BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA 439 of 2020 in IA 476 of 2018 CP(IB) 14 of 2018

Coram: Hon'ble Mr. MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
Hon'ble Mr. VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 08.09.2020

Name of the Company: Suraksha Asset Reconstruction Ltd & Ors
V/s
Shailen Shah RP For Wind World (India) Ltd &
Anr

Section: Section 60(5) IBC, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court, vide separate sheet.

(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)

(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Dated this the 8th day September, 2020.

sen

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1

IA 439 of 2020/NCLT/AHM/2020 in
IA 476 /2018 in CP (IB) 14/7/NCLT/AHM/2018

In the matter of:

1. Suraksha Asset Reconstruction Limited
(formerly known as Suraksha Asset
Reconstruction Private Limited) & Ors.

Having its registered office at:
Naman Midtown, 'A' Wing,
20th Floor, Senapati Bapat Marg,
Prabhadevi, Mumbai-400013.

2. Lakshdeep Investment and Finance Private Limited,
Having its registered office at:
3, Narayan Building, 23, L.N. Road,
Dadar (East), Mumbai-400014

3. Suraksha Reality Limited,
Having its registered office at:
3, Narayan Building, 23, L.N. Road,
Dadar (East), Mumbai-400014.
(Jointly known as "Suraksha Consortium")

.....Applicants

Versus

1. Shailen Shah, Resolution Professional of
Wind World (India) Limited,
Having office at:
5th Floor, Lodha Excelus,
Apollow Mills Compound,
NM Joshi Marg, Mahalaxmi,
Mumbai-400011

2. Committee of Creditors,
Through Mr. Shailen Shah,
Resolution Professional of

Wind World (India) Limited,

Having office at:
5th Floor, Lodha Excelus,
Apollo Mills Compound,
NM Joshi Marg, Mahalaxmi,
Mumbai-400011

.....Respondents.

Date of hearing 27th August, 2020

Order delivered on 8th September, 2020.

Coram: Madan B. Gosavi, Member (J)
Virendra Kumar Gupta, Member (T)

Appearance ...

Learned Senior Counsel Mr. Mihir Thakore a.w. Learned Counsel Mr. Sandeep Singhi, for the Successful Resolution Applicant.
Learned Senior Counsel Mr. Navin Pahwa, for the Resolution Professional.
Learned Senior Counsel Mr. Manish Bhatt a.w. Learned Counsel Mr. Rusabh Shah, for the CoC.

[Per : Bench]

1. Through this Application, the Resolution Applicants are seeking permission from this Authority to withdraw Resolution Plan post CoC's approval.

2. The relevant facts are that the Corporate Debtor was admitted into CIRP vide order of this Authority dated 20.02.2018. Thereafter, the Resolution Professional published an invitation for Expression of Interest (EOI) on 08.05.2018.The last date for submission of it was fixed on 26.05.2018.

KPMG India Pvt. Ltd. was appointed as Process Advisors who issued process document on 07.06.2018 which was subsequently amended a few times. The last amendment was carried out on 06.08.2018 and date for submission of amending Resolution Plan was fixed as 20.08.2018. The CIRP period was extended by 90 days vide order of this Authority dated 01.08.2018. The Applicants submitted Resolution Plan firstly on 20.08.2018 which was revised subsequent to discussion with COC and final Plan along with addendum was submitted on 13.11.2018. The said Resolution Plan was approved by 69.87 per cent of voting share by COC on 16.11.2018 one day before expiry of 270 days. IA No. 476 of 2018 was filed by Resolution Professional on 18.11.2018 before this Authority for approval of the said Resolution Plan. The Applicants also rendered performance Bank guarantee for a sum of Rs. 75 Crores on 26.11.2018 which was valid for a period of nine months. The validity of Bank guarantee was extended from time to time and last extension of two months was done on 19.08.2020 as per the directions of this Authority on a prayer made by the Resolution Applicants. The said Resolution Plan is pending for approval of Adjudicating Authority as various Interlocutory Applications have been filed by Financial Creditors, Operational Creditors, Suspended Management and other Stakeholders objecting the said Resolution Plan along with few other applications. It is also to be noted that these applications are also pending for adjudication.

3. In the backdrop of these facts, the learned senior counsel for Applicants submitted chart of dates and events of entire CIRP conducted so far. His

thrust of argument was that various applications were filed and time got consumed in completion of pleadings in various litigations which included a petition filed by **M/s. Sonu Cargo Movers (I) Pvt. Ltd**, Operational Creditor before the Hon'ble High Court of Gujarat, though, which was ultimately dismissed by the Hon'ble Gujarat High Court but application for approval of the Resolution Plan was not heard during the pendency of the same. This case also went up to the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its order dated 20.06.2019 directed that the matter be heard by a Bench comprising of one Judicial Member and One Technical Member. It was also pointed out that said Operational Creditor also challenged the validity of Insolvency Bankruptcy (Amendment) Act, 2019 before Hon'ble Supreme Court wherein the Petitioner was directed to raise all contentions before NCLT. Learned senior counsel also submitted copy of decision of Hon'ble Gujarat High Court in Civil Application No. 9118 of 2020 to again emphasize on the fact that even the issue hearing of this application was challenged before Hon'ble Gujarat High Court as late as in July 2020 which goes to show that the litigation in future cannot be ruled out at all, hence, even if the plan is approved, the same may not attain finality even in next one or two years. It was also contended that Adjudicating Authority vide its order date 03.12.2019 directed the CoC to revisit the Resolution Plan of applicants in the light of judgment of the Hon'ble Supreme Court in the Case of ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta*** pursuant to that CoC

meeting was held on 23.12.2019 wherein Suspended Management raised the issue of applicability of Section 29-A by submitting a representation to the Resolution Professional for that purpose. In the said meeting of COC, plan was approved by a majority of votes of 93.63 per cent. Subsequently, the Suspended Management filed an application challenging the eligibility of Resolution Applicants u/s 29-A of Code. A petition was also filed by IREDA on the same ground. These petitions were heard from time to time, however, due to pandemic situation; the matters were not listed after 16.03.2020 and are still pending. Based upon these facts, he contended that more than 600 days had lapsed since the date of approval of the said Resolution Plan by CoC on 18.11.2018 and due to such delay Resolution Plan lost its relevance.

4. Thereafter, the learned senior counsel initiated his legal arguments by stating that **speed and timeliness** were corner-stones of the scheme of IBC, hence, for non-compliance, thereof, the applicants were eligible to withdraw from the Plan. In this regard, he referred to Section 12 as amended by the Insolvency and Bankruptcy (Amendment) Act, 2019 and contended that the maximum period including the time taken in legal proceedings could be 330 days from the date of insolvency commencement date and in the present case, such period of 330 days expired in January, 2019. He further, contended that such period of 330 days was sacrosanct as a matter of policy and it could be extended only in exceptional or extraordinary circumstances as held by the Hon'ble Supreme Court in the case of ***Committee of Creditors of Essar Steel India Limited Vs. Satish***

Kumar Gupta. In this regard, he placed strong reliance on the observations of Hon'ble Supreme Court in Para 108 of the said order and contended that in the present case no such circumstances existed. He pointed out that in the present case even no application was made before this Authority to extend the CIRP period beyond 330 days. In this background, he emphasized on the fact that the Resolution Plan was submitted by the applicants with an object of reviving the business of the Corporate Debtor in time-bound manner according to its own vision and business plan which could not be achieved. It was also submitted that because of depletion in the value of assets of the Corporate Debtor due to pandemic situation and various contracts/agreements being cancelled or in the process of cancellation, hence, applicants cannot revive the Corporate Debtor as envisaged and also cannot recover its investment in the manner as considered by the applicants while submitting Plan. For this proposition, he drew our attention to various documents showing loss of contracts in the area of O & M segment of the Corporate Debtor. A chart was also submitted for this purpose. It was also contended that there was also deterioration in the value of Independent Power Producers (IPP) business of Corporate Debtor. In addition to this, the learned senior counsel contended that complete closure of Daman Unit was to be done as per the terms of Resolution Plan which was not done and huge liability towards workers dues had mounted which further made the proposal of Resolution Applicants unviable and non-feasible and, therefore, its implementation

was not possible. He further pointed out that additional liability towards workers' dues could be in the range of 40 Crores or more which was a huge sum and if applicants were compelled to continue with the plan in spite of this fact then it would be a grave injustice to the applicants.

5. The learned senior counsel continued with his arguments by pointing that information relating to termination of O & M contracts to the extent of 174MW had not been included in the Information Memorandum and it was subsequently uploaded on the website, hence, in the present case, there was a case of mis-statement of facts as well. He also drew our attention to various letters written to the Resolution Professional to share current status of affairs so that applicant could make an assessment of materially adverse impact on the business of the Corporate Debtor due to lapse of time, however, the same was not provided. Thereafter, he took us to the relevant paragraphs of the decisions of Hon'ble Supreme Court in the case of *Mobilox Innovations Pvt.* Ltd. to support his contention that speed was the essence of the IBC as earlier experiments failed because of inordinate delays only. He also drew our attention to paragraphs 64 to 79 to the decision of Hon'ble Supreme Court in the case of *Arcelormittal India Pvt. Ltd.* wherein the Hon'ble Supreme Court had emphasized on timely completion of Resolution Process. He also drew our attention to the observations of Hon'ble Supreme Court in the Case of ***Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company Limited and Others*** reported in (2017) 16 Supreme

Court Cases 143 for the same proposition and drew our attention to paragraphs 17 and 18 of the said decision.

6. The learned senior counsel, thereafter, placed strong reliance on the decision of NCLT Principal Bench in the case of ***Committee of Creditors of Educomp Solutions Ltd. vs. Ebix Singapore Pte & Anr in C.A No. 1816 (PB) of 2019 in CP (IB) No. 101 (PB) of 2017*** order dated 02.01.2020, for its plea that withdrawal of Resolution Plan was Permissible. He specifically referred to Para 19 wherein it was observed that there was no absolute bar under any provisions of the Code on the withdrawal of Resolution Plan. It was also submitted that in this decision the Principal Bench of NCLT had followed the decisions of Hon'ble NCLAT in the case of ***Committee of Creditors of Metalyst Forging Ltd vs. Deccan Value Investors*** **LP & Ors.** Thereafter, he drew our attention to various other paragraphs of the said order. The learned senior counsel then took us to the order of Hon'ble NCLAT in the case of ***Committee of Creditors of Metalyst Forging Ltd vs. Deccan Value Investors*** **LP & Ors.** and referred to Para 29, 31, 32 and 39 of the said order in support of his case. It was specifically pointed out that this decision was of the Bench comprising three Members. Having stated so, he pointed out that there was a subsequent decision of the Hon'ble NCLAT in the case of COC of ***Committee of Creditors of Educomp Solutions Ltd. vs. Ebix Singapore Pte Ltd.*** wherein Bench comprising of two Members held that plan approved by CoC could not be withdrawn. It was further

pleaded that the earlier decision of Hon'ble NCLAT in the case of ***Committee of Creditors of Metalyst Forging Ltd Vs Deccan Value Investors LP & Ors*** had been taken note of only as a contention of the applicants in Para 17 of the said order but no further consideration of earlier decision had been made, hence, this decision was not binding and earlier decision of Larger Bench of the Hon'ble NCLAT in the case of ***Committee of Creditors of Metalyst Forging Ltd Vs Deccan Value Investors LP & Ors was*** still valid, being a decision of lager Bench, hence, to be followed.

7. The learned senior counsel for the applicant also placed strong reliance on the decision of Hon'ble Supreme Court in the case *of CoC of Essar Steel India Ltd. vs. Satish Kumar Gupta* and referred to findings given in Para 95 and 108 of the said order for the proposition that time lines were to be adhered by all concerned.

8. Learned Counsel for the applicant, thereafter, contended that the timely approval was essence of the contract, hence, delay in such approval discharged the Resolution Applicants from their obligations. He also contended that it was a case of bilateral contract and there were reciprocal promises and once RP/CoC failed to get the plan approved, the Resolution Applicants could not be forced to perform beyond such time line. For this proposition, he placed reliance on the provisions of Section 46, 54 and 55 of Indian Contract Act, 1872. He specifically referred to Section 46 and explanation thereto to contend that the performance had to be made within a reasonable time and question that what was reasonable time, was a

question of fact. Thereafter, he referred to provisions of Section 54 of Indian Contract Act, 1872 to show that if some promise remains unfulfilled then the corresponding promise which is based upon the performance of such unfulfilled promise, could not be expected in law. For the concept of reasonable time, he also placed reliance on the decision of Court of Appeal in the case of ***United Dominions Trust (commercial) Ltd. vs. Eagle Aircraft Services Limited*** and referred to page 82 to 85 of the said order. He also contended that even as per the provisions of Specific Relief Act, 1963, a contract could not be enforced if there was a delay beyond reasonable time in the performance and in the present case because substantial delay had already occurred in the performance of mutual promise by CoC/RP in getting approval and handing over of Corporate Debtor to applicants and, therefore, Resolution Applicants could not be expected to perform their part of the promise given in the Resolution Plan. It was also contended that these were the mutual promises and in view of the provisions of IBC, 2016 where time is the essence and contract was contingent upon the approval of Adjudicating Authority which was not expected to have so much delay then, for this reason also contract had become voidable at the option of the Resolution Applicant, being a promisee under Section 54 and 55 of the Contract Act, 1872 and, therefore, it could withdraw there from. It was again emphasized that there was a considerable element of doubt as regard to the future of the Resolution Plan in view of number of objections/applications filed for opposing the approval of the

Resolution Plan on various grounds and provisions of appeal against the order of Adjudicating Authority before the NCLAT and Supreme Court. He then referred to the provisions of Section 60(5)(c) to contend that this Authority had both jurisdiction as well as power there-under to decide the issue of withdrawal of Resolution Plan of the Resolution Applicant.

9. Learned senior counsel for the Resolution Professional appeared and after narrating sequence of events made following submissions:

[A] Date and Events

Dates	Events
20.02.2018 (pg. 29/71)	Commencement of CIRP pursuant to order made by Hon'ble AA
6.11.2018	RA submitted Resolution Plan
16/17.11.2018	CoC approved the Resolution Plan by 69.87%
17.11.2018	The CoC in its 13th meeting approved the Resolution Plan
18.11.2018	The RP filed I.A No. 476 of 2018 for approval of Resolution Plan
15.11.2019	The Hon'ble Supreme Court approved the Resolution Plan in the matter of Essar Steel and disposed writ petitions challenging vires of certain provisions of amendments in IB Code (Pg. 322/324)
3.12.2019 (Pg. 276-281)	This Hon'ble AA directed CoC to revisit the Resolution Plan in light of the judgment in Essar Steel.
23.12.2019 (Pg. 287-321)	The Resolution Plan is revisited by CoC in its 14th Meeting in presence of the RA. • Para 13 @ pg. 300 notes discussions with RA. Para 15 @ pg. 301/304 notes update on business operations which show growth of business • Pg. 311 @ Sr. No. 68-70 note presence of RA officials. • Resolution Plan is approved by majority of 93.63% (@ Pg. 318)
6.1.2020	The RP filed affidavit in compliance with the order dated 3.12.2019 in I.A No. 476 of 2018, a copy of this affidavit along with all annexure is supplied to the RA

[B] Submissions

The Resolution Applicant in the captioned Application has sought withdrawal of the Resolution Plan citing reasons of efflux of time in approval of the Resolution Plan as the reason for making it unviable and unfeasible. The effect of efflux of time on the Corporate Debtor is alleged to be mainly deterioration in business, loss of contracts and effect on vision of the Applicant in reviving the Corporate Debtor being affected. Some pints to be noted in support of the contentions of the Respondent No. 1 to counter facts alleged by the Applicant are as follows:

1. **Resolution is a time bound process – However, the said timeline is indicative and not mandatory in cases like the present.**

   a) The timelines under the IBC is only a guideline which is to be followed and is not mandatory in nature (Para 12 of Reply + Essar Steel **Para 108 of the judgment**).

   b) The Hon'ble Appellate Authority in the Judgment dated July, 29, 2020 (Educomp NCLAT Judgment) in the matter of Committee of Creditors of Educomp Solutions Limited vs Ebix Singapore Pte. Ltd & Anr. held that (Refer Para 96)

      > 96. ....."delay cannot be taken advantage of by a litigant because of the fact that 'Actus curiae neminemgravabit' i.e. the act of Court shall harm no person which is embedded in jurisprudence (vide Jang Singh V. Brij Lal, 1964) 2 SCR Page 146 at special page 149.97"

   c) Thus, as such the delay in approval of the Resolution Plan would not provide any ground for the Applicant to withdraw the Resolution Plan and prejudice the CIRP of the Corporate Debtor. The Applicant even after the expiry of 330 days has until filing of the present application supported approval of the Resolution Plan.

2. **IB Code as also Process document does not permit withdrawal of Resolution Plan once approved by CoC.**

   i. The Code, Resolution Plan itself and the Process Document accepted by the Applicant, does not provide any provisions for withdrawal of the Resolution Plan. The IB Code is self contained law and is exhaustive of the matters dealt with therein. (**Para 53 of M/s Innovative Industries Ltd judgment**).

   ii. The Hon'ble Supreme Court in the case of K. Sashidhar (Civil Appeal No. 10673 of 2018) has observed as under:-

> **"35.** *Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the Resolution Plan "as approved" by the requisite percent of voting share of financial creditors....."*
>
> **"40.** *.....At the best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" Resolution Plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of financial creditor- be it for approving, rejecting or abstaining, as the case may be....."*

iii The scope of inquiry by this Hon'ble Adjudicating Authority is thus limited to the scope of defined in Section 31 of IB Code. The opening word of Section 31(1) also substantiates this, when it says ".....**<u>if the Adjudicating Authority is satisfied that the Resolution Plan as approved by Committee of Creditors....</u>**.". The Resolution Plan therefore may be approved or rejected only on the basis of the considerations stipulated in Section 30(2) r/w. the proviso to Section 31 of IB Code.

iv The Hon'ble NCLAT in *Educomp Solutions Limited* (Company Appeal (AT) No. 203 of 2020) is also placed to observe:-

> *"94.....This court holds that the Adjudicating Authority after approval of the Resolution Plan by the Committee of Creditors had no jurisdiction to entertain or to permit the withdrawal application filed by the First Respondent/ 'Resolution Applicant."*

v The Hon'ble NCLT, New Delhi, Special Bench has also in I.A No. 1679/2019 in IB-940 (ND)/2018 has rejected application for withdrawal of the Resolution Plan. It is held ***".....After careful consideration of the matter, we are of the view that NCLT has no jurisdiction to permit withdrawal of the Resolution Plan which has been placed before the authority with due approval of the CoC".*** A copy of the order date 3.7.2020 is attached.

vi The judgment in the case of *Deccan Value Investors LP, Company Appeal No.* 1276 cited by the applicant is not applicable in the facts of the present case in view of the following reasons:-

a. The said judgment arose from rejection of the Resolution Plan by Hon'ble Adjudicating Authority ***on the ground that the plan was violative of Section 30(2)(e) of IB Code*** (**Pg. 40**) which is not in the present case.

b. The said judgment has been challenged before the Hon'ble Supreme Court in Civil Appeal .....Diary No. 11299 of 2020 and by order dated 20.05.2020, the Hon'ble Supreme Court has issued notice and directed parties to maintain status quo with respect to liquidation. *A copy of the order is attached.*

vii The Resolution Applicant has never before indicated timelines within which it was expecting approval failing which Resolution Plan would be deemed to be unviable as alleged.

viii On the contrary, the RA has accepted that it will not unilaterally change/ withdraw the Resolution Plan once submitted to the Resolution Professional. Clause 1.17.17 (**Pg. 97**) reads as under:-

> *"1.17.17 The Resolution Applicant(s) cannot unilaterally change/withdraw the Resolution Plan once submitted to the Resolution Professional."*

Please see also Clause 1.75 (**Pg. 87**), Clause 1.12.5 (**Pg. 92**)

ix The contention based on Section 55 of the Contract Act is misconceived for following reasons:-

a) There is no intention expressed to make time as the essence of the contract. No date is either fixed by the parties for performance of the contract;

b) Both the parties should be ad-idem as to intention to make time as the essence of the contract;

c) The contract is therefore not voidable at the option of the applicant;

3. **Allegation of Loss of O&M contracts & loss in revenue is misconceived**

a) The Resolution Plan is revisited by CoC in its 14th Meeting convened pursuant to the order dated 3.12.2019 by this Hon'ble Adjudicating Authority in the presence of RA. Please Refer Para 13 @ Pg. 300 notes discussions with RA. Para 15 @ Pg. 301/304 notes

update on business operations which show improvement in operational performance. Also Refer Pg. 311 @ Sr. No. 68-70 which note the presence of RA officials. Resolution Plan is approved by majority of 93.63 (@ Pg. 318).

b) The Resolution Professional has demonstrated from the records that the going concern status of the Corporate Debtor has been maintained and overall performance has improved in the business rather than deterioration. Allegations on withdrawal of O&M contracts are based on incorrect facts (***Para 14.2 of Reply (Pg. 10/14) + Para 8 of Affidavit-in-Sur Rejoinder (Pg. 4) + Merged Table (now being produced + provisional financial statements as at 31.3.2020 produced***). Considering these contents, it is clear that the allegation of deterioration in business is misconceived.

c) In the year ended March 2020, the revenue, EBIDTA, cash flows, profit after tax- all have shown improvements (Para 20 of the Reply + Page 4 of the unaudited provisional financial statement).

d) Machine Availability (M.A)- which is the availability of wind turbines to generate electricity power has increased consistently during the CIRP period – In FY 2018 around 71% of fleet has MA more than 95%; In FY 2020 around 93% of fleet has MA more than 95% -- this is clear indication of the wind turbines being serviced better compared from the time of submission of the Plan (Para 14 of Reply).

e) All documents pertaining to the cash flows of the Corporate Debtor and the financial statements have been provided to the Applicant at timely and regular intervals. There has been no objection by the Applicant. The Applicant has after almost 2 years filed the instant application.

f) The document dated April 6, 2018 at page 36 at Annexure A of the Applicant's Rejoinder, is not the complete Information Memorandum (**IM**) as sought to be alleged by the Applicant. The said documents (at page 37) clearly mention that the IM shall update from time to time. Thus, the complete date on the Virtual Date Room (**VDR**) as uploaded and updated regularly continues the complete IM. Documents uploaded on the IM/VDR have not been

properly reviewed and interpretation of documents and statistics are misinterpreted by the Applicant (Para 14.1 of Reply + 14.8 of Reply) despite all updated information being provided to the Applicant either in the form of IM/VDR or replies to specific queries and information sought on emails.

g) Furthermore, MOUs/ interim arrangements have been agreed with various parties whose contract had expired/ termination. Applicant will be at liberty to negotiate the contracts once their plan is approved (Para 14.2 (B) of Reply). Contracts of 187 WECs have been renewed in the period January 2020 to June 2020 (Para 14.3 of Reply). CLP Group and Renew Group have been retained (Para 14.4 of Reply). Invoices have been raised basis the retention understanding that has been reached with the parties. Cash and bank balance increased from 1.5 crores in February 2018 to 61 crores in June 2020 (Para 14.9). Revenue generated during the CIRP is within the Corporate Debtor's books of accounts and has not been lost.

10. Thereafter, he also drew our attention to the table containing the details of claims made by applicants and replies of Resolution Professional thereto which centre on the withdrawal/termination of O and M contracts and manufacturing capacity of the Corporate Debtor. According to the learned senior counsel, the contentions by Resolution Applicants were made on the basis various assumptions and without having the correct information as regard to commercial activities of the Corporate Debtor being carried on by Resolution Professional, hence, misconceived. It was also submitted that the applicant neither had any grievance against the Resolution Professional nor there were any allegations of misconduct. It was also claimed that Resolution Plan envisaged haircut to the extent of 80% of debts owed by the Corporate Debtor, hence, it was not a case that a high offer had been made.

11. Learned senior counsel on behalf of the Resolution Professional further submitted that provisions of Section 31 and 31 were self contained provisions as regard to Resolution Plan and legislature in its wisdom did not provide for withdrawal of plan by Resolution Applicant after approval of the plan by CoC, hence, power of withdrawal could not be borrowed from Section 60(5)(c) of IBC, 2016. For these propositions, he relied on the observations of the Hon'ble Supreme Court in the Case of *Essar Steel India Ltd.* and referred to Para 49 and 50. For this proposition, he strongly relied on the decision of Hon'ble NCLAT in the Case of *Educomp Solutions Ltd.* It was also pleaded that the decision of the two Bench which had given subsequent to earlier decision of three Judge Bench and after consideration of the same, had to be followed.

12. Learned senior counsel for the CoC again narrated the basic facts. He emphasized on the fact that delay in approval of Resolution Plan caused loss to the members of CoC to the extent of 140 Crores and this fact could not be ignored while deciding the issue. It was also argued that no time period was prescribed for Adjudicating Authority to approve the Resolution Plan and, therefore, application filed by Resolution Applicant for withdrawal of plan was completely misconceived and consequently, the same was liable to be rejected. It was also pleaded that CoC's approval was not dependent on vision and assumptions of Resolution Applicant and such assumptions could not override the provisions of Code. Thereafter, it was pleaded that provisions of Section 51and/ or Section 52 of Indian Contract, 1872 were

not applicable in the instant case as Resolution Applicant's performance of the contract was not dependent on Resolution Professional and CoC's performance. It was also argued that contract did not contain any reciprocal promises and for this reason, provisions of Section 53 of Indian Contract Act, 1872 were also not applicable. For these submissions, it was emphasised that neither RP nor CoC had prevented Resolution Applicant from performing its promises and delay in approval of Resolution Plan by Adjudicating Authority could not be construed to mean that Resolution Applicant was prevented from performing his obligation under Resolution Plan. It was also argued that Section 54 of Indian Contract Act, 1872 was also not applicable as it provided for effect of default a promise that should be first performed in a contract consisting of reciprocal promises. So, in fact, it was Resolution Applicant had to first perform its promise and not the other way around. It was also contended that provisions of Section 55 of Indian Contract Act, 1872 were also not applicable as same provision applies when parties have specifically made time as the essence of contract. In this regard, it was also been pleaded that RA could not make time as the essence of contract because in that event the offer of RA would have been conditional and, therefore, such offer would have been rejected at that stage only.

13. The learned senior counsel further pleaded that though provisions of Section 56 of Indian Contract Act, 1872 were claimed to have not been relied on by the Resolution Applicant but these were extensively argued

indirectly and, therefore, in fitness of things, a reply thereto was required. Having stated so, the learned senior counsel pleaded that provisions of Section 56 of Indian Contract Act, 1872 would not be applicable in a situation where contract had become commercially onerous or unviable for a party to perform due to occurrence of any event subsequent to entering into contract. For this proposition, the learned senior counsel relied on the decision of Hon'ble Supreme Court in the case of ***Travancore Board vs. Thanath International (2004) 13 SCC 44***.Thereafter, it was also contended that in the present case, Resolution Applicant was a promisor and CoC was a promisee and after approval of CoC, Resolution Plan contract had become valid and binding on both the parties, hence, there was no question of any reciprocal promises and if the Resolution Applicants' arguments were to be accepted then each and every contract would be construed as a case of reciprocal promises under the provisions of Indian Contract Act, 1872. Thereafter, the learned senior counsel reiterated the submission made on behalf of RP that there was no provision in the Code for withdrawal of Plan duly approved by CoC. In this regard, he also relied on the observations of the Hon'ble Supreme Court in the case of ***Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors.*** and drew our attention to Para 29 of the said order. He distinguished the decision of Hon'ble NCLAT in the case of ***Deccan Value Investors LP*** which was relied on by RA on the ground that in that case there was a specific finding about misleading information given by Resolution Professional which

was not the case here. It was also stated that the said decision had also been challenged before the Hon'ble Supreme Court and decision thereon was pending. He also vehemently argued that it was not open for the Resolution Applicants to contend that decision of Hon'ble NCLAT comprising of Two Member Bench in case of ***Educomp Solutions Limited*** was sub-silentio as earlier decision of Three Member Bench of Hon'ble NCLAT was not followed nor any discussion was made in regard to such order in the subsequent order. Thereafter, he relied on the provision of Section 238 of IBC, 2016 to submit that provisions of Section 46 of Indian Contract Act, 1872 were not applicable as these were inconsistent with the provisions of IBC, 2016. He also drew our attention to Clause 1.74, 1.75 and 1.17.17 of the process document which created limitations on the part of the Resolution Applicant to withdraw or alter Resolution Plan and contended that since Resolution Applicant had neither challenged the process document nor any specific clause thereof, allowing prayer of Resolution Applicant for withdrawal of plan post CoC's approval would amount to setting aside/quashing of the specific clauses of process document. Learned senior counsel further contended that virtually there was no change in financial/commercial circumstances of Corporate Debtor then those prevailing on 21.12.2019, hence, claims made by Resolution Applicant as regard to deteriorated financial conditions and commercial viability of Corporate Debtor were without any basis and not supported by any material on record. It was also pleaded that depletion in value of fixed assets was as

per the normal course of business. Learned senior counsel emphasized on the fact that Resolution Applicant had renewed the Bank Guarantee on 19.05.2020 for the period of three months hoping that plan would be approved and Resolution Applicant did not take any exception to the plan, and therefore, present application was nothing but an afterthought without any reasonable basis. He further contended that the application filed by Resolution Applicant was not maintainable u/s 60(5) of IBC, 2016 and for this proposition, he placed reliance on the decision of Hon'ble Supreme Court in the case of ***Embassy Property Developments Private Limited vs. State of Karnataka.*** The learned senior counsel finally argued that if the withdrawal of Resolution Plan was allowed CoC would be saddled with substantial losses and this will open the floodgates for such applications and, hence, considering this position, this application was liable to be dismissed.

14. In rejoinder, the learned senior counsel contended that more than 600 days had passed and even 9 more months have passed after the amendment prescribed maximum period of 330 days including the time taken in judicial proceedings and even no solution was in sight, hence, the contentions of the RP/CoC that there was no basis for making such request, particularly after the pandemic situation caused by Covid-19 which happened after December, 2019 were liable to be rejected and due to this even the valuation of the Corporate Debtor and business prospects are going to face severe impact in future and thus, nullifying the objects of investment proposed by

Resolution Applicant. As regard to applicability of provisions of Section 46 of Indian Contract Act, 1872, the learned senior counsel vehemently argued that such provisions were clearly attracted in the present case and these were not contrary to the provisions of IBC, 2016, hence, applicable. It was also pleaded that other provisions of Indian Contract Act, 1872 relied on by the Resolution Applicant were also not inconsistent or contrary to the provision of IBC, 2016. As regard to the jurisdiction of this Tribunal u/s 60(5)(c), he specifically pointed out that this section invested the Tribunal with the authority to decide any question of law or fact arising out of or in relation to insolvency resolution or liquidation proceeding and any pleading contrary to that would, in a sense, be contrary to the scheme of IBC, 2016 itself. It was contended that the decision of Deccan Value Investors being a judgment of Three Member Bench was binding wherein jurisdiction of the Adjudicating Authority to release an unwilling Resolution Applicant from performance had been upheld and though this decision was pending before the Hon'ble Supreme Court but it was not stayed. It was also pleaded that in the view of subsequent decision in the case of *Educomp Solutions Ltd.* of the Hon'ble NCLAT, there cannot be a blanket principle that a Resolution Applicant can never be permitted to withdraw from the Resolution Plan even after lapse of unreasonable time nor there could be a principle that Adjudicating Authority had no jurisdiction to permit withdrawal. In respect of these contentions, he specifically drew our attention to the powers and duties of Adjudicating Authority as enunciated in proviso to Section 31(1) of

IBC, 2016 which were in addition to its obligation under main Section 31 to see the compliance of provisions of Section 30(2) of IBC, 2016. He summed up his arguments, in this regard, by submitting that if the implementation on the date, when the question of approval was being considered, may not be effectively done then Adjudicating Authority had necessary jurisdiction to permit the withdrawal. As regard to reliance placed by CoC on the decision of Hon'ble Supreme Court in the case of ***Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors.,*** it was contended that in that case it was held that withdrawal of Resolution Plan by Resolution Applicant was not permissible u/s12A IBC, 2016 which applied only to creditors who filed the insolvency petition, hence, such decision was not at all applicable to the present situation. As regard to conditions of process document relied on by RP/CoC, it was contended that no party would ever offer any Resolution Plan if there was no time prescribed or underlying therein as inordinate delay in the implementation of Resolution Plan in business world would lead to innumerable uncertainties which no Resolution Applicant could afford to undertake. According to learned senior counsel, the process document was required to be read with underlying condition that Resolution Plan, if offered, would be approved within a reasonable time or at least within the maximum period of 330 days. It was further contended that the clauses relied on by the RP/CoC could not bind a Resolution Applicant for all times to come and were contrary to the very essence of IBC, 2016 and provisions of Indian Contract Act, 1872. He further contended that the Resolution

Applicant was not a debtor and it had not come forward to submit the Resolution Plan only with the objects to serve the purpose or the creditors but it had come forward with vision to revive the Corporate Debtor and make it profitable which was more important than the narrow interests of CoC who were mainly concerned with the realisation of their money at the earliest point of time. The learned senior counsel finally contended the Resolution Plan was not based on past performance of the Corporate Debtor as that was a result of mismanagement by the Corporate Debtor but according to its own vision having legitimate and reasonable expectation of approval of Resolution Plan in reasonable time but delay in such approval changed the complexion of feasibility and viability of Resolution Plan, hence, Resolution Applicant was eligible to withdraw from the same under the changed circumstances.

15. We have considered the submissions made by all parties and material on record. This application raises important question as regard to powers and jurisdiction of Adjudicating Authority to permit withdrawal of Resolution Plan approved by CoC mainly on the ground of delay in approval of Resolution Plan resulting into unviability and non-feasibility of such plan and also its implementation. In this regard, it has been vehemently contended on behalf of the CoC as well as Resolution Professional that Adjudicating Authority has no power and jurisdiction to allow the withdrawal of Resolution Plan once approved by CoC. In order to decide this

issue, we consider it appropriate to briefly narrate scheme of the Code as regard to the Resolution Plan as under:

i. After the initiation of Insolvency Resolution, IRP/RP is appointed who prepares Information Memorandum which is put forward for approval of CoC. Evaluation matrix is prepared by Resolution Professioal which is also approved by CoC. Invitation for Expression of Interest is invited and a process is designed whereby each step is defined relating to terms and conditions governing the submission of Resolution Plan and contents thereof as per the provisions of IBC r.w. Regulations made there under.

ii. A Resolution Applicant has to submit Resolution Plan in accordance therewith. If such Resolution Plan is found to be in conformity with the provisions of IBC, 2016 then it is submitted by Resolution Professional before CoC for its approval. Resolution Professional is bound to apprise CoC that such plan confirms to the provisions of IBC, 2016 and Regulations made there-under.

iii. CoC may approve or reject such plan. If approved, then such plan is submitted by Resolution Professional to the Adjudicating Authority for its approval who has to evaluate the plan in terms of provisions of Section 31(1) of IBC, 2016. If such plan is found to be in conformity and complying with the requirements of Section 30(2) of IBC, 2016 then such plan needs to be approved by Adjudicating Authority subject to satisfaction of Adjudicating Authority that such plan can be

effectively implemented. An important aspect is that the timeline provided for such approval of Resolution Plan is 165 days from the date of commencement of Insolvency Resolution Process. Thereafter, 15 days are given to Adjudicating Authority for consideration and approval of Resolution Plan. Thus, the total process is to be completed within 180 days from the date of commencement of Insolvency Resolution Process. Such timelines would stand modified/extended if initial CIRP period of 180 days is extended as per provisions of Section 12 of IBC, 2016.

16. In the background of this scheme, now, we have to consider the status and obligations of Resolution Applicant arising due to submission of Resolution Plan. Resolution Applicant has been defined in Section 5(25) of the Code which reads as under:

[5(25) " resolution applicant" means a person, who individually or jointly with any other person, submits a Resolution Plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section25']

This definition takes us to the provisions of Section 25(2)(h) which reads as under:

[25(2)(h) " invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such

other conditions as may be specified by the Board, to submit a Resolution Plan;]

Thus, the basic responsibility of a Resolution Applicant is to submit a Resolution Plan as per criteria fixed by CoC and to comply with other requirements of IBC, 2016 and regulations thereto.

17. The Resolution Professional prepares Information Memorandum and Resolution Applicant gets access to relevant information in terms of provisions of Section 29(2) which reads as under:

> ***29 (2)*** *the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—*
>
> *(a) To comply with provisions of law for the time being in force relating to confidentiality and insider trading;*
>
> *(b) To protect any intellectual property of the corporate debtor it may have access to; and*
>
> *(c) Not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.*
>
> *Explanation.-- For the purposes of this section, "relevant information" means the information required by the resolution applicant to make the Resolution Plan* ***for the corporate debtor,*** *which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.]*

18. It is important to note that Section 29A provides situations where Resolution Applicant will not be eligible to submit Resolution Plan, if such person falls into those situations. The Resolution Applicant has to file an

affidavit as regard to its eligibility under Section 29A along with Resolution Plan which has been prepared on the basis of Information Memorandum. This is so provided in Section 30(1) of IBC, 2016. Thereafter, the ball shifts to the court of Resolution Professional and CoC. Resolution Professional as per Section 30(2) is required to examine the Resolution Plan to confirm that such Resolution Plan is in conformity with the provisions of Section 30(2) of IBC, 2016. If such Plan confirms to the conditions prescribed in Section 30(2) then it is presented for approval of CoC. The CoC may approve a Resolution Plan by a Vote of not less than 66% of voting share of Financial Creditors after considering its feasibility and viability and the manner of distribution taking into consideration the provisions of Section 53(1) of IBC, 2016. There is a specific provision in Section 30 (4) that Resolution Plan will not be approved where the Resolution Applicant is ineligible under Section 29-A of IBC, 2016. In this process, the Resolution Applicant is eligible to attend the meetings of CoC in which Resolution Plan of the Applicant is considered, however, such Resolution Applicant does not have any voting right unless such Applicant is also a Financial Creditor. The Plan, if approved by CoC then submitted to Adjudicating Authority for its approval.

19. Now, we may consider relevant Regulations of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 as amended from time to time. As per Regulations 35 fair value and liquidation is to be determined after receipt of Resolution Plan in accordance with the Code and

Regulation, the same is to be provided to every member of CoC who shall maintain the confidentiality and cannot use such information for undue gains. Regulation 36 governs the preparation and contents of all Information Memorandum which can be provided to member of CoC after receipt of undertaking form that person that it shall not be used to cause an undue gain or undue loss to itself or any other person. Thereafter, as per the Regulations 36A invitation for Expression of Interest is to be published in Form G. Such Form G shall provide the last date of submission of Expression of Interest and also mention source from which the detailed information can be obtained as regard to Corporate Debtor. The prospective Resolution Applicant can submit Expression of Interest which shall be unconditional and accompanied by documents specified Regulation 36(A)(7). As per said Regulation 36A(8) Resolution Professional shall conduct due diligence based on the material on record in order to satisfy that the prospective Resolution applicant complies with the requirements of Section 25(2)(h), 29A and other conditions as specified in the invitation for Expression of Interest. The Resolution Professional may seek clarification or additional information, document from the prospective resolution applicant for conducting such due diligence. Thereafter, the provisional list shall be prepared after considering the objections of prospective Resolution Applicant for its exclusion and final list of prospective Resolution Applicants shall be submitted to CoC. Thereafter, request for Resolution Plan (RFRP) shall be issued to all prospective resolution applicants as per

the provisional list including the one who had contested the decision of the resolution professional against its non-inclusion in the said provisional list.

20. It is important to note that the process document shall detail each steps in the process, and the manner and purpose of interaction between resolution professional and prospective resolution applicant. The process document shall not require any non-refundable deposit for submission of or along with Resolution Plan. As per the Regulation 36B (4A) a Resolution Applicant shall be required to provide a performance security which, in case, its plan is approved by CoC under Section 30(4) of IBC, 2016 could be forfeited in the event of failure of Resolution Applicant to implement or to contributes to the failures of implementation of a Resolution Plan approved by Adjudicating Authority. Any modification in the approval matrix or in RFRP shall be deemed to be a fresh issue and timelines will have to be modified accordingly. Regulation 37 provides that Resolution Plan should contain measures for insolvency resolution of the Corporate Debtor for maximization of value of its assets and such measures are necessary but not exhaustive. There is Regulation 38 which provides regarding mandatory contents of the Resolution Plan. We shall refer to this regulation in detail in later part of our order as it has got a great significance for the disposal of issue on hand. Regulation 39 contains the process for approval Resolution Plan. As per this Regulation a prospective Resolution Applicant has to submit Resolution Plan prepared in accordance with the Code and this regulation within the time specified for submission thereof. Such plan

should be accompanied by an affidavit regarding the eligibility of Resolution Applicant u/s 29A and undertaking that contents of Resolution Plan are true and correct and in case any false information being found therein, any refundable deposit may be forfeited. The Resolution Plan which does not comply with these requirements shall be rejected.

21. From the perusal of scheme of the I&B Code, and Regulations made there-under, thus, it is apparent that prospective Resolution Applicant has got practically no role after submission of Resolution Plan in accordance with the requirements of RFRP. The prospective Resolution Applicant does not have a right to have its Resolution Plan approved. The process for approval of Resolution Plan approved by CoC involves RP and Adjudicating Authority. In this regard, it be useful to reproduce the findings of Hon'ble Supreme Court in the case of ***Arcelormittal India Pvt Ltd vs. Satish Kumar Gupta*** **in Para 81 to 86** as under:

> ***81***. *Thus, the importance of the Resolution Professional is to ensure that a Resolution Plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a Resolution Plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the Resolution Plans under consideration, and to state briefly as to why it does or does not conform to the law.*
>
> ***82***. *Take the next stage Under Section 30. A Resolution Professional has presented a Resolution Plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to*

Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh Resolution Plan within the time limits specified where no other Resolution Plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its Resolution Plan approved, and as no adjudication has yet taken place.

83. *It is the Committee of Creditors which will approve or disapprove a Resolution Plan, given the statutory parameters of Section 30. Under Regulation 39 of the CIRP Regulations, Sub-clause (3) thereof provides:*

"39.(3) The committee shall evaluate the Resolution Plans received Under Sub-Regulation (1) strictly as per the evaluation matrix to identify the best Resolution Plan and may approve it with such modifications as it deems fit:

Provided that the committee shall record the reasons for approving or rejecting a Resolution Plan."

This Regulation shows that the disapproval of the Committee of Creditors on the ground that the Resolution Plan violates the provisions of any law, including the ground that a Resolution Plan is ineligible Under Section 29-A, is not final. The Adjudicating Authority, acting quasi-judicially, can determine whether the Resolution Plan is violative of the provisions of any law, including Section 29-A of the Code, after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority to the Appellate Authority Under Section 61.

84. *If, on the other hand, a Resolution Plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority Under Section 61, and may further be challenged before the Supreme Court Under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it*

speaks of the ***NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority****. The non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.*

85. *One thing that must be made clear at this stage is that when Section 33 speaks of the "Adjudicating Authority" in Sub-section (1), it is referring to both the Adjudicating Authority as well as the Appellate Authority. An Adjudicating Authority may decide in favour of a Resolution Plan, which order may then be set aside by the Appellate Authority. This order of the Appellate Authority, setting aside the order of the Adjudicating Authority, would then be the order which rejects the Resolution Plan for the purposes of Section 33. The same would apply to an ultimate order of rejection by the Supreme Court under Section 62. This is on the principle that, as stated in Lachmeshwar Prasad Shukul and Ors. v. Keshwar Lal Chaudhuri and Ors. and followed in a number of our judgments, an appeal is a continuation of the original proceedings.*

86. ***Given the fact that both the NCLT and NCLAT are to decide matters arising under the Code as soon as possible, we cannot shut our eyes to the fact that a large volume of litigation has now to be handled by both the aforesaid Tribunals.*** *What happens in a case where the NCLT or the NCLAT decide a matter arising out of Section 31 of the Code beyond the time limit of 180 days or the extended time limit of 270 days? Actus curiae neminem gravabit- the act of the Court shall harm no man-is a maxim firmly rooted in our jurisprudence (see Jang Singh v. Brijlal, SCR at P. 149 A.R. Antulay v. R.S Nayak, SCR at p. 71).* ***It is also true that the time taken by a Tribunal should not set at naught the time limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of***

the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. *We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible. A reasonable and balanced construction of this statute would therefore lead to the result that, where a Resolution Plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded.* ***This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good Resolution Plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.***

22. Thus, on the basis of above discussion, it can be concluded that the role of Resolution Applicant ends after the submission of a valid Resolution Plan prepared in accordance with the terms and conditions of process document which is based upon the information memorandum provided to such Resolution Applicant. It may not be out of context to mention here that Resolution Applicant, though, is liable to comply with various contractual obligations in terms of provisions of process document signed by him but ,as far as requirements of IBC, 2016 are concerned, Resolution Applicant has been burdened with only one legal obligation as per section30 (1) of IBC, 2016 i.e., Resolution Applicant has to give an affidavit that he is eligible u/s 29A of IBC, 2016 and rest of the requirements of IBC, 2016, in regard to

Resolution Plan, are to be complied with by Resolution Professional in consultation/with the approval of CoC. This leads to a conclusion that, in case, Resolution Plan approved by CoC is found to be non-complaint to any other requirements of Section 30(2) of IBC, 2016 then only RP/CoC would be responsible for such non-compliance and Resolution Applicant cannot be made accountable for that in any manner. As far as Resolution Plan is concerned, the role of CoC ends after approval of such plan. Thereafter, role of Resolution Professional starts to get it approved from Adjudicating Authority. This is to be done within the timelines as specified in the Code. As per model timelines, Adjudicating Authority is required to be given 15 days time to approve the Resolution Plan. However, if such process is completed in such specified time schedule and there would be a legitimate expectation on part of the Resolution Applicant as well as other stakeholders that it would certainly be approved in a reasonable time. However, if the approval doesn't come within a reasonable time which is essentially a matter of fact, then, can a Resolution Applicant claim that it is not bound by such Resolution Plan and, if it is so claimed, whether Adjudicating Authority has got the requisite jurisdiction and power to dispose of such application for this purpose? For this purpose, we have to consider the provisions of Section 60 of IBC, 2016 which are reproduced as under:

Adjudicating Authority for corporate persons.

60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.

2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

23. Section 60(1) provides for territorial jurisdiction which is not in question in the case before us. Section 60(2) and 60(3) provide for disposal of the matters of guarantors of Corporate Debtor whose insolvency proceedings or Liquidation proceedings are pending before the NCLT. Section 60(4) provides that NCLT would have the power of DRT. Section 60(5) is relevant for our purposes. The RP and CoC have relied upon mainly on the provision of Section 30 and 31 of IBC, 2016 and judicial decisions rendered by Hon'ble NCLAT/ Hon'ble Supreme Court to contend that these sections only are to be looked into in regard to matters relating to Resolution Plan and provisions of Section 60(5) could not be borrowed. In this regard, we are of the view that as far as jurisdiction of NCLT as Adjudicating Authority u/s 31of IBC, 2016 is concerned there cannot be any dispute that when a plan is approved by CoC and such plan is submitted by Resolution Professional before the Adjudicating Authority u/s 30(6) for its approval, the Adjudicating Authority is obliged either to approve or reject this plan, if such plan complies or does not comply with provisions of Section 30(2) of IBC, 2016 and proviso to Section 31(1) of IBC, 2016, as the case may be. Admittedly, in this application, we are not concerned with the approval of a Resolution Plan on an application filed by Resolution Professional which has

been approved by COC but we are concerned with the application filed by the Resolution Applicant for withdrawal of plan post CoC's approval. Therefore, in our humble view, provisions of Section 31 are not at all attracted in this situation. Having said so, now, we have to look whether there is any bar, express or implied, in the IBC, 2016 or Regulations made there-under to refuse such withdrawal so that our jobs become easy and there is no need to go to Section 60(5)(c) of IBC, 2016. The RP and CoC have not been able to bring to our notice any express or implied provision which prohibits the withdrawal of Resolution Plan approved by CoC and their contentions are based solely on the provisions of Section 30 and 31 of IBC, 2016 which we have found to be inapplicable in the context of present application.

24. Having stated so, now, we go back to the provisions of Section 60(5) as reproduced hereinbefore. Clause 60(5)(a) authorises NCLT to entertain or dispose of any application or proceeding by or against the Corporate Debtor or Corporate Person. This clause is applicable in regard to the applications filed u/s 7, 9 or 10 of IBC, 2016 and also to proceedings connected therewith. The Hon'ble Supreme Court in Para 86 of the order in the case of ***Arcelormittal India Private Limited Vs. Satish Kumar Gupta and Others*** as reproduced hereinbefore has opined that NCLT before quasi judicial determination of such application or proceedings will not be entitled to interfere on behalf of the applicant which, in our opinion, leads to an irresistible conclusion that unless a Corporate Debtor or Corporate Person

is admitted into CIRP, any application filed by third parties cannot be entertained/disposed of by NCLT as jurisdiction to entertain such applications starts only thereafter. We are further of the view that even Rule 11 of NCLT Rules, 2016 cannot be pressed into service as such Rule cannot supersede express provisions of law. Thus, in case of any urgency only option which is available to dispose of such other applications is firstly to do the quasi judicial determination u/s 60(5)(a) of application or proceeding initiated u/s 7, 9 and 10 of IBC, 2016 to assume valid jurisdiction u/s 60(5)(c). As far as Clause 60(5)(b) is concerned, it is not of much relevance for our purposes in the present case, hence, we consider that it is not necessary to deal with the same in an elaborate manner.

Now, comes clause 60(5)(c) under which following three situations can be entertained or disposed of by NCLT as Adjudicating Authority:

i. ***any question of priorities or;***
ii. ***any question of law which arises out of or in relation to the insolvency resolution or liquidation proceedings or;***
iii. ***any question of fact which arises out of or in relation to the insolvency resolution or liquidation proceedings***

The words 'insolvency resolution" or "liquidation proceedings" indicate that the stage of quasi judicial determination of an application filed u/s 7, 9 and 10 has already been over by admission of such applications for insolvency resolution or liquidation of the corporate debtor or corporate person as per the relevant provisions of IBC, 2016. In our considered view, in the present case, both question of law and question of fact are involved. Question of law

is whether withdrawal of Resolution Plan post CoC's is permissible. Question of fact is what would be the reasonable time required for approval of Resolution Plan by Adjudicating Authority. Thus, in our considered view, we have got the jurisdiction to consider this application. Having stated so, we are further of the view that provisions of Section 60(5), as far as, jurisdiction is concerned, override contrary provisions of all other laws which is not evident from the language of section itself.

25. It is a settled proposition and convention that no person can be rendered without any remedy. It is not in dispute that NCLT can approve or reject a Resolution Plan approved by CoC u/s 30 and 31 of IBC, 2016 which means that NCLT has jurisdiction to adjudicate upon Resolution Plan and because of that Civil Court can not have jurisdiction in respect of this matter. This position is also strengthened on account of Section 63 and Section 231 of IBC, 2016 which, for ready reference, are reproduced here under:

Section 63 - Civil court not to have jurisdiction

[(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days.]

Section 231 - Bar of jurisdiction

[No civil court shall have jurisdiction in respect of any matter in which the [Adjudicating Authority or the Board] is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any

order passed by such 2[Adjudicating Authority or the Board] under this Code.]

Even the writ jurisdiction under Article 226 of the constitution can be exercised only in exceptional cases. This can be seen from the findings of the Hon'ble Supreme Court in the case of ***Embassy Property Developments Pvt. Ltd. v. State of Karnataka*** in the following Paragraphs:

> ***24.*** *Therefore in so far as the question of exercise of the power conferred by Article 226, despite the availability of a statutory alternative remedy, is concerned, Anisminic cannot be relied upon. The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.*
>
> ***25.*** *On the basis of this principle, let us now see whether the case of the State of Karnataka fell under the category of (1) lack of jurisdiction on the part of the NCLT to issue a direction in relation to a matter covered by MMDR Act, 1957 and the Statutory Rules issued there under or (2) mere wrongful exercise of a recognized jurisdiction, say for instance, asking wrong question or applying a wrong test or granting a wrong relief.*
>
> ***28.*** *Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as observed by this court in Sub-Committee on Judicial Accountability vs. Union of India, flows from the concept of a higher law, namely the Constitution.*

Paragraph 61 of the said decision captures this position as follows:

> *"But where, as in this country and unlike in England, there is a written Constitution which constitutes the fundamental and in that sense a "higher law" and acts as a limitation upon the legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited government'. Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the Constitution and that the judicial wing is the interpreter of the Constitution and, therefore, of the limits of authority of the different organs of the State. It is to be noted that the British Parliament with the Crown is supreme and its powers are unlimited and courts have no power of judicial review of legislation."*

29. *The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT.*

Thus, the legal position which emerges from above discussion is that Resolution Applicants cannot get relief from anywhere if we accept the contention of the RP/CoC that NCLT does not have jurisdiction and powers to permit withdrawal of CoC approved Resolution Plan. This certainly cannot be the intention of the legislature, hence, the inevitable and logical conclusion which can be arrived at is that NCLT

has jurisdiction to decide this issue u/s 60(5)(c) of IBC, 2016 for this reason as well.

26. However, jurisdiction of NCLT under Section 60(5)(c) would be subject to one limitation i.e., this cannot be used to direct other statutory Government Authorities who discharge functions under Public Law. This proposition of law was explained by Hon'ble Supreme Court in the case of ***Embassy Property Developments Pvt. Ltd. v. State of Karnataka reported in 2019 SCC Online SC 1542.*** In that case NCLT directed Karnataka Government to review the terms of lease of property given to Corporate Debtor. In this background, the Hon'ble Supreme Court explained the scope of powers of NCLT u/s 60(5) as under:

> *37. From a combined reading of Sub-section (4) and Sub-section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued there-under. The only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate*

Tribunal before the NCLT, instead of moving a statutory appeal Under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt" Under Section 5(21), making the Government an "operational creditor" in terms of Section 5(20). The moment the dues to the Government are crystalised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the Resolution Plan as approved by the Adjudicating Authority, namely the NCLT.)

42. *Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.*

47. *Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non judice.*

27. In the present case, we are not exercising jurisdiction u/s 60(5)(c) of IBC, 2016 in that manner or on an issue of that nature, hence, in our most humble view, these findings of the Hon'ble Supreme Court do not come in our way and, hence, these do not help the cause of the RP/CoC. Further, the Hon'ble Supreme Court held that government dues fell into the category of operational debts, hence, already ascertained claims would be subject to

consideration of NCLT under IBC, 2016 as per the scheme of Code. We are of the view that when there is a dispute or appeal pending under relevant statute, the same would be decided as per the provisions of that statute and not under IBC, 2016. However, RP/Liquidator can make best estimate thereof for it being considered in Resolution Plan so that Resolution Applicants is made aware of such claims.

28. There is one more aspect of scope of provision of Section 60(5)(c) of IBC, 2016. It is an established legislative practice that one omnibus provision is generally provided in every statute as all situations and eventualities which may arise in future cannot be forecast or visualised at the time of making of statute. Such omnibus provision or enabling provision is pressed into service when a fact situation so demands. However, disposal of such situation under such provision would have to be made in the light of specific provisions, if any, contained in the statute.

29. Thus, when the issue of jurisdiction of NCLT is settled, then, next question arises as regard to how such jurisdiction is to be exercised in different situations arising out of or in relation to insolvency resolution or liquidation proceedings.

30. Certain situations/matters have specifically been provided in various sections of IBC, 2016 and in those situations scope of power as well manner of decision have also been given. Thus, in those situations NCLT has to act accordingly. Whereas there are certain

situation/jurisdiction is given but that mode and manner of decision making has been left open. We can have brief overview of both types of situations hereunder:

i. As per Section 17 Officers and Managers of the Corporate Debtor are required to provide all assistance to IRP. As per Section 20, Management of Operations of Corporate Debtor as a going concern is also responsibility of IRP/RP. Section 19 provides where such co-operation is not extended to IRP then he can approach Adjudicating Authority and Adjudicating Authority u/s 19(3) shall direct such person to comply with the instructions of Resolution Professional and cooperate with him in efficient conduct of CIRP u/s 16 of IBC, 2016, Adjudicating Authority is bound to appoint IRP as proposed by Financial Creditors and also by Operational Creditors, though, such Operational Creditors are not mandatorily required to propose the name of IRP. Thus, there is no discretion with Adjudicating Authority in this regard.

ii. CoC in its first meeting is required to confirm the appointment of such IRP or may replace IRP by another Resolution Professional (RP). Under Section 22(4) the Adjudicating Authority is bound with such resolution of CoC. This aspect has judicially been settled. Under Section 27 CoC can replace Resolution Professional by passing resolution to this effect by a vote of sixty-six per cent of voting share and again Adjudicating Authority is bound by such decision.

iii. Under Section 35(1)(n) the liquidator may apply to Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the Corporate Debtor. In this regard, it is to be noted that there may arise issues for which no specific provision has been made under IBC and NCLT as Adjudicating Authority would have to apply its mind in accordance to

provisions of various laws/regulations which may be dealing with the subject matters subject to limitation of Section 238 of IBC and ratio of decision of Hon'ble Supreme Court in the case of Embassy Property Development Private Limited (supra).

iv. Under Section 42 an appeal may be filed to Adjudicating Authority against the order of liquidator in respect of its decision in accepting or rejecting the claims again Adjudicating Authority has to decide the same in the manner as aforementioned in preceding clause.

v. Under Section 44 the Adjudicating Authority may pass in the manner as prescribed therein in respect of preferential transaction, hence, no discretion is vested.

vi. Similar is the case in respect of undervalued transactions as specified in Section 45 to 47 where order is to be passed by Adjudicating Authority u/s 48.

vii. Under Section 51 the prescription of order has been made. Adjudicating Authority is supposed to act accordingly.

viii. Under Section 60(5)(a) the Adjudicating Authority is empowered to dispose of applications filed u/s 7, 9 and 10 of IBC, 2016 in the manner specified in those sections and such order is to contain the directions which are required to be given in terms of provisions of Section 13, 14 and 15 of IBC, 2016.

31. Apart from these situations, the process of approval of Resolution Plan post CoC's approval is governed by the provisions of Section 30 and 31 of IBC, 2016 which we have already been dealt in the earlier part of this order, hence, not discussed here again.

32. Further, the Adjudicating Authority is required to pass order of liquidation in terms of provisions of Section 33 and 34 of IBC, 2016 in the situation and manner as specified therein.

33. The Adjudicating Authority is also empowered to pass order of liquidation, in case an application is made u/s 59 of IBC, 2016 in accordance with provisions of that section. Thereafter, order of dissolution is required to be passed in terms of provisions of Section 54 of IBC, 2016 which is also applicable to applications filed u/s 7, 9 and 10 of IBC, 2016.

It is needless to mention that all applications connected with above matters are filed u/s 60(5)(a) and 60(5)(c) of IBC, 2016 r.w. specific sections governing those issues.

34. Now, comes a situation how the Adjudicating Authority can decide the issue u/s 60(5)(c) on which, though, it has jurisdiction there under but neither specific provision has been made in a positive manner nor a specific prohibition has been made. We have already stated the limitations imposed upon by the statutory provision of Section 238 of IBC whereby the contrary law cannot be applied. Further limitation has been imposed by the Hon'ble Supreme Court in the case of *Embassy Property Developments Pvt. Ltd* (supra). Barring these two limitations, we are of the view that for this purpose, the scheme of the Code and provisions made there-under, which may provide assistance for the disposal of issue, can be taken into consideration. For example, in the

present case, the Regulation 38(2) clearly stipulates that the Resolution Plan must have a term. Thus, based upon such regulation, an interference can be drawn that Resolution Plan is not perpetual and can be withdrawn, if the party so wishes by following the prescribed procedure in the contract and/or as per law. In case, such assistance/guidance is not available then, we are of the view that for this purpose, the Adjudicating Authority is to be guided by the preamble of IBC because preamble is considered as a part of statute and key source to judicial mind as it expresses the scope and object of a particular statute in a comprehensive manner. In this regard, we can also take assistance of settled principle of interpretation of statute i.e. construction of different provisions of statute be made in a manner to give effect to the object and intent of that statute. This principle is known as purposive construction or harmonious interpretation which is put into service in such kinds of situations. We are further of the view that Rule 11 of NCLT Rules, 2016 may also give substantial assistance and guidance to Adjudicating Authority as to how that matter before it can be disposed of. For this purpose, firstly we look at Rule 11 of NCLT Rules, 2016 which reads as under:

> *Nothing in these rules shall be deemed to limit or otherwise affect the Inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.*

It is also noted that as per Rule 10 of Application to Adjudicating Authority Rules, 2016, certain provisions of NCLT Rules, 2016 are applicable to filing of applications under IBC, 2016 and by virtue of Section 420 and 424 of Companies Act, 2013, other NCLT Rules including Rule 11 are applicable for disposal of application/proceedings under IBC, 2016 by NCLT as Adjudicating Authority as no separate Rules for this purpose have yet been framed.

It is a settled position of law that a rule cannot supersede the provisions of substantive law nor it could extend or curtail the scope of substantive provisions of law as such rule derives life and strength from substantive provisions. As stated earlier, that there is no specific prevision which bars Adjudicating Authority to permit the withdrawal of a Resolution Plan approved by CoC, hence, Rule 11 also comes to our aid in applying our jurisdiction u/s 60(5)(c) of IBC, 2016. Thus, both these provisions taken together, in our humble view, give us jurisdiction to allow withdrawal of approved Resolution Plan in the interests of substantial justice in the present case.

In our view, the Adjudicating Authority also has freedom to apply the provisions of such laws which govern the adjudication of subject matter before it. In our considered view, principles of equity and fair play can also be applied in a given set of circumstances. We most humbly feel that even principles based on customs and practices of a trade or business can also be of great help to decide the matter as it is a settled judicial view that

realistic business situations should be given a preference over narrow legalistic interpretation in general and more so in the case of commercial/economic legislation. Having stated so, in our view, the dispute before us can be decide by resorting to provisions of Indian Contract Act, 1872 read with Scheme of IBC, 2016 and in particular its preamble. This exercise is done in later on.

35. Now, we would deal with the judicial decisions relied on by RP/CoC. As regard to the case of *Essar Steel Vs. Satish Kumar Gupta*, we find that in that case the issue involved was whether commercial wisdom exercised by Financial Creditors (CoC) while approving the Resolution Plan was open to judicial review or not. In that background, it was pleaded before the Hon'ble Supreme Court that the provisions of Section 60(5)(C) could be applied independent of provisions of Section 30 and 31 of IBC, 2016. This claim was rejected by the Hon'ble Supreme Court in view of specific provisions concerning the approval or rejection of a Resolution Plan post CoC's approval as contained in Section 30 and Section 31 of IBC, 2016. We have already stated that for approval or rejection of CoC approved Resolution Plan, Section 30 and Section 31 of IBC, 2016 are applicable and Adjudicating Authority is bound to exercise its jurisdiction in terms of those provisions whereas in the present case, we have to adjudicate upon the request of the Resolution Applicants for withdrawal of Resolution Plan approved by CoC. We further state that we are not indulging into any

judicial review of justness or legitimacy of commercial wisdom exercised by CoC. Accordingly, in our humble view, the ratio of this decision of the Hon'ble Supreme Court is not applicable in the facts of present case.

36. We have already dealt briefly with the findings of the Hon'ble Supreme Court in Para 86 of the order in the case of ***Arcelormittal India Private Limited vs Satish Kumar Gupta*** wherein the issue was that at what stage NCLT as Adjudicating Authority could exercise its jurisdiction u/s 60(5) and that too in the context of provisions of Section 60(5)(a) only. Hence, this decision also does not render any assistance to RP/CoC.

37. In our view, decision of Hon'ble NCLAT in the case of *Educomp* (supra) relied on by the RP/CoC is also not applicable in view of the fact that in that case two applications for withdrawal of Resolution Plan approved by CoC had earlier been dismissed by NCLT and in the third application permission to withdraw was granted by NCLT. Secondly, there was a clause of validity of Resolution Plan for not less than six months and because of participation by Resolution Applicant after expiry of such period in the CIRP proceedings, the Hon'ble NCLAT held it to be an act of waiver of said condition by the Resolution Applicant in that case. In the case before us it has been specified in Clause 1.7.4 that Resolution Plan is not subject to any expiry and shall remain valid and binding on the Successful Resolution Applicant, hence, participation by the Resolution Applicant and extension of Bank guarantee from time to time, in our view, cannot be considered as

an acceptance by the Resolution Applicant that it shall remain bind with such Resolution Plan forever. This fact also distinguishes the case on hand with the case relied on by RP and CoC. Further, in that case the aspect of jurisdiction of NCLT as Adjudicating Authority to decide such issue u/s 60(5)(c) was not specifically brought to the notice of Hon'ble NCLAT, hence, plea of Resolution Professional that appeal was filed before Hon'ble NCLAT against an order passed by Adjudicating Authority, in our considered view, does not have any force. Further, Rule 11 of NCLT Rules, 2016 was also not brought to the notice of Hon'ble NCLAT. Last but not the least; we most humbly submit that as per established judicial practice, decision of three Member Bench of Hon'ble NCLAT would remain binding unless it is overruled by a decision of lager Bench subsequently. Accordingly, we, most humbly submit that decision of two Judge Bench relied on by the CoC/RP does not help their cause. In this regard, we further consider it necessary to reproduce the findings of **Hon'ble Supreme Court in the Case of *Maharashtra Seamless Limited vs. Padmanabhan Venkatesh* given in Para 29 of the said order as under:**

> ***29.*** *So far as the IA taken out by the MSL is concerned, in our opinion they cannot withdraw from the proceeding in the manner they have approached this Court. The exit route prescribed in Section 12-A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code. In this case, having appealed against the NCLAT order with the object of implementing the Resolution Plan, MSL cannot be permitted to take a contrary stand in an application filed in connection with the very same appeal. Moreover, MSL has raised the funds upon mortgaging the assets of*

the corporate debtor only. ***In such circumstances, we are not engaging in the judicial exercise of determining the question as to whether after having been successful in a CIRP, an applicant altogether forfeits their right to withdraw from such process or not.***

38. From the perusal of the observations underlined by us, it is apparent that the Hon'ble Supreme Court in this decision has merely stated that provision of Section 12A could not be invoked for withdrawal of Resolution Plan approved by CoC. Rather closing observations of Hon'ble Supreme Court in the above Para indicate that the question whether Resolution Applicant could be permitted to withdraw the plan approved by CoC has been left open and the wording of such finding indicates a situation of serious concern as far as Resolution Applicant is concerned. Thus, in our most humble view, the claim made by RP and CoC that withdrawal of a Resolution Plan approved by CoC cannot be permitted by Adjudicating Authority is not a closed question and, hence, their claim is rejected.

39. Now, we will look into the merits of the application.

40. In this regard, it is pertinent to mention that application for approval of such Resolution Plan in IA 476 of 2018 is also pending before us which cannot be decided now without disposal of this application. However, for the moment, if we leave the question of disposal of present application aside and pose ourselves a question whether Resolution Plan submitted by Resolution Applicant and approved by CoC meets the requirements of Section 30(2)(e) and proviso to Section 31 of IBC, 2016 or not so that a

decision as regard to approval or rejection of such Resolution Plan can be taken. For this purpose, we confine ourselves to provisions of Section 30(2)(e) of IBC, 2016. In Section 30(2)(e) of IBC, 2016 it is specified that Resolution Plan should not contravene any provisions of law for the time being in force. The words "any provisions of law" also include provisions of I&B Code, hence, our exercise to check this compliance starts. Accordingly, we have to see term of Resolution Plan which is a mandatory requirement of Regulation 38(2) of CIRP Regulations. The provisions of Regulation 38 of CIRP Regulations are reproduced as under:

38. Mandatory contents of the Resolution Plan.

(1) *The amount payable under a Resolution Plan -*
(a) to the operational creditors shall be paid in priority over financial creditors; and

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

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

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

(2) A Resolution Plan shall provide:
(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor ***during its term; and***
(c) adequate means for supervising its implementation
[(3) A Resolution Plan shall demonstrate that –
(a) it addresses the cause of default;
(b) it is feasible and viable;

(c) it has provisions for its effective implementation;
(d) it has provisions for approvals required and the timeline for the same; and
(e) the resolution applicant has the capability to implement the Resolution Plan.]

41. As per Regulation 38 (2)(a), the Resolution Plan shall provide the term of the plan and its implementation schedule. Clause 38(2)(b) also refers to term of Resolution Plan. In our view, the word "term" used in the Regulation 38(2) refers to "period" only as it is not capable of any other interpretation in this context. Having stated so, we still consider it necessary to ponder a little on the meaning of this word. The word "Term" is not defined in IBC, 2016 or CIRP Regulations. Hence, we have to look for the meaning of this word as per common parlance and dictionary. In common parlance and as per general business practices, every agreement/contract has a fixed tenure which can be extended by mutual consent or contract can also be terminated even before such term expires if agreement between parties so provide. As far as dictionary meaning is concerned, the word "term" has been defined in concise Oxford English Dictionary South Asia 12th Edition as under:

*Term- **1**. A word or phrase used to describe a thing or to express a concept. **(terms)** a way of expressing oneself: a protest in the strongest terms. Logic a word or words that may be in subject or predicate of a proposition. **2. A fixed or limited period for which something lasts or is intended to last**.*

As per Black's Law Dictionary the word "term" has been defined as under:

*Term-**1.** A word or phrase; esp., an expression that has a fixed meaning in some filed<term of art>. **2.** A contractual stipulation < the delivery term provided for shipment within 30 days>.- Also termed contract term.*

Thus, as per dictionary meaning, the word "term" is essentially refers to period in relation to a contract.

42. Apart from above observations, we also take note that the other aspect of such 38(2) which is that Resolution Plan should also provide implementation schedule which is also in terms of specific period. Thus, both aspects, if read together, make it conclusive that there should be a specified period of validity of Resolution Plan. We also take note of explanation II to Regulation 36 B (4A) which reads as under:

36B. Request for Resolution Plans.

> *(4A) The request for Resolution Plans shall require the resolution applicant, in case its Resolution Plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.*

Explanation I. - not relevant, hence, not reproduced.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the Resolution Plan, amount payable to creditors under the Resolution Plan, etc.]

43. It is evident from the perusal of this explanation that tenure of Bank Guarantee is to be given in number of years or it may also be on the basis of **the term of the Resolution Plan**. Thus, this explanation makes it amply clear that the term of Resolution Plan should be for a specific

period. This mandatory condition is of paramount significance in the context of controversy before us. When we pose a question to ourselves that why such a condition i.e., term of the plan has been incorporated? In our view, it is very vital because Resolution Applicant is coming to the rescue of Corporate Debtor. One of objects of insolvency resolution is to balance the interests of all stakeholders, which, not only includes financial creditor, corporate debtor and Resolution Applicant but also includes employees, operational creditors, Government and other stakeholders. No doubt, Resolution Applicant is also not coming with an object of charity. Resolution Applicant, in business sense, comes only when Resolution Applicant sees some value in the business of the Corporate Debtor. Resolution Applicant has to allocate resources for insolvency resolution as well as to keep it as going concern after taking over and earn profit. Considering this, in our view, allocation of funds for such Resolution Plan cannot be committed forever and the Resolution Applicant cannot wait forever as Resolution Applicant may employ funds earmarked for acquisition of business of Corporate Debtor elsewhere more productively which, in turn, would help in the growth of overall economy of the country and generate employment. Apart from this, inordinate delay results into erosion in the value of assets of Corporate Debtor which also goes against the object of maximization of value of assets of the Corporate Debtor. Further, insolvency resolution is a time-bound process where speed is of essence. In our view, it is because of

these considerations, the legislature has required that term of the plan should be specified in the Resolution Plan mandatorily so that after the expiry of such term or before such expiry, parties to a Resolution Plan i.e. Resolution Applicant and CoC can mutually decide to extend the validity of Resolution Plan. In the event of an agreement on extension, plan certainly stands extended and if Resolution Applicant does not find it worth to continue at that point of time it may have option to back out. Here, we may also say that, in appropriate cases, where there is no agreement on the extension of term of Resolution Plan, both CoC and Resolution Applicant can approach this Authority for suitable directions u/s 60(5)(c) of IBC, 2016 and the Adjudicating Authority can settle the issue having regard to circumstances as prevailing at that point of time and, in particular, to the delay in the approval of Resolution Plan, if any, by Adjudicating Authority. It is also of great significance to note that such exercise by Adjudicating Authority does not encroach, in any manner, upon the area of application of commercial wisdom earmarked for CoC in accepting or rejecting a Resolution Plan.

44. This position takes us to analyze the definition of plan validity period and clause 1.7.4 as specified in process document which read as under:

> ***"Plan Validity Period"*** *shall have the meaning ascribed to the term in clause 1.7.4 of this Process Document.* ***(Pg. 10 of 62 of process document).***

1.7.4 ***A Resolution Plan once made/submitted shall be valid for not less than 6(six) months from the Resolution Plan Submission Date including any revision to such Resolution Plan Submission Date ("Plan Validity Period"). In case of extension of Resolution Plan Submission Date by the CoC, the validity period of the Resolution Plan shall also be deemed to be extended for a period of 6(six) months from such revised Resolution Plan Submission Date. It is clarified for abundant caution that the Resolution Plan approved by the CoC shall not be subject to any expiry and shall remain valid and binding on the Successful Resolution Applicant. (Pg. 15 of 62 of process document).***

45. From the perusal of the above clauses, it is apparent that this clause makes Resolution Plan submitted by a Resolution Applicant valid for perpetuity meaning thereby if the Resolution Plan is not approved even after ten years still the Resolution Applicant will remain tagged or bind therewith. Can this be the intention of the legislature? In our view, having regard to objects and scheme of IBC, 2016, this cannot be so by stretching our imagination to any extent.However, in the present case as can be seen from the perusal of Clause 1.7.4, Resolution Plan does not have any expiry period which, in our opinion, is not in consonance with the provisions of Regulation 38(2) of CIRP Regulations, hence, if such plan comes for approval then the same can be rejected as being in violation of CIRP Regulations and ultimately of Section 30(2)(e) of IBC,

2016. We have also perused the Resolution Plan submitted by Resolution Applicant which has been approved by CoC in which term of plan has not been specified at all and only implementation schedule has been mentioned in Clause 3 at page 25 and clause 12 at page 39 of Resolution Plan (page 229, 243 and 244 of paper book). Said clauses are reproduced hereunder for the sake of ready reference:

3. *Conditions Precedent and Transfer Date*

The commencement of implementation of the Resolution Plan is subject to the following conditions ("Conditions Precedent"):

(i) Final Order on the Resolution Plan in accordance with the Code has been passed.

(ii) Finalization of Definitive Documents shall happen within 30 days of approval of the Resolution Plan by the CoC.

Definition of Final Order- "a period of 90 days has been completed, from the date of order of the Adjudicating Authority under Section 31(1) of the Code approving this Resolution Plan, in absence of any applicable stay by any judicial authority during such period".

12. *Implementation Schedule*

Key Highlights of the Action Plan

Implementation of various Activity	*Indicative Term/Schedule*
• *Formation of "SVP"* • *Issuance of NCDs to Financial Creditors* • *Re-construction of Board of Directors* • *Reduction in share capital* • *Issuance of equity to Financial Creditors* • *Setting up of management team and control systems*	*Within 30 days of the Transfer Date*
• *Infusion of working capital in the Corporate Debtor*	*Within 6 months from the Transfer Date*

Accordingly, it can be safely concluded that the Resolution Plan without having a period of its validity does not confirm to the requirements of 30(2((e) IBC, 2016 and, thus, liable to be rejected.

46. Considering the legal position explained above, if we dispose of IA 476 of 2018 which has been filed for approval of Resolution Plan and is pending for our approval and in doing so, the conclusion which could be arrived by us is that such Resolution Plan is liable to be rejected as violative of provisions of Section 30(2)(e) of IBC, 2016 and consequence of this would be that we will have to pass an order of liquidation u/s 33(1)(b) of IBC, 2016. Though, as per CIRP and Liquidation process Regulations, even during liquidation the Corporate Debtor is first to be sold as a going concern but such order may have severe adverse consequences on the running business operations of Corporate Debtor and may not be in the interest of all stakeholders. Thus, instead of that, in our considered view, the option to dispose of the present application by permitting withdrawal of such Resolution Plan if exercised in favour of the Resolution Applicant would be better one so that we may not be required to pass order of liquidation necessarily because withdrawal situation as such does not fall either in Section 33(1)(a) or 33(1)(b) of IBC, 2016 for the reason that a Resolution Plan has been received u/s 30(6) of IBC, 2016 and the same is being permitted to be withdrawn and not rejected. We are further of the view that CoC may find suitable entrepreneurs considering the fact that Corporate Debtor is still a going concern and has substantial

amount of business/assets, hence, for this reason also allowing the Resolution Applicant to withdraw may serve this purpose.

47. Thus, this withdrawal application can be disposed of at this stage only by passing an order permitting such withdrawal. However, considering the fact that there exists no specific provision in IBC, 2016 or Regulations made there-under as regard to this aspect, hence, question of applicability of the provisions of Indian Contract Act, 1872 in such situation is of paramount importance not only with perspective of case on hand but also for disposal of other similar cases. The first question arises for our consideration is whether any clause exists in the process document as regard to applicability of general laws? The answer to this question was in definition of term "Applicable Laws" in the definition section of process document and in clause 3.1 miscellaneous section of process document which read as under:

> ***"Applicable Laws"*** *means, any statute, law, regulation, ordinance, rule, judgment, order, decree, clearance, approval, directive, guideline, policy, requirement, or other governmental restriction or any similar form of decisions, or determination by, or any interpretation of administration of any of the foregoing by, any Government Agency of India whether in effect as of the date of this Process Document or thereafter and in each case as amended or modified.* (Pg. 6 of 62 of process document).
>
> ***Clause 3.1***
>
> *This process document, the Resolution Plan Process and he Resolution Plan submitted hereto shall be governed by and construed in accordance with the laws of Republic India and the Adjudicating Authority/Courts of Mumbai shall have the exclusive jurisdiction over all disputes arising under, pursuant to or in*

connection with this Process Document or the Resolution Plan Process.

Thus, in view of the above provisions of process document, there remains no dispute as regard to applicability of provisions of Indian Contract Act, 1872 to the process document and consequently to Resolution Plan submitted in accordance with the provisions of such process document. Having said so, in our view, even in the absence of such clauses in the process document, provisions of Indian Contract Act, 1872 would still be applicable as this Act governs the field of enforcement of contracts. Though, the provisions of Indian Contract Act, 1872 would be applicable for the Resolution of the dispute before us but that would be subject to one limitation that any provision of this Act contrary to any specific provision of IBC, 2016 or regulations made there-under would not be applicable because of Section 238 of IBC, 2016. Having found so, now, we move forward to decide the issue on hand having regard to provisions of Indian Contract Act, 1872.

48. In this regard, the Resolution Applicant has relied on various judicial decisions wherein it has been held that time is the essence of insolvency resolution and IBC, 2016 also contemplates a strict enforcement of timeline prescribed therein. According to Resolution Applicant, if this is not achieved for any reason without any fault on the part of the Resolution Applicant, then the Resolution Applicant shall stand absolved from its obligation of performing his promise in the Resolution Plan. For

this purpose, Resolution Applicant has placed strong reliance under the provisions of Section 46, 54 and 55 of Indian Contract Act, 1872 which are reproduced as under:

> ***"46. Time for performance of promise, when no application is to be made and no time is specified.***—*where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.*
>
> ***Explanation.***—*the question "what is a reasonable time" is, in each particular case, a question of fact.*
>
> ***54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.***— *When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.*
>
> ***Illustrations***
>
> .....
>
> *(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B"s promise to pay need not be performed, and A must make compensation.*
>
> ***55. Effect of failure to perform at fixed time, in contract in which time is essential.***—*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*
>
> ***Effect of such failure when time is not essential.***—*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do*

such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—*If, in case of a contract voidable on account of the promisor failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.*

49. It has also been submitted on behalf of Resolution Applicant that Resolution Applicant and CoC/RP are both promisor and promisee. The Resolution Applicant has promised to bring required funds as committed in the Resolution Plan submitted by it and CoC/RP have promised to hand over the Corporate Debtor absolutely as per the Resolution Plan to the Resolution Applicant. Thus, it is claimed that these are mutual promises and having regard to the time, being essence of the contract, delay of more than 600 days in approval of Resolution Plan by Adjudicating Authority from the date of submission/approval of plan has made such contract voidable at the option of the Resolution Applicant, being a promise, in accordance with the provisions of Section 54 and Section 55 of Indian Contract Act, 1872 as referred to above. It has been emphasized that even if time was not to be treated as essence of contract then also it was required to be performed within a reasonable time in the light of provisions of Section 46 of Indian Contract Act, 1872.

50. Before proceeding further, we deem it fit to deal with the contentions made on behalf of CoC in this regard. The questions raised regarding the nature of contract require us to look into the sequence of actions involved in the transaction. The Resolution Professional first published invitation for Expression of Interest. The Resolution Applicant expressed its interest. List of proposed Resolution Applicants have been finalised by the Resolution Professional. Resolution Professional has prepared RFRP as approved by CoC. The Resolution Applicant has submitted Resolution Plan. Thereafter, the Resolution Professional has confirmed that such plan meets the relevant requirements of IBC, 2016 and submitted the same before CoC for its approval. CoC has approved such plan. Thereafter, performance security is provided by Resolution Applicant. After this, Resolution Professional is required to submit the same to Adjudicating Authority for its approval. Resolution Plan consist acts to be performed subsequent to approval by Adjudicating Authority which include implementation of Resolution Plan where in the Resolution Applicant is required to give the consideration and Resolution Professional is required to hand over the assets and management of the Corporate Debtor to Resolution Applicant through definitive agreements to be executed between the parties. The funds received are to be distributed by Resolution Professional to various stakeholders in terms of provisions of Section 53 r.w. 52 of IBC, 2016. Thus, as per sequence of events, it is clear that all three parties are involved in this process and they have got some obligation to perform at every stage and subsequent

performance is dependent upon the achievement/completion of pre stage performance. Thus, in our view, process document is an instance of bilateral contract and this cannot be considered as unilateral contract as pleaded on behalf of the CoC. For such view, we also draw strength from the definition of both unilateral contact and bilateral contract as per Black's law dictionary. The term "Unilateral contract" is defined as under:

Unilateral contract

A contract in which only one party makes a promise or undertakes a performance.

"[M]any unilateral contracts are in reality gratuitous promises enforced for good reason with no element of bargain." P.S. Atitya, an Introduction to the Law of Contract 126(3d. ed. 1981)

"If says to B, 'if you walk across the Brooklyn Bridge I will pay you $100,' A has made a promise but has not asked B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B Must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a conduct involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."

Thus, the unilateral contract is a contract in which only one party makes a promise or undertakes to perform. For example, in the present case, without any invitation to offer being made by Resolution Professional, if the Resolution Applicant would have made a promise to pay the consideration to acquire Corporate Debtor then it could be said that it was a unilateral contract but admittedly it is not so here as both the parties have made promises and undertaken respective performance obligations.

Bilateral Contract:

A contract in which each party promises a performance, so that each party is on obligor on that party's own promise and an obligee on the other's promise; a contract in which the parties obligate themselves reciprocally, so that the obligation of one party is correlative to the obligation of the other- Also termed mutual contract; reciprocal contract; (in civil law) synallagmatic contract. See COUNTERPROMISE.

> *"In a bilateral contract a promise, or set of promises on one side, is exchanged for a promise or a set of promises on the other side. In a unilateral contract, on the other hand, a promise on one side is exchanged for an act (or forbearance) on the other side. Typical examples of bilateral contracts are contracts of sale, the buyer promising to pay the price and the seller promising to deliver the goods. A typical example of a unilateral contract is a promise of reward for the finding of lost property followed by the actual finding of the property."*

From the perusal of above, our view that process document is a bilateral contract gets confirmed.

51. Now, coming to the contention on behalf of CoC that the Resolution Applicant has accepted various terms and conditions of the process document on its own, hence, binding. On the other hand, it has also been stated that it was required to be done so by Resolution Applicant otherwise his offer would have become conditional and, therefore, it would have been rejected at the stage only by CoC. Thus, it means that such conditions have been accepted by Resolution Applicant to remain in fray and, therefore, such acceptance cannot lead to an interference that there is no expectation on the part of the Resolution Applicant that such Resolution Plan would be approved in a reasonable time and could be implemented thereafter, particularly when timelines for each step are well defined IBC, 2016 and

there is no clause in the process document which indicates about possibility of inordinate delay or delay beyond a reasonable period in the whole process so that Resolution Applicant could foresee the same at the time of submitting Resolution Plan. As far as the aspect of reasonable period is concerned, in the background of legislation under which we are dealing, completion of proceedings in a time-bound manner is its hall mark and having regard to delays occurring in completion of insolvency resolution due to the legal process, the legislature also intervened to amend the provisions of Section 12 of IBC, 2016 to include time consumed in judicial proceedings for disposal of various disputes in the maximum period available for CIRP to make it workable and to keep its soul intact. Even threshold limit of rupees one lacs to trigger insolvency resolution has been increased to rupees one crores so that work load of Adjudicating Authority is reduced. Model timelines also prescribe the period to be taken by Adjudicating Authority in approval of Resolution Plan i.e. 15 days from the date of submission of Resolution Plan by Resolution Professional for its approval within the overall period of 180 days, hence, it is not correct to say that no time is prescribed for approval of Resolution Plan by Adjudicating Authority. In view of above discussion, we reject all contentions made on behalf of CoC in this regard.

52. We further find that the Resolution Applicant has participated in CoC meeting held on 23.12.2019 which was convened in pursuance of order of this Authority to make the CoC approved plan to make the conditions of

Resolution Plan in accordance with the findings of the Hon'ble Supreme Court in the case of *Essar Steel India Limited(supra)* but the same, in our view, cannot be considered as acceptance of the Resolution Applicant to wait for approval of the Resolution Plan indefinitely thereby making him disentitled to withdraw from such plan in future even if the circumstances change and it also appears to Resolution Applicant that there may not be a finality to Resolution Plan in near future. This is particularly so in view of pandemic situation caused by Covid-19 and pendency of several Interlocutory Applications filed by different parties whereby various challenges have been made to the validity of Resolution Plan submitted by Resolution Applicant and approved by CoC. Such IAs are around 30 in numbers and still pending for disposal by this Authority. At this stage, we cannot escape from our contribution in the delay in disposal of the application filed by RP due to structure of processes which the Adjudicating Authority has to follow and administrative constraints. In this regard, we may also submit that even the contribution of Bar is also required to avoid frivolous litigation causing delays and, thus, saving IBC regime from failure like earlier regimes. In this regard, we further consider it appropriate to reproduce the findings given by the Hon'ble Mr. Justice Dr. D.Y. Chandrachud vide order dated 13.11.2019 in the case of Rojer Mathew V/s. South Indian Bank Limited in Civil Appeal No.8588 of 2019 as under:

A. Introduction
A.1 Challenges of the tribunal structure

A global trend

1. *India is no exception to the global trend towards the tribunalisation of justice. World over, tribunals have been constituted both in regulatory and adjudicatory areas. Tribunals act as adjudicators of disputes. This movement has in part been occasioned by new legislation governing modern societies as they confront the challenges thrown up by the complexities of social and economic orderings. The engagement of law with economics and technology has been shaped by social, cultural and historical contexts. While many of them may reflect the shared aspirations of societies governed by a common legal tradition, it would be simplistic to assume that the challenges thrown up by the layered adjudication through tribunals are common to all societies. Hence, as we analyse the impact of the growing movement towards tribunalisation – a feature which is common to all societies – it is important to bear in mind the context in which our problems have arisen as we attempt to find answers to many of those concerns. Precedents, both judicial and scholarly, in other jurisdictions furnish a useful point of reference, so long as we understand that which is peculiarly our own.*

The old and the new

2. *Courts and tribunals should in theory be, but are not always in practice, cooperative allies. Tribunals have taken over the mantle of deciding cases which conventionally were assigned for adjudication to courts. Litigation, traditionally the domain of courts, has in incremental stages come to be transferred to the decision- making authority of tribunals. There is hence a jurisdictional transfer of dispute resolution to tribunals. Accompanied by legislative enactment, this postulates the exclusivity of entrustment to tribunals. Then again, new tribunals have been constituted to deal with subject areas of a genre quite distinct from, and therefore, unlike the traditional pattern of litigation with which conventional courts were familiar. Tribunals have thus not only taken away subjects which have been carved out of the jurisdiction of courts as a matter of legislative policy, but have also fostered a new culture of adjudication over areas in which a traditional court mechanism had little experience and expertise. In that sense, tribunalisation represents an amalgam of the old and the new: a combination of the role which was traditionally performed by the court together with new functional responsibilities, quite unlike the dispute resolution function which was traditionally performed by courts.*

Domain specialisation

3 *The movement towards setting up tribunals has been hastened in many parts by the need for specialisation. Specialisation acknowledges the pool of knowledge and domain expertise of persons who discharge core adjudicatory functions within tribunals. The assumption which underlies the setting up of tribunals is that those who decide are individuals possessed of the qualities necessary for adjudication in that specific field. Acquisition of knowledge prior to appointment to a tribunal and practical experience of handling subject areas reserved for the tribunal bring together a pool of individuals possessing the qualifications and abilities to render specialised justice.* ***In fostering specialisation, the tribunal structure emphasises the specialisation of adjudicatory personnel. But equally, an important facet is the specialisation of those who appear before the tribunals. A specialised Bar is an invaluable input towards the efficiency of institutional adjudication. Together, this contributes to an adjudicatory process which is cognisant of the special features, needs and requirements of the subject areas carved for the tribunal.***

4 *The extent to which the purpose of setting up tribunals is realized is often a projection of ground realities. These realities, including the manner and extent to which provisions of the law governing a tribunal are enforced, directly impact upon the efficacy of the tribunal. Critical to the purpose of having a specialised tribunal is the presence of specialised adjudicators on decision-making posts. For, it is their domain expertise which defines the quality of outcomes in the adjudicatory process. Collectively, the presence of specialised adjudicators depends upon well-trained and qualified persons and their availability in a source pool. This factor has often been lost sight of in the selection of judges to specialised tribunals. Absent the requisite degree of expertise, the procedure and functioning of the tribunal may only replicate a conventional adjudication in a court of law which the tribunal seeks to substitute.*

Expedition

5 *Apart from specialisation, a significant reason for the establishment of tribunals is expedition in the course of justice. This is also linked to the perceived values implicit in a specialised adjudicatory process. Domain expertise, particularly in a complex area, is a means of allowing*

adjudicators who understand the subject to decide quickly and effectively. It is often expected that the tribunal will follow procedures which are less cumbersome and tied to forms established in conventional courts. By allowing for a measure of procedural flexibility coupled with domain knowledge, tribunals are expected to remedy some of the causes which burden the judicial system.

6 *Similarly, another object of the growing need for tribunalisation is to unburden the court system. That purpose may be subserved when a chunk of existing cases pending before the conventional court system are transferred for adjudication to the newly created body. Reducing the burden on courts is a partial realisation of the purpose underlying the creation of the tribunal. Equally significant is that the tribunal must possess the ability not to allow, over a period of time, accretions of undisposed cases which had created judicial arrears in the first place. Statistical reduction of pending arrears in the judicial system occasioned by the creation of a tribunal has to be matched by the capacity of the new body to dispose of cases transferred to it from the court as well as new institutions before it. If this is not achieved, the net result is to defeat the very purpose of establishing the tribunal.*

Impact assessment

7 *Our analysis above indicates that the actual impact of the creation of a structure of tribunals needs to be closely monitored to assess the efficacy of a tribunal as a measure of legal reform. The efficacy of the tribunal is functionally dependent on the availability of resources and capital, both human and otherwise. The tribunal must be possessed of adequate infrastructure both in terms of physical availability and the deployment of technological knowledge in the management of litigation. The procedures adopted by the tribunal must be flexible enough to allow for decision-making effectively and without delay. The process of making appointments to the tribunals must be seamless in order to fill up vacancies arising from retirement or unforeseen causes. The presence of large-scale vacancies can render tribunals defunct. This defeats the cause of justice in the area of the jurisdiction of the tribunal. This problem becomes particularly acute where a jurisdiction of a conventional court has been transferred to the tribunal under the provisions of an operating enactment. Absent a recourse to traditional courts for the resolution of conflicts, a litigant is virtually denied access as a result of an unavailable adjudicator to resolve a*

dispute. In other words, the process for appointment and selection has a direct bearing on the efficacy of tribunalisation. Keeping vacancies unfilled, either as a matter of tardy procedures or for other reasons, has the tendency to denude the efficacy of the tribunal as a dispute resolution mechanism. The surest way to deny access to justice is to keep a large number of vacancies."

Thereafter, flaws of current format of tribunal structure such as lack of were highlighted, which were hampering the achievement of objectives of tribunalisation. Thus, it is apparent that causes for delay need to be addressed by making suitable structural changes and active positive participation by the Bar in Insolvency Resolution or liquidation proceedings so as to meet the ends of justice as sought to be achieved by Insolvency and Bankruptcy Code, 2016. **No one, then, can complain of *"Justice delayed, justice denied."***

Now we may consider the aspect of specific reasons for delay on account of manner of completion of proceedings under Insolvency and Bankruptcy Code, 2016. In this regard, it is to be noted that rules for conducting Insolvency and Bankruptcy Code, 2016 proceedings have not been framed as yet and NCLT is conducting judicial proceedings as per NCLT Rules, 2016 which are not in harmony with the concept of adherence to time lines prescribed under substantive provisions of Insolvency and Bankruptcy Code, 2016. **The Hon'ble Supreme Court, in the case of Swiss Ribbons Pvt. Ltd. and Ors. Vs. Union of India (UOI) and Ors. in Para 33, observed as under:**

33. Rule 4 (3) of the aforesaid Rules states as follows:

4. Application by financial creditor.—

xxx xxxxxx

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

xxx xxxxxx

Section 420 of the Companies Act, 2013 states as follows:

420. Orders of Tribunal.—(1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

Rules 11, 34, and 37 of the National Company Law Tribunal Rules, 2016 [—NCLT Rules] state as follows:

11. Inherent Powers. —Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

xxx xxxxxx

34. General Procedure.—(1) In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5.

xxx xxxxxx —

37. Notice to Opposite Party.- (1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.

A conjoint reading of all these Rules makes it clear that at the stage of the Adjudicating Authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the Adjudicating Authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application. What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties. Thus, Section 65 of the Code reads as follows:

65. Fraudulent or malicious initiation of proceedings.—(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

Thus, it is apparent that adherence to time lines prescribed under substantive provision of Insolvency and Bankruptcy Code, 2016is not capable of being observed in spite of Section 64 thereof which prescribes for recording of reasons for not disposing of the matter within the period specified in the Insolvency and Bankruptcy Code 2016. In our view, suitable rules may be framed on priority which should be in conformity to the scheme of Insolvency and Bankruptcy Code, 2016. For example, Form-3 being notice of demand under Section 8 of Insolvency and Bankruptcy Code, 2016r.w rule 5 of Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 contains particulars of debt and default along with supporting documents and Corporate Debtor is obliged to reply to this notice within the specified period of 10 days from the receipt of such notice. When it is not done so then there is no need to give any opportunity of hearing to such Corporate Debtor and to file pleadings in support of its claim of pre-existing dispute, if any, subsequently. Further, time lines may be provided for completion of all pleadings and provisions for imposition of costs may also be made.

53. Apart from this, if we strictly go by legal provisions of section 60(5)(a) and section 60(5)(c) of IBC, 2016, in our considered view, time required for completing pleadings in such IAs and disposal thereof should not have come in the way of approval of Resolution Plan because all such IAs could be considered by the Appellate Authority u/s 61 or 61(3) of IBC, 2016 in an appeal against our order either approving or rejecting the Resolution Plan or order of dismissal of the same as pre-mature or without any locus and thereafter by Hon'ble Supreme Court under section 62 of IBC,2016. Having regard to the chequered history of litigation in this case and considering the statutory mechanism available to all litigants, we find substantial merit in the argument of Resolution Applicant that finality of their proposal cannot be expected in near future. In our considered view, due to non-occurrence of a contemplated event i.e. approval of Resolution Plan by Adjudicating Authority which is the foundation of the contract in a sense that without this Resolution Plan cannot be implemented in a reasonable time henceforth and even approval of Resolution Plan by us cannot attain finality in near future in view of statutory remedies available to various litigants, the Resolution Applicant stands discharged from its obligation of performance even though theoretically such performance may still be possible.

54. Although, the Resolution Applicant has specifically stated that it is not taking any shelter of the provisions of Section 56 of Indian Contract Act, 1872, still we consider it necessary to ponder a little on this aspect in view of submissions made on behalf of CoC in regard to this. It is a settled

proposition that contract is a pious obligation undertaken by parties thereto, hence, the same should be given effect to in its true sense. Thus, doctrine of absolute contract remains valid for all times. However, certain exceptions have emerged to this over last two hundred years. Initially, the party to a contract was discharged from its obligation or performance on account of physical incapacity or destruction of subject matter due to natural calamities or otherwise. Subsequently, sovereign intervention which made the performance of executory contract impossible also released party from performance due to frustration. Thereafter, permanent injunction by a Court was also found to be a ground upon which performance of contract could be cancelled. However, it goes without saying that all these factors have to be considered in view of specific terms and conditions of the contract between the parties and, therefore, in spite of such factors existing a party may not be released from its obligations if contract terms suggest otherwise. The other aspect which needs to be considered is that delay in performance should not be self-induced i.e. without any act of party contributing of such delay or which should be beyond the control of the party. We also agree with the contention made on behalf of CoC that commercial hardship by itself is not a sufficient ground to release a party from its contractual obligations. Having stated such general principles, we submit that provisions of Section 56 of Indian Contract Act, 1872 are an instance of positive law which applies only when contract does not prescribe for the situations/events of frustration. In the present case, there is a provision in process document

which says that Resolution Applicant cannot unilaterally withdraw but no circumstances have been prescribed in the process document whereby even by mutual consent, Resolution Applicant could withdraw. On the contrary, in other clause 1.7.4 of process document it has been prescribed that Resolution Plan is without any expiry. In this situation, we are of the view that no significance can be given to clause 1.17.17 relating to withdrawal. Accordingly, we hold that provisions of Section 56 of Indian Contract Act, 1872 would be applicable. In terms of provisions of section 56, the word "impossible" does not mean only physical impossibility but it also connotes impracticability. This section covers both situations i.e. impossibility of performance and failure of object. In the background of the facts of the present case, in our opinion, due to inordinate delay in approval of such Resolution Plan, object of the Resolution Plan has frustrated. Consequently, in our view, Resolution Applicant stands discharged. We do not hesitate here to mention that in case of commercial arrangement governed by a legislation like IBC, 2016, inordinate delay in disposal of proceedings by a judicial forum for significant period but due to complexities involved in the process of disposal beyond the control of parties to the contract would also be construed as an event giving occasion to frustration of contract.

55. Based upon these legal principles, the position which emerges is that the law recognizes that without default of either party, if a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for have rendered the performance impossible then

a party may be released from its performance obligation. This is the proposition in general law and if it is so in general law then such doctrine has to be necessarily applied to a case which is governed by a law which is itself based upon adherence to timelines. Having said so, we do not consider it necessary to go into the exercise of judicial approach as regard to focus on adherence to timelines given under IBC, 2016 in much detail as this issue has already been settled by Hon'ble Supreme Court in various decisions after taking note of Reports of BLRC, Parliamentary Committee and ILC and which can also be seen from recent judicial approach coupled with statutory changes made under IBC, 2016. Thus, adherence to such timelines is mandatory in general barring a few exceptions. In this regard, in our view, the observations of Hon'ble Supreme Court in the case of *Arcelormittal India Pvt. Ltd* in Para 86 (already reproduced at page 33 of this order) and in the case of *Essar Steel India Ltd* in Para 98 to 108 are most relevant. The observations of Hon'ble Supreme Court in the case of *Essar steel* are reproduced as under:

> **98**. *So far as Section 4 is concerned, it is clear that the original timelines in which a CIRP must be completed have now been extended to 330 days, which is 60 days more than 180 plus 90 days (which is equal to 270 days). But this 330-day period includes the time taken in legal proceedings in relation to such resolution process of the corporate debtor. This provision is to get over what is stated in the judgment in Arcelormittal India(supra) at paragraph 86, that the time taken in legal proceedings in relation to the corporate resolution process must be excluded from the timeline mentioned in Section 12. Secondly, the third proviso added to the Section also mandates that where the period of 330 days is over on the date of commencement of the Amending Act of 2019, a further grace period of 90*

days from such date is given, within which such process shall either be completed or the corporate debtor be sent into liquidation.

99. *The raison d'être for this provision comes from the experience that has been plaguing the legislature ever since SICA was promulgated. The problems of SICA and other successor enactments was stated in graphic detail in Madras Petrochem Limited v. BIFR (2016) 4 SCC 1 at paragraphs 17 to 23. It will be seen from these paragraphs that though SICA, the Recovery of Debts Act of 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") all provided for expeditious determination and timely detection of sickness in industrial companies, yet, legal proceedings under the same dragged on for years as a result of which all these statutory measures proved to be abject failures in resolving stressed assets. It is for this reason that the BLRC Report of 2015 stated:*

> *"In limited circumstances, if 75 % of the creditors committee decides that the complexity of a case requires more time for a Resolution Plan to be finalised, a onetime extension of the 180 day period for up to 90 days is possible with the prior approval of the adjudicator. This is starkly different from certain present arrangements which permit the debtor / promoter to seek extensions beyond any limit.*

This approach has much strength:

- *Asset stripping by promoters is controlled after and before default.*
- *The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.*
- *Others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring.*
- *All parties know that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death.*
- *The role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the Resolution Plan.*

xxx xxx xxx

Speed is of essence

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the „calm period□ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay. This same idea is found in FSLRC's treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

Identifying and addressing the sources of delay

Before the IRP can commence, all parties need an accurate and undisputed set of facts about existing credit, collateral that has been pledged, etc. Under the present arrangements, considerable time can be lost before all parties obtain this information. Disputes about these facts can take up years to resolve in court. The objective of an IRP that is completed in no more than 180 days can be lost owing to these problems. Hence, the Committee envisions a competitive industry of „information utilities who hold an array of information about all firms at all times. When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay. The second important source of delays lies in the adjudicatory mechanisms. In order to address this, the Committee recommends that the National Company Law Tribunals (for corporate debtors) and Debt Recovery Tribunals (for individuals and partnership firms) be provided with all the necessary resources to help them in realizing the objectives of the Code.

xxx xxx xxx

Conclusion

The failure of some business plans is integral to the process of the market economy. When business failure takes place, the best outcome for society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a

rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigor and greater competition."

100. *The speech of the Hon'ble Minister on the floor of the House of the Rajya Sabha also reflected the fact that with the passage of time the original intent of quick resolution of stressed assets is getting diluted. It is therefore essential to have time-bound decisions to reinstate this legislative intent. It was also pointed out on the floor of the House that the experience in the working of the Code has not been encouraging. The Minister in her speech to the Rajya Sabha gives the following facts and figures:*

> *"Now, regarding the Corporate Insolvency Resolution Process (CIRP), under the Code, I want to give you data again as of 30th June, 2019. First, I will talk about the status of CIRPs. Number of admitted cases is 2162;number of cases closed on appeal, which I read out about, is 174; number of cases closed by withdrawal under Section 12A, is 101, I have given you a slightly later data; number of cases closed by resolution is 120; closed by liquidation, 475; and ongoing CIRPs are 1292. So, now, I would like to mention the number of days of waiting. I would like to mention here the details of the ongoing CIRPs, along with the timelines. Ongoing CIRPs are 1,292, the figure just now I gave you. Over 330 days, 335 cases; over 270 days, 445 cases; over 180 days and less than 270 days, 221 cases; over 90 days but less than 180 days, 349 cases; less than 90 days, 277 cases. The number of days' pending includes time, if any, excluded by the tribunals. So, that gives you a picture on what is the kind of wait and, therefore, why we want to bring the Amendments for this speeding up."*

101. *Mrs. Madhvi Divan also pointed out that the Hon'ble Minister's speech had also adverted to the strengthening of the NCLT as follows:*

> *"In view of the increasing number of cases, the Government has increased the number of benches of NCLT from 10 to 15, during just the last one year. In one year, we have increased it from 10 to 15. The number of members has also been increased in a phased manner. Recently, 26 new members have joined bringing the total number of members to 52. Sir, more than one court has been operationalised in the benches where a large number of cases are pending, such as, in Mumbai, Delhi, Chennaiand Kolkata. The*

projects like e-governance and e-courts have also been implemented for faster and speedier disposal of the cases."

102. *Shri Sibal vehemently objected to any reliance on the speech of the Minister and cited* ***K.P. Varghese v. ITO*** *(1982) 1 SCR 629 and* ***K.S. Paripoornan v. State of Kerala*** *(1994) 5 SCC 593. In* ***Varghese*** *(supra) this Court held, at page 645, as follows:*

> *"...Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be emedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in Loka Shikshana Trust v. CIT [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : 101 ITR 234 : 1976 LR 1] , the other in Indian Chamber of Commerce v. Commissioner of Income Tax [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : 101 ITR 796 : 1976 Tax LR 210] and the third in Additional Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers' Association [(1980) 2 SCC 31 : 1980 SCC (Tax) 170 : 121ITR 1] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause.*

103. *In* ***Paripoornan*** *(supra), the Court held as follows:*

*"**77.** In support of the construction placed on Section 23(1- A) of the principal Act and Section 30(1) of the amending Act in Zora Singh [(1992) 1 SCC 673] the learned counsel for the claimants have*

referred to the Statement of Objects and Reasons appended to the Bill in 1982 as well as the Bill of 1984 and have submitted that the said Statement of Objects and Reasons show that the object underlying the enactment of Section 23(1-A) was to remove the hardship to the affected parties on account of pendency of acquisition proceedings for a long time which renders unrealistic the amounts of compensation offered to them. Our attention has also been invited to the speeches made by members at the time when the Bill was considered and was adopted by Parliament. It has been urged that a construction which advances the said object must be adopted. We are unable to accept this contention. As regards the Statement of Objects and Reasons appended to the Bill the law is well settled that the same cannot be used except for the limited purpose of understanding the background and the state of affairs leading to the legislation but it cannot be used as an aid to the construction of the statute. (See Aswini Kumar Ghosh v. Arabinda Bose [1953 SCR 1, 28 : AIR 1952 SC 369] ; State of W.B. v. Subodh Gopal Bose [1954 SCR 587, 628 : AIR 1954 SC 92] per Das, J.; State of W.B. v. Union of India [(1964) 1 SCR 371, 383 : AIR 1963 SC 1241] .) Similarly, with regard to speeches made by the members in the House at the time of consideration of the Bill it has been held that they are not admissible as extrinsic aids to the interpretation of the statutory provisions though the speech of the mover of the Bill may be referred to for the purpose of finding out the object intended to be achieved by the Bill. (See State of ravancore-Cochin v. Bombay Co. Ltd. [1952 SCR 1112 : AIR 1952 SC 366] and swini Kumar v. Arabinda Bose [1953 SCR 1, 28 : AIR 1952 SC 369] .) On a perusal of the Bills of 1982 and 1984 we find that they did not contain the provisions found in Section 23(1-A) of the principal Act and Section 30(1) of the amending Act. These provisions were inserted when the 1984 Bill was under consideration before Parliament. The Statement of Objects and Reasons does not, therefore, throw any light on the circumstances in which these provisions were introduced."

104. *As the speech of the Hon'ble Minister on the floor of the House only indicates the object for which the amendment was made and as it contains certain data which it is useful to advert to, we take aid from the speech not in order to construe the amended Section 12, but only in order to explain why the Amending Act of 2019 was brought about.*

105. *Given the fact that timely resolution of stressed assets is a key factor in the successful working of the Code, the only real argument against the amendment is that the time taken in legal proceedings cannot ever be put against the parties before the NCLT and NCLAT based upon a Latin maxim which sub-serves the cause of justice namely, actus curiae neminem gravabit.*

106. *In Atma Ram Mittal v. Ishwar Singh Punia(1988) 4 SCC 284, this Court applied the maxim to time taken in legal proceedings under the Haryana Urban (Control of Rent and Eviction) Act, 1973, holding:*

> *"**8.** It is well-settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim "actus curiae neminem gravabit" — an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the ten years' exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else."*

107. *Likewise, in Sarah Mathew v. Institute of Cardio Vascular Diseases,(2014) 2 SCC 62, this Court held that for the purpose of computing limitation under Section 468 of the Code of Criminal Procedure, 1973 the relevant date is the date of filing of the complaint and not the date on which the Magistrate takes cognizance, applying the aforesaid maxim as follows:*

> *"**39.** As we have already noted in reaching this conclusion,*

light can be drawn from legal maxims. Legal maxims are referred to in Bharat Kale [Bharat Damodar Kale v. State of A.P., (2003) 8 SCC 559 : 2004 SCC (Cri) 39] , Japani Sahoo [Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394 : (2007) 3 SCC (Cri) 388] and Vanka Radhamanohari [Vanka Radhamanohari v. Vanka Venkata Reddy, (1993) 3 SCC 4 : 1993 SCC (Cri) 571]. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim nullum tempus aut locus occurrit regi, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim vigilantibuet non dormientibus, jura subveniunt. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim actus curiae neminem gravabit which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles."

***108.** Both these judgments have been followed in **Neeraj Kumar Sainy v. State of Uttar Pradesh** (2017) 14 SCC 136 at paragraphs 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date - without any exception thereto - may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down*

the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from Madras Petrochem (supra). Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation.

56. Thus, we are of the view that although word "mandatorily" was held unconstitutional by Hon'ble Supreme Court in Essar's case but the spirit of amendment in Section 12 has been retained by Hon'ble Supreme Court by putting so many riders for extension of period, hence, delay beyond the maximum period specified in Section 12 would be a reasonable cause for excuse from performance.

57. Now, we shall deal with other contentions made by the parties.

58. The Resolution Applicant has pointed out that there were serious adverse impacts due to delay and for which he has relied on various facts such as cancelling of O&M Contracts and uncertainty regarding renewal of O&M contract, substantial portion of other income in the cash flow meaning thereby that business was not generating cash from basic operations and erosion in the value of assets. The Resolution Applicant has also claimed that claims towards workmen were to be settled as per clause 6 of part II of Resolution Plan as in relation to the workers had Daman Unit which was to be closed completely but still the same had not been closed and due to this additional liability of Rs. 40 Crores till date had arisen which may further increase and it would be a grave injustice to the Resolution Applicant, if Resolution Applicant is forced to take this liability. This plea of the Resolution Applicant has remained uncontroverted or undisputed. We are of the considered view that except this plea of additional liability towards workmen there is no merit in the claims of the Resolution Applicant as regard to commercial/business prospects in view of clause 2

of the disclaimer section as well as Clause 1.12.1 of the process document. We also do not fine any merit in the contentions of the Resolution Applicant that there were mis-statements as regard to cancellation of O&M contracts to the extent of 174 MW as the same was available in VDR/website access of which, as per the relevant provisions of process document i.e. clause 1.17.14, was available to the Resolution Applicant and, in fact, that process/facility had been accessed to before submitting the Resolution Plan. As regard to the contention of the CoC/RP that they had approved the Resolution Plan which envisaged 80 % (eighty per cent) hair-cut, the Resolution Applicant has submitted that Resolution Plan submitted by such applicants was twice the liquidation value, hence, fact of such hair-cut cannot go against the Resolution Applicant for withdrawal of such application. Be that as it may, we are of the view that this fact, as such, have got no relevance for determination of the issue of withdrawal because it is not the claim of the CoC that Resolution Applicant had made a wrong bargain, hence, it was seeking an exit opportunity nor such a case has been made out.

59. It has been contended on behalf of CoC that if Resolution Applicant is allowed to withdraw then it would set a bad precedent and may result into filing of number of applications seeking same relief. It has also been claimed that Financial Creditors had already suffered loss due to such delay and would be saddled with huge losses if it Resolution Plan is withdrawn. There cannot be disagreement with this situation but question

arises as to why this situation has come. Some of the causes have been mentioned in earlier part of this order and it is now to seen whether actions of RP/CoC have also contributed for such delay. If answer is in yes, then the question of how and to what extent would arise? Before we arrive at any conclusion in this regard, we consider it pertinent to dwell upon the issue of role and powers of CoC as per statutory provisions and shift in the approach of legislature/judiciary forums as regard to the same. CoC is constituted by RP in terms of provision of Section 21 of IBC, 2016 which is comprised of all Financial Creditor or Corporate Debtor. The Voting power of each member of the CoC is determined on the basis of financial debt owed to him. CoC in its first meeting is bound to appoint Resolution Professional by the requisite percentage of votes. It is also within its competence to replace IRP/RP in terms of provisions of Section 22 and 27 of IBC, 2016 respectively. Section 28 of IBC, 2016 provides that certain actions cannot be taken by Resolution Professional during the CIRP without the prior approval of CoC. And the important obligation of CoC is contained in Section 25(2)(h) of IBC, 2016 which provides for approval of criteria for submission of Resolution Plan and such criteria is to be fixed having regard to the complexity and scale of operations of the business of the Corporate Debtor. As far as role of CoC as regard to Information Memorandum is concerned, there is no requirement in the Code or Regulations that such Information Memorandum is to be approved by CoC. Only requirement is that such Information

Memorandum be provided to members of CoC on the completion of certain formalities. Similar is case for publication of invitation for Expression of Interest i.e. only the role and duties are assigned as regard to invitation for Expression of Interest only to RP. Only RP is empowered to issue request for submission of Resolution Plan which is to be based upon the Information Memorandum and evaluation matrix. The Role of CoC starts when Resolution Plan(s) are submitted to CoC as per the final list of Resolution Applicants as per Regulations 39(3). Originally, Regulation 39(3) stood as under:

"The committee may approve any Resolution Plan with such modifications as it deems fit."

Thereafter, w.e.f. 03.07.2018 Regulation 39(3) reads as under:

39. Approval of Resolution Plan.

3) *The committee shall evaluate the Resolution Plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best Resolution Plan and may approve it with such modifications as it deems fit:*

Simultaneously, following proviso was added to Regulation 39(3) w.e.f. 03.07.2018:

"Provided that the committee shall record the reasons for approving or rejecting a Resolution Plan."

This proviso was amended w.e.f. 25.07.2019 and amended proviso read as under:

"Provided that the committee 'shall' record its deliberations on the feasibility and viability of the Resolution Plans."

However, w.e.f. 07.08.2020 such Regulation has again been restructured. Amended regulation 39(3) now reads as under:

39. Approval of Resolution Plan.

3) The Committee shall-

a. Evaluate the Resolution Plans received under sub-regulation (2) as per evaluation matrix;

b. record its deliberations on the feasibility and viability of each Resolution Plan; and

c. vote on all such Resolution Plans simultaneously.

60. Now, when we analyze the Regulations 39(3) of CIRP Regulations which has been reproduced with amendments carried out therein from time to time hereinbefore then, it would emerge that originally there was no requirement to evaluate the same strictly as per evaluation matrix as Clause 25(2)(h) was inserted w.e.f. 06.06.2018 along with amendment of such regulation. Further, in the proviso which was existing prior to 25.07.2019 there was a mandatory requirement of recording the reasons for approving or rejecting the Resolution Plan. It is noteworthy that in the main sub regulation 3 the word 'may' was always there which means that a plan could be approved or rejected. The Coc was always having power to modify. In the amended proviso w.e.f. 25.07.2019, the requirement of recording reasons has been substituted with the requirement to record its deliberations on the feasibility and viability of the Resolution Plan which is in sync with the provisions of Section 30(4) of IBC, 2016. Further, it is much wider in scope for responsibilities of CoC as compared to the earlier provisions consisting to requirement or recording the reasons.

61. Now, we reproduce the provisions of Section 30(1) to 30(4) of IBC, 2016 as under:

30. Submission of Resolution Plan

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

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

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the 4[payment] of other debts of the corporate debtor;

6[(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.

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

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

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

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

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

(c) provides for the management of the affairs of the Corporate debtor after approval of the Resolution Plan;

(d) the implementation and supervision of the Resolution Plan;

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

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

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

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

(4) The committee of creditors may approve a Resolution Plan by a vote of not less than [sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Provided *that the committee of creditors shall not approve a Resolution Plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017),*

where the Resolution Applicant is ineligible under section 29A and may require the resolution professional to invite a fresh Resolution Plan where no other Resolution Plan is available with it:

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

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

***Provided** also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (ord. 6 of 2018) shall apply to the Resolution Applicant who has not submitted Resolution Plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.*

Before amendment by Act of 2018 Section 30(4) stood as under:

"(4) The Committee of Creditors may approve a Resolution Plan by a vote of not less than seventy five percent of voting share of voting share of the Financial Creditors." Thus, thereafter w.e.f. 06.06.2018 percentage of voting was reduced from seventy-five to sixty-six per cent. Amendments were also made as regard to examination of aspect of eligibility of Resolution Applicant u/s 29A of IBC, 2016.

Thereafter, another amendment was carried out w.e.f. 16.08.2019 which provided for manner of distribution amongst the creditors. From the prospective of present case, the incorporation of words "after considering its feasibility and viability" are important as these two words impose

onerous obligation on part of CoC to take care of interest of all stakeholders. These words, in our view, results into two proposition, namely, firstly, that the feasibility and viability of a plan is to be seen not only at the stage of its submission but Resolution Plan should also be feasible and viable in times to come and secondly, these terms also impose a condition that plan should not be in the realm of speculation or vague. The term **"feasibility"** though not defined in the Code but it has generally been accepted as a test which requires that the conformation of plan may not likely be followed by the liquidation or the need for additional financial resources by the Corporate Debtor or Resolution Applicant. Accordingly, the requirement of considering feasibility and viability of a Resolution Plan by CoC in itself is a step forward to take care of interest of all stakeholders in addition to interests of CoC comprising of Financial Creditors. In a sense, it also leads to prima facie conclusion that legislature gradually thought it fit to burden CoC to give due weightage and consideration to the objects enshrined in the preamble to the IBC, 2016. This is further strengthened by incorporating words "feasibility and viability" in Regulation 39(3) of CIRP regulations as well.

62. Now, we would take note of provisions of Section 31(1) and 31(2) are also reproduced as under:

*31. **Approval of Resolution Plan***

30(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.

63. It is to be noted that said proviso to Section 31(1) has been inserted by Insolvency and Bankruptcy Code, (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018.

64. From the perusal of Section 30(2), 30(3) and 30(4) it is noted that Resolution Professional submits such Resolution Plans to CoC which confirm to the conditions referred in sub-section 30(2). As per Clause 30(2) RP is entrusted with the responsibility to see that Resolution Plan provides for the implementation and supervision of the Resolution Plan, though, the words "provides for" are missing therein. Thereafter, CoC has to consider its **feasibility** and **viability** amongst other things as per provisions of Section 30(4) and evaluate the Resolution Plan as per evaluation matrix as approved by CoC u/s 25(2)(h) of the IBC, 2016.

65. It is noted that a number of amendments were carried out through second amendment Act of 2018 on the basis of recommendations of the committee appointed by the government to review functioning and implementation of the Code on the basis of consensus that further fine tuning of the code was required. The committee recommended for incorporation of this proviso with a view to enable NCLT to give direction regarding implementation of the plan while approving it to ensure that a proper implementation strategy has been included in the Resolution Plan, for example, a provisions for management of the Corporate Debtor in various scenario like on an appeal against the Resolution Plan or transfer of management etc.

66. It is, thus, clear that NCLT, in preference to CoC, has been given such power in spite of the fact that implementation schedule is being examined by CoC while approving the Resolution Plan as CoC, in reality, is generally concerned and remain interested till debts owed to Financial Creditors are settled or repaid whereas legislature is concerned that there should not be situation of second insolvency and plan should get implemented in the best interest of all stakeholders. In this sense, there is again a curtailment of powers of CoC in a progressive manner.

67. In the case of *K Sashidharan*, Hon'ble Supreme Court upheld the supremacy of commercial wisdom of the CoC based upon the provision then existing. The fact that there were changes to CIRP regulations

thereafter was also noted by the Hon'ble Supreme Court in that case and those changes were held to be prospective. Hon'ble Supreme Court in the case of *Essar Steel Vs. Satish Kumar Gupta* in Para 54 held as under:

> 54. *This is the reason why Regulation 38(1A)* speaks of a *Resolution Plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a Resolution Plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid – would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the Resolution Plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders*

including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a Resolution Plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a Resolution Plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the Resolution Plan, other things being equal.

68. The above findings have given power of limited judicial review to Adjudicating Authority on the various aspects which essentially emanates from preamble to the IBC, 2016. The significance of these findings is that the Hon'ble Supreme Court has settled the proposition that preamble to an Act may not only be a guide but it also prescribes certain conditions which are not mentioned in any specific provisions of that statute but would run through the Code as spirit of the Code and would have to be complied with. This decision has also imposed an obligation on CoC to ensure that corporate debtor remains a going concern and insolvency resolution is done after taking into consideration larger interests of all stakeholders.

69. It is very interesting to note that the factors which Adjudicating Authority is now capable to consider for limited judicial view are not mentioned in Section 30(2). This is a significant departure in judicial approach whereas earlier it was generally held that the role of NCLT was limited to see that Resolution Plan confirms to the requirements of Section 30(2) on the

assumption that both RP and CoC had already seen aspects mentioned therein and merits of the Commercial wisdom of CoC could not be interfered with. In fact, Hon'ble Supreme Court in the case of *Maharashtra seamless* again reiterated that limited judicial review was available to Adjudicating Authority in accordance with the findings of Hon'ble Supreme Court in Para 54 in the case of *Essar Steel* (supra).

70. Thus, considering both statutory changes together with paradigm shift in the judicial approach, we are of the view that the CoC must take into consideration interest of all stakeholders in the best possible manner and for that purpose, it should follow the principle of fair play and reasonableness while supervising CIRP and approving the Resolution Plan. Consequently, the process adopted by Resolution Professional and CoC should not only be in accordance with the provisions of IBC, 2016 but should also not be arbitrary or unreasonable. The above proposition has also been statutorily recognized by way of amendment of Regulation 39(3) of CIRP Regulations. It is also noteworthy provision of simultaneous voting on Resolution Plan has been brought in this regulation which also goes to show the legislative intent as regard to transparent process be followed by RP/CoC.

71. In the background of above discussion, now, we would see as to how the process of obtaining Resolution Plan has been designed and what the major terms are. For this purpose, we look into the following paragraphs

of disclaimer section of process document (We have done the numbering on our own for the sake of convenience) and miscellaneous Section thereof.

(a) ...."*This document is neither an agreement nor an offer by the members of CoC to the prospective Resolution Applicant(s) or any other person. The purpose of this document is to provide the Resolution Applicant(s) with information that may be useful to them in submitting heir Resolution Plan(s) pursuant to this document. This document does not constitute any recommendation to submit Resolution Plan. This document may not be appropriate for all Persons (as defined hereinafter), and it is not possible for the CoC to consider the objectives, financial situation and particular needs of each party who reads or uses this document. This document is issued without regard to suitability, financial situations and needs of any particular Person (defined hereinafter). Nothing in these materials is intended to be construed as legal, financial, accounting or tax advice.*"

(b) ...."*Past performance is not a guide for future performance. Forward-looking statements are not predictions and may be subject to change without notice. Actual results may differ materially from the forward-looking statements due to various factors. No statement, fact, information (whether current or historical) or opinion contained herein should be construed as a representation or warranty, express or implied of Resolution Professional, Resolution Process Advisors, Corporate Debtor (as defined below) or the members of CoC; and none of the Resolution Professionals, Resolution Process Advisors, Corporate Debtor, the member of CoC, or any other Persons/entities shall be held liable for the authenticity, correctness or completeness of any such statements, facts or opinions. This document has not been approved and will or may not be reviewed or approved by any statutory or regulatory authority in India or by any stock exchange in India. This document may not be all inclusive and may not contain all of the information that the recipient may consider material. Each Resolution Applicant(s) should, conduct its own investigations, diligence, and analysis and should check the accuracy, adequacy, correctness,*

reliability and completeness of the assumptions, assessments, statements and information contained in this document and obtain independent advice from appropriate source". **(page 2 of 62 of process document).**

(c) ..."***By accepting a copy of this document, the recipient accepts the terms of this disclaimer notice, which forms an integral part of this document****. Further, no Person (including the Resolution Applicant(s)) shall be entitled under any law, statute , rules or regulations or tort, principles of restitution or unjust enrichment or otherwise to claim for any loss, damage, cost or expense which may arise from or be incurred or suffered on account of anything contained in this document or otherwise, including the accuracy, adequacy, authenticity, correctness, completeness or reliability of the information or opinions contained in this document and any assessment, assumption, statement or information contained therein or deemed to form part of this document, and Resolution Professional Resolution Process Advisors, Corporate Debtor, members of CoC, affiliates, directors, employees, agents and representatives do not have any responsibility or liability for any such information or opinions and therefore, any liability or responsibility is expressly disclaimed".* ***(page 3 of 62 of process document).***

(d) *.... the CoC may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this document. Further, the Resolution Applicant(s) must specifically note that the CoC reserves the right to change, update, amend, supplement, modify, add to, delay or otherwise annual or cease the Resolution Plan Process at any point in time, for any reason determined in their sole discretion in accordance with the Insolvency and Bankruptcy code, 2016(IBC)."* ***(page 3 of 62 of process document).***

(e) *.....The issue of this document does not imply that the members of CoC are bound to select a Resolution Applicant(s) as Successful Resolution Applicant(s) in respect of its Resolution Plan and the members of CoC reserve the right to reject* ***at any stage*** *all or any of the Resolution Applicant(s) or Resolution Plans without assigning any reasons whatsoever. (****Page 3 of 62 of process document).***

Miscellaneous Section

3.2 *The Committee of Creditors, in their sole discretion and without incurring any obligation or liability, reserve the right, any time, to:*

i. Suspend and/or cancel the Resolution Plan Process and/or amend and/or supplement the Resolution Plan Process modify the dates or other terms and conditions set out in this Process Document;

ii. Consult with any Resolution Applicant(s) in order to receive clarifications or further information;

iii. Retain any information and/or evidence submitted to the Resolution Professional by, on behalf of, and/or in relation to any Resolution Applicant(s);

iv. Cancel or disqualify the Resolution Plan submitted by the Resolution Applicant(s) at any stage of the Resolution Plan Process; or

v. Independently verify, disqualify, reject and/or accept any and all submissions or other information and/or evidence submitted by, or on behalf of any Resolution Applicant(s).

vi. Request the Successful Resolution Applicant(s) to provide any additional documents or information in relation to the Proposed Transaction. ***(page 30 of 62 of process document).***

72. From the perusal of above clauses, a question arises in our mind as to whether such process document is legally valid by itself or not and, therefore, whether any Resolution Plan submitted in response to such process document could be an enforceable agreement at law. Without going further on this aspect and assuming the enforceability of Resolution Plan submitted by Resolution Applicant as per the terms of process document, we would now analyze the implications of these clauses. The

opening phrase of clause (c) clearly shows that terms of the disclaimer are integral part of process document. We also find that clause (d) gives power to CoC to annul or cease the Resolution Plan process at any time for any reason determined by CoC in their sole discretion. This clause, though, gives absolute powers to CoC as regard to annulment and cancellation but it still refers to provisions of IB Code. Now, when we see the clause (e) which gives CoC an authority **to reject at any stage all or any of the Resolution Applicant or Resolution Plan without assigning any reason whatsoever**. The use of the words "at any stage" leads to *prima facie* conclusion that the CoC even after approval of a Resolution Plan can reject that and that too without assigning any reason there for. Similar power has been given in Clause 3.2 of process document. This means as on date CoC need not to come before Adjudicating Authority if it wishes to reject such approved plan of the Resolution Applicant. This is not the end of story. On the contrary, there are provisions which are contained in clause 1.7.4, 1.7.5. and 1.17.17 which make it impossible for the Resolution Applicant to unilaterally withdraw or change plan once submitted to the resolution professional under any circumstances. These clauses are reproduced as under:

> *1.7.4. A Resolution Plan once made/submitted shall be valid for not less than 6(six) months from the Resolution Plan Submission Date including any revision to such Resolution Plan Submission Date ("Plan Validity Period"). In case of extension of Resolution Plan Submission Date by the CoC, the validity period of the Resolution Plan shall also be deemed to*

be extended for a period of 6(six) months from such revised Resolution Plan Submission Date. It is clarified for abundant caution that the Resolution Plan approved by ***the CoC shall not be subject to any expiry and shall remain valid and binding on the Successful Resolution Applicant.(Pg. 15 of 62 of process document)***

1.7.5. A Resolution Plan submitted by a Resolution Applicant(s) shall be irrevocable and binding on the Resolution Applicant(s). No modification, alteration, amendment or change may be made to a Resolution Plan submitted by a Resolution Applicant(s) except as specifically provided in this Process Document. ***(Pg. 16 of 62 of process document).***

1.17.17. ***The Resolution Applicant(s) cannot unilaterally change/withdraw the Resolution Plan once submitted to the Resolution Professional. (Pg. 26 of 62 of process document).***

73. Apart from these clauses, there are other provisions in process document which make it a document tilted strongly in favour of CoC and also lead to an inference that terms and conditions of process document may not be in compliance of provisions of IBC, 2016. However, we are not reproducing the same as, in our view, above discussion is sufficient to indicate about the arbitrary and unreasonable approach of CoC while formulating the process document but we cannot resist ourselves from observing that as per Section 30(1) of IBC, 2016 the Resolution Applicant is required to prepare and submit Resolution Plan passed upon Information Memorandum provided to him. However, as per following clause of disclaimer section of process document the integral requirement of

reliance on Information Memorandum appears to have become nullity and this also indicates the arbitrary approach of CoC:

> *While the data/information provided in this Process Document or the Data Room, has been prepared and provided in good faith, the Resolution Professional or Resolution Process Advisors, the members of CoC have verified such information to the best of their ability and shall not accept any responsibility or liability whatsoever in respect of any statements or omissions herein, or of the accuracy, correctness, completeness or reliability of information in the Process Document or the Data Room, or incur any liability under any law, statute, rules, or regulations, even if any loss or damage is caused to any of the Resolution Applicant(s) by any act or omission on their part. The Resolution Applicant(s) is required to make its own assessments of the information provided in the Information Memorandum or the Data Room* ***(Pg. 4 of 62 of process document).***

Similar disclaimer has been made in clause 1.6.1 of process document which reads as under:

> ***Clarification***
>
> *1.6.1 While the data/information provided in this Process Document & Virtual Date Room (VDR) has been prepared and provided in good faith, the Resolution Professional, Resolution Process Advisor and the members of Committee of Creditors shall not accept any responsibility or liability, whatsoever, in respect of any statement or omissions herein, or the accuracy, correctness, completeness or reliability of information provided, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability and completeness of the information provided, even if any loss or damage is caused to any of the Resolution Application(s) by any act or omission on their part.* ***(Pg. 15 of 62 of process document).***

The conditions made in process document virtually makes RP/CoC not liable for any consequences of any mistake creeping in Corporate Insolvency Resolution Process this is in spite of fact that RP and its team is having a protection of the provision of Section 233 of IBC, 2016. Apart from this, there is a condition that Resolution Applicant could not take any exception to the conditions specified in the process document to remain eligible applicant. Thus, this approach creates a situation of "take it or leave it" for the Resolution Applicant. However, in our considered view, in spite of such circumstances, it cannot be said that by submitting a Resolution Plan, the Resolution Applicant has committed a crime which is punishable by a term for life imprisonment.

Now, the consequences of such conditions are apparent. In this regard, we may submit that initial 180 days were practically consumed in finalization of process document which was ultimately approved and finalized just few days before expiry of initial period of 180 days. Further, incorporation of such clauses create a situation where RP and CoC feel confident that once Resolution Applicant is declared successful and his plan is approved, such Resolution Applicant can never get out. Thus, as against the claim of CoC that permission to withdraw the Resolution Plan would result into serious difficulties for all stakeholders in future, we are of the view that, in fact, it would result into improving the quality and timeliness of Resolution Process with more accountability and responsible behaviour of all the people involved in such exercise. Further, permission to withdraw would

also in consonance with objects as enshrined in preamble to IBC, 2016 i.e. it would promote entrepreneurship in real sense and would also go a long way in balancing the interests of all stakeholders.

74. We have also taken note of contention made by Resolution Applicant that no extension of CIRP period beyond 330 days have been sought by Resolution Professional and no resolution appears to have been passed by CoC in this regard which, in our view, is due to the fact that there appears to be a certainty in the mind of RP/CoC that irrespective of delays to any extent such application is not required as Resolution Applicant cannot withdraw itself from such process.

We are further of the view that even on ground of arbitrariness and unreasonableness process document can be set aside but in spite of that we consider it proper to direct Resolution Professional to amend/modify the process document to meet the requirements of applicable laws including IBC, 2016 and regulations made there-under.

75. In view of the above discussion, we order as under:

(i) The Resolution Applicant is granted permission to withdraw its Resolution Plan.

(ii) Resolution Professional is directed to return the performance security of Rs. 75 Crores given by the Resolution Applicant by way of Bank guarantee within ten working days from the date of this order.

(iii) Resolution Professional is directed to modify the terms and conditions of process document and is allowed to seek other Resolution Plan(s) and finalize the same within a period of 15 days from the date of this order in conformity with the provisions of IBC, 2016 and CIRP Regulations and Indian Contact Act, 1872. Thereafter, CIRP should be completed within a further period of 75 days.

(iv) In case, no Resolution Plan is received or Resolution Plan, if any, received but it is not approved by CoC within such period of 90 days, the Resolution Professional is directed to file an application for the liquidation of the Corporate Debtor in terms of provisions of Section 33 of IBC, 2016 before this Authority.

(v) Thus, this application stands disposed of in terms indicated above.

76. Urgent certified copy of this order, if applied for, be issued to all concerned parties upon compliance with all requisite formalities.

8/9/2020

(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)

8/9/2020

(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

sen