REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1682-1683 OF 2022

M.K. RAJAGOPALAN .....APPELLANT(S)

VERSUS

DR. PERIASAMY PALANI GOUNDER .....RESPONDENT(S) & ANR.

WITH

C.A. No. 1756/2022

C.A. No. 1759/2022

C.A. No. 1757/2022

C.A. No. 1807/2022

C.A. No. 1810/2022

C.A. No. 1827/2022

JUDGMENT

DINESH MAHESHWARI, J.

Preliminary and brief outline

1. These civil appeals are essentially directed against the common judgment and order dated 17.02.2022, as passed by the National Company Law Appellate Tribunal, Chennai Bench,[1] in a batch of appeals in relation to the Corporate Insolvency Resolution Process[2] under the Insolvency and Bankruptcy Code, 2016,[3] concerning the corporate debtor, Appu Hotels Limited[4], whereby the Appellate Tribunal has reversed the order dated 15.07.2021, as passed by the National Company Law Tribunal, Chennai[5]; and while rejecting the resolution plan in question, has remanded the

[1] Hereinafter also referred to as 'NCLAT' / 'the Appellate Tribunal'.
[2] 'CIRP', for short.
[3] Hereinafter also referred to as 'IBC' / 'the Code'.
[4] Hereinafter also referred to as 'the corporate debtor'.
[5] Hereinafter also referred to as 'NCLT'/ 'the Tribunal' / 'the Adjudicating Authority'.

matter to the committee of creditors[6] with directions to the resolution professional[7] to proceed from the stage of publication of Form 'G', and invite the expression of interest[8] afresh as per the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[9].

2. In view of multiple issues raised in this batch of matters, where several steps have been taken at different stages and different parties are having different stands and interests, we may draw a brief outline with salient features of the factual and background aspects, in order to indicate the contours of the forthcoming discussion.

2.1. CIRP against the corporate debtor got initiated on 05.05.2020, with the NCLT admitting an application moved under Section 7 of the Code by one of its financial creditors, Tourism Finance Corporation of India Limited[10]. In the course of proceedings, after various rounds of CoC meetings, ultimately, the resolution plan in question was approved with 87.39 per cent. majority of voting share on 22.01.2021. However, the CoC recommended certain changes to be made in the resolution plan. After incorporating the changes as suggested by CoC, an application was moved before the Adjudicating Authority (NCLT) under Section 30(6) of IBC for approval of the resolution plan. During the proceedings before NCLT, several objections were raised by various financial creditors, other

[6] 'CoC', for short.
[7] 'RP', for short.
[8] 'EOI', for short.
[9] Hereinafter also referred to as 'the CIRP Regulations'.
[10] 'TFCI', for short.

resolution applicants and by the promoter and erstwhile director of corporate debtor against the resolution plan. The promoter also stated his grievance about want of consideration of his settlement proposal in terms of Section 12-A of the Code. However, the NCLT dismissed all the objections and approved the resolution plan declaring it binding on the corporate debtor and other stakeholders by the common order dated 15.07.2021.

2.2. Challenging approval of the resolution plan, several appeals were preferred before the Appellate Tribunal (NCLAT), which were decided in the impugned common judgment and order dated 17.02.2022. The Appellate Tribunal, while upholding several of the objections against the process of consideration of the resolution plan as also the eligibility of the successful resolution applicant, allowed all the appeals; set aside the aforesaid order dated 15.07.2021; rejected the resolution plan so approved by the NCLT; declared the resolution applicant ineligible in terms of Section 88 of the Indian Trusts Act, 1882[11] and disqualified in terms of Section 164(2)(b) of the Companies Act, 2013[12]; and issued directions to the resolution professional to proceed with CIRP from the stage of publication of Form 'G' while inviting EOI afresh as per the CIRP Regulations. The Appellate Tribunal also issued directions to the resolution professional to place the settlement proposal of promoter and erstwhile director of the corporate debtor for consideration before the CoC; and if such a proposal

[11] Hereinafter also referred to as 'the Trusts Act'.
[12] Hereinafter also referred to as 'the Companies Act'.

was approved with 90 per cent. voting share of CoC, to initiate the proceeding for withdrawal of CIRP under Section 12-A of the Code read with Regulation 30-A of the CIRP Regulations. The Appellate Tribunal also directed that the claim of the related party financial/operational creditors be not discriminated from that of the unrelated financial/operational creditors.

3. The aforesaid order of NCLAT dated 17.02.2022 is under challenge before this Court by the resolution applicant as also by the resolution professional on several counts, which could be broadly summarised thus: *First*, that Regulation 35 of the CIRP Regulations does not mandate sharing of the valuation report to the CoC and instead mandates only sharing of liquidation value. *Second*, that the non-core assets were not significant in value and the valuation was communicated to and agreed upon by the members of the CoC on 15.12.2020. *Third*, that non-publication of Form G on the designated website was a mere procedural irregularity which did not prejudice interests of any of the parties. *Fourth*, that the commercial wisdom of CoC was not justiciable and once the CoC had approved the resolution plan by the requisite majority, there was very limited scope of interference by the Courts. *Fifth*, that the Appellate Tribunal has overstepped its jurisdiction by declaring the resolution applicant ineligible under Section 88 of the Trusts Act and disqualified under Section 164(2)(b) of the Companies Act. *Sixth*, that the claims of related party creditors cannot be treated at par with the unrelated creditors. And *seventh*, that Section 12-A IBC application of the promoter was merely a dilatory tactic and that he was not entitled to file any such application. These and other

grounds raised in these appeals have been duly contested by the respondents with their respective stands and positions in these cases. This apart, some of the financial creditors have also moved the applications for impleadment and have placed their respective viewpoints for consideration.

4. During the pendency of these appeals, this Court did not stay the operation of impugned order dated 17.02.2022; and during the course of hearing of these appeals, on 07.03.2022, it was informed by RP that pursuant to the order impugned, another meeting of CoC had been conducted on 03.03.2022. It is noticed that in the said CoC meeting held on 03.03.2022, the settlement proposal of the promoter was voted against by 51.81% of the voting share. After conclusion of initial hearing, while reserving judgment, this Court also took note of the fact that further meeting of CoC was slated for 21.03.2022; and it was provided that the meetings/proceedings of the CoC could go on but the entire process shall remain subject to the final orders to be passed in these appeals.

4.1. These matters were again taken on board on 20.05.2022 when this Court took note of the submissions made in another application moved by the resolution applicant for directions while pointing out that the fresh process had been initiated by the RP by publication of Form G on 26.04.2022, inviting fresh EOIs. Therein, the resolution applicant sought interim stay over the fresh process initiated by RP or in the alternative, to stay the operation of the impugned order as regards declaration of his disqualification, and to direct the RP to consider his EOI in the fresh

process so initiated. This Court, however, declined to pass any other order with reference to the fact that all the proceedings remain subject to the final orders in these appeals.

4.2. Yet again, Civil Appeal No. 1682-1683 of 2022 was taken on the board on 17.11.2022 and learned counsel for the parties were heard further, in view of an application moved on behalf of the promoter and erstwhile director of the corporate debtor (IA No. 168602 of 2022), seeking permission to bring on record subsequent events that his proposal of settlement under Section 12-A of the Code was accepted by CoC on 12.10.2022 by 100% of the voting share, i.e., unanimously; and the same had been placed before the Adjudicating Authority for approval. Having regard to the events aforesaid and looking to the overall circumstances, while keeping the judgment reserved, we requested the Adjudicating Authority to await the decision of this Court in these matters.

Particulars of the proceedings and the parties

5. In view of the issues arising for determination in these appeals, with several parties carrying different roles, interests, and positions, worthwhile it would be to narrate at the outset, in brief, the relevant particulars of the proceedings leading to these appeals as also the principal parties involved herein.

6. As noticed, the CIRP against the corporate debtor got initiated on 05.05.2020, with the NCLT admitting an application moved under Section 7 of the Code by one of its financial creditors, TFCI. This application had been registered as IBA No. 1459 of 2019. The application for approval of

the resolution plan, moved before NCLT was registered as IA No. 150/CHE/2021 in the said IBA No. 1459 of 2019. This application and several other correlated applications were considered together and were dealt with in the common order dated 15.07.2021 whereby, the National Company Law Tribunal, Chennai rejected the objections and approved the resolution plan approved by the committee of creditors.

6.1. Four separate appeals were preferred before the National Company Law Appellate Tribunal, Chennai Bench against the aforesaid order dated 15.07.2021, being Company Appeal (AT) (CH) (Insolvency) Nos. 164, 176, 218 and 219 of 2021. The appeals bearing numbers 164 of 2021 and 219 of 2021 were filed by the promoter and erstwhile director of corporate debtor, respectively in challenge to the approval of resolution plan and rejection of his application for consideration of a settlement proposal. On the other hand, the appeal bearing number 176 of 2021 was filed by one of the creditors of the corporate debtor, whose claim as financial creditor as also operational creditor was declined in the approved resolution plan, for being a related party of the corporate debtor. The other appeal bearing number 218 of 2021 was filed by an NRI shareholder and erstwhile director of the corporate debtor, essentially being aggrieved by denial of any relief to shareholders in the approved resolution plan. As noticed, these four appeals were decided together by the NCLAT in its impugned common judgment and order dated 17.02.2022.

6.2. In the present set of appeals in this Court against the aforesaid judgment and order dated 17.02.2022, one sub-set is of appeals preferred by the resolution applicant which could be noticed as follows:

6.2.1. The resolution applicant has questioned the orders passed in relation to the objections and claim of the promoter and erstwhile director of the corporate debtor (in Appeal Nos.164 of 2021 and 219 of 2021 before NCLAT) by way of Civil Appeal Nos. 1682-1683 of 2022. The resolution applicant has further questioned the order passed in relation to the claim of the related party (in Appeal No. 176 of 2021 before NCLAT) by way of Civil Appeal No. 1827 of 2022. Yet further, the resolution applicant has questioned the order passed in relation to the claim of the NRI shareholder (in Appeal No. 218 of 2021 before NCLAT) by way of Civil Appeal No. 1810 of 2022.

6.3. Another sub-set is of appeals preferred by the resolution professional against the aforesaid judgment and order dated 17.02.2022, which are as follows:

6.3.1. The resolution professional has questioned the orders passed in relation to the objections and claim of the promoter and erstwhile director of the corporate debtor (in Appeal Nos.164 of 2021 and 219 of 2021 before NCLAT) by way of Civil Appeal Nos. 1756 of 2022 and 1807 of 2022 respectively. The resolution professional has further questioned the order passed in relation to the claim of the related party (in Appeal No. 176 of 2021 before NCLAT) by way of Civil Appeal No. 1757 of 2022. Lastly, the resolution professional has questioned the order passed in relation to the

claim of the NRI shareholder (in Appeal No. 218 of 2021 before NCLAT) by way of Civil Appeal No. 1759 of 2022.

7. Now, we may take note of the relevant particulars of the principal parties involved in this litigation. The parties could broadly be divided into three categories with reference to their respective stands vis-à-vis the order of the Appellate Tribunal, the CIRP, and the resolution plan in question.

7.1 The first category is of the parties who are aggrieved of the order passed by the Appellate Tribunal on several counts and are opposing the rejection of resolution plan and remand of the matter to CoC. They are:

7.1.1. Mr. M.K. Rajagopalan

He is the resolution applicant and had submitted the resolution plan in question, which was approved by a majority of 87.39 per cent. of the voting share of CoC but was rejected by the Appellate Tribunal, as being in contravention of Section 30(2) of the Code. He is appellant in Civil Appeal Nos. 1682-1683 of 2022, 1827 of 2022 and 1810 of 2022. In all the civil appeals filed by the resolution professional, he is arrayed as one of the respondents.

7.1.2. Mr. Radhakrishnan Dharmarajan

He is the resolution professional, who was appointed by the CoC in the third meeting dated 04.09.2020 and his appointment was confirmed by the NCLT in order dated 02.11.2020. He is appellant in Civil Appeal Nos. 1756 of 2022, 1807 of 2022, 1757 of 2022 and 1759 of 2022. In all the civil appeals filed by the resolution applicant, he is arrayed as proforma respondent No. 2.

7.2. The second category is of the contesting respondents in this batch of appeals, who are essentially supporting the order passed by the Appellate Tribunal. They could reasonably be introduced as follows:

7.2.1. *Dr. Periasamy Palani Gounder*[13]

He is the promoter and erstwhile director of the corporate debtor, *Appu Hotels Limited*. He is also the Chairman of *Dharani Finance Limited*, the related party. He is respondent No. 1 in Civil Appeal Nos. 1682-1683 of 2022, 1756 of 2022 and 1807 of 2022.

7.2.2. Dharani Finance Limited

The claim of this company, in its capacity as an operational creditor as also a financial creditor of the corporate debtor, was rejected by NCLT for being a related party. However, NCLAT directed the CoC to not discriminate it from unrelated financial/operational creditors. This company is respondent No. 1 in Civil Appeal Nos. 1757 of 2022 and 1827 of 2022.

7.2.3. Dr. V. Janakiraman

He is an NRI shareholder and erstwhile director of the corporate debtor who had, along with other shareholders, invested money in the corporate debtor. He is aggrieved of denial of the claim of shareholders in the resolution plan in question and has raised a few other questions too alongwith the aforesaid promoter and director of the corporate debtor. He is respondent No. 1 in Civil Appeal Nos. 1810 of 2022 and 1759 of 2022.

[13] Hereinafter also referred to as 'the promoter'.

8. Apart from the above-mentioned parties, who are directly impleaded in these appeals, there are other stakeholders, standing in their capacity as financial creditors and having their own role in CIRP in question. They include:

8.1. *State Bank of India*[14]

This financial creditor of the corporate debtor with nearly 26.41% voting share in CoC, though had earlier voted in favour of the resolution plan in question but now, looking to the order of NCLAT relating to eligibility deficiency of the successful resolution applicant as also the deficiency in process, is essentially supporting the rejection of resolution plan in question and remand of matter to CoC for consideration afresh.

8.2. *Edelweiss Asset Reconstruction Company Limited* along with *IDBI Debentures Trusteeship Limited* and *Allium Finance Private Limited*[15]

These financial creditors, with about 21.13% voting share in CoC, too had voted in favour of the resolution plan in question. They have raised questions on the order passed by NCLAT on various grounds. This apart, they have underscored certain other areas of concern including the amount deposited by the resolution applicant, and have also suggested that CIRP must be allowed to go on while leaving the promoter a right to better the resolution plan by way of a Swiss Challenge Process only after depositing the matching amount in an escrow account prior to voting on his settlement offer.

[14] 'SBI', for short.
[15] 'Edelweiss & associates', for short and collectively.

8.3. Tourism Finance Corporation of India Limited

This financial institution with 5.62% of the voting share in CoC got initiated the CIRP in question with admission of its application under Section 7 of the Code by the NCLT on 05.05.2020 (IBA No. 1459 of 2019).

The relevant factual and background aspects

9. Having taken note of the relevant particulars of the proceedings as also the principal parties involved, we may now take note of the relevant factual and background aspects, in brief, as *infra*.

10. The corporate debtor, Appu Hotels Limited, is a limited company with corporate identification number U92490TN1983PLC009942 and registered office at PGP House, No.57, Sterling Road, Nungambakkam, Chennai - 600 034. The promoter group of the corporate debtor consists of around one hundred non-resident investors living in the United States of America, who are said to have invested over twenty-two million US dollars in foreign exchange in the corporate debtor. The corporate debtor had availed project loans to construct 'Le Meridian, Coimbatore', from a consortium of bankers led by Indian Bank. It appears that the business did not materialise as per the estimated projections. The promoters and directors brought in nearly Rs. 100 crore as unsecured loans over and above the cash flow to keep the corporate debtor's asset as standard. It further appears that though the hotel was making operational profit, but the profit was insufficient to service the loan repayment to the optimum requirement and the corporate debtor defaulted in payment of overdues.

Initiation of CIRP

11. The default on the part of corporate debtor in payment of overduesled to the application under Section 7 of the Code for initiation of CIRP by one of its financial creditors, TFCI (who holds about 5% of the total loan amount) before the NCLT, in Application No. IBA/1459/2019. It appears that a few propositions of One Time Settlement [16] were mooted on behalf of the corporate debtor but without any effective result, for the corporate debtor having not been able to make payment against the dues of the financial creditor. The NCLT observed that there being the existence of a financial debt and there being a default on the part of the corporate debtor, the application moved by the financial creditor was bound to be admitted and as a consequence, triggering the corporate insolvency resolutionprocess. Accordingly, the NCLT, by its order dated 05.05.2020, admitted this application and appointed one Mr. Mukesh Kumar Gupta as interim resolution professional[17] with other necessary directions in the following terms: -

> "12. Heard the Counsel for both the parties and perused the documents placed on record. It Is a fact borne on record that the Corporate Debtor is unable to repay the dues to the Financial Creditor and as such on the garb of OTS settlement the Corporate Debtor wanted to gain time to settle of the dues to the Financial Creditor. Further, a perusal of the record of proceedings dated 04.02.2020, also shows that the Corporate Debtor was putting in efforts to settle of the dues of the Financial Creditor and upon such representation being made, the Corporate Debtor was granted time to settle the matter and the matter was finally posted to 02.03.2020 for reporting settlement or to proceed with the matter. Thus, when the matter was taken up for enquiry on 02.03.2020, it has been

[16] 'OTS', for short.
[17] 'IRP' for short.

brought to the notice of this Tribunal by the Counsel for the Financial Creditor that the Corporate Debtor has not paid the dues of the Financial Creditor and also the Learned Counsel for the Financial Creditor submitted that even in the affidavit filed by the Corporate Debtor, the outstanding debt has been admitted which Is owed to the Financial Creditor.

13. Thus, we are satisfied that there is a debt and default on the part of the Corporate Debtor and the Corporate Debtor is unable to repay its dues to the Financial Creditor. It has also been consistently held by the Hon'ble Supreme Court both in **Innoventive Industries Ltd. -Vs- ICICI Bank and another** *(2018) 1 SCC 407* as well as **Mobilox Innovations Pvt. Ltd .. -Vs- Kirusa Software Pvt**. **Ltd.***(2018) 1 SCC* 353 after going through the Scheme of I&B Code, 2016 in depth in relation to an Application under Section 7 filed by a Financial Creditor as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a 'financial debt' and when there is a default, this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution Process (CIRP) and in relation to a Section 7 Application defence of set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute In relation to the Financial debt and default In relation to It. In the present case, it is clear that there is a default on the part of the Corporate Debtor.

14. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that this Application as flied by the Applicant - Financial Creditor is required to be admitted under Section 7 (5) of the I&B Code, 2016.

15. The Financial Creditor has proposed the name of one **MUKESH KUMAR GUPTA** having Registration Number **[IBBI/IPA-001/IP-P00207/2017-18/10407] (Email id :-*guptam11@ gmail.com)* (Mob:- +91-9810798961)** as *Interim Resolution Professional* (IRP) and a written communication in the format prescribed under Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 has been filed by the proposed IRP who is appointed as the IRP to take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIR Process in relation to the Corporate Debtor in terms of the provisions of I&B Code, 2016.

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> 19. Based on the above terms, the Petition stands **admitted** in terms of Section 7 of the Code and the Moratorium shall come into effect as of this date. A copy of the order shall be communicated to the Petitioner as well as to the Respondent above named by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Further, the IRP above named be also furnished with copy of this order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned."

CoC Meetings and ancillary proceedings

12. CIRP in relation to the corporate debtor having thus been initiated, various steps were taken in terms of the requirements of the Code and the CIRP Regulations, including the meetings of CoC which ultimately led to the approval of the resolution plan in question. Some of those steps carry their own relevance in these appeals in view of the issues raised by the parties. We may briefly take note of the relevant steps/proceedings in their feasible chronology as follows:

12.1. Pursuant to the initiation of CIRP, IRP issued a public announcement in Form A on 08.05.2020 inviting claims from various stakeholders in the corporate debtor. Further, for conducting the first meeting of the committee of creditors on 22.06.2020, IRP issued a notice on 18.06.2020. The said meeting was attended by all the members of the CoC including the promoter and erstwhile director of the corporate debtor.

12.2. In the second CoC meeting conducted on 06.08.2020, the proposal of IRP in relation to information memorandum and to seek EOI by publication of Form G was approved. Two sets of valuators were engaged as registered valuators by IRP for all the three categories of assets, being Mr. Vikas Agarwal, Mr. Anil Kumar Saxena and Mr. Anubhav Aggarwal

(one set); and Future Value Advisors India (P) Ltd, a registered valuer entity registered with the Insolvency and Bankruptcy Board of India[18]. Their fees were also approved by the CoC.

12.3. On or about 17.08.2020, the IRP published Form G under Regulation 36A of the CIRP Regulations, inviting expression of interest from prospective resolution applicants to submit resolution plans.

12.4. Thereafter, in the third CoC meeting held on 04.09.2020, a resolution was adopted to appoint Mr. Radhakrishnan Dharmarajan as the resolution professional. It was in the same meeting that the list of fifteen EOIs received from the prospective resolution applicants and placed by IRP, was approved by CoC. It was further informed to CoC in the said meeting by IRP that the valuation was in process and the valuers may visit the premises of corporate debtor. On 26.09.2020, the IRP published the final list of prospective resolution applicants. It may be observed in this regard that pursuant to publication of provisional list and upon preliminary scrutiny, thirteen of the EOIs received were initially found eligible, of which, one had withdrawn and the other namely, Sri Balaji Vidyapeeth (of which the successful resolution applicant was the managing trustee), was declared ineligible since a charitable trust cannot run a profit-making entity. Hence, the final list of eleven prospective resolution applicants was submitted before the CoC on 26.09.2020. Finally, three resolution plans

[18] 'IBBI', for short.

were received, from Mr. Madhav Dhir, Mr. M.K. Rajagopalan (the resolution applicant – appellant herein) and Kotak Special Solutions.

12.5. In the fourth CoC meeting held on 12.10.2020, IRP apprised the members about the valuers visiting the properties of the corporate debtor and the valuation being in process.

12.6. On 27.10.2020, the appellant Mr. M.K. Rajagopalan submitted his resolution plan alongwith a demand draft in the sum of Rs. 2 crore. On 02.11.2020, the Tribunal approved the appointment of Mr. Radhakrishnan Dharmarajan as the resolution professional.

12.7. In the fifth CoC meeting held on 12.11.2020, in the first item on the agenda, the members took note of the appointment of Mr. Radhakrishnan Dharmarajan as the resolution professional. Thereafter, on the second item, the CoC approved that the resolution professional shall file an application before NCLT to seek extension of time period from 05.05.2020 to 31.10.2020 under Section 12(2) of the Code due to Covid-19 and lockdown. In the third agenda item as regards updates from RP and to decide on the resolution plan deadline extensions/possible reissuance of Form G, various views were expressed by various stakeholders which culminated in the following observations and resolution: -

> "Since there were mixed views of CoC the process and way forward, RP declared that it is the CoC who needs to decide on the commercial viability of the Resolution Process to its best advantage, be it re issuance of the Form G and or extension of the timelines and he will act as per the directions of the CoC.
> CoC members further discussed on the Form G, receipt of Resolution Plans and any potential requests from any of the RA's about extension of time.
> **With the consensus of CoC members, it was decided that no extension of timeline for submission of Resolution Plan should**

> **be done and the RP was directed to expedite the valuation process and check the feasibility and viability of the Resolution Plans already submitted and present the eligible Resolution Plans before the CoC for consideration.**"

12.8. In the sixth CoC meeting held on 16.12.2020, the RP apprised the CoC members about three resolution plans having been received out of which, the plan received from Kotak Special Solutions did not meet the criteria laid down under the Code. The RP also informed that there had been a revision in the claims and composition of financial creditors and as it was mandatory to give the revised details to the two resolution applicants, the formal presentation and the resolution applicants could be called after they revise the plans. In this meeting, the RP also apprised the CoC members about filing of time exclusion application, which was heard on 15.12.2020 and order was reserved.

12.8.1. In the said sixth meeting, the RP also informed that he had provided the CoC members with the fair value and liquidation value to all those who had submitted the confidential undertaking and that that due to significant difference in the value of land and building submitted by the valuers appointed by IRP, he shall have to appoint third valuer in accordance with Regulation 35 of the CIRP Regulations. It was also noted that valuation of non-core assets was not done earlier but, the third valuer appointed by RP had submitted the value of non-core assets and the same had been shared with CoC members who had submitted their undertaking. The RP emphasized that their value was not very significant, and it would not affect

the liquidation value much. The relevant part of the minutes of this sixth CoC meeting could be reproduced as under: -

> "The RP apprised the CoC members that based on the resolution passed in 5th CoC meeting an exclusion application along with an urgent application was filed before the NCLT Chennai on 19.11.2020. The application was listed for hearing 15.12.2020 and the Order has been reserved.
> The RP further apprised that he has provided the CoC members with the fair value and liquidation value to all those who have submitted the confidential undertaking. RP further apprised, that due to significant difference in the value of land and building submitted by the valuers appointed by IRP, the RP has to appoint third valuer in accordance with provisions of Regulation 35 of CIRP Regulations 2016.
> After it was noted that valuation of non-core assets was not done, the third valuer appointed by RP has submitted the value of non-core assets and the same has been shared with CoC members who have submitted their undertaking. The RP emphasized that their value is not very significant, and it will not affect the liquidation value much. However, second valuation for the non-core assets will be needed in order to reach a final value. RP apprised the CoC members that the valuers appointed by IRP are based in Delhi and they are asking much higher price for carrying the valuation of non-core assets. Therefore, the RP will hire a local valuer keeping the cost in mind."

The RP agreed to try and convene the next CoC meeting before Christmas eve, subject to getting the revised resolution plans.

12.9. In the interregnum, the Tribunal, by its order dated 23.12.2020, allowed the application moved by RP for exclusion of the period between 05.05.2020 and 31.10.2020 – 179 days – while calculating the time for completion of CIRP of the corporate debtor; and excluded the said period from the period of CIRP in terms of Section 12(2) of IBC because of pandemic conditions, in the following words: -

> "6. Heard the submission made by the Learned Counsel for the Applicant and perused the records placed on file. In the facts of the present case, it is to be noted that the CIRP in relation to the Corporate Debtor was initiated only on 05.05.2020 i.e. during the period of lockdown and as such the Applicant has sought to exclude

> the period from 05.05.2020 till 31.10.2020. The Applicant placed on record the G.O. Ms. No. 482, Revenue and Disaster Management (DM-IV) Department, Government of Tamil Nadu dated 12.09.2020 and G.O. Ms. No. 447, Revenue and Disaster Management (DM-IV) Department, Government of Tamil Nadu dated 30.08.2020 in order to substantiate the during such time, where the exclusion is sought for, the lockdown was in existence in the Government of Tamil Nadu.
> 7. Further, it is pertinent to note here that due to Covid-19 pandemic coupled with attendant lockdown imposed by the Central/ State Government, the Regulator viz. IBBI has introduced an Amendment in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, so as to exclude the period of lockdown from the CIRP timeline.
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> Regulation 40C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states as follows:
>
> > **40C. Special provision relating to time-line.** Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.
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> 8. The Learned Counsel for the Applicant submitted that he sought to exclude the period from 05.05.2020 till 31.10.2020, a total of 179 days from the period of CIRP. Thus, as to the facts of the present case, in view of Regulation 40C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 the period from 05.05.2020 till 31.10.2020 is excluded from the period of CIRP in terms of Section 12(2) of IBC, 2016. The Applicant shall make every endeavour to complete the CIRP in relation to the Corporate Debtor within the timelines as prescribed under the Code. Accordingly, the application stands **allowed**."

12.9.1. Two equity shareholders of the corporate debtor challenged the aforesaid order of the Tribunal before the Appellate Tribunal in Company Appeal (AT)(CH)(Ins.) Nos. 19 of 2021 and 20 of 2021 but, the appeals were dismissed on 05.05.2021 with the following observations[19]: -

> "33. …..In the instant case, even though we find that Regulation 30-C could have been applied for exclusion of 179 days on account

[19] There had been other observations occurring in this judgment and order dated 05.05.2021, which have been relied upon by NCLT while approving the resolution plan in question and have formed a part of contentions in these appeals, as shall be noticed later.

> of the unprecedented situation created by the Covid 19 pandemic and some of the Financial Creditors opined for fresh publication of form G for the invitation of EOI. But the COC had unanimously decided only for seeking exclusion of 179 days, i.e. from 5 May 2020 to 31 October 2020, for completion of CIRP. But the CoC, under its commercial wisdom, did not prefer for publication of Form-G afresh to invite Expression of Interest. Therefore such a decision of the CoC is not justiciable.
> 34. In the circumstances stated above, we are of the considered opinion that the decision taken by the Adjudicating Authority needs no interference, and both the Appeals deserves to be dismissed."

12.10. In the seventh CoC meeting held on 29.12.2020, the RP briefly discussed the resolution plan submitted by Mr. M.K. Rajagopalan, resolution applicant herein, as the other successful prospective resolution applicant, Mr. Madhav Dhir, could not submit his resolution plan even after being granted extension once, whose request for further extension was denied by CoC and it was decided to continue with the resolution plan received from Mr. M.K. Rajagopalan. After discussing on the resolution plan so submitted, the resolution applicant was asked to submit the revised resolution plan after incorporating the changes suggested by the CoC members and he promised to do so by 30.12.2020. Further, the RP apprised the CoC that the third valuer as appointed had visited the premises and conducted valuation of the non-core assets and promised to submit the draft valuation by 30.12.2020.

12.11. In the eighth CoC meeting held on 04.01.2021, the revised resolution plan of the resolution applicant was presented and discussed with CoC members. After long deliberation on various aspects of the plan, it was decided that the plan could be put to vote through CoC meeting on 22.01.2021.

12.12. On 21.01.2021, just a day before the resolution plan was to be put to voting, the promoter and erstwhile director of the corporate debtor - Dr. Periasamy Palani Gounder - submitted another OTS proposal with

reference to Section 12-A of the Code to the CoC. A so-called "Term Sheet" dated 22.01.2021 issued by Deutsche Bank was relied up as a proof of funding.

12.13. However, the CoC stuck to the agenda before it and the resolution plan submitted by the resolution applicant - Mr. M.K. Rajagopalan - was put to vote in the ninth CoC meeting held on 22.01.2021. Though, the said plan was approved with 87.39% of the total voting share of financial creditors present and voting in the meeting, the RP was required to send the resolution plan back to the resolution applicant as there was dissent by some of the financial creditors and in terms of Section 30 (2) of the Code, the amount to be paid to dissenting financial creditors shall not be less than the amount paid to such creditors in accordance with Section 53 in the event of liquidation of the corporate debtor. Therefore, resolution applicant was asked to further revise the resolution plan. The relevant resolution on Agenda Item No. A.1. in the ninth CoC meeting, having its relevance to the present matter is reproduced as under: -

> "**Agenda Item No. A.1 – To discuss and put to vote the Resolution Plan submitted by Mr. M.K. Rajagopalan.**
> The Resolution Professional apprised the CoC members that as decided in the last CoC meeting the revised Resolution Plan submitted by Mr. M.K. Rajagopalan will be put to physical voting for approval of the CoC members. The Resolution Professional then asked each member of CoC present in the meeting whether the revised Resolution Plan have their approval or not and the result of physical voice voting is as follows:

S.No.	Name of Financial Creditor	Voting Share	Voting (Yes/No)
1.	RSM Industries	1.43	No
2.	Sun Bright Industries	4.25	No
3.	M. Chandrasekaran	0.16	No
4.	Modern Constructions	0.86	No
5.	Aryav Exports	1.25	No
6.	URC Builders	0.39	No
7.	Prabhat Resources Ltd.	4.28	No
8.	Allium Finance (P) Ltd.	0.42	Yes

9.	IDBI Debentures Trusteeship Ltd.	19.64	Yes
10.	Edelweiss ARC	1.06	Yes
11.	TFCI	5.62	Yes
12.	IDBI Bank	3.03	Yes
13.	Bank of India (Tokyo)	13.41	Yes
14.	State Bank of India	26.41	Yes
15.	Indian Bank	17.80	Yes

The revised Resolution Plan was approved with 87.39% of total voting share of Financial Creditors present and voted in the meeting. Since there was dissent by some of the financial creditors, the Resolution Professional will send back the Resolution Plan to the Resolution Applicant for further revision, as Section 30 (2) of IBC 2016, provides that the amount paid to dissenting financial creditors shall not be less than the amount paid to such creditors in accordance with Section 53 in the event of liquidation of the Corporate Debtor.

Representative from Bank of India Tokyo emphasized that they have voted in favour considering the fact that they will be getting their full amount. Resolution Professional assured them and other CoC members who have voted in favour of the Resolution Plan that there will not be any changes in the amount provided for assenting financial creditors. RP further apprised that the RA has given an undertaking that RA will comply with Section 30(2) of IBC and there will not be any change in the amount provided in the Resolution Plan for assenting creditors."

12.14. On 25.01.2021, the resolution applicant submitted the revised resolution plan incorporating the changes. He also submitted a bank guarantee to the tune of Rs. 25 crore to the resolution professional on 01.02.2021. Thereafter, on 03.02.2021, the resolution professional furnished Form H Compliance Certificate, containing the details of the compliance of the resolution plan submitted by the resolution applicant.

12.15. Though, in the chronology of events, after the aforesaid proceedings of CoC and submission of Form H by the RP, the proceedings before the Adjudicating Authority are to be noticed but, there remains one significant feature of this case that in the ninth meeting dated 22.01.2021, even while approving the resolution plan, the CoC asked the resolution applicant to further revise the resolution plan, particularly in relation to the

dissenting financial creditors. The resolution applicant indeed revised the resolution plan but, such a revised plan was not placed in CoC before presenting the matter to the Adjudicating Authority for approval. This aspect has formed a part of contentions in these appeals and, in this regard, it has been one of the contentions on the part of the resolution applicant that there had not been any material change in the plan and in any case, in the later meeting of CoC, there had been a deemed *post facto* approval of the revised resolution plan incorporating the changes earlier suggested by CoC. In view of the issues involved, apt it would be that before adverting to the decision of the Adjudicating Authority, we refer to the tenth meeting of CoC, which was held on 15.06.2021, and where the RP's updates on the latest developments were taken note of by CoC. The relevant part of the minutes of the tenth CoC meeting dated 15.06.2021 read as under: -

> "**Agenda Item No. A 1- Update of Resolution professional on the latest developments.**
>
> - The Resolution Professional welcomed the CoC members and others to the meeting
> - RP informed that post approval of the Resolution plan in the nineth CoC meeting held on 22.01.2021, the plan was put up for revision to the RA to provide for liquidation value where relevant based on voting and the revised Resolution plan was received on 25/01/2021 and it was filed with the NCLT on 04.02.2021
> - RP confirmed that the CD has been kept on a going concern basis from that date, however there are challenges from the advent of severe Covid wave from the beginning of April 2021, which has dented the business and cash flows of the CD.
> - Cash monitoring is ongoing at Chennai, Coimbatore hotels and Kumbakonam Resort.
> - RP updated that the current occupancy at the Coimbatore hotel dropped to 4% which is all time low. The turnover for the FY 2021 is about 25 crores with a negative GOP of-20%"

12.16. Before proceeding further, another ancillary aspect may also be usefully referred to, which has also formed a part of contentions in these

appeals. It relates to another settlement proposal of the promoter. It is noticed that while the proceedings before the Adjudicating Authority were pending, the promoter, again, on 08.03.2021, submitted a settlement proposal to TFCI and sought consequent withdrawal of CIRP under Section 12-A of the Code; and also submitted a 'letter of support' dated 14.07.2021 issued by one Saveetha Institute of Medical and Technical Sciences addressed to the CoC to demonstrate its ability and bonafide in support of its withdrawal proposal. However, the said support was subsequently withdrawn by Mr. Veerayan, the President of the said Saveetha Institute of Medical and Technical Sciences.

13. Having taken note of the basic background aspects in relation to the initiation of CIRP and CoC meetings as also the ancillary matters, we may now examine the decision of the Adjudicating Authority leading to the approval of the resolution plan in question in necessary details.

Resolution plan approved by the Adjudicating Authority (NCLT)

14. As noticed, upon approval of the resolution plan of the resolution applicant – Mr. M.K. Rajagopalan - by CoC with 87.39% majority of the voting share, the application bearing IA No. 150 of 2021 was filed by the resolution professional under Section 30(6) of IBC before the Adjudicating Authority (NCLT) for approval of the resolution plan.

14.1. During the proceedings before the Adjudicating Authority, several objections were raised by the related party, the promoter, an unsuccessful

potential resolution applicant and by some of the unsecured financial creditors.

14.2. One of the objectors to the resolution plan was the suspended director/promoter of the resolution plan - Dr. Periasamy Palani Gounder - who filed MA No.13 of 2021 alleging procedural irregularities in the conduct of CIRP; non-compliance of Regulation 35(1)(a) of the CIRP Regulations, in carrying out valuation of non-core assets of corporate debtor alongwith several other procedural errors; and for consideration of his proposal under Section 12-A of the Code with the option to modify the same on the request of the members of CoC.

14.3. Two applications were filed by Dharani Finance Limited seeking that resolution professional be directed to admit its claim of Rs.1,94,14,024, as operational creditor in application bearing MA No.18 of 2021; and of Rs. Rs.4,81,62,175/- as financial creditor in application bearing MA No.48 of 2021. In both the applications, the common relief sought for was not to be treated as a related party of the corporate debtor and not to be discriminated in the resolution plan.

15. The Adjudicating Authority dismissed the applications and allowed the resolution plan as approved by CoC. The observations and findings of the Adjudicating Authority in its order dated 15.07.2021 had been as follows:

15.1. As regards the questions surrounding the valuation of assets and valuation reports, the Adjudicating Authority referred to the minutes of second, third, sixth and seventh CoC meetings, taking note of the

appointment of valuers and the proceedings conducting by them. The Adjudicating Authority further extracted Regulations 27 and 35 of the CIRP Regulations and thereafter, recorded its satisfaction that RP had arrived at a fair value and a liquidation value based on average of the three valuers in accordance with the requirements of Regulations. The Adjudicating Authority also referred to the order passed by NCLAT on 05.05.2021 in Company Appeal (AT) (Ins) Nos. 19 and 20 of 2021 and observed that the Appellate Tribunal had rendered finding that resolution plan amount had been arrived at after following the prescribed procedure. Thus, the Adjudicating Authority found no error committed by IRP or RP in appointing registered valuers and further found that there was no error in regard to the valuation submitted by those registered valuers. Accordingly, the objections in relation to valuation were overruled.

15.1.1. The relevant observations and findings of the Adjudicating Authority in regard to the questions pertaining to valuation and the valuation reports, after extensive extraction of the relevant minutes of the meetings of CoC had been as under: -

> "**(I) VALUATION REPORT:-**
>
> *** *** ***
>
> 80. In the present case, it is seen from the minutes extracted supra from the 6th CoC meeting that RP further apprised the CoC members, that due to significant difference in the value of land and building submitted by the valuers appointed by IRP, the RP had to appoint third valuer in accordance with provisions of Regulation 35 of CIRP Regulations, 2016. Accordingly, the third valuer has submitted his report before the RP and accordingly the fair value and the Liquidation value in relation to the Corporate Debtor was arrived at by the Resolution Professional.

81. Thus, it is clear that the RP has arrived at a Fair Value and the Liquidation Value based on the average of all the three valuers and the same has been done in accordance with Regulation 35 of the IBBI (IRPCP) Regulations 2016. Further, the valuation certificate dated September 2019 relied on by the promoter / suspended Director of the Corporate Debtor would be of no relevance as the same was not done in accordance with the Regulations framed under the IBC, 2016. Also, the RP who is in charge of the affairs of the Company Debtor once the CIRP has been triggered in relation to the Corporate Debtor, he has to act as per the provisions of the Regulations and cannot act according to the whims and fancies of the promoters / erstwhile directors of the Corporate Debtor. The valuation certificate dated September 2019 relied on by the promoter / suspended Director of the Corporate Debtor was done during pre-Covid period and the same cannot be a yardstick for the valuers who have been appointed pursuant to the Regulations framed under the provisions of IBC, 2016. Also, the stance of the Learned Senior Counsel for the promoter / suspended Director of the Corporate Debtor that the CIRP was triggered during the peak of Covid would be of no relevance since at that point of time, there was no statutory bar for this Adjudicating Authority to initiate CIRP in relation to a Company. However, it is seen that the Application for initiation of CIRP was filed by the Financial Creditor as early as in the year 2019 itself and during that point of time there was no cases of Covid in India and the matter was heard in detail and the orders were reserved during March 2020. While this being the fact, the contention of the Learned Senior Counsel that only because of Covid they were not able to settle the creditors of the Corporate Debtor, does not hold much water. Eventhough, the valuation as arrived at by the valuers may not be acceptable to the erstwhile promoters / Directors of the Corporate Debtor, it cannot give them a right to challenge the same before this Adjudicating Authority on ostensible grounds.

82. Further, it is also seen that as against the order of exclusion of CIRP, passed by this Tribunal in IA/1001/IB/2020, the erstwhile promoter or Corporate Debtor has filed an appeal before the Hon'ble NCLAT and the Appellate Tribunal vide its order dated 05.05.2021 in *Company Appeal (AT)(Ins) No. 19 & 20 of 2021* while dealing with the valuation of the Corporate Debtor in para 14 and 15 has held as follows;

> 14. In response to the above, the Counsel for the Respondents contended that the entire CIRP was conducted as per the procedure prescribed by the I&B Code. The Appellant who is holding some equity shares in 3rd Respondent/Corporate Debtor has come before this Appellate Tribunal by filing the present Appeal only to distract and delay the Insolvency Resolution Process and to bring about a halt to the approval of the Resolution Plan which the Committee of Creditors has

> approved with a majority of 87.34% which is pending for approval before the Adjudicating Authority.
>
> 15. The Appellant's contention about the valuation of the Corporate Debtor of ₹1600 crores is unsupported by any evidence. The fact remains that the Resolution Plan amount has arrived after following the procedure prescribed under the Code and the Rules and Regulations made thereunder
>
> *(emphasis supplied)*
>
> 83. Thus, the Hon'ble NCLAT also has rendered a finding that the Resolution Plan amount has been arrived at after following the procedure prescribed under the Code and the Rules and Regulations made thereunder.
>
> 84. Hence for reasoning stated *supra,* this Adjudicating Authority finds that there was no error committed by the IRP / RP in so far as appointing the registered valuers in relation to the Corporate Debtor, nor there was any error on the valuation being submitted by those Registered valuers and as a consequence thereof, the objections as raised by all the objectors in relation to the valuation of the Corporate Debtor are overruled. Accordingly, MA/13/CHE/2021 stands **dismissed.**"

15.2. As regards the question of non-consideration of the proposal given under Section 12-A IBC by the promoter, the Adjudicating Authority referred to the proposition made by another erstwhile promoter of the corporate debtor which was considered by CoC in its ninth meeting and it was found that even the original applicant of CIRP, i.e., TFIC was kept in dark about such a proposal. It was also noticed that even the proposal with the term sheet from Deutsche Bank came with a disclaimer. The Adjudicating Authority formed the opinion that such a proposal had only been of dilatory tactics and was mooted only at the eleventh hour to stall the resolution plan. Thus, the allegations of promoter about non-consideration of Section 12-A application were found meritless and were rejected. The Adjudicating Authority observed and held in this regard as under: -

"**(II) ON NON-CONSIDERATION OF SEC.12A APPLICATION: -**

85. The Learned Senior Counsel Mr. P.S. Raman, appearing on behalf of the erstwhile Promoter / Director of the Corporate Debtor contended that the Resolution Professional and the CoC has not considered the proposal as given under Section 12A of IBC, 2016. In this regard, it is pertinent to refer to certain communications that exchanged between the parties in relation to the same. In the 9th CoC meeting wherein the Resolution Plan was about to be put for vote, the erstwhile promoter of the Corporate Debtor Mr. Senni Malai, requested the RP to consider an application filed under section 12A of IBC, 2016. The record of the minutes as found in the 9th CoC meeting is extracted hereunder;

> " As the Resolution Plan agenda was about to be put up for voting, Mr. Senni Malai, MD of the CD and Mr. Kaliannan representing the CD, requested the RP about a Sec 12 A, Application for withdrawal request letter, prepared by them and circulated to the CoC about two hours before this meeting. RP Informed them, that discussions on that can't be part of this agenda as that has not come from the Applicant and it was not part of the agenda for this meeting. However, the Corporate Debtor's representative insisted that this be discussed. RP said he would seek the opinion of the Applicant, being TFCI in this case. Mr. Anoop Bali from TFCI said that he can't opine on this letter as it is addressed to the CoC, when prompted by Mr. Kaliannan, that this letter is being put up through TFCI, Mr. Anoop Bali said that this can't be taken up as it has not come in the appropriate required form and he will not be able to comment on this and requested the RP to carry on with the agenda for the day, that of voting on the Resolution Plan. Mr. Senni Malai requested other creditors to comment. Mr. Arun Shah of Aryav Exports said that CoC can discuss this. However other creditors with significant voting share such as SBI, Bank of India said that we should stick to the Agenda on hand and not deviate from the main agenda. RP then requested the representatives from Corporate Debtor to allow for the agenda items to go through as the majority of the CoC in favour of that and no further discussions can be made on the letter sent to the CoC."

86. A perusal of the aforesaid minutes would show that the promoter of the Corporate Debtor has proposed for a 12A settlement only at the 9th CoC meeting, when the Resolution Plan of the Resolution Applicant was about to be put to vote. Further, it is also seen that the Petitioning Creditor viz. Toursim Finance Corporation of India (TFCI) was also kept in dark about the 12A proposal by the promoters and also flagged an issue stating that the letter has been addressed to the CoC and not to them. However, it is seen that the said agenda of proposal to be made under Section 12A was not

considered by the CoC and that they proceeded to vote for the Resolution Plan.

87. It is also seen that the Term Sheet relied on by the Learned Senior Counsel for the promoter in order to substantiate that they have the source to settle the entire dues of the CoC, it is seen that the said Term Sheet dated 22.01.2021 issued by Deutsche Bank would start of with a disclaimer as follows;

> "Please note that the terms set out in this Term Sheet are indicative only and do not constitute an offer to finance the Facility. The terms and conditions of the term sheet remain subject to the diligence, internal approvals, credit committee approval, successful syndication, KYC and satisfactory documentation."

88. Thus, it is seen that the proposal as projected by the Learned Senior Counsel for the promoters to be made under Section 12A, seems to be only an eye wash and a dilatory tactics to delay the process of CIRP in relation to the Corporate Debtor and that the fact that the proposal has been mooted only during the eleventh hour is to stall the Resolution Plan as moved by the Resolution Applicant. Hence, for the. aforesaid reasons, the allegations of the promoters that their Section 12A Application was not considered by the RP and the CoC do not hold any merits and stands overruled."

15.3. As regards the alleged procedural irregularities, the Adjudicating Authority found the objections to be of no substance where the objectors had failed to establish any prejudice caused to them while also observing that a statutory provision regulating a matter of practice and procedure would generally be read as directory and not mandatory. The Adjudicating Authority observed that the objections in relation to the procedural irregularities were not so grave as to defeat the resolution plan. It was also observed that some of the objectors were, in fact, getting 100% of the claimed amount in the resolution plan and it raised a suspicion if the objections by them were rather motivated.

15.3.1. The Adjudicating Authority, in relation to the question of procedural irregularities, observed and held as under: -

"(II) PROCEDURAL IRREGULARITIES: -

89. Another major objection in relation to the Resolution Plan was that the IRP / RP has violated umpteen provisions of the Regulations by not adhering to the timelines framed thereunder. In this regard, it is to be seen that the model timelines given under the IBBI Regulations were designed by keeping into mind the CIRP period of 180 days; however in many cases the CIRP period has exceeded more than 330 days and still continues. Thus, it cannot be gainsaid that the IRP or the RP as the case may be has to strictly adhere to the model timelines stipulated under the Regulations. For instance, an avoidance Application as found in Section 43, 45 and 50 can be filed either by the RP or by the Liquidator and the model timeline prescribed under the attendant Regulations states that the same should be filed in T+75 days. If the said model timelines is construed as mandatory then the avoidance transactions which entitle the Liquidator to file an Application, would be rendered as nugatory.

90. It is significant to note here that, a statutory provision regulating a matter of practice or procedure will generally be read as directory and not mandatory. Thus, even though the objectors to the Resolution Plan have alleged many procedural irregularities in relation to the conduct of the proceedings in relation to the CoC; however those objectors have miserably failed to establish as to what prejudice has been caused to them in respect of the same. Further, a person who has been inducted as a member of the CoC in its 6th meeting cannot be allowed to question the actions taken by the CoC in the past meetings. However, in relation to the objections raised by the Applicants in IA/181/CHE/2021 and IA/183/CHE/2021, this Tribunal is unable to comprehend their objections in relation to the plan, especially when they are getting 100% of their claim amount to be paid by the Resolution Applicant. Hence, this raises a suspicion as to whether that these Applications as filed by the objectors are motivated.

91. Thus, the objections as raised by the objectors in relation to the procedural irregularities in relation to the conduct of the Corporate Insolvency Resolution Process, are not so grave in order to defeat the Resolution Plan as filed by the Resolution Professional. Hence, for the said reasons, the objections as raised by the objectors in respect of the same are overruled. Accordingly, IA/181/CHE/2021, IA/183/CHE/2021, IA/192/CHE/2021, IA/172/CHE/2021 and IA/291/CHE/2021 stand **dismissed.**"

15.4. Moving on to the questions concerning the related party - Dharani Finance Limited - and the applications moved by it, the Adjudicating Authority took note of the submissions on its behalf with reference to

Section 21(2) of the Code that it could not have been categorised as related party but rejected this contention while observing as under: -

> "93. A bare perusal of the said provision shows that, even though the Applicants viz. M/s. Dharani Finance Limited are regulated by a financial service regulator, they have miserably failed to establish that the debts due to them have become due solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares. Further the phrase "completion of such transactions as may be prescribed" would also be of no avail, since the transactions as such have not been prescribed by the Board. In any case, this Tribunal is of the considered view that the Applicants in MA/18/CHE/2021 and MA/48/CHE/2021 are related party in respect of the Corporate Debtor and that the decision of the IRP / RP in categorizing the Applicant viz. M/s. Dharani Finance Limited as "Related Party" of Corporate Debtor is free from all legal infirmities and does not warrant any interference by this Adjudicating Authority. Accordingly, MA/18/CHE/2021 and MA/48/CHE/2021 stands **dismissed.**"

15.4.1. The Adjudicating Authority also examined the question of discrimination in the resolution plan in respect of distribution of amount to the financial creditor-related party compared with the financial creditor-unrelated party. The Adjudicating Authority referred to the principles stated by this Court in ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Ors*.: (2020) 8 SCC 531** and rejected those contentions while observing that in the scheme of the Code, there was no provision which mandatorily requires payment to the related party in parity with the unrelated party. In this regard, the Adjudicating Authority, *inter alia*, observed as under: -

> **"(IV) DISCRIMINATION IN THE RESOLUTION PLAN:-**
>
> 94. Another rival contention put forth by the Learned Senior Counsel for the objectors was that there was is a discrimination in respect of the distribution of amount to the Financial Creditor - Related Party compared with the Financial Creditor – unrelated Party. It was contended that no amount is paid by the Resolution Applicant, to the Related Party of the Corporate Debtor, be it Financial Creditor

> or Operational Creditor. In this regard, it is to be noted here that the way in which the amount has to be distributed and paid, purely falls within the domain of the Resolution Applicant and further the CoC in its commercial wisdom has accepted the same. Further, there is no provision in the IBC, 2016 which mandates that the Related party should be paid in parity with the unrelated party….
>
> 95. It must be noted here that so long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors…
>
> 96. Thus, the contentions of the Learned Senior Counsel for the objectors that differential treatment are being made to them since they are related party in respect of the Corporate Debtor do not hold any merit in view of the discussions made *supra* and also the decisions referred in support of the same. Hence the objections raised by the objectors in relation to the said issues are overruled."

15.5. The Adjudicating Authority also took note of the question relating to the pending avoidance application and recorded its satisfaction that the provision had duly been made in the resolution plan as to the fate of the avoidance application and hence, the objections in that regard were required to be eschewed.

15.6. Apart from the above, the Adjudicating Authority also dealt with the objections raised by one of the other prospective resolution applicants but those aspects need not be dilated for the present purpose.

16. After recording its findings on the issues raised by the parties, the Adjudicating Authority proceeded to approve the resolution plan while recording its satisfaction as regards all the mandatory compliances by the plan in the following manner: -

"(V) APPROVAL OF RESOLUTION PLAN

103. Thus, after overruling all the objections raised in relation to the Resolution Plan, this Adjudicating Authority in so far as the approval of the Resolution Plan is concerned, section 30(6) of the IBC, 2016 cast certain duties upon this Adjudicating Authority to examine the Resolution Plan as to whether the Plan falls within the contours of the said Section. Hence, a comparison of the mandatory compliance as required under IBC, 2016 *vis-a-vis* the compliance as made in the Resolution Plan is being tabulated hereunder.

MANDATORY COMPLIANCE UNDER IBC CODE AND REGULATIONS	**COMPLIANCE UNDER RESOLUTION PLAN**
S. 30(1) - Resolution Applicant to submit an affidavit stating that he is eligible under Sec.29A of the Code, 2016	The Affidavit of the Resolution Applicant (RA) is found in "Format 3B" in Volume II of the Resolution Plan wherein Mr. M. K. Rajagopalan, the Resolution Applicant has stated that he is eligible under Section 29A of IBC, 2016 to submit a Resolution Plan. Further, the Resolution Professional in Form - H has certified that the said Affidavit is in order.
S. 30(2)(a) - Payment of Insolvency and Resolution cost in the manner specified by the Board	Clause 5.3.1 of the Resolution Plan provides for the payment of CIRP costs in priority. The CIRP Cost is arrived at ₹2.90 Crore and would be paid within 45 days from the date of approval of the Resolution Plan.
S. 30(2)(b) - Payment of debts of Operational Creditors in such manner as may be specified by the Board, which shall not be less that the amount to be paid to the Operational Creditors in the event of a liquidation of the Corporate Debtor under Sec. 53	Clause 5.3.5 and 5.3.6 of the Resolution Plan states that all the Operational Creditors (Unrelated Party) are being paid 100% of their admitted claim within 45 days from the date of approval of the Resolution Plan.
Reg.38(1A)- Resolution Plan shall include a statement as to how it has dealt with the interest of all the stakeholders, including	Clause 5.2 of the Resolution Plan provides for payments to be made to all the stakeholders of the Corporate Debtor.

financial creditors and operational creditors of the Corporate Debtor	
S.30(2)(c)- Management of the affairs of the Corporate Debtor after approval of the Resolution Plan	Clause 5.11 of the Resolution Plan deals with the Management and Control of the Corporate Debtor after the approval of the Resolution Plan
S.30(2)(d)– Implementation and Supervision of the Resolution Plan	Clause 5.10 of the Resolution Plan deals with the manner of supervision and Implementation of the Resolution Plan.
Reg. 38(2) - Resolution Plan shall provide: a) term of plan and its implementation schedule b) management and control of the business of the Corporate Debtor during its term; c) it has provisions for effective Implementation d) it has provisions for approval required and the timeline for the same; and e) the Resolution applicant has the capability to implement the Resolution Plan.	Clause 5.6, 5.10 and 5.10.2 of the Resolution Plan deals with the adequate means of supervision and Implementation of the Resolution Plan
Reg. 38(3) - Resolution Plan shall demonstrate: a) it address the cause of default b) it is feasible and viable c) it has provisions for effective implementation d) it has provisions for approval required and the timeline for the same e) the resolution applicant has the capability to implement the resolution plan	Clause 4.7, 5.16, 5.10, 5.13 and 5.16(iv) of the Resolution Plan deals with the causes of default of the Corporate Debtor and the operational Viability of the project by the Resolution Applicant.
S. 30(2)(e) - Does not contravene any of the	The Resolution Professional in Form H has confirmed that the Resolution Plan

<table>
<tr><td>provisions of the law for the time being in force</td><td>is not in contravention with the provisions of any Applicable Law.-</td></tr>
<tr><td><u>S. 30(4)</u> - Committee of Creditors approve the Resolution Plan by not less than 66% of voting share of Financial Creditors, after considering its feasibility, viability and such other requirement as specified by the Board</td><td>The CoC in its 9th meeting held on 22.01.2021 has approved the Resolution Plan in the following voting pattern;
<table>
<tr><th>S. No.</th><th>Name of Creditor</th><th>Assent (%)</th><th>Dissent (%)</th></tr>
<tr><td>1.</td><td>State Bank of India</td><td>26.41</td><td>-</td></tr>
<tr><td>2.</td><td>IDBI Debentures Trusteeship Ltd.</td><td>19.64</td><td>-</td></tr>
<tr><td>3.</td><td>Indian Bank</td><td>17.80</td><td>-</td></tr>
<tr><td>4.</td><td>Bank of India</td><td>13.41</td><td>-</td></tr>
<tr><td>5.</td><td>TFCI</td><td>5.62</td><td>-</td></tr>
<tr><td>6.</td><td>IDBI</td><td>3.03</td><td>-</td></tr>
<tr><td>7.</td><td>Edelweiss ARC</td><td>1.06</td><td>-</td></tr>
<tr><td>8.</td><td>Allium Finance (P) Ltd.</td><td>0.42</td><td>-</td></tr>
<tr><td>9.</td><td>Prabhat Resources Ltd.</td><td>-</td><td>4.28</td></tr>
<tr><td>10.</td><td>Sun Bright Industries</td><td>-</td><td>4.25</td></tr>
<tr><td>11.</td><td>M/s. RSM Industries</td><td>-</td><td>1.43</td></tr>
<tr><td>12.</td><td>Aryav Exports (P) Ltd.</td><td>-</td><td>1.25</td></tr>
<tr><td>13.</td><td>Modern Constructions</td><td>-</td><td>0.86</td></tr>
<tr><td>14.</td><td>URC Builders</td><td>-</td><td>0.39</td></tr>
<tr><td>15.</td><td>M. Chandrasekaran</td><td>-</td><td>0.16</td></tr>
<tr><td></td><td>Total</td><td>87.39</td><td>12.62</td></tr>
</table></td></tr>
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17. The Adjudicating Authority, thereafter, referred to the decisions of this Court in the cases of ***Essar Steel*** (supra); ***K. Sashidhar v. Indian Overseas Bank*****: (2019) 12 SCC 150;** ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. v. NBCC (India) Limited and Ors.*****: (2022) 1 SCC 401** and ***Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh and Ors.*****: (2020) 11 SCC 467** as regards the principles that the Adjudicating Authority would not be sitting in appeal over the commercial wisdom of CoC and also observed that there was no requirement that the bid of the resolution applicant has to match the liquidation value of the corporate debtor. The Adjudicating Authority also left the questions of various reliefs/concessions sought for by the resolution applicant to be taken up in the appropriate forum or before the appropriate authority in accordance with law.

17.1. With the above-mentioned observations and findings, the Adjudicating Authority concluded on the matter with approval of the resolution plan and with further directions in the following terms: -

> "113. Thus the Resolution Plan is hereby **approved** and is binding on the Corporate Debtor and other stakeholders involved so that revival of the Debtor Company shall come into force with immediate effect and the "Moratorium" imposed under section 14 of IBC, 2016 shall not have any effect henceforth. The Resolution Professional shall submit the records collected during the commencement of the Proceedings to the Insolvency & Bankruptcy Board of India for their record and also return to the Resolution Applicant or New Promoters. Certified copy of this Order be issued on demand to the concerned parties, upon due compliance. Liberty is hereby granted for moving any Miscellaneous Application, if required, in connection with implementation of this Resolution Plan. That in respect of stepping by the New Promoters/Resolution Applicant into the shoes of the erstwhile Company and taking over the business, the provisions of Companies Act, 2013 shall be applicable and because

> of this reason a copy of this Order is to be submitted in the Office of the Registrar of Companies, Chennai.
>
> 114. The Resolution Professional is further directed to handover all records, premises / documents to Resolution Applicant to finalise the further line of action required for starting of the operation as contemplated under the Resolution Plan. The Resolution Applicant shall have access to all the records premises / documents through Resolution Professional to finalise the further line of action required for starting of the operation. Accordingly, the Application IA/150/CHE/2021 stands **allowed.** All other connected Applications, as arrayed in the cause title, stands **dismissed.**"

Disapproval of the Appellate Tribunal (NCLAT)

18. Being aggrieved of the order dated 15.07.2021 so passed by the Adjudicating Authority, approving the resolution plan of the resolution applicant and declaring it to be binding on the corporate debtor and other stakeholders, four appeals were preferred before the Appellate Tribunal, respectively by the promoter Dr. Periasamy Palani Gounder, the related party Dharani Finance Limited and the NRI shareholder Dr. V. Janakiraman, the details whereof have been noticed hereinbefore in the particulars of proceedings and parties.

19. After considering the said appeals together, the Appellate Tribunal (NCLAT) proceeded to allow the same by its impugned judgment and order dated 17.02.2022. The Appellate Tribunal reversed the order of the Adjudicating Authority and while rejecting the resolution plan in question, remanded the matter to the CoC with directions to the resolution professional, *inter alia*, to proceed from the stage of publication of Form 'G', and to invite the EOI afresh as per the CIRP Regulations. Having regard to the questions raised in these appeals, it shall be apposite to take

note of the observations, findings, and conclusions of the Appellate Authority as relevant for the present matter in necessary details[20].

19.1. As regards the issue of valuation, the Appellate Tribunal, after discussing the requirements of Sections 30(2) and 61(3) of the Code and taking note of the minutes of the second CoC meeting as to the appointment of valuators and the other legal issues concerning the valuation of assets, held that the valuation process had been in violation of the Regulation 27 and 35 of the CIRP Regulations for the reasons that the appraisal of a property situated in Tamil Nadu by Delhi-based valuers was a point of contention during the second CoC meeting; the non-core assets were not valuated by the registered valuers; the valuation report was never circulated either to the promoters or to the other members of the CoC; and physical verification of the assets of the corporate debtor was not carried out by the two valuers appointed by CoC.

19.1.1 The observations of the NCLAT as to the issue of valuation could be reproduced as under: -

> "76……**Whether the approved Resolution Plan contravenes Section 30 (2) and Sec 61(3) of the Insolvency and Bankruptcy Code 2016?**
>
> *** *** ***
>
> 80. It is pertinent to mention that the Approval of the Resolution Plan by the COC is directly attributable to the fact that the COC was not properly apprised of the actual value of the Corporate Debtor's assets. The choices of the valuers by the IRP have been questionable since the 2nd COC meeting. The concern stems from the fact that the valuers were based in Delhi and had little knowledge of the prevailing real estate market conditions in Tamil Nadu. The circumstances were further separated by the fact that valuers lacked adequate experience with the hospitality industry. In

[20] It may be indicated that the emphasis in bold/italics/underlining in the extractions from the judgment of the Appellate Tribunal are as in the copy thereof placed on record before us.

this regard, it is pertinent to note the minutes of the 2nd COC meeting, which reads as follows;

> *"At this juncture, the COC members have raised concerns regarding the appointment of the* ***valuers as the appointed valuers are Delhi-based and are not privy to the area/properties of Tamil Nadu and might also a struggle to visit the collective sites of the corporate debtor located at Tamil Nadu given that travel restrains in the current period the competency of the process valuation might decrease. The COC members also requested the chairman to circulate the profiles in a comparative chart. The members had difficulty being faced evaluating the profile/experience of the*** *appointed valuers with respect to the hospitality industry."*

81. It is further evident from the minutes of the COC meetings that the two valuers appointed by the IRP differs significantly and therefore warranted the appointment of a third valuer. Furthermore, the RP has also admitted in the 6th COC meeting that only the 'Core Assets' of the Corporate Debtor were valued, and the 'Non-Core Assets' has not been appropriately valued. Therefore, the 3rd Valuer was also supposed to value the Non-Core Assets. Still, the RP, as evident from the minutes of the 6th meeting of the Committee of Creditors, made it clear that another valuer needs to be appointed to value the Company's non-core assets, which was not done. Therefore, the Valuation of the non-core assets is not in compliance with Regulation 35 (1) (a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

82. It is pertinent to point out that due to lockdown, quarantine and travel restrictions, the appointed valuers could not conduct the Valuation and their agents at or near Chennai who are not registered valuers and lacked the expertise to conduct the exercise on their behalf. Therefore, further physical verification of the assets by the registered valuers is indispensable, and the Respondent has taken the same note before furnishing the Valuation to the COC. Moreover, the details of the purported "Associates" of the 'Registered Valuers' have not been disclosed, and the COC has neither considered nor approved the said Associate Valuers. Conveniently, the valuation reports have not been disclosed to date, and only the Valuation is sought to be accepted as gospel truth. Therefore, the Valuation furnished to the COC is in utter violation of Regulation 35 (1) (a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and contrary to Rule 8 of the Companies (Registered Valuers and Valuation) Rules, 2017.

83. Further, it is necessary to mention that many members of the COC raised concerns relating to the Valuation. Even in the 7th

> meeting of the COC, concerns were raised as to the fact that the Resolution Plan values the Corporate Debtor at a rate that is significantly lower than the already paltry Valuation arrived at by the IRP. Moreover, the RP himself admitted the aforesaid fact in the aforesaid meeting.
>
> *** *** ***
>
> 86. Based on the above discussion, it is apparent that the two valuers appointed by IRP did not physically verify the corporate debtor's assets despite that Regulation 35 (1) (a) of the CIRP Regulations mandates explicitly that the estimator fair value and liquidation value shall be computed after physical verification of the assets of the Corporate Debtor. It is further revealed that the valuation report was never circulated either to the Appellant or to other members of the COC. Mere production of naked values without the detailed adjunct report would materially handicap the commercial wisdom of the Committee of Creditors.
>
> 87. Further, Regulation 27 Regulation 35 mandates that two registered valuers value the Corporate Debtor's assets. It is an admitted fact that the two registered valuers appointed by the Resolution Professional did not value the non-core assets of the Corporate Debtor. However, in view of the detailed valuation report, no member of the COC of the Appellant herein has any idea as to what was categorised as a 'Non-Core Assets' by the Resolution Professional or what its value could be. These are the blatant statutory violations and irregularities committed in violation of the corporate debt assets."

19.2. The Appellate Tribunal also held that compliance with statutory requirements regulating a matter of practice and procedure were mandatory in character and the Tribunal being a creature of a statute cannot dilute the statutory compliances in the following words: -

> "88. However, the learned Adjudicating Authority/NCLT's observation that **'A statutory provision regulating a matter of practice or procedure will generally be read as a directory and not mandatory is erroneous. Compliance with statutory requirements in regulating a matter of practice and procedure are mandatory.'** The Tribunal is a creature of statute, and by interpretation, it cannot dilute the statutory compliances."

19.3. After noticing non-compliance of Regulation 36-A(2)(iii) of the CIRP Regulations that mandates publication of Form-G at the earliest and not

later than 75th day from the insolvency commencement date, the Appellate Tribunal held that the publication of Form G on the designated website was essential and failure to advertise as mandated had a direct impact on the maximization of asset value, more so when the entire CIRP was conducted during lockdown at the time of Covid-19 pandemic when most of the people avoided reading the newspaper under the apprehension of infection. The relevant parts of the order of the Appellate Tribunal in this regard read as under: -

> "89. ……
> ***Non-Publication of Form-G As Per Regulation 36A(2) (iii) of the IBBI Regulations for Corporate Persons, 2016***
> 90. As per Regulation 36A(2)(iii), the RP shall publish 'Form-G' on the Corporate Debtors and IBBI websites. This would ensure adequate publicity to all prospective Resolution Applicants. This was admittedly not done by the RP. The IRP published the Form-G only in a newspaper.
> 91. In fact, in the 5th CoC Meeting dated 12.11.2020, while discussing whether 'Form G' should be re-published, the present RP points out that it was not published on the IBBI website, which may lead to litigation in the future. However, no steps were taken to re-publish 'Form-G' and invite fresh bids despite this. This was done despite the exclusion of the period between 05.05.2020 and 31.10.2020 from the period of CIRP by the Ld. Tribunal.
> 92. A plea regarding non-compliance of Regulation 36A of IBC has explicitly been taken by the Appellant in its Affidavit objecting to the Plan before the Ld. Tribunal. The impugned order itself records that the plea of non-compliance of regulation 36A was raised.
> 93. Non-publication of 'Form-G' violates Circular No. IP (CIRP)/006/2018 dated 23.02.2018 issued by the IBBI, which provides the designated website for publication of 'Form-G', i.e. invite.rp@ibbi.gov.in. Failure to advertise as mandated to ensure that more Resolution Applicants could come forward directly impacts the maximization of asset value.
> 94. Despite violations above about the publication of 'Form-G', the Learned Tribunal has approved the Resolution Plan. On pages 142-144 of Vol. of Appeal, sets out a list of provisions that have been complied with. Regulation 36A does not even find a mention in this.
> *** *** ***
> 97. Further, it is well settled that the scope of interference concerning the Successful Resolution Plan is extremely limited in nature. Challenge can only be in respect of grounds as provided in

> Section 30 (2) or Section 61 (3) of the IBC 2016, which is limited to matters “other than” the enquiry into the autonomy or commercial wisdom of the Committee of Creditors.
> 98. It is pertinent to mention that an appeal against the approval of the Resolution Plan shall lie under Section 61 (3) of the IBC on the ground, namely, there has been a material irregularity in exercise of the powers by Resolution Professional during the Corporate Insolvency Resolution period.
> 99. Further, it is necessary to mention that Regulation 36 A of CIRP Regulations mandates publication of Form-G at the earliest, not later than the 75th day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit Resolution Plans.
> 100. Non-compliance with the above regulatory provision is admitted. It is also important to point out that this entire CIRP was conducted during lockdown when the world faced Covid19 Pandemic. At that time, most people avoided reading the newspaper under the apprehension of Covid infection. So the publication of ‘Form-G’ for inviting Expression of Interest was essential. It is also important to point out that the Government of India also brought some amendments in the Code considering the impact of the Pandemic. Relevant Regulation about inviting ‘EOI’ is given below for ready reference;”

19.4. Further, the Appellate Tribunal declared the resolution applicant ineligible to submit a resolution plan in terms of Section 29-A(e) of the Code on account of being disqualified as a director under Section 164(2)(b) of the Companies Act as also because of operation of Section 88 of the Trusts Act.

19.4.1. As regards the ineligibility in terms of the Trusts Act, it was held that the case of resolution applicant was unambiguously falling within the scope of Section 88 of the Trusts Act, rendering the resolution plan in question as illegal because the trust 'Sri Balaji Vidyapeeth' was already declared ineligible, of which, the resolution applicant was the managing trustee that precluded him from acting as its alter ego during the execution of the resolution plan and obtaining any financial advantage or benefit as being barred under Section 88.

19.4.2. The relevant observations and findings of the Appellate Tribunal in regard to this aspect read as under: -

> "101. **Resolution Applicants ineligibility u/s 29A(e) of the Code**…….
>
> *** *** ***
>
> 105. The CoC was merely informed that one of the PRA[21] charitable trusts was not authorised to take up this activity. However, the rejected Trust was none other than the 2nd Respondent's Trust, namely 'Balaji Vidyapeeth', which was never disclosed to the COC and has been deliberately suppressed. The IRP/ Resolution Professional should have informed the CoC that the 2nd Respondent had presented the Resolution Plan by competing with the said Trust. He has used the very same ''Trust' to support his credentials and creditworthiness in the Resolution Plan. The relevant portions of the Resolution Plan are extracted hereunder for ready reference:
> *"3.5. Sri Balaji Vidyapeeth:*
> *Mr M.K. Rajagopalan is the founder and managing trustee of Sri Balaji Vidyapeeth...*
> *3.10. Financial Snapshot"*
> *The entities under the leadership of Mr. M.K. Rajagopalan have been growing rapidly while ensuring quality of service to nation and public at large...*
> *These entities have achieved turnover of Rs.417.94 Crores in FY 2016-2017; Rs.500.03 Crores in FY 2017-2018; Rs. 679.23 Crores in FY 2018-2019 and Rs.860.59 Crores (estimated) for FY 2019-2020.*
> *The above growth is ample testimony of the credentials of the RA as a competent business leader and his capability to manage and turn around various diverse businesses."*
> 106. Therefore, it is incorrect to say that the 2nd Respondent has not gained any advantage from the charitable Trust. The case on hand squarely falls within the ambit of Section 88 of the Indian Trusts Act, and as such, the Resolution Plan is illegal. Since the said 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent cannot act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain is barred by Section 88 of the Indian Trusts Act. The said provision is extracted hereunder for ready reference.[22]
> *** *** ***

[21] Prospective Resolution Applicant.

[22] *"Section 88. Advantage gained by fiduciary. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."*

108. It is illogical and fallacious to claim that the Resolution Plan can be tested in terms of the provisions of IBC, 2016 and not under Section 88 of the Indian Trusts Act. Therefore, it is submitted that even as per the provisions of IBC, a Resolution Plan shall be by the provisions of all other statutes, and the Resolution Plan mustn't contravene the law of the land. In this regard, it is pertinent to note Sections 30 and 61 of the Code, which reads as follows:

*"**Section 30**. Submission of Resolution Plan. –*
(2) The Resolution professional shall examine each resolution plan received by him to confirm that each resolution plan – …
(e) does not contravene any of the provisions of the law for the time being in force.
….
***Section 61**. Appeals and Appellate Authority. –*
(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely: --
(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;."

109. The argument of the 2nd Respondent that the Trust had submitted their EOIs independently and both of them were aware that the other was submitting their EOIs is purely mischievous. Admittedly, the 2nd Respondent is the Managing Director of the said Trust, and the fact remains that two EOIs were submitted by the 2nd Respondent, one for himself and the other on behalf of the Trust.

110. However, the said facts have been suppressed from the CoC, and the CoC did not have an occasion to consider that the 2nd Respondent had submitted two EOIs. Therefore, it is also false to claim that the 2nd Respondent had complied with the provisions of the RFRP and the IBC. The 2nd Respondent suppressed material facts and gave false declarations about his ineligibility and the conflict of interest.

111. The argument of IInd Respondent that a conflict of interest would arise in case the Trust were allowed to submit a Resolution Plan is incorrect and misleading. The purported Explanation of conflict of interest' stated in the RFRP would not absolve the duty cast upon the IInd Respondent under Section 88 of the Indian Trusts Act. Further, it is incorrect to state that a conflict of interest could arise only between two Resolution Applicants. Such an interpretation is contrary to the explicit provisions of Section 88 of the Indian Trusts Act. Therefore, it is incorrect to say that the 2nd Respondent has not gained any advantage from the charitable Trust.

112. The case on hand squarely falls within the ambit of Section 88 of the Indian Trusts Act, and as such, the Resolution Plan is illegal. Since the said 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent cannot act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain is barred by Section 88 of the Indian Trusts Act.

19.4.3. As to the question of disqualification under Section 164(2)(b), the Appellate Tribunal observed that Mr. M.K. Rajagopalan was the director of International Aviation Academy Private Limited, and as seen from the audited financial statements of the said company, from 2010-2011 to 2017-2018, a sum of Rs. 12,03,000/- was collected by the said company as 'share application money pending allotment'. The Appellate Tribunal further noticed that the said sum was not refunded and as such, was to be treated as 'deposit' in terms of Explanation (a) to Rule 2(1)(c)(vii) of the Companies (Acceptance of Deposits) Rules, 2014 as a consequence of which, in terms of Section 164(2)(b) of the Companies Act, the resolution applicant stood disqualified from acting as a director in any company for a period of five years from the date on which the said International Aviation Academy Private Limited failed to repay the deposit amount. Some of the relevant observations and the findings of the Appellate Tribunal in this regard could be noticed in the following extraction: -

> "117. The learned Senior Counsel for the 2nd respondent has vehemently argued that the objection raised by the appellant was never raised before the Adjudicating Authority. In response to this objection, Learned Counsel for the appellant submits no estoppel against a statute. Section 61 (3) empowers the Appellate Tribunal to question irregularities and illegalities in the CIRP, including the Resolution Plan. The Resolution Plan being in rem, these questions fall within the exclusive purview of judicial review. These grounds cannot be eschewed from consideration on the simple ground that they were never raised before NCLT, as persons who were not before NCLT are also before this court.
> 118. The Ld Senior counsel for the Appellants, in response to the above submissions of Respondent No.2, regarding the disqualification of the 2nd Respondent, argued that the 2nd Respondent is a Director of M/s. International Aviation Academy Private Limited, and it is seen from the audited financial statements of the said Company for the period 2010-2011 to 2017-2018 that a

sum of Rs.12,03,000/- has been collected as 'share application money pending allotment'.

119. It appears that the said sum has not been refunded, and as such, the same shall be treated as 'deposit' in terms of Explanation (a) of Rule 2(1)(c)(vii) of The Companies (Acceptance of Deposits) Rules, 2014. In the above circumstances, given Section 164 (2) (b) of the Companies Act, the 2nd Respondent has been disqualified from acting as a Director in any Company for five years from the date on which the said Ms International Aviation Academy Private Limited failed to repay the deposit amounts collected towards 'share application money pending allotment' aggregating to Rs.12,03,000/.

120. Even assuming these amounts have been repaid during 2018-2019, the 2nd Respondent is disqualified from acting as a director to date. Thus, the 2nd Respondent is not eligible to act as a resolution applicant as per Section 29-A(e) of the Code. The audited balance sheets of the said M/s. International Aviation Academy Private Limited for the years from 2011 to 2018.

121. The 2nd Respondent has suppressed the above facts and has submitted the Resolution Plan by giving a false declaration that he does not suffer from any disqualification. Now, the 2nd Respondent has claimed that Rs.12,03,000/- was paid by himself to the said M/s. International Aviation Academy Private Limited and that him being a member/ Director of the said Company, such payment would not amount to 'deposit' as per Rule 2(1)(c)(viii) of The Companies (Acceptance of Deposits) Rules, 2014 and General Circular No. 5 dated 30.03.2015, issued by the Ministry of Corporate Affairs.

122. The 2nd Respondent has chosen not to file any document to support the above contention and has failed to discharge his burden under Section 106 of the Indian Evidence Act, 1872.

123. Suppose it is considered that the sum of Rs.12,03,000/- was paid by the 2nd Respondent to the said M/s. International Aviation Academy Private Limited, the Application of Rule 2(1)(c)(viii) of The Companies (Acceptance of Deposits) Rules, 2014 is subject to the conditions stipulated therein, which have not been complied with. Therefore, it is misleading to state that Private Limited Companies have been granted a specific exemption.

124. Further, even as per the General Circular No.5 dated 30.03.2015, any renewal of deposit after 01.04.2014 shall be in accordance with the Companies Act, 2013 and the rules made thereunder. It is thus patent that the said sum of Rs.12,03,000/- is a deposit, and as such, the 2nd Respondent is disqualified from acting as a Director given Section 164(2)(b) of the Companies Act, 2013.

125. It is correct to say that the IRP/RP should be concerned as to whether a Resolution Application submitting his EOI is eligible as per the provisions of Section 29-A of the Code. Apparently, in the case on hand, the 1st Respondent has not properly verified the eligibility of the 2nd Respondent and has acted solely based upon the false declarations given by the 2nd Respondent.

126. However, the Appellant is well within his rights to question the legality of the CIRP and the Resolution Plan.

> 127. Based on the above discussion, it is clear that the 2nd Respondent is disqualified as a director under section 164 (2) (b), Companies Act, 2013 and consequently ineligible to submit a Resolution Plan under Sec. 29A(e) of the Insolvency and Bankruptcy Code 2016."

19.5. In relation to the assertion of the resolution professional that the revised resolution plan was approved in the ninth CoC meeting, the Appellate Tribunal examined the relevant minutes and observed that in the said meeting, the resolution plan was sent back to the resolution applicant for further revision based on the CoC resolution; and the revised resolution plan submitted by the resolution applicant dated 25.01.2021, was directly filed in the NCLT for approval without being put to vote before CoC. The Appellate Tribunal observed that as per the requirements of Sections 30 and 31 of the Code, only the plan approved by CoC was to be presented before NCLT for approval. It was further held by the Appellate Tribunal that such procedural failure was that of a material irregularity, undermining the integrity of the process and rendering the resolution plan void and *non est* in law. The observations of the Appellate Tribunal with respect to this issue of want of approval of the revised resolution plan by CoC could be usefully reproduced as under: -

> "130. On perusal of the minutes of 9th COC, it is clear that COC did not finally approve the Resolution Plan on 22 January 2021. In this meeting, COC sent back the Resolution Plan to the Resolution Applicant for further revision based on the CoC Resolution. This revised Resolution Plan dated 25 January 2021 was never sent for Approval before the COC.
> **131. The Resolution Professional's statement that 'the revised Resolution Plan was approved at the 9th COC meeting' is incorrect. Although the Resolution Plan was allegedly approved on 22 January 2021, it is not the Revised Resolution Plan. Instead, the Resolution Plan was further modified based on the CoC resolution Dt.22.1.2021. But the final Revised**

Resolution Plan, dated 25 January 2021, was never laid before the CoC for its approval. Thus the approval of the Resolution Plan by the Adjudicating Authority is not in compliance with Sec. 31(1) of the I & B Code, 2016.

132. It is pertinent to mention that after Approval of the Resolution Plan by COC entire exercise for revising the Resolution Plan for making a complaint with Section 30 (2) of the Code was left with the Resolution Applicant. Revised Resolution Plan dated 25 January 2021, without further approval of CoC, was presented by RP before the Adjudicating Authority for approval, which was finally approved by the impugned Order.

133. It is also important to mention that the learned Adjudicating Authority/National Company Law Tribunal has stated in the impugned order that "*it is seen that the final resolution plan was put up for consideration by the COC in the 9th meeting held on 22 January 2021 and the said resolution was approved with a thumping majority of 87.39%."*

134. The Adjudicating Authority failed to notice that the Resolution Plan was not approved in the 9th COC meeting. Therefore, based on the resolution of the 9th COC meeting, the Resolution Plan was to be sent back to the Resolution Applicant for further revision. After that, the final Revised Resolution Plan was made on 25 January 2021, but it was never presented before the COC for approval.

135. After "revision", the revised plan is never put to the vote. Instead, it is filed to NCLT directly, without any approval from the COC on the revised Resolution Plan. Sections 30(2), 30(4), 30(6) and Section 31 mandate that only a plan as approved by the 'COC' can be presented to the NCLT for its approval under Section 31. Such kind of procedural failure amounts to material irregularity and goes to the root of the matter, making the plan void and non-est in law, as it is trite law that where the law permits a thing to be done in a particular manner if the same is not done in that manner, the same is non-est in the eyes of the law."

19.6. As regards the issue of non-consideration of Section 12-A IBC application of the promoter of the corporate debtor, the Appellate Tribunal observed that the consideration of settlement offer was essential and that the settlement offer could not have been rejected without consideration by the CoC. It was further held that CoC, in its commercial wisdom, had full liberty to either accept or reject the settlement offer but, consideration of the settlement offer was indispensable. In regard to this aspect, the Appellate Tribunal observed and held as under: -

"140. *Based on the pleadings of the parties, it is clear that the COC meeting was not called for consideration of the 12 A application. Since 'Form FA' has to be submitted only by the Applicant Financial Creditor after the proposal floated by the promoters is considered,* ***and only after the proposal has been accepted by 90% of the Committee of Creditors,*** *the Applicant Financial Creditor has to file the proposal as per Form FA.* ***Thus, it is clear that the Resolution Professional cannot disregard the proposal for conducting a meeting of the CoC on such an untenable and superficial ground.***

141. It appears that based on the settlement offer, the appellant sent a letter to the Financial Creditor Tourism Finance Corporation of India that an investor has expressed its willingness to infuse funds of 350 crores to settle the secured Financial Creditors in full within 30 days. This amount will be deposited in the current account. Regarding the claims made by other Unsecured Financial Creditors, Operational Creditors, implies, and other stakeholders, it will be settled after discussion with them and out of the generation of funds from the company's operation. In the circumstances, the appellant requested to accept the settlement so that the 12 A application may be submitted before the NCLT. The term sheet of the Deutsche Bank was also annexed with the settlement offer.

142. It is also necessary to mention that when the appeal was filed, then on the 1st date of admission of the Appeal, i.e. 30 July 2021, the learned counsel for the appellant made a statement in the court that the appellant would deposit ₹ 450 crores. Therefore, he requires 2 or 3 days. Since the total Resolution Plans amount was 423 crores, the Appellant contended that assets of the corporate debtor are worth over rupees for 1600 crores. It is also contended that the 12 A application was pending, but it was not considered and voted. Considering all the situations and bona fides of the appellant, this Appellate Tribunal granted an interim stay on implementing the impugned order.

143. Based on the pleadings of the parties, it appears that a settlement offer was made, and a 12 A application was to be submitted after getting the consent of 90% members of the COC. In the circumstances, the appellant requested to consider the settlement proposal in the COC. However, COC was never called to consider the settlement offer. The Resolution Professional has contended that the COC has rejected the settlement offer in its 9th meeting. This statement is also not as per the minutes of the 9th COC meeting. It appears from the minutes of the 9th COC that only a Resolution Plan was discussed in that meeting. After that, the Resolution Plan was sent back to the resolution applicant by CoC for reconsideration and revision. In the 9 COC meetings, no discussion about the settlement offer occurred. It is essential to mention that after admission of the petition and formation of the Committee of Creditors, Section 12A application for withdrawal could only be accepted if the CoC approves the proposal with a 90% vote share. It is undisputed that COC, under its commercial wisdom, had full liberty to either accept or reject the settlement offer. But

> consideration of the settlement offer is essential. At this juncture, this tribunal "Worth recalls and recollects" the judgement of Hon'ble 3 Member Bench of this Tribunal in Company Appeal (AT) (Ins) No.91 of 2019 dated 6 September 2019 between Shaji Purusothaman v Union Bank of India and others (reported in MANU/NL/0438/2019) whereby and whereunder at paragraph 9 it is observed that;
> "*if an application u/s 12 A is filed by the Appellant, the Committee of Creditors may decide as to whether the proposal given by the appellant for settlement in terms of Section 12 A is better than the resolution plan as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the "Committee of Creditors", we are not expressing any opinion on the same.*"
> 144. In this case, CoC never considered the settlement proposal submitted by the Appellant. Although, after getting the settlement proposal, it was incumbent upon the resolution professional to call the COC meeting to consider the settlement proposal. It is essential to mention that the settlement offer could not have been rejected without consideration by the COC."

19.7. As regards the question of discrimination between the claims of related party and unrelated party, the Appellate Tribunal, while placing reliance on the decision of this Court in ***Phoenix ARC (P) Ltd v. Spade Financial Services Ltd. and Ors.*: (2021) 3 SCC 475** observed that 'related party' was specifically treated as a class unto itself and was restricted from any involvement in the CIRP in any capacity (under Section 21 IBC) and disqualified from being a resolution applicant (under Section 29-A IBC), the underlying object being that involvement of a related party in the CIRP is seen as giving unfair benefit to the corporate debtor and in fact, the related party is treated in the same class as the corporate debtor itself. Therefore, according to the Appellate Tribunal, a 'related party' could be treated as a separate class independent of an unrelated party and ought to be equated with the promoters as equity shareholders or as partners. After discussing various decisions of NCLT and NCLAT as also of this

Court as regards the position of related party vis-à-vis the unrelated, the Appellate Authority held that the related party financial or operational creditor cannot be discriminated against under the resolution plan, by denying their right to get payments under the resolution plan only for being a related party. The Appellate Tribunal observed and held as under: -

> "149. Under the IBC, 2016, there is no mandate to treat unrelated and related parties equally. On the contrary, the IBC and Regulations thereunder specifically treat 'related party' as a class unto itself and restrict the involvement of a 'related party' in any situation where the CIRP is likely to get affected. As held by the Hon'ble Supreme Court in Phoenix ARC, the purpose is to ensure that external creditors drive the CIRP. Following statutory provisions clarify that related party' is a class in itself. Accordingly**, a related party is prohibited from acting in any of the following capacities in a CIRP**:
>
> | Particulars | Provisions |
> |---|---|
> | Cannot be part of Committee of Creditors | Sec. 21, IBC, 2016 |
> | Cannot be a Resolution Applicant | Sec. 29A, IBC, 2016 |
> | Cannot be an authorized representative | Reg. 4A, IBBI (Insolvency Resolution Process for Corporate Persons) Reg, 2016 |
> | Cannot be a liquidator | Reg. 3, IBBI (Liquidation Process) Reg. 2016 |
> | Cannot be a part of the governing board | Reg.9, IBBI (Information Utilities) Reg, 2017 |
> | Cannot act as a professional | Reg. 7, IBBI (Insol. Professionals) Reg. 2016 |
> | In case there any only related parties as financial creditors, the CoC would be formed of the Operational Creditors | Reg. 16, IBBI(Insolvency Resolution Process for Corporate Persons) Reg. 2016 |
>
> 150. The underlying object is that the involvement of a related party in the CIRP in any capacity is seen as giving unfair benefit to the Corporate Debtor. In short, a related party is treated in the same class as the Corporate Debtor itself.
> 151. Therefore, this statutory recognition as a different class would apply even to a Resolution Plan when the CoC decides whether, in its commercial wisdom, it should pay to a related party at all as this would mean paying to the same persons who are behind the Corporate Debtor.

*** *** ***

157. Thus, it is well-settled that a 'related party' can be treated as a separate class independent of an unrelated party. Such 'related party' ought to be equated with the promoters as 'equity shareholders as partners.

*** *** ***

162. In the instant case of approved resolution plan discriminates between related party unsecured Financial Creditor and other unsecured Financial Creditors, likewise related party operational creditors and other operational creditors. The appellant argues that its claim ought to be treated equally to an unrelated Operational/ Financial Creditor given the equality clause enshrined under Article 14 of the Constitution of India.

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171. It is important to mention that related parties are barred from participating in the COC to avoid sabotaging the COC. Per contra, the claim filed by the related party, based on their admitted claims, would have influenced the CIRP if they had been permitted to participate in the COC. After completion of the CIRP and after approval of the Resolution Plan, if any amount is allotted to related party financial or operational creditors, it would not impact the CIRP.

172. It is also necessary to point out that code is a self-contained code. Therefore, any provision that restricts related-party Financial Or Operational Creditor actions is stated in the code. Thus, the Adjudicating Authority / NCLT/NCLAT cannot further limit the rights of Related Party Financial or Operational Creditors by way of interpretation. Furthermore, restrictions on the related party rights under CIRP under Code and Regulation are provided at different places. Therefore, its scope cannot be exceeded further by way of interpretation.

173. **Thus, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. Therefore, the Related Party financial or operational creditor cannot be discriminated against under the Resolution Plan, denying their right to get payments under the Resolution Plan only on being a Related Party. It is also made clear that by getting only payment under the Resolution Plan, related party creditors could in no way sabotage the CIRP.**"

19.8. The Appellate Tribunal, while concluding on its findings and reiterating its observations on several issues including those noticed above, held that increase in RP's fees with retrospective effect was not a

prudent decision of CoC; the possibility of an impact on the decision of RP for submission of the resolution plan before the Adjudicating Authority without approval of CoC cannot be ruled out. The Appellate Tribunal disapproved the order passed by the Adjudicating Authority for the reasons: (a) existence of a valid and accurate valuation report was a *sine qua non* for the CoC to exercise its commercial wisdom and observation of the Adjudicating Authority that Regulation 35 of the CIRP Regulations contemplates sharing of only fair value and liquidation value figures on obtaining confidentiality undertaking from the members of the CoC was incorrect; (b) the compliance with statutory requirements in regulating a matter of practice and procedure was mandatory and observation of Adjudicating Authority that a statutory provision regulating a matter of practice or procedure would generally be regarded as directory and not mandatory was erroneous; (c) non-publication of notices of Form G, inviting EOI, was a material irregularity in exercise of the powers by resolution professional; (d) the resolution applicant was ineligible to submit the resolution plan; (e) the revised resolution plan was filed before the Adjudicating Authority without laying it before the CoC for approval violating Sections 30(2) and 30(3) of the Code and thereby, vitiating the entire CIRP and rendering the resolution plan as void *ab initio*; and (f) the related party financial or operational creditor could not have been discriminated by denying their right to get payments under the resolution plan only on being a related party.

19.9. The Appellate Tribunal recorded its conclusions in the following terms: -

> "**CONCLUSION**
> 174. The increase in RP fees with retrospective effect can not be considered as CoC's prudent decision. The possibility of an impact on the decision of RP for the submission of the Resolution Plan before the Adjudicating Authority for approval, even without the approval of CoC, cannot be ruled out. Submission of the Resolution Plan for Approval before the Adjudicating Authority violates the statutory provision of Section 30(2) &(3) of the Code and has vitiated the entire CIRP and made the Resolution Plan Void ab initio.
> 175. Further, Adjudicating Authority observation that Regulation 35 of the IBBI (IRPCP) Regulations 2016 contemplates sharing of only fair value and liquidation value figures on obtaining confidentiality undertaking from the members of the CoC is incorrect. Finding that Since the Promoter is not a member of the CoC, the values were shared with the Promoter and that there are no requirements under the law for the RP to share the valuation report is also erroneous.
> 176. A valuation consisting of mere naked values without a detailed report is not valid. It is a settled proposition that the Valuation exercise is conducted to facilitate the CoC's decision-making process. Therefore, the existence of a valid and accurate valuation report is a sine qua non for the COC to exercise its commercial wisdom. A natural sequitur to those above would be that a detailed valuation report is necessary for the CoC to exercise its commercial wisdom objectively.
> 177. The Adjudicating Authority's observation **that a statutory provision regulating a matter of practice or procedure will generally be read as a directory and not mandatory is erroneous. Compliance with statutory requirements in regulating a matter of practice and procedure are mandatory**. The Tribunal is a creature of statute, and by interpretation, it cannot dilute the statutory compliances.
> 178. Further, observation of the Adjudicating Authority that procedural irregularities in relation to the conduct of the proceedings in relation to the CoC will not be material when the objectors failed to establish prejudice caused to them in respect of the same is also erroneous.
> 179. Regulation 36(2) of CIRP Regulations provides the mandatory condition for publication of 'Form-G' on the Corporate Debtor's website and the website designated by the Board for the purpose. Non-publication of notices of Form G is a material irregularity in exercise of the powers by Resolution Professional during the Corporate Insolvency Resolution period. In the instant case, there has been a material irregularity in exercising the powers by Resolution Professional during the Corporate Insolvency Resolution Process.

180. Since the said Trust (Prospective Resolution Applicant) 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent (SRA) cannot be permitted to act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain, which is barred by Section 88 of the Indian Trusts Act.

181. The Resolution Professional made an incorrect statement that the revised Resolution Plan was approved at the 9th COC meeting. The revised Resolution Plan was not approved on 22 January 2021. After 22nd January 2021, based on the COC Resolution Dt.22.1.2021, the Resolution Plan was further modified, and the final Revised Resolution Plan dated 25 January 2021 was never laid before the CoC for approval. Thus the approval of the Resolution Plan by the Adjudicating Authority can not be treated as valid under Sec. 31(1) of the I & B Code, 2016.

182. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. Therefore, Related Party Financial or Operational Creditor cannot be discriminated under the Resolution Plan only on being a Related Party.

183. Based on the discussion above, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under Section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification.

184. Therefore, the Related Party financial or operational creditor cannot be discriminated against under the Resolution Plan, denying their right to get payments under the resolution Plan only on being a Related Party. It is also made clear that by getting only payment under the Resolution Plan, related party creditors could in no way sabotage the CIRP.

185. Based on the above discussion, it is clear that the approved Resolution Plan is in contravention of Section 30 (2) of the Insolvency and Bankruptcy Code 2016, which contravenes the provision of law."

20. Hence, the Appellate Authority set aside the resolution plan approved by the Adjudicating Authority; directed the resolution professional to proceed with the CIRP from publication stage of Form G for inviting EOI afresh as per the CIRP Regulations and further to put up the settlement proposal of the promoter for consideration before CoC; and ordained that

the claim of related party financial/operational creditor be not discriminated from unrelated financial/operational creditors.

Proceedings in this Court

21. Aggrieved of the aforesaid judgment and order dated 17.02.2022 passed by the Appellate Authority, eight appeals are filed before this Court. As noticed, one sub-set is of four appeals as filed by the resolution applicant and other sub-set is of four appeals as filed by the resolution professional against the promoter and erstwhile director of the corporate debtor, related financial and operational creditor and against the NRI shareholder and erstwhile director of the corporate debtor. The details whereof have been noticed hereinbefore in the particulars of proceedings and parties.

22. It would be worthwhile to mention a few relevant aspects from the record of proceedings in this Court.

22.1. On 07.03.2022, civil appeals bearing numbers 1682-1683 of 2022, 1759 of 2022, 1756 of 2022, 1757 of 2022, 1807 of 2022 were called for hearing by this Court. During the hearing, counsel for the resolution applicant and counsel for contesting parties were heard but the arguments of counsel for the resolution professional remained inconclusive and the matter was posted to 11.03.2022 for further hearing. It was further pointed out during the submissions that the resolution applicant has filed two other civil appeals, bearing numbers 1810 of 2022 and 1827 of 2022, respectively against Dr. V. Janakiraman and Dharani Finance Limited. The

said appeals were ordered to be listed along with this batch of matters on 11.03.2022. Further, learned counsel for the resolution professional also placed before this Court the minutes of eleventh CoC meeting held on 03.03.2022 which were ordered to be filed in the registry with appropriate affidavit. Later on, RP filed the minutes of the eleventh CoC meeting as also the tenth CoC meeting and other documents with affidavit. The details of these and other subsequent meetings of CoC are set out in the next segment of this judgment.

22.2. On 16.03.2022, after having heard learned counsel for the respective parties along with rejoinder submissions at length, the judgment was reserved and learned counsel for the parties were granted time to file their note/additional notes on their submissions by 22.03.2022. It was further noted, during the course of submissions, that pursuant to the impugned order dated 17.02.2022 of the Appellate Authority, CoC meeting had taken place on 03.03.2022 and that another meeting was slated for 21.03.2022. As regards this submission, in the totality of circumstances, this Court deemed it appropriate to allow the meetings/proceedings of the CoC to continue, subject to the final orders to be passed in these appeals.

23. However, learned counsel for the resolution applicant filed an application for appropriate directions in this matter on 14.05.2022, seeking *ad interim* direction of staying the CIRP as initiated by the resolution professional by publishing Form G on 26.04.2022 pursuant to directions of the NCLAT in its judgment dated 17.02.2022; or to stay the operation of impugned judgment dated 17.02.2022 as regards disqualification of the

resolution applicant and to direct the resolution professional to consider his EOI in the fresh CIRP as initiated.

23.1. The aforesaid application was taken on board by this Court on 20.05.2022. Having taken note of the averments of the application and having regard to the order as passed on 16.03.2022, making all the proceedings subject to final outcome of these appeals, this Court did not consider it necessary or expedient at that stage to pass any further order or direction as regards the averment therein.

24. On 07.11.2022, Dr. Periasamy Palani Gounder - the promoter and erstwhile director of the corporate debtor, filed an application bearing IA No. 168602 of 2022 in Civil Appeal Nos. 1682 of 2022, seeking permission to bring on record subsequent facts and documents that, during the pendency of these appeals, his proposal of settlement under Section 12-A of the Code was accepted by CoC on 12.10.2022 by 100 per cent. majority which had been placed before the Adjudicating Authority for approval.

24.1. In reply to the aforesaid application, it was submitted on behalf of the resolution applicant that the very consideration of Section 12-A application of the promoter by CoC was against the explicit direction of the Appellate Authority in its judgment dated 17.02.2022, which allowed only 15 days for the CoC to examine the pending or existing Section 12-A proposal of the promoter which was rejected by the CoC on 25.03.2022 and therefore, the only recourse after such a rejection available with CoC was to continue with the fresh CIRP and it had no legal authority to consider or vote on a new application after issuance of fresh Form G.

24.2. In the wake of the applications so moved, the matter was again taken on board by this Court on 17.11.2022 and after having heard learned counsel for the respective parties this Court requested the Adjudicating Authority to await the decision in these appeals while granting permission to learned counsel for the respective parties to file further submissions in relation to the said application by 21.11.2022.

The events during pendency of these appeals.

25. To piece together a timeline, it would be worthwhile to take note of the subsequent events that took place pursuant to the orders and directions as passed by the Appellate Authority in the order impugned dated 17.02.2022 directing the resolution professional to proceed with the CIRP from stage of publication of Form G inviting fresh EOI and for consideration of settlement proposal of the promoter under Section 12-A IBC.

26. In compliance of the impugned order dated 17.02.2022 as passed by NCLAT, eleventh CoC meeting was held on 03.03.2022; and the resolution professional put the settlement proposal of the promoter to vote in the CoC, where the voting continued until 25.03.2022. Ultimately, the said settlement proposal was voted against by 51.81% of voting share in CoC.

26.1. In the twelfth CoC meeting held on 18.04.2022, the eligibility criteria and evaluation matrix for issuance of EOI was put to vote post discussion at this meeting and was approved with 92.52% of total voting power of CoC members.

26.2. In the thirteenth CoC meeting held on 23.05.2022, resolution professional informed the members of CoC that EOI was published on 26.04.2022 with last date of submission fixed as 15.05.2022 and 7 EOIs had been received. As regards the extension of time to submit EOI, the CoC resolved that the last date of submission of EOI be extended to 09.06.2022 with 93.46% of the total voting powers of CoC. It was further resolved that nothing in the Request for Resolution Plan (RFRP) be changed and the performance bank guarantee (PBG) amount as decided earlier by CoC of Rs. 25 crore shall stand approved and shall remain unchanged.

26.3. In the fourteenth CoC meeting held on 27.05.2022, it was resolved by CoC that RP shall immediately seek extension of CIRP timelines further by 90 days with effect from 13.05.2022 under Section 12(2) IBC application to be filed with the Adjudicating Authority. Further, in relation to extension of time for submission of resolution plan, the CoC in its fifteenth meeting held on 19.07.2022, resolved with 92.70% voice vote to extend the timeline to 01.08.2022. As regards further extension of time, in the sixteenth CoC meeting held on 10.08.2022, the CoC members with total voting power of 79.29%, resolved for RP to file an application for further extension/exclusion of time before the Adjudicating Authority for continuing with CIRP.

26.4. In the seventeenth CoC meeting held on 26.08.2022, discussing about the compliance of resolution plans as submitted by the prospective resolution applicants, a query was raised by one of the members of CoC

that despite being declared disqualified and ineligible by NCLAT, as to why the resolution plan of Mr. M.K. Rajagopalan – resolution applicant herein – was even being considered. To this, the Chairperson responded that in the order dated 16.03.2022 this Court while reserving the judgment clearly stated that all the meetings/proceedings of CoC shall continue subject to the final orders to be passed by the Court and this information was clearly laid down with disclaimers in the list of prospective resolution applicants as well as final list of eligible resolution applicants and was known to everyone. He also stated that as regards this, legal advice had been sought and the CoC also gave its consent.

26.5. In the eighteenth CoC meeting held on 29.09.2022, after informing the members of CoC that 7 resolution plans have been received till date and their evaluation was under process, the Chairperson apprised the CoC that a revised settlement proposal has been submitted by the promoter – Dr. Periasamy Palani Gounder – under Section 12-A IBC on 19.09.2022. The members of the CoC debated on the possibilities of consideration of Section 12-A proposal vis-à-vis evaluation and consideration of resolution plans as received. However, noticing that the mandatory 330 days period was about to end on 12.10.2022, the CoC members unanimously voted and agreed for seeking exclusion/extension of CIRP timelines and directed the RP to file suitable application under Section 12(2) IBC before the NCLT.

26.6. In the nineteenth CoC meeting held on 12.10.2022, the discussion as regards the settlement proposal submitted by the promoter - Dr. Periasamy Palani Gounder - continued and after an extensive discussion,

the CoC decided to evaluate the 12-A proposal and put it to vote. Accordingly, the settlement proposal was put to vote and was approved by the CoC with 100% of the total voting powers of members. The relevant parts of the resolutions adopted in this meeting and the final conclusion post voting, as stated in the minutes of the nineteenth meeting read as under: -

> "**Resolution for Voting by the CoC**
> **"Resolved that** the settlement proposal submitted by Mr. Palani G Periasamy (Promoter) under Section 12A of the IBC, 2016 which was placed before the COC for discussion and approval in the nineteenth COC meeting held on 12.10.2022 is hereby approved".
> (The above Resolution is being put to vote from 14/10/2022 12 PM till 21/10/2022 11.59 PM and based on the result of this voting, the post voting minutes will be updated and sent to the CoC.)
>
> **Result of the Resolution,Post Voting ended on 31/10/2022 at 10 PM**
> The above Resolution of the Promoter for settlement under Section 12 A of the IBC,2016, which was put to vote on 14.10/2022 to 31/10/2022 is approved with 100% of the Total voting powers of the CoC.
> The Voting results and the approval sheet from the E-Voting is sent to the CoC separately."

Rival submissions

27. We have heard learned senior counsel Dr. Abhishek M. Singhvi and Mr. C. Aryama Sundaram appearing for the resolution applicant; learned senior counsel Mr. Vijay Narayan appearing for the resolution professional; learned senior counsel, Mr. Mukul Rohatgi, Mr. K.V. Vishwanathan and Mr. Dhruv Mehta as also learned counsel Ms. Haripriya Padmanabhan appearing for the respective contesting parties. We have also heard learned senior counsel Mr. Rakesh Dwivedi appearing for Edelweiss & associates and learned Solicitor General Mr. Tushar Mehta, appearing for SBI.

28. Learned senior counsel for the resolution applicant, Dr. Abhishek M. Singhvi, appearing in the lead matter has emphatically argued against the impugned order while questioning the findings and observations of the Appellate Tribunal with the following principal submissions:

28.1. As regards the proposition of settlement put forward by the promoter with reference to Section 12-A of the Code, it has been contended that the entitlement to file for withdrawal of the application admitted under Section 7 of the Code would be restricted to TFCI i.e., the applicant who had filed the application, with the approval of ninety per cent. voting share of the CoC and such an application for withdrawal could have only been moved through the resolution professional. In the absence of any such move by TFCI, the promoter did not have any right to move an application for withdrawal.

28.1.1. It has further been submitted that the letter of settlement dated 21.01.2021 was submitted without proof of funds and there was no commitment towards funding in the proposal indicated in the Deutsche Bank Indicative Term-Sheet dated 22.01.2021. Even the letter of support for funds dated 14.07.2021 as issued by Saveetha Institute was withdrawn by a subsequent email dated 02.09.2021. Thereafter, in the eleventh CoC meeting dated 03.03.2022 that took place after the passing of the impugned NCLAT judgment, respondent No. 1 relied upon the settlement proposal, without placing any funds on the table in support thereof. This settlement proposal thus had been nothing but an attempt to delay the CIRP proceedings as rightly observed by NCLT.

28.2. As regards the questions concerning eligibility of the appellant to act as resolution applicant, it has been submitted by the learned senior counsel that Section 88 of the Trusts Act would not be treated as a ground for disqualification of the appellant under Section 29-A of the Code. Although the trust in question was held to be ineligible at the stage of EOI, the appellant was still held to be eligible in his individual capacity. Thus, while the trust may be disqualified, the trustee, being a separate entity, cannot be disqualified and the financial capability of the appellant was independent of the trust money.

28.2.1. Learned senior counsel would submit that the appellant could not be held ineligible under Section 29-A(e) of the Code, as the registrar of companies had not disqualified him under Section 164(2)(b) of the Companies Act for the alleged non-refunded deposit in the other company International Aviation Academy Pvt. Ltd, in which the appellant was a director. Further, the DIN status of the appellant was “active compliant” and NCLAT did not consider its own judgment in ***C. Raja John v. R. Raghavendran and Ors.*: Comp. Appl. (AT)(CH)(Ins) No. 207 of 2021** wherein it was held that if DIN is activated, Section 29-A(e) of the Code will not be applicable.

28.2.2. This apart, it has also been submitted that since the issue of ineligibility was a mixed question of fact and law, it could not have been raised before NCLAT for the first time, since there is no concept of deemed disqualification under Section 164(2) of the Companies Act.

28.3. Coming to the question of valuation of assets of the corporate debtor, learned senior counsel has submitted that the resolution plan cannot be set aside on the basis of a contention that the valuation was lower than the liquidation value. Reliance has been placed on the judgment in ***Maharashtra Seamless*** (supra) to submit that the resolution plan would not be required to match the liquidation value. Learned senior counsel would submit that members of CoC were provided with liquidation and fair value; registered valuers were appointed for valuation of core and non-core assets; and these valuers physically visited the properties for that purpose, in compliance of Regulation 35 of the CIRP Regulations. Thereafter, the CoC approved this valuation in their commercial wisdom, following which NCLT approved it as well, which cannot be second-guessed at a subsequent stage. It has also been submitted that the question as to whether valuer was registered, was not required to be adjudged since it was not in question before IBBI.

28.4. Learned senior counsel has also submitted that insofar as non-publication of Form-G on the website is concerned, the issue was discussed during the fifth CoC meeting dated 12.11.2020 and the CoC proceeded with the CIRP in its commercial wisdom after a detailed deliberation. Moreover, the earlier judgment of NCLAT dated 05.05.2021 approving non-publication would act as *res judicata*. Placing reliance on ***Kalpraj Dharamshi and Anr. v. Kotak Investment Advisors Limited and Anr.***: **(2021) 10 SCC 401**, it was submitted that non-publication of Form-G on the website cannot be treated as a grave irregularity.

28.5. As regards the issue of not placing the revised final resolution plan before the CoC, it has been submitted that the appellant had already complied with the requirement of allocating the eligible amount to dissenting financial creditors in the event of liquidation, as per the revised plan and there was no need to seek further approval of the CoC. Moreover, in the tenth meeting, the CoC had granted a 'deemed *post facto* approval' to the revised plan and had not objected to any of its portions in the affidavit filed before NCLAT dated 09.09.2021. Therefore, it cannot be said that the procedure adopted in the present case amounted to a material irregularity.

28.6. Coming to the application filed by SBI for impleadment, learned senior counsel would submit that SBI attended all meetings and voted in favour of the resolution plan, did not raise any objection before the NCLT or NCLAT and is receiving 100% of its dues under the resolution plan. Learned senior counsel has also referred to the judgment in ***EBIX Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. and Anr.:*** **(2022) 2 SCC 401** to submit that the resolution plan between a successful resolution applicant and the CoC would be binding. Thus, being a part of CoC, SBI cannot subsequently raise a contrary stand to the stand taken by the CoC.

28.7. On the aspect of commercial wisdom of the CoC, emphatic reliance has been placed on the decisions of this Court in ***K. Sashidhar, Maharashtra Seamless, Essar Steel, Jaypee Kensington***, ***Kalpraj Dharamshi*** (supra); and ***Pratap Technocrats (P) Ltd. and Ors. v. Monitoring Committee of Reliance Infratel Ltd and Anr.*****: 2021 SCC**

OnLine SC 569 to submit that scope of interference in matters concerning the successful resolution plan is extremely narrow, and the challenge is only limited to matters 'other than' enquiry into the autonomy or commercial wisdom of the CoC as under Section 30(2) or 61(3) of the IBC. In the case at hand, since the resolution plan had been approved by the CoC there would be no case for any interference.

28.8. It has also been submitted on behalf of the resolution applicant that the CIRP had reached an advanced stage, resolution applicant had given a bank guarantee of Rs. 25 crore on 01.02.2021 in pursuance of approved resolution plan, the initial amount of Rs. 150 crore, which was required to be remitted within 45 days of the approval of the resolution plan, was deposited within 15 days and the resolution applicant has always been ready with the remaining funds. It has also been vehemently submitted that deliberate dilatory tactics have been adopted by the promoter to frustrate the process of CIRP, with substantial amount of time having been lost on account of the delays.

28.9. As regards the application bearing IA No. 168602 of 2022 in Civil Appeal Nos. 1682-1683 of 2022 filed by the promoter and erstwhile director of the corporate debtor - seeking permission to bring on record subsequent facts that during the pendency of these appeals his proposal of settlement under Section 12-A of the Code was passed by CoC in its nineteenth meeting held on 12.10.2022 by 100% voting power of members - learned counsel for resolution applicant has submitted that the very consideration of Section 12-A application of the promoter by CoC had been against the

explicit direction of the Appellate Tribunal in the order dated 17.02.2022, whereby only 15 days' time was allowed to the CoC to examine the pending or existing Section12-A proposal of the promoter; and such a proposal was indeed rejected by the CoC on 25.03.2022. Therefore, the only course available with CoC after such rejection was to continue with the fresh CIRP; and the CoC had no legal authority to consider or vote on a new settlement proposal of the promoter after issuance of fresh Form G. Learned counsel would submit that the direction of the Appellate Tribunal as regards consideration of Section 12-A proposal of the promoter was exhausted when the settlement proposal was rejected by CoC in its eleventh meeting on 25.03.2022 and a fresh Section 12-A application could not have been entertained by the CoC in any case.

29. On another aspect, in CA No. 1827 of 2022, learned senior counsel for the appellant, Mr. C. Aryama Sundaram, appearing against Dharani Finance (the related party), has relied on various decisions of this Court including those in ***Phoenix ARC***, ***Pratap Technocrats***, and ***Kalpraj Dharamshi*** (supra) as also in ***Facor Alloys Ltd. v. Bhuvan Madan and Ors.*****: Civil Appeal No. 5129 of 2021** to submit that even though the resolution applicant has admitted certain dues towards related parties, the final resolution plan did not provide for any payment and the plan was upheld by this Court in these cases. On previous occasions, this Court as well as other fora had differentiated between related and non-related parties under resolution plans. Learned senior counsel would argue against the proposition that a related party could be part of the CoC when it is a

financial creditor. Further, it has been submitted that Article 14 of the Constitution in *stricto sensu* would not be applicable to the decision of the CoC, as it is not a 'State' as defined under Article 12 of the Constitution.

30. Learned senior counsel Mr. Vijay Narayan appearing on behalf of the resolution professional has mainly questioned the findings and observations in the order impugned as regards the process adopted and steps taken by RP and has made a variety of submissions as follows:

30.1. As regards the question of valuation, it has been submitted that the only responsibility of RP under Regulation 35(2) of the CIRP Regulations has been to share the fair value and liquidation value with the members of CoC after obtaining a confidentiality undertaking, which was done in the present case. There is no requirement to provide a copy of the report to the CoC or any other stakeholder. On the contention of valuation under the Companies (Valuation) Rules of 2017, it has been submitted that the interim resolution professional appointed three sets of valuers for the three main classes of assets.

30.1.1. With respect to the physical valuation of assets, learned senior counsel emphasised on agenda item No. 4 of the fourth CoC meeting, wherein it was clearly mentioned that the valuers visited the property of the corporate debtor.

30.1.2. Insofar as the issue of non-core assets not being valued is concerned, it was submitted on behalf of RP that although the value of non-core assets was fairly insignificant, in the seventh CoC meeting dated 29.12.2020, the RP informed that the second valuer Mr. G Vaidya Ramana,

visited the premises for non-core assets and had subsequently submitted his report. The statement containing the said reports was placed before the Tribunal. It has, thus, been submitted that it was incorrect for the Tribunal to render a finding that the valuation of non-core assets had not been done in the present case.

30.2. As regards non-publication of Form-G on the website, it has been argued that the same was published in all leading newspapers on 09.08.2020 and the then IRP had emailed IBBI to intimate them that there was some technical issue in uploading the said form on the website, with a request to upload the same. Thus, all the requisite steps having been reasonably taken, the process that had reached an advanced stage could not have been annulled on such a technicality.

30.3. Further, while dealing with the issue of not placing the revised resolution plan before the CoC, reliance has been placed on the ninth CoC meeting dated 22.01.2021 with the submissions that the resolution plan was approved with 87.39% of the total voting share and the resolution applicant was only required to provide for redistribution to ensure that the dissenting financial creditors were given their share in terms of Section 30(2)(b) of the Code. Pursuant to this, the resolution applicant submitted the modified resolution plan in which the allocation for the unsecured dissenting financial creditors was revised from 29 crore to 49.13 crore. The revised plan was then placed before the Coc in the tenth CoC meeting and no objections were raised at that time.

30.4. It has also been submitted that the settlement proposal put forth by the corporate debtor was not in consonance with the mandate specified under Regulation 30-A of the CIRP regulations read with Section 12-A of IBC.

30.5. On the issue of increase in the fee of RP which was not raised before the NCLT and was only raised before the NCLAT, it has been submitted that the request for revision of fee had indeed been made with reasons for said revision, much prior to the date on which the resolution plan was approved by the CoC.

30.6. It has also been submitted that the issue of ineligibility of the resolution applicant was not raised before NCLT but, NCLAT in its impugned order, has held him ineligible. In this regard, the RP could have only carried out public domain search and take into account the affidavit of compliance submitted by resolution applicant in view of Regulation 39 of the CIRP Regulations.

30.7. Coming to the allegation by Dharani Finance regarding discriminatory treatment for being a related party creditor, it has been submitted that there is a need only to ensure that the plan provides for payment to financial creditors (including dissenting financial creditors) entitled to vote. Placing reliance on Section 30(2)(b)(ii), Section 21 and Regulation 38(1), it has been argued that the approved plan is in accordance with the Code and the Regulations.

30.8. In closing, it has been argued by the learned senior counsel for the resolution professional that he has preferred applications against the

promoter-director of the corporate debtor under Section 43 of the Code seeking avoidance of certain transactions which are preferential in nature. The said applications are pending before the NCLT for adjudication. With regard to these avoidance applications, however, reliance on a judgement of the Delhi High Court in ***Venus Recruiters Private Limited v. Union of India and Ors.:*** **2020 SCC Online Del. 1479** is of no avail as in the said case, the High Court has examined the jurisdiction of the Adjudicating Authority to entertain an application under Section 43 after the approval of the resolution plan.

31. Learned senior counsel Mr. Mukul Rohatgi appearing on behalf of Dr. Perisamy Palani Gounder (promoter and erstwhile director), has supported the order impugned while contesting the submissions made on behalf of the appellant.

31.1. Learned senior counsel has submitted that the CoC approved the resolution plan in question without considering the settlement proposals put forth by the promoter under the letters dated 21.01.2021 and 08.03.2021, for settling with all creditors and for withdrawal of CIRP under Section 12-A of the Code. While placing reliance on the decision of this Court in ***Swiss Ribbons (P) Ltd. and Anr. v. Union of India and Ors.*****: (2019) 4 SCC 17**, it has been submitted that the promoter's proposals were not even placed as agenda items and hence, the CoC had not been given an opportunity to properly consider the corporate debtor as a going concern; rather CIRP was converted into a mere debt recovery process by ignoring other creditors and shareholders. It has been argued that the contesting

promoter has been putting forth sincere efforts to preserve the corporate debtor as a going concern but his genuine efforts were sought to be frustrated by hasty and illegally conducted CIRP and thereby, the approved resolution plan was essentially giving away the substantial assets of the corporate debtor at a highly undervalued price. Thus, the decision of the Appellate Tribunal in this case is correct on law as also on facts.

31.2. It has also been vehemently argued that the resolution plan in question is contrary to law, as it clearly violates the underlying principles of Section 88 of the Trusts Act and Section 164(2)(b) of the Companies Act, 2013. The main plank of submissions with respect to violation of Section 88 of the Trusts Act has been that there is a conflict of interest, as the appellant is competing in his capacity as an individual with interests of a trust in which he was the founding managing trustee. Further, it has already been ruled by the resolution professional that the said trust Sri Balaji Vidyapeeth was ineligible to be a resolution applicant due to its status as a charitable trust and a non-profit making entity. In the face of these facts, the appellant simultaneously submitting a resolution plan in his individual capacity by taking support from financial credentials of the same trust, basically sought to achieve indirectly which he could not directly. Furthermore, the fact that the trust was a prospective resolution applicant and was found to be ineligible was a fact suppressed from the knowledge of the COC.

31.2.1. It has also been submitted that the resolution applicant's plan to convert Coimbatore property into Hospital would directly result in a conflict

of interest and breach of fiduciary duties owed by him as managing director of the company MGM Healthcare Private Limited. This, according to the learned counsel would be in direct violation of Section 166(4) of the Companies Act which prohibits a director of the company from involving himself in a situation in which he may have direct or indirect interest that conflicts or possibly may conflict, with the interest of the company. For this reason too, the resolution plan in question is contrary to law and cannot pass muster under Section 30(2)(e) of the Code.

31.2.2. Another argument by the learned senior counsel on behalf of promoter has been that the appellant is not eligible to submit a resolution plan under Section 29A(e) of the Code. It has been argued that the resolution applicant has been the director of a company named 'International Aviation Academy Private Limited'; and as per the audited financial statements of the said company for 2010-2011 to 2017-2018, there was evidence that Rs. 12,03,000 had been collected as "share application money pending allotment" and had not been refunded. This would result in the same being treated as an "unrefunded deposit" within the meaning of the proviso to Explanation (A) of Rule 2(1)(c)(viii) of the Companies (Acceptance of Deposits) Rules, 2014 and result in disqualification of the appellant-resolution applicant, from being a director under Section 164(2)(b) of the Companies Act and, consequently, from being a resolution applicant in the CIRP in question.

31.3. It has also been submitted that the assets of the corporate debtor were grossly undervalued in the final resolution plan whereby, the assets

worth more than Rs. 1600 crore were sought to be transferred only for a sum of about Rs. 423 crore. In order to support this line of argument, reliance has been placed on Regulation 35(1) and 35(2) of the CIRP Regulations. Regulation 35(1) provides that two registered valuers must submit an estimate of the 'fair value' and 'liquidation value' of the corporate debtor after physical verification to the resolution professional, and Regulation 35(2) requires the resolution professional to provide the aforesaid valuation to every member of the CoC.

31.3.1. It has been argued that in the present case, there was no physical verification because the appointed registered valuers were based in Delhi and sought to delegate the process of physical verification to their associates in Tamil Nadu. Concerns regarding this were also highlighted in the second CoC meeting dated 06.08.2020. Further, it has been submitted that the valuation of the non-core assets was carried out irregularly and not in accordance with Regulation 35 of the CIRP Regulations. In addition, only bare valuation figures were shared and the valuation reports were not furnished to the erstwhile directors and the members of CoC. Thus, according to the learned senior counsel, it was rightly noticed by NCLAT that mere production of the naked value of assets without detailed adjoining report would handicap the commercial wisdom of the CoC. Reliance has also been placed on the seventh CoC meeting to submit that the concern of resolution plan not reflecting true value of the corporate debtor was expressed by the CoC members. It has also been submitted that the resolution professional under the pretext of maintaining the corporate

debtor as a going concern, has allowed approval of an illegal resolution plan that hands over assets of the Corporate Debtor at severe undervaluation.

31.3.2. Further, it has been contended that the decision in ***Maharashtra Seamless*** (supra) would not be relevant to the present case because it does not refer to a situation in which the determination of fair value and liquidation value is done in an illegal manner and in a way that grossly undervalues the assets of the corporate debtor. In the present case, the total debt of the corporate debtor is much lower than the liquidation value of its assets. This apart, according to the learned counsel, the proposition concerning the application of principles of *res judicata* remains wholly misplaced since the said proceedings in NCLAT were at the instance of a different party and the principal issue in the previous litigation had nothing to do with the resolution plan, or statutory violations in the CIRP.

31.4. Dealing with the issue of non-publication of Form G on the website, it has been submitted that Regulation 36A(2)(iii) of the CIRP Regulations, which mandates the publication on the website of IBBI and the website of corporate debtor has been violated as it has been an admitted position that the same was not done by the resolution professional. The actions of the resolution professional, therefore, had been in violation of Regulation 36A and Circular Bearing No. IP (CIRP)/006/2018 dated 23.02.2018. The resolution professional has claimed that the form could not be uploaded for technical reasons but has failed to explain the steps taken to rectify this deficiency in the CIRP.

31.5. Coming to the issue of not placing the final resolution plan before the CoC, it has been submitted, with reference to the minutes of the ninth CoC meeting dated 22.01.2021, that when the resolution plan was put to vote, there was a requirement for the resolution professional to send the plan back to the resolution applicant to comply with Section 30(2) IBC. However, after this, the revised plan was directly placed before the NCLT and not before the CoC which stands in violation of Sections 30(2), 30(4), 30(6) and 31 of the Code. Further, it has also been contended that Section 31 of the Code does not envisage any *post facto* ratification of a resolution plan.

31.6. With reference to the application to bring on record the subsequent event of acceptance of his settlement proposal under Section 12-A IBC by CoC with 100% voting powers of the members in its nineteenth meeting, placing reliance on Section 12-A and Regulation 30-A of CIRP Regulations, learned counsel has submitted that there is neither any bar on the submission of multiple settlement proposals for withdrawal under the said Section nor a cut-off date within which the proposal has to be made during the CIRP. He would also argue that the application under Section 12-A styled as 'withdrawal' also calls into play the principle that the creditors are *dominus litis* in an insolvency proceeding and they have the right to withdraw a proceeding subject to approval by the Adjudicating Authority.

31.7. Learned counsel for promoter would also contend that the resolution applicant has no vested right to have his plan accepted and implemented under the provisions of the Code. In response to the

argument of the resolution applicant that resolution applicant had deposited Rs. 150 crore which has not been returned, learned counsel for the promoter has submitted that during the eleventh CoC meeting, on the question of the promoter, the resolution professional replied that the process was between him and the resolution applicant and some procedural issues were to be addressed whereafter, the deposited money would be returned.

32. Learned senior counsel Mr. K.V. Vishwanathan, also appearing for the promoter, has re-emphasised that the revised plan was never put to vote and that there was duty of valuers to physically valuate the assets which they did not carry out. This apart, it has also been argued that the shareholders would not have the requisite locus to intervene in the CIRP process, by placing reliance on the decision of this Court in ***Jaypee Kensington*** (supra).

33. Mr. Dhruv Mehta, learned senior counsel appearing for the other promoter and erstwhile director Dr. V. Janakiraman has made largely the similar submissions, relying on the minutes of the ninth CoC meeting that there was a violation of Section 30(4) and 30(6) of IBC. Learned senior counsel has further referred to the judgment in ***Essar Steel*** (supra) to emphasise on the point that the revised resolution plan was never placed before the CoC and hence, the entire process stands vitiated.

34. Learned counsel for Dharani Finance, Ms. Haripriya Padmanabhan has primarily argued against the treatment of related parties as a separate class for payment of dues under the resolution plan. It has been submitted

that Dharani Finance is a non-banking financial institution, listed in Bombay Stock Exchange. In this case, it is a financial creditor and an operational creditor of the corporate debtor and even though its claims of Rs. 1,94,14,024 and Rs. 4,81,62,175, of operational debt and financial debt respectively, were duly admitted, it was not paid anything under the resolution plan for being a related party. While placing reliance on the judgment in ***Phoenix ARC*** (supra), it has been argued that this Court has laid down the reasons for treating related parties as a separate class, and held that related parties should be excluded from the CoC so that they do not interfere with the resolution process. The rationale behind this has been achieved by not allowing related parties to present the resolution plans or to become a part of the CoC. However, there is no reason for them to be treated as a separate class when it comes to payment of dues under the approved resolution plan. Further, it has been contended that the resolution professional in this case undertook a hasty process, without adjudicating on all the claims received by it.

34.1. Relying on the seventh and eighth CoC meetings, it has been submitted that there was a certain amount set apart for related parties, however, in the final resolution plan, there was no amount stated to be paid to the related parties and there had not been any discussion in the CoC in this regard. Thus, for Dharani Finance being an operational and a financial creditor, the failure to provide for discharge of its debt in the final resolution plan, is in violation of Sections 30(2)(b), (e) and (f) of the Code. It has been

strenuously argued that at the very least, CoC must discuss whether Dharani Finance is to be repaid, which has not been done.

35. Learned Solicitor General of India Mr. Tushar Mehta, appearing for SBI, has submitted that this financial creditor has a voting share of about 26% in the CoC with an admitted claim of Rs. 102.88 crore. As a matter of record, it has been accepted that SBI approved the resolution plan of Rs. 423 crore submitted by the resolution applicant within 87.39% of the voting share in CoC. It is submitted that the topmost priority of SBI is that the CIRP be decided in a definite time frame given that nearly 2 years have elapsed and further delay would cause deterioration in the asset value. Since the CoC had already taken steps in furtherance of the impugned order dated 17.02.2022, it has been prayed that the CoC be allowed to continue with the CIRP from the stage of fresh issuance of Form G; consideration of proposal under Section 12-A of the Code and also determine eligibility of appellant, on independent footing, uninfluenced by the observations of the NCLAT.

35.1. In regard to the fresh proceedings during the pendency of these appeals (as noticed above), it has been submitted on behalf of SBI that after being given further opportunity, the promoter re-submitted the settlement proposal under Section 12-A IBC with deposit of upfront amount of Rs. 105 crore and a Bank Guarantee of Rs. 325 crore; and on being put to vote, this settlement proposal was approved by 100% voting share in the CoC which deserves to be taken forward. Learned SG has relied on the decisions of this Court in ***Vallal RCK v. Siva Industries and Holdings Ltd.***

and Ors.: **2022 SCC OnLine SC 717** and ***Brilliant Alloys (P) Ltd. v. S. Rajagopal and Ors.:*** **(2022) 2 SCC 544.**

36. Appearing for Edelweiss and associates, learned senior counsel Mr. Rakesh Dwivedi has submitted that these financial creditors of the corporate debtor with total of about 21.13% voting share in CoC, too had voted in favour of the resolution plan in question; and the plan so approved with 87.39% of the voting share in CoC could not have been lightly interfered with. The learned counsel has contended that merely for non-consideration of revised resolution plan, which was revised at the instance of CoC itself, the approval could not have been set aside overriding the commercial wisdom of CoC. It has also been submitted that the promoters' earlier proposition with reference to Section 12-A of the Code was wholly ambiguous and could not have been countenanced in the manner presented before CoC or even before NCLAT. While referring to certain other areas of concern including the amount deposited by the resolution applicant, it has been suggested on behalf of these financial creditors that CIRP must be allowed to go on while leaving promoter a right to propose a better resolution plan by way of a Swiss Challenge Process; and for that purpose, he should be made to deposit at least a sum of Rs. 471.70 crore in an escrow account prior to the voting on his settlement offer.

Points for determination

37. For what has been noticed hereinabove and looking to the overall scenario, the following principal points arise for determination in this batch of appeals:

A. Whether the valuation process of the assets of the corporate debtor had been in violation of the Regulations 27 and 35 of the CIRP Regulations and thereby, approval of the resolution plan had been in contravention of Sections 30(2) and 61(3) of the Code?

B. Whether there had been non-compliance of Regulation 36-A(2)(iii) of the CIRP Regulations for want of publication of Form G on the designated website not later than 75th day from the insolvency commencement date; and failure to advertise as mandated had a direct impact on the maximization of asset value, particularly when the entire CIRP was conducted during lockdown at the time of Covid-19 pandemic?

C1. Whether the resolution applicant is ineligible to submit a resolution plan in terms of Section 29-A(e) of the Code for being disqualified to act as a director under Section 164(2)(b) of the Companies Act?

C2. Whether the resolution applicant is ineligible to submit a resolution plan so as to act as alter ego of the trust “Sri Balaji Vidyapeeth” that had already been declared ineligible; and submission of plan by resolution applicant is barred by virtue of Section 88 of the Trusts Act?

C3. Whether the resolution plan in question leads to violation of Section 166(4) of the Companies Act and hence, cannot be approved in terms of Section 30(2)(e) of the Code?

D1. Whether the Appellate Tribunal has erred in holding that the resolution plan in question, which was placed before the Adjudicating Authority for approval, was void and non-est in law because in the ninth CoC meeting dated 22.01.2021, the resolution plan was sent back to the resolution applicant for further revision; and the revised resolution plan thereafter submitted by the resolution applicant on 25.01.2021 was directly filed before the Adjudicating Authority without being put to vote before CoC?

D2. Whether the Appellate Tribunal has erred in making observations against increase of the fees of the resolution professional and assuming the possibility of its impact on his decision to submit the resolution plan before the Adjudicating Authority without approval of CoC?

E. Whether the Appellate Tribunal has erred in applying the principles of non-discrimination in relation to related party of corporate debtor and thereby holding against the resolution plan in question for want of provision for related party?

F. Whether the Appellate Tribunal has erred in holding that settlement offer of the promoter in terms of Section 12-A of the Code was not placed for consideration of CoC; and as to whether non-consideration of such a proposal has any bearing on the question of approval of the resolution plan in question?

G. What is the impact and effect of the subsequent events, particularly of the approval of settlement offer of the promoter by

the CoC in its nineteenth meeting held on 12.10.2022 by 100% majority of the voting share?

Relevant statutory provisions

38. We have taken note of the parties and their respective positions; the relevant factual and background aspects that have led to the present set of appeals, including various meetings of the CoC and other events that occurred during the CIRP; the impugned orders of the NCLT and NCLAT dated 15.07.2021 and 17.02.2022 respectively; and the principal points to be determined in these appeals. Before proceeding further, worthwhile it would be to take note of the statutory provisions, which are relevant to the contentions urged in these appeals[23].

38.1. We may also take note of some of the other relevant statutory provisions of the IBC including Section 12-A which provides for withdrawal of application admitted under Sections 7, 9 or 10; Section 21 in regard to constitution and composition of the CoC; Section 24 which specifies about meetings of the CoC; Section 25 which lays down the duties of the resolution professional in respect to the corporate debtor; Section 29-A which provides that certain persons may be ineligible to be resolution applicants; Section 30 relating to submission of resolution plan; Section 31 which provides for approval of the resolution plan; Section 32 which provides for appeal from order approving resolution plan; Section 61 which

[23] It may be observed that the relevant provisions have been extracted herein as presently noticeable, while indicating, as far as possible, the amendments thereto.

lays down the procedure and grounds of appeal before the Appellate Tribunal ; and Section 238 which states that the Code has an overriding power over other laws. These provisions read as follows: -

> **"[24]Section 12A. Withdrawal of application admitted under section 7, 9 or 10**.—
> The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.
>
> **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.
>
> (2) The committee of creditors shall comprise all financial creditors of the corporate debtor:
>
> Provided that a [25][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:
>
> [26][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 [27][or completion of such transactions as may be prescribed], prior to the insolvency commencement date.]
>
> (3) [28][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.
>
> (4) Where any person is a financial creditor as well as an operational creditor, -
>
> (a) 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;

[24] Ins. by Act 26 of 2018, sec. 9 (w.r.e.f. 6-6-2018).
[25] Subs. by Act 26 of 2018, sec. 15(i)(a), for "related party to whom a corporate debtor owes a financial debt" (w.r.e.f. 6-6-2018).
[26] Ins. by Act 26 of 2018, sec. 15(i)(b) (w.r.e.f. 6-6-2018).
[27] Ins. by Act 1 of 2020, sec. 7 (w.r.e.f. 28-12-2019).
[28] Subs. by Act 26 of 2018, sec. 15(ii), for "Where" (w.r.e.f. 6-6-2018).

(b) 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.

(5) 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.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility [29]**[***]** provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

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

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

(c) 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

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

[30][(6A) Where a financial debt—

(a) 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;

(b) is owed to a class of creditors exceeding the number as maybe 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;

(c) 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-

(i) 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

[29] The words “or issued as securities” omitted by Act. No 26 of 2018, sec. 15(iii) (w.r.e.f. 6-6-2018).

[30] Ins. by Act 26 of 2018, sec. 15(iv) (w.r.e.f. 6-6-2018).

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

[31][(7) 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).

(8) 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.]

(9) 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.

10) 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.

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.

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

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

(a) members of [32][committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];

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

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

(4) 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.

(5) [33][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.

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[31] Subs. by Act 26 of 2018, sec. 15(v), for sub-sections (7) and (8) (w.r.e.f. 6-6-2018).

[32] Subs. by Act 26 of 2018, sec. 18(i), for "Committee of creditors" (w.r.e.f. 6-6-2018).

[33] Subs. by Act 26 of 2018, sec. 18 (ii), for "Any creditor" (w.r.e.f. 6-6-2018).

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.
(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.
(8) 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.
(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—
(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
(b) 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;
(c) raise interim finances subject to the approval of the committee of creditors under section 28;
(d) appoint accountants, legal or other professionals in the manner as specified by Board;
(e) maintain an updated list of claims;
(f) convene and attend all meetings of the committee of creditors;
(g) prepare the information memorandum in accordance with section 29;
[34][(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.]
(i) present all resolution plans at the meetings of the committee of creditors;
(j) file application for avoidance of transactions in accordance with Chapter III, if any; and
(k) such other actions as may be specified by the Board.

[35]**[Section 29A. Persons not eligible to be resolution applicant.–** A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person,-
(a) is an undischarged insolvent;
(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

[34] Subs. by Act 8 of 2018, sec. 4, for clause (h) (w.r.e.f. 23-11-2017).
[35] Ins. by Act 8 of 2018, sec. 5 (w.r.e.f. 23-11-2017).

(c) [36][at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [37][or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

[38][Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation. I.-For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and 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 [39][or completion of such transactions as may be prescribed], prior to the insolvency commencement date.

Explanation. II.-For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

[40][(d) has been convicted for any offence punishable with imprisonment--

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of *Explanation* I;]

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[36] Subs. by Act 26 of 2018, sec. 22(i)(A), for “has an account,” (w.r.e.f. 6-6-2018).
[37] Ins. by Act 26 of 2018, sec. 22(i)(B) (w.r.e.f. 6-6-2018).
[38] Ins. by Act 26 of 2018, sec. 22(i)(C) (w.r.e.f. 6-6-2018).
[39] Ins. by Act 1 of 2020, sec. 9(i) (w.r.e.f. 28-12-2019).
[40] Subs. by Act 26 of 2018, sec. 22(ii), for clause (d) (w.r.e.f. 6-6-2018).

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

[41][Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of *Explanation* I;]

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) 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 this Code:

[42][Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;]

(h) has executed [43][a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code [44][and such guarantee has been invoked by the creditor and remains unpaid in full or part];

(i) [45][is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i)

[46]*[Explanation. I*]. -- For the purposes of this clause, the expression "connected person" means--

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).

[47][Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party

[41] Ins. by Act 26 of 2018, sec. 22(iii) (w.r.e.f. 6-6-2018).
[42] Ins. by Act 26 of 2018, sec. 22(iv) (w.r.e.f. 6-6-2018).
[43] Subs. by Act 26 of 2018, sec. 22(v)(A), for "an enforceable guarantee" (w.r.e.f. 6-6-2018).
[44] Ins. by Act 26 of 2018, sec. 22(v)(B) (w.r.e.f. 6-6-2018).
[45] Subs. by Act 26 of 2018, sec. 22(vi), for "has been" (w.r.e.f. 6-6-2018).
[46] *Explanation* renumbered as *Explanation I* thereof by Act 26 of 2018, sec. 22(vii) (w.r.e.f. 6-6-2018).
[47] Subs. by Act 26 of 2018, sec. 22(vii), for proviso (w.r.e.f. 6-6-2018).

of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [48][or completion of such transactions as may be prescribed], prior to the insolvency commencement date;]

[49][*Explanation. II*.--For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:--

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.]]

Section 30. Submission of resolution plan.-(1) A resolution applicant may submit a resolution plan [50][along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.

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

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [51][payment] of other debts of the corporate debtor;

[52][(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--

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

[48] Ins. by Act 1 of 2020, sec. 9(ii) (w.r.e.f. 28-12-2019).
[49] Ins. by Act 26 of 2018, sec. 22(viii) (w.r.e.f. 6-6-2018).
[50] Ins. by Act 26 of 2018, sec. 23(i) (w.r.e.f. 6-6-2018)
[51] Subs. by Act 26 of 2018, sec. 23(ii)(A) for "repayment" (w.r.e.f. 6-6-2018)
[52] Subs. by Act 26 of 2019, sec. 6(a), for clause (b) [w.e.f. 16-8-2019, *vide* S.O. 2953(E), dated 16th August, 2019].

(ii) 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--

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

(ii) 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

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

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

(d) the implementation and supervision of the resolution plan;

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

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

[53]*[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.]

(3) 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).

[54][(4) The committee of creditors may approve a resolution plan by a vote of not less than [55][sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [56][the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of

[53] Ins. by Act 26 of 2018, sec. 23(ii)(B) (w.r.e.f. 6-6-2018)

[54] Subs. by Act 8 of 2018, sec. 6, for sub-section (4) (w.r.e.f. 23-11-2017).

[55] Subs. by Act 26 of 2018, sec. 23(iii)(a) for "seventy-five" (w.r.e.f. 6-6-2018)

[56] Ins. by Act 26 of 2019, sec. 6(b) [w.e.f 16-8-2019, vide S.O. 2953(E) dated 16th August, 2019).

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.]

[57][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).]

(5) 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.

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

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:

[57] Ins. by Act 26 of 2018, sec. 23(iii)(b) (w.r.e.f. 6-6-2018).

[58] Ins. By Act 26 of 2019, sec. 7 [w.e.f 16-8-2019, *vide* S.O. 2953(E), dated 16th August, 2019].

[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.]

(2) 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.

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

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

(b) 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.]

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.

(2) 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.

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

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

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

[59] Ins. by Act 26 of 2018, sec. 24(a) (w.r.e.f. 6-6-2018).

[60] Ins. by Act 26 of 2018, sec. 24(b) (w.r.e.f. 6-6-2018).

(iii) 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;
(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
(v) the resolution plan does not comply with any other criteria specified by the Board.
[[61](4) An appeal against a liquidation order passed under section 33, or sub-section (4) of section 54L, or sub-section (4) of section 54N, may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.
(5) An appeal against an order for initiation of corporate insolvency resolution process passed under sub-section (2) of section 54-O, may be filed on grounds of material irregularity or fraud committed in relation to such an order.]

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."

38.2. We may also take note of regulations in the CIRP Regulations as are relevant to the facts of the present case as follows: -

[62][27. Appointment of Professionals.- (1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the

[61] Subs. by Act 26 of 2021, sec. 9, for sub-section (4) (w.r.e.f. 4-4-2021). Sub-section (4) before substitution, stood as under:
"(4) 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."

[62] Substituted by Notification No. IBBI/2021-22/GN/REG075, dated 14th July, 2021, for regulation 27 (w.e.f. 14-7-2021). Earlier regulation 27 was substituted by Notification No. IBBI/2017-18/GN/REG024, dated 6th February, 2018 (w.e.f. 6-2-2018) and amended by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 4-7-2018). Regulation 27 before substitution, stood as under:
"27. *Appointment of registered valuers.*- The resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35:
Provided that the following persons shall not be appointed as registered valuers, namely:
(a) a relative of the resolution professional;
(b) a related party of the corporate debtor;
(c) an auditor of the corporate debtor to any time during the five years preceding the insolvency commencement date; or
(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director".

liquidation value of the corporate debtor in accordance with regulation 35.

(2) The interim resolution professional or the resolution professional, as the case may be, may appoint any professional, in addition to registered valuers under sub-regulation (1), to assist him in discharge of his duties in conduct of the corporate insolvency resolution process, if he is of the opinion that the services of such professional are required and such services are not available with the corporate debtor.

(3) The interim resolution professional or the resolution professional, as the case may be, shall appoint a professional under this regulation on an arm's length basis following an objective and transparent process:

Provided that the following persons shall not be appointed, namely: -

(a) a relative of the resolution professional;

(b) a related party of the corporate debtor;

(c) an auditor of the corporate debtor at any time during the period of five years preceding the insolvency commencement date;

(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

(4) The invoice for fee and other expenses incurred by a professional appointed under this regulation shall be raised in the name of the professional and be paid directly into the bank account of such professional.]

[63][**30A. Withdrawal of application. -** (1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form-FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit

[63] Subs. by Notification No. IBBI/2019-20/GN/REG048, dated 25th July, 2019 for regulation 30A (w.e.f. 25-7-2019).

the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.]

[64]**[35. Fair value and Liquidation value.-** (1) Fair value and liquidation value shall be determined in the following manner:-

(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value."

[64] Subs. by Notification No. IBBI/2017-18/GN/REG024, dated 6th February, 2018, for Regulation 35 (w.e.f. 6-2-2018).

[65][**36A. Invitation for expression of interest.-** (1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.

(2) The resolution professional shall publish Form G-

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;

(ii) on the website, if any, of the corporate debtor;

(iii) on the website, if any, designated by the Board for the purpose; and

(iv) in any other manner as may be decided by the committee.

(3) The Form G in the Schedule shall -

(a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and

(b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.

(4) The detailed invitation referred to in sub-regulation (3) shall-

(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25;

(b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;

(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and

(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest.

[66][(4A) Any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made:

Provided that such modification shall not be made more than once.]

(5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).

(6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.

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[65] Subs. by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018, for regulation 36A (w.e.f. 4-7-2018).

[66] Ins. by Notification No. IBBI/2021-22/GN/REG078, dated 30th September, 2021 (w.e.f. 30-9-2021).

(7) An expression of interest shall be unconditional and be accompanied by-

(a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25;

(b) relevant records in evidence of meeting the criteria under clause (a);

(c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;

(d) relevant information and records to enable an assessment of ineligibility under clause (c);

(e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

(f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and

(g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-

(a) the provisions of clause (h) of sub-section (2) of section 25;

(b) the applicable provisions of section 29A, and

(c) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections to the committee.]

[67][**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: -

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

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

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

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

[69][(ca) cancellation or delisting of any shares of the corporate debtor, if applicable;]

(d) satisfaction or modification of any security interest;

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

(f) reduction in the amount payable to the creditors;

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

(h) amendment of the constitutional documents of the corporate debtor;

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

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

(k) change in technology used by the corporate debtor; and

(l) obtaining necessary approvals from the Central and State Governments and other authorities.]

38. Mandatory contents of the resolution plan.- [70][(1) The amount payable under a resolution plan –

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

(b) 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.]

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[67] Subs. Notification No. IBBI/2017-18/GN/REG024, dated 6th February, 2018, for regulation 37 (w.e.f. 06.02.2018).

[68] Ins. by Notification No. IBBI/2019-20/GN/REG052, dated 27th November, 2019 (w.e.f. 28-11-2019).

[69] Ins. by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 4-7-2018).

[70] Subs. by Notification No. IBBI/2019-20/GN/REG052, dated 27th November, 2019, for sub-regulation (1) (w.e.f. 28-11-2019).

[71][(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.]

[72][(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.]

(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

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

(c) adequate means for supervising its implementation.

[73][(d) provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed:

Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022.]

[74][(3) A resolution plan shall demonstrate that –

(a) it addresses the cause of default;

(b) it is feasible and viable;

(c) it has provisions for its effective implementation;

(d) it has provisions for approvals required and the timeline for the same; and

(e) the resolution applicant has the capability to implement the resolution plan.]

39. Approval of resolution plan.- [75][(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 -

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

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[71] Ins. by Notification No. IBBI/2017-18/GN/REG018, dated 5th October, 2017 (w.e.f. 5-10-2017).

[72] Ins. by Notification No. IBBI/2019-20/GN/REG040, dated 24th January, 2019 (w.e.f. 24-1-2019).

[73] Ins. by Notification No. IBBI/2022-23/GN/REG084, dated 14th June, 2022 (w.e.f. 14-06-2022).

[74] Subs. by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018, for sub-regulation (3) (w.e.f. 4-7-2018).

[75] Subs. by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018, for sub-regulation (1) (w.e.f. 4-7-2018).

[76][***]

(c) 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.

[77][(1A) The resolution professional may, if envisaged in the request for resolution plan-

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

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

(1B) The committee shall not consider any resolution plan-

(a) received after the time as specified by the committee under regulation 36B; or

(b) received from a person who does not appear in the final list of prospective resolution applicants; or

(c) does not comply with the provisions of sub-section (2) of section 30 and sub-regulation (1).]]

[78][(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 -

(a) preferential transactions under section 43;

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.]

[79][(3) The committee shall-

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

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

(c) vote on all such resolution plans simultaneously.

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[76] Clause (b) omitted by Notification No. IBBI/2018-19/GN/REG032, dated 5th October, 2018 (w.e.f. 5-10-2018).

[77] Subs. by Notification No. IBBI/2021-22/GN/REG078, dated 30th September, 2021, for sub-regulation (1A) (w.e.f. 30-09-2021). Sub-regulation (1A), before substitution, stood as under: -

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

[78] Subs. by Notification No. IBBI/2017-18/GN/REG019, dated 7th November, 2017, for sub-regulation (2) (w.e.f. 7-11-2017).

[79] Subs. by Notification No. IBBI/2020-21/GN/REG064, dated 7th August, 2020, for sub-regulation (3) (w.e.f. 7-8-2020). Prior to this substitution, Regulation 39(3) stood as under:

"(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.

(3A) The committee shall, while approving the resolution plan under sub-section (4) of section (30), specify the amounts payable from resources under the resolution plan for the purposes under sub-regulation (1) of regulation 38."

(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.

*** *** ***]

[80][(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating 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 [81][Form H of the [82][Schedule-I] and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B].]

(5) 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.

[83][(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:

Provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;]

(6) 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.

(7) No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for

[80] Subs. by Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018, for sub-regulation (4) (w.e.f. 4-7-2018).

[81] Subs. by Notification No. IBBI/2019-20/GN/REG040, dated 24th January, 2019, for "Form H of the Schedule" (w.e.f. 24-1-2019).

[82] Substituted by Notification No. IBBI/2022-23/GN/REG091, dated 13th September, 2022 (w.e.f. 13-09-2022) Before substitution the words stood as –"Schedule".

[83] Ins. by Notification No. IBBI/2020-21/GN/REG066, dated 13th November, 2020 (w.e.f. 13-11-2020).

> any actions of the corporate debtor, prior to the insolvency commencement date.
> (8) 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.
> [84][(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.]

38.3. We may further take note of Section 88 of the Trusts Act which essentially provides for nullifying the pecuniary advantage if gained by a fiduciary and ordains that where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage; or where the person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby the fiduciary gains for himself a pecuniary advantage, he would hold the advantage so gained for the benefit of such other person. Section 88 of the Trusts Act with a few of its illustrations read as under: -

> "**Section 88. Advantage gained by fiduciary.**—Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

[84] Ins. by Notification No. IBBI/2019-20/GN/REG040, dated 24th January, 2019 (w.e.f. 24-1-2019).

Illustrations

(a) A, an executor, buys, at an under-value from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(b) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising from such user.

(c) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(d) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

*** *** ***"

38.4. Apart from the above, we may also refer to Section 164 of the Companies Act which sets forth various disqualifications for appointment of directors. It also provides that if a person fails to repay deposits accepted by the company of which he is a director, and failure to repay the due amount has continued for one year or more, he shall not be eligible for reappointment as director of that company or appointed in any other company for a period of five years from the date on which the said company fails to do so. Moreover, in view of the submissions made, a reference to Section 166(4) of the Companies Act shall also be apposite. The relevant parts of the aforementioned provisions would read as under: -

"**Section 164. Disqualifications for appointment of director.**—

*** *** ***

(2) No person who is or has been a director of a company which—

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

> [85][Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), we shall not incur the disqualification for a period of six months from the date of his appointment.]
>
> *** *** ***"
>
> "**Section 166. Duties of directors.—**
>
> *** *** ***
>
> (4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
>
> *** *** ***"

Objectives and scheme of IBC: crucial role-players:

39. For dealing with the questions involved, at the outset, a brief reference to the scheme of the Code, as noticed from its Preamble and as exposited by this Court need to be taken note of. The Preamble of the Code 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*."

39.1. In the case of ***Swiss Ribbons*** (supra), this Court traversed through the historical background and scheme of the Code in sufficient detail and while pointing out that the Code was a beneficial legislation to put the corporate debtor on its feet and not a mere recovery legislation for the creditors, said as under: -

> **"**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

[85] Ins. by Act 1 of 2018, sec. 52(i) [w.e.f. 7-5-2018, *vide* S.O. 1833(E), dated 7th May, 2018].

> 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 viabilityof 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 growthand 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* [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta & Ors: (2019) 2 SCC 1] 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 process is not adversarial to the corporate debtor but, in fact,protective of its interests…..”
>
> (emphasis in bold supplied)

39.2. As regards to the process of insolvency resolution, while dealing with various provisions of Chapter II of Part II of the Code, this Court in the case of ***Essar Steel*** (supra) summed up the key role of 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."

39.3. In the case of ***Jaypee Kensington*** (supra), after taking note of the roles and duties of the resolution professional and the resolution applicant, this Court underscored the crucial role of committee of creditors in the entire CIRP with reference to several past decisions. Rather than any other discussion, we deem it appropriate to reproduce the relevant passages therein as under: -

> "**Committee of Creditors: the protagonist of CIRP**
>
> 97. 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[86].

97.1. 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*".

97.2. In *K. Sashidhar*, 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: (SCC pp. 183-84, paras 52-53)

> "*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

[86] 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 6-6-2018.

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)

97.3. In *Essar Steel*, a three-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 para 56 at pp. 578-79 of SCC):

> "*56*. … 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% 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)

97.4. In *Essar Steel*, the Court referred to the above-quoted and other passages from the judgment 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. …
>
> *** *** ***
>
> *59.* 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. …

60. **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.**

*** *** ***

64. 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)

97.5. In *Maharashtra Seamless Ltd.* (supra), again, a three-Judge Bench of this Court referred extensively to the enunciations in *Essar Steel* and reiterated the primacy assigned to the commercial

> wisdom of the Committee of Creditors in the matter of corporate insolvency resolution.
>
> 98. 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."

40. Keeping the aforesaid principles and the relevant statutory provisions in view, we may take up the points arising for determination in this case.

Point A – Valuation: Regulations 27 and 35

41. The Appellate Tribunal has laid great emphasis on the point that commercial wisdom of CoC was materially affected for want of existence of a valid and actual valuation report and sharing of all the relevant facts pertaining to the valuation with the members of CoC leading to violation of Regulations 27 and 35 of the CIRP Regulations. We are unable to agree.

41.1. It has rightly been contended on behalf of the appellants that the members of CoC were provided with fair value and liquidation value after obtaining a confidentiality undertaking. We have reproduced hereinbefore all the material parts of the minutes of the meetings of CoC and it is at once

clear that the members of CoC were fully satisfied with and endorsed the process of valuation and even re-evaluation as undertaken by the resolution professional. Particularly, the minutes of second, fourth, sixth and seventh CoC meetings stand testimony to the fact that the requirements of Regulation were scrupulously followed and complied with and there had not been any doubt in CoC as regards the process of valuation as also supplying of fair and liquidation value to the members of CoC. The detailed findings of the Adjudicating Authority in this regard (reproduced in paragraph 15.1.1. hereinabove) make it clear that the Adjudicating Authority independently applied its mind to the process of valuation and presentation of the matter to CoC. Rejection of all the objections in that regard by the NCLT, called for no interference.

41.2. The Appellate Tribunal appears to have unnecessarily and rather unjustifiably presumed that there had been blatant statutory violations and irregularities. Even if certain issues were raised in some of the meetings of CoC as regards the process of valuation, the clarifications from the resolution professional and the steps taken by him for valuation and re-valuation had been to the satisfaction of CoC. It has rightly been contended on behalf of the appellants with reference to the decision in ***Maharashtra Seamless*** (supra) that resolution plan is not required to match the liquidation value as such.

41.3. The findings of the Appellate Tribunal in regard to the question of valuation and thereby taking the resolution plan to be in contravention of

Sections 30(2) and 61(3) of the Code cannot be approved and are required to be set aside.

Point B – Publication of Form G: Regulation 36-A

42. A long deal of discussion of the Appellate Tribunal had been diverted towards purported non-compliance of Regulation 36-A(2)(iii) of the CIRP Regulations for want of publication of Form G on the designated website with the Appellate Tribunal assuming that want of compliance of mandatory requirements had been of material irregularity on the part of the resolution professional. The findings of the Appellate Tribunal in this regard are also difficult to be accepted.

42.1. It has rightly been contended on behalf of the resolution professional that Form G was published in all leading newspapers on 09.08.2020 and then, IBBI was also informed about technical issues in uploading the Form on the website. The Adjudicating Authority has also rightly observed that a statutory provision regulating a matter of practice or procedure would generally be read as directory and in the present case, no prejudice has been shown by anyone as regards technical non-compliance of all the requirements of publication. It has been too far-stretched on the part of the Appellate Tribunal to observe that when CIRP was conducted during the periods of lockdown in the face of Covid-19 pandemic, most of the people avoided reading newspapers under the apprehension of Covid infection. As noticed, initially as many as 13 EOIs were received. It has also rightly been contended on behalf of the resolution professional that all the requisite steps having been reasonably taken, the process that had

reached an advanced stage could not have been annulled on such technicalities.

42.2. An argument has been advanced on behalf of the appellant-resolution applicant that this issue relating to publication of Form G was dealt with by NCLAT in the earlier order dated 05.05.2021 and that decision would operate as *res judicata*. In the relevant part of the said order dated 05.05.2021, the NCLAT even while dealing with the questions raised against time enlargement granted by NCLT, took note of various features related with the CIRP in question and in that regard, also observed that it was the commercial decision of CoC not to seek extension of time for submission of resolution plans and to issue directions to the resolution professional to expedite the process on the resolution plans already submitted. The NCLAT had observed as under: -

> " 23. On perusal of the minutes of the CoC, it appears that the RP apprised the CoC about the legal options available either to seek an extension of the timeline for submission of Resolution Plan or to make the decision for publication of fresh Form-G. It was the CoC's commercial decision that ***"no extension of time for submission of Resolution Plan should be done and RP was directed to expedite the valuation process and check the feasibility and viability of the Resolution Plan already submitted and present the eligible Resolution Plan before the CoC for consideration.***"

42.3. The NCLAT held that the aforesaid was a commercial decision of CoC not requiring interference of the Court. It has been argued on behalf of the contesting respondents that, the aforesaid decision cannot be considered *res judicata* for they being not the parties to the said appeals decided by NCLAT on 05.05.2021. In our view, even if principles of *res judicata* are as such not applied, fact of the matter remains that at the given

stage, the process as undertaken by the resolution professional had been consistently approved by CoC, Adjudicating Authority and the Appellate Tribunal. Even otherwise, as observed hereinabove, there had not been any such illegality or material irregularity for which the entire process would have been considered vitiated. The findings of the Appellate Tribunal in this regard too, cannot be approved and are required to be set aside.

Point C1 – Effect of Section 164(2)(b) Companies Act

43. A long length of argument has been advanced by the contesting parties as regards impact of Section 164(2)(b) of the Companies Act because of the alleged default of the company named International Aviation Academy Private Limited of which, the resolution applicant is a director. It has been argued that the said company collected share application money pending allotment and did not refund the same; and consequently, in terms of Section 164(2)(b) of the Companies Act, this default would disqualify the resolution applicant from acting as a director and thereby, would render him ineligible to submit a resolution plan. We find it difficult to accept the submissions aforesaid and the propositions against the resolution applicant on this score.

43.1. Even if there had been any possibility of the resolution applicant incurring such a disqualification in terms of Section 164(2)(b) of the Companies Act, because of alleged default of another company, in which he is a director, to refund the share application money, the same would essentially be a matter of consideration of the registrar of companies. Unless a categorical finding was recorded in the competent forum as

regards any such default and unless specific order disqualifying the resolution applicant as director because of such default came into existence, it could not have been taken by way of any process of assumption that the appellant-resolution applicant was disqualified to act as a director and thereby, was ineligible to submit a resolution plan. It has rightly been pointed out that when DIN status of the appellant was "active compliant", he could not have been treated as ineligible.

43.2. Again, it has been too far-stretched on the part of the Appellate Tribunal to refer to the Rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014 and then to make a declaration as if the resolution applicant was disqualified in terms of Section 164(2)(b) of the Companies Act. Although, we do not agree with the submissions on behalf of appellant that such an issue of eligibility could not have been raised before NCLAT for the first time because the question of eligibility of the resolution applicant goes to the root of the matter but, we do agree with the other part of the submission in this regard that there is no concept of deemed disqualification under Section 164(2)(b) of the Companies Act.

43.3. Hence, in our view, the Appellate Tribunal had not been right in holding the resolution applicant ineligible by virtue of Section 164(2)(b) of the Companies Act. Point C1 is answered accordingly.

Point C2 – Effect of Section 88 Trusts Act

44. What has been stated hereinabove in relation to the question of ineligibility of the resolution applicant in terms of Section 164(2)(b) of the

Companies Act, however, does not apply in relation to the other material objection as regards Section 88 of the Trusts Act.

44.1. It is not in dispute that the trust "Sri Balaji Vidyapeeth" of which the appellant-resolution applicant is the Managing Trustee, was one of the disqualified resolution applicants on the ground that the said entity was a charitable trust. It has been argued on behalf of the appellant that his status as Managing Trustee of the said trust does not render him ineligible while submitting the resolution plan in his individual capacity. It has also been argued that even if the trust may be disqualified, the appellant cannot be disqualified because his financial capability was independent of the trust money. In our view, this part of the matter cannot be examined by a broad and generalised reference to the separate status of the two entities, i.e., the trust on one hand and the resolution applicant as an individual on the other.

44.2. Noticeable it is that the said trust was held ineligible on the ground that it was a charitable trust and cannot run a profit-making entity. The EOIs in the first place were submitted by the present appellant-resolution applicant for himself as also on behalf of the trust. The Appellate Tribunal has rightly noticed that this filing of two EOIs by the resolution applicant, one for himself and another one on behalf of the ineligible trust has a material bearing on the competence of the resolution plan of the appellant, for being directly hit by Section 88 of the Trusts Act. The Appellate Tribunal has rightly held that the applicant-Mr. M.K. Rajagopalan, being the Managing Trustee of the said trust, cannot be permitted to act as its alter

ego in implementing the resolution plan to gain financial advantage for himself. By virtue of the operation and impact of Section 88 of the Trusts Act, submission of individual resolution plan by the appellant cannot be countenanced for any implementation of the said individual resolution plan would nevertheless be hit by the provisions contained in the Trusts Act. We may elaborate a little.

44.3. The suggestion on the part of the resolution applicant to assert his independent standing detached from the said ineligible applicant Sri Balaji Vidyapeeth carries its own shortcoming when examined in the context of the assertions made by him in clauses 3.5 and 3.10 of his resolution plan which have been extracted by the Appellate Tribunal and we are impelled to re-extract them for ready reference as under: -

> "3.5. Sri Balaji Vidyapeeth: Mr. M.K. Rajagopalan is the founder and managing trustee of Sri Balaji Vidyapeeth……
>
> 3.10. Financial Snapshot "The entities under the leadership of Mr. M.K. Rajagopalan have been growing rapidly while ensuring quality of service to nation and public at large……..
>
> There entities have achieved turnover of Rs. 417.94 Crores in FY 2016- 2017; Rs. 500.03 Crores in FY 2017-2018; Rs. 679.23 Crores in FY 2018-2019 and Rs.860.59 Crores (estimated) for FY 2019-2020. The above growth is ample testimony of the credentials of the RA as a competent business leader and his capability to manage and turn around various diverse businesses."

44.3.1. It is thus obvious that the appellant-resolution applicant admitted his status as founder and managing trustee of said Sri Balaji Vidyapeeth and then, boldly claimed that the entities under his leadership were growing rapidly while ensuring quality of service to nation and public at large. In view of the claim made by the resolution applicant himself, coupled with the fact

that in CIRP in question, two resolution plans were submitted by this appellant, one in individual capacity and another as managing director of the said trust, it is difficult to detach him from the said resolution applicant-Sri Balaji Vidyapeeth. Hence, it cannot be said that the Appellate Tribunal committed any error in observing that the appellant was attempting to act as alter ego of the said ineligible applicant (the trust); and the benefit from his own (individual's) resolution plan cannot escape the operation of Section 88 of the Trusts Act. Even if the appellant would assert that his financial capability was independent of trust money, the fact of the matter remains that he projected the overall picture of his own profile while also relying on his status as Managing Trustee of the said trust, Sri Balaji Vidyapeeth. Thus, any pecuniary advantage gained by him under the resolution plan in question would be directly subsumed by operation of Section 88 of the Trusts Act. This would, in all practical purposes, bring about a position that what could not be done directly for the said trust was sought to be done by the appellant by way of this indirect methodology.

44.4. Although, the aspects aforesaid did not form the part of consideration of CoC but, they cannot be ignored merely with reference to the status assigned to the commercial wisdom of CoC. The principles underlying the decisions of this Court respecting the commercial wisdom of CoC cannot be over-expanded to brush aside a significant shortcoming in the decision making of CoC when it had not duly taken note of the operation of any provision of law for the time being in force.

44.5. In the given set of facts and circumstances of this case, in our view, the Appellate Tribunal has rightly held the resolution plan being in contravention of the provisions of law for the time being in force. Observations and findings of the Appellate Tribunal in paragraphs 106 to 112 of the impugned order dated 17.02.2022 (reproduced hereinabove in paragraph 19.4.2.) deserve to be and are approved.

Point C3 – Effect of Section 166(4) Companies Act

45. For what has been discussed hereinabove, the submission of resolution plan by the appellant-resolution applicant was directly hit by Section 88 of the Trusts Act and could not have been approved. In this view of the matter, no other aspect appears requiring consideration as regards the question of eligibility of the resolution applicant. However, we have formulated point C3 for determination in view of the submissions made in this case as regards another feature of ineligibility of the resolution applicant and it appears appropriate to deal with this aspect of the matter too.

45.1. The status of the appellant-resolution applicant as Managing Director of another company MGM Healthcare Private Limited is not of any dispute. Rather, the particulars of this company and projections for taking this company forward had been stated extensively by the resolution applicant in his profile submitted with the resolution plan. As per the resolution plan, the appellant-resolution applicant had proposed to convert the Coimbatore property of the corporate debtor into a hospital. The said MGM Healthcare Private Limited is also said to be a super-speciality

hospital and the company is said to be looking forward to set-up new hospitals and aspires to be a leading hospital chain in India.

45.2. In the backdrop of the aforesaid facts, noticeable it is that Section 166(4) of the Companies Act prohibits a director of a company from involving himself in a situation in which he may have a direct or even indirect interest that conflicts, or may possibly conflict, with the interest of the company. Given the status of the resolution applicant as Managing Director of MGM Healthcare Private Limited, his dealing with property of the corporate debtor and converting the same into a hospital cannot be said to be having no impact on the activities of the said MGM Healthcare Private Limited. A direct conflict of interest being writ large on the face of the record, it cannot be said that the prohibition in terms of Section 166(4) does not operate and the resolution plan does not stand in contravention of any of the provisions of law for the time being in force. For this reason too, in our view, the appellant-resolution applicant could not have been accepted as eligible applicant.

Point D1 – Revision of resolution plan after approval by CoC

46. Even when the findings of the Appellate Tribunal as regards valuation process and non-compliance of other procedural requirements have not been approved by us, a material factor which otherwise may appear to be of another procedural requirement, has its significant bearing and cannot be ignored as mere technicality. It is concerning want of presentation of finally revised plan to the committee of creditors before being presented to the Adjudicating Authority.

47. As noticed hereinbefore, commercial wisdom of CoC is given such a status of primacy that the same is considered rather a matter non-justiciable in any adjudicatory process, be it by the Adjudicating Authority or even by this Court. However, the commercial wisdom of CoC means a considered decision taken by CoC with reference to the commercial interests and the interest of revival of the corporate debtor and maximization of value of its assets. This wisdom is not a matter of rhetoric but is denoting a well-considered decision by the protagonist of CIRP i.e., CoC. As observed by this Court in ***K. Sashidhar*** (supra), the financial creditors forming CoC '*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***.'** This Court also observed in ***K. Sashidhar*** that '*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***.**' These observations read with the observations in ***Essar Steel*** (supra) with reference to the reasons stated in the report of Bankruptcy Law Reforms Committee of November 2015, make it clear that commercial wisdom of CoC is assigned primacy in CIRP for it represents collective business decision, which is arrived at after thorough examination of the proposed resolution plan and assessment made with involvement of experts by the body of persons who are most vitally interested in rapid and efficient decision making. It follows as a necessary corollary that to be

worth its name, the commercial wisdom of CoC would come into existence and operation only when all the relevant information is available before it and is duly deliberated upon by all its members, who have direct and substantial interest in the survival of corporate debtor and in the entire CIRP.

47.1. In light of the aforesaid position of law and its operation in relation to the decision-making process of CoC, it needs hardly any emphasis that each and every aspect relating to the resolution plan, and more particularly its financial layout, has to be before the CoC before it could be said to have arrived at a considered decision in its commercial wisdom.

48. From the facts and the proceedings pertaining to the present case, as noticed in detail hereinbefore, it is but clear that in the ninth CoC meeting held on 22.01.2021, the resolution plan submitted by the appellant-resolution applicant was approved with 87.39% of the total voting share of the financial creditors present and voting. However, this approval came with a significant condition that in view of the dissent by some of the financial creditors, the plan would be sent back to the creditors for further revision so as to make it complaint with Section 30(2) of the Code which provides that the amount paid to the dissenting financial creditors will not be less than the amount paid to such creditors in accordance with Section 53 of the Code in the event of the liquidation of the corporate debtor. On 25.01.2021, the appellant-resolution applicant submitted the revised resolution plan incorporating the changes. He also submitted bank guarantee as noticed hereinbefore. However, the resolution professional

did not place the revised plan in CoC meeting but directly presented it to the Adjudicating Authority for approval. This process has not been approved by the Appellate Tribunal, while observing that based on the resolution in the ninth meeting of CoC, the resolution plan was sent back for further revision and the revised plan was never presented to CoC for approval. Two major submissions in this regard by the appellant-resolution applicant are: first, that the plan had already been approved by the CoC and it was only the requirement of allocating eligible amount to the dissenting financial creditors and hence, there was no need to seek further approval of the CoC; and secondly, that in the tenth meeting, the CoC had granted the deemed *post facto* approval to the revised plan and not objected to any of its portions even in the later affidavits. The resolution professional would also contend that the resolution applicant was only required to provide for redistribution to ensure that dissenting financial creditors were given their share. It has also been submitted that in the modified resolution plan the allocation for the unsecured dissenting financial creditors was revised from Rs. 29 crore to Rs. 49.13 crore.

48.1. On the submissions as made, at the first blush it might appear as if revision of the plan after ninth CoC meeting had been a matter of formality and consequential to the approval already given by the CoC. However, on a close look at the scheme of IBC, this irregularity of not placing the revised plan after ninth meeting before the CoC and directly placing it before Adjudicating Authority cannot be ignored as a mere technicality. As noticed hereinabove, each and every aspect relating to the resolution plan, and

more particularly its financial layout, has to be considered by the CoC before it could be said to have arrived at a considered decision. The fact that there had been a change in financial layout in the resolution plan in question is not a matter of dispute. When CoC applied itself and arrived at a decision in its commercial wisdom with approval by the requisite majority, it was equally the requirement that the resolution applicant would revise the plan. In terms of the minutes of the ninth CoC meeting, it is difficult to assume that the CoC had even in anticipation given an approval to the plan which was to be revised. As to what decision CoC would have taken after examination of the revised plan, pursuant to its decision in the ninth meeting, cannot be a matter of guess or assumption that it was bound to be approved. As to which aspect would have arisen for consideration of CoC after revision of the plan is again a matter of uncertainty but it cannot be said that the conditional approval in the ninth CoC meeting was to be treated as *fait accompli.* This, in our view, is not the true operation of the scheme of the process of corporate insolvency resolution nor could the commercial wisdom of CoC be a matter of assumption. Looking to the nature and form of decision taken by the CoC in its ninth meeting, such a conditional approval could not have been treated as a final approval. Whereafter, whatever be the revision, the plan was only to be presented to CoC and could have been presented to the Adjudicating Authority only after final approval of CoC by the requisite majority. In other words, when the modified resolution plan, even if carrying minor modification/revision was

not finally approved by CoC, its presentation to the Adjudicating Authority amounts to a material irregularity and this defect cannot be cured.

48.2. The suggestion of *post facto* approval of the revised resolution plan in the tenth CoC meeting has only been noted to be rejected. There is no and there cannot be any concept of *post facto* approval of any resolution plan by CoC which had not been placed before it prior to the filing before the Adjudicating Authority. Moreover, in the tenth CoC meeting dated 15.06.2021, Agenda Item No. A1 only related to the updates of resolution professional where he, of course, stated about the plan having been revised and filed with NCLT on 04.02.2021. Such updates by resolution professional, even if taken note of by CoC, could hardly be considered as of approval by requisite majority of voting share in the CoC. In any case, prior to this meeting, the plan had already been presented to the Adjudicating Authority. That plan could not have been approved thereafter by the CoC.

49. We would hasten to observe that the requirement of CIRP Regulations, particularly of placing the resolution plan in its final form before the CoC, has to be scrupulously complied with. No alteration or modification in the process could be countenanced. We say so for the specific reason concerning law that if the process as adopted in the present matter is approved, the very scheme of the Code and CIRP regulations would be left open-ended and would be capable of inviting arbitrariness at any level. The minor procedural aspects which we have held to be not of material bearing hereinbefore and this aspect pertaining to approval of

financial resolution plan by CoC stand at entirely different footing. The irregularity in the process of approval by CoC and filing before Adjudicating Authority are not the matters of such formal nature that deviation in that regard could be ignored or condoned. As stated above, when commercial wisdom of CoC is assigned primacy, it presupposes a considered decision on the resolution plan in its final form.

50. For what has been discussed hereinabove, disapproval of the resolution plan by the Appellate Tribunal for want of presentation of final resolution plan before CoC remains unexceptionable and calls for no interference.

Point D2 – Increase of fees of resolution professional

51. Though we have approved the findings of the Appellate Tribunal that the resolution plan in question, which was placed before Adjudicating Authority for approval without having been put to vote before CoC was void and non-est but, an ancillary observation of the Appellate Tribunal in correlating this material irregularity with increase of fees of resolution professional is difficult to be accepted.

51.1. The CoC had precisely deliberated over the question of increase of fees of resolution professional and its decision in that regard could not have been correlated with any shortcoming in the process undertaken, which might have occurred for want of an erroneous assumption on the part of the resolution professional in view of the contents of minutes of ninth CoC meeting dated 22.01.2021. Though as aforesaid, when the resolution plan was to be revised so as to make provision for dissenting financial creditors,

the financial outlay was going to be altered and it ought to have been placed before CoC again but, it is too far-stretched to connect this irregularity with the increase of fees of the resolution professional. The findings and observations of the Appellate Tribunal against resolution professional in this regard deserve to be set aside.

Point E – The matter concerning related party

52. Another factor taken into consideration by the Appellate Tribunal has been in relation to the so-called discrimination in the resolution plan in relation to a related party of the corporate debtor.

53. Learned counsel for the appellant in Civil Appeal No.1827 of 2022 has referred to several decided cases to submit that therein, even when certain dues of related parties were admitted, the resolution plans not providing for any payment to such related parties were upheld by this Court; and that the principles of non-discrimination would not be applicable to the decision of CoC. It has been argued on behalf of the resolution professional that none of the statutory requirements are of any mandate that a provision has to be made in the resolution plan for payment to the related parties. According to the learned counsel, the need is, essentially, to ensure that the plan provides for payment to financial creditors (including dissenting financial creditors) entitled to vote. Thus, the plan in question cannot be said to be standing in contravention of any mandatory requirements. *Per contra*, the learned counsel appearing for the related party would submit that even when related party is to be treated as a separate class in terms of the principles laid down by this Court in ***Phoenix ARC*** (supra), so as to

be excluded from CoC, there is no reason that they be treated as separate class when it comes to payment of dues under the resolution plan. It is submitted that failure to provide for discharge of debt of the related party is in violation of Section 30(2)(b), (e) and (f) of the Code. The submissions made on behalf of the related party and the observations of the Appellate Tribunal are difficult to be accepted.

54. The lengthy discussion of Appellate Tribunal in regard to the related party (the parts whereof have been reproduced in paragraph 19.7 hereinabove) depict rather unsure and irreconcilable observations of the Appellate Tribunal.

54.1. After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorized representative etc., the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other

operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

54.2. It has rightly been argued on behalf of the appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party.

54.3. On the facts of the present case, we find no reason to discuss this matter any further when it is noticed that the promoter and erstwhile director, the contesting respondent before us, has been holding the position of Chairman of the said related party. Suffice it would be to observe for the present purpose that the Appellate Tribunal has erred in applying the principles of non-discrimination and thereby holding against the resolution plan in question for want of provision for related party.

Point F – NCLAT's findings regarding settlement offer of promoter

55. The discussion foregoing, particularly with answers to points C2, C3 and D1 is decisive of the matter so far as approval of the resolution plan in question is concerned. As noticed, for want of eligibility of the resolution applicant and for want for approval of the finally revised resolution plan by

CoC meeting, the resolution plan in question is required to be rejected and the process as adopted in seeking approval of the Adjudicating Authority is required to be disapproved. However, the other segment of consideration in this case, carrying the peculiarities of its own, relates to the settlement offer of the promoter and operation of the provisions of Section 12-A of the Code.

56. A comprehensive look at the factual aspects and the orders previously passed in the matter make it clear that right from the inception of CIRP in question, the promoter and erstwhile director had made several attempts to invoke the operation of Section 12-A of the Code. At the very initial stage, while admitted the petition made by TFCI, the NCLT observed in its order dated 05.05.2020 that the attempts on the part of corporate debtor by way OTS settlement proposal had only been to gain time. Yet again, when the process has gone several steps ahead and when the resolution plans were being put to vote, just a day before voting, the promoter put forth yet another settlement proposal without any concrete plan and without disclosing the source of funds to complete the settlement. The CoC, after due deliberation, refused to consider the same and thereafter voted on the resolution plan in question.

57. The Adjudicating Authority (NCLT) dealt with the matter in sufficient detail (vide paragraph 15.2 and relevant extraction therein) while noting that even the original applicant of CIRP, i.e., TFIC, was kept in dark about such a proposal. It was also noticed that even the term-sheet to support the proposal from Deutsche Bank came with a disclaimer. In the

totality of facts and circumstances, the proposals as made by the promoter and erstwhile director were all of eyewash and of dilatory tactics. However, the Appellate Tribunal (NCLAT) proceeded to observe that in the ninth CoC meeting, no discussion about settlement proposal had occurred and that CoC never considered the settlement proposal submitted by the promoter and erstwhile director; and that after getting the settlement proposal, it was incumbent upon the resolution professional to call the CoC meeting for consideration of such proposal. The observations of the Appellate Tribunal cannot be said to be in conformity with the record of proceedings.

57.1. As noticed, the proposal in question was forwarded for consideration only at the eleventh hour, i.e., a day before CoC was to vote on the resolution plan in its ninth meeting. The CoC, in the said meeting, indeed, took into consideration the proposition of settlement and application for withdrawal request letter, which was circulated two hours before the meeting. The creditors with significant voting shares such as SBI and Bank of India were clear in their stand that they would stick to the agenda and would not deviate therefrom. The resolution professional had to request the representatives of the corporate debtor to allow the agenda items to go through as per the wishes of the majority of CoC and no further discussions were to be made on the letter sent to CoC. When the substantial majority of CoC was not in favour of such discussion which was proposed to be thrusted on them only a few hours before the meeting, their approach cannot be faulted at. In any case, an application for withdrawal in terms of Section 12-A of the Code could have been made only if CoC

approved the proposal with 90% voting share. When the creditors with substantial voting share were against any such proposal, any consideration was clearly ruled out and there could not have been any valid application for withdrawal.

58. Thus, the Appellate Tribunal has erred in holding that the settlement offer of the promoter in terms of Section 12-A was not placed for consideration of CoC. Approval of resolution plan in question could not have been reversed on this count. However, as noticed hereinbefore, approval of the resolution plan in question could not have been endorsed by the Appellate Tribunal because of other substantial reasons.

Point G – Impact and effect of subsequent events

59. The discussion aforesaid would have been decisive of the matter but there had been several subsequent events in this matter, particularly of fresh invitation for EOI and then, approval of the settlement offer of the promoter by the CoC in its nineteenth meeting held on 12.10.2022 by 100% majority of the voting share. Thus, the question is about the impact and effect of such subsequent events. For dealing with this question, we need to recapitulate the relevant background aspects of the case and the chronology of subsequent events.

60. As noticed, in the impugned judgment and order dated 17.02.2022, the Appellate Tribunal had directed the CoC to reconsider the offer of the promoter within fifteen days from the date of its order (i.e., within fifteen days from 17.02.2022). Prior to this, twice over the propositions of such settlement offer by the promoter had been dealt with disfavourably. The

relevant parts of proceedings in the ninth CoC meeting concerning such proposal have already been noticed hereinbefore. It is noticed that after approval of the resolution plan, the promoter again submitted a settlement proposal on 08.03.2021 which was followed by a letter dated 14.07.2021 from one Saveetha Institute of Medical and Technical Sciences as proof of funding, but the said letter was subsequently withdrawn by the said Institute. The resolution plan was approved by the Adjudicating Authority on 15.07.2021, which was challenged by the promoter and the Appellate Tribunal granted stay over operation of the order dated 15.07.2021. The Appellate Tribunal, ultimately, allowed the appeal and apart from disapproving the resolution plan in question, directed the resolution professional to call for the meeting of CoC within 15 days from the date of judgment and to proceed with CIRP from the stage of publication of Form G and put the proposal of promoter before CoC for consideration. In compliance of these directions of NCLAT, eleventh CoC meeting was held on 03.03.2022 where the settlement proposal of the promoter was put to vote in the CoC; the voting continued until 25.03.2022; and ultimately, the said settlement proposal was voted against by 51.81% of the voting share.

61. After such rejection of the settlement proposal of the promoter, as we have detailed hereinabove in paragraphs 26.1 to 26.4, proceedings continued in CoC for invitation of fresh EOI and for that purpose, CoC even resolved to seek further time extension to the Adjudicating Authority.

61.1. On 29.09.2022, in the eighteenth CoC meeting, it was informed that seven resolution plans had been received and their evaluation was under

process but, the CoC members were informed that another settlement proposal was received from the promoter on 19.09.2022. At that stage, again, when the mandatory 330 days' period was about to end, the CoC members unanimously voted to seek extension of CIRP timelines. Then, on 12.10.2022, the discussion on the settlement proposal of the promoter took place, it was put to vote and was approved by the CoC with 100% of the total voting powers.

62. The aforesaid proceedings continued with the matter remaining pending in this Court. The question is, what ought to be the way forward? At the first blush, it may appear that when the settlement proposal has now been approved by the CoC with 100% voting powers in their commercial wisdom, the process thereunder may be allowed to continue as such. However, a blanket approval by this Court at this stage is fraught with other complications.

63. Section 12-A was introduced in the Code later and in accordance with the Insolvency Law Report, March, 2018. This provision was introduced to provide for a mechanism for withdrawal upon settlement which was missing in IBC as originally promulgated. Regulation 30-A was also introduced to the CIRP Regulations. It was further amended with effect from 25.07.2019, providing for withdrawal of CIRP even after issuance of expression of interest but, with the condition that the applicant shall state the reasons justifying withdrawal after issuance of EOI.

64. As noticed from various events, even at the threshold stage, the NCLT noticed the settlement proposal on behalf of the corporate debtor but

then, found the same to be an eyewash which was put forward only to gain time. The petition was admitted, triggering CIRP. Significantly, the settlement proposal then came up from the promoter only a day before the received resolution plans were to be put to vote, i.e., on 21.01.2021. The CoC, even when not formerly voting on it, clearly rejected the same for the Agenda having already set for dealing with the resolution plan received from the resolution applicant. As noticed, after approval of the resolution plan, the promoter again submitted a settlement proposal but the Institute, said to be supporting the same, subsequently withdrew. After allowing of the appeal by NCLAT and in terms of those directions, the new settlement proposal was precisely put to vote and was rejected. Thereafter, fresh EOIs were invited and resolution plans were received. Significantly, the promoter moved another settlement proposal for invoking Section 12-A of the Code on 19.09.2022, only after receiving of the resolution plans from seven prospective resolution applicants. A pattern in the aforesaid dealings by the promoter is quite striking. When the resolutions plans had been received at the earlier stage, only at the eleventh hour, the settlement proposal came up. This time too, the settlement proposal came up from the promoter only after resolution plans had been received. Prior to it, his proposal had already been rejected. It gets perforce commented that the representative of the corporate debtor being a part of CoC, such proposer is obviously in a position to know about the propositions in the resolution plans when received in response to invitation.

65. We have pondered over various facets of this rather ticklish part of the matter because on one hand stands the approval of the re-submitted settlement proposal by 100% voting powers in the CoC and on the other hand, fact of the matter remains that before such settlement proposal, second time EOIs had been invited and in fact, seven resolution plans had been received. As noticed, the earlier settlement proposal from the promoter came up only a day before the resolution plans were to be put to vote, i.e., on 21.01.2021. This time again, the settlement proposals came up from the promoter only on 19.09.2022 after receiving of seven resolution plans from the prospective resolution applicants.

66. We are not expanding further on the matter because when we find that the settlement proposal of the promoter, after approval of CoC, for invoking the provisions of Section 12-A of the Code, is pending before the Adjudicating Authority, in our view, it shall be in the fitness of things that all the relevant aspects of the matter are left open for consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. In other words, we would leave all the relevant aspects open for consideration of the Adjudicating Authority in accordance with law while keeping in view the observations of this Court.

Summation

67. For what has been discussed hereinabove, disapproval of the resolution plan in question by the Appellate Tribunal (NCLAT) in the impugned order dated 17.02.2022 is not to be interfered with but, not for all

the reasons which weighed with the Appellate Tribunal. As observed hereinabove, the reasons and findings of the Appellate Tribunal in relation to the valuation process and alleged non-compliance of some of the procedural provisions as also the observations against increase of fees of resolution professional (points A, B and D2) are not to be approved. Similarly, the Appellate Tribunal has not been right in holding the resolution applicant ineligible to submit a resolution plan with reference to Section 164(2)(b) of the Companies Act, 2013 (as held in point C1). The disapproval by the Appellate Tribunal, with reference to the settlement offer of promoter in terms of Section 12-A of the Code, and its purported non-consideration is also not approved by us and such findings of the Appellate Tribunal are required to be set aside (as held in point F). Similarly, the Appellate Tribunal has erred in applying the principles of non-discrimination in relation to the related party (as held in point E). However, the other findings in relation to points C2, C3 and D1 and the consequential order passed by the Appellate Tribunal deserve to be approved.

67.1. Therefore, the impugned judgment and order dated 17.02.2022 in relation to the issues covered by points for determination A, B, C1, D2, E and F is not approved and findings of the Appellate Tribunal in that regard are set aside. However, rejection of the resolution plan is maintained in view of the answers to points C2, C3 and D1.

68. Putting it in different words, we are clearly of the view that even while respecting the commercial wisdom of CoC, in the present case, the resolution plan in question could not have been approved by the

Adjudicating Authority for two major reasons: one, for the ineligibility of the resolution applicant; and second, for not placing of the revised resolution plan in the CoC before seeking approval from the Adjudicating Authority. Of course, on the questions relating to the valuation reports, and want of publication of Form G on the website, we are at one with the Adjudicating Authority that these aspects were not of material bearing in the process in question and the resolution professional had taken reasonable steps as permissible in law and feasible in the circumstances. Similarly, we are not inclined to endorse the views of the Appellate Tribunal regarding the treatment of related party in the resolution plan as also regarding the settlement offer of the promotor; and the process in that relation cannot be said to be suffering from any illegality.

69. So far the subsequent events concerning invitation of fresh EOIs and approval of the fresh settlement proposal of the promoter by the CoC are concerned, all the relevant aspects are kept open for consideration of the Adjudicating Authority.

Conclusion

70. In view of the above, these appeals are disposed of in the following terms: -

1. The impugned judgment and order dated 17.02.2022 is not interfered with only insofar the Appellate Tribunal has not approved the resolution plan in question for the reasons which have been affirmed by us in points C2, C3 and D1 hereinbefore. Other findings, observations and directions of the Appellate Tribunal are set aside.

2. The question of dealing with fresh settlement proposal of the promoter, as approved by the CoC in its nineteenth meeting dated 12.10.2022 after receiving fresh resolution plans, is left open for consideration of the Adjudicating Authority, who shall be expected to deal with this aspect of the matter while keeping in view the law applicable and the facts of the present case as also the observations foregoing.

……..…….J.
(DINESH MAHESHWARI)

……..…….J.
(VIKRAM NATH)

NEW DELHI;
MAY 03, 2023.