

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 198 of 2018

(Arising out of Order dated 23rd April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.A No. 152(PB)/2018 in C.P. (IB)-202(PB)/2017)

IN THE MATTER OF:

Tata Steel Limited

...Appellant

Vs

Liberty House Group Pte. Ltd. & Ors.

....Respondents

Present:

For Appellants:

Dr. Abhishek Manu Singhvi, Mr. Sudipto Sarkar and Mr. Rajiv Nayar, Senior Advocates with Mr. V.P. Singh, Ms. Ruby Singh Ahuja, Mr. Vishal Gehrara, Mr. Abhimanyu Chopra, Mr. Aditya Jalan, Mr. Aditya Chatterjee, Mr. Aman Sharma, Mr. Utsav Trivedi, Mr. Navandeep Matta, Ms. Tahira Karanjawala, Mr. Vishal, Mr. Avishkar Singhvi, Ms. A.R. Choudhary, Mr. Shubham Saigal, Mr. Shameek, Mr. Utkarsh Maria, Mr. Sahil Monga and Ms. Manjira Dasgupta, Advocates.

Mr. Siddhartha Sharma and Mr. A. Mohta, Advocates.

For Respondents:

Mr. Dhruv Mehta and Mr. A.S. Chandhiok, Senior Advocates with Mr. K. Datta, Ms. Prachi Johri, Ms. Shweta Kakkar, Mr. Angad Baxi and Mr. Rahul Pandit, Advocates for R-1.

Mr. Abhinav Vasisht, Senior Advocate with Ms. Misha, Mr. Shantanu Chaturvedi, Ms. Priya, Ms. Jasveen Kaur, Ms. Charu Bansal, Ms. Shreyas Gupta, Ms. Srishti Khare, Mr. Anoop Rawat, Advocates for R-2.

Mr. Kapil Sibal and Mr. Amit Sibal, Senior Advocates with Mr. Manmeet Singh, Ms. Anjali Anchayil, Ms. Geetanjali Shahi, Ms. Anukrit Gupta, Ms. Anusha Nagrajan and Ms. Nishta Chaturvedi, Advocates for 'JSW Steel Limited'.

Mr. Tushar Mehta and Mr. Ramji Srinivasan, Senior Advocates with Mr. Bishwajit Dubey, Mr. Spandan Biswal, Ms. Srideepa Bhattacharya, Mr. Bhupendra Verma, Mr. Prafful Goyal, Mr. Manpreet Lamba, Ms. Sylona Mohapatra, Mr. Bunmeet Singh Grover, Ms. Surabhi Khattar, Mr. Naveen Hegde, Advocates for 'Committee of Creditors'.

Mr. Sumant Batra, Mr. Sanjay Bhatt, Ms. Srishti Kapoor and Mr. Akshat Singh, Advocates for 'Jaldhi Overseas'.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

'Tata Steel Limited', one of the 'Resolution Applicants' for 'Bhushan Power & Steel Limited'- ('Corporate Debtor') has challenged the order dated 23rd April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, wherein the Adjudicating Authority *inter alia* directed the 'Committee of Creditors' of 'Bhushan Power & Steel Limited'- ('Corporate Debtor') also to consider the 'Resolution Plan' submitted by the 1st Respondent- 'Liberty House Group Pte. Limited' ('Liberty House' for short). Relevant portion of the aforesaid directions reads as follows:

“.....73. In the new regime consideration of a Resolution Plan of another competitor would advance the object of the Code in maximisation of the assets of the Corporate Debtor and may provide better solution in restructuring the stressed assets. The packet in sealed cover has been kept intact so that it may be seen by COC and RP. The bench officer shall hand it over to RP or his counsel.

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76, For the reasons aforementioned this application is allowed and the following directions are issued:

- (a) The period spend on this litigation stands excluded. The whole process may now be concluded before 23.06.2018.*
- (b) The Resolution Professional shall place the unopened sealed cover apparently containing the resolution plan of the Liberty House before the next meeting of the COC.*
- (c) The Resolution Plan of the Liberty House shall not be rejected on the ground of delay emanating from process document or any other document internally circulated by the RP or the COC. The rejection shall be on some substantive ground as against flimsy one.*

(d) *Since resolution plan is under consideration and yet to be decided by COC and as there is still considerable time left for completion of resolution process, it is expected that COC will take appropriate commercial decision in terms of the Code, Rules and Regulations in order to achieve the object of the Code as quoted above.”*

2. The main plea taken by the Appellant is that the Adjudicating Authority cannot provide the numerous opportunities at the belated stage.

3. It was stated that the 1st Respondent- ‘Liberty House’ failed to participate and provide necessary documents as per pre-qualification with criteria, including confidentiality affidavit within the time lines as provided by the ‘Resolution Professional’. The 1st Respondent- ‘Liberty House’ in spite of belatedly admitting to express its interest with complete document was provided with numerous opportunities by communications dated 18th November, 2017, 20th November, 2017, 2nd December, 2017, 8th December, 2017 and 16th December, 2017.

4. However, in view of the subsequent development when the appeal was taken up, counsel for the Appellant had not made much effort to challenge the opportunity given to the 1st Respondent- ‘Liberty House’.

5. ‘Tata Steel Limited’ and ‘JSW Steel Limited’ (“JSW Steel” for short) both had submitted their ‘Resolution Plans’.

6. 'JSW Steel' who had already submitted its 'Resolution Plan' on 8th February, 2018 after the aforesaid order passed by the Adjudicating Authority submitted an 'improved financial' offer' on 26th July, 2018. Apart from improving the offers for various creditors, the 'improved financial offer' also provided for infusion of substantial upfront equity for improving the operation of the 'Corporate Debtor'.

7. 'Tata Steel Limited' objected the 'improved financial offer' before the 'Resolution Professional' and the 'Committee of Creditors' on 26th July, 2018. The 'Committee of Creditors' in its meeting held on 27th July, 2018 to give equal opportunity to all the three 'Resolution Applicants' namely—'Tata Steel Limited', 'Liberty House' and 'JSW Steel Limited' allowed them to submit 'improved financial offers' by 31st July, 2018.

8. 'Tata Steel Limited' instead of filing an 'improved financial offer', filed an I.A. No. 1096 of 2018 before this Appellate Tribunal for restraining the 'Resolution Professional' and the 'Committee of Creditors' from considering the 'improved financial offers'. Though such prayer was made, Appellant failed to implead 'JSW Steel' as a party Respondent though the Appellant was aware that 'JSW Steel' would be aggrieved if application is allowed.

9. On 9th May, 2018, this Appellate Tribunal passed the following interim order:

"09.05.2018 xxx xxx xxx

During the pendency of the appeal, the 'Committee of Creditors' may consider the Resolution Plan

submitted by all the Resolution Applicants which will be subject to the decision of this appeal. While considering so, they should give reason for rejecting one or other Resolution Plan and also record the suggestions, if any, given by the Board of Directors or the 'Operational Creditor' or their representative. While accepting the Resolution Plan, the 'Committee of Creditors' will consider whether the Resolution Applicant(s) have made any provision with regard to other creditors such as 'secured creditors', 'unsecured creditors', 'employees' and 'Government dues'. Though the 'Committee of Creditors' may approve the same with prior permission of this Appellate Tribunal, but not place the same before the Adjudicating Authority and keep it in a sealed cover....."

10. The 'Operational Creditors' raised grievance that they were not allowed to take part in the meeting of the 'Committee of Creditors', so an interim order was passed directing the 'Committee of Creditors' to allow their representatives to take part in the meeting of the 'Committee of Creditors'.

11. On 1st August, 2018, learned counsel for the 'Tata Steel Limited' submitted that the 'revised financial offers' cannot be allowed to be submitted even for maximization of the assets of the 'Corporate Debtor'. On

1st August, 2018, this Appellate Tribunal while observed that such issue will be decided at the time of disposal of the appeal, as follows:

“01.08.2018

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3. *In the meantime, to ensure that all parties get opportunities to submit ‘revised financial offers’ without altering the basic standard like viability and feasibility as shown in the original ‘resolution plans’, we give opportunity to ‘Tata Steel Ltd.’ and ‘Liberty House Group Pvt. Ltd.’, if they so choose to file ‘revised financial offer(s)’ subject to the decision of the appeal by 6th August, 2018.....”*

12. The aforesaid opportunity was given to the ‘Tata Steel Limited’ and the ‘Liberty House’ as ‘JSW Steel’ has already submitted its ‘revised financial offer’. In the meantime, the ‘JSW Steel’ filed an application for its impleadment and it was impleaded being a necessary party. In fact, on 1st October, 2018, the ‘Committee of Creditors’ in its application, sought permission from this Appellate Tribunal to consider the ‘improved financial offer’ of ‘JSW Steel’ and stated as follows:

“19. That it is most respectfully submitted that the Respondent No.3 is required to exercise commercial judgment and has accordingly taken a decision to consider the revised financial offer keeping in mind

that the value of the Corporate Debtor has substantially improved and a better financial value can be achieved. Therefore, the Respondent No.3 would be well within its rights to give (and has given) a fair opportunity to all the three Resolution Applicants to revise their financial offers and to then select the best resolution plan on the basis thereof. It should also be noted that all three Resolution Applicants have reserved their rights to submit revised financial offers. JSW has submitted a revised financial offer in a sealed envelope and has further stated that it is open to further revising it to take into account the deliberations in the meeting today.

20. No prejudice would be caused to any of the stakeholders in the present circumstances as the Respondent No. 3 has permitted the revision only to the financial offer.”

13. However, instead of submitting an ‘improved financial offer’, ‘Tata Steel Limited’ chose to file a statutory appeal before the Hon’ble Supreme Court challenging the order dated 1st August, 2018 without impleading the ‘JSW Steel’ as party Respondent. The ‘Tata Steel Limited’ simultaneously also approached this Appellate Tribunal on 3rd August, 2018 by way of mentioning sought extension of the timeline for submission of ‘revised

financial offers'. This Appellate Tribunal orally observed that 'Tata Steel Limited' may file an application showing its intention to file a 'revised financial offer' and for modification of the order dated 1st August, 2018. It is only thereafter the 'Tata Steel Limited' filed an I.A. No. 1154 of 2018 on 3rd August, 2018 seeking extension of two weeks' time for submitting its 'revised financial offer', relevant of which reads as follows:-

*"5.The Applicant stated that **it is evaluating its prospects** to revise the financial component of the existing resolution plan submitted by it, and intends to file a revised financial component to its resolution plan, **subject to business exigencies**....."* (Emphasis supplied)

14. On 6th August, 2018, when the matter was taken up, this Appellate Tribunal passed the following order:

"06.08.2018 As the Interlocutory Application is the conditional one, we are not inclined to pass any specific order, particularly, as the matter is also pending before the Hon'ble Supreme Court. However, on the oral request of the learned counsel for the appellant, we allow the 'Appellant' and the other 'Resolution Applicants' to file additional unconditional 'resolution plans' by 13th August, 2018 improving the 'financial offer' without

compromising the basic para-meters of the 'resolution plans' already submitted by them. In such case additional plans will be treated to the part of their respective 'original resolution plans'.

I.A. No. 1154 of 2018 stands disposed of.

Dasti service is permitted."

15. The Hon'ble Supreme Court in the meantime dismissed the appeal preferred by 'Tata Steel Limited' on 10th August, 2018. In view of the order of this Appellate Tribunal dated 6th August, 2018, 'JSW Steel' also submitted its 'improved financial offer' on 13th August, 2018. 'JSW Steel' further improved its financial offer increasing the amounts for payment to the different groups of creditors. It significantly increased upfront equity for improving the operations of the 'Corporate Debtor'. The 'Committee of Creditors' in their affidavit has informed that 'Tata Steel Limited' and the 'Liberty House' also submitted their respective 'revised financial offers'.

16. The 'Committee of Creditors' considered the matter in its meeting held on 14th August, 2018 and sought for certain clarifications from all the 'Resolution Applicants'.

17. 'Tata Steel Limited' thereafter filed an affidavit on 23rd August, 2018, alleging *malafide* conduct on the part of the 'Committee of Creditors' and alleged that in its meeting held on 14th August, 2018, the 'Committee of Creditors' was favoring 'JSW Steel'.

As the Appellant- 'Tata Steel Limited' somehow or the other was trying to drag the appeal, this Appellate Tribunal directed the 'Committee of Creditors' to consider all the 'Resolution Plans' and to submit the 'Resolution Plan' approved by it in a sealed cover.

18. According to learned Senior Counsel, Phase-1 includes events up to and including 8th February, 2018 i.e. the last date for submission of bids as notified by the 'Process Document'. Phase-2 are the events as taken place after 8th February, 2018.

19. It is not in dispute that 'Tata Steel Limited' and 'JSW Steel' had submitted the Expression of Interest by 8th February, 2018. The 'Resolution Professional' sought information from 'Liberty House' but he did not receive any response or plan from 'Liberty House', who ultimately submitted on 20th February, 2018.

20. Learned Senior Counsel appearing on behalf of the 'Tata Steel Limited' submitted that 'Resolution Plan' submitted by 'Tata Steel Limited' being highest bid was approved as H-1, but such submission was disputed by learned counsel appearing for the 'Committee of Creditors'. According to 'Committee of Creditors', only a *prima facie* view was expressed but no decision was taken by the 'Committee of Creditors', in fact, no voting took place.

21. Learned Counsel for the 'Tata Steel Limited' submitted that the 'Committee of Creditors' had earlier received five bids from 'JSW Steel' through repetitive revisions and sought permission of this Appellate

Tribunal to submit 6th revised offer. Thereby, the 'JSW Steel' has submitted as many as six 'Resolution Plans', which were wrongly considered by the 'Committee of Creditors'.

22. It was submitted that after the order of this Appellate Tribunal, after 13th August, 2018 no 'Resolution Plan' could have been accepted by the 'Committee of Creditors'. Further, according to learned Senior Counsel, the 'Resolution Applicants' have no right to revise their bids endlessly and the 'Committee of Creditors' are not authorized to entertain fresh or revised bids without exhausting available bids.

23. Learned Senior counsel appearing on behalf of the 'Committee of Creditors' while refuted the allegations of bias submitted such allegations is not based on record.

24. According to learned Senior Counsel for the 'Committee of Creditors', the orders of this Appellate Tribunal dated 1st August, 2018 and 6th August, 2018 do not restrict the 'Committee of Creditors' from exercising its powers and obligations and to seek clarifications from the 'Resolution Applicants' as permitted under the Code and Regulations. In fact, the 'Committee of Creditors' has acted in accordance with law.

25. Earlier, it was made clear by this Appellate Tribunal that it was open to the 'Committee of Creditors' to go through the viability, feasibility and financial matrix of the 'Resolution Plans' taking into consideration **'revised financial offers'** and to decide the same in accordance with law. It was on oral request of the learned counsel for the 'Tata Steel Limited', this

Appellate Tribunal allowed the 'Tata Steel Limited' to file additional unconditional 'revised financial offer' by 13th August, 2018, improving the financial offer as provided in the original plan without compromising the basic para-meters of the 'Resolution Plan' already submitted.

26. We have noticed that the 'Tata Steel Limited' was adamant that it will not submit any 'revised financial offer'. Initially such submission was orally made by learned counsel, however, on their subsequent oral request, we allowed the 'Tata Steel Limited' to submit 'revised financial offer'.

27. We have noticed that the 'Tata Steel Limited' also filed five 'revised financial offers', including the offer given in the original 'Resolution Plan'. Therefore, 'Tata Steel Limited' cannot take plea that after submission of the original 'Resolution Plan', no 'revised financial offer' can be submitted.

28. Learned Senior Counsel appearing on behalf of the 'JSW Steel' submitted that 'Committee of Creditors' have right to consider improved financial offers. According to him, the Appellant- 'Tata Steel Limited' as a 'Resolution Applicant' has no vested right or fundamental right to have its 'Resolution Plan' considered or approved.

29. Further, according to him, a 'Resolution Applicant' cannot challenge a decision of the 'Committee of Creditors' at any stage, till a 'Resolution Plan' is approved by the Adjudicating Authority under Section 31.

30. Admittedly, the Adjudicating Authority has not taken any decision on any of the 'Resolution Plan'. Therefore, we hold that there is no cause of action for the Appellant- 'Tata Steel' to prefer the appeal. By impugned

order dated 23rd April, 2018, the Adjudicating Authority has only allowed the ‘Committee of Creditors’ to consider the ‘Resolution Plan’ submitted by ‘Liberty House’, but that does not mean that the ‘Resolution Plan’ submitted by ‘Liberty House’ has been approved.

31. In ***Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.— (Civil Appeal Nos. 9402-9405 of 2018 etc.)***” the Hon’ble Supreme Court observed that the ‘Resolution Applicant’ has no vested right or fundamental right to have its ‘Resolution Plan’ considered or approved. The Hon’ble Supreme Court observed and held as follows:

“75. What has now to be determined is whether any challenge can be made at various stages of the corporate insolvency resolution process. Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional’s rejection? It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable.....”

*76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, **it is clear that no challenge can be preferred to the Adjudicating Authority at this stage.** A writ*

petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.

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79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan

approved, and as no adjudication has yet taken place.

81. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear

that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.”

32. It is true that the ‘Committee of Creditors’ will have to ensure a time bound process, to better preserve the economic value of the asset. Simultaneously, it is duty of the ‘Committee of Creditors’ to ensure that the ‘Resolution Plan’ is viable, feasible and should maximize the assets of the ‘Corporate Debtor’.

33. In **“Binani Industries Limited Vs. Bank of Baroda & Anr. – Company Appeal (AT) (Insolvency) No. 82 of 2018 etc.”**, this Appellate Tribunal by its judgment dated 14th November, 2018 held that the ‘Corporate Insolvency Resolution Process’ is not a litigation, nor it is money suit. The persons are not required to submit bid. The ‘Committee of Creditors’ has a statutory mandate to ensure value maximization within the timeframe prescribed by the ‘I&B Code’. In the said case, this Appellate Tribunal noticed almost similar facts of submission of ‘revised offer’ and observed:

“32 It appears that the ‘process document’ was issued on 20th December, 2017 which inter alia stipulated general and qualitative parameters. It clearly indicated that ‘Committee of Creditors’ will negotiate only with the ‘Resolution Applicant’ which reveals highest score based on the evaluation criteria and whose ‘Resolution Plan’ is in compliance with the

requirements of the 'I&B Code' as confirmed by the 'Resolution Professional'. We have dealt with the object of the 'I&B Code' as recorded above. The 'Resolution Professional' as well as the 'Committee of Creditors' are duty bound to ensure maximization of value within the time frame prescribed by the 'I&B Code'.....”

34. In the said case of **“Binani Industries Limited”** (Supra), this Appellate Tribunal further held that improved financial offer(s) submitted by a 'Resolution Applicant' is a continuation of its 'Resolution Plan' already submitted, as quoted below:

“34. Section 25 (2) (h) provides invitation of prospective lenders, investors and any other persons to put forward a 'Resolution Plan'. Submission of revised offer is in continuation of the 'Resolution Plan' already submitted and accepted by the 'Resolution Professional'. It is not in dispute that after invitation was called for, the 'Ultratech Cement Limited' submitted the revised 'Resolution Plan' on 12th February, 2018 i.e. well within the time. It is not the case of the 'Committee of Creditors' that the plan of the 'Ultratech Cement Limited' was in violation of Section 30(2) of the 'I&B Code'. The 'Resolution Plan' having submitted by 'Ultratech Cement Limited'

within time on 12th February, 2018, it was open to the ‘Committee of Creditors’ to notice the revised offer given by ‘Ultratech Cement Limited’ on 8th March, 2018. The ‘Committee of Creditors’ has taken note of revised offer given by the ‘Rajputana Properties Private Limited’ on 7th March, 2018 but refused to notice the revised offer submitted by ‘Ultratech Cement Limited’ on 8th March, 2018 i.e., much prior to the decision of the ‘Committee of Creditors’ (14th March, 2018).”

35. From the aforesaid decision in **“Binani Industries Limited”** (Supra), it is clear that prior to the ‘Committee of Creditors’ voting upon ‘Resolution Plan’, it is open to the ‘Committee of Creditors’ to call for and consider the ‘improved financial offer(s)’ in accordance with the statutory mandate to ensure value maximization.

36. The ‘Process Document’ for the ‘Corporate Insolvency Resolution Process’ of the ‘Corporate Debtor’ does not curtail the powers of the ‘Committee of Creditors’ to maximize value. In this regard, we may refer the relevant provisions of the ‘Process Document’ issued by the ‘Resolution Professional’ in consultation with the ‘Committee of Creditors’ which are as follows:

ANNEXURE A

RELEVANT PROVISIONS OF THE PROCESS DOCUMENT ISSUED BY THE RESOLUTION PROFESSIONAL IN THE CORPORATE INSOLVENCY RESOLUTION PROCESS OF BHUSHAN POWER AND STEEL LIMITED

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Part A

Provisions of the Process Document that give flexibility to the RP / CoC to seek improved financial offers in order to maximise the value of the assets of the Corporate Debtor

1. Disclaimer to the Process Document

...

The CoC, may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this document. Further, the Resolution Applicants must specifically note that the CoC reserves the right to change, update, amend, supplement, modify, add to, delay or otherwise annul or cease the Resolution Process at any point in time, for any reason determined in their sole discretion.

The issue of this document does not imply that the members of the CoC are bound to select a Compliant Resolution Applicant as a Successful Resolution Applicant in respect of its Resolution Plan and the members of the CoC reserve the right to reject at any stage all or any of the Resolution Applicants or Resolution Plans without assigning any reason whatsoever.

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2. Clause 5.1

5.1 The terms and conditions of this Process Document and any Resolution Plan submitted pursuant hereto shall be non-binding on the CoC and the Resolution Professional.

3. Clause 5.3

5.3 The Resolution Professional and the CoC, in their sole discretion and without incurring any obligation or liability, reserve their right, at any time, to:

- (a) suspend and / or cancel the Resolution Process and / or amend and / or supplement the Resolution Process or modify the dates or other terms and conditions set out in this Process Document;

...

4. Clause 1.3.6

1.3.6 The Resolution Plan(s) submitted by the Qualified Resolution Applicant(s) shall be examined by the Resolution Professional to check the compliance of the Resolution Plan with the requirements under the IBC and this Process Document. The Resolution Plans compliant with the aforementioned requirements shall be presented by the Resolution Professional to the CoC for evaluation based on the Evaluation Criteria and terms and conditions as set out in this Process Document. Further, the CoC shall have the right to negotiate better terms with the Compliant Resolution Applicant(s).

5. Clause 1.14.13

1.14.13 No extension of time shall be granted under any circumstances to the Qualified Resolution Applicant(s) for submission of the Resolution Plan including, but not limited to, on the grounds that the Qualified Resolution Applicant did not obtain a complete set of this Process Document, or on any other ground(s), except with the permission of the CoC. The Resolution Professional in consultation with the CoC may extend the timelines at its sole discretion if expedient for obtaining the best Resolution Plan for the Company.

6. Clause 1.3.9 (as amended by the Second Addendum)1.3.9 Proposal Due-date

A Qualified Resolution Applicant shall submit the Resolution Plan and the Submission Bond Guarantee on or prior to 100 hours IST on or before February 8, 2018 ("Proposal Due Date"), at the address provided in Clause 1.8.6 in the form and manner as set out in this Process Document.

The Resolution Professional may, at its sole discretion and with the concurrence of CoC and/or NCLT, if so required, extend the Proposal Due Date. The Resolution Plan would be opened in the presence of Qualified Resolution Applicants at 1600 hours IST on February 8, 2018.

7. Format V – Essential Terms of the Resolution Plan

ANNEXURE II

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FORMAT V

ESSENTIAL TERMS OF THE RESOLUTION PLAN

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Part B. Financial Proposal¹

The members of the Committee of Creditors have further right to negotiate the terms of the Financial Proposal and the decision of the Resolution Professional and / or the Committee of Creditors in selection of the Compliant Resolution Applicant and / or the Successful Applicant shall be final and binding on us.

Part B

Provisions of the Process Document that permit the CoC to seek clarifications from the resolution applicants

8. Clause 1.14.6

1.14.6 No change or supplemental information to the Resolution Plan shall be accepted after the Proposal Due Date. The Resolution Professional may, at its sole discretion or on the instructions of the CoC, request for additional information / documents and/ or seek clarifications from a Qualified Resolution Applicant, after the Proposal Due Date. Delay in submission of additional information and / or documents sought by the Resolution Professional or the CoC shall make the Resolution Plan liable for rejection.

9. Clause 5.3

5.3 The Resolution Professional and the CoC, in their sole discretion and without incurring any obligation or liability, reserve their right, at any time, to:

...

(b) consult with any Resolution Applicant(s) in order to receive clarifications or further information;

...

(e) require the Resolution Applicant to provide any additional documents or information in relation to the Resolution Plan.

Part C

Provisions of the Process Document in relation to financial proposal being a composite whole comprising the amounts proposed to be paid to the various categories of creditors of the corporate debtor and the various financial parameters which underpin and provide the basis of arriving at such numbers

10. Format V – Essential Terms of the Resolution Plan

ANNEXURE II

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FORMAT V

ESSENTIAL TERMS OF THE RESOLUTION PLAN

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Part B. Financial Proposal

1. Mandatory Content of the Plan

[Applicant to provide the mandatory contents of the plan as per the IBC and as mentioned in Clause 1.12 of the Process Document (including proposal towards the payment to other stakeholders).]

¹ Format V of Annexure II of the Process Document was amended *vide* Annexure A to First Addendum. This note appears at the end of Part B of Format V (on the next page of the Process Document).

11. Clause 1.12:

1.12.14 In addition to the above requirements, the Resolution Plan should also set out the following:

- (a) ...
- (b) Any infusion and/ or arrangement of funds as may be required for working capital and expenditure requirements of the Company; provided that any infusion shall be in compliance of the Company; unless otherwise agreed to by the CoC: (I) in the event of infusion of debt, such debt shall be arranged without any obligation on members of CoC to provide such funds; (II) such funds shall be arranged without any recourse to the assets of the Company; and (III) any equity infusion to meet such requirements shall be in the form of fresh issuance of equity shares of the Company. However, the CoC may allow creation of (i) pari passu charge to secure such new debt, pursuant to such debt; and (ii) exclusive charge to secure such new debt, on any new fixed assets created pursuant to such debt;
- (c) ...
- (d) ...
- (e) Projections for the Company and provide for detailed income statement or profit and loss account linked to capacity utilization and production plan, a balance sheet, cash flow statement and debt service coverage calculations prepared on sound commercial principles along with the assumptions made for arriving at the projections in support of the Resolution Plan, CoC shall have the right to examine the feasibility, viability and such other parameters of the Resolution Plan as may be specified under the IBC and may reject any Resolution Plan which does not meet such requirements;
- (f)

12. Clarifications with respect to the Process Document Dated 14 December 2017 and First Addendum to the Process Document dated January 03, 2018 in respect of submission of Resolution Plans for Bhushan Power and Steel Limited ("Process Document") – Part IV

Reply to Queries – Item 1

The Resolution Applicant would be required to provide projections for the Company even in case it proposes for one time settlement for the Lenders in its Resolution Plan. Projections are required for enabling the CoC to determine the viability and feasibility of the Resolution Plan and, also the same will be considered in the Evaluation Criteria for evaluating a Resolution Plan.

37. From the 'Process Document, it is clear that the 'Committee of Creditors' have absolute discretion but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions and right to change, update, amend, supplement, modify, add to, delay or otherwise annul or cease the 'Resolution Process' at any point in time. Thus, the 'Resolution Plan' can be modified as per dates or other terms and conditions set out in the 'Process Document'.

38. As per Clause 1.3.6, the 'Committee of Creditors' have right to negotiate better terms with the 'Compliant Resolution Applicant(s)'. In terms of Clause 1.14.13, the 'Resolution Professional' in consultation with the 'Committee of Creditors' can extend the timelines at its sole discretion if expedient for obtaining the best 'Resolution Plan' for the Company. Therefore, granting more opportunity to all the eligible 'Resolution Applicants' to revise its 'financial offers', even by giving more opportunity, is permissible in the Law. However, all such process should complete within the time frame.

39. Similar provisions were noticed by this Appellate Tribunal in ***"Binani Industries Limited"*** (Supra), and held that the 'Committee of Creditors' in its sole discretion can ask the 'Resolution Professional' to negotiate better terms with the 'Compliant Resolution Applicant(s)'. However, such negotiation to be made and completed within the timeframe i.e. within 180 days' subject to extension if granted by the Adjudicating Authority which should not be extended beyond 270 days.

40. In this background, while we hold that this appeal preferred by 'Tata Steel Limited' is premature, uncalled for, in absence of any final decision taken by the Adjudicating Authority under Section 31, this appeal is also not maintainable.

41. Though we have held that the appeal at the instance of the 'Tata Steel Limited' is premature and not maintainable but we are of the view that the

observations made by the Adjudicating Authority against the ‘Resolution Professional’ was uncalled for.

42. We have opened the sealed cover submitted by the ‘Committee of Creditors’ enclosing the copy of the ‘Resolution Plan’ approved by it.

43. Under sub-section (4) of Section 30, the ‘Committee of Creditors’ required to approve a ‘Resolution Plan’ by a vote of not less than sixty-six percent, as quoted below:

“30. Submission of resolution plan.

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

xxx

xxx

xxx

(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017

(Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

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

[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the

Insolvency and Bankruptcy Code (Amendment)
Ordinance, 2018 (Ord. 6 of 2018).]”

44. On plain reading of sub-section (4), it is clear that the members of the ‘Committee of Creditors’ only after considering its feasibility and viability, and such other requirements as may be specified by the Board is entitled to approve or reject the ‘Resolution Plan’.

45. A member of the ‘Committee of Creditors’ who is not present in the meeting either directly or through Video Conferencing and thereby not considered its feasibility and viability and such other requirements as may be specified by the Board, their voting shares, therefore, cannot be counted for the purpose of counting the voting shares of the members of the ‘Committee of Creditors’. Therefore, we hold that only the members of the ‘Committee of Creditors’ who attend the meeting directly or through Video Conferencing, can exercise its voting powers after considering the other requirements as may be specified by the Board. Those members of the ‘Committee of Creditors’ who are absent, their voting shares cannot be counted.

46. We find that the ‘Resolution Plan’ submitted by ‘JSW Steel’ has been approved by the ‘Committee of Creditors’ with 97.12% voting shares and voters having 2.88% voting shares remained absent. If some members of the ‘Committee of Creditors’ having 2.88% voting shares remained absent, it cannot be held that they have considered the feasibility and viability and other requirements as specified by the Board, therefore, their shares should not have been counted for the purpose of counting the voting shares of the

‘Committee of Creditors’. In fact, 97.12% voting shares of members being present in the meeting of the ‘Committee of Creditors’ and all of them have casted vote in favour of ‘JSW Steel’, we hold that the ‘Resolution Plan’ submitted by ‘JSW Steel’ has been approved with 100% voting shares.

47. For the reasons aforesaid, while we are not inclined to interfere with the substantive part of the impugned order dated 23rd April, 2018, set aside part of the order whereby adverse observation has been made against Mr. Mahender Kumar Khandelwal (‘Resolution Professional’).

48. The case is remitted to the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, for passing appropriate order under Section 31. The ‘Resolution Professional’ will immediately place the ‘approved Resolution Plan’ before the Adjudicating Authority for its order.

49. The Adjudicating Authority at the time of consideration of the approved ‘Resolution Plan’ of ‘JSW Steel’ will only ensure that all the stakeholders, particularly the ‘Operational Creditors’ are treated similarly. It should ensure that no discrimination is being made between the ‘Financial Creditors’ or the ‘Operational Creditors’ as held by this Appellate Tribunal in **“Binani Industries Limited”**.

50. In case, the Adjudicating Authority is of the opinion that the discrimination has been made between the ‘Financial Creditors’ and the ‘Operational Creditors’, it may give opportunity to the ‘JSW Steel’ to improve its plan and thereby, by substituting the approved ‘Resolution Plan’ with such improvement.

Let the period of pendency of this appeal i.e. from 7th May, 2018 till date be excluded for the purpose of counting of the period of 270 days.

51. As we have noticed the rival contentions of the parties in this appeal, the parties cannot re-agitate such submission again before the Adjudicating Authority at the time of the approval of the 'Resolution Plan'.

52. The appeal is dismissed with aforesaid observations and directions.
No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

4th February, 2019

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