IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

I.A. (IB) No. 1132/KB/2022
In
Company Petition (IB) No. 1852/KB/2019

An application under Section 30(6) and 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of IBBI (Insolvency Regulations Process of Corporate Persons) Regulations, 2016 for approval of Resolution Plan.

IN THE MATTER OF:
Variant Commercial Private Limited

... Operational Creditor.

Versus

Indian Mining Works Private Limited

... Corporate Debtor.

And

IN THE MATTER OF:
Sandip Kumar Kejriwal, Insolvency Professional having Registration No. IBBI/IPA-002/IP-N00236/2017-18/10687, the **Resolution Professional (RP)** of Indian Mining Works Private Limited (Corporate Debtor).

... Applicant/ Resolution Professional.

Date of Pronouncement: July 01, 2024.

CORAM:
SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:
For Resolution Professional: Mr. Shaunak Mitra, Adv.
Mr. Sandip Kumar Kejriwal, RP.

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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court congregated through a hybrid mode.

2. We have heard the Learned Counsel appearing on behalf of the **Resolution Professional (RP)** of Indian Mining Works Private Limited (Corporate Debtor).

Prologue

3. The present application has been preferred by Mr. Sandip Kumar Kejriwal, the **Resolution Professional (RP)** of Indian Mining Works Private Limited (Corporate Debtor) under Section 30(6) and 31 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" read with Regulation 39(4) of IBBI (Insolvency Regulations Process of Corporate Persons) Regulations, 2016, seeking the approval of the Resolution Plan submitted by **Elite Enterprises** hereinafter referred to as Successful Resolution Applicant (for brevity "SRA") which has duly been approved by the Committee of Creditor (CoC) by 100% voting shares on May 17, 2022.

4. At the 16th meeting of the CoC of the Corporate Debtor convened on May 16, 2022, the CoC agreed to vote on the Resolution Plan submitted by **Elite Enterprises**, which was deliberated upon and

considered in detail at the 12th CoC meeting held on September 14, 2021. The CoC agreed to conduct a voting by postal ballot and the deadline for the receipt of the voting was fixed at 9 P.M. on May 17, 2022. The RP received the ballots of the constituent members of the CoC approving the Resolution Plan of the **Elite Enterprises** by 100% voting share and accordingly, **Elite Enterprises** was declared as the Successful Resolution Applicant of Indian Mining Works Private Limited (Corporate Debtor).

5. The Letter of Intent (LoI) was issued by the RP on the instructions and due authorization from the COC to the SRA. The SRA has furnished a Demand Draft for Rs. 5 Lakh only as performance security towards successful implementation of the Resolution Plan, the copy of the Demand Draft dated 01.02.2022 drawn on Axis Bank Limited bearing no. 53655 in favour of the Corporate Debtor for an amount of Rs. 5 Lakh is annexed to Page 140 as Annexure "K".

Particulars of Indian Mining Works Private Limited (Corporate Debtor)

6. Indian Mining Works Private Limited (Corporate Debtor) is a company limited by shares, bearing CIN: U13209WB2005PTC104026, incorporated on July 05, 2005, under the provisions of the Companies Act, 1956.

Commencement of the Corporate Insolvency Resolution Process (CIR Process) of the Corporate Debtor

7. Variant Commercial Private Limited (Operational Creditor) had preferred an application under Section 9 of the I&B Code, 2016, sought to initiate CIR Process in respect of Indian Mining Works Private Limited (Corporate Debtor). Vide an Order dated February 24, 2020, this Adjudicating Authority admitted the application and put the Corporate Debtor into the CIR Process and Mr. Sandip Kumar Kejriwal, the Applicant herein was appointed as an Interim Resolution Professional (IRP). Later, on 20.10.2020, the Applicant herein was appointed as the Resolution Professional (RP) of the Corporate Debtor.

Public Announcement

8. Pursuant to the Order dated February 24, 2020, the IRP made the publication on 29.02.2020 and invited claims from the creditors of the Corporate Debtor. The last day of submission of the claim by the creditors was fixed on 13.03.2020.

Constitution of the Committee of Creditors (CoC)

9. Upon receiving claims from the creditors, the Committee of Creditors of Indian Mining Works Private Limited (Corporate Debtor) was constituted on 18.03.2020 with two **Secured Financial Creditors** as under:

SN	Name of the Creditors	Amount claimed	Per cent share in CoC
1.	Axis Bank Limited	Rs. 6,16,23,386/-	75.30%
2.	SREI Equipment Finance Limited	Rs. 2,02,18,763/-	24.70%
Total		**Rs. 8,18,42,149/-**	**100%**

10. The total number of meetings of the CoC convened is 16. At the 16th CoC meeting, held on 16.05.2022 and concluded on 17.05.2022, the Resolution Plan submitted by **Elite Enterprises** was unanimously approved by the CoC.

Collation of Claims

11. The Resolution Professional herein submits the amount claimed and verified which are summarized below:

SN	Name of the Creditors	Amount claimed	Amount Admitted	Admitted in Percentage
Financial Creditors (Secured)				
1.	**Axis Bank Limited**	Rs. 616.23 Lakh	Rs. 616.23 Lakh	100%
2.	**SREI Equipment Finance Limited**	Rs. 202.19 Lakh	Rs. 202.19 Lakh	100%

Total (1+2) =		**Rs. 818.42 Lakh**	**Rs. 818.42 Lakh**	**100%**
Operational Creditors				
3.	Government Dues (CGST)	Rs. 9603.24 Lakh	Rs. 9603.24 Lakh	100%
4.	Operational Creditor	Rs. 48.66 Lakh	Rs. 48.66 Lakh	100%
Total (3+4) =		**Rs. 9651.90 Lakh**	**Rs. 9651.90 Lakh**	**100%**
Grant Total (1+2+3+4) =		**Rs. 10470.32 Lakh**	**Rs. 10470.32 Lakh**	**100%**

The earlier orders of this Adjudicating Authority and the reply to our observations by Resolution Professional, CoC and Successful Resolution Applicant are as under:

12. On earlier two occasions, on 01.08.2023 and 21.08.2023, we made our observations and accordingly asked for clarifications from the Resolution Professional as well as from the CoC and the Successful Resolution Applicant. The RP, CoC members and the SRA have clarified the same through supplementary affidavits dated 18.08.2023 & 05.02.2024; 10.08.2023 & 10.10.2023; and 22.08.2023; respectively as under:

Our first observation vide order dated 01.08.2023:

a. There are two financial proposals attached to the Resolution Plan, one dated 01 February 2022 at pages 9-11 of the Resolution Plan and the second financial proposal undated at pages 73 to 76 of the I.A.,

the first financial proposal offers lesser value and the second financial proposal states that the successful Resolution Applicant has proposed a value which is higher. In the minutes of the 13th CoC Meeting, the financial proposal of Rs.1,00,00,000/- was discussed and agreed by the one of the CoC members which is reflected in Agenda 5 (page 105 of the I.A.). Why has the CoC accepted the proposal in which a lesser amount has been proposed?

Additional observation vide order dated 21.08.2023:

Let fresh compilation be provided which shall on what basis, out of the two plans one has approved and one is rejected, and valuation report that forms basis.

Clarification by the RP:

It is clarified that the financial proposal of the resolution plan annexed at Page 73 to Page 76 was originally submitted by the said resolution applicant and subsequently, after negotiation and discussion with the COC revised financial proposal including the revised resolution plan was submitted on 03.02.2022, which superseded the original financial proposal attached at Page 73-76. It is hereby additionally clarified that the financial outlay submitted through the revised Resolution plan is higher than the original proposal submitted by the said PRA. The difference between the original and the revised resolution plan is depicted through the following tabulation:

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FINANCIAL PROPOSAL SUBMITTED WITH THE ORIGINAL RESOLUTION PLAN ANNEXED AT PAGE 73-76 OF THE APPLICATION FOR THE APPROVAL OF RESOLUTION PLAN:

COMPONENTS	**AMOUNT (Rs.)**	**TIMELINE FOR PAYMENT AND OTHER TERMS**
CIRP Cost	17,50,000/-	Within 30 days from the receipt of certified copy of the order passed by the Adjudicating Authority approving the Resolution Plan.
Financial Creditor (Un-related)	62,25,952/-	Within 60 days from the receipt of certified copy of the order passed by the Adjudicating Authority approving the Resolution Plan. To be paid in proportion to their admitted claims.
TOTAL PLAN OUTLAY EXCLUDING WORKING CAPITAL INFUSION(A):	79,75,952/-	

Working Capital Infusion	25,00,000/-	As and when required
TOTAL PLAN OUTLAY INCLUDING WORKING CAPITAL INFUSION (B):	1,04,75,9523/-	

FINANCIAL PROPOSAL SUBMITTED WITH THE REVISED RESOLUTION PLAN ANNEXED AT PAGES 10-11 OF THE APPLICATION FOR THE APPROVAL OF THE RESOLUTION PLAN.

COMPONENTS	**AMOUNT (Rs.)**	**TIMELINE FOR PAYMENT AND TERMS OF PAYMENT**
CIRP Cost	32,00,000/- (Estimated)	Unpaid CIRP Cost at actuals will be paid from Rs. 1 crore. CIRP Cost Estimated at Rs. 32 Lacs, balance to be paid to the financial creditor after deducting the estimated CIRP as above. (Within 30 days from the receipt of

		certified copy of the order passed by the Adjudicating Authority approving the Resolution Plan.
Financial Creditor (Unrelated)	68,00,000/- (After deducting estimated CIRP cost)	After the payment of CIRP Cost, the balance left out of Rs.1 Crore will be paid to the financial creditor. (Within 60 days from the receipt of certified copy of the order passed by the Adjudicating Authority approving the Resolution Plan. To be paid in proportion to their admitted claims.)
TOTAL PLAN OUTLAY EXCLUDING WORKING CAPITAL INFUSION AS AND WHEN REQUIRED(C):	**1,00,00,000/-**	

Working Capital to be Infused as and when required	25,00,000/-	As and when required, considering infusion to the tune of Rs. 25 Lacs.
TOTAL PLAN OUTLAY INCLUDING THE WORKING CAPITAL OUTLAY (D):	**1,25,00,000/-**	

As such the total resolution plan outlay has increased through the submission of the revised resolution plan, which was finally approved by the CoC as under:

PARTICULARS	**EXCLUDING WORKING CAPITALS**	**INCLUDING WORKING CAPITAL**
TOTAL PLAN OUTLAY AS PER ORIGINAL PLAN	79,75,952/- **(Total A)**	1,04,75,952/- **(Total B)**
TOTAL PLAN OUTLAY AS PER REVISED PLAN	1,00,00,000/- **(Total C)**	1,25,00,000/- **(Total D)**
INCREASE IN REVISED PLAN, FINALLY	20,24,048/-	20,24,048/-

APPROVED BY THE COC		

Notes to the above clarification with regards to the above tabulation:

I. CIRP Cost under the new Resolution Plan has been proposed to be paid at actuals which is currently estimated at Rs. 32 Lacs.

II. Amount payable to secured financial creditor under the revised resolution plan is Rs. 68 Lacs after deducting the estimated CIRP Cost.

III. The RA has proposed to bring in working capital from time-to-time for improving operations under the revised resolution plan which for comparison purposes has been assumed to be Rs. 25 Lacs as proposed in the original Resolution Plan.

Copy of all the valuation reports is annexed as **"Annexure C" at pages 53-114 to the Supplementary Affidavit dated 05.02.2024.**

Clarification by the CoC:

The first resolution plan was submitted by one Resolution Applicant namely Elite Enterprise total amounting to Rs 1,04,75,952/- wherein they have offered an amount of Rs

17,50,000/- as CIRP cost payable within 30 days from the NCLT approval date, Rs 62,25,952/- to be paid to Financial Creditors payable within 60 days from receipt of certified copy of NCLT approval and Rs 25,00,000/- as Working Capital for improving operations as and when required. Thereafter negotiation was going on with the Resolution Applicant with an object to increase the plan value. Accordingly, the Resolution Applicant submitted a revised resolution plan offering a total amount of Rs 1.00 Cr wherein the entire payment of Rs 1.00 Cr would go to the Financial Creditors after deduction of CIRP cost at actuals. Further taking into account that the probable CIRP cost would not increase beyond Rs 30 Lakhs thus the secured creditors voted for the plan with lesser value wherein the Financial Creditors would receive a higher amount. In the meantime, the Demand draft submitted by the resolution applicant as EMD had expired. Thus, COC along with RP requested the resolution applicant for submission of a revised resolution plan along with a fresh Demand Draft. The plan value of the revised resolution plan was Rs. 1 Crore which is evident from the minutes of the 13th CoC held on 20.01.2022. This, it may be noted that although the total plan value has decreased from Rs. 1.04 Crore to Rs. 1 Crore but the payment to the Financial Creditors has increased from Rs. 62 Lakh to Rs. 70 Lakh.

Clarification by SRA:

It is a matter of facts and record that RA has submitted the Resolution plan through email on 18.06.2021 and also submitted the original copy of the same to the RP on 03.09.2021 with the

value of Rs 79,75,952.00 with an additional infusion of amount of Rs. 25,00,000 as working capital as and when required for the better revival of the corporate debtor. The same was reviewed by the RP and accordingly placed before the COC for their kind consideration. Based on the discussion held in the COC, the RA was asked to revise their resolution plan by increasing the value proposed for the corporate debtor. Considering the same, the RA has submitted the Revised Resolution plan on 01.02.2022 with the full and final proposal of Rs. 1 Crore with an additional infusion of any sum as working capital as and when required for the better revival of the corporate debtor. It is a matter of fact that, a sum of Rs. 20,24,048.00 has been enhanced pursuant to the request of the COC. It is clear from the revised Resolution plan that no specific amount for the working capital has been mentioned in comparison to the original resolution plan and further it was made clear that apart from the proposed value of Rs. 1 crore, the RA shall infuse any amount for the working capital as and when required. The same revised Resolution plan was duly approved by the COC and accordingly the RP has filed the instant application for the approval of the resolution plan.

Second observation of us vide order dated 01.08.2023:

b. According to the Resolution Plan, Rs.11,62,378.43 was claimed by the Operational Creditors but the Resolution Professional did not admit any of the claims, but in Form H this information has not been given, rather under the head of Operational Creditors, the Resolution Professional has stated that there was NIL amount claim under the

said headed "Amount claimed" and under the header "Amount Admitted" and amount of Rs.96,51,89,583/- has been admitted. We are unable to come to a conclusion on what is the correct amount claimed and admitted due to such discrepancy.

Clarification by the RP:

The Resolution plan captures the amount claimed and admitted by the operational creditor on the date of the preparation of the information memorandum i.e., 20.11.2020 for Rs.11,62,378.43. However, subsequently, additional claims were received and admitted and accordingly captured in the Form-H while filing the application for approval of the resolution plan. The correct amount claimed and admitted relating to the operational creditor is tabulated hereunder:

Type of Creditor	**Amount Claimed (In Lakh)**	**Amount Admitted (In Lakh)**	**Amount provided under the Plan**
Financial Creditor	818.42	818.42	Resolution Plan Amount Rs 100 Lacs less Actual CIRP Cost.
Operational Creditor	48.66	48.66	NIL

Government	9603.24	9603.24	NIL

It is further clarified that the figures in the Form H submitted with the application was erroneously mentioned and as such revised accordingly. The above change would not affect the approval and implementation of the Resolution Plan, as the Successful Resolution Applicant has proposed NIL payments towards all such operational creditors. The revised Form-H is also attached herewith correcting all the inadvertent error including the above and marked as "Annexure D" at pages 115-122 to the Supplementary Affidavit dated 05.02.2024 and the applicant craves leave for replacement of the same with the Form H annexed with the application filed for approval of the plan with Adjudicating Authority.

Clarification by the CoC:

The same falls under the purview of the RP hence they would not comment.

Clarification by the SRA:

It is a matter of record, that the documents as shared by the RP with the RA at the time of submission of the Resolution plan evidenced that there are no admitted operational creditors dues, however the same could have been changed considering the claims of the operational creditor.

Irrespective of any amount admitted for the Operational Creditor, the Resolution Applicant has proposed an NIL amount for such category and further the liquidation value for them was also mentioned as NIL.

The clarification under the said paragraph regarding the admission of the claim is concerned with the Resolution Professional, hence the RA abstain himself from commenting on the same.

Third Observation of us vide Order dated 01.08.2023:

c. Similarly, there is no clarity of the amount proposed to the Financial Creditors, Form H states that the amount admitted and proposed for the Financial Creditors is Rs.8,18,42,149/- and 100% payment is being proposed to the Financial Creditors. How is it possible when the total plan amount is lesser than the amount abovementioned?

Clarified by the RP:

The Financial Creditor as depicted in the clarification of the first observation is supposed to be paid Rs. 68 Lacs after the deduction of the estimated CIRP cost of Rs. 32 Lacs against their admitted claim of Rs. 8,18,42,149/- and which was approved unanimously by the CoC. Figures and percentage of recovery have been erroneously and inadvertently mentioned in Form H submitted along with the application for resolution plan and is sought to be corrected through this affidavit. The revised Form-H annexed with

this instant affidavit, is to be considered instead of the earlier Form-H filed in this regard.

Clarified by CoC:

The Resolution Plan submitted for approval of this Adjudicating Authority states that the entire payment of Rs. 1.00 Crore would go to the Financial Creditors after deduction of CIRP cost at actuals and no amount will be paid to any other creditor.

Clarified by SRA:

The RA has proposed a value of Rs. 1 Crore for the Resolution of the Corporate Debtor. In the said value of Rs. 1 Crore, the ratified CIRP cost would be paid in priority within 30 days from the date of approval of the Resolution Plan by this Adjudicating Authority and thereafter the balance amount shall be paid to the secured financial creditor within 60 days from the date of approval of the Resolution Plan by this Adjudicating Authority.

The said Revised Resolution Plan was duly accepted and approved by the CoC members.

Fourth observation of us vide order dated 01.08.2024:

d. What is the approximate CIRP cost?

Clarification by the RP:

The approximate CIRP cost placed in the last COC meeting was Rs. 32 Lacs, however additional cost that may be incurred up to the date of approval of resolution plan would be placed before the monitoring committee for its approval and computing the final CIRP Cost and thereby payment of the balance amount to the Financial Creditors, as envisaged under the approved resolution plan by the Successful Resolution Applicant.

Clarified by CoC:

The same falls under the purview of Resolution Professional. However, at the time of approving the resolution plan the cost incurred for CIRP was Rs. 26.00 Lakh approx. including the entire RP fees Thus, the plan was approved by the CoC with a view that CIRP cost would not go beyond Rs. 30.00 Lakh.

Clarified by SRA:

This clarification under the said paragraph is concerned with the Resolution Professional, hence the RA abstain himself from commenting on the same.

Fifth observation of us vide order dated 01.08.2023:

e. Clause e at Page 10 of the Resolution Plan (page 18 of the I.A.) is incomplete.

Clarification by the RP:

As clarified by the Successful Resolution Applicant in this regard, the word **'However'** has been erroneously typed in the last line of clause e (3) of the resolution plan at page 10. The same should be treated as omitted and would have no impact on the Resolution Plan approved. Clarificatory letter by the said successful Resolution Applicant is annexed and marked as "Annexure E".

Clarified by CoC:

The same falls under the purview of the Resolution Applicant and the Resolution Professional.

Clarified by SRA:

The RA clarifies that the word 'However' has wrongly been typed in 'clause e' at page 10 of the revised resolution plan and the same has no connection in any manner with the said paragraph. The same shall be ignored because of the typographical error.

Sixth observation of us vide order dated 01.08.2023:

f. The point related to regulation 38(2) (d) of the CIRP Regulations is to be given.

Clarification by the RA:

As per the final Resolution plan attached along with the application for approval of Resolution Plan at Page 23, the plan envisages as under: "*The resolution applicant shall be eligible for getting the benefits of any amount due to reversal of any transaction against the applicant filed for preferential transactions before the Adjudicating Authority and any of the financial creditors or other creditors shall have no claim on such amount*". Subsequently, the RA through an affidavit had clarified that he will be the beneficiary pursuant to the PUFE application and that the application post the approval of the resolution plan shall be pursued by them at their own cost. The copy of the affidavit containing the said clarification has already been filed and annexed herewith as "Annexure F".

The revised Form-H incorporating the above clarification and correction is prepared and filed herewith and the applicant creates leave of this court for consideration of the same, as the final and corrected Form-H for the approval of the Resolution Plan.

Clarified by the CoC:

The same falls under the purview of the Resolution Professional.

Clarified by the SRA:

SRA submits an addendum to the Resolution Plan on 04.02.2022.

Financial Proposal as per revised Form H annexed to the Supplementary Affidavit dated 05.02.2024.

13. Under Regulation 39(4) of the IBBI (CIRP) Regulations, 2016, the RP submits the revised Form H, annexed at page 115-122 to the Supplementary Affidavit dated 05.02.2024. The amounts provided for the stakeholders under the Resolution Plan as under:

Sl. No.	Category of Stakeholder	Sub-Category of Stakeholder	Amount Claimed	Amount Admitted	Amount Provided under the Plan	Amount Provided to the Amount Claimed (%)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	Secured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21	-	-	-	
		(b) Other than (a) above: (i) who did not vote in favour of the	-	-	-	

		resolution Plan (ii) who voted in favour of the resolution plan	Rs. 818.42 Lakh	Rs. 818.42 Lakh	Resolution Plan amount Rs. 100 Lakh less Actual CIRP Cost.	
		Total[(a) + (b)]	Rs. 818.42 Lakh	Rs. 818.42 Lakh	Resolution Plan amount Rs. 100 Lakh less Actual CIRP Cost.	-
2	Unsecured Financial Creditors	(a) Creditors not having a right to vote under sub-section (2) of section 21	-	-	-	-
		(b) Other than (a) above: (i) who did not vote in favour of the resolution Plan (ii) who voted in favour of the resolution plan	- -	- -	- -	- -

		Total[(a) + (b)]	-	-	-	-
3	Operational Creditors	(a) Related Party of Corporate Debtor	-	-	-	-
		(b) Other than (a) above: (i) Government (CGST) (ii) Workmen (iii) Employees (iv) Operational Creditor	 Rs. 9603.24 Lakh - - Rs. 48.66 Lakh	 Rs. 9603.24 Lakh - - Rs. 48.66 Lakh	 **NIL** - - **NIL**	
		Total[(a) + (b)]	Rs. 9651.90 Lakh	Rs. 9651.90 Lakh	**NIL**	
4	Other debts and dues	NIL	-	-	-	
Grand Total			**Rs. 10470.32 Lakh**	**Rs. 10470.32 Lakh**	Resolution Plan amount Rs. 100 Lakh	

				less Actual CIRP Cost.	

14. Further, the Applicant has preferred the revised financial proposal through the Supplementary Affidavit dated 05.02.2024 as under:

COMPONENT	**AMOUNT (Rs.)**	**TIMELINE FOR PAYMENT AND TERMS OF PAYMENT**
CIRP Cost	32,00,000/- (Estimated)	Unpaid CIRP Cost at actuals will be paid from Rs. 1 crore. CIRP Cost Estimated at Rs. 32 Lacs, balance to be paid to the financial creditor after deducting the estimated CIRP as above. (Within 30 days from the receipt of certified copy of the order passed by the Adjudicating Authority approving the Resolution Plan.
Financial Creditor (Unrelated)	68,00,000/- (After deducting estimated CIRP cost)	After the payment of CIRP Cost, the balance left out of Rs.1 Crore will be paid to the financial creditor. (Within 60 days from the receipt of certified copy of the order passed by the

		Adjudicating Authority approving the Resolution Plan. To be paid in proportion to their admitted claims.)
TOTAL PLAN OUTLAY EXCLUDING WORKING CAPITAL INFUSION AS AND WHEN REQUIRED(C):	**1,00,00,000/-**	
Working Capital to be Infused as and when required	25,00,000/-	As and when required, considering infusion to the tune of Rs. 25 Lacs.
TOTAL PLAN OUTLAY INCLUDING THE WORKING CAPITAL OUTLAY (D):	**1,25,00,000/-**	

15. Further the RP through a supplementary affidavit dated 13.03.2024, would submit that at the 21st CoC meeting convened on 07.03.2024, the RP had placed the agenda of revised CIRP cost and to enhance the plan value. After all deliberation between the members of the CoC and the resolution applicant, the value of the resolution plan has been further enhanced to Rs. 1.25 Crore by the resolution applicant. The same has been consented in favour with 75.29%. the copy of the minutes

is annexed at pages 11-18 to the supplementary affidavit dated 13.03.2024.

16. The RP further clarifies that the CIRP Cost under the new Resolution Plan has been proposed to be paid at actuals which is currently estimated at Rs. 32 Lakh. The Amount payable to the secured financial creditor under the revised resolution plan is Rs. 68 Lakh after deducting the estimated CIRP Cost. The Resolution Applicant has proposed to bring in working capital from time to time for improving operations under the revised resolution plan which for comparison purposes has been assumed to be Rs. 25 Lakh as proposed in the original Resolution Plan.

Appointment of the Registered Valuers and the valuation of the Corporate Debtor

17. The RP in terms of Regulation 27 of the CIRP Regulations, 2016, has appointed two registered valuers i.e., Mr. Asim Maity and SKA Business Advisory Services Private Limited on 20.10.2020, to determine the fair and liquidation value of the Corporate Debtor. The average fair value and the liquidation values obtained from the appointed Registered valuers and the same is provided in the revised Form H annexed to the Supplementary Affidavit date 05.02.2024, are as follows:

a. **The Fair Value = Rs. 2,55,94,025/-**
b. **The liquidation value = Rs. 2,21,73,675/-**

18. We have duly considered the submissions advanced by the Learned Counsel for the Resolution Professional and perused all the documents available with us properly.

Analysis and Findings:

(a) Proposed NIL amount towards the category of the Operational Creditors in the Resolution Plan approved by the CoC:

19. We have noted that under the categories of "Operational Creditors", there are two kinds of creditors, i.e., **Government (CGST)** and **Operational Creditor.**

20. We find that in the CoC-approved resolution plan, the Government (CGST) has claimed an amount of Rs. 96.03 Crore, and against such claim, the RP has admitted the same in 100%. However, no amount has been proposed to the Government (CGST) towards its admitted claim.

21. Further, we have noted that the Operational Creditor has filed its claim of Rs. 48.66 Lakh, and against such claim, the RP has admitted the claim in 100%, and similarly, no amount has been proposed to the Operational Creditor in the Resolution Plan.

22. Vide order dated 01.08.2023, we asked to clarify that:

> *"b. According to the Resolution Plan, Rs.11,62,378.43 was claimed by the Operational Creditors but the Resolution Professional did not admit any of the claims, but in Form H this information has not been given, rather under the head of Operational Creditors, the Resolution*

*Professional has stated that there was **NIL** amount claim under the said headed "Amount claimed" and under the header "Amount Admitted" and amount of Rs.96,51,89,583/- has been admitted. We are unable to come to a conclusion on what is the correct amount claimed and admitted due to such discrepancy***."**

23. In reply, the RP clarifies that the Resolution plan captures the amount claimed and admitted by the operational creditor on the date of the preparation of the information memorandum i.e., 20.11.2020 for Rs.11,62,378.43. However, subsequently, additional claims were received and admitted and accordingly captured in Form-H while filing the application for approval of the resolution plan. It is further clarified that the figures in the Form H submitted with the application was erroneously mentioned and as such revised accordingly. The above change would not affect the approval and implementation of the Resolution Plan, as the Successful Resolution Applicant has proposed NIL payments towards all such operational creditors. The revised Form-H has been attached correcting all the inadvertent errors including the above and marked as "Annexure D" at pages 115-122 to the Supplementary Affidavit dated 05.02.2024 and the applicant craves leave for replacement of the same with the Form-H annexed with the application filed for approval of the plan with Adjudicating Authority.

24. We have noted that in reply the CoC has not made any comment as the same falls under the purview of the RP. However, the SRA has clarified that the documents as shared by the Resolution Professional with the Resolution Applicant at the time of submission of the Resolution plan, that there are no admitted operational creditors dues, however, the

same could have been changed considering the claims of the operational creditors later. Irrespective of any amount admitted for the Operational Creditor, the Resolution Applicant has proposed the NIL amount for such category and further the liquidation value was also mentioned as NIL for such creditors.

25. We are of the view that this proposition of the Resolution Professional and the Resolution Applicant is not in line with Section 30(2)(b) of the I&B Code.

Concerning the admitted claim of the Government (CGST):

26. It is a settled position of law that the 'government dues/claim' under the I&B Code falls within the arena of "secured debt" and the Code does not preclude any Government or Governmental Authority from treating them as a "secured creditor". At this juncture, it would be appropriate to refer to the ratio as laid down in ***State Tax Officer (1) vs. Rainbow Papers Limited*** reported in **(2023) 9 SCC 545: MANU/SC/1109/2022** wherein it has been held that Gujarat State Government is a secured creditor in view of special provisions in GVAT Act to that effect. As per Section 82 of the Central Goods and Services Tax Act, 2017 (CGST Act), tax is to be the first charge on the property, save as otherwise provided in the I&B Code. There is nothing in the I&B Code to negate that position of the CGST Act being treated as secured debt. We would refer to the provision of Section 82 of the CGST Act in verbatim:

> **"*Tax to be first charge on property.—*** *Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a* ***first charge*** *on the property of such taxable person or such person.***"**

27. Further, in ***Rainbow Papers Limited*** **(Supra),** the Hon'ble Apex Court observed that:

> **"*52. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan.***
>
> *53. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC.*
>
> *54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.*
>
> *xxx xxx xxx*
>
> *56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.*

> *57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law.* ***The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority****."*
>
> **(Emphasis added)**

28. Thus, in view of the proposition laid down in ***Rainbow Papers* (Supra),** the definition of a "secured creditor" under the Insolvency and Bankruptcy Code, 2016 includes the government or governmental authority and accordingly, at the present case, allocating of NIL payment towards the CGST's admitted claim of Rs. 96.03 Crore in the resolution plan approved by the CoC cannot be accepted.

Concerning the admitted claim of the other Operational Creditor(s):

29. Further, we find that against the admitted claim of the other Operational Creditor(s) of Rs. 48.66 Lakh, no amount has been proposed to them in the Resolution Plan. Before, considering the issue, it would be appropriate to read the statutory provisions under the I&B Code as under:

SN	Sections	Provisions
i.	**30(2)(b) of the Code.**	*Submission of resolution plan. –* *xxx xxx xxx* *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—*

		xxx xxx xxx *[(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* *(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.*
ii.	**53(1) of the Code.**	***Distribution of assets.*** *-* *(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the*

		proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: — *(a) the insolvency resolution process costs and the liquidation costs paid in full;* *(b) the following debts which shall rank equally between and among the following: —* *(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and* *(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;* *(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;* *(d) financial debts owed to unsecured creditors;* *(e) the following dues shall rank equally between and among the following: —* *(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;*

		(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest; ***(f) any remaining debts and dues;*** *(g) preference shareholders, if any; and* *(h) equity shareholders or partners, as the case may be.* *xxx xxx xxx*

30. Further, in the landmark judgment rendered by the Hon'ble Apex Court in ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta*** reported in **(2020) 8 SCC 531: MANU/SC/1577/2019,** it was held that:

> **"*80.*** *When it comes to the validity of the substitution of Section 30(2) (b) by Section 6 of the Amending Act of 2019, it is clear that the substituted* ***Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures*** *mentioned in sub-clauses (i) and (ii) of Sub-clause (b) that is now to be paid as a minimum amount to operational creditors.* ***The same goes for the latter part of Sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors*** *and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of Clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done*

this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in Sub-section (2). ***Mrs. Madhavi Divan is also correct in stating*** *that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in Sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors.* ***It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors*** *that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder***."**

(Emphasis Added)

31. After careful reading of the statutory provisions and the law laid down in ***Essar Steel*** **(Supra),** it will be clear that in a resolution plan, a **minimum amount shall be paid to the operational creditors** towards its claim admitted by the resolution professional in a manner which **shall not be less than** the amount either to be paid in the event of a liquidation of the corporate debtor or the plan value to be distributed in accordance with the provision of Section 53 of the Code.

32. We have noted the submission of the Resolution Applicant that at the time of submission of its plan, there was no admitted claim of such operational creditors, thus, the Resolution Applicant proposed NIL amount for such category and further the liquidation value was NIL for such category.

33. As per section 30(2)(b) of the I&B Code, in a resolution plan, the operational creditor and the dissenting financial creditor, shall be entitled to receive **either** the amount that would be payable to such operational creditor in the event of liquidation and accordingly the distribution

should be made as per section 53(1) of the Code **or**, the amount that would be receivable if the amount paid under the resolution plan is distributed in accordance with the order of priority in section 53(1) of the I&B Code, **whichever is higher.** The legislative intent as well as the validity of the amendment of Section 30(2)(b) of the Code, by Section 6 of the Amendment Act, 2019, as observed by the Hon'ble Apex Court in ***Essar Steel*** **(Supra),** is that the I&B Code binds the resolution applicant to allocate a minimum amount to the operational creditor, which is either the amount would be paid in an event of liquidation or the minimum amount, the operational creditor will receive if the resolution plan value is distributed in the order of priority mentioned in section 53(1) of the Code. Further, regulation 38(1) of the CIRP Regulations, 2016, mandates the resolution applicant to pay the operational creditor in priority over the financial creditors and also the financial creditor who is dissentient to the resolution plan in priority over the financial creditors who voted in favour of the plan. Thus, a conjoint reading of Section 30(2)(b) of the I&B Code and Regulation 38(1) of the CIRP Regulations, 2016, it can be drawn that the resolution plan must secure an amount, i.e., **the not less than** the liquidation value, should be paid in priority to the operational creditor as well as the dissenting financial creditors, and the same cannot be a NIL amount.

34. In the recent judgment passed by the Hon'ble Supreme Court of India in ***DBS Bank Limited, Singapore vs. Ruchi Soya Industries Limited*** [Civil Appeal Nos. 9133 of 2019 and 787 of 2020] reported in **MANU/SC/0012/2024,** the Hon'ble Apex Court has dealt with the issue,

"*Whether Section 30(2)(b)(ii) of the Insolvency and Bankruptcy Code, 20161, as amended in 2019, entitles the dissenting financial creditor to be paid the minimum value of its security interest*?**"**

The Hon'ble Apex Court has observed that:

"*44.* *We would, for the above reasons, reject the submission on behalf of the Respondents that Section 30(2)(b)(ii) is unworkable because it involves deeming fiction relating to liquidation, which is inapplicable during the CIRP period. This would be contrary to the legislative intent and is unacceptable***.'**

"*45.* *Respondent No. 2 - CoC has submitted that the Appellant has dissented because it did not approve the manner of distribution of the proceeds under the resolution plan. The Appellant did not dispute the resolution plan itself. Accordingly, Section 30(2)(b)(ii) is not applicable. The argument is fallacious and must be rejected. Section 30(2)(b)(ii) relates to the proportion of the proceeds mentioned in the resolution plan or the amount which the dissenting financial creditor would be entitled to in terms of the waterfall mechanism provided in Section 53(1****), if the corporate debtor goes into liquidation.*** *The dissenting financial creditor does not have any say when the resolution plan is approved by a two-third majority of the CoC. The resolution plan will be accepted when approved by the specified majority in the CoC. The dissenting financial creditor cannot object to the resolution plan, but can object to the distribution of the proceeds under the resolution plan, when the proceeds are less than what the dissenting financial creditor would be entitled to in terms of Section 53(1) if the corporate debtor had gone into liquidation.* ***This is the statutory option or choice given by law to the dissenting financial creditor. The option/choice should be respected*****.'**

"*46.* *Respondent No. 2 - CoC had referred to the objections referred to in the CoC meetings dated 15.04.2019 and 23.04.2019. We are of the view that the objections raised by the Appellant relate to the distribution of the proceeds in terms of the*

*liquidation plan. According to them, they were entitled to money of value not less than the amount that they would have received Under Section 53(1) of the Code.***'**

"*47.* *It is also argued that the NCLAT had rejected the first appeal on the ground that the Appellant had only challenged the distribution of the pay-out under the plan inter se the financial creditors of the corporate debtor and not the resolution plan. Accordingly, the amendment to Section 30(2)(b) vide the Amendment Act of 2019 was not applicable. We have already rejected this argument, for the reasons set out above. In our opinion, the contention that the Appellant is not the dissenting financial creditor is to be rejected.***'**

"*48.* *The contention on behalf of the Respondent that there is conflict between Sub-section (4), as amended in 2019, and the amended Clause (b) to Sub-section (2) to Section 30 of the Code does not merit a different ratio and conclusion. Section 30(4) states that the CoC may approve the resolution plan by a vote not less than 66% of the voting share of the financial creditor. It states that the CoC shall consider the feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors Under Sub-section (1) to Section 53, including the priority and value of the security interest of the secured creditors, and other requirements as may be specified by the Board. These are the aspects that the CoC has to consider. It is not necessary for the CoC to provide each assenting party with liquidation value. However, a secured creditor not satisfied with the proposed pay- out can vote against the resolution plan or the distribution of proceeds, in which case it is entitled to full liquidation value of the security payable in terms of Section 53(1) on liquidation of the corporate debtor.* ***The conflict with Sub-clause (ii) to Clause (b) to Sub-section (2) to Section 30 does not arise as it relates to the minimum payment which is to be made to an operational creditor or a dissenting financial creditor. A dissenting financial creditor does not vote in favour of the scheme. Operational creditors do not have the right to vote.*****"**

"49. *In view of the aforesaid discussion, and as we are taking a different view and ratio from India Resurgence ARC Private*

*Limited (supra) on interpretation of Section 30(2)(b)(ii) of the IBC, we feel that it would be appropriate and proper if the question framed at the beginning of this judgment is referred to a larger Bench. The matter be, accordingly placed before the Hon'ble the Chief Justice for appropriate orders***."**

(Emphasis Added)

35. We have already expressed our view in the ***Suasth Healthcare Foundation*** reported in **(2023) ibclaw.in 1000 NCLT** upon examination of the implication of Section 30(2)(b) of the Code in the light of the decision of the Hon'ble Apex Court in ***Essar Steel (Supra).*** It is reproduced hereunder:

> **"*53. On careful examination of Section 30(2)(b) of the I&B Code, 2016 in our view, two legal propositions emerge:***
>
> > ***53.1.*** *Reference to Section 53(1) of the I&B Code is only for the purpose of calculating the amount payable to operational creditors and dissenting financial creditors. Otherwise, there is no place for Section 53 (1) when it comes to the resolution of a corporate debtor under the CIR Process***.'**
> >
> > **"*53.2.*** *The provision of some amount should be made for operational creditors as well as dissenting financial creditors, and the amount so provided cannot be NIL***."**
>
> **"*54.*** *This being a beneficial amendment as observed by the Hon'ble Apex Court,* ***in our view code contemplates a scenario where a provision made to an operational creditor or dissenting financial creditor in a Resolution Plan could be lesser than what they would have got in the event of liquidation in terms liquidation value as per section 53(1). In such a situation the code provides for provision as per liquidation value*****.'**

> **"*55.*** *In fact, in the case of operational creditors the code says that they will have to be paid as per the value provided to them as per the resolution plan, or liquidation value or the amount that would have been paid to them in the plan as if the resolution plan value had been distributed in accordance with the order of priority mentioned in sub-section (1) of Section 53 whichever is higher.***'**
>
> **"*56.*** *Therefore, we are of the view, that is the reason for the word "not less than" used in Section 30(2)(b). If the legislature wanted to restrict the amount payable to them to liquidation value at the most, then the words "not more than liquidation value" would have been used.***'**
>
> **"*57.*** *In view of the above analysis, we are of the view that the code contemplates mandatory allocation to dissenting financial creditors and to operational creditors and the allocation would be the amount provided in the plan or liquidation value whichever is higher and the contention that such creditors can be paid NIL value because liquidation value for them is NIL, would defeat the very purpose of the beneficial amendment made in Section 30(2) of the I&B Code. Such contention made by Ld. Senior Counsels, in our view, will not be correct proposition in a CIRP proceedings, though the same would be correct in a liquidation proceeding under Section 53(1) of the I&B Code***."**
>
> **(Emphasis Added)**

36. Similarly, we have taken a view in ***Export-Import Bank of India and Ors. vs. Eastern Silk Industries Pvt. Ltd. and Ors.*** reported in **MANU/NC/0042/2024** that:

> **"***After careful examination and interpretation of the statutory provisions enshrined in the I&B Code, 2016 along with the leading judgments discussed above, we are of the considered view that:*
>
> ***33.1.*** *Section 30(2)(b) of the Code envisages that the Resolution Professional shall examine the plan received by him to confirm that the resolution plan allocates the payment of debts of*

Financial Creditors either secured or unsecured in such manner as may be specified by the Board which shall not be less than the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or 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.

33.2. *Thus, the Committee of Creditors cannot turn volta face by allocating "No" payment towards the "Unsecured Financial Creditor" who is "not related party", against its admitted claim by quoting a reason that the total admitted claims of the Secured Financial Creditors is more than the Liquidation Value of the Corporate Debtor and therefore, in the case of liquidation of the Corporate Debtor, the Applicant herein being an Unsecured Financial Creditor as per Section 53 of the Code, shall be entitled to NIL value***."**

(Emphasis Added)

37. Thus, we can conclude after analysing the statutory provisions as well as the legal positions laid down in ***Essar Steel*** **(Supra),** ***DBS Bank Limited*** **(Supra),** ***Suasth Healthcare*** **(Supra) and** ***Eastern Silk Industries (Supra)*** that Section 30(2)(b) of the I&B Code enumerates that the resolution plan must ensure the amount to the Operational Creditor which will **not be less than** the amount to be paid in the event of the liquidation value or the amount that would have been paid to them in the plan as if the resolution plan value had been distributed per the order of priority mentioned in sub-section (1) of Section 53 whichever is higher. We are of the view that the legislative intent to provide the word "not less than" in the first line of Section 30(2)(b) of the I&B Code is contemplating a mandatory allocation to the operational creditors and the dissenting financial creditors. Further, the allocation would be the amount provided in the resolution plan or liquidation value whichever is higher and at any

event, such creditors can be paid NIL value because the liquidation value is NIL for them, which would defeat the very purpose of the beneficial amendment made in Section 30(2) of the I&B Code.

Concerning the aspect of "Commercial Wisdom" of the CoC:

38. We are conscious of the legal position that the **"Commercial Wisdom"** of the CoC is supreme and cannot be interfered with when it comes to approving a resolution plan, yet it is incumbent upon this Adjudicating Authority to restrict itself to the four corners of the statute keeping the legislative intent intact and not to render a decision contrary to the view and established as propounded by the Hon'ble Apex Court, when it comes to allocation of an amount to a particular class of creditor. We reiterate that the observation of the Hon'ble Apex Court in the ***Essar Steel (supra)*** and in ***DBS Bank Limited (supra)*** to frame our view.

39. In a very recent judgment rendered by the Hon'ble High Court of Judicature at Madras in ***The National Sewing Thread Co. Ltd. v. The Superintending Engineer TANGEDCO and Anr.*** in **W.P. No.29845 of 2022,** has observed that:

> **"*(e) Operational Creditors & Right to Property***
>
> *21. In a free country where every individual citizen is endowed with the fundamental right to do any lawful business under Article 19(1)(g) of the Constitution, all those who engage in different businesses are free to make their commercial decisions. Some succeed and some fail, and hence loss in business is an inevitable consequence attached to the vagaries of commerce. When misfortune strikes like a*

hurricane it lands some businesses in bankruptcy. And, every time a debtor loses, his or its creditors also lose.

22.1 The object of the IBC evidently is to minimize the loss of various categories of creditors even as it attempts to salvage the corporate debtor from its commercial extinction. Appreciable it is, but it may not be let to gloss over the fact that ***every claim of the operational creditors involves a right to their property under Article 300 A of the Constitution, which the Supreme Court now reads it as a facet of human right and as integral to the right to life under Article 21 of the Constitution*** *vide the ratio in* ***Lalaram Vs Jaipur Development Authority*** *[(2016) 11 SCC 31] read alongside the ratio in* ***Tukaram Kana Joshi Vs MIDC*** *[(2013)1 SCC 353], and approved in* ***Vidya Devi Vs State of H.P.****, [(2020)2 SCC 569)]. This is the major premise.*

22.2 Every right to property has its adjunct rights shadowing it. ***Kolkata Municipal Corporation Vs Bimal Kumar Shah*** *[2024 SCC OnLine SC 968]*

> *"26…….. The binary reading of the constitutional right to property must give way to more meaningful renditions, where the larger right to property is seen as comprising intersecting sub-rights, each with a distinct character but interconnected to constitute the whole. These sub-rights weave themselves into each other, and as a consequence, State action or the legislation that results in the deprivation of private property must be measured against this constitutional net as a whole, and not just one or many of its strands."*

*This necessarily includes the right to enforce or secure the right to property, which we commonly understand as right of action. Ordinarily, a person with a claim has the right of action to enforce the claim before a neutral arbiter, be it the Court or a tribunal, both of which are positioned equidistantly from opposing claims. This is the minor premise.***"**

xxx *xxx* *xxx*

"***(k) Duty of the Adjudicating Authority***

46. From the ***Essar Steel case*** *to the* ***Rainbow Papers case*** *and other decisions, the Adjudicating Authority has been told that its duty is limited to satisfying itself of the due compliance of Sec.30(2) requirement by the CoC when the latter approved the resolution plan. The* ***Essar Steel*** *in particular has held that the Adjudicating Authority shall not substitute its sense of fairness and equity to replace the commercial wisdom of the CoC. The* ***Rajagopalan*** *effect, it must be stated, does not stop with bringing in clarity in understanding the expression 'commercial wisdom' of the CoC, but also has interfered to realign the understanding of the duty of the Adjudicating Authority.* ***Therefore, even though the Adjudicating Authority may not sit in appeal over the commercial wisdom of the CoC, still it is required to exercise a jurisdiction, akin to a revisional jurisdiction, to ascertain the correctness of what has been done before and by the CoC. And, this may have to be appreciated in the backdrop of the Constitutional need to constitute the Adjudicating Authority as a neutral tribunal to save IBC*** *from facing embarrassing moments in view of the law declared in the* ***Madras bar Association case****. Set on this plane and based on the discussion hereinabove made, it could be now derived that* ***the Adjudicating Authority may refuse to give his approval to a resolution plan as approved by the CoC in the following circumstances****:*

a) if the information which forms the basis for the CoC for according its assent to a resolution plan is incomplete and exhibits lack of due diligence on the part of the RP to collect and collate information. This includes failure of the suspended Board of the Corporate debtor to make full disclosure of its affairs, which the IRP or the RP could have discovered with due diligence;

b) where there is lack of transparency vis-a vis the correctness of the information to the knowledge of the operational creditors;

> *c) where the CoC does not provide for the minimum payment which the operational creditors would have received in case of liquidation of the corporate debtor;*
>
> *d)* ***where despite providing for the minimum, the operational creditors are not fairly and equitably treated in terms of Explanation I to Sec.30(2), such as where fairness and equity might have permitted payments above the minimum. To repeat, the Adjudicating Authority may not substitute the commercial wisdom of the CoC with its sense of equity and fairness, but can always refuse his assent to a resolution plan for breach of Explanation I to Sec.30(2) of the IBC****."*
>
> **(Emphasis Added)**

40. The gist of the principles, which could be culled out from the judgment rendered by the Hon'ble Madras High Court supra, would be thus:

i. The object of the I&B Code is to minimize the loss of various categories of creditors even as it attempts to salvage the corporate debtor from its commercial extinction.

ii. Every claim of the operational creditors involves a right to their property under Article 300A of the Constitution of India, which would be read as a facet of 'Human Rights' and an integral part of the 'Right to Life' under Article 21 of the Constitution.

iii. However, having limited scope to challenge the commercial wisdom, the Adjudicating Authority is required to exercise a revisional jurisdiction to ascertain the correctness of what has been done before and by the CoC.

iv. The Adjudicating Authority may refuse a resolution plan as approved by the CoC if it is incomplete and exhibits a lack of due diligence on the part of the RP, and a lack of transparency in the information of the operational creditors.

v. Further, the Adjudicating Authority may not accept the plan if a minimum amount has not been allocated to the operational creditors which they would have received in case of liquidation of the corporate debtor and the operational creditors are not fairly and equitably treated under Explanation I to Section 30(2), in where the fairness and equity might have permitted payments above the minimum.

41. In the present case at hand, the NIL allocation against the total admitted claim of the Operational Creditors of Rs. 96.52 Crore, according to us, does not conform to the requirements referred to in Sub-section (1) of Section 31 of the I&B Code and accordingly, the resolution plan as approved by the CoC **is liable to be rejected**.

(b) The Resolution Plan Value is far less than the Liquidation Value:

42. We find that as per the valuation reports, the average Fair Value is **Rs. 2,55,94,025/-** and the Liquidation Value is **Rs. 2,21,73,675/-**, whereas the plan value is only **Rs. 1.00 Crore**, which is far less than the liquidation value. However, we are conscious of the legal position as laid down in ***Maharashtra Seamless Limited v. Padmanabhan Venkatesh & Ors.*** reported in **(2020) 11 SCC 467: 2020 SCC OnLine SC 67,** that:

> **"***26. **No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value** arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of **Essar Steel (supra)**. We have quoted above the relevant passages from this judgment.***"**
>
> **(Emphasis Added)**

However, the Hon'ble Apex Court held that:

> **"***27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, **the statutory mandate on the Adjudicating Authority Under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of Sub-sections (2) and (4) of Section 30 thereof**. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.***"**
>
> **(Emphasis Added)**

43. We are of the view that though, there is no bar concerning the plan value required to be met or to be greater than the liquidation value, as observed by the Hon'ble Apex Court, but, this huge reduction in the plan value compared to the liquidation value should not be appreciable while the Code aims to resolve the corporate debtor for maximization of value assets of the debtor with the availability of credit and balance the interest of all the stakeholders, including alteration in the order of priority of payment of the Government dues.

(c) Huge reduction in the proposed amount compared to the admitted claim of the financial creditor:

44. We find that the total claim submitted by the financial creditor is of Rs. 818.42 lakh which is totally admitted by the RP. The Resolution Applicant has proposed against the admitted claim of the financial creditor is Rs. 68 Lakh only, which leads to a large haircut of 99.92%. We have noted that an application under Section 66 of the I&B Code (PUFE Application) has been preferred by the RP on 02.06.2021. However, this kind of huge reduction is not appreciable at large when the I&B Code casts a huge responsibility for the public interest to resolve the corporate debtor and reinstate its business.

45. We have noted that the corporate debtor with a liquidation value of Rs. 2.22 Crore is being handed over to the Successful Resolution Applicant for a sum of Rs. 1.00 Crore. Strangely, in the Resolution Plan submitted on 03.09.2021 and the Revised Resolution Plan submitted on 03.02.2022, in Format V, Part B, Clause 3, under the heading ***"Management and control of the business of the Corporate Debtor after approval/ during the term of the Resolution Plan",*** the Resolution Applicant states that "*the resolution applicant shall be eligible for getting the benefit of any amount due to reversal of any transaction against the application filed for preferential transaction before the NCLT and any of the financial creditor or other creditors shall have no claim on such amount*." The same has further been clarified through an Affidavit under **"*Addendum to the Resolution Plan*"** dated 04.02.2022 that if any recovery or realization comes from the application filed by the RP alleging PUFE transactions, the same shall be retained by the Resolution

Applicant only, the Creditors shall not have any rights over them and the said PUFE application shall be pursued by the Resolution Applicant at his own cost. Since, the Success Resolution Applicant is also the beneficiary of the recovery or realization pursuant to the PUFE application filed by the Resolution Professional to the tune of Rs. 5 Crore around, thus, the entire process does not instil any confidence with regard to the fair and equitable distribution to the creditors as contemplated in Explanation I of Section 30(2)(b) of the I&B Code. We wonder how the plan could pass muster at the instance of the members of the CoC.

(d) The Resolution Plan at hand does not conform with the requirements of Section 31(1):

46. As per Sub-sections (1) and (2) of Section 31 of the I&B Code, there are certain requirements need to be met to approve a resolution plan by the Adjudicating Authority such as:

> ***Firstly,*** the resolution plan must be approved by the CoC by the requisite voting shares.
>
> ***Secondly,*** the **plan meets the requirements as referred to in Sub-section (2) of Section 30 of the Code**.
>
> ***Thirdly,*** the resolution plan shall be binding on the corporate debtor and its employees, members, **creditors**, including the **Central and State Government,** or any local authority **to whom a debt in respect of the payment of dues** arising under any law in

force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Fourthly, the resolution plan shall have a clause of its effective implementation.

47. We would refer to Section 31(1) and 31(2) of the Code reproduced verbatim hereinbelow:

Section 31: Approval of resolution plan.

Section 31 (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**, [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.

[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.]

Section 31 (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.

48. In ***Ebix Singapore Private Limited and Ors. vs. Committee of Creditors of Educomp Solutions Limited and Ors.*** reported in **(2022) 2 SCC 401: MANU/SC/0628/2021**, the Hon'ble Apex Court observed that:

> **"***147. In terms of Regulation 39(4), the RP shall endeavour to submit the resolution plan approved by the CoC before the adjudicating authority for its approval Under Section 31 IBC, at least fifteen days before the maximum period for completion of CIRP. Section 31(1) provides that the* ***adjudicating authority shall approve the resolution plan if it is satisfied that it complies with the requirements set out Under Section 30(2) IBC.*** *Essentially,* ***the adjudicating authority functions as a check on the role of the RP to ensure compliance with Section 30(2) IBC and satisfies itself that the plan approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) IBC****. Once the resolution plan is approved by the adjudicating authority, it becomes binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan....***'**
>
> *157. […] the Adjudicating Authority Under Section 31(2) of the IBC can only examine the validity of the plan on the* ***anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan****. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A* ***rejection*** *by the Adjudicating Authority is followed by a direction of mandatory liquidation Under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.***"**
>
> **(Emphasis Added)**

49. Further, in**.** ***Rainbow Papers Limited*** **(Supra),** the Hon'ble Apex Court laid down that:

41. Section 31 of the IBC which provides for approval of a Resolution Plan by the Adjudicating Authority makes it clear that the Adjudicating Authority can approve the Resolution Plan only upon satisfaction that the Resolution Plan, as approved by the Committee of Creditors (CoC), meets the requirements of Section 30(2) of the IBC. When the Resolution Plan does not meet the requirements of Section 30(2), the same cannot be approved.

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43. The learned Solicitor General rightly argued that when a grievance was made before the Adjudicating Authority with regard to a Resolution Plan, the Adjudicating Authority was required to examine if the Resolution Plan met the requirements of Section 30(2) of the IBC. The word "satisfied" used in Section 31(1) contemplates a duty on the Adjudicating Authority to examine the Resolution Plan - The Resolution Plan cannot be approved by way of an empty formality.

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45. As rightly argued by the learned Solicitor General, there can be no question of acceptance of a Resolution Plan ***that is not in conformity with the statutory provisions of Section 31(2) of the IBC. Section 30(2) (b) of the IBC****, casts an obligation on the Resolution Professional to examine each resolution plan received by him and* ***to confirm that such resolution plan provides for the payment of dues of operational creditors, as specified by the Board****, which shall not be less than the amount to be paid to such creditors, in the event of liquidation of the Corporate Debtor Under Section 53, or the amount that would have been paid to such operational creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sub-section 2 of Section 53, whichever was higher, and provided for the payment of debts of financial creditors, who did not vote in favour of the resolution plan, in such manner as might be specified by the Board.*

46. Under Section 31 of the IBC, a resolution plan as approved by the Committee of Creditors Under Sub-section (4) of Section 30 might be approved by the Adjudicating Authority only if the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements as referred to in Sub-section (2) of Section 30 of the IBC. The condition precedent for approval of a resolution plan is that the resolution plan should meet the requirements of Sub-section (2) of Section 30 of the IBC.

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48. ***A resolution plan which does not meet the requirements of Sub-section (2) of Section 30 of the IBC, would be invalid*** *and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor.*

49. ***Section 31(1) of the IBC which empowers the Adjudicating Authority to approve a Resolution Plan uses the expression "it shall by order approve the resolution plan which shall be binding..."*** *subject to the condition that the Resolution Plan meets the requirements of Sub-section (2) of Section 30. If a Resolution Plan meets the requirements, the Adjudicating Authority is mandatorily required to approve the Resolution Plan. On the other hand, Sub-section (2) of Section 31, which enables the Adjudicating Authority to reject a Resolution Plan which does not conform to the requirements referred to in Sub-section (1) of Section 31, uses the expression "may".*

*50. Ordinarily, the use of the word "**shall**" connote a mandate/ binding direction, while use of the expression "**may**" connotes discretion. If statute says, a person may do a thing, he may also not do that thing. Even if Section 31(2) is construed to confer discretionary power on the Adjudicating Authority to reject a Resolution Plan, it has to be kept in mind that discretionary power cannot be exercised arbitrarily,*

whimsically or without proper application of mind to the facts and circumstances which require discretion to be exercised one way or the other.

51. If the established facts and circumstances require discretion to be exercised in a particular way, discretion has to be exercised in that way. If a Resolution Plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. It is also a well settled principle of interpretation that the expression "may", if circumstances so demand can be construed as "Shall".

***52. If the Resolution Plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan*.”**

(Emphasis added)

50. Further, in ***Ghanshyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*** reported in **(2021) 9 SCC 657**, the Apex Court has observed that**:**

“*64. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by adjudicating authority is limited to the extent provided Under Section 31 of the I&B Code and of the appellate authority is limited to the extent provided Under Sub-section (3) of Section 61 of the I&B Code, is no more res integra.*

65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in Sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since

one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.

*66. The resolution plan submitted by the successful resolution applicant is required to contain various provisions viz. provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor Under Section 53; or 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. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also 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 to Clause (b) of Sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts that a distribution in accordance with the provisions of the said Clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of Sub-section (2) of Section 30 of the I&B Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.***"***

(Emphasis Added)

51. In view of the precedents supra, we can safely conclude that if a resolution plan meets the requirements as provided under Section 31(1) of the I&B Code and approved by the CoC by majority, the Adjudicating Authority has no choice but to approve the plan by upholding the commercial wisdom. Conversely, it does not mean that the Adjudicating

Authority has been established to function as a mere rubber stamp affixing authority to allow all the commercial decisions of the CoC, wherein the irregularities or illegalities committed by the CoC, or the insinuating circumstances are galore. A resolution plan that is violative or non-compliant to the provisions of Section 30(2) read with Section 31(1) can be rejected under Section 30(2) of the I&B Code, though the plan has been approved by the CoC under its commercial wisdom.

52. In the present case, we have found grave irregularities in the approval of the resolution plan by the CoC, wherein, the Operational Creditors including the Governmental Authority (CGST) against their Rs. 96.52 Crore admitted claim has been allocated NIL payment merely because at the time of submission of the Resolution Plan before the CoC, there was no admitted claim of the Operational Creditors, and the liquidation value is NIL for those creditors. The RP submitted that as on the date of preparation of the information memorandum, i.e., on 20.11.2020 the admitted claim of the Operational Creditor was Rs. 11,62,378.43 and subsequently additional claimed were received and accordingly captured in the Form H. We are in a dismay that if any additional claim was admitted albeit belatedly, then why it was not communicated to the Resolution Applicant for raising its plan value and accordingly not allocated a minimum amount to such operational creditors.

53. It is noted that the Resolution Professional, CoC and the Resolution Applicant have availed a plethora of opportunity to reconsider the plan and clarify the plan application, that would be evident from our orders dated 01.08.2023, 21.08.2023, 09.01.2024, 09.02.2024, thus, we deem

it fit not to send it again to the CoC for further consideration. However, we abide by the law laid down in ***Jaypee Kensington*** **(Supra)** that:

> **"***[…] In the adjudicatory process concerning a resolution plan under IBC,* ***there is no scope for interference with the commercial aspects of the decision of the CoC;*** *and there is no scope for substituting any commercial term of the resolution plan approved by Committee of Creditors. If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court***."**
>
> **(Emphasis Added)**

54. However, in ***Ebix Singapore*** **(Supra)**, the Hon'ble Apex Court held that:

> **"***157. […] the Adjudicating Authority Under Section 31(2) of the IBC can only examine the validity of the plan on the* ***anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan****. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A* ***rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation Under Section 33****. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan***."**
>
> **(Emphasis Added)**

55. Thus, in terms of the law laid down in ***Ebix Singapore*** **(Supra)**, we are of the view that no purpose would be served in sending the Resolution Plan back to the CoC, to come back to us once again for approval. This will only further delay the resolution of the Corporate Debtor.

To summarize:

56. This resolution plan approved by the CoC of the Corporate Debtor is **rejected** on the following grounds:

a. The plan violates Section 30(2)(b) of the I&B Code with regard to allocation to the operational creditors. Further, providing the NIL amount in the plan to the operational creditors towards their total admitted claim of Rs. 96.52 Crore breaches the mandate as enshrined under Article 300A read with Article 21 of the Constitution of India, as observed by the Hon'ble Madras High Court in the case of ***The National Sewing Thread*** **(Supra).**

b. The plan also has not allocated any sum to the CGST Department (Government of India) when they are actual creditors in terms of Section 82 of the CGST Act. The plan can be rejected when the resolution plan ignores the statutory payments payable to any state government or legal authority *together*, the Adjudicating Authority is bound to **reject** the resolution plan, as held by the Hon'ble Apex Court in the Case of ***Rainbow Papers*** **(Supra).**

c. The corporate debtor with a liquidation value of Rs. 2.22 Crore has been handed over for a sum of Rs. 1 Crore with a provision to provide another sum of around Rs. 5 Crore which may become recoverable pursuant to the PUFE application filed by the RP, which if recovered, would ensure to the benefit of the Resolution Applicant and not the creditors.

d. Thus, this resolution plan does not inspire any confidence in regard to the entire process conducted with regard to transparency, valuation and equitable distribution etc. and consequently, violates the mandatory statutory provisions envisaged in Explanation I to Section 30(2)(b) of the I&B Code.

Conclusion:

57. In terms of the enumerations supra, we are of the considered opinion to **reject** the Resolution Plan as submitted by the Elite Enterprise (Resolution Applicant) and **dismiss** the instant application for the approval of the Resolution Plan.

58. As laid down in ***Ebix Singapore*** **(Supra)** that a rejection of the resolution plan by the Adjudicating Authority would follow by a direction of mandatory liquidation under Section 33 of the I&B Code, we leave it to the wisdom of the CoC to take a pragmatic view whether to initiate the liquidation process of the corporate debtor or seek a revised proposal. A decision be taken at the earliest.

59. **I.A. (IB) No. 1132/KB/2022** filed by the Resolution Professional of the Indian Mining Works Private Limited (Corporate Debtor) is **dismissed** accordingly.

On PUFE Application:

60. We make it clear that dismissal of this Resolution Plan Application shall not affect the proceedings of the PUFE application and the same

shall be pursued after the pronouncement of this order in the manner as prescribed in the Code and the Regulations, by the Committee of Creditors of the Corporate Debtor.

61. A copy of this Order is to be submitted to the Registrar of Companies (RoC) to whom the company is registered, by the Resolution Professional.

62. The **Registry** is directed to send e-mail copies of the order forthwith to all the parties and their Learned Counsels for information and for taking necessary steps.

63. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

64. File be consigned to the record.

65. Post the main Company petition on **08/08/2024.**

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 01st Day of July 2024.

Bose, R. K. [LRA]