In the National Company Law Tribunal,
Kolkata Bench,
Kolkata

Coram: Shri Jinan K.R.,
Hon'ble Member (J)
&
Shri M.B.Gosavi
Hon'ble Member (J)

C.A.(IB) No.201/KB/18
And

C.A.(IB) No.234/KB/18

And
C.A.(IB) No.245/KB/18
And
C.A.(IB) No.210/KB/18
And

C.A.(IB) No.227/KB/18
And
C.A.(IB) No.233/KB/18
And
C.A.(IB) No.223/KB/18
And

C.A.(IB) No.249/KB/18
And
Int.App.(IB) No.248/KB/18
And
Int. App.(IB) No.343/KB/18
And

Int. App.(IB) No.344/KB/18
And
C.A.(IB) No.246/KB/18

In
C.P.(IB) No.359/KB/2017

In the matter of:

An application under sections 60(5) and Section 30 and 31 of the Insolvency and Bankruptcy Code, 2016, read with Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

Persons) Regulations, 2016;

-And-

In the matter of:

BANK OF BARODA, a body corporate constituted by and under the Banking Companies (Acquisition and Transfer of Undertakings Act, 1970), with the head office at Baroda House, Mandvi, Baroda, Gujarat 1971)and acting through its Corporate Financial Service branch at 1972)1st Floor, Walchand Hirachand, Ballard Pier, Mumbai 400 001, 1973), India

…. Financial Creditor

-And-

IN THE MATTER OF:

BINANI CEMENT LIMITED, a Company incorporated under the Companies Act, 1956 and having its registered office at 37/2, Chinar Park, New Town, Rajarhat Main Road, P.O. Hatiara, Kolkata 700 154.

… Corporate Debtor

-And-

BRAJ BHUSANDAS BINANI, Member of Board of Director of Binani Cement Limited, Residing at Shubham, 6 Laburnum Road, Gamdevi, Mumbai 400 007;

…. Applicant

-And-

ULTRA TECH CEMENT LTD., having its registered office at B Wing, Ahura Centre, 2nd floor, Mahakali Caves Road, Andheri East, Mumbai- 400093;

…. **Applicant**

-And-

State Bank of India HONG KONG, having its office/branch at State Bank of India, Hong Kong branch, 15th floor, Central Tower, 28, Queen's Road, Central Hong Kong, Hong Kong SAR

…. **Applicant**

-And-

EXPORT IMPORT BANK OF INDIA, having its head office at Centre One Building, floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai;

….**Applicant**

-And-

SHRI KHEMISATIA POLYSACKS PRIVATE LIMITED and 07 others

…Applicants

-And-

ARKA CARBON FUELS PRIVATE LIMITED and 04 others

….**Applicants**

-And-

SWASTIK COAL CORPORATION PRIVATE LTD. And 07 Others

…. Applicants

-Versus -

Mr. Vijaykumar V. Iyer, Resolution Professional of Binani Cement Limited, Deloitte Touche Tohmatsu India LLP, India Bulls Finance Center, Tower-e, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai 400 013.

… Applicant/Respondent

Counsels appeared:

For the Financial Creditor/ EXIM Bank in CA(IB)No.249/KB/2018	1. Mr. Krishnaraj Thaker, Advocate 2. Mr. Varun Kedia, Advocate 3. Mr. Kumardeep Majumdar, Advocate
For Intervenor /Operational Creditors S.K.Singhi & Company.	1. Mr. Jishnu Chowdhury, Advocate 2. Mr. Asif Doctor, Advocate 3. Mr. S.K.Singhi, Advocate 4. Mr. Ankur Singhi, Advocate 5. Ms.Divyata Badiani, Advocate 6. Ms. Riti Basu, Advocate 7. Mr. Subhadeep Basak, Advocate 8. Mr. Dhaval Vussonji, Advocate 9. Mrs. Manju Bhuteria, Advocate 10.Ms.Sweta Kakkad, Advocate 11.Mr. Angad Baxi, 13.Ms. Pallavi Kumar
For SBI HongKong	1. Mr. P. V. Dinesh, Sr. Advocate 2. Mrs. Poonam Keswani, Advocate 3. Mr. Dwaipayan Ghosh, Advocate 4. Ms.Neha Negar Alam, Advocate for INDIALAW LLP
For Income-Tax Dept.	1. Mr. Shiv Chandra Prasad, Advocate
For Rajputana Properties Pvt. Ltd. (H1 Bidder)	1. Mr. S.K.Kapur, Sr. Advocate 2. Mr. Kathpalia, Sr. Advocate 3. Mr. Siddhartha Datta, Advocate 4. Mr. Rudrajit Sarkar, Advocate 5. Ms. Suhani Dwivedi, Advocate 6. Ms. Isha Sinha, Advocate 7. Mr. Debangshu Dinda, Advocate 8. Ms. Mishra, Advocate

For EARC & Lenders	1. Mr. Sumant Batra, Advocate
For IDBI Bank Ltd.	1. Mr. Jishnu Saha, Sr. Advocate 2. Mr. Indranil Nandi, Advocate 3. Mr. Ishaan Saha, Advocate 4. Mr. Sayak Konar, Advocate 5. Mr. Anubhav Sinha, Advocate 6. Mr. Siddharth Barua, Advocate 7. Ms. Paheli Majumder, Advocate
For Resolution Professional	1. Mr. Abhrajit Mitra, Sr. Advocate 2. Mr. Joy Saha, Sr. Advocate 3. Mr. Rishad Meclova, Advocate 4. Mr. Soumava Mukherjee, Advocate 5. Mr. Sarbapriya Mukherjee, Advocate 6. Mr. Pranshu Paul, Advocate 7. Mr. Prashant Pakhiddey, Advocate 8. Mr. Vijay Kumar Iyer, Resolution Professional
For Committee of Creditors	1. Mr. Pratap Chatterjee, Sr. Advocate 2. Mr. Samrat Sen, Sr. Advocate 3. Mr. Soorya Ganguli, Advocate 4. Ms. Pooja Chakrabarti, Advocate 5. Mr. Adheesh Agarwal, Advocate
For Intervenor Director	1. Mr. Ratnanko Banerji, Sr. Advocate 2. Mr. Sabhyasachi Chaudhury, Advocate 3. Mr. S. Mitra, Advocate 4. Mr. Neelesh Choudhury, Advocate 5. Ms. Anuradha Poddar, Advocate
For Ultratech Cements Limited	1. Mr. Mukul Rohatgi, Sr. Advocate 2. Mr. Venkatesh Dhond, Sr. Advocate 3. Mr. Siddhartha Mitra, Sr. Advocate 4. Mr. Mahesh Agarwal, Advocate 5. Ms. S. Mukherjee, Advocate 6. Mr. Aritra Basu, Advocate 7. Mr. Abhijit Sarkar, Advocate 8. Mr. Abhik Kundu, Advocate 9. Mr. Domingo Gomes, Advocate 10. Mr. Devanshi Singh, Advocate

Order pronounced on 4th May, 2018

ORDER(Amended)

Per Shri Jinan K.R., Member(J)

By this common order we propose to dispose of 12 applications filed under sections 60(5), 30 and 31 of the Insolvency and Bankruptcy Code, 2016 as common questions arise for consideration and for avoiding repetition of facts and for convenience.

2. Briefly, stating the facts of the applications as follows:-

CA(IB)No.201/KB/2018,CA(IB)No.234/KB/2018 and CA(IB)No.245/KB/2018

3. All these applications were filed by one Braj Bhushan Das Binani, a promoter director of the Corporate Debtor on 20.02.2018 mainly raising serious challenge against the resolution process initiated at the instance of the Resolution Professional. CA(IB) No 234/KB/2018 was filed on 16.03.2018 alleging wrongful and illegal actions of RP and CoC and prays for issuing directions to allow him to participate in the CoC meeting. CA(IB)No. 245/KB2018 was filed on 16.03.2018 alleging violation of master restructuring agreement by EARC and prays for issuing injunction restraining EARC from making any claim in excess of Rs.2594.24 Crores and to correct voting share by restructuring CoC excluding IDBI from CoC. CA (IB)No. 201/KB/2018 was filed alleging misconduct of the Resolution Professional by causing wrongful losses to the Corporate Debtor. He contents that the valuation of the assets of the Company was not properly done. The Resolution Professional acted malafide and in contravention of the provisions of the I&B Code. Despite directions given to the Resolution Professional vide Order in CA (AT)(Insolvency) No.82/2018, dated 09.03.2018 of NCLAT, he was not allowed to participate in the CoC meeting from the beginning till the conclusion of the meeting. Whenever certain crucial points affecting the Corporate Debtor arise for deliberation, he was directed to leave the meeting room and to wait outside. Therefore, Section 24 of the Code is violated as well as **Regulation 21(3)(a)**

of the Insolvency and Bankruptcy Regulations for Corporate Persons Regulations 2016. One another serious contention raised by the applicant herein is that the Resolution Professional did not done any work of his own. He delegated all his powers to representatives and appointed so many adviser, legal counsels and evaluators so as to burden the resolution applicant to pay a resolution cost. Majority work of the Resolution Professional has been outsourced so as to claim exorbitant fees and cost of resolution by the Resolution Professional. He also appointed an LLP firm, namely Deloittes for pre-audit of expenses and for monitoring the affairs of the corporate debtor at a fee of Rs.13 lakhs per month. So also he managed to get himself insured at a cost of Rs.72.5 lakhs during the resolution process which is unwarranted in a case of this nature. Rs.2.4 crores had been paid to Deloitte on account of Resolution Professional Facilitator, Rs.2 crores have been paid to Alvares & Marshall allegedly evaluators on account of evaluation of bids.

4. The above said acts are certain acts of the Resolution Professional highlighted by the applicant which according to him the Resolution Professional is guilty and causing unlawful gain to its own entity and further causing unlawful losses to the Corporate Debtor. Upon the said contentions he prays for issuing directions to the Resolution Professional to provide access to him and other board of directors of the Corporate Debtor to have full information in regard to all matters transacted in the CoC meeting and issue directions to provide copies of bids, resolution applications so as to enable him to express his views and to direct investigation of the expenses incurred as part of the CIRP and to set aside the CIRP process by removing the Resolution Professional.

CA (IB) No.210/KB/2018

5. This is an application filed by UltraTech Cement Limited under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 contending that the

evaluation criteria as applied were to result in more than one resolution applicant coming close in the scoring, it would stand to reason that to discharge the statutory mandate of maximizing the value of the assets, the parties can be made to participate in a transparent auction that can be conducted in hours, and even electronically. The applicant contends that it apprehended miss-appreciation of competition law, upon correction would lead to the Applicant having the highest score, or even with a score lower by a few decimal points, and if it transpires that the price quoted by the parties in the forefront have a very narrow gap, it should only follow the best possible price should be discovered by conducting a fast-track expedited auction among all such parties. According to the applicant, it proposed proportionate resolution for all creditors, but CoC and Resolution Professional not to fix the evaluation criteria without applying natural justice and not in fair play. The evaluation process is made known and clearly a sense of fair play in action is demonstrated. The applicant prays for issuing direction to the CoC and Resolution Professional to provide the applicants with the manner of application of the evaluation criteria that form the basis for CoC to take the decision on the H1 in the CIRP of the Corporate Debtor so also prays for ordering investigation against cartelization and even to disclose how a Resolution Professional and CoC has dealt with this disclosure and if not disclosed how Resolution Professional and the CoC has dealt with such non-disclosure and other incidental prayers.

CA (IB) No.227/KB/2018 IN CA (IB)No.210/KB/2018

6. This is an application filed by UltraTech Cement Limited under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 contending that CoC and Resolution Professional are refusing to consider a revised offer which has been made while the process is under way within the period prescribed under Section 12 and that the Resolution Professional would not call for a fresh expression of interest to ensure maximization of value, thereby breaching the

trust reposed on the CoC and the Resolution Professional to conduct a fair and transparent process to maximization of value of assets. The applicant prays for issuing directions to the CoC as well as to the Resolution Professional so as to evaluate the revised offer dated 08.03.2018 of the applicant and compare the same with other competing offers to achieve the objective of maximization of value of assets for the Corporate Debtors.

CA(IB) No.233/KB/2018 IN CA(IB) No.210/KB/2018

7. This is an application filed by UltraTech Cement Limited under Section 60(5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of NCLT Rules 2016 alleging that the meeting of the CoC dated 14.03.2018 has been held completely illegal and arbitrary and deserves to be set aside and quashed upon the following grounds:-

(i) The COC and RP went on to hold the meeting without considering the orders passed by the Tribunals to seek directions to hold meeting in a fair and just manner. Despite so, the COC and the RP proceeded ahead to hold the meeting and approve the bidder whose offer is much lower than the revised offer of the Applicant.

(ii) Despite the pendency of the application and the matter being sub judice before the court of law went on to take contradictory positions but at the same time when asked to disclose the information which the RP and COC didn't

(iii) The RP and COC acted directly acted in contrary to the object and purpose of IB Code which mandates maximization of value of the assets

(iv) Such act of RP and COC is mots opaque and non-transparent, relevant information were kept secret from the applicant and till date the applicant has not been informed the evaluation criteria based on which the applicant was relegated to the rank of second highest bidder.

(v) The RP is duty bound to maintain checks and balances to conduct the COC meet under the IB Code, the RP is duty-bound to pint out the objectives and obligations under the law. The RP's confirmation vide letter dated 13.04.2018 giving an assurance to the applicant to

consider their application for the bidding process is vitiates the rules of just and fairness as per the law laid down in the IB Code. That the RP had acted against the letter and spirit of the Hon'ble Courts, against the interest of the various stake holders of the Corporate Debtor and acted unfairly and arbitrarily ignoring the Applicant who is an eligible competing bidder.

8. Upon the above said grounds the applicant prays for declaring that the entire process adopted by the CoC and Resolution Professional is vitiated that they have acted against the objective of the Code against the interest of various stakeholders of the Corporate Debtor and also acted unfairly, arbitrarily and against the interest of the applicants who is an eligible competing bidder.

CA(IB) No.223/KB/2018.

9. This is an application filed by the State Bank of India, Hong Kong Branch under Sub Section 5 of Section 60 of the I&B Code with Rule 11 of the NCLT Rules challenging inequality in considering the claim of the applicants at par with the approval of claim of financial creditors. The applicant alleged that 10% of the verified claim by giving a hair cut of 90% of the regular valid claim of the arbitrator is highly illegal and challenged the allotment of claim as per the resolution plan submitted for the approval and prays for issuing direction to allow the claim of the applicant bank at par with other similarly placed financial creditors based on their status and without discrimination.

CA(IB) No.249/KB/2018.

10. This is an application filed on by the Export Import Bank of India under sub section (5) of Section 65 of the I&B Code read with rule 11 of the NCLT Rules to set aside the decision of the CoC approving the H1 Resolution Plan and to consider revised offer submitted by the Ultratech, another bidder, before the CoC and to give further direction to the Resolution Professional to conduct the process in fairness and transparency equitable practice and practice of natural justice during the selection and approval of Resolution Plan. The applicant contends that CoC accepted the H1 bidder's Resolution Plan as its

plan scores maximum in consideration of the evaluation criteria and decided to negotiate with the H1 bidders in the meeting held on 27.02.2018. As per the Resolution Plan, the applicant had proposed only 72.59% of its verified claim and arbitrarily gave a hair cut of 27.41% of the legal and verified claim of the applicant. The applicant claims that the liquidation value payable to unsecured financial creditors is nil and upon subrogation would not be sufficient to recover amounts paid to the applicant. The Resolution applicant proposed to make 52% payment in the initial plan and 72.5% payment in the later plan. The applicant further contends that there is no concrete basis for such discrimination against the applicant at par with other financial creditors and the Resolution Plan is contrary to the scheme of the I&B Code 2016. The practice of allotment of claim raised serious doubts about the process and, therefore, the applicant filed this application seeking the above-mentioned directions. The applicant further contends that Ultratech Cement Limited also given revised proposal which is to be considered by the CoC and, therefore, the applicant is to be permitted to intervene in the Company Petition and prays for passing appropriate directions.

CA(IB) No.248/KB/2018.

11. This is an intervention application filed by Shri. Khemisatia Polysacks Private Limited and seven others under Sub-Section 5 (a) of Section 60 of the I&B Code challenging the resolution process initiated by the Resolution Professional alleging that the applicants are aggrieved for not considering their legitimate claims submitted to the Resolution Professional and their claims have been ignored by passing the benefit of resolution to the financial creditors of the corporate debtor. The applicants further contends that they were denied of information / documents in respect of bids / resolution plans received by the Resolution Professional and not allowed to participate in the CIRP, not allowed to put their suggestions on the CIRP and not allowed to interact with bidders. The affairs of the Company is dealt with by Deloittee and the CoC and a total

of Rs.37.02 crores is the outstanding debt due to the applicants in total on account of supply of goods, materials and services provided to the Corporate Debtor though he applicant repeatedly demands the Resolution Professional to upload the verified claims admitted by the Resolution Professional of the applicants. He has not bothered to honour the claims of the Operational Creditors of the Corporate Debtor including the applicant and, therefore, the applicants are aggrieved by the action of the Resolution Professional. Resolution Professional is outsourcing most of his work by causing financial burden on the corporate debtor. Upon the aforesaid contentions, the applicants pray for allowing them to intervene in the Company Petition and permission to be given to the applicants for participation in the CIRP and without considering the contention of the applicants in this application, the Resolution Plan submitted by the Resolution Professional to the adjudicating authority cannot be approved.

CA (IB) No.343/KB/2018

12. This is an application jointly filed by five Operational Creditors challenging inaction from the side of the Resolution Professional in not providing the details of the amount payable to each of the Operational Creditors in pursuance of the plan and against the uploading the list of claims of the Operational Creditors admitted by the Resolution Professional. The applicants contends that the list of claims of the Operational Creditors was uploaded by the Resolution Professional on 28th February 2018 and uploaded a fresh list on 12th April, 2018 but on going through the list there is no mentioning regarding the verification of claim pending with the Resolution Professional or not. Some of the claims of the applicant were reduced by the Resolution Professional without giving an opportunity to justify its claim that the steps taken by the Resolution Professional in regard to the verification of claim of Operational creditors is not legal and liable to be declared null and void. The applicants also contend that they are not allowed to participate in the

CIR process and no attempt made on the side of the Resolution Professional in protecting and preserving the rights of the Operational Creditors. Upon the said contentions, the applicant prays for permitting them to intervene in the main application and alternatively prays for issuing directions to the Resolution Professionals for permitting them to participate in the CIR process and for providing necessary information regarding the claim verified and admitted by the Operational Creditors.

CA (IB) No.344/KB/2018

13. This is an application jointly filed by eight Operational Creditors challenging the uploading of the claim of the Operational Creditors by the Resolution Professional and as against the non-verification of the claim of the Operational Creditors. The applicant contends that the final verified list admitting / rejecting the claim of the Operational Creditors seems to be not published by the Resolution Professional and the list uploaded dated 12.04.2018 specifies different figures than the amounts stated in the affidavit filed by them dated 26.03.2018. The applicant further contends that the Resolution Professional did not have a uniform terminology regarding the admission as well as the verification of the claim. The applicant further contends that their claim has not been finally verified and the claim admitted seem not based on the claim of the applicants and that no opportunity to justify the claim of the applicant have been given by the Resolution Professional and, therefore, the plan without providing provision for clearing their dues cannot be approved. The applicant filed this application so as to permit them to intervene in the proceedings and also seeking information from the Resolution Professional regarding the Resolution Plan and in respect of further directions directing the Resolution Professional to permit them to participate in the CIR process.

CA(IB) 246/KB/2018

14. This is an application filed by the Resolution Professional Mr. Vijaykumar V. Iyer under Section 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (in short I&B Code) read with Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, praying for approval of the Resolution Plan of the Corporate Debtor/ Binani Cements Limited.

15. Bank of Baroda / Financial Creditor filed the application in C.P.(IB) No.359/KB/2017 under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Corporate Debtor, namely Binani Cement Limited.

16. After hearing on both sides, the application was admitted. Mr. Vijaykumar V. Iyer a Resolution Professional has been appointed as the Interim Resolution Professional vide order dated 25.07.2017. The Interim Resolution Professionals appointment was later confirmed by the Committee of Creditor (CoC) in pursuance of the decision in the first meeting of the CoC held on 22.08.2017. The Resolution Professional filed the instant application on 19.03.2018 within 270 days as provided under Section 12 of the Code. The initial period of 180 days of CIR process has been extended as per application submitted by the Resolution Professional at the instance of the CoC and the CIR process of extended period expired on 21st April, 2018. The Resolution Professional allegedly succeeds in his attempt in finding out a resolution applicant, Rajputana Properties' Private Ltd. (in short, RPPL) in time before the expiry of the CIR process of the Corporate Debtor and submitted the Resolution Plan along with the application for the approval of the adjudicating authority.

17. A brief summary of the submissions of Ld. Resolution Professional in the application is the following:

18. Resolution Professional issued public announcements by way of advertisement published in the Economic Times dated 13th October 2017 and invited prospective Resolution Applicants to put forward their Resolution Plans for the Corporate Debtor. He was in receipt of 65 potential resolution applications. Out of that 65 resolution applications, 27 resolution applicants expressed their interest to submit Resolution Plans also executed confidentiality undertakings. Thereafter, 12 resolution applicants turned up further in conducting inspection of the plants of the Corporate Debtor and thereafter on 15.01.2018 the Resolution Professional received six Resolution Plans.

19. After that, the Resolution Professional also prepared the evaluation criteria formulated after due deliberation with CoC and as per the evaluation criteria and after getting advice from the advisers and legal counsel appointed by the CoC and after due deliberation and interaction with prospective resolution applicants, CoC in the meeting held on 27.02.2018 was able to identify one among the six Resolution Plans submitted before the CoC for consideration by the Resolution Professional as the resolution plan scored the highest in terms of the evaluative parameters set out and finalized by the CoC in the evaluation matrix. Accordingly, as per the meeting of the CoC convened on 27.02.2018, CoC desired to continue the process with the Resolution Plan of Rajputana Properties Private Limited (RPPL). The CoC had extensive negotiation and consultation with the H1 Resolution Applicant and after getting clarification from the applicants, after due deliberation, the H1 Resolution Plan put for voting in the meeting held on 14th March 2018. The CoC with voting percentage of 99.43% approved the Resolution Plan of H1 applicant. 10.53% of the CoC which voted in favour of the Resolution Plan also recorded a protest note alleging that they had not been dealt with equitably when compared with other financial creditors who were corporate guarantee beneficiaries of the Corporate Debtor. It is that H1 Resolution Applicant's

Resolution Plan came up for consideration before the Adjudicating Authority on 19.03.2018 for its approval.

20. This is a case in which a plethora of interim applications were filed by the various stake holders as well as director of the corporate debtor, the holding company of the corporate debtor under Sub-Section (5) of Section 60 of the Code challenging the transparency in the manner of continuing the Resolution Process by the Resolution Professional, mismanagement in the affairs of the Corporate Debtor by spending huge expenditure by engaging representatives of the Resolution Professional and incurred highest resolution cost pertaining to Corporate Debtor as well as the resolution applicants. So also, there was allegation that there is discrimination in regard to the consideration of unsecured debts of unsecured creditors as well as debts due to Operational Creditors. One another allegation levelled is that the entire claims of certain Operational Creditors were ignored by the resolution professional with out assigning any reasons and that despite request for verification of their claims the Resolution Professional did not provide access to the finalization of claims admitted by the Resolution Professional. Since all those applications were filed challenging the resolution process and the manner of approval of Resolution Plan by the CoC, and since common questions arise for determination and for avoiding repetition of facts and for convenience all these applications are taken together.

21. The resolution professional filed reply affidavits in CA(IB) 210/KB/2018, CA(IB) 201/KB/2018, CA(IB) 234/KB/2018 and CA(IB) 248/KB/2018 contending in brief is the following:-

22. The Resolution Professional in CA(IB) 210/KB/2018 contends that the applicant is neither a corporate debtor, nor a director, or a financial /operational creditor and while dealing with the resolution plan, the Resolution professional had complied with he provisions of the Insolvency and Bankruptcy Code, 2016,

therefore, the grievances raised by the applicant by way of the application under reply is not maintainable and also the applicant has no locus standi under the provisions of I&B code, 2016 to seek relief that has been sought in the application under reply. The contention that the revised offer not being considered by the Resolution Professional and the CoC not at all deserve any merits. So called substantial revised bid offer by the Ultratech Cement Ltd. dated 8th March 2018 could not have been considered as a valid bid. The applicant has been heard while his Resolution Plan has been taken into consideration by the CoC on 23.02.2018. CoC had discussed the plan of all applicants in the meeting held on 23.02.2018 in the presence of respective resolution applicants and in the meeting held on 27.02.2018 the 2nd respondent's Resolution Plan (RPPL) has been declared as H1 by the CoC in terms of the process document and the evaluation criteria issued as per CVC guidelines and the IBA Circular.

23. As per the decision of the CoC, there could not have been any negotiation with any other resolution applicant other than H1 Resolution Applicant which can be deployed for voting under Section 24 of the Code and that the Resolution Plan has been tabled for voting and approved with a majority of 99.43%. In such a situation, only if the Letter of Intent is not accepted by the R2 and it fails to give a Performance Bank Guarantee can, therefore, put in action for considering alternative Resolution Plan. The Letter of Intent has been accepted by the R2 and Performance Bank Guarantee has been submitted already. As per the process documents and as per CVC guidelines, post tender negotiation are not to be held except with the H1, highest tenderer. Indian Banks' Association (IBA) has referred a few suggestions from Member Banks and the same was placed before IBA Managing Committee and IBA Managing Committee issued certain guidelines to the Banks who approached the National Company Law Tribunal for resolution and the process documents is based on IBA Circular.

Therefore, the Resolution Applicant Ultratech Cement Ltd who has submitted its revised offer on 8.03.2018 is beyond the cut off date for filing Resolution Plan in the bidding process and the same cannot be entertained based on the evaluation criteria. The Resolution Professional issued a clarification with the process document dated 20.12.2017 which *inter alia* stipulated general and qualitative parameters and clearly indicated that CoC will negotiate only with Resolution Applicant which reveals highest score based on the evaluation criteria and whose Resolution Plan is in compliance with the requirements of IB Code as confirmed by the Resolution Professional.

24. Therefore, non-consideration of the revised offer of the Ultratech Cement Ltd. does not violate any of the provisions of the Code, Regulations or the evaluation matrix and unsuccessful applicants has no right to ask for the evaluation criteria on the basis of which the other Resolution Professionals have been ranked. The applicant has submitted a Resolution Plan on 12.02.2018 and thereafter submitted five other resolution applications. The evaluation was done as per the evaluation criteria issued by the CoCs. The Tribunal has no role under Section 31 of the Code to conduct evaluation of any Resolution Plan other than the Resolution Professional presented under Section 34 of the Code, 2016. The allegation levelled in the application never demonstrated that there has been any circumvention or violation of the provisions of the Code of the Regulations in declaring the H1 Resolution Applicant as the highest bidder. The CoC has decided that it would not consider the revised bid made by the applicant, and took into consideration and discussed the following reasons: First, that the revised offer was not vide a resolution plan but was merely an e-mail as sent with an offer; Second, that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC. Third, that the offer was beyond the time as stipulated under the IBC. Upon the said reasons, the CoC decided not to consider the

revised offer. The RP has complied all the provisions of the IBC while dealing with the applicant and therefore there cannot be any grievance of the applicant in respect of non consideration of revised offer. The contentions raised by the applicant is malafide.

25. The resolution professional also filed detail reply affidavit in CA(IB) 201/KB/2018 challenging maintainability of the application filed by the applicant and that the applicant who is a member of the suspended board of directors of the corporate debtor filed the application with *mala fide*, with out merit and has been made to derail the entire CIRP. The resolution professional contends that he safeguard the enterprise value of the corporate debtor and uphold the interest of all the stakeholder as an on -going concern and have discharged his duties as per section 18 and section 25 of the IBC. He contends that all notices, agenda points were provided by the RP as per the requirements and complied section 24(3) of IBC. It is incorrect that the RP exceeds his power of delegation of work as alleged. Since the corporate debtor is a huge entity with factory plant in two different place such plants require raw material, marketing of product, and confirming to sales supply chain he delegated some of his work. The RP has undertaken work with Deloitte Touche Tohmatsu India Ltd as per provisions of IBC. He also contends that all efforts have been made to protect the value of the corporate debtor including ensuring that the plants of the corporate debtor and brought back to work to achieve value maximization for the benefit of all the stake holder, and corporate debtor has a net positive cash flow. He further contends that he did not exceeds his powers and not denied any opportunity to the members of the board of directors to make their submissions as alleged. By denying all the allegations the RP prays for dismissal of the application.

26. The Resolution Professional in its reply affidavit in CA(IB) 248/KB/2018 contended that the application under section 30 & 31 of the I&B Code, 2016 by the operational Creditor is not maintainable on the ground that the aggregate

claim amount which is less than 10% of the debt and as such, the applicant(s) have no right of participation in the CoC meetings and the resolution plan which stands approved by the CoC and which included the applicant cannot be altered/modified to include the claims of the applicant. The Resolution Professional also contends that the claims received by the resolution professional from the applicants and they were informed about their claims. The Resolution Professional also contends that some of the operational creditors attended the 12th CoC meeting and the CoC heard the submission/contentions of the operational Creditors and that no promise or allegation were made by the Resolution professional as alleged or otherwise and it was agreed that the CoC will try to ensure maximum payment of the past dues. None of the applications put forward by the Applicants are worth consideration and it is liable to be dismissed *in limini*.

27. RPPL the resolution applicant who is the 2nd respondent in CA(IB) 210/KB/2018 also filed reply affidavits in support of the resolution professional, its contentions in brief is the following:-

28. The H1 Resolution Applicant namely Rajputana Properties Private Limited challenged the application filed by Ultratech Cement Limited. Ultratech filed the application so as to protract the process. All the applications filed by Ultratech Cement Limited contained false and frivolous contentions are liable to be dismissed in limini. The respondent denies all the averments raised by the Ultratech Cement Ltd., in this application. The applicant is only attempting to push the Corporate Debtor in the liquidation by creating obstructions in completion of the Corporate Insolvency Resolution Process of the Corporate Debtor. The RPPL is a successful bidder in the already concluded bidding process carried on for resolution applicants for the Corporate Debtor in terms of the provisions of the Code 2016. The application filed by Ultratech Cement Limited contains false and frivolous contentions and for the said reason alone it is liable to be dismissed in limini. The contentions of the Resolution Applicant

that its revised offer not being considered by the Resolution Professional and the CoC not at all deserve any merits. So called substantial revised bid offer by the Ultratech Cement Ltd. Dated 8th March 2018 could not have been considered as a valid bid. The applicant has been heard while his Resolution Plan has been taken into consideration by the CoC on 23.02.2018 and in the meeting held on 27.02.2018 the respondent's Resolution Plan has been declared as H1 by the CoC in terms of the process document and the evaluation criteria issued as per CVC guidelines and the IBA Circular.

29. As per the decision of the CoC, there could not have been any negotiation with any other resolution applicant other than H1 Resolution Applicant which can be deployed for voting under Section 24 of the Code and that the Resolution Plan has been tabled for voting and approved with a majority of 99.43%. In such a situation, only if the Letter of Intent is not accepted by the R2 and it fails to give a Performance Bank Guarantee can, therefore, put in action for considering alternative Resolution Plan. The Letter of Intent has been accepted by the R.2 and Performance Bank Guarantee has been submitted already. As per the process documents and as per CVC guidelines, post tender negotiation are not to be held except with the H1, highest tenderer. Indian Banks' Association (IBA) has referred a few suggestions from Member Banks and the same was placed before IBA Managing Committee and IBA Managing Committee issued certain guidelines to the Banks who approached the National Company Law Tribunal for resolution and the process documents is based on IBA Circular. Therefore, the Resolution Applicant Ultratech Cement Ltd who has submitted its revised offer on 8.03.2018 is beyond the cut off date for filing Resolution Plan in the bidding process and the same cannot be entertained based on the evaluation criteria. The Resolution Professional issued a clarification with the process document dated 20.12.2017 which *inter alia* stipulated general and qualitative parameters and clearly indicated that CoC will negotiate only that Resolution

Applicant which reveals highest score based on the evaluation criteria and whose Resolution Plan is in compliance with the requirements of IB Code as confirmed by the Resolution Professional.

30. The Applicant has no right under the IBC to attend the meeting of COC which is considering a Resolution Plan of another Resolution Applicant i.e. Respondent No.2 in this case. It is not open to the Applicant under the IBC to seek judicial review of the commercial decisions of the COC taken during the course of the insolvency resolution process. Besides, IBC does not permit a resolution applicant any right to interfere in the CIRP and thus the Applicant has no locus standi to question the decision of the COC and also call for records of the RPs and COC. The COC took a majority decision in declaring Respondent No.2 as H1 bidder which can now not be called into question by the Applicant. The entire bidding process undertaken by the Respondent No. 1 is in accordance with law and all procedural norms. It is in compliance with the Process Document and guidelines prescribed by the Central Vigilance Commission (CVC) and Indian Bank Association and therefore, the Applicant is acting in mala fide manner in objecting to the negotiations already undertaken. The Respondent No. 2 has received the approval of the Competition Commission of India on 7th March, 2018 for completing the CIRP which authenticates the resolution process considered by the COC.It is also submitted that the Applicant had not challenged any part of the evaluation criteria issued on February 1, 2018 and clarification dated 7th February, 2018 or any part of the procedures in the Process Document which shows the entire process to be fair. Therefore, at this stage the Applicant is unscrupulously objecting to the process to scuttle the successful resolution applicant.

31. It is submitted that the Application also suffers from non-joinder of necessary party being the COC of the Corporate Debtor and is liable to be rejected on this ground alone.

32. The 2nd respondent also filed reply in CA(IB) 233/KB/2018 contenting that the unsuccessful Resolution applicant is only attempting to push the Corporate Debtor into liquidation by creating obstacles in completion of the CIRP. The respondent further contended that the aforesaid application has been made by an unsuccessful bidder in the already concluded bidding process carried out for Resolution applicants for the corporate debtor and thus is malafide and ultravires the I & B code,2016; the CIRP and the CIRP Regulations. The respondent also contends that on February12, 2018, all six Resolution Applicants including the applicant and the Respondent No.2 submitted their revised Resolution Plans to the resolution professional to which the cut-off date of February12, 2018 has been actively suppressed by the Applicant in CA bearing no.210/2018. The respondent also contends that no jurisdiction of this Hon'ble Tribunal under section 31 of the code,2016 to conduct evaluation of any resolution plan other than presented under section 30 (4) of the Code,2016. The respondent furthermore contended that the Respondent No.1 has filed the said resolution plan with this Hon'ble Tribunal, therefore, neither could this so-called substantially revised offer of the applicant be entertained by the committee of creditors in its meeting dated March 14,2018 nor can the Hon'ble Tribunal at this stage direct the Respondent No 3 to consider or re evaluate based on the substantially revised offer of the applicant. Upon the said contentions second respondent also prays for dismissal of all the applications and to approve the resolution plan submitted before the Adjudicating Authority.

33. Heard the Ld. Sr. Counsel appearing for all the parties at length and perused the documents and various citations relied upon by the Ld. Sr. Counsel.

34. Upon hearing the rival submissions and considering the facts and applicable provisions of the I&B Code and Regulations the points that arise for our determination are the following:-

i) Whether the resolution professional exceeds his power in appointing professionals, outsourced the work in violation of circular No. IP/003/2018 issued by the IBBI and incurred exemplary cost in violation of any of the provisions of the Code and Regulations and circular?

ii) Whether non consideration of revised offer of resolution applicant Ultra Tech amount to violation of any of the provisions of the I&B Code and Regulations and against the objects of the Code?

iii) Whether there is any discrimination against the unsecured financial creditors at par with other financial creditors and the Resolution Plan submitted for the approval is contrary to the scheme of the I&B Code 2016?

iv) Whether the resolution professional ignored any of the operational creditors claim and not honoured their claims as alleged by the Operational Creditors?

Point No (i).

35. One of the directors of the corporate debtor filed three applications [CA(IB) No.201/KB/2018, CA(IB) No.245/KB/2018 and CA(IB) No. 234/KB/2018) mainly alleging mismanagement of the Corporate Debtor, misconduct of Resolution Professional so as to cause wrongful loss to the Corporate Debtor. He contends that in violation of the objective and spirit of IBC presumably at the behest of certain vested parties with an intention to diminish the enterprise value of the Corporate Debtor, the Resolution Professional acted malafide and in contravention of the provisions of the I&B Code. Serious allegations also levelled against the Resolution Professional

alleging that despite directions from the NCLAT as well as this adjudicating authority, Resolution Professional did not permit the director in participating in the Committee of Creditor (CoC) meeting and whenever crucial points arise for determination, the directors who are attending the CoC meeting were asked to leave the meeting room and to wait outside. The notice issued for attending the meeting by the Resolution Professional is also in violation of Regulation 21(3) (a) of the IBBI (Insolvency and Resolution Process for Corporate Persons) Regulations 2016. No document attached to the notice for enabling the directors to participate in the meeting effectively. The Resolution Professional acted *mala fide* and in contravention of the provisions of the I&B Code. Therefore, he violates Section 24 of the Code as well as **Regulation 21(3)(a) of the IBBI (Insolvency and Bankruptcy Regulations for Corporate Persons) Regulations 2016.**

36. In order to appreciate as to whether there is any violation of section 24 of the Code and 21(3) of the Regulations it is good to read the relevant provisions.

Section 24

24. (1) .....

(2) .....

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of Committee of creditors;

(b) ***members of the suspended Board of Directors or the partners of the corporate persons, as the case may be***;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such direct or, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) **.....**

Regulation 21(3)

(3) The notice of the meeting shall-

(a) contain an agenda of the meeting with the following:

(i) a list of the matters to be discussed at the meeting;

(ii) a list of the issues to be voted upon at the meeting; and

(iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting; and

(b) state that a vote of the members of the committee shall not be taken at the meeting unless all members are present at such meeting.

37. A reading of Section 24(4) of the Code shows that it provides right of participation to the directors in the meeting of CoC. As per the proviso to section 24(4) despite notice if a director did not attend the meeting his absence shall not invalidate proceedings of such meetings. Here in this case,

the director approached the Bench and to the Hon'ble NCLAT alleging denial of opportunity to attend in the meeting of CoC and vide order in CA(AT) (Insolvency) No.82 of 2018 the Hon'ble NCLAT allowed him to participate in the meeting of CoC. Vide Regulation 21(3) (a) of IBBI (IRP for Corporate Persons) Regulations, 2016 the notice to be issued must contain the agenda of the meeting. Ld. Sr. Counsel Mr. Ratnanko Banerji for the applicant submits that both the said provisions were violated by the RP and his representatives were asked to wait outside, while some sensitive issues touching the corporate debtor were under discussions, violate the right of hearing. Truly, notice had been issued and directors' representatives attended the meetings. However, the representative of directors were asked to go out before the completion of the meeting, whenever discussions in respect of affairs of the corporate debtor were going on.

38. Admittedly, the representatives of directors were asked to go out from the meetings. Ld. Sr. Counsel Mr. Abhrajit Mitra for the RP submits that none of the directors appeared in person and their representatives were asked to wait outside because certain sensitive issues regarding certain diversion of fund and fraudulent transfers of the fund of the corporate debtor were taken for discussion. The copies of minutes produced for our screening also shows that what the director alleged in his application in respect of asking his representative to go out from the meeting hall is found true. The submission that the directors never attended the meetings but their representative attended the meetings and therefore the allegations were alleged for the sake of allegations seems to have no force. The Code permit any person who can attend the CoC meetings can send his representative. According to the Ld.Sr. Counsel for the RP corporate debtor has been involved in dubious transactions leading to conflict of interest and discussion in respect of the said transaction being dealt with confidentially the representatives of the directors were asked to wait outside. Since persons who are attending the meetings has

to undertook confidentiality undertaking the said reason for exclusion of representatives of corporate debtor is found have no legal force. In respect of issuing notice without agenda also, no valid explanation was offered from the side of RP. The above said conduct in managing the process of resolution of a corporate debtor is unfair. No doubt, it amounts to violation of the mandate of the Code and Regulations and violate the right of hearing especially when issues regarding the affairs of corporate debtor is taken for consideration by the CoC.

39. The director of the corporate debtor raised serious objections against the RP from the inception of the CIRP till the conclusion of CoC meeting held on 14.03.2018. The Director challenges the valuation of the assets of the Company, appointment of legal advisors at an exorbitant fees, appointment of Deloitte LLP firm for auditing the daily cash flow of the corporate debtor company, appointment of Deloittes persons, who are his related partners, as his representatives for the management of the company, out sourcing of most of the work to persons from Deloitte, delegation of all his work to other interested persons. He further submits that RP gets insured his life for huge amount for no life threat existing. RP appointed legal counsels for exorbitant fees, appointed facilitators and Evaluators for the work he has to do in persons at the approval of the CoC. The applicant demonstrated some of the payment which according to the applicant causes wrongful loss to the corporate debtor and gain to himself. The table below would demonstrate some of the rate of cost and fees spent by the RP. It is pertinent to note here that CoC approved all the expenses.

Name of the Consultant	Purpose	Sanctio-ned Amount	One time (Amount excl. GST and Out Pocket Expenses (OPE)	Monthly (Amt. excl. GST and Out Pocket Expenses) (OPE)	Reserve amount	Date of CoC Meeting where approved
		Rs. Lakhs				
Luthra & Luthra		16	16		Initial 40 days	Tuesday – 22/08/2017 Agenda 5
BOB	Legal cost	38.73	38.73			5/12/2017 – 6th CoC Agenda 7
RP Insurance	Tailor made Insurance policy from New India for USD 96k	72.5	72.5			5/12/2017 – 7th CoC Agenda 9
RP	Resolution Professional	35		35		Tuesday – 22/8/2017 Agenda 6
RP	Resolution Professional	25		25		-do-
Deloitte	Pre-audit of expenses and dispatch monitoring	13		13	Rs.65.00 lakhs for 5 months (Rs.13.00 lakhs per month)	Tuesday – 22/8/2017
Security Agency Checkmate Services Pvt. Ltd.	For safety of the assets of the Corporate Debtor at Binanigram & Neem Ka Thana	13.58		13.58	Rs.67.9 lakhs for 5 months (Rs.13.58 lakhs per month)	Tuesday – 22/8/2017
Holtech	Valuer	31.5	31.5			
PWC	Valuer	40	40			
Argus Partner	CoC legal advisers	10K/hr per lawyer & Managing Partner Rs.15l/hr involved since Decem-ber 2017			10K/hr per lawyer & Managing Partner Rs.15k/hr involved since Decem-ber 2017	16/1/2018 8th CoC – Agenda 12

Holtec – Technical Consul-tant (3 people)	Plant operations & mktg	14.5		14.5		
Alvares & Marshall	Evaluation of bids	200				16/1/2018 8th CoC – Agenda 11
Luthra & Luthra - Legal Consultant	Assistance with submission to the NCLT	11.5		11.5	Rs.57.5 lakhs for 5 months (Rs.11.5 lakhs per month subject to cap of 100 hrs)	Tuesday – 22/8/2017 – Agenda
Hari Bhakti	Forensic	17	17		One time	17/11/17 – 5th CoC – Agenda 8
RP facilitator	Deloitte TTILLP	240	240			4/10/2017 – 4th CoC Agenda 4
		641.08	480.73	87.58		

40. The Ld. Sr. Counsel for the applicant submits that the RP contravenes he provisions of the Code violated code of conduct and the regulations in respect of continuing the process efficiently with utmost transparency. According to him expenditure in continuing the process is unreasonable and unjust so as to see the corporate debtor is a going concern and causes wrongful lose to the corporate debtor and it amounts to increase the cost of resolution to a promoter who wish to take over the Company. A serious allegation is also raised submitting that the valuation of the assets of the company was not done properly. We find some force in the argument advanced on the side of the director of the corporate debtor. The liquidation value is arrived at 2300 Crores. However, bidders showed readiness to take over the company offering more than double the amount of liquidation value. Ultra Tech offered 1021.70 Crores before us. What is its indication. Its tangible and intangible assets value is much higher than overall liabilities due to the stakeholders?. However nobody other than the director of the company

challenged the liquidation value. On a careful screening of the minutes in respect of approving the expenses by the CoC rendered by the RP, it appears to us that the CoC nor RP has taken any care in getting appointment of advisors and other category of professionals and fixed the cost and fees without considering the volume of work and complicity of the work which had been entrusted to them. They liberally and casually suggested the cost and fees by themselves and fixed the cost and fee with out getting any supporting data in respect of fixation of fees to the professionals. At this juncture it is good to see what is resolution cost. Insolvency resolution cost is defined under section 5(13) of the Code. It reads as follows:-

Section 5(13)

5(13) "insolvency resolution process costs" means--

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board;

28. As per 5(13) (a) any other costs as may be ***specified*** by the board. Now it is also specified as per the following Regulations in Sh.1 of IBBI (Insolvency Professionals) Regulations,2016.

25. ***An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.***

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. ***An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that <u>such costs are not unreasonable.</u>***

41. It is also good to read Sub. reg. 7 of Sh.1 of IBBI(Insolvency professionals) Regulations. It reads as follows:-

An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

42. Thus, a reading of above referred regulations no doubt it cautioned the resolution professional that the costs spent at his instances payable to any professional on account of resolution cost shall not be unreasonable. The cost must be on the basis of the volume of the work and complexity of the resolution process. Here in this case he appointed about 22 representatives for the management of the affairs of the corporate debtor. In all the meetings his representatives participated and spoke for him. He appointed advisors, legal professionals,facilitator and evaluators. Mostly all works outsourced to a firm in which he admittedly a partner and thereby violated the circular No.IP/003/2018 issued by the IBBI. His explanation in person is that sub. reg 7

referred to above not prohibit him from appointing persons in a firm in which he is holding partnership because none of them related to the Corporate Debtor and that too approved by the CoC. He also appointed advisors and legal professionals. CoC also appointed advisors and legal counsels at the cost of resolution. So also BOB's litigation cost in filing the CP also claimed out of the resolution cost. Truly all the cost he spent out of resolution process must be ratified by the CoC and in the case in hand the CoC seen responsible for fixing or rather approving the cost which according to us is at an unreasonable rate. No doubt it gives an additional financial burden to a sinking company which is under resolution. Who has to bare this cost? None other than the corporate debtor. If the RP has taken too much care he could have very well avoided so many appointments. When he was asked why he appointed 22 representatives to monitor the corporate debtor he would say that when he took over the company the management and workmen were not responsive to provide information and to ascertain the correctness of the information he appointed them. The above said discussions leads to a conclusion that Ld.RP not taken any care to ensure that such resolution costs are not unreasonable as per Regulation 27 referred to above. So also not strictly followed Reg. 21(3) of IBBI(IRP for Corporate Persons) Regulations, 2016 in respect of issuing notice of meetings and in violation of the circular outsourced most of his works to his interested persons. This point is answered accordingly.

Point no ii.

43. UltraTech Cement Limited a resolution applicant who has submitted its resolution plan for participating in the bidding process rushed to this Tribunal with three applications, CA (IB) 210/KB/2018, CA(IB) 227/KB/2018 and CA(IB) 233/KB/2018. The very challenge of applicant in CA(IB) No.210/KB/2018 is that the evaluation criteria as applied were to result in more than one resolution applicant coming close in scoring is not permitted to participating in the bidding process amount to violation of the mandate of maximizing the

value. Ld. Sr. Counsel appearing for the applicant submits that the resolution plan of Ultra Tech Cement Limited not considered by the RP and reason for non-consideration of the plan not communicated to the applicant. According to him short-listing of the resolution plan was done not in the presence of the applicant and an opportunity of hearing the applicants objection regarding ranking the resolution applicant as not H1 was denied. He also submits that entire procedure adopted in ranking the resolution applicants is vitiated and is in violation of the provisions of the Code as well as the regulation and as against the scheme of the Code.

44. By filing **CA(IB) No. 277/KB/2018,** the very same applicant challenged non-consideration of its revised offer submitted by the applicant to the Resolution Professional. Ld. Sr. Counsel also submits that non consideration of the revised offer of the applicant Ultra Tech by the RP and CoC causes prejudice to the applicant and prevent the applicant from competing with the other resolution applicants and the Resolution Professional did not give an opportunity to here the resolution applicants before the CoC despite the applicant was informed by an email dated 13.03.2018 issued by the RP that when its plan is taken up for consideration he will be called for before the CoC. According to him the revised offer was made with in time as prescribed under section 12 of the Code and avoiding its revised offer shows that RP as well as CoC not ensuring maximization of value, thereby breaching the trust reposed on the CoC and the RP to conduct a fair and transparent process to maximization of value.

45. By filing **CA(IB) No.233/KB/2018,** the very same applicant challenged the decision of CoC in the meeting held on 14.03.2018 during the pendency of the above said CAs and contended that the meeting has been held completely illegally and arbitrarily and prays for declaring that the entire process adopted by the CoC and RP is vitiated that they have acted against the objective of the

Code and against the various interest of the stakeholders of the corporate debtor.

46. The Resolution Professional as well as the H1 resolution applicant and the Committee of Creditors strongly opposed all the three CA's filed by the applicant. They have unanimously contended that the attempt of the applicant is to push the Corporate Debtor in the liquidation by creating obstruction in completion of the Corporate Insolvency Resolution Process of the Corporate Debtor. The said contention seems to be not worthwhile. CA(IB) No.210/KB/2018 was filed by the resolution applicant UltraTech Cement Limited on 06.03.2018. It has come out in the evidence that even after 06.03.2018 negotiation has been undertaken in respect of H1 resolution applicant and the H1 resolution applicant revised its offer on 07.03.2018 and submitted a revised resolution plan. That plan was approved by the CoC in the meeting held on 14.03.2018 despite pendency of the said CA as well as one another CA(IB) 227/KB/2018. Moreover, it has come out in evidence that UltraTech revised offer is much more the bid amount approved by the CoC in the resolution applicant's plan under challenge. Then how can it be viewed that UltraTech attempt is to see that the corporate debtor is to push to liquidation?

47. According to the Ld. Sr. Counsel Mr. Mukul Rohatgi for the applicant what the applicant submitted is a substantially revised bid offer on 8th March 2018 and the Resolution Professional did not consider the revised offer and thereby caused great prejudice to the applicant. Pending the CA(IB) No.210/KB/2018, the resolution applicant filed CA(IB) No.227/KB/2018 challenging non-consideration of the revised offer which has been filed 43 days before the date of expiry of the CIRP and filed CA(IB) No.233/KB/2018 on 16.03.2018 for setting aside the decision of the CoC. Serious contentions also raised that the Resolution Professional acted unfairly, arbitrarily and against the interest of the applicants who is otherwise found eligible as a

competing bidder but, however, it was ranked not as a H1 resolution applicant for the reason not brought to its notice that too without hearing the resolution applicant.

48. The Ld. Sr. Counsel reiterated that the Ultra Tech was not classified as H1 Resolution applicant because of miss-appreciation of competition law, and that the resolution applicant was not heard when a decision was taken to the effect that its plan is not the highest scored plan and the reason for the classification was not informed to it. He further submits that upon knowing that his plan is not H1 Plan the resolution applicant immediately send a revised offer increasing the bid amount but the revised offer submitted to RP as well as to members of CoC was ignored on the strength of evaluation criteria and Process Document as applied were to result in not to permit more than one resolution applicant coming close in the scoring. According to him the said approach as laid down in the **Process Document** is against the statutory mandate of maximizing the value of the assets, the parties can be made to participate in a transparent manner. According to the Ld. Sr. Counsel for the applicant, it proposed proportionate resolution for all creditors, but CoC and Resolution Professional not to fix the evaluation criteria without applying natural justice and not in fair play. The evaluation process is made known and clearly a sense of fair play in action is demonstrated. He also submits that all the process in avoiding Ultra Tech from raising its offer is against the scheme of the code and as against the sentiments of public sector banks.

49. Referring to certain citations, the Ld. Sr. Counsel, Mr. Mukul Rohatgi submits that the Adjudicating Authority is empowered even to order open bid to see that maximization of the value of the assets of the corporate debtor and offered 7,960.86 crores and showed his readiness to deposit the amount with in 3 days to prove its bonafide. We do not incline to accept that offer because none of the provisions of the Code permit us to accept the bid offer made by the ld. Sr. Counsel for the applicant.

50. The Ld. Sr. Counsel Mr. S.K.Kapur for RPPL repudiated the submissions advanced by Ld. Sr. Counsel for the Ultra Tech, submitted that there is no merit in the arguments advanced on the side of the Ultra Tech and referred the evaluation scoring given to the resolution applicants. According to him as per the clarifications: qualitative parameters 4/6 the Ultra Tech applicant did not produce proof to prove that no adverse regulatory order has been passed against it by any regulatory authority with in the last 5 years and thereby scored less 1 marks than that of the H1 applicant and that the bid amount is less than that of the H1 applicant and therefore there is no irregularity or arbitrariness in classifying Ultra Tech below the rank given to H1 applicant.

51. In reply to the said submission, Ld. Sr. Counsel for the applicant submits that it has got Competition commission of India (CCI) approval and that the order of CCI refereed to in the scoring was stayed and therefore said classification doesn't arise at the time of submission of revised offer. Admittedly at the time of classification of resolution applicants application as not H1 on 27.02.2018 an adverse order of regulatory authority was in force. So also bid amount offered by the Ultra Tech in the resolution plan is lesser than that of the H1 applicant offer. Truly, following the evaluation criteria already published the classification of Ultra Tech as not H1 on 27.02.2018 cannot be considered as irregular or arbitrary as alleged. Admittedly, the said regulatory authority's order not at all a disqualification of a resolution applicant under section 29A of the Code.

52. The question is whether an adverse decision can be taken by the CoC as against an applicant who has submitted a prospective bidding plan without giving an opportunity for hearing? In a case of this nature the applicant being a leading company in India who is capable of taking over a corporate debtor like the debtor in hand and can compete with other bidders denying an opportunity to here the applicant is quiet unjust and arbitrary. No doubt CoC consists of skilled officers of the financial creditors. They are the fit persons to

take commercial or business decisions so as to find out an applicant who is more competent and technically sound so as to takeover a company undergoing resolution process. Denial of opportunity to have a hearing when the applicants resolution plan was screened for the purpose of classification no doubt is unfair and unjust. Bare in mind the objective of the Code it amount to shutting out an opportunity to a prospective bidder in participating the bidding process which it is otherwise entitled to compete. It is an adverse decision affecting the right of a participant in the process till the CoC took a decision to approve a plan from out of 6 plans. Thus no doubt denying the opportunity to be heard by the UltraTech applicant when CoC took a decision not to consider its plan for further negotiation is unfair and unjust and against the very objective of the Code. Scoring not as H1 applicant also not a disqualification in participating the bidding process. In case such applicant is ready to revise its offer and that offer is more than the bid amount offered by H1 applicant and agreed to satisfy all the stakeholders claims then why not its offer is considered? Can such an offer be ignored by fixing terms in evaluation criteria and in the process document? We will answer it later.

53. In denying the request of the Ultra Tech request to reconsider its revised offer the Ld. Sr. Counsel Mr. Abhrajit Mitra appearing for the RP submits that upon the following objections the CoC decided not to consider the revised offer of Ultra Tech. The objections as given in his reply affidavit read as follows:

(i) That the revised offer was sent by way of merely an e-mail;

(ii) That the offer was not made in accordance with the process documents and to consider it would be a deviation of the process laid down in the process document by the CoC.

(iii) That the offer was beyond the time stipulated under the IBC

54. None of the above objections are substantive objections which can be raised in a case of this nature where the RP as well as CoC is duty bound to ensure maximization of value with in the time frame prescribed by the code. Such an object in finding out a bidder who can offer maximum bid amount so as to safeguard the interest of all stakeholders of the corporate debtor is lacking in the case in hand from the side of the RP as well as from the side of the CoC. The first objection for non consideration of revised offer is because it was offered through an e-mail. Mode of submission of revised offer by way of e-mail not at all prohibited by the Code, Regulations and the Rules. According to the Ld. Counsel for RPPL the email offer is made not under section 25(2) (h) of the Code. S.25(2) (h) provide provision for inviting prospective lenders, investors, and any other persons to put forward resolution plan. Submission of revised offer is in continuation of the resolution plan already submitted and accepted by the RP. Admittedly, as per invitation called for the Ultra Tech submitted revised resolution plan on 12.02.2018 that is with in time. So can a revised offer subsequent to submission of a resolution plan amount to violation of section 25(2)(h)? Our answer is not. It is significant to note here that H1 applicant revised its offer on 07.03.2018 and submitted a revised plan to RP and it was readily accepted by him. The answer offered on behalf of RP is that evaluation matrix and process documents permit him to have negotiation only with H1 applicant.

55. Ld. Sr. Counsel for the RP submits that RP's hand is locked from doing anything as per the process document and hence he cannot take a decision for reconsideration of an offer placed before him by an applicant who was not ranked as first. We are afraid the very independence in the conduct of RP is to be ensured is thrown to air by restricting the RP from taking an independent decision with out interference from any corner and from the CoC. Of course, his decision if any can be put to CoC for approval. Can he not to take a decision of his own before he decide a question which is liable to be answered

by him alone? If he can only identify the bidders on the advice of the CoC why he appointed advisors of his own? No valuable answers forthcoming. All answers based on process document which according to us not legally binding on RP. Sub. Reg.5 of Sh.1 of IBBI(Insolvency Professionals) Regulations,2016 mandate independence and impartiality. It says "***an insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences"***. So, no doubt he is to be independent. Whenever an offer comes which would be in the interest of all stakeholders then no doubt he is duty bound to accept the offer and to be placed before the CoC or he would have convened a meeting for consideration of revised offer because on 8.03.2018 CIRP period never ends and there is sufficient time left to convene a special meeting of CoC. It is also significant to note here that EXIM bank demands for convening a meeting for taking a decision about the revised offer of UltraTech. In the light of the said discussion, we have no hesitation in holding that non consideration of revised offer by the RP because it was sent by e-mail violate the object of the Code and absence of taking an independent decision in this regard by RP is in violation of Regulations.

56. Coming to the second objection in not considering the revised offer of the applicant that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC does not inspire our confidence. The resolution plan by the applicant has been submitted in time and admittedly all the resolution applicants were given liberty to rectify certain errors in order to come within the purview of the provisions of the Code and Regulations. It is thereafter the CoC considered all the resolution plans of the resolution applicants at a meeting held on 23rd February, 2018 and in that meeting, truly, all the resolution applicants were called for discussion. But admittedly, no

decision regarding the acceptance or non acceptance of any of the resolution applications plan was considered. The selection of the resolution applicant was done in the meeting held on 27.02.2018. It is in that meeting, the CoC admittedly declared the Rajputana Properties Private Lt d's (RPPL) application as the H1 plan and decided not to consider the UltraTech resolution plan and intimated the resolution applicant that its resolution plan is not H1 plan. It is after receipt of the email from the RP the applicant submitted the revised offer on 08.03.18 by way of an e-mail. Being aggrieved in not considering the revised offer of the UltraTech, it filed the CA(IB) 227/KB/18 on 14.03.2018 requesting this Adjudicating Authority to issue directions to the CoC to consider the revised offer of the resolution applicant.

57. Pending consideration of this CA, the CoC convened its final meeting on the day the Ultra Tech moved the application by giving advance notice to the RP and to the CoC but without taking any decisions as to consider or not to consider the revised offer of the Ultra Tech put the H1 plan was put to vote and passed by a majority vote as required under the Code. It cannot be ruled out that the attempt of the CoC in approving a disputed plan pending for consideration before an adjudicating authority is in disregard to the outcome of the decision if any to be taken in the said application. Especially when CIRP duration as on 14.03.2018 never expires. No doubt, the CoC in a hurry took the decision for the reason that there was no stay passed by this Bench in the above CA. The revised offer has been declined by the Resolution Professional as well as the CoC in the meeting held on 14.03.2018 only for the reason of committee of creditors self made Process Documents allegedly restrained them to have negotiations with any other resolution applicant other than H1 applicant. No decision as such above referred seems to have taken by the CoC in respect of declining the revised offer of Ultra Tech. However the RP did not take any independent decisions as to reject its request. On the other hand he send an email in reply on 13.03.2018 to the e-mail dated 08.03.2018

of Ultra Tech that ***when its plan would takes for consideration he will be called for***. Even thereafter Ultra Tech did not receive any invitation hence it filed the CA. It is in the said background let us see any merit in the second objection submitted by the ld. Counsel for the RP.

58. The reason that the process document does not permit the resolution professional and the CoC in considering the revised offer of the applicant have no legal force at all. Even if the process document restricts CoC and the Resolution Professional which has been made by the CoC for their own convenience and for guidelines to the resolution applicant as well as to the Resolution Professional that is not a ground to deny a participant right in participating in the bidding process. Even if it is a document give rise certain guidelines it may not supersedes the provisions of the code and regulations. The process document referred to us even if considered as a valid document it does not entirely restrict the CoC from reconsidering a resolution plan which according to it not ranked first. There is no provisions in the **Process Document** or in the clarification matrix that its makers cannot amend it if necessity arises.

59. The **clarification matrix** is fixed based on the terms in the process documents. The ***PREFACE*** of the Clarifications to Resolution Applicants read as follows:-

> 1. *This document is being issued to provide certain clarifications on the illustrative list of parameters set out in Annexure 1 to the Process Document dated December 20,2017 ("Process Document") that may be considered for the purpose of evaluation of the Compliant Resolution Plan submitted by the Resolution Application ("RA"). Please note that the clarifications mentioned herein are not meant to be exhaustive. The CoC reserves the right, in its sole discretion, to provide further clarifications or delete or modify the same*.

2. *All terms of the Process Document shall continue to apply and be effective.*

60. Thus, it provides a clause to the effect that the CoC can delete or modify the clarification. So if it wish to consider a revised offer of an applicant which may exceeds the offer already under consideration CoC can amend the process document so as to meet the purpose of the resolution process. Nothing forthcoming in the case in hand that any of the private lenders and few public sector lenders wish to consider other than the plan of RPPL even if they are satisfied that some of the public sector lenders offered with haircut exceeding 50%. This approach create a shadow of doubt over the hasty decision of the CoC where EARC and IDBI a privet sector lender having supremacy over the CoC with vote share of 43.12 and 25.70 respectively. Serious allegations were levelled from the side of the applicants against the supremacy of EARC and IDBI over CoC. So also counter allegations also were raised as against Ultra Tech that it is playing unfair practice so as to take over a company with the backing of Binani Industries which is the holding company of the corporate debtor. Both allegations being not found in the respective pleading we reserve our observation about the allegations.

61. So also Process Document not at all prohibit the CoC from amending the clause. **Clause 2.1.3.reads** as follows:-

i) Clause 2.1.3 of the process document provides that "*the COC reserves the right to amend or modify the criteria of the evaluation of the Resolution Plan/ Financial Proposal submitted by the Resolution Applicants prior to the Resolution Plan Submission Date*."

62. Truly, the said clause permit its maker to amend prior to the submission of resolution plan. It is good to have a look at certain other clauses of Process Document. Clause 1.6.1 provides that the ***CoC have right to accept or reject in or all plans prior to approval of the same by the Adjudicating Authority.*** A reading of clause 1.6.1 it cannot be hold that the CoC's hand is fettered so

as to avoid a resolution applicants plan from revising its offers only because it was ranked below H1 applicant. It can accept or reject any plan at any time before the approval of the plan submitted to the adjudicating authority. It is also good to read clause 1.6.2(a) in the process document. It reads as follows:

> 1.6.2(a):*On receipt of a Resolution Plan submitted by a Resolution Applicant, the Resolution Professional shall review the same for compliance under the IB Code in consultation with his legal advisors and have deliberations with the CoC in relation to the same. Where Resolution Applicant(s) are found to have submitted a Resolution Plan which is not a Compliant Resolution Plan, that is, one which does not meet the provisions of the IB Code or the CIRP Regulations, the Resolution Professional may request the Resolution Applicant(s) to remedy the deficiencies in the Resolution Plan submitted, and submit a Revised Resolution Plan. The Revised Resolution Plan shall be reviewed by the Resolution Professional in consultation with his advisors for ensuring compliance with the IB Code and the aforesaid process would be repeated. If any Revised Resolution Plan is found to be a Compliant Resolution Plan, by the Resolution Professional, the same shall be submitted to the CoC for its consideration.*

63. On a careful reading of the above-said clauses, what we under stood is that all the resolution plans which meets the requirements of section 30(2) of the Code shall be placed before the CoC and if he is satisfied that any plan requires revision he can demand revision and can place before the CoC. The Resolution Professional can review the resolution plan under I.B.Code in consultation with his legal advisors and can have deliberations with the CoC in relation to the same and that process, if it is necessary, can be repeated even. And the revised resolution plan is found to be compliant resolution plan, the

same shall be submitted to the CoC for its consideration. ***To apply this clause, there is no time limit prescribed.***

64. Similarly, as per Clause 1.13.10 the CoC who is the maker of the process document reserve their discretion so as to extend the timelines for submission of resolution plan for all applicants and such extension in timeline shall be communicated to all Resolution applicants by placing an appropriate extension notice in the data room and publishing the notice of extension on the website of the company. So a reading of process document as a whole it appears to us that second objection for non consideration of the revised offer of the UltraTech is bad and not sustainable under law. At this juncture, the Ld. Counsel appearing for the applicant cited an order of ***Hon'ble NCLT, Principal Bench, New Delhi in CA(IB) No.152/PB/ 2018 in CP(IB) 202/PB/2017 (Punjab National Bank -vs- Bhushan Steel & Powers Ltd.)*** for strengthening his argument that a guideline framed by the CoC cannot impose restriction upon a resolution applicant by denying its legitimate right to participate in the bidding process and revise its offer till the bidding process is complete. Such a right of an investor cannot be restricted by way of framing guidelines by a CoC like the guideline in the case in hand argued by the Ld Counsel for the applicant. The above cited order was passed by the Hon'ble NCLT, PB in a case fairly similar to this case. The Hon'ble Principal Bench has held that:

> "***The Resolution Plan with Liberty House shall not be rejected on the ground of delay emanating from process document or any other document entirely circulated by the Resolution Professional or the CoC. The rejection shall be on substantive ground as against flimsy work."***

65. This proposition is squarely applicable in the case in hand. One among the three objections of the RP is that consideration of the revised proposal would be a deviation of the process document. Such a decision is not at all

legally sustainable as held in the above cited decision. The said ground for non consideration is not a substantive ground but is a flimsy ground. Much argued by the Ld. Sr. Counsel for the H1 bidder and CoC that process document deviation by the CoC may call for litigation and to avoid the possibility of complaint and for upholding its transparency the process document was framed. We do not find any merit in the said submission upon the reason already led in. In view of the above said discussion we also hold that the second objection for non consideration of revised offer is devoid of any merit.

66. The third objection is that the revised offer was beyond the time as stipulated by the IBC. It appears to us that this objection is also devoid of any merits. As referred to above, the CIR process when the applicant submitted revised offer, never expired so also the Resolution Plan originally submitted by the applicant was in time. No provision in the Code or Regulation restrict the Resolution Professional or the CoC from accepting the revised offer in addition to the offer already offered by a resolution applicant. Admittedly the revised offer has been placed before the Resolution Professional as well as to the members of the Committee of Creditors on 8.3.2018 that is well in advance before the approval of H1 Pan by the CoC. After 8.3.2018 the only meeting convened was on 14.03.2018. If the Resolution Professional as well as the CoC in its fairness wish to see whether that offer can be considered for the better interest of the stakeholders as well as to the Corporate Debtor, necessarily they would have considered the offer. Only three financial creditors among 21 financial creditors made a request to the CoC to have a reconsideration of the offer made by Ultratech Cement Limited. As stated earlier, the request was unheard, rather ignored raising the above said three flimsy reasons highlighted on the side of the Resolution Professional. It has come on evidence that the extended period of CIR process would expire only on 21.04.2018. Enough days are ahead to the Resolution Professional as well

as to the CoC to have a consideration of the revised offer of the Ultratech Cement Limited. In the above said peculiar circumstance it can be inferred that the time-line fixed by the CoC is for a deliberate exclusion of other competent resolution applicants other than H1 applicant. The third objection is also found not a substantive objection and therefore we come to a conclusion that none of the objections raised on the side of RP, RPPL and CoC are sustainable under law.

67. This is an unfortunate case in which extensive number of interim applications were filed by various stakeholders, director of the suspended board of directors and one of the resolution applicant. Why like interruptions comes? What legal standard should be followed by an insolvency professional is laid down in the Code and Regulations. A resolution professional must follow it. With out following it, a guideline prescribed on the basis of CVC and IBA is followed by the RP in disregards to the provisions of the code and Regulations. None of these applications could have filed by them provided RP and the CoC taken care in following the process as mandated under the Code. The RP forget his fiduciary duty owed by the lenders to stakeholders without any discrimination. His name as an RP is proposed by the applicant in the CP who is a lender. Can he is loyal to the lenders because of his name was proposed by a lender? Here in this case the RP not taken any independent decision of his own before placing the plans before the CoC. It cannot be ruled out that there is undue influence over him by the lenders who has larger voting share.

68. The very object of the Code is on revival and rehabilitation of the Corporate Debtor who is sinking for reason of non-payment of dues in time. The object of the Code is not to liquidate the business of the Corporate Debtor. What we expected from the Resolution Professional and also from CoC is fair and transparent process in finding out a bidder who can satisfy all the claims of the lenders and operational creditors in a transparent manner with out giving

a chance to interrupt the process by affected parties. The CoC is consists of financial creditors. When majority of its members like EARC and IDBI get benefit of clearance of their entire debt with out hair cut they are prompted to neglect minority unsecured financial creditors whose claim is accepted with hair cut exceeding 50% and larger number of operational creditors would get nothing. RP or nobody else bargained for them. Though one of the representatives of the operational creditors is entitled to attend in the meeting of CoC that right was also denied for want of quantification of the claim of 3600 and odd number of claimant in the case in hand before the approval of plan by CoC. Some of the operational creditors claims verification not yet finished even if RP is assisted by larger number of representatives under him. Who should take care of their claim?.

69. Ld. Sr. Counsel for the RP submits that RP is concerned to see that section 30(2) of the code is complied and if he is satisfied that plan shall place before the CoC and question of satisfaction of all lenders creditors claims are not the concern of the RP but the concern of the CoC. According to him RP has to be blind in regards proposal of offers made by the resolution applicant. We are afraid of hearing such a submission from a Ld.Sr.Counsel of this Bar who is arguing for and on behalf of RP. Is it meant that the RP has no liability or responsibility in taking decision of his own? Can he permit creditors to suffer especially when an offer brought to his notice to satisfy all stake holders from a resolution applicant who is otherwise qualified and competent to take over the stressed assets of the corporate debtor who showed its interest in the corporate debtor company and showed willingness to clear all dues of all lenders and creditors with out a haircut?. In a situation like the situation in the case in hand can he be blind?. The very competency of the RP itself is challenged from his own side. It appears to us that the said submission is devoid of any merit.

70. So, whenever a resolution applicant's plan is under consideration of CoC and that plan is not at all placed before the Adjudicating Authority for approval and if another resolution applicant comes forward making an offer before the CIRP duration expires, that it will satisfy all the stakeholders of the Corporate Debtor, then there is nothing in the Code or Regulations to prevent the CoC from considering a revised offer of another applicant. It is significant to note that on 14.03.2018 when the Ultra Techs application came up for consideration before this Adjudicating Authority the CoC passed the disputed resolution plan disregards to the outcome of the application.

71. In this regard, it is also good to look into the minutes of the CoC in the meeting held on 14.03.2018. Some of the financial creditors, namely, EXIM Bank, Canara Bank as well as SBI Hong Kong requested the CoC to consider the revised offer of Ultra Tech received by all of its members of the CoC by email dated 08.03.2018. Though their request has been discussed in detail, no decision regarding the rejection or reconsideration of the application of the Resolution Applicant, Ultra Tech had been taken out. The Canara Bank stated before the CoC that if money is coming high, one must try. The representative of the Canara Bank further stated that process is not that important that outcome has been forgotten. If there is a value addition by INR 700 crores, (vide revised offer the Ultra Tech offered INR 700 core in addition to the offer already made in its plan and that offer was subsequently revised to INR.1021.70Crore)definitely a thought should be made over it. EXIM Bank representative stated in the meeting that it is not necessary to be bound by the process document. There is world beyond that. He further stated that if we inform H1 that their plan would be considered without an increase, then there is no need to revise the offer. Similarly, EXIM Bank reiterated that in the correct spirit of IBC maximum recovery is to be made when ***the asset has the potential to generate that and the bidders have demonstrated their willingness*** to do that just because someone is getting their old dues. ***He***

cannot deprive any other lenders of their dues. ***That is the spirit in which everyone is expected to function.*** Despite this deliberation as suggested by vote share of aggregate of 88.9%, the Resolution Professional was forced to take a decision to put the H1 applicant Resolution Plan to vote. SBI, SBI Bahrain, SBI Hong Kong requested the Chair not to put the plan to vote. The remaining financial creditors though opposed the putting H1 plan alone for voting when the voting was happened and it was put to vote, SBI Hong Kong voted against the Resolution Plan. SBI Bahrain and EXIM Bank voted in favour the Resolution Plan under protest.

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72. In the light of the above said discussion, we are in considered opinion that the revised offer of the Ultra tech is to be considered by the CoC and non consideration of the revised offer is found not legally sustainable and is against objective of maximization of value as provide in the Code and is in violation of the provisions of the Code and Regulations as discussed above. This point is answered accordingly.

Point No.iii

73. SBI Hong Kong filed CA(IB) No.223/KB/18 alleging inequality in considering the claim of the applicants at par with the approval of claim of financial credits. The applicant alleged that 10% of the verified claim by giving a hair cut of 90% of the regular valid claim of the applicant is highly illegal and challenged the restructuring of the debt due to all stake holders as per the approved plan. This application was filed on 14.03.2018, immediately before the approval of the plan.

74. Similarly, EXIM bank filed CA(IB) No.249/KB/18 alleging discrimination among the financial creditors. According to the Ld. Counsel for the EXIM Bank the Resolution Plan proposes only 72.59% of its verified claim and arbitrarily gave a hair cut of 27.41% of the legal and verified claim of the applicant. The applicant claims that the liquidation value payable to unsecured financial

creditors is nil and upon subrogation would not be sufficient to recover amounts paid to the applicant. The Resolution applicant proposed to make 52% payment in the initial plan and 72.5% payment in the later plan. The applicant further contends that there is no concrete basis for such discrimination against the applicant at par with other financial creditors and the Resolution Plan is contrary to the scheme of the I&B Code 2016. According to the Ld. Counsel the practice of allotment of claim raised serious doubts about the process and, therefore, the applicant filed this application seeking directions. According to Ld. Counsel the Ultratech Cement Limited also given revised proposal which may satisfy all the stakeholders but the CoC did not consider its request to negotiate with the Ultra Tech and since if it wont vote it would be an economical loss to the Bank and hence opted for vote fearing descenting creditors would get nil as per the Code.

75. Both Banks are corporate guarantees beneficiaries. Admittedly, Corporate Debtor not invoked the guarantees held by SBI and IDBI. According to the Ld. Counsel, Mr. P. V. Dinesh for SBI HongKong and Ld. Counsel Mr. Krishnaraj Thaker for EXIM Bank, IDBI is similar to SBI Hong Kong but the plan proposes 100% of its verified claim and therefore it is discriminatory and considered equals as unequal which cannot be permissible under the Code. It is significant to note here an order of this Bench dated 17.11.2017 passed in CA(IB) No.505/KB/18 filed by RP for clarification in respect of corporate guarantees issued by the corporate debtor but not invoked. It read as follows:-

> "***In view of the judgement delivered on 27/10/2017 by the Hon'ble Principal Bench, National Company Law Tribunal, New Delhi in (IB)-102(PB)/2017 (Axis Bank Limited & Anr. -Versus- Edu Smart Services Private Limited)*** wherein it has been held that *in order to qualify as a 'debt' firstly provisions of the corporate guarantee must be satisfied by raising a demand which is expressed by invoking the corporate guarantee and the date of its invocation has it be earlier than the insolvency commencement date. In the present case, the CIRP*

commenced on 27.06.2017 and the corporate guarantee was admittedly invoked on 21.07.2017, which is much after the insolvency commencement date. Therefore, we find that the Resolution Professional would not be in a position to verify the claim as it will not be reflected in the Books of Accounts which are supposed to be updated as on 27/06/2017. In the absence of any record to verify the claim, it will be impossible for the Resolution Professional to accept any such claim which has become a debt after 27.06.2017.

Keeping in view of the decision taken by the Principal Bench, NCLT, New Delhi it is clear that corporate guarantee, which has not been invoked before commencement of insolvency process, cannot be considered as debt if it was invoked after the commencement of insolvency process and "moratorium" was issued. Therefore, RP is to be guided by the decision of the Hon'ble Principal Bench, NCLT, New Delhi."

76. This order was challenged by the IDBI before the Hon'ble NCLAT but later it was withdrawn. Vide order dated 08.03.2018 Hon'ble **NCLAT in CA(AT)(ins) No.313 of 2017** allowed the appellant to withdraw the appeal but ***without any liberty to challenge the same very impugned order.*** The said withdrawal order was on 08.03.2018. At this juncture, Ld. Counsel for the EXIM Bank cited a decision of Hon'ble Supreme Court in **(1992) 3 SCC; (1992) 3 SUPREME COURT CASES 1(Shree Chamundi Mopeds Ltd.vs. Church of South India Trust Association CSI Cinod Secretariat, Madras)** for highlighting an argument that when an appeal challenging an order is withdrawn recoding that right of appellant in raising the very same challenge against the impugned order is barred, its effect is restoration of the order under challenge and this Adjudicating Authority's order become in force as if there is no challenge. It is good to read the following observation in the above cited decision. It read as follows:-

"*While considering the effect of an interim order staying the operation of the order under-challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence".*

77. Ld Sr. Counsel for R.P. at this juncture referred to the interim order of Hon'ble NCLAT in the above referred appeal. It reads as follows: "I***n the meantime, Interim Resolution Professional will consider the claim of the appellant uninfluenced by the order, if any, passed by the Adjudicating Authority Principal Bench New Delhi Which shall be subject to the decision of the appeal".*** He submits that in view of the interim order the RP has decided to include the claim of IDBI and moved an application for withdraw after allowing the claim and therefore there is no violation of the order of this Bench. Though literately there is no violation it appears to us that under the guise of an interim order in the appeal the RP hurried in allowing the claim of IDBI in full and the H1 applicant managed to submit final revised plan to RP on 07.03.2018. This plan proposes to satisfy IDBI claim despite non invoking corporate guarantee. Thus, all the above referred banks except EXIM bank are in similar status. The corporate debtor though hold the corporate guarantee never invoked the same. If it so how the RP permit the resolution applicant to include the entire claim of IDBI to the tune of Rs.1567.45 crores in restructuring the debt when others in similar position not granted relief with out haircut? According to the Ld. Counsel for the RP such enhancement was allowed based on negotiation of resolution applicant with lenders in the lenders forum meeting held on 07.03.2018 and RP has no role in the offer made in the

resolution plan. Thus it has come out in evidence that financial debts owed to unsecured financial creditors holding corporate guarantees issued by the corporate debtors treated differently with out assigning valid reasons. On screening the resolution plan it is understood that entire claim of IDBI to the tune of INR 1567.40 Crores was verified and admitted by the RP despite UN-invoked guarantee issued by the corporate debtor in favour of IDBI and resolution applicant allowed the entire claim on a **condition that IDBI gave consents to the resolution plan of RPPL**. It leads doubts in regards undue influence of majority lenders who has majority of votes share requiring to cast vote so as to have minimum vote share to pass a resolution as per section 30(4) of the Code. Any resolution applicant who can satisfy the claim of EARC and IDBI can get an approval of its plan by a majority of votes share is a fact brought to our notice and no consideration of very similar financial creditors at par with IDBI add strength to the submission of the Ld. Counsel for the above referred Banks that practice of allotment of claim is not based on any concrete basis or norms. So no doubt it amount to discrimination against the above refereed two banks. In the above said view we find some force in the argument advanced on the side of the Banks and satisfied that the plan under dispute requires modification. This point is answered accordingly.

Point No. V

78. By filing CA(IB) No. 248/KB/18, eight(8) operational creditors jointly challenged the plan alleging that their claim was totally ignored by the RP and no attempt was made from the side of the RP to provide proportionate benefit to the operational creditors. According to the Ld. Counsel, Mr. Jishnu Chowdhury restructuring of the debt as per the plan only passes the benefit to the financial creditors and therefore no equitable consideration in respect of all the claims of all the stakeholders and therefore the plan is liable to be rejected. Another five Operational Creditors jointly filed CA(IB) No.343/KB/2018 and eight Operational Creditors jointly filed CA (IB) No.344/KB/2018 raising very

same allegations. The Operational Creditors who filed CA(IB) No.248/KB/2018 alleged that their claims not at all fully admitted by the Resolution Professional for the reason that the verification of claim of Operational Creditors is pending with him. According to the Ld. Counsel appearing for the Operational Creditors, the inaction on the side of the Resolution Professional in settling the claim to be verified by the Operational Creditor before the submission of Resolution Plan to the Committee of Creditors not at all adhered to. The Ld. Counsel also submits that none of the representatives of the Operational Creditors were permitted to attend any of the meeting of Committee of Creditors so as to have an effective representation of the claim of the Operational Creditors. Section 24 (3) (c) of the Code gives a right to one representative of Operational Creditor to attend the meeting of Committee of Creditors without having any rights to votes. As per Section 24(3)(c), in order to claim representation by representative of the group of Operational Creditors, the aggregate dues due to the Operational Creditors is not less than 10% of the debt. So that in order to see that any one of the representative of Operational Creditors can be permitted to attend the CoC meeting necessarily the Resolution Professional to have verified the claims of all the Operational Creditors so as to quantify their admissible claim of the Operational Creditors. However, in the case in hand, the Ld. Counsel appearing for the Operational Creditors brought to our notice a reply addressed to the Ld. Counsel appearing for the Operational Creditors dated 23rd April 2018 ascertaining that the verification of the claim was an ongoing process and he will consider its claim as and when information documents were received. The Ld. Counsel for the Operational Creditor would submit that none of the claims of claimants referred to in the in the application were in receipt of any of the demands from the Resolution Professional so as to submit proof of any claim. According to him, proof of claim already submitted to the Resolution Professional and, therefore, the contention on behalf of the Resolution Professional has no force at all. According to Ld. Sr. Counsel for the R.P., all the admitted claims of

Operational Creditors were considered by the Resolution Professional. However, on a reference to the resolution plan the clarifications submitted on the side of the Resolution Professional seems to be not true. However, the Ld. Sr. Counsel appearing for the RPPL, the resolution applicant submits that the resolution applicant has been furnished data regarding admitted verified amount of 2,980 Operational Creditors and that 2941 operational creditors whose dues have been verified by the Resolution Professional not exceeds Rupees One Crore is offered 100% payment and those Operational Creditors' dues varied from Rs.1 Crores to Rs.5 Crores offered maximum 40% of verified amount of Rs.1 Crore and operational creditors, whose dues exceeded Rs.5 Crores and less than Rs.10 Crores maximum 25% of verified amount of Rs.2 crores are offered and that those dues exceeding an amount of more than Rs.10 crore, maximum 5% of value of Rs.2.5 crores are proposed. As per the plan, the total verified amounts of Operational Creditors not exceeding Rs.1 Crore comes to 2,941 operational creditors. Those dues is less than Rs.5 crores and higher than Rs.1 Crore is only 24 Operational Creditors and there is only 5 Operational Creditors whose verified claim is in excess of Rs.5 crore but less than Rs.10 crores and there is only 10 Operational Creditors whose claim exceeds Rs.10 crores. The total number of Operational Creditors found verified come to 2,980 and the total verified amount come to Rs.429 Crores. Admittedly, the total number of Operational Creditors exceeds 3,600. According to the Ld. Counsel for the RP the total operational creditors including workmen, employees and statutory creditors comes to 4311. Admittedly, the process of verification is going on till date of conclusion of the argument in this case that is till 23.04.2018. Therefore, the contention on the side of the Ld. Counsel that their interests as claimed by them through the claim submitted to the Resolution Professional not safeguarded by the Resolution Professional is found to have some force. According to the Ld. Counsel for the RP approval of resolution plan is not the mandate of the RP and that he is bound to submit such resolution plan which would meets the

requirements of section 30(2) of the code and after its approval by the CoC he has to submit it before the adjudicating authority under section 30(6) of the code and he cannot ask for any modification after its approval. The said argument appears to us not at all inspire our confidence in the manner the RP considered the applicant request for verification and admission of their claims. It is contented in the reply filed by the RP that the applicant claims were taken note of by him and submitted to the CoC. But in the meeting held on 14.03.2018 we failed to see any serious discussions has been deliberated in respect of the operational creditors claims. The duty cast upon the RP is before the submission of plan before the CoC. Before the submission of a plan it is his bounden duty to see all the requirements of section 30(2) of the Code meets the plan. Section 30(2) (b) of the Code "*provides for the repayments of debts of operational creditors in such manner as may be* ***specified*** *by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53".*

79. The above provision must be read along with Reg. 37(1) and 38(1) (b) of IBBI(IRP for Corporate Persons) Regulations,2016. Reg. 37(1)(f) provides "*reduction in the amount payable to the creditors"*. 38(1)(b) says "*liquidation value due to operational creditors and provide for such payments in priority to any financial creditor which shall in any event be made before the expiry of 30 days after the approval of a resolution plan by the Adjudicating Authority".*

80. Thus RP is bound to see that all these requirements meets by a resolution applicant before the plan is placed before the CoC. It is good to read Reg. 39(2). it read as follows:

> (2) The resolution professional shall present all resolution plans that meet the requirements of the code and these Regulations to the committee for its consideration.

81. A reading of above referred provision shows that a resolution plan can be accepted even if there is reduction in the amount payable to the creditors. It is significant to note that the said reduction is in general applicable to all class of creditors. So reduction in regarding restructuring of debt is applicable to financial creditors, unsecured creditors and operational creditors too. There is no distinction as per the code or Regulations. No doubt no financial creditor takes a hair cut on his entitlement to realise the amount he claimed. Here in this case one unsecured creditors was given a haircut up to 90% another given 27% haircut and one another given no haircut. In the case of operational creditors whose claims not go beyond one crore is offered no haircut, operational creditors whose dues vary form 1 crore to 5 crore given a haircut of 40% or 1 crore which ever is higher. Similarly operational creditors dues very from 5 Crore to 10 crore 25% of 2 crore and if it exceeds 10 crore 5% of 2.5 Crore. The above said factors only adds strength to the contentions of creditors that their claims not considered strictly by the RP in accordance with the Code and Regulations. So the contention that the plan submitted for approval does not contravene any of the provisions of the law for the time being in force is found not true. Who will take care of operational creditors claim. Is it not they are essential part of a growing company. With out them how can they do the manufacturing process. It may be the reason Ultra Tech offered satisfaction of their claims without a hair-cut. Is that offer is malafide?. An argument was advanced on the side of RPPL that Ultra Tech intention is malafide. We do not find any reason to doubts its bonafide. In the interest of healthy trade competition why not its claim is considered?. No valid answer other than stressing on the timeline as specified in the Process Document and evaluation matrix offered. In view of the above said discussion we are unable to hold that there is no discrimination among the creditors who are equal and reduction offered to the operational creditors too is not in accordance with the regulations and with in the objective of the Code. This point is answered accordingly.

82. Before the conclusion of the argument Dy. Commissioner of Income Tax also rushed before us and its Ld. Counsel Mr. Shiv Chand Prasad submits that the plan never provide any provision for priority of payment due to government including Income tax authority and pressed for rejection of the plan submitted for the approval. A copy of the claim submitted to the RP also brought to our notice. It indicates that total outstanding claim of the Dy. Commissioner of Income tax is INR 33,37,18,692.00. ld. Sr. Counsel for the RP by referring to the resolution plan submits that out of the said total claim undisputed amount of Rs. 240635112/- is admitted by the RP and that amount is included in the plan for clearance. According to the Ld. Sr. Counsel for the RP the remaining amount is disputed and an appeal is pending before the appellate authority and it is why the entire claim is not included. So it appears to us that statutory dues due to the Dy. Commissioner of Income Tax seen taken care of by RP.

83. To sum up, we find the following proved factors:- The representatives of suspended board of directors were not allowed to attend some of the meetings where issues regarding the corporate debtor was discussed. Though as per the directions from NCALT and this Bench directors were permitted to attend the meeting under section 24(3)of the code, they were not permitted to attend the meeting till the meeting is completed. RP also violated section 21(3) of the code. In regards resolution cost it appears to us that Reg.25 of Sh.1 of IBBI(Insolvency Professionals)Regulations,2016 is violated. So also Reg.27 is not strictly followed. No effort seems to have taken by the RP so as to ensure that the resolution costs are not unreasonable. Non consideration of revised offer is found with out assigning substantive reasons and refusal to consider it is found on flimsy grounds on the strength of Process Documents and time line fixed in evaluation criteria. The entire decisions of RP as well as CoC in respect of identifying one resolution plan from among six plans and denying opportunity to have negotiation so as to raise the bid amount by the willing

bidders other than H1 bidder is found vitiated that they have acted against the objective of the code and against the interest of various stakeholders of the corporate debtor and also acted unfairly, arbitrarily and against the interest of the competing bidders including the applicant Ultra Tech. Non consideration of uniform basis for giving reduction of the debt due to various creditors including unsecured creditors and operational creditors in the plan submitted for approval is amount to discrimination. Upon the above said factors we come to a legitimate conclusion that the process of selection and identification of one plan alone when there is other competing bidders is evidently available and who showed willingness to offer full satisfaction of the claim of all stakeholders claim denying opportunity to them from participating the bidding process even if CIRP period of 270 days ever expired is found filed with irregularity and in violation of the objective of the Code and Regulations.

84. From the above said discussions, it appears to us that when we are taking judicial notice of denial of a better revival of the corporate debtor company on flimsy grounds, can we be blind? We may not blind in a case of this nature. It is good to refer a citation of Hon'ble Supreme Court in **Miheer H. Maftalal Vs. Maftlal Industries Ltd.(Manu/SC/2143/1996)** referred to us from the side of operational creditors. To understand the proposition it is good to read last part of para 28 at page 11. It reads as follows:

> "*No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholder or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua*

them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its sanction".

85. The above said proposition is squirely applicable in the case in hand. Approval of the plan of RPPL doesn't satisfy larger claim of operational creditors and not satisfy some of the unsecured financial creditors claim. On the other hand the revised offer of Ultra Tech if approved by the CoC it would satisfy the claim of all the stakeholders. For the said reason also we are not bound to approve a resolution plan when we are satisfied upon relevant material regarding availability of a better resolution if RP is directed to have reconsideration of both plans under dispute. Interest of justice no doubt demand reconsideration of the resolution plans. For the afore said view we are inclined to allow the applications CA(IB)No. 233/KB/2018 and CA(IB)No.227/KB/2018 along with CA(IB)No.210/KB/2018 by excluding the duration of litigation from the date of filing of CA(IB) No. 227/KB/2018 till date of today. CIRP period of 270 days expired on 21.04.2018. In **Quantum Limited V. Indus Finance Corporation Limited, CA(AT) (Insolvency) No.35/2015** dated 20.02.2018 the Hon'ble NCLAT by setting aside the order of Mumbai Bench of NCLT has held that "***For the aforesaid reasons, we set aside the impugned order dated 18th December, 2017 and extend the period of resolution process for another 90 days to be counted from today. The period between 181 day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the Adjudicating Authority will proceed in accordance with Law."*** Following the proposition, as held in the above cited decision, the Hon'ble NCLT Principal Bench in **CA(IB) No.152 (PB)/2018 in C.P.(IB) 202(PB)/2017 (Punjab National Bank Vs. Bhushan Power & Steel Limited)** allowed the above application excluding the period of duration in disposing the said IA observing the following :- "***It has come on record that the period of 270 days for CIR process is to expire on 22.04.2018. The present application by Liberty House was filed on 22.02.2018 and it is being decided on***

today (23rd April, 2018). The period from 22.02.2018 till date would thus stand excluded from the period of 270 days and the process may now be concluded by 23.06.2018." in view of the above said proposition it appears to us that the duration for disposal of the above said CA filed by Ultra Tech is to be excluded from the duration of CIRP of 270 days fixed in the CP in hand. Accordingly, we exclude the period from 08.03.2018 till today(03.05.2018) and therefore the CIR process is to be concluded on or before 24.06.2018. Upon the above said observation we are inclined to pass the following orders:-

86. Before passing orders and parting with we would like to high light certain factors we have taken judicial notice while this case was heard at length. The preamble of the Code ensure a speedy disposal of a resolution in a time bound manner for maximisation of value of assets of a corporate debtor like the debtor in the case in hand. So also it ensure balancing the interest of all the stakeholders and order of priority of payment of Government dues. The adjudicating Authority is facing too much interruptions from various stakeholders. Till date we never come across any frivolous applications. All comes with some genuine grievance. All challenges the independence of the resolution professional and lack of transparency, competency and arbitrariness in the matter of resolution process. In the case in hand 12 applicants come forward challenging the process only for not following the process mandated under the Code by the resolution professional. The arbitrary way of dealing with the cases has always led to interruptions and also causes delay in disposal of like case. Here, in this case the resolution professional is a chartered account by profession. However he failed to take business decisions so as to run the corporate debtor by his own. He managed to run the company by appointing about 22 representative who are from his own partnership. Truly running an insolvent company pending exploration of a resolution process by him alone is not an easy task. A resolution professional like the RP in a case of this nature need some basic training in regards

handling the resolution independently, efficiently so as to tackle with the multiple question may arises for consideration form different stakeholders in the courses of resolution. Whenever a question arise even if answerable by the RP independently or with advice from his advisors, he comes to Adjudicating Authority for having determination so that he is not exercising his own effort to see that all the questions posed to him during the process is answered justifiably. He shift that burden too to the Adjudicating Authority. So also in a case of this nature nobody taking care of operational creditors claim. At least minimum amount as required under the Code is not offered to those creditors in the plan of revival. But because of the supremacy of financial creditors who has control over the process, their claims neglected or rather ignored. It is time to recognise their voice also in the Committee of Creditors. While there was a need for reforms the Regulations to ensure that it is not misused or misinterpreted, there cannot be any question on the fact that independence and competency of a resolution professional is essential for preserving the object of the code in a transparent manner giving no room to have interruption from any corner. Hopefully, we believe that IBBI take note of all the above observations and to do the needful review of the Code and Regulations.

ORDER

1. CA(IB) No.227/KB/2018, CA(IB) No.233/KB/2018 along with CA(IB) No. 210/KB/2018 is allowed upon the following directions:-

i) The period of duration of litigation on account of CA 227/18 and other applications filed after the date of CA 227/2018 stands excluded. The CIR Process is to be concluded expeditiously before 24.06.2018.

ii) The resolution professional is directed to accept the revised offer quoting the bid amount Rs.7,960.86 crores from UltraTech within 3 days from the date of this order and place it along with the resolution plan of Ultra Tech before the CoC.

iii) The CoC is directed to consider the revised offer along with the resolution plan of Ultra Tech by giving an opportunity to have hearing if any for further modification is found necessary and to take appropriate decision bare in mind the object of the Code.

iv) The CoC is also directed to reconsider the resolution plan of RPPL, if the resolution applicant is willing to raise the offer above the offer of Ultra Tech to be placed before it by the RP along with the resolution plan of Ultra Tech. It is made clear that if both resolution applicants if willing to participate in the bidding process CoC is expected to allow both resolution applicants in the bidding process and which is best for revival of the corporate debtor is to be decided by the CoC.

v) RP is also directed to comply the provisions of the Code and regulations in submitting the revised offer before CoC and in issuing notice to the director of the suspended board of the corporate debtor and notice also is to be issued one among the operational creditor who filed the above referred application as a representative if the requirement of section 24 (3)(c) of the Code is satisfied.

2. Since we are inclined to allow the above applications, we are dismissing CA(IB) No.245/KB/2018 filed by the director praying for issuing injunction restraining EARC from making any claim in excess of Rs.2594.24 crores on the strength of master restructuring agreement evidently recalled by the EARC as it is also not maintainable.

3. CA(IB) No. 246/KB/2018 is dismissed.

4. In view of directing reconsideration of resolution plans by RP, no further directions is to be issued in the following CA(IB) 201/KB/2018; CA(IB) No. 234/KB/2018; CA(IB) No. 223/KB/2018; CA(IB) No.248/KB/2018; CA(IB) No.

249/KB/2018; CA(IB) No.343/KB/2018 and CA(IB) No.344/KB/2018 and these CAs are disposed as above.

5. Certified copy of the order may be issued, if applied for, upon compliance with all requisite formalities.

6. Urgent Photostat and/or certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities. The registry is directed to forward a copy of this order to IBBI

List it on 4th June, 2018 for filing progress report.

Sd/- **Sd/-**
(Madan B. Gosavi) (Jinan K.R.)
Member (J) Member (J)

Signed on this the 4th day of May 2018.

In the National Company Law Tribunal,
Kolkata Bench,
Kolkata

Coram: Shri Jinan K.R.,
Hon'ble Member (J)
&
Shri M.B.Gosavi
Hon'ble Member (J)

C.A.(IB) No.201/KB/18
And

C.A.(IB) No.234/KB/18

And
C.A.(IB) No.245/KB/18
And
C.A.(IB) No.210/KB/18
And

C.A.(IB) No.227/KB/18
And
C.A.(IB) No.233/KB/18
And
C.A.(IB) No.223/KB/18
And

C.A.(IB) No.249/KB/18
And
Int.App.(IB) No.248/KB/18
And
Int. App.(IB) No.343/KB/18
And

Int. App.(IB) No.344/KB/18
And
C.A.(IB) No.246/KB/18

In
C.P.(IB) No.359/KB/2017

In the matter of:

An application under sections 60(5) and Section 30 and 31 of the Insolvency and Bankruptcy Code, 2016, read with Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

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Persons) Regulations, 2016;

-And-

In the matter of:

BANK OF BARODA, a body corporate constituted by and under the Banking Companies (Acquisition and Transfer of Undertakings Act, 1970), with the head office at Baroda House, Mandvi, Baroda, Gujarat 1971)and acting through its Corporate Financial Service branch at 1972)1st Floor, Walchand Hirachand, Ballard Pier, Mumbai 400 001, 1973), India

.... Financial Creditor

-And-

IN THE MATTER OF:

BINANI CEMENT LIMITED, a Company incorporated under the Companies Act, 1956 and having its registered office at 37/2, Chinar Park, New Town, Rajarhat Main Road, P.O. Hatiara, Kolkata 700 154.

... Corporate Debtor

-And-

BRAJ BHUSANDAS BINANI, Member of Board of Director of Binani Cement Limited, Residing at Shubham, 6 Laburnum Road, Gamdevi, Mumbai 400 007;

.... Applicant

-And-

ULTRA TECH CEMENT LTD., having its registered office at B Wing, Ahura Centre, 2nd floor, Mahakali Caves Road, Andheri East, Mumbai- 400093;

.... **Applicant**

-And-

State Bank of India HONG KONG, having its office/branch at State Bank of India, Hong Kong branch, 15th floor, Central Tower, 28, Queen's Road, Central Hong Kong, Hong Kong SAR

.... **Applicant**

-And-

EXPORT IMPORT BANK OF INDIA, having its head office at Centre One Building, floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai;

....**Applicant**

-And-

SHRI KHEMISATIA POLYSACKS PRIVATE LIMITED and 07 others

...Applicants

-And-

ARKA CARBON FUELS PRIVATE LIMITED and 04 others

....**Applicants**

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-And-

SWASTIK COAL CORPORATION PRIVATE LTD. And 07 Others

.... Applicants

-Versus -

Mr. Vijaykumar V. Iyer, Resolution Professional of Binani Cement Limited, Deloitte Touche Tohmatsu India LLP, India Bulls Finance Center, Tower-e, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai 400 013.

... Applicant/Respondent

Counsels appeared:

For the Financial Creditor/ EXIM Bank in CA(IB)No.249/KB/2018	1. Mr. Krishnaraj Thaker, Advocate 2. Mr. Varun Kedia, Advocate 3. Mr. Kumardeep Majumdar, Advocate
For Intervenor /Operational Creditors S.K.Singhi & Company.	1. Mr. Jishnu Chowdhury, Advocate 2. Mr. Asif Doctor, Advocate 3. Mr. S.K.Singhi, Advocate 4. Mr. Ankur Singhi, Advocate 5. Ms.Divyata Badiani, Advocate 6. Ms. Riti Basu, Advocate 7. Mr. Subhadeep Basak, Advocate 8. Mr. Dhaval Vussonji, Advocate 9. Mrs. Manju Bhuteria, Advocate 10.Ms.Sweta Kakkad, Advocate 11.Mr. Angad Baxi, 13.Ms. Pallavi Kumar
For SBI HongKong	1. Mr. P. V. Dinesh, Sr. Advocate 2. Mrs. Poonam Keswani, Advocate 3. Mr. Dwaipayan Ghosh, Advocate 4. Ms.Neha Negar Alam, Advocate for INDIALAW LLP
For Income-Tax Dept.	1. Mr. Shiv Chandra Prasad, Advocate
For Rajputana Properties Pvt. Ltd. (H1 Bidder)	1. Mr. S.K.Kapur, Sr. Advocate 2. Mr. Kathpalia, Sr. Advocate 3. Mr. Siddhartha Datta, Advocate 4. Mr. Rudrajit Sarkar, Advocate 5. Ms. Suhani Dwivedi, Advocate 6. Ms. Isha Sinha, Advocate 7. Mr. Debangshu Dinda, Advocate 8. Ms. Mishra, Advocate

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For EARC & Lenders	1. Mr. Sumant Batra, Advocate
For IDBI Bank Ltd.	1. Mr. Jishnu Saha, Sr. Advocate 2. Mr. Indranil Nandi, Advocate 3. Mr. Ishaan Saha, Advocate 4. Mr. Sayak Konar, Advocate 5. Mr. Anubhav Sinha, Advocate 6. Mr. Siddharth Barua, Advocate 7. Ms. Paheli Majumder, Advocate
For Resolution Professional	1. Mr. Abhrajit Mitra, Sr. Advocate 2. Mr. Joy Saha, Sr. Advocate 3. Mr. Rishad Meclova, Advocate 4. Mr. Soumava Mukherjee, Advocate 5. Mr. Sarbapriya Mukherjee, Advocate 6. Mr. Pranshu Paul, Advocate 7. Mr. Prashant Pakhiddey, Advocate 8. Mr. Vijay Kumar Iyer, Resolution Professional
For Committee of Creditors	1. Mr. Pratap Chatterjee, Sr. Advocate 2. Mr. Samrat Sen, Sr. Advocate 3. Mr. Soorya Ganguli, Advocate 4. Ms. Pooja Chakrabarti, Advocate 5. Mr. Adheesh Agarwal, Advocate
For Intervenor Director	1. Mr. Ratnanko Banerji, Sr. Advocate 2. Mr. Sabhyasachi Chaudhury, Advocate 3. Mr. S. Mitra, Advocate 4. Mr. Neelesh Choudhury, Advocate 5. Ms. Anuradha Poddar, Advocate
For Ultratech Cements Limited	1. Mr. Mukul Rohatgi, Sr. Advocate 2. Mr. Venkatesh Dhond, Sr. Advocate 3. Mr. Siddhartha Mitra, Sr. Advocate 4. Mr. Mahesh Agarwal, Advocate 5. Ms. S. Mukherjee, Advocate 6. Mr. Aritra Basu, Advocate 7. Mr. Abhijit Sarkar, Advocate 8. Mr. Abhik Kundu, Advocate 9. Mr. Domingo Gomes, Advocate 10. Mr. Devanshi Singh, Advocate

Order pronounced on 2nd May, 2018

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ORDER

Per Shri Jinan K.R., Member(J)

By this common order we propose to dispose of 12 applications filed under sections 60(5), 30 and 31 of the Insolvency and Bankruptcy Code, 2016 as common questions arise for consideration and for avoiding repetition of facts and for convenience.

2. Briefly, stating the facts of the applications as follows:-

CA(IB)No.201/KB/2018,CA(IB)No.234/KB/2018 and CA(IB)No.245/KB/2018

3. All these applications were filed by one Braj Bhushan Das Binani, a promoter director of the Corporate Debtor on 20.02.2018 mainly raising serious challenge against the resolution process initiated at the instance of the Resolution Professional. CA(IB) No 234/KB/2018 was filed on 16.03.2018 alleging wrongful and illegal actions of RP and CoC and prays for issuing directions to allow him to participate in the CoC meeting. CA(IB)No. 245/KB2018 was filed on 16.03.2018 alleging violation of master restructuring agreement by EARC and prays for issuing injunction restraining EARC from making any claim in excess of Rs.2594.24 Crores and to correct voting share by restructuring CoC excluding IDBI from CoC. CA (IB)No. 201/KB/2018 was filed alleging misconduct of the Resolution Professional by causing wrongful losses to the Corporate Debtor. He contents that the valuation of the assets of the Company was not properly done. The Resolution Professional acted malafide and in contravention of the provisions of the I&B Code. Despite directions given to the Resolution Professional vide Order in CA (AT)(Insolvency)No.82/2018, dated 09.03.2018 of NCLAT he was not allowed to participate in the CoC meeting from the beginning till the conclusion of the meeting. Whenever certain crucial points affecting the Corporate Debtor arise for deliberation, he was directed to leave the meeting room and to wait outside.

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Therefore, Section 24 of the Code is violated as well as **Regulation 21(3)(a) of the Insolvency and Bankruptcy Regulations for Corporate Persons Regulations 2016.** One another serious contention raised by the applicant herein is that the Resolution Professional did not done any work of his own. He delegated all his powers to representatives and appointed so many adviser, legal counsels and evaluators so as to burden the resolution applicant to pay a resolution cost. Majority work of the Resolution Professional has been outsourced so as to claim exorbitant fees and cost of resolution by the Resolution Professional. He also appointed an LLP firm, namely Deloittes for pre-audit of expenses and for monitoring the affairs of the corporate debtor at a fee of Rs.13 lakhs per month. So also he managed to get himself insured at a cost of Rs.72.5 lakhs during the resolution process which is unwarranted in a case of this nature. Rs.2.4 crores had been paid to Deloitte on account of Resolution Professional Facilitator, Rs.2 crores have been paid to Alvares & Marshall allegedly evaluators on account of evaluation of bids.

4. The above said acts are certain acts of the Resolution Professional highlighted by the applicant which according to him the Resolution Professional is guilty and causing unlawful gain to its own entity and further causing unlawful losses to the Corporate Debtor. Upon the said contentions he prays for issuing directions to the Resolution Professional to provide access to him and other board of directors of the Corporate Debtor to have full information in regard to all matters transacted in the CoC meeting and issue directions to provide copies of bids, resolution applications so as to enable him to express his views and to direct investigation of the expenses incurred as part of the CIRP and to set aside the CIRP process by removing the Resolution Professional.

CA (IB) No.210/KB/2018

5. This is an application filed by Ultratech Cement Limited under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 contending that the

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evaluation criteria as applied were to result in more than one resolution applicant coming close in the scoring, it would stand to reason that to discharge the statutory mandate of maximizing the value of the assets, the parties can be made to participate in a transparent auction that can be conducted in hours, and even electronically. The applicant contends that it apprehended miss-appreciation of competition law, upon correction would lead to the Applicant having the highest score, or even with a score lower by a few decimal points, and if it transpires that the price quoted by the parties in the forefront have a very narrow gap, it should only follow the best possible price should be discovered by conducting a fast-track expedited auction among all such parties. According to the applicant, it proposed proportionate resolution for all creditors, but CoC and Resolution Professional not to fix the evaluation criteria without applying natural justice and not in fair play. The evaluation process is made known and clearly a sense of fair play in action is demonstrated. The applicant prays for issuing direction to the CoC and Resolution Professional to provide the applicants with the manner of application of the evaluation criteria that form the basis for CoC to take the decision on the H1 in the CIRP of the Corporate Debtor so also prays for ordering investigation against cartelization and even to disclose how a Resolution Professional and CoC has dealt with this disclosure and if not disclosed how Resolution Professional and the CoC has dealt with such non-disclosure and other incidental prayers.

CA (IB) No.227/KB/2018 IN CA (IB)No.210/KB/2018

6. This is an application filed by Ultratech Cement Limited under Section 60 (5) of the Insolvency and Bankruptcy Code 2016 contending that CoC and Resolution Professional are refusing to consider a revised offer which has been made while the process is under way within the period prescribed under Section 12 and that the Resolution Professional would not call for a fresh expression of interest to ensure maximization of value, thereby breaching the

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trust reposed on the CoC and the Resolution Professional to conduct a fair and transparent process to maximization of value of assets. The applicant prays for issuing directions to the CoC as well as to the Resolution Professional so as to evaluate the revised offer dated 08.03.2018 of the applicant and compare the same with other competing offers to achieve the objective of maximization of value of assets for the Corporate Debtors.

CA(IB) No.233/KB/2018 IN CA(IB) No.210/KB/2018

7. This is an application filed by Ultratech Cement Limited under Section 60(5) of the Insolvency and Bankruptcy Code 2016 read with Rule 11 of NCLT Rules 2016 alleging that the meeting of the CoC dated 14.03.2018 has been held completely illegal and arbitrary and deserves to be set aside and quashed upon the following grounds:-

(i) *The COC and RP went on to hold the meeting without considering the orders passed by the Tribunals to seek directions to hold meeting in a fair and just manner. Despite so, the COC and the RP proceeded ahead to hold the meeting and approve the bidder whose offer is much lower than the revised offer of the Applicant.*

(ii) *Despite the pendency of the application and the matter being sub judice before the court of law went on to take contradictory positions but at the same time when asked to disclose the information which the RP and COC didn't*

(iii) *The RP and COC acted directly acted in contrary to the object and purpose of IB Code which mandates maximization of value of the assets*

(iv) *Such act of RP and COC is mots opaque and non-transparent, relevant information were kept secret from the applicant and till date the applicant has not been informed the evaluation criteria based on which the applicant was relegated to the rank of second highest bidder.*

(v) *The RP is duty bound to maintain checks and balances to conduct the COC meet under the IB Code, the RP is duty-bound to pint out the objectives and obligations under the law. The RP's confirmation vide letter dated 13.04.2018 giving an assurance to the applicant to*

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consider their application for the bidding process is vitiates the rules of just and fairness as per the law laid down in the IB Code. That the RP had acted against the letter and spirit of the Hon'ble Courts , against the interest of the various stake holders of the Corporate Debtor and acted unfairly and arbitrarily ignoring the Applicant who is an eligible competing bidder.

8. Upon the above said grounds the applicant prays for declaring that the entire process adopted by the CoC and Resolution Professional is vitiated that they have acted against the objective of the Code against the interest of various stakeholders of the Corporate Debtor and also acted unfairly, arbitrarily and against the interest of the applicants who is an eligible competing bidder.

CA(IB) No.223/KB/2018.

9. This is an application filed by the State Bank of India, Hong Kong Branch under Sub Section 5 of Section 60 of the I&B Code with Rule 11 of the NCLT Rules challenging inequality in considering the claim of the applicants at par with the approval of claim of financial creditors. The applicant alleged that 10% of the verified claim by giving a hair cut of 90% of the regular valid claim of the arbitrator is highly illegal and challenged the allotment of claim as per the resolution plan submitted for the approval and prays for issuing direction to allow the claim of the applicant bank at par with other similarly placed financial creditors based on their status and without discrimination.

CA(IB) No.249/KB/2018.

10. This is an application filed on by the Export Import Bank of India under sub section (5) of Section 65 of the I&B Code read with rule 11 of the NCLT Rules to set aside the decision of the CoC approving the H1 Resolution Plan and to consider revised offer submitted by the Ultratech, another bidder, before the CoC and to give further direction to the Resolution Professional to conduct the process in fairness and transparency equitable practice and practice of natural justice during the selection and approval of Resolution Plan. The applicant contends that CoC accepted the H1 bidder's Resolution Plan as its

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plan scores maximum in consideration of the evaluation criteria and decided to negotiate with the H1 bidders in the meeting held on 27.02.2018. As per the Resolution Plan, the applicant had proposed only 72.59% of its verified claim and arbitrarily gave a hair cut of 27.41% of the legal and verified claim of the applicant. The applicant claims that the liquidation value payable to unsecured financial creditors is nil and upon subrogation would not be sufficient to recover amounts paid to the applicant. The Resolution applicant proposed to make 52% payment in the initial plan and 72.5% payment in the later plan. The applicant further contends that there is no concrete basis for such discrimination against the applicant at par with other financial creditors and the Resolution Plan is contrary to the scheme of the I&B Code 2016. The practice of allotment of claim raised serious doubts about the process and, therefore, the applicant filed this application seeking the above-mentioned directions. The applicant further contends that Ultratech Cement Limited also given revised proposal which is to be considered by the CoC and, therefore, the applicant is to be permitted to intervene in the Company Petition and prays for passing appropriate directions.

CA(IB) No.248/KB/2018.

11. This is an intervention application filed by Shri. Khemisatia Polysacks Private Limited and seven others under Sub-Section 5 (a) of Section 60 of the I&B Code challenging the resolution process initiated by the Resolution Professional alleging that the applicants are aggrieved for not considering their legitimate claims submitted to the Resolution Professional and their claims have been ignored by passing the benefit of resolution to the financial creditors of the corporate debtor. The applicants further contends that they were denied of information / documents in respect of bids / resolution plans received by the Resolution Professional and not allowed to participate in the CIRP, not allowed to put their suggestions on the CIRP and not allowed to interact with bidders. The affairs of the Company is dealt with by Deloittee and the CoC and a total

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of Rs.37.02 crores is the outstanding debt due to the applicants in total on account of supply of goods, materials and services provided to the Corporate Debtor though he applicant repeatedly demands the Resolution Professional to upload the verified claims admitted by the Resolution Professional of the applicants. He has not bothered to honour the claims of the Operational Creditors of the Corporate Debtor including the applicant and, therefore, the applicants are aggrieved by the action of the Resolution Professional. Resolution Professional is outsourcing most of his work by causing financial burden on the corporate debtor. Upon the aforesaid contentions, the applicants pray for allowing them to intervene in the Company Petition and permission to be given to the applicants for participation in the CIRP and without considering the contention of the applicants in this application, the Resolution Plan submitted by the Resolution Professional to the adjudicating authority cannot be approved.

CA (IB) No.343/KB/2018

12. This is an application jointly filed by five Operational Creditors challenging inaction from the side of the Resolution Professional in not providing the details of the amount payable to each of the Operational Creditors in pursuance of the plan and against the uploading the list of claims of the Operational Creditors admitted by the Resolution Professional. The applicants contends that the list of claims of the Operational Creditors was uploaded by the Resolution Professional on 28th February 2018 and uploaded a fresh list on 12th April, 2018 but on going through the list there is no mentioning regarding the verification of claim pending with the Resolution Professional or not. Some of the claims of the applicant were reduced by the Resolution Professional without giving an opportunity to justify its claim that the steps taken by the Resolution Professional in regard to the verification of claim of Operational creditors is not legal and liable to be declared null and void. The applicants also contend that they are not allowed to participate in the

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CIR process and no attempt made on the side of the Resolution Professional in protecting and preserving the rights of the Operational Creditors. Upon the said contentions, the applicant prays for permitting them to intervene in the main application and alternatively prays for issuing directions to the Resolution Professionals for permitting them to participate in the CIR process and for providing necessary information regarding the claim verified and admitted by the Operational Creditors.

CA (IB) No.344/KB/2018

13. This is an application jointly filed by eight Operational Creditors challenging the uploading of the claim of the Operational Creditors by the Resolution Professional and as against the non-verification of the claim of the Operational Creditors. The applicant contends that the final verified list admitting / rejecting the claim of the Operational Creditors seems to be not published by the Resolution Professional and the list uploaded dated 12.04.2018 specifies different figures than the amounts stated in the affidavit filed by them dated 26.03.2018. The applicant further contends that the Resolution Professional did not have a uniform terminology regarding the admission as well as the verification of the claim. The applicant further contends that their claim has not been finally verified and the claim admitted seem not based on the claim of the applicants and that no opportunity to justify the claim of the applicant have been given by the Resolution Professional and, therefore, the plan without providing provision for clearing their dues cannot be approved. The applicant filed this application so as to permit them to intervene in the proceedings and also seeking information from the Resolution Professional regarding the Resolution Plan and in respect of further directions directing the Resolution Professional to permit them to participate in the CIR process.

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CA(IB) 246/KB/2018

14. This is an application filed by the Resolution Professional Mr. Vijaykumar V. Iyer under Section 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (in short I&B Code) read with Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, praying for approval of the Resolution Plan of the Corporate Debtor/ Binani Cements Limited.

15. Bank of Baroda / Financial Creditor filed the application in C.P.(IB) No.359/KB/2017 under Section 7 of the Insolvency and Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Corporate Debtor, namely Binani Cement Limited.

16. After hearing on both sides, the application was admitted. Mr. Vijaykumar V. Iyer a Resolution Professional has been appointed as the Interim Resolution Professional vide order dated 25.07.2017. The Interim Resolution Professionals appointment was later confirmed by the Committee of Creditor (CoC) in pursuance of the decision in the first meeting of the CoC held on 22.08.2017. The Resolution Professional filed the instant application on 19.03.2018 within 270 days as provided under Section 12 of the Code. The initial period of 180 days of CIR process has been extended as per application submitted by the Resolution Professional at the instance of the CoC and the CIR process of extended period expired on 21st April, 2018. The Resolution Professional allegedly succeeds in his attempt in finding out a resolution applicant, Rajputana Properties' Private Ltd. (in short, RPPL) in time before the expiry of the CIR process of the Corporate Debtor and submitted the Resolution Plan along with the application for the approval of the adjudicating authority.

17. A brief summary of the submissions of Ld. Resolution Professional in the application is the following:

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18. Resolution Professional issued public announcements by way of advertisement published in the Economic Times dated 13th October 2017 and invited prospective Resolution Applicants to put forward their Resolution Plans for the Corporate Debtor. He was in receipt of 65 potential resolution applications. Out of that 65 resolution applications, 27 resolution applicants expressed their interest to submit Resolution Plans also executed confidentiality undertakings. Thereafter, 12 resolution applicants turned up further in conducting inspection of the plants of the Corporate Debtor and thereafter on 15.01.2018 the Resolution Professional received six Resolution Plans.

19. After that, the Resolution Professional also prepared the evaluation criteria formulated after due deliberation with CoC and as per the evaluation criteria and after getting advice from the advisers and legal counsel appointed by the CoC and after due deliberation and interaction with prospective resolution applicants, CoC in the meeting held on 27.02.2018 was able to identify one among the six Resolution Plans submitted before the CoC for consideration by the Resolution Professional as the resolution plan scored the highest in terms of the evaluative parameters set out and finalized by the CoC in the evaluation matrix. Accordingly, as per the meeting of the CoC convened on 27.02.2018, CoC desired to continue the process with the Resolution Plan of Rajputana Properties Private Limited (RPPL). The CoC had extensive negotiation and consultation with the H1 Resolution Applicant and after getting clarification from the applicants, after due deliberation, the H1 Resolution Plan put for voting in the meeting held on 14th March 2018. The CoC with voting percentage of 99.43% approved the Resolution Plan of H1 applicant. 10.53% of the CoC which voted in favour of the Resolution Plan also recorded a protest note alleging that they had not been dealt with equitably when compared with other financial creditors who were corporate guarantee beneficiaries of the Corporate Debtor. It is that H1 Resolution Applicant's

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Resolution Plan came up for consideration before the Adjudicating Authority on 19.03.2018 for its approval.

20. This is a case in which a plethora of interim applications were filed by the various stake holders as well as director of the corporate debtor, the holding company of the corporate debtor under Sub-Section (5) of Section 60 of the Code challenging the transparency in the manner of continuing the Resolution Process by the Resolution Professional, mismanagement in the affairs of the Corporate Debtor by spending huge expenditure by engaging representatives of the Resolution Professional and incurred highest resolution cost pertaining to Corporate Debtor as well as the resolution applicants. So also, there was allegation that there is discrimination in regard to the consideration of unsecured debts of unsecured creditors as well as debts due to Operational Creditors. One another allegation levelled is that the entire claims of certain Operational Creditors were ignored by the resolution professional with out assigning any reasons and that despite request for verification of their claims the Resolution Professional did not provide access to the finalization of claims admitted by the Resolution Professional. Since all those applications were filed challenging the resolution process and the manner of approval of Resolution Plan by the CoC, and since common questions arise for determination and for avoiding repetition of facts and for convenience all these applications are taken together.

21. The resolution professional filed reply affidavits in CA(IB) 210/KB/2018, CA(IB) 201/KB/2018, CA(IB) 234/KB/2018 and CA(IB) 248/KB/2018 contending in brief is the following:-

22. The Resolution Professional in CA(IB) 210/KB/2018 contends that the applicant is neither a corporate debtor, nor a director, or a financial /operational creditor and while dealing with the resolution plan, the Resolution professional had complied with he provisions of the Insolvency and Bankruptcy Code, 2016,

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therefore, the grievances raised by the applicant by way of the application under reply is not maintainable and also the applicant has no locus standi under the provisions of I&B code, 2016 to seek relief that has been sought in the application under reply. The contention that the revised offer not being considered by the Resolution Professional and the CoC not at all deserve any merits. So called substantial revised bid offer by the Ultratech Cement Ltd. dated 8th March 2018 could not have been considered as a valid bid. The applicant has been heard while his Resolution Plan has been taken into consideration by the CoC on 23.02.2018. CoC had discussed the plan of all applicants in the meeting held on 23.02.2018 in the presence of respective resolution applicants and in the meeting held on 27.02.2018 the 2nd respondent's Resolution Plan (RPPL) has been declared as H1 by the CoC in terms of the process document and the evaluation criteria issued as per CVC guidelines and the IBA Circular.

23. As per the decision of the CoC, there could not have been any negotiation with any other resolution applicant other than H1 Resolution Applicant which can be deployed for voting under Section 24 of the Code and that the Resolution Plan has been tabled for voting and approved with a majority of 99.43%. In such a situation, only if the Letter of Intent is not accepted by the R2 and it fails to give a Performance Bank Guarantee can, therefore, put in action for considering alternative Resolution Plan. The Letter of Intent has been accepted by the R2 and Performance Bank Guarantee has been submitted already. As per the process documents and as per CVC guidelines, post tender negotiation are not to be held except with the H1, highest tenderer. Indian Banks' Association (IBA) has referred a few suggestions from Member Banks and the same was placed before IBA Managing Committee and IBA Managing Committee issued certain guidelines to the Banks who approached the National Company Law Tribunal for resolution and the process documents is based on IBA Circular.

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Therefore, the Resolution Applicant Ultratech Cement Ltd who has submitted its revised offer on 8.03.2018 is beyond the cut off date for filing Resolution Plan in the bidding process and the same cannot be entertained based on the evaluation criteria. The Resolution Professional issued a clarification with the process document dated 20.12.2017 which *inter alia* stipulated general and qualitative parameters and clearly indicated that CoC will negotiate only with Resolution Applicant which reveals highest score based on the evaluation criteria and whose Resolution Plan is in compliance with the requirements of IB Code as confirmed by the Resolution Professional.

24. Therefore, non-consideration of the revised offer of the Ultratech Cement Ltd. does not violate any of the provisions of the Code, Regulations or the evaluation matrix and unsuccessful applicants has no right to ask for the evaluation criteria on the basis of which the other Resolution Professionals have been ranked. The applicant has submitted a Resolution Plan on 12.02.2018 and thereafter submitted five other resolution applications. The evaluation was done as per the evaluation criteria issued by the CoCs. The Tribunal has no role under Section 31 of the Code to conduct evaluation of any Resolution Plan other than the Resolution Professional presented under Section 34 of the Code, 2016. The allegation levelled in the application never demonstrated that there has been any circumvention or violation of the provisions of the Code of the Regulations in declaring the H1 Resolution Applicant as the highest bidder. The CoC has decided that it would not consider the revised bid made by the applicant, and took into consideration and discussed the following reasons: First, that the revised offer was not vide a resolution plan but was merely an e-mail as sent with an offer; Second, that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC. Third, that the offer was beyond the time as stipulated under the IBC. Upon the said reasons, the CoC decided not to consider the

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revised offer. The RP has complied all the provisions of the IBC while dealing with the applicant and therefore there cannot be any grievance of the applicant in respect of non consideration of revised offer. The contentions raised by the applicant is malafide.

25. The resolution professional also filed detail reply affidavit in CA(IB) 201/KB/2018 challenging maintainability of the application filed by the applicant and that the applicant who is a member of the suspended board of directors of the corporate debtor filed the application with *mala fide*, with out merit and has been made to derail the entire CIRP. The resolution professional contends that he safeguard the enterprise value of the corporate debtor and uphold the interest of all the stakeholder as an on -going concern and have discharged his duties as per section 18 and section 25 of the IBC. He contends that all notices, agenda points were provided by the RP as per the requirements and complied section 24(3) of IBC. It is incorrect that the RP exceeds his power of delegation of work as alleged. Since the corporate debtor is a huge entity with factory plant in two different place such plants require raw material, marketing of product, and confirming to sales supply chain he delegated some of his work. The RP has undertaken work with Deloitte Touche Tohmatsu India Ltd as per provisions of IBC. He also contends that all efforts have been made to protect the value of the corporate debtor including ensuring that the plants of the corporate debtor and brought back to work to achieve value maximization for the benefit of all the stake holder, and corporate debtor has a net positive cash flow. He further contends that he did not exceeds his powers and not denied any opportunity to the members of the board of directors to make their submissions as alleged. By denying all the allegations the RP prays for dismissal of the application.

26. The Resolution Professional in its reply affidavit in CA(IB) 248/KB/2018 contended that the application under section 30 & 31 of the I&B Code, 2016 by the operational Creditor is not maintainable on the ground that the aggregate

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claim amount which is less than 10% of the debt and as such, the applicant(s) have no right of participation in the CoC meetings and the resolution plan which stands approved by the CoC and which included the applicant cannot be altered/modified to include the claims of the applicant. The Resolution Professional also contends that the claims received by the resolution professional from the applicants and they were informed about their claims. The Resolution Professional also contends that some of the operational creditors attended the 12th CoC meeting and the CoC heard the submission/contentions of the operational Creditors and that no promise or allegation were made by the Resolution professional as alleged or otherwise and it was agreed that the CoC will try to ensure maximum payment of the past dues. None of the applications put forward by the Applicants are worth consideration and it is liable to be dismissed *in limini*.

27. RPPL the resolution applicant who is the 2nd respondent in CA(IB) 210/KB/2018 also filed reply affidavits in support of the resolution professional, its contentions in brief is the following:-

28. The H1 Resolution Applicant namely Rajputana Properties Private Limited challenged the application filed by Ultratech Cement Limited. Ultratech filed the application so as to protract the process. All the applications filed by Ultratech Cement Limited contained false and frivolous contentions are liable to be dismissed in limini. The respondent denies all the averments raised by the Ultratech Cement Ltd., in this application. The applicant is only attempting to push the Corporate Debtor in the liquidation by creating obstructions in completion of the Corporate Insolvency Resolution Process of the Corporate Debtor. The RPPL is a successful bidder in the already concluded bidding process carried on for resolution applicants for the Corporate Debtor in terms of the provisions of the Code 2016. The application filed by Ultratech Cement Limited contains false and frivolous contentions and for the said reason alone it is liable to be dismissed in limini. The contentions of the Resolution Applicant

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that its revised offer not being considered by the Resolution Professional and the CoC not at all deserve any merits. So called substantial revised bid offer by the Ultratech Cement Ltd. Dated 8th March 2018 could not have been considered as a valid bid. The applicant has been heard while his Resolution Plan has been taken into consideration by the CoC on 23.02.2018 and in the meeting held on 27.02.2018 the respondent's Resolution Plan has been declared as H1 by the CoC in terms of the process document and the evaluation criteria issued as per CVC guidelines and the IBA Circular.

29. As per the decision of the CoC, there could not have been any negotiation with any other resolution applicant other than H1 Resolution Applicant which can be deployed for voting under Section 24 of the Code and that the Resolution Plan has been tabled for voting and approved with a majority of 99.43%. In such a situation, only if the Letter of Intent is not accepted by the R2 and it fails to give a Performance Bank Guarantee can, therefore, put in action for considering alternative Resolution Plan. The Letter of Intent has been accepted by the R.2 and Performance Bank Guarantee has been submitted already. As per the process documents and as per CVC guidelines, post tender negotiation are not to be held except with the H1, highest tenderer. Indian Banks' Association (IBA) has referred a few suggestions from Member Banks and the same was placed before IBA Managing Committee and IBA Managing Committee issued certain guidelines to the Banks who approached the National Company Law Tribunal for resolution and the process documents is based on IBA Circular. Therefore, the Resolution Applicant Ultratech Cement Ltd who has submitted its revised offer on 8.03.2018 is beyond the cut off date for filing Resolution Plan in the bidding process and the same cannot be entertained based on the evaluation criteria. The Resolution Professional issued a clarification with the process document dated 20.12.2017 which *inter alia* stipulated general and qualitative parameters and clearly indicated that CoC will negotiate only that Resolution

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Applicant which reveals highest score based on the evaluation criteria and whose Resolution Plan is in compliance with the requirements of IB Code as confirmed by the Resolution Professional.

30. The Applicant has no right under the IBC to attend the meeting of COC which is considering a Resolution Plan of another Resolution Applicant i.e. Respondent No.2 in this case. It is not open to the Applicant under the IBC to seek judicial review of the commercial decisions of the COC taken during the course of the insolvency resolution process. Besides, IBC does not permit a resolution applicant any right to interfere in the CIRP and thus the Applicant has no locus standi to question the decision of the COC and also call for records of the RPs and COC. The COC took a majority decision in declaring Respondent No.2 as H1 bidder which can now not be called into question by the Applicant. The entire bidding process undertaken by the Respondent No. 1 is in accordance with law and all procedural norms. It is in compliance with the Process Document and guidelines prescribed by the Central Vigilance Commission (CVC) and Indian Bank Association and therefore, the Applicant is acting in mala fide manner in objecting to the negotiations already undertaken. The Respondent No. 2 has received the approval of the Competition Commission of India on 7th March, 2018 for completing the CIRP which authenticates the resolution process considered by the COC.It is also submitted that the Applicant had not challenged any part of the evaluation criteria issued on February 1, 2018 and clarification dated 7th February, 2018 or any part of the procedures in the Process Document which shows the entire process to be fair. Therefore, at this stage the Applicant is unscrupulously objecting to the process to scuttle the successful resolution applicant.

31. It is submitted that the Application also suffers from non-joinder of necessary party being the COC of the Corporate Debtor and is liable to be rejected on this ground alone.

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32. The 2nd respondent also filed reply in CA(IB) 233/KB/2018 contenting that the unsuccessful Resolution applicant is only attempting to push the Corporate Debtor into liquidation by creating obstacles in completion of the CIRP. The respondent further contended that the aforesaid application has been made by an unsuccessful bidder in the already concluded bidding process carried out for Resolution applicants for the corporate debtor and thus is malafide and ultravires the I & B code,2016; the CIRP and the CIRP Regulations. The respondent also contends that on February12, 2018, all six Resolution Applicants including the applicant and the Respondent No.2 submitted their revised Resolution Plans to the resolution professional to which the cut-off date of February12, 2018 has been actively suppressed by the Applicant in CA bearing no.210/2018. The respondent also contends that no jurisdiction of this Hon'ble Tribunal under section 31 of the code,2016 to conduct evaluation of any resolution plan other than presented under section 30 (4) of the Code,2016. The respondent furthermore contended that the Respondent No.1 has filed the said resolution plan with this Hon'ble Tribunal, therefore, neither could this so-called substantially revised offer of the applicant be entertained by the committee of creditors in its meeting dated March 14,2018 nor can the Hon'ble Tribunal at this stage direct the Respondent No 3 to consider or re evaluate based on the substantially revised offer of the applicant. Upon the said contentions second respondent also prays for dismissal of all the applications and to approve the resolution plan submitted before the Adjudicating Authority.

33. Heard the Ld. Sr. Counsel appearing for all the parties at length and perused the documents and various citations relied upon by the Ld. Sr. Counsel.

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34. Upon hearing the rival submissions and considering the facts and applicable provisions of the I&B Code and Regulations the points that arise for our determination are the following:-

i) Whether the resolution professional exceeds his power in appointing professionals, outsourced the work in violation of circular No. IP/003/2018 issued by the IBBI and incurred exemplary cost in violation of any of the provisions of the Code and Regulations and circular?

ii) Whether non consideration of revised offer of resolution applicant Ultra Tech amount to violation of any of the provisions of the I&B Code and Regulations and against the objects of the Code?

iii) Whether there is any discrimination against the unsecured financial creditors at par with other financial creditors and the Resolution Plan submitted for the approval is contrary to the scheme of the I&B Code 2016?

iv) Whether the resolution professional ignored any of the operational creditors claim and not honoured their claims as alleged by the Operational Creditors?

Point No (i).

35. One of the directors of the corporate debtor filed three applications [CA(IB) No.201/KB/2018, CA(IB) No.245/KB/2018 and CA(IB) No. 234/KB/2018) mainly alleging mismanagement of the Corporate Debtor, misconduct of Resolution Professional so as to cause wrongful loss to the Corporate Debtor. He contends that in violation of the objective and spirit of IBC presumably at the behest of certain vested parties with an intention to diminish the enterprise value of the Corporate Debtor, the Resolution Professional acted malafide and in contravention of the provisions of the I&B Code. Serious allegations also levelled against the Resolution Professional

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alleging that despite directions from the NCLAT as well as this adjudicating authority, Resolution Professional did not permit the director in participating in the Committee of Creditor (CoC) meeting and whenever crucial points arise for determination, the directors who are attending the CoC meeting were asked to leave the meeting room and to wait outside. The notice issued for attending the meeting by the Resolution Professional is also in violation of Regulation 21(3) (a) of the IBBI (Insolvency and Resolution Process for Corporate Persons) Regulations 2016. No document attached to the notice for enabling the directors to participate in the meeting effectively. The Resolution Professional acted *mala fide* and in contravention of the provisions of the I&B Code. Therefore, he violates Section 24 of the Code as well as **Regulation 21(3)(a) of the IBBI (Insolvency and Bankruptcy Regulations for Corporate Persons) Regulations 2016.**

36. In order to appreciate as to whether there is any violation of section 24 of the Code and 21(3) of the Regulations it is good to read the relevant provisions.

Section 24

24. (1) .....

(2) .....

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of Committee of creditors;

(b) ***members of the suspended Board of Directors or the partners of the corporate persons, as the case may be***;

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(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such direct or, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) .....

Regulation 21(3)

(3) The notice of the meeting shall-

(a) contain an agenda of the meeting with the following:

(i) a list of the matters to be discussed at the meeting;

(ii) a list of the issues to be voted upon at the meeting; and

(iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting; and

(b) state that a vote of the members of the committee shall not be taken at the meeting unless all members are present at such meeting.

37. A reading of Section 24(4) of the Code shows that it provides right of participation to the directors in the meeting of CoC. As per the proviso to section 24(4) despite notice if a director did not attend the meeting his absence shall not invalidate proceedings of such meetings. Here in this case,

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the director approached the Bench and to the Hon'ble NCLAT alleging denial of opportunity to attend in the meeting of CoC and vide order in CA(AT) (Insolvency) No.82 of 2018 the Hon'ble NCLAT allowed him to participate in the meeting of CoC. Vide Regulation 21(3) (a) of IBBI (IRP for Corporate Persons) Regulations, 2016 the notice to be issued must contain the agenda of the meeting. Ld. Sr. Counsel Mr. Ratnanko Banerji for the applicant submits that both the said provisions were violated by the RP and his representatives were asked to wait outside, while some sensitive issues touching the corporate debtor were under discussions, violate the right of hearing. Truly, notice had been issued and directors' representatives attended the meetings. However, the representative of directors were asked to go out before the completion of the meeting, whenever discussions in respect of affairs of the corporate debtor were going on.

38. Admittedly, the representatives of directors were asked to go out from the meetings. Ld. Sr. Counsel Mr. Abhrajit Mitra for the RP submits that none of the directors appeared in person and their representatives were asked to wait outside because certain sensitive issues regarding certain diversion of fund and fraudulent transfers of the fund of the corporate debtor were taken for discussion. The copies of minutes produced for our screening also shows that what the director alleged in his application in respect of asking his representative to go out from the meeting hall is found true. The submission that the directors never attended the meetings but their representative attended the meetings and therefore the allegations were alleged for the sake of allegations seems to have no force. The Code permit any person who can attend the CoC meetings can send his representative. According to the Ld.Sr. Counsel for the RP corporate debtor has been involved in dubious transactions leading to conflict of interest and discussion in respect of the said transaction being dealt with confidentially the representatives of the directors were asked to wait outside. Since persons who are attending the meetings has

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to undertook confidentiality undertaking the said reason for exclusion of representatives of corporate debtor is found have no legal force. In respect of issuing notice without agenda also, no valid explanation was offered from the side of RP. The above said conduct in managing the process of resolution of a corporate debtor is unfair. No doubt, it amounts to violation of the mandate of the Code and Regulations and violate the right of hearing especially when issues regarding the affairs of corporate debtor is taken for consideration by the CoC.

39. The director of the corporate debtor raised serious objections against the RP from the inception of the CIRP till the conclusion of CoC meeting held on 14.03.2018. The Director challenges the valuation of the assets of the Company, appointment of legal advisors at an exorbitant fees, appointment of Deloitte LLP firm for auditing the daily cash flow of the corporate debtor company, appointment of Deloittes persons, who are his related partners, as his representatives for the management of the company, out sourcing of most of the work to persons from Deloitte, delegation of all his work to other interested persons. He further submits that RP gets insured his life for huge amount for no life threat existing. RP appointed legal counsels for exorbitant fees, appointed facilitators and Evaluators for the work he has to do in persons at the approval of the CoC. The applicant demonstrated some of the payment which according to the applicant causes wrongful loss to the corporate debtor and gain to himself. The table below would demonstrate some of the rate of cost and fees spent by the RP. It is pertinent to note here that CoC approved all the expenses.

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Name of the Consultant	Purpose	Sanctio-ned Amount	One time (Amount excl. GST and Out Pocket Expenses (OPE)	Monthly (Amt. excl. GST and Out Pocket Expenses) (OPE)	Reserve amount	Date of CoC Meeting where approved
				Rs. Lakhs		
Luthra & Luthra		16	16		Initial 40 days	Tuesday – 22/08/2017 Agenda 5
BOB	Legal cost	38.73	38.73			5/12/2017 – 6th CoC Agenda 7
RP Insurance	Tailor made Insurance policy from New India for USD 96k	72.5	72.5			5/12/2017 – 7th CoC Agenda 9
RP	Resolution Professional	35		35		Tuesday – 22/8/2017 Agenda 6
RP	Resolution Professional	25		25		-do-
Deloitte	Pre-audit of expenses and dispatch monitoring	13		13	Rs.65.00 lakhs for 5 months (Rs.13.00 lakhs per month)	Tuesday – 22/8/2017
Security Agency Checkmate Services Pvt. Ltd.	For safety of the assets of the Corporate Debtor at Binanigram & Neem Ka Thana	13.58		13.58	Rs.67.9 lakhs for 5 months (Rs.13.58 lakhs per month)	Tuesday – 22/8/2017
Holtech	Valuer	31.5	31.5			
PWC	Valuer	40	40			
Argus Partner	CoC legal advisers	10K/hr per lawyer & Managing Partner Rs.15l/hr involved since Decem-ber 2017			10K/hr per lawyer & Managing Partner Rs.15k/hr involved since Decem-ber 2017	16/1/2018 8th CoC – Agenda 12

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oltec – echnical Consul-tant (3 people)	Plant operations & mktg	14.5		14.5		
Alvares & Marshall	Evaluation of bids	200				16/1/2018 8th CoC – Agenda 11
Luthra & Luthra - Legal Consultant	Assistance with submission to the NCLT	11.5		11.5	Rs.57.5 lakhs for 5 months (Rs.11.5 lakhs per month subject to cap of 100 hrs)	Tuesday – 22/8/2017 – Agenda
Hari Bhakti	Forensic	17	17		One time	17/11/17 – 5th CoC – Agenda 8
RP facilitator	Deloitte TTILLP	240	240			4/10/2017 – 4th CoC Agenda 4
		641.08	480.73	87.58		

40. The Ld. Sr. Counsel for the applicant submits that the RP contravenes he provisions of the Code violated code of conduct and the regulations in respect of continuing the process efficiently with utmost transparency. According to him expenditure in continuing the process is unreasonable and unjust so as to see the corporate debtor is a going concern and causes wrongful lose to the corporate debtor and it amounts to increase the cost of resolution to a promoter who wish to take over the Company. A serious allegation is also raised submitting that the valuation of the assets of the company was not done properly. We find some force in the argument advanced on the side of the director of the corporate debtor. The liquidation value is arrived at 2300 Crores. However, bidders showed readiness to take over the company offering more than double the amount of liquidation value. Ultra Tech offered 1021.70 Crores before us. What is its indication. Its tangible and intangible assets value is much higher than overall liabilities due to the stakeholders?. However nobody other than the director of the company challenged the liquidation value. On a careful screening of the minutes in

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respect of approving the expenses by the CoC rendered by the RP, it appears to us that the CoC nor RP has taken any care in getting appointment of advisors and other category of professionals and fixed the cost and fees without considering the volume of work and complicity of the work which had been entrusted to them. They liberally and casually suggested the cost and fees by themselves and fixed the cost and fee with out getting any supporting data in respect of fixation of fees to the professionals. At this juncture it is good to see what is resolution cost. Insolvency resolution cost is defined under section 5(13) of the Code. It reads as follows:-

Section 5(13)

5(13) "insolvency resolution process costs" means--

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board;

28. As per 5(13) (a) any other costs as may be ***specified*** by the board. Now it is also specified as per the following Regulations in Sh.1 of IBBI (Insolvency Professionals) Regulations,2016.

25. ***An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.***

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26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. ***An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that <u>such costs are not unreasonable.</u>***

41. It is also good to read Sub. reg. 7 of Sh.1 of IBBI(Insolvency professionals) Regulations. It reads as follows:-

An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.

42. Thus, a reading of above referred regulations no doubt it cautioned the resolution professional that the costs spent at his instances payable to any professional on account of resolution cost shall not be unreasonable. The cost must be on the basis of the volume of the work and complexity of the resolution process. Here in this case he appointed about 22 representatives for the management of the affairs of the corporate debtor. In all the meetings his representatives participated and spoke for him. He appointed advisors, legal professionals,facilitator and evaluators. Mostly all works outsourced to a firm in which he admittedly a partner and thereby violated the circular No.IP/003/2018 issued by the IBBI. His explanation in person is that sub. reg 7 referred to above not prohibit him from appointing persons in a firm in which he

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is holding partnership because none of them related to the Corporate Debtor and that too approved by the CoC. He also appointed advisors and legal professionals. CoC also appointed advisors and legal counsels at the cost of resolution. So also BOB's litigation cost in filing the CP also claimed out of the resolution cost. Truly all the cost he spent out of resolution process must be ratified by the CoC and in the case in hand the CoC seen responsible for fixing or rather approving the cost which according to us is at an unreasonable rate. No doubt it gives an additional financial burden to a sinking company which is under resolution. Who has to bare this cost? None other than the corporate debtor. If the RP has taken too much care he could have very well avoided so many appointments. When he was asked why he appointed 22 representatives to monitor the corporate debtor he would say that when he took over the company the management and workmen were not responsive to provide information and to ascertain the correctness of the information he appointed them. The above said discussions leads to a conclusion that Ld.RP not taken any care to ensure that such resolution costs are not unreasonable as per Regulation 27 referred to above. So also not strictly followed Reg. 21(3) of IBBI(IRP for Corporate Persons) Regulations, 2016 in respect of issuing notice of meetings and in violation of the circular outsourced most of his works to his interested persons. This point is answered accordingly.

Point no ii.

43. UltraTech Cement Limited a resolution applicant who has submitted its resolution plan for participating in the bidding process rushed to this Tribunal with three applications, CA (IB) 210/KB/2018, CA(IB) 227/KB/2018 and CA(IB) 233/KB/2018. The very challenge of applicant in CA(IB) No.210/KB/2018 is that the evaluation criteria as applied were to result in more than one resolution applicant coming close in scoring is not permitted to participating in the bidding process amount to violation of the mandate of maximizing the value. Ld. Sr. Counsel appearing for the applicant submits that the resolution

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plan of Ultra Tech Cement Limited not considered by the RP and reason for non-consideration of the plan not communicated to the applicant. According to him short-listing of the resolution plan was done not in the presence of the applicant and an opportunity of hearing the applicants objection regarding ranking the resolution applicant as not H1 was denied. He also submits that entire procedure adopted in ranking the resolution applicants is vitiated and is in violation of the provisions of the Code as well as the regulation and as against the scheme of the Code.

44. By filing **CA(IB) No. 277/KB/2018,** the very same applicant challenged non-consideration of its revised offer submitted by the applicant to the Resolution Professional. Ld. Sr. Counsel also submits that non consideration of the revised offer of the applicant Ultra Tech by the RP and CoC causes prejudice to the applicant and prevent the applicant from competing with the other resolution applicants and the Resolution Professional did not give an opportunity to here the resolution applicants before the CoC despite the applicant was informed by an email dated 13.03.2018 issued by the RP that when its plan is taken up for consideration he will be called for before the CoC. According to him the revised offer was made with in time as prescribed under section 12 of the Code and avoiding its revised offer shows that RP as well as CoC not ensuring maximization of value, thereby breaching the trust reposed on the CoC and the RP to conduct a fair and transparent process to maximization of value.

45. By filing **CA(IB) No.233/KB/2018,** the very same applicant challenged the decision of CoC in the meeting held on 14.03.2018 during the pendency of the above said CAs and contended that the meeting has been held completely illegally and arbitrarily and prays for declaring that the entire process adopted by the CoC and RP is vitiated that they have acted against the objective of the Code and against the various interest of the stakeholders of the corporate debtor.

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46. The Resolution Professional as well as the H1 resolution applicant and the Committee of Creditors strongly opposed all the three CA's filed by the applicant. They have unanimously contended that the attempt of the applicant is to push the Corporate Debtor in the liquidation by creating obstruction in completion of the Corporate Insolvency Resolution Process of the Corporate Debtor. The said contention seems to be not worthwhile. CA(IB) No.210/KB/2018 was filed by the resolution applicant UltraTech Cement Limited on 06.03.2018. It has come out in the evidence that even after 06.03.2018 negotiation has been undertaken in respect of H1 resolution applicant and the H1 resolution applicant revised its offer on 07.03.2018 and submitted a revised resolution plan. That plan was approved by the CoC in the meeting held on 14.03.2018 despite pendency of the said CA as well as one another CA(IB) 227/KB/2018. Moreover, it has come out in evidence that UltraTech revised offer is much more the bid amount approved by the CoC in the resolution applicant's plan under challenge. Then how can it be viewed that UltraTech attempt is to see that the corporate debtor is to push to liquidation?

47. According to the Ld. Sr. Counsel Mr. Mukul Rohatgi for the applicant what the applicant submitted is a substantially revised bid offer on 8th March 2018 and the Resolution Professional did not consider the revised offer and thereby caused great prejudice to the applicant. Pending the CA(IB) No.210/KB/2018, the resolution applicant filed CA(IB) No.227/KB/2018 challenging non-consideration of the revised offer which has been filed 43 days before the date of expiry of the CIRP and filed CA(IB) No.233/KB/2018 on 16.03.2018 for setting aside the decision of the CoC. Serious contentions also raised that the Resolution Professional acted unfairly, arbitrarily and against the interest of the applicants who is otherwise found eligible as a competing bidder but, however, it was ranked not as a H1 resolution applicant

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for the reason not brought to its notice that too without hearing the resolution applicant.

48. The Ld. Sr. Counsel reiterated that the Ultra Tech was not classified as H1 Resolution applicant because of miss-appreciation of competition law, and that the resolution applicant was not heard when a decision was taken to the effect that its plan is not the highest scored plan and the reason for the classification was not informed to it. He further submits that upon knowing that his plan is not H1 Plan the resolution applicant immediately send a revised offer increasing the bid amount but the revised offer submitted to RP as well as to members of CoC was ignored on the strength of evaluation criteria and Process Document as applied were to result in not to permit more than one resolution applicant coming close in the scoring. According to him the said approach as laid down in the **Process Document** is against the statutory mandate of maximizing the value of the assets, the parties can be made to participate in a transparent manner. According to the Ld. Sr. Counsel for the applicant, it proposed proportionate resolution for all creditors, but CoC and Resolution Professional not to fix the evaluation criteria without applying natural justice and not in fair play. The evaluation process is made known and clearly a sense of fair play in action is demonstrated. He also submits that all the process in avoiding Ultra Tech from raising its offer is against the scheme of the code and as against the sentiments of public sector banks.

49. Referring to certain citations, the Ld. Sr. Counsel Mr. Mukul Rohatgi submits that the Adjudicating Authority is empowered even to order open bid to see that maximization of the value of the assets of the corporate debtor and offered 1,021.70 crores and showed his readiness to deposit the amount with in 3 days to prove its bonafide. We do not incline to accept that offer because none of the provisions of the Code permit us to accept the bid offer made by the ld. Sr. Counsel for the applicant.

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50. The Ld. Sr. Counsel Mr. S.K.Kapur for RPPL repudiated the submissions advanced by Ld. Sr. Counsel for the Ultra Tech, submitted that there is no merit in the arguments advanced on the side of the Ultra Tech and referred the evaluation scoring given to the resolution applicants. According to him as per the clarifications: qualitative parameters 4/6 the Ultra Tech applicant did not produce proof to prove that no adverse regulatory order has been passed against it by any regulatory authority with in the last 5 years and thereby scored less 1 marks than that of the H1 applicant and that the bid amount is less than that of the H1 applicant and therefore there is no irregularity or arbitrariness in classifying Ultra Tech below the rank given to H1 applicant.

51. In reply to the said submission, Ld. Sr. Counsel for the applicant submits that it has got Competition commission of India (CCI) approval and that the order of CCI refereed to in the scoring was stayed and therefore said classification doesn't arise at the time of submission of revised offer. Admittedly at the time of classification of resolution applicants application as not H1 on 27.02.2018 an adverse order of regulatory authority was in force. So also bid amount offered by the Ultra Tech in the resolution plan is lesser than that of the H1 applicant offer. Truly, following the evaluation criteria already published the classification of Ultra Tech as not H1 on 27.02.2018 cannot be considered as irregular or arbitrary as alleged. Admittedly, the said regulatory authority's order not at all a disqualification of a resolution applicant under section 29A of the Code.

52. The question is whether an adverse decision can be taken by the CoC as against an applicant who has submitted a prospective bidding plan without giving an opportunity for hearing? In a case of this nature the applicant being a leading company in India who is capable of taking over a corporate debtor like the debtor in hand and can compete with other bidders denying an

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opportunity to here the applicant is quiet unjust and arbitrary. No doubt CoC consists of skilled officers of the financial creditors. They are the fit persons to take commercial or business decisions so as to find out an applicant who is more competent and technically sound so as to takeover a company undergoing resolution process. Denial of opportunity to have a hearing when the applicants resolution plan was screened for the purpose of classification no doubt is unfair and unjust. Bare in mind the objective of the Code it amount to shutting out an opportunity to a prospective bidder in participating the bidding process which it is otherwise entitled to compete. It is an adverse decision affecting the right of a participant in the process till the CoC took a decision to approve a plan from out of 6 plans. Thus no doubt denying the opportunity to be heard by the UltraTech applicant when CoC took a decision not to consider its plan for further negotiation is unfair and unjust and against the very objective of the Code. Scoring not as H1 applicant also not a disqualification in participating the bidding process. In case such applicant is ready to revise its offer and that offer is more than the bid amount offered by H1 applicant and agreed to satisfy all the stakeholders claims then why not its offer is considered? Can such an offer be ignored by fixing terms in evaluation criteria and in the process document? We will answer it later.

53. In denying the request of the Ultra Tech request to reconsider its revised offer the Ld. Sr. Counsel Mr. Abhrajit Mitra appearing for the RP submits that upon the following objections the CoC decided not to consider the revised offer of Ultra Tech. The objections as given in his reply affidavit read as follows:

(i) That the revised offer was sent by way of merely an e-mail;

(ii) That the offer was not made in accordance with the process documents and to consider it would be a deviation of the process laid down in the process document by the CoC.

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(iii) That the offer was beyond the time stipulated under the IBC

54. None of the above objections are substantive objections which can be raised in a case of this nature where the RP as well as CoC is duty bound to ensure maximization of value with in the time frame prescribed by the code. Such an object in finding out a bidder who can offer maximum bid amount so as to safeguard the interest of all stakeholders of the corporate debtor is lacking in the case in hand from the side of the RP as well as from the side of the CoC. The first objection for non consideration of revised offer is because it was offered through an e-mail. Mode of submission of revised offer by way of e-mail not at all prohibited by the Code, Regulations and the Rules. According to the Ld. Counsel for RPPL the email offer is made not under section 25(2) (h) of the Code. S.25(2) (h) provide provision for inviting prospective lenders, investors, and any other persons to put forward resolution plan. Submission of revised offer is in continuation of the resolution plan already submitted and accepted by the RP. Admittedly, as per invitation called for the Ultra Tech submitted revised resolution plan on 12.02.2018 that is with in time. So can a revised offer subsequent to submission of a resolution plan amount to violation of section 25(2)(h)? Our answer is not. It is significant to note here that H1 applicant revised its offer on 07.03.2018 and submitted a revised plan to RP and it was readily accepted by him. The answer offered on behalf of RP is that evaluation matrix and process documents permit him to have negotiation only with H1 applicant.

55. Ld. Sr. Counsel for the RP submits that RP's hand is locked from doing anything as per the process document and hence he cannot take a decision for reconsideration of an offer placed before him by an applicant who was not ranked as first. We are afraid the very independence in the conduct of RP is to be ensured is thrown to air by restricting the RP from taking an independent decision with out interference from any corner and from the CoC. Of course, his decision if any can be put to CoC for approval. Can he not to take a

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decision of his own before he decide a question which is liable to be answered by him alone? If he can only identify the bidders on the advice of the CoC why he appointed advisors of his own? No valuable answers forthcoming. All answers based on process document which according to us not legally binding on RP. Sub. Reg.5 of Sh.1 of IBBI(Insolvency Professionals) Regulations,2016 mandate independence and impartiality. It says "***an insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences***". So, no doubt he is to be independent. Whenever an offer comes which would be in the interest of all stakeholders then no doubt he is duty bound to accept the offer and to be placed before the CoC or he would have convened a meeting for consideration of revised offer because on 8.03.2018 CIRP period never ends and there is sufficient time left to convene a special meeting of CoC. It is also significant to note here that EXIM bank demands for convening a meeting for taking a decision about the revised offer of UltraTech. In the light of the said discussion, we have no hesitation in holding that non consideration of revised offer by the RP because it was sent by e-mail violate the object of the Code and absence of taking an independent decision in this regard by RP is in violation of Regulations.

56. Coming to the second objection in not considering the revised offer of the applicant that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC does not inspire our confidence. The resolution plan by the applicant has been submitted in time and admittedly all the resolution applicants were given liberty to rectify certain errors in order to come within the purview of the provisions of the Code and Regulations. It is thereafter the CoC considered all the resolution plans of the resolution applicants at a meeting held on 23rd February, 2018 and in that meeting, truly,

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all the resolution applicants were called for discussion. But admittedly, no decision regarding the acceptance or non acceptance of any of the resolution applications plan was considered. The selection of the resolution applicant was done in the meeting held on 27.02.2018. It is in that meeting, the CoC admittedly declared the Rajputana Properties Private Lt d's (RPPL) application as the H1 plan and decided not to consider the UltraTech resolution plan and intimated the resolution applicant that its resolution plan is not H1 plan. It is after receipt of the email from the RP the applicant submitted the revised offer on 08.03.18 by way of an e-mail. Being aggrieved in not considering the revised offer of the UltraTech, it filed the CA(IB) 227/KB/18 on 14.03.2018 requesting this Adjudicating Authority to issue directions to the CoC to consider the revised offer of the resolution applicant.

57. Pending consideration of this CA, the CoC convened its final meeting on the day the Ultra Tech moved the application by giving advance notice to the RP and to the CoC but without taking any decisions as to consider or not to consider the revised offer of the Ultra Tech put the H1 plan was put to vote and passed by a majority vote as required under the Code. It cannot be ruled out that the attempt of the CoC in approving a disputed plan pending for consideration before an adjudicating authority is in disregard to the outcome of the decision if any to be taken in the said application. Especially when CIRP duration as on 14.03.2018 never expires. No doubt, the CoC in a hurry took the decision for the reason that there was no stay passed by this Bench in the above CA. The revised offer has been declined by the Resolution Professional as well as the CoC in the meeting held on 14.03.2018 only for the reason of committee of creditors self made Process Documents allegedly restrained them to have negotiations with any other resolution applicant other than H1 applicant. No decision as such above referred seems to have taken by the CoC in respect of declining the revised offer of Ultra Tech. However the RP did not take any independent decisions as to reject its request. On the other

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hand he send an email in reply on 13.03.2018 to the e-mail dated 08.03.2018 of Ultra Tech that ***when its plan would takes for consideration he will be called for***. Even thereafter Ultra Tech did not receive any invitation hence it filed the CA. It is in the said background let us see any merit in the second objection submitted by the ld. Counsel for the RP.

58. The reason that the process document does not permit the resolution professional and the CoC in considering the revised offer of the applicant have no legal force at all. Even if the process document restricts CoC and the Resolution Professional which has been made by the CoC for their own convenience and for guidelines to the resolution applicant as well as to the Resolution Professional that is not a ground to deny a participant right in participating in the bidding process. Even if it is a document give rise certain guidelines it may not supersedes the provisions of the code and regulations. The process document referred to us even if considered as a valid document it does not entirely restrict the CoC from reconsidering a resolution plan which according to it not ranked first. There is no provisions in the **Process Document** or in the clarification matrix that its makers cannot amend it if necessity arises.

59. The **clarification matrix** is fixed based on the terms in the process documents. The ***PREFACE*** of the Clarifications to Resolution Applicants read as follows:-

> 1. *This document is being issued to provide certain clarifications on the illustrative list of parameters set out in Annexure 1 to the Process Document dated December 20,2017 ("Process Document") that may be considered for the purpose of evaluation of the Compliant Resolution Plan submitted by the Resolution Application ("RA"). Please note that the clarifications mentioned herein are not meant to be exhaustive. The*

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CoC reserves the right, in its sole discretion, to provide further clarifications or delete or modify the same.

2. *All terms of the Process Document shall continue to apply and be effective.*

60. Thus, it provides a clause to the effect that the CoC can delete or modify the clarification. So if it wish to consider a revised offer of an applicant which may exceeds the offer already under consideration CoC can amend the process document so as to meet the purpose of the resolution process. Nothing forthcoming in the case in hand that any of the private lenders and few public sector lenders wish to consider other than the plan of RPPL even if they are satisfied that some of the public sector lenders offered with haircut exceeding 50%. This approach create a shadow of doubt over the hasty decision of the CoC where EARC and IDBI a privet sector lender having supremacy over the CoC with vote share of 43.12 and 25.70 respectively. Serious allegations were levelled from the side of the applicants against the supremacy of EARC and IDBI over CoC. So also counter allegations also were raised as against Ultra Tech that it is playing unfair practice so as to take over a company with the backing of Binani Industries which is the holding company of the corporate debtor. Both allegations being not found in the respective pleading we reserve our observation about the allegations.

61. So also Process Document not at all prohibit the CoC from amending the clause. **Clause 2.1.3.reads** as follows:-

i) Clause 2.1.3 of the process document provides that "*the COC reserves the right to amend or modify the criteria of the evaluation of the Resolution Plan/ Financial Proposal submitted by the Resolution Applicants prior to the Resolution Plan Submission Date.*"

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62. Truly, the said clause permit its maker to amend prior to the submission of resolution plan. It is good to have a look at certain other clauses of Process Document. Clause 1.6.1 provides that the ***CoC have right to accept or reject in or all plans prior to approval of the same by the Adjudicating Authority.*** A reading of clause 1.6.1 it cannot be hold that the CoC's hand is fettered so as to avoid a resolution applicants plan from revising its offers only because it was ranked below H1 applicant. It can accept or reject any plan at any time before the approval of the plan submitted to the adjudicating authority. It is also good to read clause 1.6.2(a) in the process document . It reads as follows:

> 1.6.2(a):*On receipt of a Resolution Plan submitted by a Resolution Applicant, the Resolution Professional shall review the same for compliance under the IB Code in consultation with his legal advisors and have deliberations with the CoC in relation to the same. Where Resolution Applicant(s) are found to have submitted a Resolution Plan which is not a Compliant Resolution Plan, that is, one which does not meet the provisions of the IB Code or the CIRP Regulations, the Resolution Professional may request the Resolution Applicant(s) to remedy the deficiencies in the Resolution Plan submitted, and submit a Revised Resolution Plan. The Revised Resolution Plan shall be reviewed by the Resolution Professional in consultation with his advisors for ensuring compliance with the IB Code and the aforesaid process would be repeated. If any Revised Resolution Plan is found to be a Compliant Resolution Plan, by the Resolution Professional, the same shall be submitted to the CoC for its consideration.*

63. On a careful reading of the above-said clauses, what we under stood is that all the resolution plans which meets the requirements of section 30(2) of

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the Code shall be placed before the CoC and if he is satisfied that any plan requires revision he can demand revision and can place before the CoC. The Resolution Professional can review the resolution plan under I.B.Code in consultation with his legal advisors and can have deliberations with the CoC in relation to the same and that process, if it is necessary, can be repeated even. And the revised resolution plan is found to be compliant resolution plan, the same shall be submitted to the CoC for its consideration. ***To apply this clause, there is no time limit prescribed.***

64. Similarly, as per Clause 1.13.10 the CoC who is the maker of the process document reserve their discretion so as to extend the timelines for submission of resolution plan for all applicants and such extension in timeline shall be communicated to all Resolution applicants by placing an appropriate extension notice in the data room and publishing the notice of extension on the website of the company. So a reading of process document as a whole it appears to us that second objection for non consideration of the revised offer of the UltraTech is bad and not sustainable under law. At this juncture, the Ld. Counsel appearing for the applicant cited an order of ***Hon'ble NCLT, Principal Bench, New Delhi in CA(IB) No.152/PB/ 2018 in CP(IB) 202/PB/2017 (Punjab National Bank -vs- Bhushan Steel & Powers Ltd.)*** for strengthening his argument that a guideline framed by the CoC cannot impose restriction upon a resolution applicant by denying its legitimate right to participate in the bidding process and revise its offer till the bidding process is complete. Such a right of an investor cannot be restricted by way of framing guidelines by a CoC like the guideline in the case in hand argued by the Ld Counsel for the applicant. The above cited order was passed by the Hon'ble NCLT, PB in a case fairly similar to this case. The Hon'ble Principal Bench has held that:

> "***The Resolution Plan with Liberty House shall not be rejected on the ground of delay emanating from process document or any***

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other document entirely circulated by the Resolution Professional or the CoC. The rejection shall be on substantive ground as against flimsy work."

65. This proposition is squarely applicable in the case in hand. One among the three objections of the RP is that consideration of the revised proposal would be a deviation of the process document. Such a decision is not at all legally sustainable as held in the above cited decision. The said ground for non consideration is not a substantive ground but is a flimsy ground. Much argued by the Ld. Sr. Counsel for the H1 bidder and CoC that process document deviation by the CoC may call for litigation and to avoid the possibility of complaint and for upholding its transparency the process document was framed. We do not find any merit in the said submission upon the reason already led in. In view of the above said discussion we also hold that the second objection for non consideration of revised offer is devoid of any merit.

66. The third objection is that the revised offer was beyond the time as stipulated by the IBC. It appears to us that this objection is also devoid of any merits. As referred to above, the CIR process when the applicant submitted revised offer, never expired so also the Resolution Plan originally submitted by the applicant was in time. No provision in the Code or Regulation restrict the Resolution Professional or the CoC from accepting the revised offer in addition to the offer already offered by a resolution applicant. Admittedly the revised offer has been placed before the Resolution Professional as well as to the members of the Committee of Creditors on 8.3.2018 that is well in advance before the approval of H1 Pan by the CoC. After 8.3.2018 the only meeting convened was on 14.03.2018. If the Resolution Professional as well as the CoC in its fairness wish to see whether that offer can be considered for the better interest of the stakeholders as well as to the Corporate Debtor,

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necessarily they would have considered the offer. Only three financial creditors among 21 financial creditors made a request to the CoC to have a reconsideration of the offer made by Ultratech Cement Limited. As stated earlier, the request was unheard, rather ignored raising the above said three flimsy reasons highlighted on the side of the Resolution Professional. It has come on evidence that the extended period of CIR process would expire only on 21.04.2018. Enough days are ahead to the Resolution Professional as well as to the CoC to have a consideration of the revised offer of the Ultratech Cement Limited. In the above said peculiar circumstance it can be inferred that the time-line fixed by the CoC is for a deliberate exclusion of other competent resolution applicants other than H1 applicant. The third objection is also found not a substantive objection and therefore we come to a conclusion that none of the objections raised on the side of RP, RPPL and CoC are sustainable under law.

67. This is an unfortunate case in which extensive number of interim applications were filed by various stakeholders, director of the suspended board of directors and one of the resolution applicant. Why like interruptions comes? What legal standard should be followed by an insolvency professional is laid down in the Code and Regulations. A resolution professional must follow it. With out following it, a guideline prescribed on the basis of CVC and IBA is followed by the RP in disregards to the provisions of the code and Regulations. None of these applications could have filed by them provided RP and the CoC taken care in following the process as mandated under the Code. The RP forget his fiduciary duty owed by the lenders to stakeholders without any discrimination. His name as an RP is proposed by the applicant in the CP who is a lender. Can he is loyal to the lenders because of his name was proposed by a lender? Here in this case the RP not taken any independent decision of his own before placing the plans before the CoC. It cannot be ruled

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out that there is undue influence over him by the lenders who has larger voting share.

68. The very object of the Code is on revival and rehabilitation of the Corporate Debtor who is sinking for reason of non-payment of dues in time. The object of the Code is not to liquidate the business of the Corporate Debtor. What we expected from the Resolution Professional and also from CoC is fair and transparent process in finding out a bidder who can satisfy all the claims of the lenders and operational creditors in a transparent manner with out giving a chance to interrupt the process by affected parties. The CoC is consists of financial creditors. When majority of its members like EARC and IDBI get benefit of clearance of their entire debt with out hair cut they are prompted to neglect minority unsecured financial creditors whose claim is accepted with hair cut exceeding 50% and larger number of operational creditors would get nothing. RP or nobody else bargained for them. Though one of the representatives of the operational creditors is entitled to attend in the meeting of CoC that right was also denied for want of quantification of the claim of 3600 and odd number of claimant in the case in hand before the approval of plan by CoC. Some of the operational creditors claims verification not yet finished even if RP is assisted by larger number of representatives under him. Who should take care of their claim?.

69. Ld. Sr. Counsel for the RP submits that RP is concerned to see that section 30(2) of the code is complied and if he is satisfied that plan shall place before the CoC and question of satisfaction of all lenders creditors claims are not the concern of the RP but the concern of the CoC. According to him RP has to be blind in regards proposal of offers made by the resolution applicant. We are afraid of hearing such a submission from a Ld.Sr.Counsel of this Bar who is arguing for and on behalf of RP. Is it meant that the RP has no liability or responsibility in taking decision of his own? Can he permit creditors to suffer especially when an offer brought to his notice to satisfy all stake holders from a

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resolution applicant who is otherwise qualified and competent to take over the stressed assets of the corporate debtor who showed its interest in the corporate debtor company and showed willingness to clear all dues of all lenders and creditors with out a haircut?. In a situation like the situation in the case in hand can he be blind?. The very competency of the RP itself is challenged from his own side. It appears to us that the said submission is devoid of any merit.

70. So, whenever a resolution applicant's plan is under consideration of CoC and that plan is not at all placed before the Adjudicating Authority for approval and if another resolution applicant comes forward making an offer before the CIRP duration expires, that it will satisfy all the stakeholders of the Corporate Debtor, then there is nothing in the Code or Regulations to prevent the CoC from considering a revised offer of another applicant. It is significant to note that on 14.03.2018 when the Ultra Techs application came up for consideration before this Adjudicating Authority the CoC passed the disputed resolution plan disregards to the outcome of the application.

71. In this regard, it is also good to look into the minutes of the CoC in the meeting held on 14.03.2018. Some of the financial creditors, namely, EXIM Bank, Canara Bank as well as SBI Hong Kong requested the CoC to consider the revised offer of Ultra Tech received by all of its members of the CoC by email dated 08.03.2018. Though their request has been discussed in detail, no decision regarding the rejection or reconsideration of the application of the Resolution Applicant, Ultra Tech had been taken out. The Canara Bank stated before the CoC that if money is coming high, one must try. The representative of the Canara Bank further stated that process is not that important that outcome has been forgotten. If there is a value addition by INR 700 crores, (vide revised offer the Ultra Tech offered INR 700 core in addition to the offer already made in its plan and that offer was subsequently revised to INR.1021.70Crore)definitely a thought should be made over it. EXIM Bank

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representative stated in the meeting that it is not necessary to be bound by the process document. There is world beyond that. He further stated that if we inform H1 that their plan would be considered without an increase, then there is no need to revise the offer. Similarly, EXIM Bank reiterated that in the correct spirit of IBC maximum recovery is to be made when ***the asset has the potential to generate that and the bidders have demonstrated their willingness*** to do that just because someone is getting their old dues. ***He cannot deprive any other lenders of their dues***. ***That is the spirit in which everyone is expected to function.*** Despite this deliberation as suggested by vote share of aggregate of 88.9%, the Resolution Professional was forced to take a decision to put the H1 applicant Resolution Plan to vote. SBI, SBI Bahrain, SBI Hong Kong requested the Chair not to put the plan to vote. The remaining financial creditors though opposed the putting H1 plan alone for voting when the voting was happened and it was put to vote, SBI Hong Kong voted against the Resolution Plan. SBI Bahrain and EXIM Bank voted in favour the Resolution Plan under protest.

72. In the light of the above said discussion, we are in considered opinion that the revised offer of the Ultra tech is to be considered by the CoC and non consideration of the revised offer is found not legally sustainable and is against objective of maximization of value as provide in the Code and is in violation of the provisions of the Code and Regulations as discussed above. This point is answered accordingly.

Point No.iii

73. SBI Hong Kong filed CA(IB) No.223/KB/18 alleging inequality in considering the claim of the applicants at par with the approval of claim of financial credits. The applicant alleged that 10% of the verified claim by giving a hair cut of 90% of the regular valid claim of the applicant is highly illegal and

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challenged the restructuring of the debt due to all stake holders as per the approved plan. This application was filed on 14.03.2018, immediately before the approval of the plan.

74. Similarly, EXIM bank filed CA(IB) No.249/KB/18 alleging discrimination among the financial creditors. According to the Ld. Counsel for the EXIM Bank the Resolution Plan proposes only 72.59% of its verified claim and arbitrarily gave a hair cut of 27.41% of the legal and verified claim of the applicant. The applicant claims that the liquidation value payable to unsecured financial creditors is nil and upon subrogation would not be sufficient to recover amounts paid to the applicant. The Resolution applicant proposed to make 52% payment in the initial plan and 72.5% payment in the later plan. The applicant further contends that there is no concrete basis for such discrimination against the applicant at par with other financial creditors and the Resolution Plan is contrary to the scheme of the I&B Code 2016. According to the Ld. Counsel the practice of allotment of claim raised serious doubts about the process and, therefore, the applicant filed this application seeking directions. According to Ld. Counsel the Ultratech Cement Limited also given revised proposal which may satisfy all the stakeholders but the CoC did not consider its request to negotiate with the Ultra Tech and since if it wont vote it would be an economical loss to the Bank and hence opted for vote fearing descenting creditors would get nil as per the Code.

75. Both Banks are corporate guarantees beneficiaries. Admittedly, Corporate Debtor not invoked the guarantees held by SBI and IDBI. According to the Ld. Counsel, Mr. P. V. Dinesh for SBI HongKong and Ld. Counsel Mr. Krishnaraj Thaker for EXIM Bank, IDBI is similar to SBI Hong Kong but the plan proposes 100% of its verified claim and therefore it is discriminatory and considered equals as unequal which cannot be permissible under the Code. It is significant to note here an order of this Bench dated 17.11.2017 passed in

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CA(IB) No.505/KB/18 filed by RP for clarification in respect of corporate guarantees issued by the corporate debtor but not invoked. It read as follows:-

"***In view of the judgement delivered on 27/10/2017 by the Hon'ble Principal Bench, National Company Law Tribunal, New Delhi in (IB)-102(PB)/2017 (Axis Bank Limited & Anr. -Versus- Edu Smart Services Private Limited)*** wherein it has been held that *in order to qualify as a 'debt' firstly provisions of the corporate guarantee must be satisfied by raising a demand which is expressed by invoking the corporate guarantee and the date of its invocation has it be earlier than the insolvency commencement date. In the present case, the CIRP commenced on 27.06.2017 and the corporate guarantee was admittedly invoked on 21.07.2017, which is much after the insolvency commencement date. Therefore, we find that the Resolution Professional would not be in a position to verify the claim as it will not be reflected in the Books of Accounts which are supposed to be updated as on 27/06/2017. In the absence of any record to verify the claim, it will be impossible for the Resolution Professional to accept any such claim which has become a debt after 27.06.2017.*

Keeping in view of the decision taken by the Principal Bench, NCLT, New Delhi it is clear that corporate guarantee, which has not been invoked before commencement of insolvency process, cannot be considered as debt if it was invoked after the commencement of insolvency process and "moratorium" was issued. Therefore, RP is to be guided by the decision of the Hon'ble Principal Bench, NCLT, New Delhi."

76. This order was challenged by the IDBI before the Hon'ble NCLAT but later it was withdrawn. Vide order dated 08.03.2018 Hon'ble **NCLAT in CA(AT)(ins) No.313 of 2017** allowed the appellant to withdraw the appeal but ***without any liberty to challenge the same very impugned order.*** The said

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ithdrawal order was on 08.03.2018. At this juncture, Ld. Counsel for the XIM Bank cited a decision of Hon'ble Supreme Court in **(1992) 3 SCC; 1992) 3 SUPREME COURT CASES 1(Shree Chamundi Mopeds Ltd.vs. Church of South India Trust Association CSI Cinod Secretariat, Madras)** or highlighting an argument that when an appeal challenging an order is withdrawn recoding that right of appellant in raising the very same challenge against the impugned order is barred, its effect is restoration of the order under challenge and this Adjudicating Authority's order become in force as if there is no challenge. It is good to read the following observation in the above cited decision. It read as follows:-

> *"While considering the effect of an interim order staying the operation of the order under-challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence".*

77. Ld Sr. Counsel for R.P. at this juncture referred to the interim order of Hon'ble NCLAT in the above referred appeal. It reads as follows: "I***n the meantime, Interim Resolution Professional will consider the claim of the appellant uninfluenced by the order, if any, passed by the Adjudicating Authority Principal Bench New Delhi Which shall be subject to the decision of the appeal".*** He submits that in view of the interim order the RP has decided to include the claim of IDBI and moved an application for withdraw after allowing the claim and therefore there is no violation of the order of this Bench. Though literately there is no violation it appears to us that under the guise of an interim order in the appeal the RP hurried in allowing the

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claim of IDBI in full and the H1 applicant managed to submit final revised plan to RP on 07.03.2018. This plan proposes to satisfy IDBI claim despite non invoking corporate guarantee. Thus, all the above referred banks except EXIM bank are in similar status. The corporate debtor though hold the corporate guarantee never invoked the same. If it so how the RP permit the resolution applicant to include the entire claim of IDBI to the tune of Rs.1567.45 crores in restructuring the debt when others in similar position not granted relief with out haircut? According to the Ld. Counsel for the RP such enhancement was allowed based on negotiation of resolution applicant with lenders in the lenders forum meeting held on 07.03.2018 and RP has no role in the offer made in the resolution plan. Thus it has come out in evidence that financial debts owed to unsecured financial creditors holding corporate guarantees issued by the corporate debtors treated differently with out assigning valid reasons. On screening the resolution plan it is understood that entire claim of IDBI to the tune of INR 1567.40 Crores was verified and admitted by the RP despite UN-invoked guarantee issued by the corporate debtor in favour of IDBI and resolution applicant allowed the entire claim on a **condition that IDBI gave consents to the resolution plan of RPPL**. It leads doubts in regards undue influence of majority lenders who has majority of votes share requiring to cast vote so as to have minimum vote share to pass a resolution as per section 30(4) of the Code. Any resolution applicant who can satisfy the claim of EARC and IDBI can get an approval of its plan by a majority of votes share is a fact brought to our notice and no consideration of very similar financial creditors at par with IDBI add strength to the submission of the Ld. Counsel for the above referred Banks that practice of allotment of claim is not based on any concrete basis or norms. So no doubt it amount to discrimination against the above refereed two banks. In the above said view we find some force in the argument advanced on the side of the Banks and satisfied that the plan under dispute requires modification. This point is answered accordingly.

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Point No. V

78. By filing CA(IB) No. 248/KB/18, eight(8) operational creditors jointly challenged the plan alleging that their claim was totally ignored by the RP and no attempt was made from the side of the RP to provide proportionate benefit to the operational creditors. According to the Ld. Counsel, Mr. Jishnu Chowdhury restructuring of the debt as per the plan only passes the benefit to the financial creditors and therefore no equitable consideration in respect of all the claims of all the stakeholders and therefore the plan is liable to be rejected. Another five Operational Creditors jointly filed CA(IB) No.343/KB/2018 and eight Operational Creditors jointly filed CA (IB) No.344/KB/2018 raising very same allegations. The Operational Creditors who filed CA(IB) No.248/KB/2018 alleged that their claims not at all fully admitted by the Resolution Professional for the reason that the verification of claim of Operational Creditors is pending with him. According to the Ld. Counsel appearing for the Operational Creditors, the inaction on the side of the Resolution Professional in settling the claim to be verified by the Operational Creditor before the submission of Resolution Plan to the Committee of Creditors not at all adhered to. The Ld. Counsel also submits that none of the representatives of the Operational Creditors were permitted to attend any of the meeting of Committee of Creditors so as to have an effective representation of the claim of the Operational Creditors. Section 24 (3) (c) of the Code gives a right to one representative of Operational Creditor to attend the meeting of Committee of Creditors without having any rights to votes. As per Section 24(3)(c), in order to claim representation by representative of the group of Operational Creditors, the aggregate dues due to the Operational Creditors is not less than 10% of the debt. So that in order to see that any one of the representative of Operational Creditors can be permitted to attend the CoC meeting necessarily the Resolution Professional to have verified the claims of all the Operational Creditors so as to quantify their admissible claim of the Operational Creditors. However, in the case in

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hand, the Ld. Counsel appearing for the Operational Creditors brought to our notice a reply addressed to the Ld. Counsel appearing for the Operational Creditors dated 23rd April 2018 ascertaining that the verification of the claim was an ongoing process and he will consider its claim as and when information documents were received. The Ld. Counsel for the Operational Creditor would submit that none of the claims of claimants referred to in the in the application were in receipt of any of the demands from the Resolution Professional so as to submit proof of any claim. According to him, proof of claim already submitted to the Resolution Professional and, therefore, the contention on behalf of the Resolution Professional has no force at all. According to Ld. Sr. Counsel for the R.P., all the admitted claims of Operational Creditors were considered by the Resolution Professional. However, on a reference to the resolution plan the clarifications submitted on the side of the Resolution Professional seems to be not true. However, the Ld. Sr. Counsel appearing for the RPPL, the resolution applicant submits that the resolution applicant has been furnished data regarding admitted verified amount of 2,980 Operational Creditors and that 2941 operational creditors whose dues have been verified by the Resolution Professional not exceeds Rupees One Crore is offered 100% payment and those Operational Creditors' dues varied from Rs.1 Crores to Rs.5 Crores offered maximum 40% of verified amount of Rs.1 Crore and operational creditors, whose dues exceeded Rs.5 Crores and less than Rs.10 Crores maximum 25% of verified amount of Rs.2 crores are offered and that those dues exceeding an amount of more than Rs.10 crore, maximum 5% of value of Rs.2.5 crores are proposed. As per the plan, the total verified amounts of Operational Creditors not exceeding Rs.1 Crore comes to 2,941 operational creditors. Those dues is less than Rs.5 crores and higher than Rs.1 Crore is only 24 Operational Creditors and there is only 5 Operational Creditors whose verified claim is in excess of Rs.5 crore but less than Rs.10 crores and there is only 10 Operational Creditors whose claim exceeds Rs.10 crores. The total number of Operational Creditors found

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verified come to 2,980 and the total verified amount come to Rs.429 Crores. Admittedly, the total number of Operational Creditors exceeds 3,600. According to the Ld. Counsel for the RP the total operational creditors including workmen, employees and statutory creditors comes to 4311. Admittedly, the process of verification is going on till date of conclusion of the argument in this case that is till 23.04.2018. Therefore, the contention on the side of the Ld. Counsel that their interests as claimed by them through the claim submitted to the Resolution Professional not safeguarded by the Resolution Professional is found to have some force. According to the Ld. Counsel for the RP approval of resolution plan is not the mandate of the RP and that he is bound to submit such resolution plan which would meets the requirements of section 30(2) of the code and after its approval by the CoC he has to submit it before the adjudicating authority under section 30(6) of the code and he cannot ask for any modification after its approval. The said argument appears to us not at all inspire our confidence in the manner the RP considered the applicant request for verification and admission of their claims. It is contented in the reply filed by the RP that the applicant claims were taken note of by him and submitted to the CoC. But in the meeting held on 14.03.2018 we failed to see any serious discussions has been deliberated in respect of the operational creditors claims. The duty cast upon the RP is before the submission of plan before the CoC. Before the submission of a plan it is his bounden duty to see all the requirements of section 30(2) of the Code meets the plan. Section 30(2) (b) of the Code "*provides for the repayments of debts of operational creditors in such manner as may be* ***specified*** *by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53".*

79. The above provision must be read along with Reg. 37(1) and 38(1) (b) of IBBI(IRP for Corporate Persons) Regulations,2016. Reg. 37(1)(f) provides

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reduction in the amount payable to the creditors". 38(1)(b) says *"liquidation value due to operational creditors and provide for such payments in priority to any financial creditor which shall in any event be made before the expiry of 30 days after the approval of a resolution plan by the Adjudicating Authority".*

80. Thus RP is bound to see that all these requirements meets by a resolution applicant before the plan is placed before the CoC. It is good to read Reg. 39(2). it read as follows:

> (2) The resolution professional shall present all resolution plans that meet the requirements of the code and these Regulations to the committee for its consideration.

81. A reading of above referred provision shows that a resolution plan can be accepted even if there is reduction in the amount payable to the creditors. It is significant to note that the said reduction is in general applicable to all class of creditors. So reduction in regarding restructuring of debt is applicable to financial creditors, unsecured creditors and operational creditors too. There is no distinction as per the code or Regulations. No doubt no financial creditor takes a hair cut on his entitlement to realise the amount he claimed. Here in this case one unsecured creditors was given a haircut up to 90% another given 27% haircut and one another given no haircut. In the case of operational creditors whose claims not go beyond one crore is offered no haircut, operational creditors whose dues vary form 1 crore to 5 crore given a haircut of 40% or 1 crore which ever is higher. Similarly operational creditors dues very from 5 Crore to 10 crore 25% of 2 crore and if it exceeds 10 crore 5% of 2.5 Crore. The above said factors only adds strength to the contentions of creditors that their claims not considered strictly by the RP in accordance with the Code and Regulations. So the contention that the plan submitted for approval does not contravene any of the provisions of the law for the time being in force is found not true. Who will take care of operational creditors

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claim. Is it not they are essential part of a growing company. With out them how can they do the manufacturing process. It may be the reason Ultra Tech offered satisfaction of their claims without a hair-cut. Is that offer is malafide?. An argument was advanced on the side of RPPL that Ultra Tech intention is malafide. We do not find any reason to doubts its bonafide. In the interest of healthy trade competition why not its claim is considered?. No valid answer other than stressing on the timeline as specified in the Process Document and evaluation matrix offered. In view of the above said discussion we are unable to hold that there is no discrimination among the creditors who are equal and reduction offered to the operational creditors too is not in accordance with the regulations and with in the objective of the Code. This point is answered accordingly.

82. Before the conclusion of the argument Dy. Commissioner of Income Tax also rushed before us and its Ld. Counsel Mr. Shiv Chand Prasad submits that the plan never provide any provision for priority of payment due to government including Income tax authority and pressed for rejection of the plan submitted for the approval. A copy of the claim submitted to the RP also brought to our notice. It indicates that total outstanding claim of the Dy. Commissioner of Income tax is INR 33,37,18,692.00. Id. Sr. Counsel for the RP by referring to the resolution plan submits that out of the said total claim undisputed amount of Rs. 240635112/- is admitted by the RP and that amount is included in the plan for clearance. According to the Ld. Sr. Counsel for the RP the remaining amount is disputed and an appeal is pending before the appellate authority and it is why the entire claim is not included. So it appears to us that statutory dues due to the Dy. Commissioner of Income Tax seen taken care of by RP.

83. To sum up, we find the following proved factors:- The representatives of suspended board of directors were not allowed to attend some of the meetings where issues regarding the corporate debtor was discussed. Though as per

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the directions from NCALT and this Bench directors were permitted to attend the meeting under section 24(3)of the code, they were not permitted to attend the meeting till the meeting is completed. RP also violated section 21(3) of the code. In regards resolution cost it appears to us that Reg.25 of Sh.1 of IBBI(Insolvency Professionals)Regulations,2016 is violated. So also Reg.27 is not strictly followed. No effort seems to have taken by the RP so as to ensure that the resolution costs are not unreasonable. Non consideration of revised offer is found with out assigning substantive reasons and refusal to consider it is found on flimsy grounds on the strength of Process Documents and time line fixed in evaluation criteria. The entire decisions of RP as well as CoC in respect of identifying one resolution plan from among six plans and denying opportunity to have negotiation so as to raise the bid amount by the willing bidders other than H1 bidder is found vitiated that they have acted against the objective of the code and against the interest of various stakeholders of the corporate debtor and also acted unfairly, arbitrarily and against the interest of the competing bidders including the applicant Ultra Tech. Non consideration of uniform basis for giving reduction of the debt due to various creditors including unsecured creditors and operational creditors in the plan submitted for approval is amount to discrimination. Upon the above said factors we come to a legitimate conclusion that the process of selection and identification of one plan alone when there is other competing bidders is evidently available and who showed willingness to offer full satisfaction of the claim of all stakeholders claim denying opportunity to them from participating the bidding process even if CIRP period of 270 days ever expired is found filed with irregularity and in violation of the objective of the Code and Regulations.

84. From the above said discussions, it appears to us that when we are taking judicial notice of denial of a better revival of the corporate debtor company on flimsy grounds, can we be blind? We may not blind in a case of this nature. It is good to refer a citation of Hon'ble Supreme Court in **Miheer H.**

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Maftalal Vs. Maftlal Industries Ltd.(Manu/SC/2143/1996) referred to us from the side of operational creditors. To understand the proposition it is good to read last part of para 28 at page 11. It reads as follows:

> *"No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholder or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme placed for its sanction".*

85. The above said proposition is squirely applicable in the case in hand. Approval of the plan of RPPL doesn't satisfy larger claim of operational creditors and not satisfy some of the unsecured financial creditors claim. On the other hand the revised offer of Ultra Tech if approved by the CoC it would satisfy the claim of all the stakeholders. For the said reason also we are not bound to approve a resolution plan when we are satisfied upon relevant material regarding availability of a better resolution if RP is directed to have reconsideration of both plans under dispute. Interest of justice no doubt demand reconsideration of the resolution plans. For the afore said view we are inclined to allow the applications CA(IB)No. 233/KB/2018 and CA(IB)No.227/KB/2018 along with CA(IB)No.210/KB/2018 by excluding the duration of litigation from the date of filing of CA(IB) No. 227/KB/2018 till date of today. CIRP period of 270 days expired on 21.04.2018. In **Quantum Limited V. Indus Finance Corporation Limited, CA(AT) (Insolvency) No.35/2015** dated 20.02.2018 the Hon'ble NCLAT by setting aside the order of

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Mumbai Bench of NCLT has held that "***For the aforesaid reasons, we set aside the impugned order dated 18th December, 2017 and extend the period of resolution process for another 90 days to be counted from today. The period between 181 day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose. Now the Adjudicating Authority will proceed in accordance with Law."*** Following the proposition, as held in the above cited decision, the Hon'ble NCLT Principal Bench in **CA(IB) No.152 (PB)/2018 in C.P.(IB) 202(PB)/2017 (Punjab National Bank Vs. Bhushan Power & Steel Limited)** allowed the above application excluding the period of duration in disposing the said IA observing the following :- "***It has come on record that the period of 270 days for CIR process is to expire on 22.04.2018. The present application by Liberty House was filed on 22.02.2018 and it is being decided on today (23rd April, 2018). The period from 22.02.2018 till date would thus stand excluded from the period of 270 days and the process may now be concluded by 23.06.2018."*** in view of the above said proposition it appears to us that the duration for disposal of the above said CA filed by Ultra Tech is to be excluded from the duration of CIRP of 270 days fixed in the CP in hand. Accordingly, we exclude the period from 08.03.2018 till today(03.05.2018) and therefore the CIR process is to be concluded on or before 24.06.2018. Upon the above said observation we are inclined to pass the following orders:-

86. Before passing orders and parting with we would like to high light certain factors we have taken judicial notice while this case was heard at length. The preamble of the Code ensure a speedy disposal of a resolution in a time bound manner for maximisation of value of assets of a corporate debtor like the debtor in the case in hand. So also it ensure balancing the interest of all the stakeholders and order of priority of payment of Government dues. The adjudicating Authority is facing too much interruptions from various stakeholders. Till date we never come across any frivolous applications. All

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comes with some genuine grievance. All challenges the independence of the resolution professional and lack of transparency, competency and arbitrariness in the matter of resolution process. In the case in hand 12 applicants come forward challenging the process only for not following the process mandated under the Code by the resolution professional. The arbitrary way of dealing with the cases has always led to interruptions and also causes delay in disposal of like case. Here, in this case the resolution professional is a chartered account by profession. However he failed to take business decisions so as to run the corporate debtor by his own. He managed to run the company by appointing about 22 representative who are from his own partnership. Truly running an insolvent company pending exploration of a resolution process by him alone is not an easy task. A resolution professional like the RP in a case of this nature need some basic training in regards handling the resolution independently, efficiently so as to tackle with the multiple question may arises for consideration form different stakeholders in the courses of resolution. Whenever a question arise even if answerable by the RP independently or with advice from his advisors he comes to Adjudicating Authority for having determination so that he is not exercising his own effort to see that all the questions posed to him during the process is answered justifiably. He shift that burden too to the Adjudicating Authority. So also in a case of this nature nobody taking care of operational creditors claim. At least minimum amount as required under the Code is not offered to those creditors in the plan of revival. But because of the supremacy of financial creditors who has control over the process, their claims neglected or rather ignored. It is time to recognise their voice also in the Committee of Creditors. While there was a need for reforms the Regulations to ensure that it is not misused or misinterpreted, there cannot be any question on the fact that independence and competency of a resolution professional is essential for preserving the object of the code in a transparent manner giving no room to have interruption from any corner. Hopefully, we believe that IBBI take note of

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all the above observations and to do the needful review of the Code and Regulations.

ORDER

1. CA(IB) No.227/KB/2018, CA(IB) No.233/KB/2018 along with CA(IB) No. 210/KB/2018 is allowed upon the following directions:-

i) The period of duration of litigation on account of CA 227/18 and other applications filed after the date of CA 227/2018 stands excluded. The CIR Process is to be concluded expeditiously before 24.06.2018.

ii) The resolution professional is directed to accept the revised offer quoting the bid amount Rs.1021.70 crores from UltraTech with in 3 days from the date of this order and place it along with the resolution plan of Ultra Tech before the CoC.

iii) The CoC is directed to consider the revised offer along with the resolution plan of Ultra Tech by giving an opportunity to have hearing if any for further modification is found necessary and to take appropriate decision bare in mind the object of the Code.

iv) The CoC is also directed to reconsider the resolution plan of RPPL, if the resolution applicant is willing to raise the offer above the offer of Ultra Tech to be placed before it by the RP along with the resolution plan of Ultra Tech. It is made clear that if both resolution applicants if willing to participate in the bidding process CoC is expected to allow both resolution applicants in the bidding process and which is best for revival of the corporate debtor is to be decided by the CoC.

v) RP is also directed to comply the provisions of the Code and regulations in submitting the revised offer before CoC and in issuing notice to the director of the suspended board of the corporate debtor

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and notice also is to be issued one among the operational creditor who filed the above referred application as a representative if the requirement of section 24 (3)(c) of the Code is satisfied.

2. Since we are inclined to allow the above applications, we are dismissing CA(IB) No.245/KB/2018 filed by the director praying for issuing injunction restraining EARC from making any claim in excess of Rs.2594.24 crores on the strength of master restructuring agreement evidently recalled by the EARC as it is also not maintainable.

3. CA(IB) No. 246/KB/2018 is dismissed.

4. In view of directing reconsideration of resolution plans by RP, no further directions is to be issued in the following CA(IB) 201/KB/2018; CA(IB) No. 234/KB/2018; CA(IB) No. 223/KB/2018; CA(IB) No.248/KB/2018; CA(IB) No. 249/KB/2018; CA(IB) No.343/KB/2018 and CA(IB) No.344/KB/2018 and these CAs are disposed as above.

5. Certified copy of the order may be issued, if applied for, upon compliance with all requisite formalities.

6. Urgent Photostat and/or certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities. The registry is directed to forward a copy of this order to IBBI

List it on 4th June, 2018 for filing progress report.

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(Madan B. Gosavi)
Member (J)

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(Jinan K.R.)
Member (J)

Signed on this the 2nd day of May 2018.

02-05-2018 – CA(IB) No. 201/KB/2018 - CA(IB) No. 234KB/2018 - CA(IB) No. 245/KB/2018 - CA(IB) No. 210/KB/2018 - CA(IB) No. 227/KB/2018 - CA(IB) No. 233/KB/2018 - CA(IB) No. 223/KB/2018 - CA(IB) No. 249/KB/2018 -Inv. (IB) No. 248/KB/2018 - Inv. (IB) No. 343/KB/2018 - Inv. (IB) No. 344/KB/2018 – CA(IB) No. 246/KB/2018 - CA(IB) No. 247/KB/2018 - CA(IB) No. 244/KB/2018- CP(IB) No. 359/KB/2017 – Bank of Baroda – Vs.- Binani Cements Ltd.

O R D E R

Vide common order in separate sheet, CA(IB) No. 210/KB/2018 - CA(IB) No. 227/KB/2018 - CA(IB) No. 233/KB/2018 are allowed.

Since we are inclined to allow Applications CA(IB) No.227/KB/2018, CA(IB)/233/KB/2018 along with CA(IB) No. 210/KB/2018, we are dismissing CA(IB) No.245/KB/2018 filed by the Director praying for issuing injunction restraining EARC from making any claim in excess of Rs. 2594-24 crores o the strength of master restructuring agreement evidently recalled by the EARC as it is also not maintainable.

CA(IB) No. 246/KB/2018 is dismissed.

In view of directing reconsideration of resolution plans by RP, no further directions is to be issued in CA(IB) No. 201/KB/2018, CA(IB) No. 234/KB/2018, CA(IB) No. 223/KB/2018 , Inv. (IB) No. 248/KB/2018, CA(IB) No. 249/KB/2018, Inv. (IB) No. 343/KB/2018 - Inv. (IB) No. 344/KB/2018 and these CAs. are disposed of.

CA(IB) No.247/KB/2018

This is an application filed by Edelweiss Asset Reconstruction Company Limited representing the Committee of Creditors seeking impleadment of Committee of Creditors as party respondent. In order to enable the Committee of Creditors to present before this Tribunal the true facts and

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circumstances in the instant matter in respect of the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor. The applicant contends that none of the parties in the main application will be prejudicially affected if direction for impleadment as sought by the CoC are allowed. Upon the said contentions it prays for impleading the CoC members as an additional respondent to the CP (IB) No.359/KB/2017. We have given ample opportunity to the Ld. Counsel appearing for EARC and the CoC for submission of their arguments in respect of hearing of all the CAs and considered their arguments. Accordingly, this CA for impleading them so as to contest the CAs doesn't arise. Therefore, this CA is dismissed. However, no order as to cost.

CA(IB) No.244/KB/2018

This is an application filed by Mrs. Visalakshmi Sridhar the Company Secretary of the applicant/Binani Industries Limited under Sub-Section 5 of Section 60 of I&B Code, 2016 read with Rule 11 of the NCLT Rules, 2016 challenging the resolution process initiating at the instance of the Resolution Professional and the CoC. The applicant challenged that the Directors of the CoC has not been given proper access to the CoC meeting so as to avoid him in respect of taking any crucial decision affecting the Corporate Debtor. She alleges serious irregularities allegedly committed by the Resolution Professional regarding constitution of the CoC and particularly inclusion of IDBI Bank Limited and inclusion of SBI Hong Kong Branch and contends that both these banks are dis entitled to be part of CoC. Despite directions given by the Hon'ble NCLAT, the Committee of Creditors continued its meeting not in terms of the Code and Regulations and not in accordance with the directions of the order passed by the Hon'ble NCLAT, that the entire process has been carried out in most arbitrary and non transparent manner. She further contents that the liquidation value is fixed at very low value and that applicant is willing to pay the entire outstanding to the lenders and hence filed this application. She also

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contents that the promoter shareholder has always maintained that the shares have value and promoter shareholder seek termination of the proceedings on the basis that the amounts as claimed by the banks accepted by the RP/CoC will be paid and prays for permission to settle all the dues to all stakeholders in the manner stated in the CA. Upon the above said contentions and some other contentions which is not necessary to dealt with in detail she prays for issuing direction to make payment of all resolution expenses as certified by the resolution professional and pending consideration of this CA permit the applicant to clear all the dues payable to the lenders and to declare that the CoC and the resolution professional would become *functus officio* and cease to have any role in the company upon termination of the proceedings.

Upon hearing the Ld. Sr.Counsel for the applicant and Ld. Sr.Counsel for the CoC and RP, we are in the considered opinion that an application of this nature is not maintainable. This is an application come up for the consideration after filing CA(IB) 246/KB/2018 for the approval of the plan. So also extensive number of applications being filed by lenders,operational creditors and the director of the suspended board of directors of the corporate debtor challenging the approval of the Plan. Vide common order in CA(IB) No.210/KB/2018, CA(IB) No.277/KB/2018 and CA(IB) No.233/KB/2018, we ordered reconsideration of resolution plans and dismissed CA(IB) 246/KB/2018. According to the Ld. Sr. Counsel, there is no bar under any of the provisions of the code in recalling order of admission upon settlement of the dues liable to be paid by the corporate debtor and this Adjudicating Authority under inherent power can recall the order of admission. We are not at all convinced by the argument advanced on the side of the applicant. Applicant is a holding company of the corporate debtor. Its attempt to settle the dues by attempting to approach the Hon'ble NCLAT and lastly before the Hon'ble Supreme Court was failed. We too also had given opportunity to explore the possibility of settlement out of this Tribunal by approaching superior Courts. The relief pressed for is

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settlement by recalling the order of admission. It appears to us that settlement proposal does not fall under the purview of any of the provisions of the code or Regulations. It is a matter which requires to be settled in between the parties involved. That is even left open to them. But its attempts to settle was become futile may be due to disagreement with some of the lenders. The Adjudicating Authority has expressed that it has no role to play in the matter of settlement process. We have taken judicial notice of granting approval of settlement by the Hon'ble Supreme court under Article 142 of the Constitution. After admission of a petition of this nature, it acquires the character of representative suit. Rule 11 of NCLT Rules, 2016 can be invoked only in a situation necessary for meeting the ends of justice or to prevent abuse of process of the Tribunal. In the light of above, we hereby dismiss this application as it is not maintainable. However, no order as to cost.

In CA(IB) No. 235/KB/2018, notice to the respondents is already issued.

List CA(IB) No. 235/KB/2018 for the appearance of the respondents and for further consideration along with main CP(IB) No. 359/KB/2017 on 04-06-2018 for filing of progress report by the Resolution Professional.

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(MADAN B GOSAVI)
MEMBER(JUDICIAL)

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(JINAN K.R.)
MEMBER(JUDICIAL)