NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeals (AT) (CH)(Insolvency) No.164, 176, 218 & 219 of 2021

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[Arising out of Impugned Order dated 15 July 2021 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai in MA/13/CHE/2021 in IBA/1459/2019]

1. Company Appeals (AT) (CH)(Insolvency) No. 164 of 2021

IN THE MATTER OF:

Dr. Periasamy Palani Gounder
(erroneously spelt in the impugned Order as
Dr Periyasamy Palani Gounder)
(Promoter & Erstwhile Director)
Appu Hotels Limited, 4A, Dugar Apartments
Raja Rengasamy Road, Off 4th Seaward Valmiki
Nagar, Thiruvanmiyur, Chennai - 600041 **Appellant**

Versus

1. Mr Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D-3 Triumph Apartments
Jawaharlal Nehru Salai
Arumbakkam, Chennai – 600106 **Respondent No.1**

2. M K Rajagopalan
(Resolution Professional)
Balaji Villa, No. 30A, Beach Road
Kapaleeshwarar Nagar, Neelangarai
Chennai – 600115 **Respondent No.2**

Present:

For Appellant	**:**	**Mr Ashkrit Tiwari, Advocate for Mr P H Arvindh Pandian, Sr. Advocate** **Mr K Surendar and Chenthoori Pugazendhi, Advocates**
For Respondent No.1	**:**	**Mr Vijay Narayan, Sr Advocate (Resolution Professional) for Mr V. Ramakrishnan, Sr. Advocate, Mr T. Ravichandran, Advocates**
For Respondent No.2		**Dr Abhishek Manu Singhvi, Sr. Advocate** **Mr Ramji Srinivasan, Sr. Advocate** **(Successful Resolution Applicant) and**

Mr Devashish Bharuka, Mr Anant Merathia, Mr Justine George, Mr Rishi Srinivas, Ms Dhanisha Giri, Mr Srikanth and Mr Shivkrit Rai, Advocates

With

2. Company Appeal (AT) (CH) (Insolvency) No. 176 of 2021

IN THE MATTER OF:

Dharani Finance Limited
Represented by its Chief Financial Officer
No. 59, Sterling Road, Nungambakkam
Chennai – 600034
Email: dfl@pgpgroup.in **Appellant**

Versus

1. Mr Radhakrishnan Dharmarajan
Professional – M/s Appu Hotels Limited
D3, Block 1 Triump Apartments
114, Jawaharlal Nehru Salai, Arumbakkam
Chennai – 600106
Email: rp.appuhotels@gmail.com **Respondent No.1**

2. M K Rajagopalan
Balaji Villa, No. 30A, Beach Road
Kapaleeshwarar Nagar, Neelangarai
Chennai – 600115
Email: mkdirect@gmail.com **Respondent No.2**

Present:

For Appellant : Mrs Haripriya Padmanabhan, Advocate for Mr V Shyamohan, Advocate, Mr R Udhayakumar, Ms Jhanvi Dubey, Ms Ishita Chowdhury, Mr Ashkrit Tiwari, Ms Sruthi Rajamanickam, Ms Sradhaxna Mudrika and Ms Astu Khandelwal, Advocates

For Respondent No.1 : Mr Vijay Narayan, Sr. Advocate (Resolution Professional) for Mr V Ramakrishnan, Sr. Advocate, Mr T Ravichandran & Ms Elavarasi D, Advocates

For Respondent No.2 : Mr Ramji Srinivasan, Sr. Advocate (Successful Resolution Applicant) for Mr Devashish Bharuka, Advocate

Mr Anant Merathia, Mr Justine George, Mr Rishi Srinivas, Ms Dhanisha Giri, Mr Srikanth and Mr Shivkrit Rai, Advocates

With

3. Company Appeal (AT) (CH) (Insolvency) No. 218 of 2021

IN THE MATTER OF:

Dr V Janakiraman
S/o Shri Vijayaraghavan
No.159, Stratford Court
Hollidaysburg, PA – 16648, USA

Address for Service:
M/s Avinash Krishnan Ravi
Jerin Asher Sojan &
Vikram Veerasamy, Advocate

Address: No.115, 1st Floor,
Luz Church Road, Mylapore
Chennai – 600004
Ph. No. 9560015330
Email: kravinash.akr911@gmaill.com **Appellant**

Versus

1. Mr Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D-3 Triumph Apartments
Jawaharlal Nehru Salai
Arumbakkam, Chennai – 600106 **Respondent No.1**

2. M K Rajagopalan
Balaji Villa, No. 30A, Beach Road
Kapaleeshwarar Nagar, Neelangarai
Chennai – 600115
Mobile: +91 9841099099/ +91 9940699099
Email: mkrdirect@gmail.com **Respondent No.2**

Present:

For Appellant : Mr Satish Parasaran, Sr. Advocate for Mr Avinash Krishnan Ravi, Advocate
Mr Jerin Asher Sojan, Mr Vikram Veerasamy, Mr Ashkrit Tiwari, Advocates

For Respondent No.1 : **Mr Vijay Narayan, Sr. Advocate (Resolution Professional) For Mr V Ramakrishnan, Sr. Advocate, Mr T. Ravichandran, Advocate**

For Respondent No.2 : **Dr Abhishek Manu Singhvi, Sr. Advocate**
Mr Ramji Srinivasan, Sr. Advocate (Successful Resolution Applicant) and Mr Devashish Bharuka, Advocate
Mr Anant Merathia, Mr Justine George, Mr Rishi Srinivas, Ms Dhanisha Giri, Mr Srikanth, Mr Shivkrit Rai, Advocates

With

4. Company Appeal (AT) (CH) (Insolvency) No. 219 of 2021

IN THE MATTER OF:

Dr. Periasamy Palani Gounder
(Promoter & Erstwhile Director)
Appu Hotels Limited, 4A, Dugar Apartments
Raja Rengasamy Road, Off 4th Seaward Valmiki Nagar, Thiruvanmiyur, Chennai - 600041 **Appellant**

Versus

1. Mr Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D-3 Triumph Apartments
Jawaharlal Nehru Salai
Arumbakkam, Chennai – 600106 **Respondent No.1**

2. M K Rajagopalan
(Resolution Applicant)
Balaji Villa, No. 30A, Beach Road
Kapaleeshwarar Nagar, Neelangarai
Chennai – 600115 **Respondent No.2**

Present:

For Appellant : **Ms Haripriya Padmanaban, Advocate for Mr P H Arvindh Pandian, Sr. Advocate**
Mr K Surendar, Chenthoori Pugazendhi and Mr Ashkrit Tiwari, Advocates

For Respondent No.1 : **Mr Vijay Narayan, Sr. Advocate (Resolution Professional) for Mr V Ramakrishnan, Sr. Advocate, Mr T Ravichandran, Advocate**

For Respondent No.2 : **Mr Ramji Srinivasan, Sr. Advocate for Mr Devashish Bharuka, Advocate**
Mr Anant Merathia, Mr Justine George, Mr Rishi Srinivas, Ms Dhanisha Giri, Mr Srikanth and Mr Shivkrit Rai, Advocates

CORAM:
Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. The present set of Appeals, i.e. Company Appeal (AT) (Ins) No. 164 of 2021, Company Appeal (AT) (Ins) No. 176 of 2021, Company Appeal (AT) (Ins) No. 218 of 2021 & Company Appeal (AT) (Ins) No. 219 of 2021 have been filed against a common impugned order dated 15.07.2021, passed by Adjudicating Authority/National Company Law Tribunal, Chennai Bench, Chennai,in whereby the Adjudicating Authority has approved the Resolution Plan for the revival of the Corporate Debtor, i.e. Appu Hotels Limited.

Factual Background

Company Appeals (AT) (CH) (Ins) 164 & 219 of 2021

Appellant's Contention:

2. The Appellant in the Company Appeal No. 164 & 219 of 2021 herein is the Promoter and erstwhile Director of the Corporate Debtor, M/s Appu Hotels Limited, subjected to CIRP based on the Application of Financial Creditor, namely, Tourism Finance Corporation of India limited (TFCIL). Consequently, Mr Mukesh Kumar Gupta was appointed as the Interim Resolution Professional (IRP), following which, Ist Respondent, i.e. Mr Radhakrishnan Dharmarajan (R-1), was nominated as the Resolution

Professional by the Committee of Creditors (CoC) and the Adjudicating Authority approved the same.

3. The Appellant, after that, initiated the measures under Section 12A of the I&B Code for withdrawal of CIRP. However, the proposal of the Appellant was not placed before the CoC, leaving the proposal unconsidered. The Appellant had preferred an application before the Adjudicating Authority, i.e. MA/13/CHE/2021 in IBA/1459/2019 for fair Valuation and to consider the promoters' proposal with the option to modify the same on the request of the members of the CoC.

4. The Appellant objected that the Valuation of the corporate debtor was done in utter violation of the statutory mandates, as a result of which, CoC was deceived into approving the Resolution Plan submitted by IInd Respondent, i.e. M.K. Rajagopalan (R-2), thereby allowing him to acquire the assets of the corporate debtor for a price less than 25% of the actual market value.

5. The promoter group of the corporate debtor consists of around 100 Non-Resident investors living in the United States of America, who as a group invested over US$ 22 million in foreign exchange in the corporate debtor. The corporate debtor had availed project loans to construct 'Le Meridian', 'Coimbatore', from a consortium of bankers led by Indian Bank. The business in this Tier 2 city did not materialise as per estimated projections. The financial performance of the Chennai Hotel also experienced a sharp fall in revenue. Both hotels were making operational profits, but the profit was

insufficient to service the loan repayment fully. The promoters and directors brought in nearly Rupees One hundred crores, as unsecured loans over and above the cash flow from the Company to keep the Corporate Debtor's asset as standard.

6. The Application was preferred under Section 7 of the I&B Code by 'TFCIL', one of the financial creditors with only 5% of the total loan. The Adjudicating Authority vide its Order in IBA/1459/2019 dated 05.05.2020 had admitted the said Application. The IRP implemented the IBC process at the peak of the 'COVID-19' Pandemic, during lockdowns of hotels and other business travel channels and the inability of the Company to raise fresh funds to settle the dues of the secured creditors.

7. The public announcement was issued by IRP on 08.05.2020, calling for submitting claims against the corporate debtor. However, the notice for the 1st CoC meeting was given on 18.06.2020, whereas 1st meeting was held on 22.06.2020, which was in blatant disregard to Regulation 19(1) of Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, which mandates that at least five days notice must be given before CoC meeting.

8. As a result, the entire CIRP process was rushed and marred with procedural inadequacies. After that, R-1, who took over from IRP in November 2020, had finalised the rest of the steps hastily and failed to place proper valuation reports before the CoC. As a result, CoC voted in favour of the Resolution Plan submitted by R-2 at Rs. Four hundred twenty-three

crores, i.e. much lower than the liquidation value and just 25% of the Valuation of the assets made by the registered Valuer during September 2019.

9. Appellant stated that CoC had approved the Resolution Plan of R-2 without even considering the proposal put forth by the Appellant vide letter dated 21.01.2021 and 08.03.2021 for settling all the creditors and for withdrawal of the CIRP under section 12-A of I&B Code. The CoC has not considered the corporate debtor as a going concern but has used the CIRP as a mere debt recovery process by ignoring other creditors and the shareholders in total.

10. It is further stated that the NRI shareholders had invested their hard-earned money, including their pension funds and lifelong savings, and the Resolution Plan does not provide any payment for the shareholders. The promoters have not taken any dividend or benefit from their investment over 30 years. The corporate debtor had been repaying the loan regularly from 2000 until 31 March 2019. Therefore, the promoter group will incur a total investment loss if approved the Resolution Plan.

11. On behalf of the Appellant, it is submitted that there is a violation of section 88 of the Indian Trust Act, 1882. It is seen from the final list of prospective Resolution Applicants dated 26.09.2020, issued by the IRP, that a prospective resolution applicant, namely, 'Sri Balaji Vidyapeeth', is ineligible on the ground that it is a charitable trust and it cannot run a profit-making entity. Furthermore, it is seen from the approved Resolution Plan

that R-2 is the founder and Managing Trustee of the said 'Sri Balaji Vidyapeeth'.

12. However, the fact that Sri Balaji Vidyapeeth was a prospective Resolution Applicant and found ineligible was wholly suppressed from the CoC. Therefore, IInd Respondent being the Managing Trustee of Sri Balaji Vidyapeeth, has proceeded to submit the Resolution Plan by competing with the same Trust by taking advantage of his fiduciary position within the meaning of Section 88 of the Indian Trust Act, 1882. Since the said Trust has already been declared ineligible, R-2 cannot be permitted to act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain, which is barred under Section 88 of the Trust Act.

13. IInd Respondent is the Managing Director of 'MGM Healthcare Private Limited'. The Resolution Plan states that 'MGM Healthcare' is looking forward to setting up new hospitals in the State of Tamil Nadu envisages to expand pan India and becoming a leading hospital chain in India. At the same time, IInd Respondent proposes in the Resolution Plan to convert the 'Coimbatore property' of Corporate Debtor into a hospital, which would directly conflict with 'MGM Healthcare' interest. Therefore, the Resolution Plan submitted by R-2 is hit by Section 166(4) of the Companies Act, 2013, which reads as follows:

> *"Section 166 (4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company."*

14. The Appellant also submitted that IInd Respondent is a Director of a Company, namely, M/s International Aviation Academy Private Limited. It is seen from the audited financial statements of the said Company from 2010-11 to 2017-18 that a sum of Rs. 12,03,000/- has been collected as 'share application money pending allotment'. Therefore, it appears that the sum has not been refunded. As such, the same shall be treated as a deposit in terms of proviso to Explanation (a) of Rule 2(1)(c)(vii) of the Companies Act (Acceptance of Deposits) Rules, 2014.

15. In the above circumstances, given Section 164(2)(b) of the Companies Act, R-2 has been disqualified from acting as a Director in any company for five years from the date such Company failed to repay the deposit and even assuming these amounts have been repaid during the Financial Year 2018-19, R-2 is disqualified from acting as Director till date. Thus, R-2 is ineligible to submit the Resolution Plan under Section 29 A(e) of the I&B Code. However, R-2 deliberately suppressed the same and submitted the Resolution Plan fraudulently. Unfortunately, IRP and R-1 failed to conduct proper due diligence and report the above statutory violation to CoC or the Adjudicating Authority.

16. The CoC was not adequately appraised of the actual value of the Corporate Debtor's assets to evaluate the Resolution Plan. The Valuer was based out of Tamil Nadu and had little knowledge of the prevailing real estate market conditions in Tamil Nadu. Moreover, the Valuer lacked adequate experience with the hospitality industry. As a result, only the core assets of the Corporate Debtor were valued, and the non-core assets have thus not

been appropriately valued. In the 7th CoC meeting dated 29.12.2020, RP informs that the Valuation of non-core assets was being done and that the draft valuation figures will be available by 30.12.2020. However, the valuation summary was finalised on 02.12.2020 and shared with the former MD vide Email dated 26.12.2020. It is thus evident that the non-core assets have not been appropriately valued, and the RP has chosen not to explain the same to date. Therefore the Valuation of the non-core assets is not in compliance with Regulation 35(1)(a) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Person) Regulation 2016.

17. It is stated that due to strict lockdown, quarantine and travel restrictions, the appointed valuers could not conduct the Valuation and their agents at or near Chennai who are not registered valuers and lacked the expertise to conduct the exercise on their behalf. Further physical verification of the assets by the registered Valuer is indispensable, and the Respondent has ignored the same before furnishing the Valuation to the CoC. The IRP never visited any of the sites of the corporate debtor, not even the registered office or any of the hotels. The IRP at no stage took control of the assets and operated the business as a going concern and has contravened sections 18(f) and 25(2)(a) of the I&B Code.

18. It is contended that one of the 'registered valuers' appointed during the CIRP viz, Mr Vikas Agarwal is not a registered valuer as seen from the official website of IBBI. The purported Registration No. IBBI/RV/07/2019/12228 belongs to Mr Sajay Suresh Ranade, who is unconnected to the instant case. It is thus evident that the entire valuation process is tainted with fraud and

malice.

19. The Appellant further contends that the IRP's public advertisement did not conform to the statutory guidelines provided under Regulation 6 of the CIRP Regulations. The Public Advertisement was neither published on the website ofthe Corporate Debtor nor was it published on the website of IBBI. Furthermore, Regulation 35(2) of IBBI Regulations, 2016 mandates that fair and liquidation values had to be provided to the member of CoC upon receipt of Resolution Plans. This was not done as admitted by the RP in the 5th CoC meeting. Also, The Invitation to submit Expression of Interest vide Form G itself was made on 17.08.2020, which was beyond the 75 days envisaged under Regulation 36A(2)(iii). The Information memorandum prepared by the IRP does not contain the requisite information in violation of Regulation 36(2) of IBBI Regulations, 2016. Based on the above, it is clear that the CIRP has been conducted in contravention to the IBBI Regulations and the Code.

20. The Appellant contends that the CoC ought to act not merely in its interest but as a Trustee of all the creditors and with the object of the Code in its mind not to treat this as a recovery process.

21. The Appellant further submits that it has also identified investors to preserve the corporate debtor as a going concern. Accordingly, in addition to M/s. Deutsche Bank, a private investor, namely, Saveetha Institute of Medical Sciences, had come forward to extend a loan of Rs. Three hundred fifty crores to the Corporate Debtor have been duly informed to the CoC and R-1 by way of a letter dated 16.07.2021 and the proof for the source of funds like bank statements. Therefore, the investors are now ready and

willing to invest more funds than stipulated under the Resolution Plan. Therefore, the interest of all the stakeholders can be protected, and the Corporate Debtor can also be preserved as a going concern.

22. The Appellant has relied on the decision of the Hon'ble Supreme Court in Standard Chartered Bank's case that the promoter/ directors of the Corporate Debtor should be privy to all details pertinent to the CIRP. However, the erstwhile Directors have not been shared the valuation reports to date. Non-sharing of information with erstwhile Directors was held to be a ground for setting aside of Resolution Plan in the Standard Chartered Bank's case [AIR 2019 SC 2477]

23. Appellant also relied on Dwarkadish Sakhar Karkhana Ltd.'s case; MANU/NL/0240/2021**.** Section 30(2)(e) of the Code provides that the Resolution Plan and its Approval by the COC should not be in contravention of the law. Where the Valuation is contrary to Regulation 35, the same would result in the decision of the COC being vitiated by illegality in the process and fraud. For those reasons, the decision would not be in the exercise of commercial wisdom but would be plain, illegal.

Submissions of Ist Respondent, i.e. Resolution Professional

24. It is submitted that so far as the Valuation of the assets is concerned, R1 has conducted the whole process under the provisions of the Code and Regulations, the CoC approved the same in its commercial wisdom. Also, there is no documentary evidence to support the contentions of the Appellant about the Valuation of the corporate debtor of Rs. One thousand six hundred

crores which this Tribunal held in Appeal No. 19/2021 in paragraph 15 under the head 'Discussions and Findings':-

> *"15. The Appellant's contentions about the Valuation of the corporate debtor of 1600 crores is unsupported by any evidence. The fact remains that the resolution plan amount has arrived after following the due procedure prescribed under the Code and the rules and regulations made thereunder."*

25. Ist Respondent has complied with the provisions of the I&B Code and IBBI Regulations, 2016, vide Regulations 27 and 35 and in the absence of any evidence to substantiate the alleged Valuation of Rs. One thousand six hundred crores, the issue about Valuation cannot be the subject matter of the Appeal.

26. The CoC discussed the issue with regard to the valuers in its second meeting held on 06.08.2020. So far, the appointment of the third Valuer is concerned; R1 in the 6th and 7th meeting of CoC duly apprised the members about the need for the appointment of the third Valuer under Regulation 35. As a result, R1 arrived at fair and liquidation values on the average of the two closest values as per Regulation 35(C) provisions.

27. The contention by the Appellant that two valuers who were originally appointed did not value the entire asset of the corporate debtor and had only valued the core assets is denied as it can be seen in the minutes of the 6th CoC meeting that the non-core assets which the previous valuers did not value are around 3 to 4 Crores viz against the total value of the non-core asset being 100 Crores. This was communicated to the member of CoC on

15.12.2020.

28. The contention of the Appellant regarding disqualification of the Resolution Applicant under Section 164(2)(b) and Section 88 of Indian Trust Act, 1882 is turned down as R1/IRP had satisfied himself based on documents available before him and based on materials and data available in the public domain that R2 was eligible to submit a Resolution Plan and that he was not disqualified from being a director. There was no material to show that R2 was hit by any provisions of Section 29A of the Code. The legal contentions raised by the Appellant based on the Companies (acceptance of deposits) Rules, 2014, the other provisions of Companies Act, 2013 and the Trust Act are factually and legally incorrect.

29. The Appellant's contention that there is a violation of Section 166(4) of Companies Act, 2013 is baseless; the Appellant is trying to misquote a particular clause in the Resolution Plan, which reads as under:

> *"5.7.... The RA has plans to convert the Coimbatore hotel premises into medical hospital. The tentative estimate for necessary modifications are being worked out"*

a. Ist Respondent proceeds to contend that the Appellant submitted the first proposal at the time when the Resolution Plan was being put for a vote on 22.01.2021. The Appellant gave another proposal on 08.03.2021, and the third proposal after the impugned order was passed on 16.07.2021. Therefore, to date, no concrete proposal as contemplated in section 12A of the Code read with Regulation 30A is placed.

30. The Appellant's contention that the Resolution Plan approved by Adjudicating Authority was never placed before the CoC for its Approvalis incorrect. A perusal of the 9th CoC meeting minutes would reveal that CoC had approved the Resolution Plan, and R2 was requested to revise the same in line with Section 53 of the Code read with Section 30 (2). The CoC took the commercial decision about the Approval of the Plan.

31. It is stated by Respondent No.1 that a submission was made before this Tribunal referring to agenda A3 of the 9th CoC meeting held on 22.01.2021, wherein the fee of Resolution Professional was to be increased from Rs. 1.50 lakhs to Rs. 2.5 lakhs retrospectively, and some malice was attributed as the same is a quid pro quo to the Approval of the Resolution Plan. At the outset, there is no pleading in this regard. The increase in the fee resulted from an email date 16.01.2021 sent by R1 to the CoC, which was much before the Resolution Plan was considered on 22.01.2021.

Company Appeal (AT) (CH) (Ins) 176 of 2021

Factual Background

32. Most of the facts under the present Appeal are similar to the facts stated in the above Appeal, therefore not reiterated for convenience.

33. The Appellant under present Appeal is a listed company in BSE with more than nine thousand shareholders. The Appellant approached this Tribunal against dismissing its applications, preferred in the underlying insolvency proceedings initiated against Corporate Debtor, i.e. M/s 'Appu Hotels Limited'.

34. The Appellant submitted two claims, one as a Financial Creditor for Rs. 4,81,62,175/- and one as an Operational Creditor for Rs. 1,94,14,024/- on 03.08.2020; the Appellant, in its claim, stated that while it may be a related party, it had a right to be inducted in the CoC by 2nd proviso to Section 21(2) of the I&B Code.

35. Neither the Appellant was inducted in CoC, nor any adjudication of the claim was made. However, the Appellant sent two reminders. In response to the 2nd reminder sent on 19.01.2021, R-1 replies that the Appellant cannot be inducted into the CoC as it is a related party.

36. The Appellant filed its objection to the Resolution Plan, filed two applications for its claims to be admitted by the R-1 and to be included in the CoC and to declare the Resolution Plan, if any approved by the CoC, without admitting Appellant's claim as a Financial Creditor, void and non-est in law.

37. In reply to the Application, the Appellant came to know that the claims were admitted as a financial creditor and an Operational Creditor. Still, the Resolution Plan does not allow any money to the Appellant as it is a related party. Accordingly, Appellant's applications were dismissed, and the Resolution Plan was approved under the common impugned Order.

Appellant's Submissions

38. It is submitted on behalf of the Appellant that under Section 61(3) of Code, a Resolution Plan can be challenged if it is violative of law, the RP has not followed the due procedure, or have not been provided for in the

Resolution Plan. In the present case, all three conditions are attracted.

39. The Appellant further submits that **the I&B Code, a detailed Code, only creates Related Party as a separate Class for exclusion from the CoC and disentitling Related Parties from filing Resolution Plans.** Other than this, the I&B Code does not contemplate any other distinction between Related Parties and other Creditors for payment of dues. The purpose behind this differentiation is that related parties of Corporate Debtors do not interfere in the CIRP. The current Resolution Plan is discriminatory as it denies payments to the Appellant because of it being a related party. The I&B Code does not permit discriminatory plans to be approved. [**Binani Industries Limited v. Bank of Baroda & Anr., 2018 SCC OnLine NCLAT 521**].

40. The Appellants submit that it is trite law that equality is the norm and discrimination is an exception. Therefore, the law has to permit a distinction to be explicitly created in the first place. This distinction should be based on intelligible criteria. The discrimination should have a nexus with the object sought to be achieved. Hence, before classification can be created for a purpose, it has to be shown that the law contemplates such a classification for this purpose. In the absence of a classification of a Related Party as a separate Class for payment of creditors under a Resolution plan, the same is impermissible in law and violative of the IBC and Article 14 of the Constitution of India. [**Hiralal P. Harsora and Others v. Kusum Narottamdas Harsora and Others, (2016) 10 SCC 165**].

41. The Appellant also submits that In terms of Sections 43 & 44 of the Code and Regulation 35A, the RP was required first to file Avoidance Applications and obtain an order regarding the same prior to the Resolution Plan being filed. In the present case, the Forensic Audit Report regarding preferential transactions was given on 02.01.2021. However, before this could be done, the RP goes ahead with placing the Resolution Plan before the CoC for its Approval. The CoC approved the Plan on 22.01.2021. The RP files an Application on 04.02.2021 for Approval of the Plan and then on 22.01.2021moves, Avoidance Application. The NCLT, which should have first decided the Avoidance Applications, first approves the Plan and defers adjudication of the Avoidance Application.

42. The Appellant further states that Valuers were appointed from Delhi while the properties of the Corporate Debtor were situated in Tamil Nadu. It is learnt that these Valuers did not physically verify the properties. Instead, three different valuations were done. Without prejudice, the Appellant submits that the Valuation made in the Resolution Plan is very low even compared to the valuations obtained from the valuers. The total Resolution Plan value is Rs.423 Crores, while their liquidation value is Rs.565 Crores. While the commercial wisdom of the CoC cannot be questioned, the process by which they undertook the decision and the fact that maximisation of asset value was not the objective of the process is grounds for challenging the Resolution Plan.

43. The RP must look into all claims and decide before calling for Resolution Plans. In its Application dated 03.08.2020, the Appellant had

specifically submitted its claims as Operational Creditor and Financial Creditor and claimed it had a right to be a part of the CoC. Despite submitting its claims for a sum of Rs.4,81,62,175/-in Form C and a sum of Rs. 1,94,14,024/-in Form B on 03.08.2020, neither the IRP nor the RP communicated to the Appellant seeking clarification regarding the claims. But no communication regarding the acceptance of any part of it was made. After filing the underlying Applications, the Appellant learnt that part of its claims stood admitted.

44. The Appellant further argues that the role of the Adjudicating Authority is not formal or mechanical but has to scrutinise the Resolution Plan and has to examine whether it meets the requirement of all the stakeholders and if it is in conformity with the provisions of the IBC. For example, there was non-adherence to Regulation 38 of IBBI Regulations, 2016. It is mandatory to balance the interests of all stakeholders in the Resolution Plan under Regulation 38. Similarly, there was non-adherence to Regulation 6, which mandates that an insolvency professional make a public announcement immediately on his appointment as an IRP. However, the same was not complied with by the IRP. The non-publication of the notice in the website of the Corporate Debtor was raised before the Adjudicating Authority, but, unfortunately, the issue was not adjudicated upon by the Adjudicating Authority.

Ist Respondents Submissions (Resolution Professional / R-1)

45. The Appellant challenged the impugned Order dated 15.07.2021 in MA/18/CHE/2021 in IBA No. 1459/2019, which is an application filed by

the Appellant herein before the Adjudicating Authority. In addition, the Appellant filed an application in MA 48 of 2021 about its claim as a Financial Creditor, and by the common impugned Order, dismissed both the applications. Admittedly, no appeal has been preferred against MA 48/2021. Therefore, the Appellant cannot agitate its claim as a Financial Creditor in the present Appeal.

46. It is further submitted that the Appellant had not raised the valuation issue before the Adjudicating Authority, and its submissions were limited only to the admission of its claim and declaration that it was not a related party. Therefore, the Appellant cannot raise issues relating to Valuation in the present Appeal.

47. Respondents No-1submits that the admission of claims in CIRP is not an adjudicatory or judicial process. Instead, it is an administrative process resulting in admission and not an adjudication of claims. Consequently, the Appellant cannot superimpose the requirements of a judicial process on admission of claims.

48. It is further argued by R-1 that the Appellant's claims were admitted, and no grave injustice was caused to the Appellant. The Appellant is a related party in Section 5(24), I&B Code. Section 21(2), second proviso I&B Code will not apply to the Appellant who did not become a related party "solely on conversion or substitution of debt into equity shares". The Appellant never pleaded or proved such a case before the Adjudicating Authority.

49. R-1 contends that the Code does not mandatorily require Resolution

Plans for payment to a related party. Merely because the Code does not prohibit the payment to related parties cannot lead to the conclusion that payment to related parties is mandatory in a Resolution Plan. There is no discrimination in the payment scheme to the various class of creditors as proposed under the approved Resolution Plan. The Resolution Plan provides for all the stakeholders of the Corporate Debtor except related parties of the Corporate Debtor.

IInd Respondents Submissions/ (Successful Resolution Applicant/R-2)

50. Successful Resolution Applicant/ R-2 submits that the entire purpose of filing the present Appeal is to delay the Resolution Process. The Adjudicatory Authority vide its impugned judgment dated 15.07.2021 had categorically observed that the Appellant herein, even though was regulated by a financial service regulator, had failed to establish that the debts due to him had become due solely on account of conversion or substitution of debt into equity shares or instruments as required under the second proviso to Sec. 21(2), IBC and was pleased to dismiss their Application. The present case is not one of conversion or substitution of debt as required under the second proviso to Sec. 21(2), IBC. Therefore, the Appellant stands covered by the first proviso to Sec. 21(2), which bars a related party to have any right of representation, participation or voting in a meeting of the CoC.

51. It is the prerogative of the Resolution Applicant to allocate to the related parties. Even though the Appellant's claim as a Financial Creditor and Operational Creditor was admitted, they were not made part of the CoC and paid, as they were related party to the Corporate Debtor. Accordingly,

reliance is placed on Pratap Technocrats (P) Ltd. & Ors. vs Monitoring Committee of Reliance Infratel Ltd., 2021 SCC OnLine SC 569 at para 51.

52. It is also submitted that the Hon'ble Supreme Court in Vijay Kr. Jain v Standard Chartered Bank, (2019) 20 SCC 455 at para 23 had categorically upheld the bar of a director of a related party of a Corporate Debtor to have any right of representation, participation or voting in a meeting of the CoC.

53. R-2 further submits that the definition of the related party as under Sec. 2(54), IBC and its consequence in Sec. 21 has been laid down by the Hon'ble Supreme Court in Phoenix ARC v Spade Fin Services, (2021) 3 SCC 475. The Hon'ble Supreme Court held that those entities in the CoC, who are related parties, can often negatively affect the insolvency process. It further went on to hold that the objects and purposes of the Code are best served when the CIRP is driven by external creditors to ensure that related parties of the Corporate Debtor do not sabotage the CoC.

54. It is also stated that the claim of a related party, whether in the nature of loan or otherwise, should rank subordinate to the claim of the Operational Creditors and should be treated at par with equity shareholders under Section 53(1)(h) of IBC, 2016 - J. R. Agro Industries P Ltd. Vs. Swadisht Oils Pvt. Ltd., [NCLT, Allahabad, Company Application No.59 of 2018 dated 24.07.2018].

Company Appeal (AT) (Ins) 218 of 2021

Factual Background

55. The facts of the present Appeal are similar to the above set of appeals, therefore not reiterated herein for the sake of convenience.

56. The Appellant is an NRI shareholder and erstwhile Director of the Corporate Debtor. Accordingly, the Appellant submits that the Appellant is filling in respect of the rights of about 100 NRI shareholders of the Corporate Debtor, whose rights have been affected and whose shareholding has been extinguished and nullified in gross contravention of principles of fairness and reasonableness, which are sine qua non, for any Resolution Plan to be validly approved by a court of law, as per Section 31 of I&B Code.

Appellant's Submissions

57. It is submitted that IRP and the CoC failed to note that R-2, a managing trustee of a trust which was found ineligible to act as a Resolution Applicant, has indirectly done what the Trust was directly barred from doing.

58. It is further submitted that R-2 has misled the CoC that he did not have any conflict of interest, thereby playing fraud of the CoC to have his Resolution Plan approved. On the date of giving the Expression of interest, there was a conflict of interest for R-2 as he was simultaneously in competition with a trust of which he was a Managing Trustee. Under Regulation 39(1)(c) of the CIRP Regulations, this misrepresentation warranted the rejection of the Resolution Plan and the forfeiture of all monies paid thereunder.

59. It is also submitted that CoC has time and again expressed its doubt about the manner in which the IRP conducted CIRP, and the IRP has

consciously misled the CoC into believing that the process was conducted as per law. In addition, CoC has expressed doubts about the appointment of the valuers and the valuation process itself.

60. It is also submitted that R-2 herein seeks to take over the entire assets of the corporate debtor by extinguishing the shareholding of the Corporate Debtor for nil consideration.

61. It is further stated that CoC failed in its ultimate object of achieving the maximisation of value of the stakeholders by failing to consider the proposal u/s 12A of the Code. As a result, shareholders who have invested about USD 22 million have lost their monies in toto. At the same time, creditors enjoy 100% returns, and R-2 enjoys a bonanza of having obtained assets worth about Rs. One thousand six hundred crores for Rs. 423 crores. Such acts of CoC do not amount to the maximisation of the value of the Corporate Debtor and its stakeholders.

62. It is also contended on behalf of the Appellant that given the ratio laid down in the case of Committee of Creditors of Essar Steel India v. Satish Kumar Gupta and Others (2020) 8 SCC 531**,** the immunity attached to the commercial wisdom of CoC lies in the assumption that the CoC has access to all the documents and relevant material and therefore applies its business mind and arrives at a decision. Therefore, in light of the fact that in the instant case, the material itself has been compromised and various members of the CoC were excluded from the committee till 14.12.2020, it is amply clear that the CoC enjoys no immunity in the instant case.

Ist Respondents Submissions /(Resolution Professional/ R-1)

63. It is argued by R-1 that the Appellant has no locus standi. Though the appellant claim that he is a shareholder, no documentary evidence has been filed to show that he is a shareholder. The issue of Valuation is only a repetition of the Promoter's arguments.

64. It is further argued that with regard to averments on the ineligibility of the Successful Resolution Applicant, this respondent/ the then IRP had satisfied himself on the basis of the materials and data available in the public domain that R-2 was eligible to submit a Resolution Plan and that he was not disqualified from being a director. There was no material evidence to show that R-2 was hit by any of the provisions of Section 29A of the Code.

IInd Respondents Submissions /(Successful Resolution Applicant/ R-2)

65. The IInd Respondent argues that the Appellant has no locus standi on the grounds that the Appellant herein chose not to participate in the CoC meetings or ever raised any objections before the CoC. Further, the Appellant has also not filed any application before the Adjudicating Authority objecting to the Resolution Plan of R-2. Altogether new issues and grounds to challenge the Resolution Plan are sought to be raised before this Appellate Tribunal for the first time by the Appellant.

66. The multiple proceedings and cases have been initiated at the behest of the erstwhile promotors of the Corporate Debtor about the current Resolution Plan. The Standing Committee of Finance (2020-21) Report on "Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions"

before Lok Sabha had observed that the insolvency process is being delayed for a long time due to pending litigations and delay tactics employed by the promoters and directors of the Corporate Debtor.

67. It is also submitted that the Adjudicatory Authority vide its impugned judgment dated 15.07.2021 has dealt with the issue of procedural irregularities and was pleased to hold that the objections as raised were not so grave in order to defeat the Resolution Plan as filed by the Resolution Applicant, i.e. R-2 herein.

68. It is also contended that it is well settled that the scope of interference in matters concerning Successful Resolution Plans is extremely limited in nature. Accordingly, the challenge can only be in respect of grounds as provided in Sec. 30(2) or Sec. 61(3) of the IBC, 2016, which is limited to matters "other than" the enquiry into the autonomy or commercial wisdom of the Committee of Creditors (CoC).

69. It is further contended by R-2 that the fact that the entire CIRP has been completed during the COVID period cannot be a ground for challenge to the Resolution Plan – Ramasamy Palaniappan Vs Radhakrishnan Dharmaraja, Company Appeal (AT)(CH)(INS) No. 19 of 2021 (paras 20, 21, 28).

70. The issue concerning Valuation has attained finality vide the judgment of this Tribunal dated 05.05.2021 in Company Appeal (AT)(CH)(INS) No. 19 of 2021, whereby this Appellate Tribunal has upheld the valuation order while further recording that the Valuation of Rs. 1600 Cr as

claimed by the Appellant herein is unsupported by any evidence.

71. It is also argued on behalf of R-2 that a Resolution Applicant is not required to match the liquidation value while submitting a Resolution Plan. [Ref;Maharashtra Seamless Limited v Padmanabhan Venkatesh, (2020) 11 SCC 467 at paras 27-30] & [State Bank of India v M/s Accord Life Spec Pvt. Ltd., (2020) SCC OnLine SC 554 at paras 3 and 4].

72. It is further contended that Appellant's argument regarding conflict of interest of Respondent No. 2 and violation under Section 88 of Indian Trust Act, 1882 is denied. The aforesaid argument was never raised before the CoC and the Ld. Adjudicatory Authority. Respondent No.2 and Sri Balaji Vidyapeeth (trust) had submitted their Expression of Interest in their individual capacity. Therefore, Section 88, the Indian Trust Act, would not affect the Approval of the Resolution Plan of Respondent No. 2. Further, as per the definition of conflict of interest as per Para 1.1 of RFRP, the conflict shall arise only when the Resolution Applicant is found to be in a position to have access to information about or influence the Resolution Plan of another Resolution Applicant. Admittedly, the Trust was declared ineligible even before it could submit a Resolution Plan.

73. It is further contended that Respondent No. 2's directorship, as per the Ministry of Corporate Affairs website, Government of India still shows as active compliant. As long as a Director is an active compliant under the Companies Act, Section 29A(e), IBC, 2016 would not apply.

74. It is also contended by R-2 that the argument that the Resolution plan

by Respondent No.2 is hit by Section 166(4), Companies Act since he is the Director of MGM Health Care and is planning to convert the hotel into hospital is untenable as Starting a new line of business or a separate company to carry on a similar business, does not in any way result in a conflict of interest when both the interests are separately and independently pursued, without any conflict. Respondent No.2, in his Resolution Plan, had already disclosed his intention to convert the Coimbatore Hotel into a hospital subject to suitability. Further, MGM's hospital is in Chennai and therefore, there can be no conflict of interest.

ANALYSIS

75. We have heard the arguments of the learned counsel for the parties and perused the record. Appellant's objection is based on the following points;

a) The 'Form G' for inviting 'EOI'[1] was neither published on the Corporate Debtor's website nor posted on the website designated by the IBBI[2].

b) The IRP had received claims from a large set of Unsecured Financial Creditors. Still, the IRP/RP did not proceed to accept or reject the Unsecured Financial Creditors' claims, which resulted in excluding the said unsecured creditors from the entire decision-making process.

c) CoC has not considered the OTS DT. 21.1.2021.

[1] Expression of Interest
[2] Insolvency and Bankruptcy Board of India

d) The approved resolution plan discriminates between the related party unsecured financial creditors with other unsecured financial creditors.

e) The estimate of the Fair Value and Liquidation Value of the Corporate Debtor is computed without physical verification of the Corporate Debtor's assets. Therefore, the entire valuation process of the Corporate Debtor is in total disregard of the Regulations.

f) The Resolution Applicant is disqualified under Section 164 (2) (b) of the Companies Act 2013 hence ineligible under Section 29 A (e) of the Insolvency and Bankruptcy Code to submit a Resolution Plan.

g) The COC does not approve the revised Resolution Plan.

76. Based on the pleadings of the parties following issue arises for our consideration ;

Whether the approved Resolution Plan contravenes Section 30 (2) and Sec 61(3) of the Insolvency and Bankruptcy Code 2016?

77. The Appellant contends that the approved Resolution Plan is in contravention of section 30 (2) and Sec 61(3) of the Insolvency and Bankruptcy Code 2016. The Appellant raises the following points to show the violation of the statutory provision of Section 30(2) & 61(3)of the Code.

A. Objections about Valuation of the Corporate Debtor

The Appellant's contention about the valuation report is as under;

(a) The Valuation Process conducted by the IRP and the RP is contrary to various statutory provisions and, consequently, has directly impaired the commercial wisdom of the Committee Creditors.

(b) The two Valuers Appointed by the IRP did not physically verify the Corporate Debtor's assets. Regulation 35 (1) (a) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 mandates explicitly that the estimate of Fair Value and Liquidation Value be computed after physical verification of the assets of the Corporate Debtor.

(c) The Non-Core assets have been valued only by One Valuer, which is against Regulation 35 (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which mandates two registered valuers.

(d) The Valuation Report was never circulated either to the Appellant or to other members of the Committee of Creditors. Mere production of naked values without the detailed adjunct report would materially handicap the commercial wisdom of the Committee of Creditors.

(e) The provisions of Rule 8 of The Companies Act (Registered Valuers and Valuation) Rules, 2017, were not followed. The Rule mandates that any assistance can only be from Registered Valuers,

and the details of such valuers must be produced. The Rule also mandates the production of a report and also details the mandatory contents of such report.

(f) The Interim Resolution Professional had appointed two different valuers at the 2 Meeting of the Committee of Creditors. A perusal of the relevant minutes of the meeting shows that the Valuers were based out of Tamil Nadu and were appointed at the height of the Pandemic. The Valuers did not come to Chennai and did not physically verify the Corporate Debtor's assets.

(g) The IRP and the valuers claim that they delegated their function to "local associates", but the credentials of such persons is conspicuously absent. Furthermore, Regulation 35(1)(a) mandates explicitly that the Registered Valuer must physically verify the assets. It is an admitted fact that the same has not been done in the instant case.

(h) Assuming that the physical verification process can be delegated, Rule 8(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 mandates that a Registered Valuer can only obtain inputs from other Registered Valuers. It further mandates that such inputs and particulars of the other Valuer must be mentioned in the Valuation Report. The relevant provisions are extracted below:

> ***"Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016***

35. ***Fair value and Liquidation value***

(1) Fair value and liquidation value shall be determined in the following manner:-

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

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

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

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

(3) The Resolution professional and registered valuers

shall maintain confidentiality of the fair value and the liquidation value.

The Companies (Registered Valuers and Valuation) Rules. 2017

8. Conduct of Valuation.-

(1) The registered Valuer shall, while conducting a valuation, comply with the valuation standards as notified or modified under rule 18: Provided that until the valuation standards are notified or modified by the Central Government, a valuer shall make valuations as per-

(a) internationally accepted valuation standards,

(b) valuation standards adopted by any registered valuers organisation.

(2) The registered Valuer may obtain inputs for his valuation report or get a separate valuation for an asset class conducted from another registered valuer, in which case he shall fully disclose the details of the inputs and the particulars etc. of the other registered Valuer in his report and the liabilities against the resultant Valuation, irrespective of the nature of inputs or Valuation by the other registered Valuer, shall remain of the first mentioned registered Valuer.

(3) The Valuer shall, in his report, state the following:

(a) background information of the asset being valued;

(b) purpose of Valuation and appointing Authority;

(c) identity of the Valuer and any other experts involved in the Valuation;

(d) disclosure of valuer interest or conflict, if any;

(e) date of appointment, valuation date and date of report;

(f) inspections and/or investigations undertaken;

(g) nature and sources of the information used or relied upon;

(h) procedures adopted in carrying out the valuation and valuation standards followed;

(i) restrictions on use of the report, if any;

(j) major factors that were taken into account during the Valuation;

(k) conclusion; and

(l) caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by Valuer, which shall not be for the purpose of limiting his responsibility for the valuation report."

(i) **Therefore, the statutory provisions categorical state that Physical Verification must be done before completing the Valuation Process.** The provisions also clearly state that the report must include the nature of the inputs and particulars of the registered Valuer.

(j) Further, Regulation 27 read with Regulation 35 also mandates that two Registered Valuers value the Corporate Debtor's assets. It is an admitted fact that the two Registered Valuers appointed by the Resolution Professional did not value the non-core assets of the Corporate Debtor. The Resolution Professional admits to the same in the 6th Meeting of the CoC, and the aforesaid admission is found in the Minutes of the 6th meeting of the CoC. The RP also states that the non-

core assets would need to be valued by another valuer. However, he did not appoint another valuer to undertake the valuation exercise for reasons best known to him. The Resolution Professional's only response to this blatant abdication of his duty is that the value of the Non-Core assets was not significant.

(k) However, in lieu of the detailed valuation report, no member of the CoC or the Appellant herein has any idea as to what was categorised as a **Non-Core Asset** by the Resolution Professional or what its value could be. It is an admitted fact that Valuation as per the Code requires two registered valuers, and it also revealed that the same had not been done in the instant case. This blatant statutory violation cannot be brushed aside and given a quietus by alleging that their value was insignificant. This is especially concerning in a scenario where the detailed valuation report has not been provided to any party concerned.

(l) A valuation consisting of mere naked values without a detailed report is not a valid valuation for the Insolvency and Bankruptcy Code. It is a settled proposition that the Valuation exercise is conducted to facilitate the CoC in its decision-making process. Therefore, the existence of a valid and accurate valuation report is a sine qua non for the COC to exercise its commercial wisdom. A natural sequitur to the aforesaid would be that a detailed valuation report is necessary for the CoC to exercise its Commercial Wisdom objectively.

(m) If the proposition canvassed by the Resolution Professional is

accepted, then it would enable any Resolution Professional to appoint any two registered valuers sitting in any part of the world to remotely undertake the valuation process by taking the assistance of any unqualified person. The RP could merely circulate the raw numbers without circulating the report on how such valuers operating remotely through unqualified persons arrived at that figure. This concern is further exacerbated in the instant case as there is a detailed valuation report prepared by a registered valuer that values the Company at Rs 1641 Crores in September 2019.

(n) Rule 8 of the Companies (Registered Valuers and Valuation) Rules, 2017 mandates explicitly that the conduct of Valuation would require the production of a detailed valuation report. The Rule also provides a list of mandatory contents that must find a place in the Valuation Report. Thus, it is clear that the production of a detailed valuation report to the CoC is a sine qua non of a valid valuation exercise under the Insolvency and Bankruptcy Code.

(o) Furthermore, both Regulation 35 and Rule 8 state that Valuation must be conducted per internationally accepted valuation standards. This will not be verifiable if the detailed valuation report is not provided. The legislative intent will be defeated if the IRP/RP can bypass this requirement by circulating raw numbers without evidence of the Valuers' practices in arriving at their valuation report.

(p) Appellant contend that the Resolution Professional has

hoodwinked the CoC by conducting an illegal, improper and mala fide valuation process. This has materially affected the Commercial Wisdom of the CoC and, in any event, the mere fact that the CoC had considered the issues and decided to brush it aside cannot set right statutory violations apparent on the face of the record.

78. **Ist Respondent's (RP) response to the objection about Irregularities in Valuation** of the Corporate Debtor is as follows;

A. Valuation of assets and alleged irregularities in Valuation:

1. Two contentions have been raised on Valuation, namely (a) the Resolution Plan seeks to transfer assets worth more than Rs.1600 crores for Rs.423 crores and that the Committee of Creditors was not apprised of the actual value of the assets since the valuers were Delhi based and were not aware of the existing prevailing real estate market conditions and (b) Alleged Non-consideration of Section 12A proposal of the Appellant.

2. So far as the (a) is concerned, there is no documentary evidence to support the contention of the Appellant that the Valuation of Rs.1600 crores. This Respondent has conducted the whole process under the provisions of the Code and the Regulations. The Resolution Plan was approved after following due process of law, after approval from the Committee of Creditors under its commercial wisdom. Respondent adverted to the observations of this Appellate Tribunal in Paragraph 15, under the head 'Discussions and Findings', in Company Appeal No. 19/2021, wherein it is held that:-

> *15. The Appellant's contentions about the Valuation of the Corporate Debtor of Rs. 1600 crores are unsupported by any evidence. The fact remains that the Resolution Plan amount has arrived after following the due procedure prescribed under the Code and the Rules and Regulations made thereunder.*

3. The aforesaid judgment has attained finality.

4. The Appellant is not sure of the Valuation and has stated the value of the property as Rs.1000 crores in the affidavit submitted by him before NCLT, High Court of Chennai, NCLAT and Hon'ble Supreme Court.

5. This Respondent has complied with the provisions of the Insolvency and Bankruptcy Code and the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 vide Regulations 35 and 27, and in the absence of any evidence to substantiate the alleged Valuation of Rs.1600 crores, the issue about the Valuation cannot be the subject matter of the Appeal.

6. Secondly, with regard to the allegation of the CoC not being apprised of the actual value of the assets since the valuers were Delhi based, the attention of this Tribunal is invited to the Minutes of the 2nd meeting of the CoC held on 06.08.2020, which starts at page No.63 of Volume I of the 1st Respondent's reply compilation. The issue about the valuers was discussed by the CoC as Agenda item No. A4 on page 66.

7. So far as the appointment of the third Valuer is concerned, the attention of this Appellate Tribunal was invited to the minutes of 6, and 7 meetings of the CoCs wherein this Respondent duly apprised the members about the need for the appointment of a third Valuer by Regulations 35. Agenda Item No. A5 ,Sl. No 7, on page 135 and Agenda Item No.A3 on Page 142, respectively.

8. This Respondent arrived at the fair value and liquidation value on the average of the two closest values as per Regulation 35 (c) provisions. In this connection, the attention of this Hon'ble Tribunal is also invited to the impugned Order, which deals with the valuation issue at length from paragraphs 74 to paragraph 84.

An argument is raised that the two valuers who were initially appointed did not value the total assets of the Corporate Debtor and had only valued the core assets of the Corporate Debtor.

9. The reference to the minutes of the 6th CoC at page No.312 of Volume II of Appellant paper book is being read is out of context. A perusal of the said minutes of meeting under paragraph 3 would reveal the following fact:-

i. The Non-Core Assets that the previous valuers did not value is around 3 to 4 crores, as against the total value of the non-core assets being 100 Crores. This was communicated to the members of the CoC on 15.12.2020. Thus it is futile on the part of the Appellant to contend that only Core Assets of the Corporate Debtor were valued. The

Appellant is now trying to take advantage of this Respondent's non-inclusion of Expression of some of the Non-Core Assets in the Agenda Item No.2 of 6th CoC.

ii. Furthermore, the Valuation procedure under Regulation 35 has been followed, perusing Agenda Item No. A 4 of the 2nd CoC would reveal that the IRP had followed the process mentioned in the CIRP Regulations about the appointment of registered valuers. The said agenda item also discussed how the Valuation is proposed to be carried out, including a visit to the properties to be valued.

iii. The Appellant has placed reliance on the judgment of the Supreme Court about the submission of a copy of the valuation report. The reliance placed on the judgment is ill-founded, and in the said judgment, the Supreme Court had examined the issue as to whether Resolution Plan needs to be given to the Promoter. The said judgment does not deal with the valuation report. The Regulation itself does not provide for sharing a copy of the Valuer's report even with the CoC and only enabled the Resolution Professional to share the numbers after getting confidentiality undertaking. It is not understood how reliance can be placed on this judgment. As much as there is no violation of Regulation 35, the infraction of Section 32 of the Code does not arise. The judgment relied on by the Appellant has no application to the facts of the present case in as much as the issue which came up for consideration before the NCLAT in the said case was about the decision of the CoC to permit a person to submit the Expressions of Interest after

the last date for submission was over. In such circumstances, the NCLAT has held that such a decision of the CoC cannot be said to be commercial wisdom.

79. While dealing with the irregularities about the Valuation of the corporate debtor, the Resolution Professional relied on the judgement of this Appellate Tribunal in Company Appeal AT (CH) (Ins) No. 19 of 2021. The proceedings of Company Appeal (AT) (CH) (Ins) No. 19 of 2021 pertains to an order dated 23 December 2020 passed by the Adjudicating Authority under Section12 (2) of the Code, excluding the period commencing from 5 May 2022 to 31 October 2020 to provide the benefit under Regulation 40 C. The said Appeal was preferred at the instance of one shareholder, namely, Mr Ramasamy Palaniappan. It did not pertain either to the statutory violations in the process of CIRP and the Resolution Plan or the eligibility of the 2nd Respondent to act as a resolution applicant. Merely because the said Mr Ramasamy Palaniappan was unable to produce any evidence to show the actual Valuation on an earlier occasion, the Appellant cannot be prevented to produce such evidence to establish the illegality in the CIRP.

80. It is pertinent to mention that the Approval of the Resolution Plan by the COC is directly attributable to the fact that the COC was not properly apprised of the actual value of the Corporate Debtor's assets. The choices of the valuers by the IRP have been questionable since the 2nd COC meeting. The concern stems from the fact that the valuers were based in Delhi and had little knowledge of the prevailing real estate market conditions in Tamil Nadu. The circumstances were further separated by the fact that valuers

lacked adequate experience with the hospitality industry. In this regard, it is pertinent to note the minutes of the 2nd COC meeting, which reads as follows;

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

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

82. It is pertinent to point out that due to lockdown, quarantine and travel

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

83. Further, it is necessary to mention that many members of the COC raised concerns relating to the Valuation. Even in the 7th meeting of the COC, concerns were raised as to the fact that the Resolution Plan values the Corporate Debtor at a rate that is significantly lower than the already paltry Valuation arrived at by the IRP. Moreover, the RP himself admitted the aforesaid fact in the aforesaid meeting.

84. The Appellant further contends that it has come to notice that one of the registered Valuers appointed during the CIRP viz, Mr Vikas Agarwal, is not a registered valuer, as seen from the official website IBBI. The purported Registration No. IBBI/RV/07/2019/12, 228 belongs to Mr Sanjay Suresh

Ranadey, who is not connected to the case. The Appellant has also annexed the search result extracted from the official website of the IBBI in this regard. It is thus evident that the entire process of Valuation is tainted with fraud and mala fides.

85. The learned Senior Counsel for the Appellant adverted to the observations of the Adjudicating Authority in the paragraphs 66, 81, 90 & 91 of the Impugned Order, which is reproduced below for ready reference;

> *"66. In relation to the sharing of the valuation report, it was submitted by the Learned Senior Counsel that Regulation 35 of the IBBI (IRPCP) Regulations 2016 contemplates sharing of only fair value and liquidation value on obtaining confidentiality undertaking from the members of the CoC and even though the Promoter is not a member of the CoC**, the values were shared with the Promoter and that there are no requirements under the law for the RP to share the valuation report.***
>
> *81. Thus, it is clear that the RP has arrived at a Fair Value and the Liquidation Value based on the average of all the three valuers and the same has been done in accordance with Regulation 35 of the IBBI (IRPCP) Regulations 2016. Further, the valuation certificate dated September 2019 relied on by the promoter / suspended Director of the Corporate Debtor would be of no relevance as the same was not done in accordance with the Regulations framed under the IBC, 2016. Also, the RP who is in charge of the affairs of the Company Debtor once the CIRP has been triggered in relation to the Corporate Debtor, he has to act as per the provisions of the Regulations and cannot act according to the whims and fancies of the promoters / erstwhile directors of the Corporate Debtor. The valuation certificate dated September 2019 relied on by the promoter /*

suspended Director of the Corporate Debtor was done during pre-Covid period and the same cannot be a yardstick for the valuers who have been appointed pursuant to the Regulations framed under the provisions of IBC, 2016. Also, the stance of the Learned Senior Counsel for the promoter / suspended Director of the Corporate Debtor that the CIRP was triggered during the peak of Covid would be of no relevance since at that point of time, there was no statutory bar for this Adjudicating Authority to initiate CIRP in relation to a Company. However, it is seen that the Application for initiation of CIRP was filed by the Financial Creditor as early as in the year 2019 itself and during that point of time there was no cases of Covid in India and the matter was heard in detail and the orders were reserved during March 2020. While this being the fact, the contention of the Learned Senior Counsel that only because of Covid they were not able to settle the creditors of the Corporate Debtor, does not hold much water. Even though, the Valuation as arrived at by the valuers may not be acceptable to the erstwhile promoters / Directors of the Corporate Debtor, it cannot give them a right to challenge the same before this Adjudicating Authority on ostensible grounds.

90. ***It is significant to note here that, a statutory provision regulating a matter of practice or procedure will generally be read as directory and not mandatory***. ***Thus, even though the objectors to the Resolution Plan have alleged many procedural irregularities in relation to the conduct of the proceedings in relation to the CoC; however those objectors have miserably failed to establish as to what prejudice has been caused to them in respect of the same***. *Further, a person who has been inducted as a member of the CoC in its 6th meeting cannot be allowed to question the actions taken by the CoC in the past*

meetings. However, in relation to the objections raised by the Applicants in IA/181/CHE/2021 and IA/183/CHE/2021, this Tribunal is unable to comprehend their objections in relation to the Plan, especially when they are getting 100% of their claim amount to be paid by the Resolution Applicant. Hence, this raises a suspicion as to whether that these Applications as filed by the objectors are motivated.

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

86. Based on the above discussion, it is apparent that the two valuers appointed by IRP did not physically verify the corporate debtor's assets despite that Regulation 35 (1) (a) of the CIRP Regulations mandates explicitly that the estimator fair value and liquidation value shall be computed after physical verification of the assets of the Corporate Debtor. It is further revealed that the valuation report was never circulated either to the Appellant or to other members of the COC. Mere production of naked values without the detailed adjunct report would materially handicap the commercial wisdom of the Committee of Creditors.

87. Further, Regulation 27 Regulation 35 mandates that two registered

valuers value the Corporate Debtor's assets. It is an admitted fact that the two registered valuers appointed by the Resolution Professional did not value the non-core assets of the Corporate Debtor. However, in view of the detailed valuation report, no member of the COC of the Appellant herein has any idea as to what was categorised as a 'Non-Core Assets' by the Resolution Professional or what its value could be. These are the blatant statutory violations and irregularities committed in violation of the corporate debt assets.

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

89. **Exclusion of unsecured creditors from the entire decision-making process;**

a) The Appellant contends that IRP had received claims from a large set of Unsecured Financial Creditors. Still, the IRP/RP did not proceed to accept or reject the Unsecured Financial Creditors' claims, which resulted in excluding the said unsecured creditors from the entire decision-making process.

Non-Publication of Form-G As Per Regulation 36A(2) (iii) of the IBBI Regulations for Corporate Persons, 2016

90. As per Regulation 36A(2)(iii), the RP shall publish 'Form-G' on the Corporate Debtors and IBBI websites. This would ensure adequate publicity to all prospective Resolution Applicants. This was admittedly not done by the RP. The IRP published the Form-G only in a newspaper.

91. In fact, in the 5th CoC Meeting dated 12.11.2020, while discussing whether 'Form G' should be re-published, the present RP points out that it was not published on the IBBI website, which may lead to litigation in the future. However, no steps were taken to re-publish 'Form-G' and invite fresh bids despite this. This was done despite the exclusion of the period between 05.05.2020 and 31.10.2020 from the period of CIRP by the Ld. Tribunal.

92. A plea regarding non-compliance of Regulation 36A of IBC has explicitly been taken by the Appellant in its Affidavit objecting to the Plan before the Ld. Tribunal. The impugned order itself records that the plea of non-compliance of regulation 36A was raised.

93. Non-publication of 'Form-G' violates Circular No. IP (CIRP)/006/2018 dated 23.02.2018 issued by the IBBI, which provides the designated website for publication of 'Form-G', i.e. invite.rp@ibbi.gov.in. Failure to advertise as mandated to ensure that more Resolution Applicants could come forward directly impacts the maximization of asset value.

94. Despite violations above about the publication of 'Form-G', the Learned Tribunal has approved the Resolution Plan. On pages 142-144 of Vol. of Appeal, sets out a list of provisions that have been complied with. Regulation 36A does not even find a mention in this.

95. Appellant has taken specific pleas regarding non-publication of Form-G in the Appeal.

96. In response to the irregularity mentioned above, the learned Senior Counsel for Respondent No. 2 submits that the Learned Adjudicating Authority vide its impugned judgement dated 15 July 2021 has dealt with the issue of procedural irregularities and was pleased to hold that the objections as raised by the not so grave to defeat the Resolution Plan as filed by the Resolution Applicant, i.e. Respondent No. 2 herein.

97. Further, it is well settled that the scope of interference concerning the Successful Resolution Plan is extremely limited in nature. Challenge can only be in respect of grounds as provided in Section 30 (2) or Section 61 (3) of the IBC 2016, which is limited to matters "other than" the enquiry into the autonomy or commercial wisdom of the Committee of Creditors

98. It is pertinent to mention that an appeal against the approval of the Resolution Plan shall lie under Section 61 (3) of the IBC on the ground, namely, there has been a material irregularity in exercise of the powers by Resolution Professional during the Corporate Insolvency Resolution period.

99. Further, it is necessary to mention that Regulation 36 A of CIRP Regulations mandates publication of Form-G at the earliest, not later than the 75th day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit Resolution Plans.

100. Non-compliance with the above regulatory provision is admitted. It is

also important to point out that this entire CIRP was conducted during lockdown when the world faced Covid19 Pandemic. At that time, most people avoided reading the newspaper under the apprehension of Covid infection. So the publication of 'Form-G' for inviting Expression of Interest was essential. It is also important to point out that the Government of India also brought some amendments in the Code considering the impact of the Pandemic. Relevant Regulation about inviting 'EOI' is given below for ready reference;

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

[**36-A. Invitation for expression of interest**.—

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

(2) The resolution professional shall publish Form G—

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

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

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

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

(3) The Form G in the Schedule shall—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*b*) the applicable provisions of Section 29-A, and

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

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

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

committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.
(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections to the committee.]

101. **Resolution Applicants ineligibility u/s 29A(e) of the Code**

a) The Appellant contends that there is a violation of Section 88 of the Indian Trust Act, 1882. It is seen from the final list of prospective Resolution Applicants dated 26.09.2020, issued by the IRP, that a prospective Resolution Applicant, namely, 'Sri Balaji Vidyapeeth', is ineligible on the ground that it is a 'Charitable Trust' and it cannot run a profit-making entity. It is seen from the approved resolution plan that R-2 is the founder and Managing Trustee of the said 'Sri Balaji Vidyapeeth'.

b) However, "Sri Balaji Vidyapeeth" was a prospective Resolution Applicant and found ineligible was wholly suppressed from the CoC. Therefore, IInd Respondent being the Managing Trustee of Sri Balaji Vidyapeeth, has proceeded to submit the Resolution Plan by competing with the same Trust by taking advantage of his fiduciary position within the meaning of Section 88 of the Indian Trust Act, 1882. Since the said Trust has already been declared ineligible, R-2 cannot be

permitted to act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain, which is barred under Section 88 of the Trust Act.

c) IInd Respondent /SRA is the Managing Director of 'MGM Healthcare Private Limited'. The Resolution Plan states that 'MGM Healthcare' is looking forward to setting up new hospitals in the State of Tamil Nadu envisages to expand pan India and becoming a leading hospital chain in India. At the same time, IInd Respondent proposes in the Resolution Plan to convert the 'Coimbatore property' of Corporate Debtor into a hospital, which would directly conflict with 'MGM Healthcare' interest. Therefore, the Resolution Plan submitted by R-2 is hit by Section 166(4) of the Companies Act, 2013, which reads as follows:

> *"Section 166 (4) A director of a company shall not involved in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company."*

102. In reply to the Appellants argument, the Resolution Professional submits that Resolution Applicant was not disqualified from being a director in response to the above allegations. There was no material to show that RA[3] was hit by any provisions of section 29 A of the Code. The contentions raised by the Appellant based on the Companies (Acceptance of Deposits) Rules, 2014, the other provisions of Companies Act, 2013 and the trust act are

[3] Resolution Applicant

factually and legally incorrect.

103. In response to the allegations of the Appellant, the Successful Resolution Applicant[4] submits that;

a. The aforesaid argument of violation of Sec. 88 of the Indian Trust Act, 1882 was never raised by the Appellant before the CoC and the Ld. They are Adjudicating Authority. Further, the Appellant has no locus to raise the issue of conflict of interest.

b. Respondent No.2 and 'Sri Balaji Vidyapeeth' (trust) had submitted their Expression of Interest in their individual capacity.

c. Sec. 88, the Indian Trust Act would not affect the Approval of the Resolution Plan of Respondent No. 2. Further, as per the definition of conflict of interest as per Para 1.1 of RFRP, the conflict shall arise only when the resolution applicant is found to be in a position to have access to information about or influence the Resolution Plan of another resolution applicant. Admittedly, the Trust was declared ineligible even before submitting a Resolution Plan.

d. Sri Balaji Vidyapeeth was declared ineligible as it was a trust a non-profit concern). Thus, Sec. 88, the Indian Trust Act, will be inapplicable to the present case. Consequently, neither the Trust suffered any loss, and IInd Respondent gained any advantage, which is the sine qua non to the applicability of Sec. 88.

[4] SRA

e. The Resolution Plan in no manner contravenes any law as required under Sec. 30, IBC only on account of Sec. 88, Indian trust act. Assuming but not admitting that there is a violation of Sec. 88, the only consequence is that the trustee has to hold such advantage to the benefit of the Trust, and it is for the Trust to claim such an advantage gained. It does not in any way attract disqualification under Sec. 29A, IBC. It does not impact the trustee in the capacity of a Director in a Company under Section 164(2), Companies Act, 2013. Sec. 29A(e), IBC is restricted to the Companies Act alone and is not applicable in the case of the Trust Act. Thus, assuming but not admitting that Respondent No.2 has violated Sec.88, Trust Act, it has no impact on his eligibility as a Director under Sec. 164 of the Companies Act or as a Resolution Applicant under the IBC.

f. Lastly, without prejudice and without admitting, even if it is presumed that there is a violation of Sec. 88, Trusts Act, still, Sec. 29-A(e) of IBC does not debar Respondent No. 2 in any manner to file the Resolution Plan. The consequences of violation of Sec. 88, if any, would be what is provided under the Trusts Act alone and that too, at the instance of the concerned Trust and not the Appellant. Further, the Resolution Plan does not, in any manner, get affected. The Plan does not contravene any provisions of the law.

104. Regarding the above averments, the Ld. Senior Counsel for the Appellant submitted that the 2nd Respondent is the Managing Trustee of 'Sri Balaji Vidyapeeth', which features in Final List Prospective List of Resolution

Applicants. The IInd Respondent suppressed the fact from the CoC that the 'Sri Balaji Vidyapeeth' Trust was a prospective Resolution Applicant and was found ineligible.

105. The CoC was merely informed that one of the PRA[5] charitable trusts was not authorised to take up this activity. However, the rejected Trust was none other than the 2nd Respondent's Trust, namely 'Balaji Vidyapeeth', which was never disclosed to the COC and has been deliberately suppressed. The IRP/ Resolution Professional should have informed the CoC that the 2nd Respondent had presented the Resolution Plan by competing with the said Trust. He has used the very same '"Trust' to support his credentials and creditworthiness in the Resolution Plan. The relevant portions of the Resolution Plan are extracted hereunder for ready reference:

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

[5] Prospective Resolution Applicant

around various diverse businesses."

106. Therefore, it is incorrect to say that the 2nd Respondent has not gained any advantage from the charitable Trust. The case on hand squarely falls within the ambit of Section 88 of the Indian Trusts Act, and as such, the Resolution Plan is illegal. Since the said 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent cannot act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain is barred by Section 88 of the Indian Trusts Act. The said provision is extracted hereunder for ready reference. [6]

107. The Appellants counsel argues that he is entitled to challenge the legality of the Resolution Plan and the eligibility of the 2nd Respondent to act as a Resolution Applicant. The Appellant is not concerned about how the 2nd Respondent discharges his fiduciary obligations concerning the said Trust or other entities. However, when the 2nd Respondent intends to act as a Resolution Applicant, the Appellant is well within his rights to point out the resolutions Plan's illegalities since the Code requires that a Resolution Plan shall not contravene any of the provisions of law for the time being in force.

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

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

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

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

110. However, the said facts have been suppressed from the CoC, and the

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

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

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

113. **Objections about 2nd Respondents disqualification as a director under Section 164 (2) (b), Companies Act, 2013 and consequently under Sec. 29A(e) of the Insolvency and Bankruptcy Code 2016.**

114. The Appellant had submitted that IInd Respondent is a Director of a Company, namely, M/s International Aviation Academy Private Limited[7] (for brevity 'IAAPL'). It is seen from the audited financial statements of the said Company from 2010-11 to 2017-18 that a sum of Rs. 12,03,000/- has been collected as 'share application money pending allotment'. Therefore, it appears that the sum has not been refunded. As such, the same shall be treated as a deposit in terms of proviso to Explanation (a) of Rule 2(1)(c)(vii) of the Companies Act (Acceptance of Deposits) Rules, 2014.

115. In the above circumstances, given Section 164(2)(b) of the Companies Act, R-2 has been disqualified from acting as a Director in any company for five years from the date such Company failed to repay the deposit and even assuming these amounts have been repaid during the Financial Year 2018-19, R-2 is disqualified from acting as Director till date. Thus, R-2 is ineligible to submit the Resolution Plan under Section 29 A (e) of the I&B Code. However, R-2 deliberately suppressed the same and submitted the Resolution Plan fraudulently. Unfortunately, IRP and RP(R-1) failed to conduct proper due diligence and report the above statutory violation to CoC or the Adjudicating Authority.

116. In response to the above, the Ld Senior Counsel for the IInd Respondent submits that;

a) The aforesaid argument of Sec. 164(2)(b),2 Companies Act, 2013 was never raised by the Appellant before the CoC and the Ld.

[7] IAAPL

Adjudicatory Authority and even on the grounds of Appeal. Further, the Appellant herein has no locus to probe into such implications.

b) Sec. 73 of Companies Act, 2013 (which came into force on 01.04.2014) states that no company shall invite, accept, renew deposits from the public except in the manner provided under this chapter on or after commencement of this Act. Therefore, when read along with Sec. 1(3),* Companies Act, any deposit received before 01.04.2014 does not partake the character of the deposit referred to in Sec. 73 read with Companies (Acceptance of Deposit) Rules, 2014. Thus, this argument must fail.

c) The above-mentioned contention ignores the Ministry of Corporate Affairs circular dated 30.03.2015, which exempts the amounts received from directors under deposit. The amount of Rs. 12,03,000/- shown in the financial statement as share application pending allotment, was received from members and Directors of the Company, M/s IAAPL before 01.04.2014 and is continuing in the books of the IAAPL. The amount above, thus, does not fall under the definition of deposit under Rule 2 of Companies (Acceptance of Deposit) Rules, 2014. Further, the circular dated 30.03.2015 circular is in tune with Sec. 73(1) read with Sec. 1(3) and relates to Rule 2(c)(viii) of the Deposit Rules and, therefore, applicable.

d) Respondent No. 2's directorship, as per the Ministry of Corporate Affairs, Government of India website, still shows as active compliant.

As long as a Director is an active compliant under the Companies Act, Sec. 29A(C), IBC, 2016 would not apply. As per Sec. 29A, IBC, the following persons are ineligible to be a Resolution Applicant:

1. is an undischarged insolvent;

2. is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

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

4 has been convicted for any offence punishable with imprisonment - (i) for two years or more under any Act specified under the Twelfth Schedule; or (ii) for seven years or more under any law for the time being in force;

5 is disqualified from acting as a director under the Companies Act, 2013 (18 of 2013);

a. is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

b. has been a promoter or in the management or control of a corporate debtor in which a preferential transaction,

undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

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

d. .....

e. .....

e) It is undeniable that neither any of the aforesaid events have actually happened with respect to Respondent No. 2 nor any competent authority under the relevant laws with respect to the aforesaid matters has passed any order, direction or decision declaring, convicting, disqualifying or prohibiting Respondent No. 2 in any manner. Sec. 29-A would, if at all, come into operation upon after the competent Authority has done any of the aforesaid against Respondent No. 2.

f) There is no other provision in the IBC with regard to the ineligibility of a Resolution Applicant. Further, it is clear that Sec. 29A(e), IBC categorically provides for persons to be ineligible as resolution applicants. Therefore, the Act should have already happened and been declared by the competent Authority to be ineligible. Neither CoC nor Adjudicating Authority can presume

ineligibility unless the above disqualification has already been found and held by the competent Authority under the concerned statute. Therefore, assumption of or deemed ineligibility by inference is not provided under Sec. 29A, IBC.

117. The learned Senior Counsel for the 2nd respondent has vehemently argued that the objection raised by the appellant was never raised before the Adjudicating Authority. In response to this objection, Learned Counsel for the appellant submits no estoppel against a statute. Section 61 (3) empowers the Appellate Tribunal to question irregularities and illegalities in the CIRP, including the Resolution Plan. The Resolution Plan being in rem, these questions fall within the exclusive purview of judicial review. These grounds cannot be eschewed from consideration on the simple ground that they were never raised before NCLT, as persons who were not before NCLT are also before this court.

118. The Ld Senior counsel for the Appellants, in response to the above submissions of Respondent No.2, regarding the disqualification of the 2nd Respondent, argued that the 2nd Respondent is a Director of M/s. International Aviation Academy Private Limited, and it is seen from the audited financial statements of the said Company for the period 2010-2011 to 2017-2018 that a sum of Rs.12,03,000/- has been collected as 'share application money pending allotment'.

119. It appears that the said sum has not been refunded, and as such, the same shall be treated as 'deposit' in terms of Explanation (a) of Rule

2(1)(c)(vii) of The Companies (Acceptance of Deposits) Rules, 2014. In the above circumstances, given Section 164 (2) (b) of the Companies Act, the 2nd Respondent has been disqualified from acting as a Director in any Company for five years from the date on which the said Ms International Aviation Academy Private Limited failed to repay the deposit amounts collected towards 'share application money pending allotment' aggregating to Rs.12,03,000/-.

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

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

122. The 2nd Respondent has chosen not to file any document to support

the above contention and has failed to discharge his burden under Section 106 of the Indian Evidence Act, 1872.

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

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

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

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

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

The Revised Resolution Plan was never placed before the AA/NCLT for final Approval.

Admittedly, the last CoC meetings were conducted on 22.01.2021, and it is unknown how the Resolution Plan dated 25.01.2021 could have been approved by the CoC [Pg. 1 of Addl. Documents-Vol. 1 (Resolution Plan)].

(i) It is seen from the minutes of the 9th CoC Meeting dated 22.01.2021 [Refer to Page 343 of Volume 2 of the Appeal Paper Book @ Pg. 345, 346] When the resolution plan was put to the vote, the CoC had required the Resolution Professional to send the Plan back to the 2nd respondent to comply with Section 30(2) of the Code. After that, the revised resolution plan dated 25.01.2021 was never placed before the CoC for its Approval and has been directly placed before the Adjudicating Authority.

(ii) The impugned order is therefore in violation of Sections 30(2), 30(4), 30(6) and 31, IBC, which mandate that only a plan as approved by the COC can be presented to the NCLT for its Approval under section 31.

(iii) In this regard, the Appellant relies upon the judgment of this Hon'ble Appellate Tribunal dated 29.09.2021 rendered in *Dinesh Gupta vs Vikram Bajaj Liquidator M/s Best Foods Ltd.*

128. In response to the above objection of the Appellant, the Resolution Professional in its Revised Written Submission wherein stated *that;*

> *"A perusal of the 9th minutes of the COC would reveal that the COC had approved the resolution plan and the RA was requested to revise the same in line with section 53 of the Code read with section 30 (2). The commercial decision with regard to Approval of the Plan was taken by the COC, which is evident from the minutes of 9th COC."*

129. **The Revised Resolution Plan dated 25 January, 2021, of which copy is filed along with the convenience compilation by the Appellant, reveals that the 9th CoC meeting took place on Friday, 22 January 2021.**

The Minutes of 9th CoC contains the following agenda;

> **Agenda Item No. A.1.; 'To discuss' and put to the vote the Resolution Plan submitted by M K Rajagopalan.**
>
> "*A revised resolution plan was approved with 87.39% of voting share of financial creditors present and voted in the meeting. Since* ***there was dissent by some of the financial creditors, the Resolution professional will send back the Resolution Plan to the Resolution Applicant for further revision, as Section 30 (2) of IBC 2016, provides that the amount paid to dissenting financial creditors shall not be less than the amount paid to such creditors in accordance with Section 53 in the event of liquidation of the corporate debtor.***

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

130. On perusal of the minutes of 9th COC, it is clear that COC did not finally approve the Resolution Plan on 22 January 2021. In this meeting, COC sent back the Resolution Plan to the Resolution Applicant for further revision based on the CoC Resolution. This revised Resolution Plan dated 25 January 2021 was never sent for Approval before the COC.

131. **The Resolution Professional's statement that 'the revised Resolution Plan was approved at the 9th COC meeting' is incorrect. Although the Resolution Plan was allegedly approved on 22 January 2021, it is not the Revised Resolution Plan. Instead, the Resolution Plan was further modified based on the CoC resolution Dt.22.1.2021. But the final Revised Resolution Plan, dated 25 January 2021, was never laid before the CoC for its approval.** Thus the approval of the Resolution Plan by the Adjudicating Authority is not in compliance with Sec. 31(1) of the I & B Code, 2016.

132. **It is pertinent to mention that after Approval of the Resolution Plan by COC entire exercise for revising the Resolution Plan for making**

a complaint with Section 30 (2) of the Code was left with the Resolution Applicant. Revised Resolution Plan dated 25 January 2021, without further approval of CoC, was presented by RP before the Adjudicating Authority for approval, which was finally approved by the impugned Order.

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

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

135. After "revision", the revised plan is never put to the vote. Instead, it is filed to NCLT directly, without any approval from the COC on the revised Resolution Plan. Sections 30(2), 30(4), 30(6) and Section 31 mandate that only a plan as approved by the 'COC' can be presented to the NCLT for its approval under Section 31. Such kind of procedural failure amounts to material irregularity and goes to the root of the matter, making the plan void and non-est in law, as it is trite law that where the law permits a thing to be

done in a particular manner if the same is not done in that manner, the same is non-est in the eyes of the law.

Non-consideration of 12 A

1. The Appellant emphasized the issue of Non-Consideration of Application under Section 12A, highlighting the following points:

(a) The Appellants submits that the current CIRP is completely against the essence of the IBC, that is, maximizing the value of the Corporate Debtor as a going concern. The existing resolution plan seeks to convert the Corporate Debtor into a hospital, which will put numerous employees, vendors, and other stakeholders at risk.

(b) Furthermore, the operation costs attached to such a large-scale conversion have also not been considered. The Promotor has placed a request with the applicant Creditor, the RP, and other CoC members to consider the financial proposal floated by M/s. Deutsche Bank by way of facility amount of Rs 350 crores and other sources of funds. However, the same was never placed for consideration in the COC meetings.

(c) The above proposal would have effectively maximised the value of the Corporate Debtor as a going concern. It would ensure that all classes of financial creditors are completely accounted for immediately. Other Classes of creditors would have also taken care of in full either immediately or in due course of functioning as a going concern. However, the 1st Respondent has failed to consider the request of the

Promoters to call for a meeting of the Committee of Creditors to consider the application under Section 12A.

(d) The Proposal was placed before the Applicant Financial Creditor seeking for an opportunity of the Promoter group along with the prospective funders Deutsche Bank to be provided with an audience with the Applicant, the RP and the CoC to demonstrate how the funds can be arranged and the manner in which it shall be provided to the secured financial creditors immediately. Opportunity for the same has not been provided. There appears to be no intention to give the promoters a chance to resolve the Company on their own while settling all the creditors. The failure to provide an opportunity is contrary to the intention of the Code and the principles of natural justice.

(e) The Form FA has to be submitted only by the Applicant Financial Creditor after the proposal floated by the promoters is considered. Only after the proposal has been accepted by 90% of the Committee of Creditors, the Applicant Financial Creditor has to file the proposal as per Form FA. Therefore, the Resolution Professional cannot disregard the proposal for the conduct of a meeting of the CoC on such an untenable and superficial ground. Nevertheless, the Promoters are still willing to present their proposal under Section 12A, under which all financial creditors would be paid upfront in an expedited manner. This would accrue to the benefit of all members of the Committee of Creditors and ensure that the value of the Corporate Debtor is maximized.

Therefore, the objectives of the Insolvency and Bankruptcy Code would be fulfilled.

2. Since the proposal of the Appellant was not even discussed in the COC meeting, the Appellant had preferred an application before the Adjudicating Authority in MA/13/CHE/2021 in IBA/1459/2021 for fair valuation and to consider the proposal dated 08.03.2021 or such other proposals made by the Promoters with the option to modify the same on the request of the members of the COC. Meanwhile, the 1st respondent had also preferred an application in IA/150/CHE/2021 in IBA/1459/2021 inter-alia seeking approval of the Resolution Plan submitted by the 2nd Respondent. Despite glaring malafides in the CIRP.

3. Appellants further contends that the Adjudicating Authority had committed a grave error and has passed the impugned order dated 15.07.2021, dismissing the application in MA/13/CHE/2021 in IBA/1459/2021 and allowing the application in IA/150/CHE/2021 in IBA/1459/2021, thereby confirming the Resolution Plan of the 2nd Respondent. Further, the petitions of several other stakeholders were also dismissed by way of the impugned order, primarily on the ground that their respective claims were to be settled under the Resolution Plan.

136. In response to the Appellants submissions regarding non-consideration of application for one-time settlement of Appellant under Sec. 12A, IBC, 2016, IInd Respondent (RA) contends that;

a. The Ld. Adjudicatory Authority vide its impugned judgment had categorically considered the Appellant's argument regarding non-consideration of Sec. 12A application and held that the same was only placed before the CoC that too when the Resolution Plan was being put to the vote. It also noted the disclaimer in the term sheet issued by the Deutsche Bank, holding the whole application to be an eye-wash and dilatory tactics to delay the CIRP process

b. The 9th CoC meeting dated 22.01.2021, while dealing with the application under Sec.12A, rejected to consider the same as it was placed right before the Resolution Plan was being put to the vote and had approved the Resolution Plan 87.39% voting share.

c. Sec. 12A application and the Deutsche bank term sheet was issued only at a belated stage by the appellant, and the same is only indicative. Moreover, the appellant was part of every CoC.

d. The Term Sheet of Deutsche Bank was placed before the CoC for the first time only on 08.03.2021.

e. Deutsche Bank term sheet dated 22.01.2021 is a hoax, as it is only indicative and is not a commitment of funding in any manner.

4. Regarding the Appellant's contention of adequate funding through a Letter by one Saveetha Institute of Medical Science dated 14.07.2021 as proof of funding, the Respondent submits that;

a. The aforesaid letter was procured almost a month after the Ld AA/NCLT reserved the judgment.

b. Further, such alleged proof of funding was never produced before the CoC. (pg. 25 of R-2 counter)

c. Pertinently, the aforesaid letter by Saveetha Institute of Medical Science has been withdrawn vide email dated 02.09.2021. (pg. 13 of the CoC affidavit filed by R-1 dated 09.09.2021) and therefore, is no more available to the Appellant for reliance.

137. However, the Appellants, in response to the 2nd Respondent's submissions, stated that R-2 does not have any locus to question the efforts of the Appellant taken towards the one-time settlement of the creditors.

138. In response to the 12A application Resolution Professional in its affidavit, states that *"the CIRP of the corporate debtor was initiated on an application by the TFCIL pursuant to order dated 5 May 2020. There is used public money which is at its stake by way of claims of several secured and unsecured Financial Creditors of about 390 crores besides the claim of Operational Creditor of ₹ 8.52 crores. The CIRP of the Corporate Debtor has paved way for resolution and recovery of public money. The conduct of the erstwhile promoter of the corporate debtor by pushing a communication in the guise of proposal under Section 12 A that too at a belated stage when Resolution Plan submitted by the Resolution Applicant was being put to vote, is nothing but an attempt to derail of a statutory process***. ***In this context, it is relevant to note that the Hon'ble NCLT wide its order dated 15 July***

2021, approving the resolution plan has rejected the contentions of the promoters by observing that;

> "86. *A perusal of the aforesaid minutes would show that the promoters of the corporate debtor has proposed for a 12 A settlement only at the 9th COC meeting, when the resolution plan of the resolution applicant was about to be put to vote. Further,* ***it is also seen that the petitioning Creditor viz. Tourism Finance Corporation of India was also kept in the dark about the 12 A proposal by the promoters and also flagged an issue stating that the letter has been addressed to the COC and not to them……."***
>
> Further, act para 88, the Hon'ble NCLT observe that;
>
> "88. *Thus, it is seen that the proposal as projected by the learned senior counsel for the promoters to be made under section 12 A, seems to be only an eyewash and a dilatory practice to delay the process of CIRP in relation to the corporate debtor and that the fact that the proposal has been mooted only during the eleventh hour is to stall the Resolution Plan as moved by the Resolution Applicant……*"

139. The Resolution Professional further stated in the affidavit that *"this clearly goes to show that neither the paper submitted by the promoter was in any way near to any proposal for consideration under section 12 A nor was it placed before COC with any bonafide intention.*"

140. *Based on the pleadings of the parties, it is clear that the COC meeting was not called for consideration of the 12 A application. Since 'Form FA' has to be submitted only by the Applicant Financial Creditor after the proposal floated by the promoters is considered,* ***and only after the proposal has***

been accepted by 90% of the Committee of Creditors, *the Applicant Financial Creditor has to file the proposal as per Form FA.* ***Thus, it is clear that the Resolution Professional cannot disregard the proposal for conducting a meeting of the CoC on such an untenable and superficial ground.***

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

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

appellant, this Appellate Tribunal granted an interim stay on implementing the impugned order.

143. Based on the pleadings of the parties, it appears that a settlement offer was made, and a 12 A application was to be submitted after getting the consent of 90% members of the COC. In the circumstances, the appellant requested to consider the settlement proposal in the COC. However, COC was never called to consider the settlement offer. The Resolution Professional has contended that the COC has rejected the settlement offer in its 9th meeting. This statement is also not as per the minutes of the 9th COC meeting. It appears from the minutes of the 9th COC that only a Resolution Plan was discussed in that meeting. After that, the Resolution Plan was sent back to the resolution applicant by CoC for reconsideration and revision. In the 9 COC meetings, no discussion about the settlement offer occurred. It is essential to mention that after admission of the petition and formation of the Committee of Creditors, Section 12A application for withdrawal could only be accepted if the CoC approves the proposal with a 90% vote share. It is undisputed that COC, under its commercial wisdom, had full liberty to either accept or reject the settlement offer. But consideration of the settlement offer is essential. At this juncture, this tribunal "Worth recalls and recollects" the judgement of Hon'ble 3 Member Bench of this Tribunal in Company Appeal (AT) (Ins) No.91 of 2019 dated 6 September 2019 between Shaji Purusothaman v Union Bank of India and others (reported in MANU/NL/0438/2019) whereby and whereunder at paragraph 9 it is observed that;

"*if an application u/s 12 A is filed by the Appellant, the Committee of Creditors may decide as to whether the proposal given by the appellant for settlement in terms of Section 12 A is better than the resolution plan as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the "Committee of Creditors", we are not expressing any opinion on the same."*

144. In this case, CoC never considered the settlement proposal submitted by the Appellant. Although, after getting the settlement proposal, it was incumbent upon the resolution professional to call the COC meeting to consider the settlement proposal. It is essential to mention that the settlement offer could not have been rejected without consideration by the COC.

Company Appeal CA (AT) (Ins) 176 of 2021

145. In the Company Appeal mentioned above, CA (AT) (Ins) 176 of 2021 Resolution Plan is challenged on the ground that the Resolution Plan is violative of the IBC and Article 14 of the Constitution; there has been a material irregularity in the exercise of the powers by the RP, and the Appellant who is also an Operational Creditor has not been provided for.

146. **Resolution Plan is Discriminatory**

i. The appellant contends that the Resolution Plan discriminates against the Appellant by providing no payment to it on the ground that it is a Related Party, even though the debt is admitted. The IBC does not permit discriminatory plans to be approved. Binani Industries

(Supra) was challenged before the Hon'ble Supreme Court was dismissed.

ii. Reliance on JR Agro Industries P. Ld. v. Swadisht Oils Pvt. Ld.,]Company Appeal No. 59 of 2018, dated 24.07.2018 (@Pg. 10-60 of R2's Additional Compilation of Judgments] is misplaced. JR Agro (Supra) was challenged before the Hon'ble NCLAT in Jya Finance and Investment Company Limited vs J.R. Agro Industries Pvt. Ltd., 2018 SCC OnLine NCLAT 1001 and the resolution plan therein was modified, which was free from any discrimination.

iii. After Binani Industries (Supra), the Insolvency and Bankruptcy Code (Amendment) Act, 2019, was enacted. The Bill before the Rajya Sabha contained the Statement of Objects and Reasons, which allowed for a certain level of discrimination. The 2019 Amendment does not provide for 'related party to be classified separately for payments under the Resolution Plan. On the other hand, the Objects and Reasons at para 2 clarify that the amendment was brought to ensure that creditors with "different pre-insolvency entitlements" were not treated equally under the IBC.

iv. Para 131 of the Supreme Court's Judgment in Committee of Creditors of Essar Steel India Ltd. Satish Kumar Gupta, (2020) 8 SCC 531 states explicitly that the Resolution Plan may consider different classes of creditors mentioned in Section 53 of the IBC. Accordingly, Section 53 does not treat related parties as separate creditors.

v. In the first place, the law has to permit a distinction to be explicitly created, and this distinction should be based on intelligible criteria. The discrimination should have a nexus with the object sought to be achieved. **In the present case, the IBC does not provide for a separate classification of Related Party for payments under the Resolution Plan**. Even otherwise, assuming without admitting, the CoC can permit this sub-classification even though the IBC doesn't provide for the same. Such classification must still meet the test of reasonable nexus with the object to be achieved. [Ref; Hiralal P. Harsora and Others v. Kusumn Narottamdas Harsora and Others, 2016) 10 SCC 165 @Pgs. 19-56]

vi. The IBC treats related parties as a separate category for specified purposes, excluding them from CoC under section 21 and disqualifying them from being Resolution Applicants under section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. In Phoenix ARC Private Limited w. Spade Financial Services Limited, 20213 SCC 475 [Paras 63, 81-82, 98-99 @Pgs. 286-339] the Hon'ble Supreme Court dealt with in detail the reason for treating related parties as a separate class and held that they are excluded from the CoC so that they do not impede and interfere with the Resolution Process. This rationale is achieved by excluding them from the CoC and submitting Resolution Plans. However, for payment

under the Resolution Plan, there is no reason to treat them as a separate class.

vii. Further, in the present case, the minutes of the CoC Meetings clearly show that no discussion whatsoever has taken place on the reasons for exclusion of Related Party from the payments to be made under the Resolution Plan. On the contrary, even in the 7th and 8th COC Meetings, a certain amount is set apart for Related Parties. However, in the final plan approved in the next meeting, no amount is paid to the Related Party, and no discussion in the CoC for the same is recorded.

viii. The Appellant contends that there was no application of mind, let alone the commercial wisdom of the CoC while approving the resolution plan regarding the exclusion of the claims of Related Parties. However, in Essar Steel (Supra) @ para 73, the Hon'ble Supreme Court specifically held that the decision of the Committee must reflect the fact that it has taken into account maximizing the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interests of all stakeholders. Further, in para 73, the Hon'ble Supreme Court holds that the Adjudicating Authority can look into this and see if the necessary parameters have been taken into account while arriving at a decision. However, in the present case, the CoC has not considered the interests of the Appellant and even failed to assign any reason why the Appellant was left out from the resolution plan.

ix. The stand of the RP before the Ld. Tribunal which the Ld. Tribunal accepted was that it was the prerogative of the Resolution Applicant to distribute the funds in a manner of his choice and that the IBC did not prohibit treating related parties as a separate class for this purpose. This stand of the RP is also reflected in the Reply filed before this NCLT. Ist Respondent's contention at para 24 of its Reply that there is no provision under the IBC or Regulations to pay a related party in parity with the unrelated party is wrong and misconceived. Nothing under the IBC permits the RP or RA to discriminate against the related parties. This argument is best suited to say that the RP/CoC had put the cart before the horse. It was for the RP to ensure compliance of the provisions of the IBC and the CoC to apply its mind on protecting all stakeholders, both of which have not taken place in the present case, resulting in the Resolution Plan being violative of the IBC and Article 14 of the Constitution.

x. Reliance on Pratap Technocrats Pvt. Ltd. v. Monitoring Committee of Reliance Infratel Limited and Another, 2021 SCC OnLine SC 569 is misplaced because the judgment does not decide the point of discrimination. Similarly, even the judgment in the case of Facor Alloys Ltd and Another. Bhuvan Madan and Others, 2020 SCC OnLine 789, has no application because it does not deal with discrimination of a related party.

xi. The Appellant is admittedly an Operational Creditor and Financial Creditor, and failure to provide for the discharge of its debts

in the Resolution Plan is also contrary to Section 30(2)(b), (e) and (1) of the IBC.

IInd Respondent's Response to the above argument

147. IInd Respondent No. 2 submits that, given the argument that there cannot be discrimination towards the debt owed, on the basis that the Appellant is a related party under Sec. 5(24), IBC and the Appellant ought to be treated equally to an unrelated operational, Financial Creditor given the equality clause enshrined under Article 14 of the Constitution of India.

148. The Ld. Adjudicatory Authority vide impugned judgment, in para 33 observed as under:

> *"33. In so far as admission of the claim is concerned, it is seen from the resolution plan that the claim of the applicant has been admitted by the RP both in the capacity as an operational creditor and financial creditor; however the applicant was classified as "Related Party" of the corporate debtor. However, during the course of submissions, the learned senior counsel Mr Satish Parasaran, submitted that there is discrimination in relation to the distribution of the amount by the resolution applicant. It is seen that no such pleading has been made in the application in relation to the discrimination of the amount being made to the related parties in the resolution plan, and the present application has been filed only with a prayer to declare the applicant company as not a related party of the corporate debtor. In so far as the admission of the claim, the said prayer has become infructuous since the claim of the applicant company was admitted by the RP, and the same is also reflected in the resolution plan."*
>
> *(verbatim copy)*

149. Under the IBC, 2016, there is no mandate to treat unrelated and related parties equally. On the contrary, the IBC and Regulations thereunder specifically treat 'related party' as a class unto itself and restrict the involvement of a 'related party' in any situation where the CIRP is likely to get affected. As held by the Hon'ble Supreme Court in Phoenix ARC, the purpose is to ensure that external creditors drive the CIRP. Following statutory provisions clarify that related party' is a class in itself. Accordingly**, a related party is prohibited from acting in any of the following capacities in a CIRP**:

Particulars	Provisions
Cannot be part of Committee of Creditors	Sec. 21, IBC, 2016
Cannot be a Resolution Applicant	Sec. 29A, IBC, 2016
Cannot be an authorized representative	Reg. 4A, IBBI (Insolvency Resolution Process for Corporate Persons) Reg, 2016
Cannot be a liquidator	Reg. 3, IBBI (Liquidation Process) Reg. 2016
Cannot be a part of the governing board	Reg.9, IBBI (Information Utilities) Reg, 2017
Cannot act as a professional	Reg. 7, IBBI (Insol. Professionals) Reg. 2016

In case there any only related parties as financial creditors, the CoC would be formed of the Operational Creditors	Reg. 16, IBBI(Insolvency Resolution Process for Corporate Persons) Reg. 2016

150. The underlying object is that the involvement of a related party in the CIRP in any capacity is seen as giving unfair benefit to the Corporate Debtor. In short, a related party is treated in the same class as the Corporate Debtor itself.

151. Therefore, this statutory recognition as a different class would apply even to a Resolution Plan when the CoC decides whether, in its commercial wisdom, it should pay to a related party at all as this would mean paying to the same persons who are behind the Corporate Debtor.

152. In JR Agro, Allahabad, the NCLT, while dealing with the class that a related party should fall observed as under:

> *"Therefore, keeping in view the global practices, especially UNCITRAL legislative guide to insolvency law, we are of the view that claim of a related party, i.e. Jya Finance and Investment Company Limited should rank subordinate to the claim of operational creditors and treated at par with equity shareholders are partners under waterfall principle under section 53(1)(h) of the Code."*
>
> *"Thus, we hold that the debt of Rs.36.6643 crore of Jaya Finance & Investment Co. Ltd., which is admittedly a related party of the corporate debtor should fall in the category of "equity shareholders are partners" as provided in section 53(1)(h) of the Code. Their claim will be treated at par with equity shareholders are partners, who are other unsecured*

creditors they rank below the operational creditors of the corporate debtor."

(verbatim copy emphasis supplied)

153. The NCLT in JR Agro had equated a related party with equity shareholders or partners as provided under Section 53(1)(h) of the Code and ranked lower in level than the obligation due to unrelated Financial Creditors. Accordingly, it further held that non-allocation of the fund by the Resolution Applicant, in the case in hand, to the related party of the Corporate Debtor does not contravene the waterfall mechanism as provided in Section 53(1)(h) of the Code, 2016.

154. The NCLAT in Facor Alloys was pleased to hold that an approved resolution plan could deal with a claim of a related party and extinguish the same. This was based upon reliance placed by the NCLAT in Essar Steel India Ltd. The aforesaid judgment by the NCLAT was upheld by the Hon'ble Supreme Court of India in Civil Appeal No. 5129/2021, Facor Alloys Lid. vs Bhuvan Madan & Ors. Furthermore, based on Facor Allows, the NCLAT reiterated the above in Bank of India v Bhuvan Madan RP of Ferro Alloys Corp Ltd.

155. The NCLAT in Lalit Mishra was pleased to hold that the 'IBC Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor' or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome.

156. The NCLAT in Gail India Ltd.' Has held that there is no embargo for the classification of Operational Creditor(s) into separate/different classes

for deciding how the money is to be distributed to them by the Committee of Creditors' because of the fact, they do have; the amount to be paid; the quantum of money to be paid, to a specific category or the incidental category of creditors, of course, nicely balancing the interests of the 'Stakeholders' and, the Operational Creditors', as the case may be.

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

158. On the facts of the present case:

a. The CoC had the discretion to decide regarding payment of an admitted claim to a related party depending on its relationship with the Corporate Debtor. The facts of the case show that the top key management personnel of the Corporate Debtor also control and run the Appellant. Mr Palani G. Periyasamy (the Appellant in Appeal No. 164 of 2021) is the Chairman of the Corporate Debtor and the Appellant. Mr K. Kandasamy is the Managing Director of the Appellant and Director of the Corporate Debtor. Mr Visalakshi Periasamy is the Director of both the Corporate Debtor and the Appellant. Both the companies are, therefore, run under the same management. The Appellant was created only for the sake of convenience in the hotel business run by the Corporate Debtor.

b. In its commercial wisdom, the CoC decided not to pay anything to the Appellant as it is a related party to the Corporate Debtor.

159. The Learned Senior Counsel for the IInd Respondent, to bolster his argument adverted to the observations of the Hon'ble Supreme Court in paragraphs 12,25,27,36,41&42 of the Hon'ble Supreme Court in case of *Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd. (Monitoring Committee)*, (2021) 10 SCC 623, wherein it is observed that observe that;

> **"12.** *NCLAT by its judgment dated 4-1-2021 [Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd., 2021 SCC OnLine NCLAT 384] rejected the appeal. NCLAT noted that there was no substance in the grievance that the operational creditors had been unfairly or inequitably treated in regard to the distribution of funds. As a matter of fact, operational creditors (other than related parties and statutory creditors) were allocated 19.62% of the upfront payment of Rs 3720 crores, while the financial creditors were paid only an amount of 10.32% of the upfront payment. The approved resolution plan, NCLAT observed, ensures restructuring and revival of the corporate debtor.*
>
> ***25.*** *The resolution plan was approved by the CoC, in compliance with the provisions of IBC. The jurisdiction of the adjudicating authority under Section 31(1) is to determine whether the resolution plan, as approved by the CoC, complies with the requirements of Section 30(2). NCLT is within its jurisdiction in approving a resolution plan which accords with IBC. There is no equity-based jurisdiction with NCLT, under the provisions of IBC.*
>
> ***27.*** *The RP has to present to the CoC, for its approval, such resolution plans which conform to the conditions specified in sub-section (2) of Section 30. The approval of the resolution plan is a statutory function which is entrusted to the CoC, under sub-section (4) of Section 30. The CoC may approve a resolution plan*

with a voting percentage of not less than 66% of the voting shares of financial creditors after considering:

(i) its feasibility and viability;

(ii) the manner of distribution proposed having regard to the order of priority amongst creditors laid down in Section 53(1) IBC, including priority and value of the security interest of the secured creditors; and

(iii) such other requirements as may be specified by the Insolvency and Bankruptcy Board of India. In other words, the decision to approve a resolution plan is entrusted to the CoC.

36. *The Court, also held (in para 62) that the legislative history of IBC indicated that: (K. Sashidhar case [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , SCC p. 188)*

> "*62.* … there is a contra-indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority".

"41. The observations in para 73 of the decision in Essar Steel India Ltd. [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] clarify that once the adjudicating authority is satisfied that the CoC has applied its mind to the statutory requirements spelt out in sub-section (2) of Section 30, it must then pass the resolution plan. ***The decision also emphasises that equitable treatment of creditors is "equitable treatment" only within the same class****. In this context, the judgment contains an elaborate foundation* ***on the basis of which it has held that financial creditors belong to a class distinct from operational***

creditors. *This distinction was emphasised in the earlier decision in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , wherein a two-Judge Bench of the Court, speaking through R.F. Nariman, J., observed : (Swiss Ribbons case [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , SCC p. 69, para 51)*

"51. Most importantly, ***financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor****. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress,* ***which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."***

42. *In Essar Steel India Ltd. [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531: (2021) 2 SCC (Civ) 443], this Court held that "the* UNCITRAL *Legislative Guide* ***... makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors****" [Available at <https: //uncitral.un.org/sites/uncitral.un.org/ files/media-documents/uncitral/en/05-80722_ebook.pdf> last accessed 6-8-2021, p. 218] .* ***The Court finally also observed that the "fair and equitable" norm does not mean that financial and operational creditors must be paid the same amounts in any resolution plan*** *before it can pass muster. On the contrary, it noted: (Essar Steel*

case [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531: (2021) 2 SCC (Civ) 443] , SCC p. 606, para 88)

> *"88. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."*

160. It is pertinent to mention that in the case mentioned above Hon'ble Supreme Court has held that the COC may approve a Resolution Plan with their voting percentage of not less than 66% of the voting share of financial creditors after considering its feasibility and viability; the manner of distribution proposed having regard to the order of priority amounts creditors laid down in section 53 (1) IBC, including priority and value of the security interest of the secured creditors; such other requirements as may

be specified by the IBBI. In other words, the decision to approve a resolution plan is entrusted to the COC.

161. Therefore, it is clear that COC has the right to approve a resolution plan considering the distribution's manner regarding the order of priority amongst creditors laid down in section 53 (1) of IBC.

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

163. **IInd Respondent further relied on the judgement of Hon'ble Supreme Court in case of *Vijay Kumar Jain v. Standard Chartered Bank*, (2019) 20 SCC 455 wherein it is observed that:**

> ***"23.*** *The argument on behalf of the Committee of Creditors based on the proviso to Section 21(2) is also misconceived.* ***The proviso to Section 21(2) clarifies that a Director who is also a financial creditor who is a related party of the corporate debtor, shall not have any right of representation, participation, or voting in a meeting of the Committee of Creditors****. **Directors, simpliciter, are not the subject-matter of the proviso to Section 21(2), but only Directors who are related parties of the corporate debtor****. It is only such persons who do not have any right of representation, participation, or voting in a meeting of the Committee of Creditors. Therefore, the contention that a*

Director simpliciter would have the right to get documents as against a Director who is a financial creditor is not an argument that is based on the proviso to Section 21(2), correctly read, as it refers only to a financial creditor who is a related party of the corporate debtor. For this reason, this argument also must be rejected."

164. ***Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd.*, (2021) 3 SCC 475: (2021) 2 SCC (Civ) 1: 2021 SCC OnLine SC 51 at page 518**

"81. *These objects underscore the composition of the CoC, guided by Section 21 IBC. The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the corporate debtor [Report of the Insolvency Law Committee, March 2018, p. 23, para 1.25.] . This is the intent behind the first proviso to Section 21(2) which disqualifies a financial creditor or the authorised representative of the financial creditor under sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, from having any right of representation, participation or voting in a meeting of the committee of creditors.*

82. *Since the IBC attempts to balance the interests of all stakeholders, such that some stakeholders are not able to benefit at the expense of others, related party financial creditors are disqualified from being represented, participating or voting in the CoC, so as to prevent them from controlling the CoC to unfairly benefit the corporate debtor ["Vidhi Centre for Legal Policy, Understanding the Insolvency and Bankruptcy Code, 2016: Analysing Developments in Jurisprudence", available at <https://vidhilegalpolicy.in/research/ understanding-the-insolvency-and- bankruptcy-code- 2016-analysing-developments-in-jurisprudence/> p. 34.]*

83. *It is pertinent to note that disqualification of related parties from being members of the CoC, has also been recommended in the UNCITRAL Legislative Guide on Insolvency law [UNCITRAL, "Legislative Guide on Insolvency Law, 2005", available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> p. 204.] :*

"131. The insolvency law should specify the creditors that are eligible to be appointed to a committee. Creditors who may not be appointed to a creditor committee would include related persons and others who for any reason might not be impartial. The insolvency law should specify whether or not a creditor's claim must be admitted before the creditor is entitled to be appointed to a committee."

In interpreting the legislation, which represents a Parliamentary effort to bring about structural changes in the resolution of corporate insolvencies, the effort of the court must be to aid the fulfilment of the objects of the IBC."

165. In the case of Jya Finance and Investment Company Ltd. vs J.R. Agro Industries Pvt. Ltd ., 2018 SCC OnLine NCLAT 100, the Appellate Tribunals finding is given as under;

"1. The Appellant 'Jya Finance and Investment Company Ltd.', one of the Financial Creditor has challenged judgment dated 24th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench whereby and whereunder the resolution plan submitted by the 3rd Respondent - 'Rajasthan Liquor Ltd.' has not been accepted by the Adjudicating Authority with following observations:—

"*By approving the Resolution Plan, we cannot allow exemption of any liability arising in respect of income tax. By approved resolution plan, the corporate debtor SOPL is merging with RLL. Therefore, any statutory liabilities of the transferor company shall be liability of the transferee company. Since income tax department is not party at this stage, therefore without hearing the department on this point, we cannot approve such resolution for granting exemption in respect of income tax liability that may crystalize in future. Thus clause 7.5 of the approved resolution plan cannot be accepted.*

In the circumstances, to give justice to operational creditors, we think it appropriate to direct the Resolution Professional to modify the resolution plan in the light of observation given in the body of the judgement. We further direct that "the unsecured debt of related party which is intragroup debt will be treated as an equity contribution rather than as an intragroup loan, with the consequence that the intragroup obligation will rank lower in priority than the same obligation between unrelated parties".

Thus the intra group debt given by Jya Finance & Investment Co. Ltd., a related company of the corporate debtor be classified at par with other equity shareholder and partners as provided in water fall mechanism provided in Sec. 53(1)(h) of the Code. It is further directed that all the operational creditor should be treated equally without being also classified by their ageing, i.e., without any discrimination of period of their outstanding dues.

We further direct that resolution plan may be modified in the light of our directions given above and after getting a confirmation/approval of the COC, it may again be submitted for approval by 31st July, 2018, failing which we shall be bound to initiate liquidation proceedings.

Copy of this order may be provided to the Resolution Professional, Corporate Debtor i.e. SOPL, the Resolution Applicant i.e. RLL immediately after compliance of requisite formalities, further order may also be communicated to them by email. It is further directed to the Designated Registrar to send the copy of this order to the IBBI and the Secretary, Ministry of Corporate Affairs & Central Government through Regional Director by email for consideration on the issues which have been pointed out by us in the body of this order, ***so that the related party of the corporate debtor cannot misuse the provisions of Sec. 53 of the Insolvency and Bankruptcy Code, 2016 to defraud their creditors****.*

List the matter on 31st July, 2018 for further consideration."

2. The appeal was preferred by the Appellant on the ground that the Adjudicating Authority has failed to consider that the 3rd Respondent met all the requirements of Section 30(2) of I&B Code r/w Regulation 38 and 39 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations. However, such submission was not accepted by the Appellate Tribunal when the matter was earlier heard.

3. In 'Binani Industries Limited v. Bank of Baroda appeals' in Company Appeal (AT) (Insolvency) No. 82 of 2018, etc. this Appellate Tribunal held that no discrimination can be made against same set of creditors on one or other ground.

4. For the reason aforesaid, the 3rd Respondent - 'Rajasthan Liquor Ltd.' sought time to submit modified resolution plan and by our order dated 20th September, 2018 we allowed the 3rd Respondent to modify the same.

5. The Resolution Professional has filed a report enclosing a copy of the modified resolution plan submitted by the 3rd Respondent. It is informed that all the Financial Creditors have been treated equally. Similarly, all the Operational Creditors have also been treated equally. No discrimination has been made between one or other Financial Creditor. Similarly, No discrimination has been made between one or other Operational Creditor.

6. In the facts and circumstances, we allow the Resolution Professional to place the modified resolution plan of the 3rd Respondent before the Committee of Creditors for its approval within fifteen days and Committee of Creditors in its turn will consider the viability, feasibility and financial matrix of the modified resolution plan submitted by the 3rd Respondent - 'Rajasthan Liquor Ltd.' and vote accordingly. While exercising voting share, the Committee of Creditors shall keep in mind that the earlier resolution plan was approved by them.

7. Resolution Professional thereafter will place the matter before the Adjudicating Authority for order under Section 31 of the I&B Code. This total exercise to be completed by 15th January 2019."

166. Based on the observations of this Appellate Tribunal in the Jya Finance (supra), it is clear that this Appellate Tribunal has not accepted the NCLT's

interpretation treating related party Financial Creditors at par with equity shareholders. But this Appellate Tribunal decided the appeal that in the modified Resolution Plan, all the Financial Creditors have been treated equally. Similarly, no discrimination has been made between one or another Operational Creditor.

167. Judgement of Hon'ble Supreme Court in Pratap Technocrats (supra) Hon'ble Supreme Court is misplaced in this case because it does not deal with the issue of discrimination. It is explicitly laid down that in the process of Approval of Resolution Plan the RP's role is to present to the CoC, for its approval, **such Resolution Plans which conform to the conditions specified in sub-section (2) of Section 30**. The approval of the Resolution Plan is a statutory function entrusted to the CoC under Sub-section (4) of Section 30. The CoC may approve a Resolution Plan with a voting percentage of not less than 66% of the voting shares of Financial Creditors after considering:

(i) **its feasibility and viability;**

(ii) **the manner of distribution proposed having regard to the order of priority amongst creditors laid down in Section 53(1) IBC,** including priority and value of the security interest of the secured creditors; and

(iii) such other requirements as may be specified by India's Insolvency and Bankruptcy Board. In other words, the decision to approve a resolution plan is entrusted to the CoC with the rider that Plan has taken care of the priority given u/s 53(1) of the Code.

In the instant case, the approved plan does not conform to the order of priority provided u/s 53 (1) of the Code. It provides nil value to related party Financial and Operational Creditors. Sec 53 of the Code is given as under for ready reference;

> ***53. <u>Distribution of assets</u>****.—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely—*
>
> *(a) the insolvency resolution process costs and the liquidation costs paid in full;*
>
> *(b) the following debts which shall rank equally between and among the following—*
>
> *(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
>
> *(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;*
>
> *(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;*
>
> ***(d) financial debts owed to unsecured creditors;***
>
> *(e) the following dues shall rank equally between and among the following:—*
>
> *(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India*

and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

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

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

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

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

Explanation.—For the purpose of this section—

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

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

168. Respondents counsel adverted to the observation of the Hon'ble Supreme Court in para 145 of the case of Essar Steel India Ltd. Committee

of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531, wherein it is observed that;

> ***"145.*** *The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53, not in the context of priority of payment of creditors****, but only to provide for a minimum payment to operational creditors****. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself."*

169. In the case-law cited above, the Hon'ble Supreme Court has clarified that the CoC power is not limited to classifying creditors as Financial or Operational and secured or unsecured.

170. It is pertinent to mention that Hon'ble Supreme Court in Phoenix Arc v Spade Fin Services, (2021) 3 SCC 475. The Hon'ble Supreme Court held that those entities in the CoC, who are **related parties, can often negatively affect the insolvency process. It further went on to hold that the objects and purposes of the Code are best served when external creditors drive the CIRP to ensure that related parties of the Corporate Debtor do not sabotage the CoC.**

171. It is important to mention that related parties are barred from participating in the COC to avoid sabotaging the COC. Per contra, the claim

filed by the related party, based on their admitted claims, would have influenced the CIRP if they had been permitted to participate in the COC. After completion of the CIRP and after approval of the Resolution Plan, if any amount is allotted to related party financial or operational creditors, it would not impact the CIRP.

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

173. **Thus, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. Therefore, the Related Party financial or operational creditor cannot be discriminated against under the Resolution Plan, denying their right to get payments under the Resolution Plan only on being a Related Party. It is also made clear that**

by getting only payment under the Resolution Plan, related party creditors could in no way sabotage the CIRP.

CONCLUSION

174. The increase in RP fees with retrospective effect can not be considered as CoC's prudent decision. The possibility of an impact on the decision of RP for the submission of the Resolution Plan before the Adjudicating Authority for approval, even without the approval of CoC, cannot be ruled out. Submission of the Resolution Plan for Approval before the Adjudicating Authority violates the statutory provision of Section 30(2) &(3) of the Code and has vitiated the entire CIRP and made the Resolution Plan Void ab initio.

175. Further, Adjudicating Authority observation that Regulation 35 of the IBBI (IRPCP) Regulations 2016 contemplates sharing of only fair value and liquidation value figures on obtaining confidentiality undertaking from the members of the CoC is incorrect. Finding that Since the Promoter is not a member of the CoC**,** the values were shared with the Promoter and that there are no requirements under the law for the RP to share the valuation report is also erroneous.

176. A valuation consisting of mere naked values without a detailed report is not valid. It is a settled proposition that the Valuation exercise is conducted to facilitate the CoC's decision-making process. Therefore, the existence of a valid and accurate valuation report is a sine qua non for the COC to exercise its commercial wisdom. A natural sequitur to those above would be that a

detailed valuation report is necessary for the CoC to exercise its commercial wisdom objectively.

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

178. Further, observation of the Adjudicating Authority that procedural irregularities in relation to the conduct of the proceedings in relation to the CoC will not be material when the objectors failed to establish prejudice caused to them in respect of the same is also erroneous.

179. Regulation 36(2) of CIRP Regulations provides the mandatory condition for publication of 'Form-G' on the Corporate Debtor's website and the website designated by the Board for the purpose. Non-publication of notices of Form G is a material irregularity in exercise of the powers by Resolution Professional during the Corporate Insolvency Resolution period. In the instant case, there has been a material irregularity in exercising the powers by Resolution Professional during the Corporate Insolvency Resolution Process.

180. Since the said Trust (Prospective Resolution Applicant) 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent (SRA) cannot be permitted to act as its alter ego in implementing the

Resolution Plan and attain any financial advantage or gain, which is barred by Section 88 of the Indian Trusts Act.

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

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

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

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

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

ORDER

Company Appeals (AT)(CH) (Ins.) Nos. 164, 176, 218 & 219 of 2021 are allowed.

The Common order passed in Miscellaneous Applications, IA/150/CHE/2021, MA/13/CHE/2021, MA/18/CHE/2021, MA/48/CHE/2021, IA/181/CHE/2021, IA/183/CHE/2021, IA/192/CHE/2021, IA/217/CHE/2021, IA/172/CHE/2021, IA/291/CHE/2021, IA/572/CHE/2021, IA/571/CHE/2021 passed in Company Appeal in IBA/ 1459 of 2021, dated 15 July 2021, approving the Resolution Plan is set aside. Resolution Professional is directed to proceed with the CIRP from the publication stage of Form 'G' for inviting Expression of Interest afresh as per CIRP Regulations. RP is directed to put up the Appellant/Promoters Settlement proposal for consideration before the CoC.

The Resolution Professional is directed to call the CoC within 15 days from the date of order and settlement proposal should be put to the vote and

if approved with 90% vote share of the Committee of Creditors, then proceeding for withdrawal of the CIRP under Section 12 A read with Regulation 30A of CIRP Regulation.

Further, it is declared that the claim of related party Financial/Operational Creditor cannot be discriminated from unrelated Financial/Operational Creditors.

In the circumstances stated above, the time taken in the Appeal may be excluded for computation of the CIRP period. No order as to cost.

[Justice M. Venugopal]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
17 February 2022