material correction were not examined.

221.2. Nevertheless, it gets reiterated that encumbrance over 758 acres of land (which is said to be carrying a valuation of over INR 5000 crores) is removed; and availability of the said land parcel has a substantial impact on the position of assets and liquidity of the corporate debtor JIL.

For all the features we have noticed hereinabove, it is at once clear that the entire substratum of the corporate insolvency resolution concerning JIL has undergone a sea of change. The added features in the continuing processes had been that JAL asserts to have carried out several works to reduce its liability towards JIL and on the other hand, IRP has asserted to have carried out further construction works and having made Offers of Possession to several homebuyers.

Taking all the facts and circumstances into account and in keeping with the spirit and purport of the orders passed in the past, we are inclined to again exercise the powers under Article 142 of the Constitution of India and to enlarge the time for completion of CIRP concerning JIL while extending opportunity to the said resolution applicants Suraksha Realty and NBCC to submit modified/fresh resolution plans, which are compliant with the requirements of the Code and the CIRP Regulations and are in accord with the observations and findings in this judgment.

We are conscious of the requirements of the discipline of IBC and would hasten to observe that the course which is being adopted is in the complex and peculiar features of this case but, this repeat exercise concerning the CIRP of JIL cannot be an unending process and needs to be taken to its logical conclusion. As regards the time frame, we are inclined to proceed on the theme and spirit of the judgment dated 06.11.2019 wherein, first 45 days were allowed for invitation of resolution plan and consideration by CoC. The later part of the extended time was provided for removing any difficulty and for passing appropriate orders by the Adjudicating Authority.

Having regard to the circumstances, we deem it just and proper to provide further time of 45 days from the date of this judgment for submission of the modified/fresh resolution plans by the resolution applicants, for their consideration by CoC and for submission of report by IRP to the Adjudicating Authority. This extended time includes the

reconciliation of accounts of JIL and JAL referred to in Point **J**. The process of reconciliation of accounts may go on alongside the processing of the resolution plans.

We also deem it appropriate to clarify that the processing of the modified/fresh resolution plans, as permitted and envisaged by this judgment, is required to be completed within the extended time and for that matter, the other aspects like reconciliation of accounts between JAL and JIL or resolution of the issues related with the financial creditor of the subsidiary of the corporate debtor shall be the matters to be dealt with separately and decision on the resolution plan by the Committee of Creditors need not wait the resolution of those issues.[92]

Accordingly, while once again exercising our powers under Article of the Constitution of India to do substantial and complete justice to the parties and in the interest of all the stakeholders of JIL, we conclude on these matters with the following order:

225.1. The matter regarding approval of the resolution plan stands remitted to the Committee of Creditors of JIL and the time for

92 In the passing, we may also observe that intrinsically interwoven transactions between JAL and JIL cover another aspect of arrangements whereby certain land parcels were transferred from JIL to JAL. The resolution plan in question, in clause 19 of Schedule 3, provided for termination of such arrangements where title and ownership was lying with the corporate debtor JIL. The Adjudicating Authority approved the said proposition while observing that the resolution applicant would be at liberty to proceed in accordance with law. The erstwhile director of the corporate debtor has raised questions over this arrangement in his written submissions while submitting that such terminations may create unprecedented crises and would cause prejudice to JAL's homebuyers. We have not commented on this aspect in the judgment essentially for the reason that the same did not form the core of the principal issues involved in this matter. However, when the matter is to be reconsidered, all the relevant aspects are left open for consideration of the Committee of Creditors.

completion of the process relating to CIRP of JIL is extended by another period of 45 days from the date of this judgment.

225.2. We direct the IRP to complete the CIRP within the extended time of 45 days from today. For this purpose, it will be open to the IRP to invite modified/fresh resolution plans only from Suraksha Realty and NBCC[93] respectively, giving them time to submit the same within 2 weeks from the date of this judgment.

225.3. It is made clear that the IRP shall not entertain any expression of interest by any other person nor shall be required to issue any new information memorandum. The said resolution applicants shall be expected to proceed on the basis of the information memorandum already issued by IRP and shall also take into account the facts noticed and findings recorded in this judgment.

225.4. After receiving the resolution plans as aforementioned, the IRP shall take all further steps in the manner that the processes of voting by the Committee of Creditors and his submission of report to the Adjudicating Authority (NCLT) are accomplished in all respects within the extended period of 45 days from the date of this judgment. The Adjudicating Authority shall

93 Only these resolution applicants were permitted to submit the revised plans in the judgment dated 06.11.2019.

take final decision in terms of Section 31 of the Code expeditiously upon submission of report by the IRP.

225.5. These directions, particularly for enlargement of time to complete the process of CIRP, are being issued in exceptional circumstances of the present case and shall not be treated as a precedent.

225.6. As noticed in paragraphs 4.5 and 38.3 hereinabove, the proceedings relating to CIRP of JIL were initiated by the Allahabad Bench of National Company Law Tribunal but, later on, the same were transferred to its Principal Bench at New Delhi. Therefore, the proceedings contemplated by this judgment shall be taken up by the Principal Bench of the National Company Law Tribunal at New Delhi.

All the appeals, transferred cases, transfer petitions and interlocutory applications in this batch stand disposed of.

A copy of this order be forwarded to the NCLT, New Delhi and IRP through email forthwith for compliance.

Acknowledgement

While closing, we owe a duty to put on record our thanks and compliments to the learned counsel for the respective parties, their associates and their research assistants who all, despite challenging

circumstances due to the pandemic and virtual hearing, have rendered invaluable assistance to the Court in dealing with vast variety of questions involved in these matters, by way of neatly articulated oral submissions as also meticulously drawn written submissions.

……J.
(A.M. KHANWILKAR)

……J.
(DINESH MAHESHWARI)

……J.
(SANJIV KHANNA)

New Delhi
Dated: 24th March, 2021

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