IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

I.A/5534/ND/2020
IN
CP IB-1731/ND/2019

[Under Section 30 (6) and 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

IN THE MATTER OF

MAYOGA INVESTMENTS LIMITED **... Financial Creditor**

VERSUS

M/S MK OVERSEAS PRIVATE LIMITED **... Corporate Debtor**

AND

IN THE MATTER OF:

Suresh Kumar Jain
Resolution Professional of
M/s MK Overseas Private Limited
B-1 112, 2nd Floor, Safdarjung Enclave,
New Delhi 110029 **... Applicant**

Versus

1. **Committee of Creditors**

   1.a Venus India Asset-Finance Pvt. Ltd.
   198/12-13, 2nd Floor, Ramesh Market,
   East of Kailash, New Delhi 110065

   1.b HDFC Bank Ltd.
   HDFC Bank House, Senapati Papat Marg,
   Lower Parel (West), Mumbai 400013,

   1.c Yes Bank Ltd.
   IFC 2, 15th Floor, Senapati Bapat Marg,
   Elphinston, Mumbai,400013

1.d Drip Capital Pvt. Ltd.
Solitire Company Park,
Building No.12, 2nd Floor,
Guruhargovindji Marg (Andheri Ghatkopar Link Road),
Andheri (East), Mumbai 400093, Maharashtra

1.e Mayoga lnvestments Ltd.
Off. No. 714,7th Floor,
Goldcrest Business Centre, Opp Mannubhai Jewellers LT Road,
Borivali West, Mumbai, 400092

2. M/s Exclusive Motors Private Limited
Lower Ground Floor, 7/17, Sarvapriya Vihar
New Delhi, South Delhi, Pin 110016 **...Respondents**

Order Delivered on: 08.07.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant	**:** Mr. Sudhir Makkar, Sr. Adv. with Mr. Siddharth Garg, Ms. Aadhya, Advs. for Standard Capital/FC
For the Respondent	**:**
For the SRA	**:** Mr. Anant Nerathia, Ms. Priyanka Varma, Advs.
For the RP	**:** Mr. Sapan Mohan Garg, Adv Palash Singhai and Mr. Harshal Sareen
For the CoC (VSJ)	**:** Mr. P. Nagesh, Sr. Adv., Adv. Aanchal Tikmani

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

1. The Present application i.e., I.A/5534/2020 has been filed under Section 30(6) read with section 31(1) of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations') on behalf of Mr. Suresh Kumar Jain, Erstwhile Resolution Professional ('Applicant')

of M/s MK Overseas Private Limited ('Corporate Debtor'), seeking approval of the Resolution Plan submitted by M/s Exclusive Motors Private Limited ('Successful Resolution Applicant') and approved by the Committee of Creditor ('CoC') in its 20th meeting through e-voting on 02.12.2020 with 76.69% voting in favor.

2. Facts as averred by the Applicant in I.A./5534/ND/2020

a) The Applicant submits that the Corporate Insolvency Resolution Process was initiated against M/s MK Overseas Private Limited ('Corporate Debtor') by this Adjudicating Authority vide order dated 19.09.2019 in C.P IB-1731/PB/2019 on an application filed by Mayoga Investments Limited under Section 7 of the Code, wherein, Mr. Suresh Kumar Jain was appointed as the Interim Resolution Professional (IRP) of the Corporate Debtor who was confirmed to act as the Resolution Professional vide 2nd CoC meeting dated 30.10.2019.

b) The primary business of the Corporate Debtor was processing and exporting of meat products and had its dealings in the global market as well.

c) The Applicant submits that a public announcement was made by the IRP inviting claims from all the creditors of the Corporate Debtor in Form A under Regulation 6 of the CIRP Regulations, in the manner prescribed under the Code and was published on 22.09.2019. The last date for submission of the claims by the creditors was 04.10.2019.

d) The Applicant submits that pursuant to his appointment, the Applicant appointed two Registered Valuers, namely, Rishi Kumar Aggarwal and Ankit Goel for Plant & Machinery, Vikas Aggarwal and Ankush Garg for Financial Assets, Anil Saxena and Sachin Goel for Land & Building as per Regulation 27 of the CIRP Regulations, to carry out the process of determining the fair value and liquidation value of the assets of the Corporate Debtor.

e) The Applicant submits that the Resolution Professional had invited Expression of interest (EoI) from the PRAs and in this regard, advertisements/Form G was published for the first time on 03.12.2019 and for the second time on 07.04.2020 and the last date for submission of EoIs

was 11.05.2020. The latest Form G was uploaded on the website of the IBBI on 05.10.2020.

f) The Applicant submits that the Request for Resolution Plan (RFRP) dated 21.05.2020 including the evaluation matrix was issued to all the Prospective Resolution Applicants (PRAs). The last date for submission of Resolution Plan was extended by the CoC multiple times and finally, the last date for submission of the Resolution Plan was 10.10.2020.

g) The Applicant submits that the Applicant received two binding resolution plans from (i) M/s Fair Exports (lndia) Pvt. Ltd. on 30.09.2020 (and its updated version on 13.11.2020) and (ii) M/s. Exclusive Motors Pvt. Ltd. on 10.10.2020, (and its updated version on 23.11.2020).

h) The Applicant submits that the 2 resolution plans submitted by M/s Fair Exports (lndia) Pvt. Ltd. and M/s. Exclusive Motors Pvt. Ltd. were put to vote in the 20th CoC meeting held on 27.11.2020 and the Resolution Plan submitted by M/s Exclusive Motors Private Limited was approved by the CoC on 02.12.2020 with 76.69% votes in its favor in terms of Section 30(4) of the Code.

i) The total admitted debt was of Rs. 785.66 crores, whereas, the amount provided in the Plan is of Rs. 243.22 crores. The distribution of funds under the Plan is as below:

S. No	Category of Claims	Amount Admitted (INR)	Resolution Amount in case of Assent	Resolution Amount in case of Dissent	Actual Payout	Recovery %age
1.	**Secured FCs**					
(a)	**Assenting:** Venus *(@ Pg 67, Vol 1)*	260.17 Cr	190 Cr **(73.03%)**	N. A.	190 Cr **(73.03%)**	73.03%
(b)	**Dissenting:** HDFC *(@ Pg. 67, Vol 1)*	41.96 Cr	35 Cr (83.41%)	20.34 Cr. **(48.47%)**	20.34 Cr.	48.47%
(c)	**Dissenting:** Yes Bank *(@Pg. 67-71, Vol 1)*	39.42 Cr	11 Cr (27.90%)	11 Cr **(27.90%)**	11 Cr	27.90%
A	**Total Secured FCs**	341.55 Cr	236 Cr	N.A.	221.34 Cr	**64.8%**
2.	**Unsecured FCs**					
(a)	Drip Capital Inc *(@Pg. 66, Vol 1)*	7.13 Cr	28.72 Lakhs **(4.02%)**	14.37 Lakhs (2.01%)	28.72 Lakhs	4.02%
(b)	Mayoga *(@Pg. 66, Vol 1)*	31.75 Lakh	1.28 Lakhs **(4.02%)**	62,500 (1.96%)	1.28 Lakhs	4.02%
B	**Total Unsecured FCs (B)**	7.45 Cr	30 Lakhs	N.A.	30 Lakhs	**4.02%**
C	**Total FCs (A + B)**	349.01 Cr	236.30 Cr	N.A	221.64 Cr	**63.5%**
3.	**Operational Creditors**					
(a)	OCs (Workmen and Employees) *(@ Pg. 78-80, Vol 1)*	2.17 Cr	2.17 Cr			100%
(b)	OCs (Statutory Dues)	396.87 Cr (Form H)	1.50 Cr			0.38%
	(@ Pg. 80-84, Vol 1)					
(c)	Other OCs *(@ Pg. 84-86, Vol 1)*	37.35 Cr	2 Cr			5.35%
D	**Total OCs**	436.40 Cr	5.67 Cr			1.29%
4.	**Others**					
E	Other Creditors *(@ Pg. 86-88, Vol 1)*	25 Lakh	Nil			Nil
	Total (A+B+C+D+E)	785.66 Cr	**241.97**	**NA**	227.31 Cr	28.9%

j) The principal business of the SRA (M/s Exclusive Motors Pvt. Ltd.) is to bring some of the leading ultra-premium luxury segment cars in Indian market, keeping in view the growth of the Indian economy, globalization and quest of the elite Indian consumers for these luxury cars. At present, the Company is the authorised dealer of some of the most luxury brands globally recognised in automobile sector, namely "BENTLEY MOTORS LTD. UK" and has been associated with other leading luxury brands in the past.

k) The Applicant submits that the Resolution Professional sent a Letter of Intent dated 03.12.2020 to the M/s Exclusive Motors Private Limited (SRA), thereby,

intimating that the Resolution Plan submitted by it in the CIRP of the Corporate Debtor has been approved by the CoC. The said Letter of Intent was unconditionally acknowledged by the SRA on 04.12.2020.

l) The Applicant further submits that the SRA provided the copy of the Sanction Letter for Credit Facility of Rs. 150 Crore and credit arrangement of Rs. 50 Crore on 04.12.2020.

m) The applicant further submits that the approved Resolution Plan meets all requirements envisaged under the Code and hence, placed on record Compliance Certificate in Form H, as required under Regulation 39(4) of the CIRP Regulations.

n) Hence, the Applicant seeks before this Adjudicating Authority the approval of the Resolution Plan submitted by M/s Exclusive Motors Private Limited which was approved by the CoC on 02.12.2020.

3. **<u>Objections to the Resolution Plan on behalf of the Yes Bank</u>**

While the Applicant sought approval of the Resolution Plan submitted by M/s Exclusive Motors Private Limited so approved by the CoC in the 20th COC meeting through e-voting on 02.12.2020 with 76.69% votes in favor, the dissenting Financial Creditor of the Corporate Debtor i.e., Yes Bank Limited (substituted by Standard Capital Markets Ltd.), "the Objector" having 11.29% voting share in the CoC had raised objections against the approval of the Resolution Plan by filing its reply to the Resolution Plan application bearing I.A. 5534/ND/2020. During the course of proceedings, the Yes Bank had filed I.A. 3471 of 2021 for conditional withdrawal of its objections, subject to the modification of the Resolution Plan by the SRA. This IA for conditional withdrawal of objections was allowed on 11.03.2022. Another I.A. No. 3925 of 2021 was filed by Yes Bank with similar prayer which was withdrawn on 08.09.2021. The counsel for Yes bank later submitted that since the application for withdrawal of objections was a conditional one on account of failure of the SRA to modify its Plan, the objections challenging the approval of the Plan in I.A. 5534 of 2020 would continue to survive. It is pertinent to mention that Yes Bank assigned its debt to JC Flowers Asset Reconstruction Company Pvt. Ltd. (JC Flowers), as recorded in the order of this Adjudicating Authority dated 30.05.2023. Further, JC

Flowers assigned the debt to Standard Capitals Markets Ltd., which was recorded in the order dated 21.11.2023. The objections raised by the dissenting Financial Creditor are as under:

i) The Objector has submitted that the Resolution Plan affords differential treatment to Yes Bank and other financial creditors within the same class. Each secured financial creditor has been allocated a different percentage of their admitted claim amount. On the contrary, all unsecured financial creditors (Mayoga and Drip Capital) have been allocated a fixed percent of 4.02% each. Thus, different secured creditors have not been given the similar treatment, whereas, different unsecured creditors have been given similar treatment. The secured financial creditor Venus India Asset-Finance Private Limited is allocated 190 crores out of their admitted claim of INR 260,17,17,397/- i.e. 73.07% of their admitted claim. HDFC Bank is allocated 35 crores out of their admitted claim of INR 41,96,06,193/- i.e. 83.41% of their admitted claim (in case of assent to the Plan) and INR 20.35 crores (in case of dissent), i.e. 48.47% of their admitted claim). However, Yes Bank is allocated only INR 11 crores (both in case of assent or dissent) out of their admitted claim of INR 39,42,22,009/-, i.e. 27.90% of their admitted claim.

ii) The Objector submits that both the HDFC Bank and Yes Bank are dissenting financial creditors. The HDFC Bank, having 12.02% voting share has correctly been allocated INR 20.35 crores on liquidation value of INR 165.60 crores. On the other hand, Yes Bank, that has 11.29% voting share, has only been allocated INR 11 crores, as against INR 19.11 crores that they are actually entitled to on the liquidation value in terms of Section 30(2)(b) of the Code.

iii) The Objector submits that the Corporate Debtor owned a property in Daryaganj forming part of its assets in the audited balance sheet as on 31.03.2019 which was mortgaged with the Yes Bank. The Corporate Debtor constructed the flats and sold the same to the third parties without obtaining no-objection from Yes Bank. Therefore, the said Daryaganj property was written off from the books and financial statements of the Corporate Debtor as on CIRP initiation date i.e. 19.09.2019. The third-party purchasers

approached the Hon'ble High Court of Delhi with regard to the non-disclosure of the pre-existing mortgage on the said property by the Corporate Debtor, whereby, the Hon'ble High Court of Delhi passed a status quo order dated 13.09.2019 and further adjourned the matter sine die on account of moratorium imposed on the Corporate Debtor vide order dated 21.10.2020.

iv) The Objector submits that the Daryaganj property does not form part of the liquidation estate of the Corporate Debtor, having already been written off in the books of the Corporate Debtor, however, the said property is included in the Resolution Plan of the SRA. It is further submitted that the Resolution Plan, by virtue of Clauses 4.2.6.1 and 5.3.5.13, purports to assign all rights and liabilities qua the said property to the Yes Bank. The Objector further submitted that there are no property rights attached to the said property with the Corporate Debtor which can be assigned, the net effect of the plan would be Yes Bank being saddled only with liabilities qua the said property and that it is beyond the remit of any Resolution Plan to impose liability on a Financial Creditor.

v) The Objector submits that Clause 1.9.1 of the RFRP required submission of Performance Guarantee by the SRA within Five days of the date of approval of the Successful Plan by the CoC, for an amount worth Rs. 36.30 crores, which is equivalent to 15% of the Resolution amount which would be valid for initial period of 6 months from the approval of plan by CoC. However, the SRA failed to deposit the same within 5 days from approval of the plan by CoC. Further, in terms of Clause 5.20.3 of the Plan, the SRA proposed to continue with EMD of INR 10 crores deposited by them as performance security after approval by CoC and stated that the balance amount of INR 26.30 crores shall be provided after the approval of the Plan by this Adjudicating Authority. The Plan is therefore, not in compliance of Regulation 36B(4A) and therefore, not in compliance of Section 31(1) and Section 30(2) of the Code.

vi) The Objector submits that the proposed Resolution Plan is conditional as Clause 11.8.1 of the Plan permits the SRA to terminate the Plan in case the

reliefs and concessions sought by it, in clauses 5.15.2 of the Plan are not granted by this Adjudicating Authority. Clause 5.15.2 of the Plan is as below:

> *"The Resolution Applicant requests for the following reliefs, concession and dispensations from the NCLT for the successful implementation of the Resolution Plan and each of these may either be specifically included in the NCLT order approving the Resolution Plan or, if not expressly included, shall be deemed to be included in such order unless expressly disallowed by the NCLT….."*

It has been submitted that the reliefs sought at (i), (v), (vi), (xii), (xiii), (xiv), (xix), (xxi), (xxii), (xxiv), (xxv), (xxviii) of the Resolution Plan are illegal and cannot be allowed.

vii) The Objector submits that Clause 5.5.2 of the Plan clearly differentiates that employee having claim of less than INR 50,000/- shall be entitled to be paid in full and the payment of employees having claims of more than INR 50,000/- shall be limited to INR 50,000/-. However, Clause 6.3 of the Plan provides that full payment of 2,17,24,990/- shall be made to all workmen and employees. Therefore, the Resolution Plan stipulates differential treatment of the same class on the basis of admitted claims of employees.

viii) The Objector submits that Clause 5.5.4 of the Plan gives SRA the power to terminate contracts with workmen and employees, without making any mandatory payments to them in accordance with law. Further, the Plan does not contain any provision for the payment of statutory dues, ongoing litigations with Income tax, VAT and Excise Departments/ secured creditors, etc.

ix) The Objector further submits that SRA is completely dependent on third party financiers and at the time the Plan was being considered by CoC, it did not have information on proper source of funds available with SRA.

x) This Adjudicating Authority had by its order on 14.09.2023 directed the SRA to furnish new and current sanction letters/letters of comfort from the financial institutions since the earlier ones could be treated as outdated. In compliance of the order dated 14.09.2023, the SRA has submitted sanction letter/letter of comfort from ICICI Bank/ Garware Financial Corporation. The

objector has stated that letter from ICICI Bank Ltd. is only a non-binding term sheet and has many pre-conditions. Therefore, it cannot be said to constitute a binding sanction letter. With respect to the comfort letter issued by Garware Financial Corporation, the objector has stated that the balance-sheet of Garware Financial Corporation in the year 2021-2022 is valued at Rs. 22,98,33,000/- and for the Financial Year 2022-2023 its value is Rs. 23,05,10,000/- and questions how a company can extend such facility to the SRA which is almost 5 times the value in its balance sheet.

xi) Further, the SRA failed to demonstrate that the Resolution Plan has provisions for its effective implementation and how the plan is viable and feasible.

xii) The Objector further submits that Resolution Plan was approved in the 20th CoC meeting held on 27.11.2020, despite Yes Bank, HDFC and Drip Capital requesting for deferment of the meeting.

4. The Applicant (Resolution Professional) responded to the objections raised by the objector vide its reply dated 21.01.2021, wherein the applicant had explained in detail about all the measures and safeguards adopted by the applicant in the entire Corporate Insolvency Resolution Process to ensure transparency and it is also submitted that the objector had been a participant in every CoC meeting and have witnessed the entire Corporate Insolvency Resolution process. The submissions made by the Applicant in the reply are as follows:

i) The Yes Bank has been treated as Secured Creditor for the purpose of the Resolution Plan and appropriate corrections to that effect have been incorporated in the Resolution Plan by the Resolution Applicant.

ii) With regard to valuation of Daryaganj (Ansari Road Property), the valuer Report dated 09.06.2020 states that since the ownership of said property no longer resides with the Corporate Debtor, realizable value of said property to Corporate Debtor is Zero.

iii) Yes Bank has itself got conducted the valuation of the Daryaganj Property on 26.06.2019 and by 26.06.2019, a series of Sale Deeds were executed in favour of the Flat Buyers, however, the Legal Search Report mentions none of them,

which shows negligence on the part of Yes Bank in keeping its mortgage intact qua the Daryaganj Property.

iv) Yes Bank on 22.08.2019 got issued a Public Notice cautioning the general public not to deal with property in any manner after most of the sale deeds in the property were executed and third-party rights were created.

v) The Daryaganj Property was sold vide 26 Conveyance/ Sale Deeds for total consideration of Rs. 11.86 Crores i.e. at book loss of Rs. 2.32 Crores, the proceeds of which were diverted to various Bank Accounts of the Corporate Debtor and an amount of Rs.2.23 Crores was received in the bank account maintained with YES Bank which is in violation of sanction letter issued by YES Bank and thus it would not be right to say that the Yes Bank had no knowledge of the third-party interest in the property.

5. The Successful Resolution Applicant (M/s Exclusive Motors Private limited) also responded to the objections raised by the objector vide its reply dated 08.03.2021. The submissions made by the SRA in the reply are as follows:

i) The Resolution Plan of the SRA is approved by the CoC with requisite majority. Therefore, the objector Yes Bank is challenging the commercial wisdom of the CoC.

ii) Before the Resolution Plan was placed for approval of the CoC, the Resolution Professional furnished a report confirming that the Resolution Plan meets all the requirements of the Code and the CIRP Regulations. Further, the Resolution Plan reaffirmed the same by filing a compliance certificate in Form-H as required under Regulation 39(4) of the CIRP Regulations.

iii) There is no differential treatment among same class of creditors. In the instant CoC, the creditors are uniquely placed, all having different types of securities and charges over assets of the Corporate Debtor. Yes Bank is treated as Secured Creditor only for the purpose of Resolution Plan. Hence, HDFC and Yes Bank may be secured Financial Creditors, but cannot be placed on the same pedestal.

iv) As per the valuation done by the Yes Bank, the total value of the property is Rs. 26.40 Cr. The sale of units for Rs. 11.86 crores have already been done

and the remaining amount of approximately 14 crores is left to the benefit of Yes bank.

v) The sale of flats pertaining to Daryaganj property had already taken place prior to the CIRP initiation date for which full payment has been made by the homebuyers to various accounts of the Corporate Debtor including Yes Bank. Therefore, Daryaganj Property is not an asset of the Corporate Debtor as on the CIRP initiation date.

vi) By virtue of Clause 5.3.5.15 of the Plan, all rights and liabilities of the Corporate Debtor with respect to the Daryaganj Property shall be irrevocably assigned to the Yes bank.

6. We have heard the submissions made by the Ld. Counsel for the Applicant (Resolution Professional), SRA and the Objector Yes Bank (substituted by Standard Capital Markets Ltd.) and have carefully gone through the documents produced on record.

7. It is observed that the Objector Yes Bank (substituted by Standard Capital Markets Ltd.) has raised certain objections with respect to the approval of the Resolution Plan proposed by the SRA. In this regard, the Resolution Professional and the Successful Resolution Applicant have responded to the objections so raised by the SRA. On the perusal of the Resolution Plan proposed by the SRA, it is observed that all the unsecured financial creditors belonging to the same class (Mayoga and Drip Capital) have been allocated a fixed percent of 4.02% each, whereas, secured financial creditors have been allocated different percentage of their admitted claim amount. Venus India Asset-Finance Pvt. Ltd. is allocated 73.07% of their admitted claim, HDFC Bank is given 83.41% of the admitted claim in case of the assent and 48.47% of the admitted claim in case of dissent, whereas, Yes Bank is allocated only 27.90% of their admitted claim whether it assents or dissents to the Plan. Further, both the HDFC Bank and Yes Bank are dissenting financial creditors yet HDFC Bank having 12.02% voting share has been allocated INR 20.35 crores on liquidation value of INR 165.60 crores, on the other hand, Yes Bank, that has 11.29% voting share, has only been allocated INR 11 crores, as against INR 19.11

crores that they are actually entitled to on the liquidation value. It is therefore, evident that different unsecured creditors have been given the same treatment, while different secured creditors have not been given similar treatment.

As per the requirement of Section 30(2)(b)(ii) of the Code, the Resolution plan shall provide 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. However, in the present case, the Yes Bank is allocated much less than its liquidation value. Therefore, the requirement laid down under Section 30(2)(b)(ii) of the Code is not complied with in the plan proposed by the SRA.

8. Further, it is observed that both the HDFC Bank and Yes Bank are the secured creditors belonging to the same class and hence, entitled for similar treatment. In this regard, it is the contention of the SRA that even the secured creditors of the same class can uniquely be placed and hence, treated differently. Such a contention of the SRA does not hold any ground in light of the decision of the Hon'ble Supreme Court in the case of **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors., (2020) 8 SCC 531**, whereby, the Hon'ble Supreme Court has stated that for equal class of creditors, there shall be equitable treatment. The Hon'ble Supreme Court has observed as under:

> *"57. ..... it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and this Court's judgment, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code - to resolve stressed assets.* ***Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational****."*

9. It is further observed that as per the mandate of Regulation 36B(4A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RFRP is required to provide a time period, within which the SRA has to submit a

performance security, upon approval of the Resolution Plan by the CoC under Section 30(4) of IBC in order to ensure that the SRA would not withdraw from the Plan after approval by the CoC. Accordingly, in the instant case, Clause 1.9.1 of the RFRP required submission of Performance Guarantee by the SRA within Five days of the date of approval of the Successful Plan by the CoC, for an amount equivalent to 15% of the Resolution amount (i.e. INR 36.30 crores), which will be valid for initial period of 6 months from the approval of plan by CoC, however, it failed to deposit the same within 5 days from approval of the plan by CoC. Further, in terms of Clause 5.20.3 of the Plan, the SRA proposed to continue with EMD of INR 10 crores deposited by them as performance security after approval by CoC and stated that the balance amount of INR 26.30 crores shall be provided after the approval of the Plan by this Adjudicating Authority. It is observed that the non-deposit of performance security by the SRA is violative of Regulation 36B(4A) and hence, is in contravention of Section 30(4) of the Code.

10. It is further observed that Clause 11.8.1 of the Plan empowers the SRA to terminate the Plan in case the reliefs and concessions sought by it, in clauses 5.15.2 of the Plan are not granted by this Adjudicating Authority, which makes the plan conditional. Clause 11.8.1 of the proposed Resolution Plan is reproduced hereunder for ready reference as:

> *"11.8.1.* ***The Applicant may terminate this Resolution Plan through a notice to the lead member of the CoC in writing****, upon the occurrence of any fact, matter, event, circumstance; condition or change which materially and adversely affects or could reasonably be expected to materially and adversely affect, individually or in aggregate, the business, operations, assets, liabilities, conditions (whether financial, trading or otherwise), prospects or operating results of the Company on or before the Closing Date, including but not limited to a hindrance to clear title and possession over the assets of the Company being secured by the Company and the Applicant (as provided in Clause 6.4) and* ***if the reliefs sought in Clause 5.15 are not granted by the NCLT.****"*

With regard to the reliefs and concessions sought by the SRA, we are of the view that the blanket nature of the reliefs/concessions sought in sub-clauses (i), (v), (vi), (xii), (xiii), (xiv), (xix), (xxi), (xxii), (xxiv), (xxv), (xxviii) of Clause 5.15.2 of the Resolution Plan falls within the jurisdiction of various government authorities and which are regulated by the concerned enactments and are therefore, not within the scope of this Adjudicating Authority to grant. Therefore, the inclusion of the above-mentioned sub-clauses in the Resolution plan does not appear to be justified and since the SRA is relying on these reliefs/concessions for implementation of the Plan, rejection of such reliefs/concessions would seriously jeopardize the implementation of the Resolution Plan. Further, if a Successful Resolution Applicant is permitted to withdraw the plan even after obtaining approval from the CoC, then the same would derail the purpose of the IBC. Reference is taken from the decision of the Hon'ble Supreme Court in the case of **Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr., (2022) 2 SCC 401,** whereby, the Hon'ble Supreme Court has observed as under:

> *"145. ..... The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. It cannot demand vesting of certain powers and rights which have been conspicuously omitted by the legislature under the statute, in furtherance of the policy objectives of the IBC. A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy. In Essar Steel (supra), a three judge Bench of this Court, affirmed a two judge Bench decision in K Sashidhar (supra), prohibiting the Adjudicating Authority from second-guessing the commercial wisdom of the parties or directing unilateral modification to the Resolution Plans. These are binding precedents. Absent a clear legislative provision, this court will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC*

to re-negotiate a submitted Resolution Plan or agree to its withdrawal, at the behest of the Resolution Applicant. ***The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of approval or rejection, as the case may be, under Section 31.***

150. ……. Section 31(1) ensures that the Resolution Plan becomes binding on all stakeholders after it is approved by the Adjudicating Authority. ***The language of Section 31(1) cannot be construed to mean that a Resolution Plan is indeterminate or open to withdrawal or modification until it is approved by the Adjudicating Authority or that it is not binding between the CoC and the successful Resolution Applicant……***

153. Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. ***A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority.*** *It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority……*
The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. *The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC.*

154. ..... It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, ***conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable.....***

155. ..... the recommendations made in the Insolvency Law Committee Report of February 2020 discussed above indicate that ***the aim is to ensure that the Resolution Plan placed before the Adjudicating Authority should reach a certain finality, even in the context of governmental approvals. A conditionality which allows for further negotiations, modification or withdrawal, once the Resolution Plan is approved by the CoC would only derail the time-bound process envisaged under the IBC.***

156. ..... ***it is best left to the wisdom of the legislature, based on the experiences gained from the working of the enactment, to decide whether the option of modification or withdrawal at the behest of the Resolution Applicant should be permitted after submission to the Adjudicating Authority; if so, the conditions and the safeguards subject in which it can be allowed and the statutory procedure to be adopted for its exercise."***

Thus, based on the decision of the Hon'ble Supreme Court in Ebix Singapore Pvt. Ltd. (supra), it is evidently clear that the Successful Resolution Applicant can not be granted an open window to terminate the plan, in case, its discretions are not met. Hence, the Clause 11.8.1 of the Plan makes the Plan conditional and as such fails the test of 'feasibility' and 'viability' as laid down under Section 30(4) of the Code.

11. At this juncture, it is pertinent to refer to Section 31 of the Code which lays down as under: -

> ***"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, [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.]***
>
> ***(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...."***

It is observed that in the present case, the Resolution Plan of the SRA makes the differential treatment amongst the same class of creditors i.e. both HDFC Bank and Yes Bank being the dissenting secured financial creditors who have been allotted different percentages of their admitted claim amount. Further, both the Yes Bank and HDFC Bank are allotted different percentage of the liquidation value which they are entitled to receive. The same is not permissible keeping in mind the intent of the Code and the above discussed judicial precedents. Hence, the proposed Plan is not in line with the provisions contained under Section 30(2) of the Code and is also violative of the observation made by the Hon'ble Supreme Court in Essar Steels (supra).

12. It is further observed that as per the mandate of Section 30(2) of the Code, the plan shall contain provisions as to the effective implementation of the plan. However, in the present case, at the time of the approval of the Plan by the CoC, the SRA had failed to disclose the source of funds to be implemented in the resolution of the Corporate Debtor. Further, it is observed that the SRA is majorly dependent on the third-party financiers. The circumstances hereunder, significantly proves that the CoC has approved the Resolution Plan of the SRA without satisfying itself as to the financial capability of the SRA with regard to the implement the Plan.

13. With regard to the new sanction letter/comfort letter submitted by the SRA, the objector has raised certain objections/reservations whether such sanction letter/comfort letter would with a degree of certainty make available the requisite funds from these financial institutions to implement the Resolution Plan. Without going into the details/merits, it is our considered view that the CoC would be in a better position to examine these documents and their relevance in respect of availability of funds and hence, successful implementation of the Plan. Therefore, in view of the specific observations aforesaid and judicial decisions, we are of the view that the plan has become unimplementable and does not meet the express provisions/parameters of the Code and deserves to be sent back to the CoC for fresh consideration.

14. It is further observed that the Hon'ble Supreme Court in the case of **Greater Noida Industrial Development Authority Vs. Prabhjit Singh Soni & Anr. (2024) 2 SCR 258,** pertaining to the facts of that case has observed that the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC. Consequently, the Hon'ble Supreme Court had remanded back the matter to CoC for re-submission after satisfying the parameters set out by the Code. Further, the Hon'ble Supreme Court in the case of **Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr., (2022) 2 SCC 401** has held that *".....The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section*

30(2) of the IBC, before exercising its powers of approval or rejection, as the case may be, under Section 31."

15. This Adjudicating Authority finds sufficient and significant grounds as aforesaid, which shows that the Resolution plan did not meet the parameters laid down under Section 30(2) of the Code. Therefore, in the light of the decision of the Hon'ble Supreme Court in the **Prabhjit Singh (supra)** and **Ebix Singapore Private Limited (supra)** and in the light of the observations made hereinabove, this Adjudicating Authority deems it fit to send the matter back to the CoC for re-consideration.

16. Accordingly, **I.A. No. 5534/ND/2020 in CP IB No. 1731/ND/2019** stands **disposed of** in light of the aforesaid observations.

Let the copy of the order be served to the parties.

Sd/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)