NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 371 of 2024

(Arising out of the Impugned Order dated 12.12.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench in I.A No. 1360 of 2022 and I.A No. 2989 of 2023 in C.P. No. 246 of 2017]

IN THE MATTER OF:

Peter Beck und Partner
Vermoegensverwaltung GMBH
(Though its POA Holder Mr. Chandan Singh)
Having its registered office at:
Alleenster, 126, 73230 Kircheim under
Tech Baden- Wuttemberg, Germany.

Also
4th Floor 42, Masjid Lane
Bhogal Jangpura, New Delhi – 110014 **...Appellant**

Versus

1. **Sharon Bio Medicine Limited.**
   Having its registered office at:
   W-34, 34/IM IDC, Taloja Raigad,
   Maharashtra – 410208
   Email: info@sharonbio.com **...Respondent No.1**

2. **State Bank of India**
   Branch-1, Mumbai, "The Arcade",
   2nd Floor, World Trade Centre,
   Cuffe Parade, Coalaba, Mumbai – 400005 **...Respondent No.2**

3. **EY Restructuring LLP**
   17th Floor, The Ruby,
   Senapati Bapat Marg,
   Dadar (West), Mumbai City
   Maharashtra – 400028 **...Respondent No.3**

Present:

For Appellant : Mr. Ankur Kashyap, Mr. Ajith S. Ranganathan, Mr. Rohit Rajershi, Mr. Aman Bajaj and Mr. Purushartha Singh, Advocates.

For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Mr. Rahul Kumar and Ms. Alisha Roy, Advs. for R-2. Ms. Srideepa Bhattacharya and Ms. Neha Shivhare, Advocates for R-3.

With

Company Appeal (AT) (Insolvency) No. 372 of 2024

IN THE MATTER OF:

Peter Beck und Partner
Vermoegensverwaltung GMBH
(Though its POA Holder Mr. Chandan Singh)
Having its registered office at:
Alleenster, 126, 73230 Kircheim under
Tech Baden- Wuttemberg, Germany.

Also
4th Floor 42, Masjid Lane
Bhogal Jangpura, New Delhi – 110014 ...Appellant

Versus

1. **Sharon Bio Medicine Limited.**
   Having its registered office at:
   W-34, 34/IM IDC, Taloja Raigad,
   Maharashtra 410208
   Email: info@sharonbio.com ...Respondent No.1

2. **State Bank of India**
   Branch-1, Mumbai, "The Arcade",
   2nd Floor, World Trade Centre,
   Cuffe Parade, Coalaba, Mumbai – 400005 ...Respondent No.2

3. **EY Restructuring LLP**
   17th Floor, The Ruby,
   Senapati Bapat Marg,
   Dadar (West), Mumbai City
   Maharashtra-400028 ...Respondent No.3

Present:

For Appellant : Mr. Ankur Kashyap, Mr. Ajith S. Ranganathan, Mr. Rohit Rajershi, Mr. Aman Bajaj and Mr. Purushartha Singh, Advocates

For Respondent : Mr. Krishnendu Datta, Sr. Advocate with Mr. Rahul Kumar and Ms. Alisha Roy, Advs. for R-2. Ms. Srideepa Bhattacharya and Ms. Neha Shivhare, Advocates for R-3

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

[Per: Arun Baroka, Member (Technical)]

These two appeals have been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("IBC") by the Appellant, Peter Beck und Partner Vermoegensverwaltung GMBH, against the order dated 12.12.2023 passed by the Learned National Company Law Tribunal (NCLT), Mumbai Bench in IA No.1360 of 2022 and IA No. 2989 of 2023 in CP (IB) No. 246/NCLT/MB/2017. The Appellant sought a refund of INR 10 Crores deposited with Abhyudaya Cooperative Bank, which was subsequently forfeited by the Committee of Creditors (CoC) led by the State Bank of India (SBI).

Brief Background:

2. The NCLT dismissed the Appellant's application seeking the refund and allowed SBI's application to forfeit the amount. The Appellant contends that the forfeiture was unlawful and that the CoC's actions were contrary to the terms of the Resolution Plan and the applicable regulations.

3. Over the course of the CIRP, the Appellant failed to submit valid and enforceable bank guarantees as required under the Resolution Plan, leading to delays and non-compliance with the plan's implementation schedule. Consequently, the CoC, through SBI, sought directions from the NCLT to forfeit the INR 10 Crores deposited by the Appellant, which the NCLT granted.

4. Heard the counsels of both sides and also perused all the records before us.

5. The primary issues for determination in these appeals are:

a. Whether the CoC's forfeiture of the INR 10 Crores deposited by the Appellant was lawful.
b. Whether the Appellant was restrained by the CoC from implementing its Resolution Plan.

Appellant's Arguments:

6. The Appellant is a company incorporated under the laws of Germany and was the former Successful Resolution Applicant (SRA) for Sharon Bio Medicine Limited, the Corporate Debtor (Respondent No. 1).

Restraint by the CoC and Misapplication of Deposited Funds

7. The Appellant asserts that the Committee of Creditors (CoC), particularly the State Bank of India (SBI), obstructed the implementation of the Resolution Plan by not providing the necessary account details for depositing additional funds. The Appellant further argues that the forfeiture of the INR 10 Crores was unwarranted as it was intended for share application money, not as a performance guarantee.

Approval and Implementation of the Resolution Plan

8. The Resolution Plan for Respondent No. 1 was approved by the Adjudicating Authority on 28.02.2018. This approval was challenged by the former promoter before this Hon'ble Tribunal, which stayed the implementation of the plan. The appeal was eventually dismissed on 19.12.2018, and the Resolution Plan was upheld by the Hon'ble Supreme Court on 05.04.2019.

9. Under the approved Resolution Plan, the Appellant was required to furnish a bank guarantee of INR 10 Crores, valid from the plan's approval by

the CoC until the Effective Date, which is defined as the date when the Appellant would be allotted all equity shares in accordance with the plan. Accordingly, the Appellant provided a bank guarantee issued by Banque De Luxembourg on 19.02.2017, which was subsequently renewed.

Issues with Bank Guarantee and Deposit of Funds

10. On 04.07.2019, during a meeting of the Monitoring Agency and Lenders, SBI suggested depositing INR 10 Crores in lieu of the bank guarantee due to operational difficulties faced by the Appellant with the renewal of the bank guarantee in the required SWIFT format.

11. Consequently, the Appellant deposited INR 10 Crores in the account of Respondent No. 1 at Abhyudaya Cooperative Bank on 27.08.2019, in accordance with the CoC's instructions. However, the CoC's actions obstructed the deposit of the remaining INR 5 Crores, thus preventing the allotment of shares as stipulated in the Resolution Plan.

Invocation of Bank Guarantee and Consequent Issues

12. Despite the infusion of INR 10 Crores, SBI, in a letter dated 30.08.2019, instructed Banque De Luxembourg to treat the letter as an invocation of the bank guarantee if it was not renewed. This action led to the freezing of the Appellant's funds and strained its banking relationships, further complicating the procurement of a new bank guarantee in the required format.

13. The Appellant objected to this invocation and requested SBI to withdraw the letter and release the bank guarantee. The objections were

communicated via email on 31.08.2019, but the Appellant's requests were ignored.

Failure to Implement the Resolution Plan Due to CoC's Demands

14. The CoC's demands for an upfront payment of INR 35 Crores, beyond the terms of the approved Resolution Plan, hindered the Appellant's ability to implement the plan. This demand was made during a meeting on 22.10.2020, further complicating the implementation process.

15. In a bonafide effort to comply, the Appellant sought the CoC's account details to deposit the remaining INR 5 Crores. However, the CoC failed to provide these details, thus obstructing the Appellant's compliance.

Legal Proceedings and Tribunal Orders

16. Respondents SBI and Edelweiss filed applications (IA No. 4003 of 2019 and IA No. 2220 of 2020) before the Adjudicating Authority, seeking re-initiation of the CIRP due to the alleged failure of the Appellant to implement the Resolution Plan. The Adjudicating Authority, on 02.02.2021, directed the Appellant to infuse INR 10 Crores for CIRP costs and share allotment, acknowledging that invoking the bank guarantee would serve no purpose since the INR 10 Crores had already been deposited.

17. Despite the Adjudicating Authority's directive, Respondents did not provide the necessary account details, leading to further complications. This non-compliance was noted in the order dated 19.02.2021 by the Hon'ble NCLT Mumbai.

Appellant's Appeals and the Hon'ble Supreme Court's Decision

18. The Appellant appealed to this Hon'ble Tribunal, which on 05.01.2022 directed the Appellant to submit a bank guarantee of INR 10 Crores and make overdue payments within specified timelines. The Tribunal also allowed for the adjustment or refund of the deposited INR 10 Crores.

19. The Appellant's subsequent appeal to the Hon'ble Supreme Court (Civil Appeal 1304-1305 of 2022) sought to modify this order, arguing that the deposit in lieu of the bank guarantee should suffice. The Supreme Court dismissed the appeal on 28.02.2022, granting liberty to initiate a fresh CIRP.

20. The Appellant contends that the impugned order dated 12.12.2023 by the NCLT, Mumbai, which allows the forfeiture of INR 10 Crores, is unjust and contrary to the terms of the Resolution Plan and CIRP regulations. The order misinterprets the purpose of the deposited funds and applies regulations retrospectively, which is not permissible.

21. It is also claimed by the Appellant that no prayer was made by the Respondents in the respective applications regarding the investigation under the provision of Section 74 (3) of the IB Code 2016 and this prayer has been incorporated in the allowed forfeiture application via previous order of the Adjudicating authority dated 21.11.2023 in I.A. No 4003 of 2019, in which the Appellant was not heard and the same was not even listed on the date of hearing of the allowed forfeiture application.

22. The Appellant seeks the setting aside of the impugned order on the grounds that the forfeiture is not justified, the CoC's actions impeded compliance, and the funds were intended for share application, not as a

performance guarantee. In light of the above arguments, the Appellant prays this Appellate Tribunal to set aside the impugned order dated 12.12.2023 passed by the NCLT, Mumbai Bench, in I.A. No. 1360 of 2022 and I.A. No. 2989 of 2023 in C.P. No. 246 of 2017.

Arguments of Respondent No. 2 - State Bank of India – FC

23. The Appellant, Peter Beck und Partner Vermoegensverwaltung GMBH, is a defaulting Resolution Applicant who caused a delay of four years in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor. This delay necessitated a second round of CIRP.

Failure to Submit Valid Bank Guarantees

24. The Appellant failed to submit valid and enforceable bank guarantees (BGs), in violation of its Resolution Plan. This failure has been conclusively determined by this Appellate Tribunal's judgment dated 05.01.2022 in Company Appeal (AT) (Ins) No. 161 of 2021 and Company Appeal (AT) (Ins) No. 169 of 2021, as well as the Hon'ble Supreme Court's judgment dated 28.02.2022 in Civil Appeal No. 1305-1306 of 2022.

25. Consequently, the amount of INR 10 Crore deposited by the Appellant in lieu of BGs has been lawfully forfeited by Respondent No. 2, in accordance with Clause 12 of Section 5 of the Resolution Plan and Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

Appellant's Incorrect Claims on being restrained by CoC

26. The Appellant's claim that the Committee of Creditors (CoC) restrained it from implementing its Resolution Plan is incorrect. The failure of the

Appellant has been noted by both the Hon'ble Supreme Court and this Hon'ble Tribunal.

27. Despite multiple opportunities provided by the CoC, this Tribunal, and the NCLT, the Appellant has failed to implement the Resolution Plan.

Deposited Amount and Misleading Claims

28. The Appellant contends that it was restrained by the CoC from implementing the Resolution Plan due to a lack of bank details for depositing INR 5 Crore. However, it is on record that the Appellant deposited USD 13,99,928 (equivalent to INR 10,06,85,725) in the Corporate Debtor's bank account with Abhyudaya Cooperative Bank on 27.08.2019 (transaction reference number: OrigBrCd-16-IRSTT 2019000048 INREM TTUDD 1399928).

29. The bank account details were always available to the Appellant for depositing the monies under the plan, and the Appellant is merely attempting to mislead this Hon'ble Tribunal by claiming that the bank details were not provided.

Previous Judgments and Orders

30. The Appellant grossly failed to implement its Resolution Plan, which was approved by the CoC in 2018, for four years until 2022. This failure has been documented in the orders of this Hon'ble Tribunal and the Hon'ble Supreme Court.

31. The NCLAT Order dated 05.01.2022 clearly states the Appellant's failure to provide a valid bank guarantee and to take steps towards the

implementation of the Resolution Plan, including the payment of CIRP costs, workmen dues, and infusion of cash.

Lawful Forfeiture of INR 10 Crore

32. The amount of INR 10 Crore has been lawfully forfeited by the CoC in terms of Clause 12 of Section 5 of the Resolution Plan and Regulation 36B(4A) of the CIRP Regulations. This clause provides for forfeiture if the Resolution Applicant withdraws without reasonable cause or fails to implement the Proposed Plan.

33. The term "Effective Date" is defined in the Resolution Plan as the date on which the Resolution Applicants are allotted all Equity Shares in accordance with the Proposed Plan.

Applicability of Regulation 36B(4A)

34. Regulation 36B(4A) of the CIRP Regulations, which provides for forfeiture of performance security if the resolution applicant fails to implement the approved plan, is applicable to this case. The Ld. NCLT correctly noted that the regulation is applicable, and the forfeiture is justified based on the provisions of the Resolution Plan.

Contradictory Stance of Appellant

35. The Appellant is contradicting its own stance regarding the nature of the INR 10 Crore deposited with SBI, misleading this Hon'ble Tribunal by claiming it was deposited as share application money and should be repatriated under the Foreign Exchange Management Act, 1999.

Failure to Comply with Bank Guarantee Requirements

36. The Appellant failed to submit the Bank Guarantee via SWIFT mode on 07.19.2019. Subsequently, the Monitoring Agency gave the Appellant

multiple chances to comply, including an option to deposit INR 15 Crores, which the Appellant failed to fulfil completely.

Misleading Correspondence

37. Despite claims to the contrary, Peter Beck admitted that the amount deposited was in lieu of a Bank Guarantee in its emails dated 31.08.2019 and 18.11.2019.

38. The Respondent respectfully requests that this Hon'ble Tribunal dismiss the instant appeals with costs, as the Appellant has failed to implement the Resolution Plan and the forfeiture of INR 10 Crore is lawful and justified.

Findings

39. After examining the records before us and considering the arguments presented from both sides, our findings are noted in the following paragraphs.

On the Forfeiture of INR 10 Crores

40. Clause 12 of Section 5 of the Resolution Plan, particularly the below-mentioned highlighted portion, clearly brings out that the bank guarantee or equivalent performance security can be invoked and forfeited if the Resolution Applicant withdraws or fails to implement the plan without reasonable cause. The relevant portion of the clause is extracted herein as follows:

> "(ii) The Resolution Applicants shall not provide any personal or corporate guarantees in any form and manner other than a sum of INR 10 Cr. which shall be furnished in the form of a bank guarantee or standby letter of credit for the period from which the Proposed Plan is approved by the CoC till the Effective Date ("Guarantee"). The Guarantee can be invoked only if the Resolution Applicants withdraws for no reasonable cause from the CIRP; or (ii) during implementation of the Proposed Plan… **It is expressly clarified that withdrawal by the resolution applicants on account of non-receipt of any approvals required for the proposed plan, as a result of which the**

RA cannot implement the proposed plan, shall not be valid grounds for invoking the guarantee"

41. Applicability of Regulation 36B(4A): Apart from the condition in Clause 12 of Section 5 of the Resolution Plan, noted by us in previous paragraph, Regulation 36B(4A) of the CIRP Regulations, which provides for forfeiture of performance security, if the resolution applicant fails to implement the approved plan, is very much applicable in this case. The relevant Regulation is extracted herein as follows:

> **"Regulation 36B: Request for Resolution Plans**.
>
> XXX
>
> 3[(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such **performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.**
> Explanation I. – For the purposes of this sub-regulation, "performance security" shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.
>
> Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.]"

42. It is to be noted that the CIRP Regulation 36B(4A) was notified via Notification No. IBBI/2019-20/GN/REG040, dated 24th January 2019 (w.e.f. 24.01-2019). In the present case, the CIRP was initiated on 11.04.2017. But the fact is that the CIRP of the Corporate Debtor was still going as on 24.01.2019 and the factum of default by the Appellant attained finality by way of the order dated 28.02.2022 of the Hon'ble Supreme Court. i.e. when

the aforesaid Regulation was very much in force. The Appellant's contention that this Regulation cannot be applied retrospectively, therefore, without merit, as the CIRP was ongoing when the Regulation came into effect, and the default was established while the Regulation was in force.

43. Irrespective of the fact whether Regulation 36B(4A) was applicable or not, the forfeiture Clause 12 of Section 5 of the Resolution Plan, as noted by us earlier, clearly provides for the forfeiture in such a situation and the argument of the Appellant, therefore, cannot be accepted.

44. This matter had been agitated earlier also before this Appellate Tribunal as well as before Hon'ble Supreme Court. The orders of this Appellate Tribunal and later on Hon'ble Supreme court - all have come to more or less similar conclusion that the SRA had to pay the security deposit. In fact, the Appellant got multiple extensions and opportunities as provided by the CoC, NCLT and the NCLAT and even Hon'ble Supreme Court.

45. Relevant extracts of the NCLAT Order dated 05.01.2022 in Company Appeal (AT) (Ins) No. 161 of 2021 and Company Appeal (AT) (Ins.) No. 169 of 2021, which provided another opportunity to the Appellant, is as follows:

> "25. It is quite apparent that the bank guarantee submitted by Respondent No. 1 was not enforced properly because it was not submitted in SWIFT mode. Respondent No. 1 has claimed that it is not responsible for non-enforceability of the Bank guarantee because it was due to the international banking practices. While bank guarantees were submitted later, they were not to the satisfaction of monitoring agency. Moreover, Respondent No. 1 failed to take steps towards implementation of the Resolution Plan, which included payment of CIRP costs and workmen dues and infusion of cash. Respondent No. 1 has submitted that CoC agreed to infusion of funds amounting to Rs. 10 Crores in the Corporate Debtor in the lieu of bank guarantee, and based on this agreement Respondent No.1 infused Rs. 10 Crores in the Corporate Debtor before the expiry of the bank

guarantee and honour its commitment and this amount remains with the Corporate Debtor till date….

26. Thus, the issue of non-adherence of the timelines in accordance with the Approved Resolution Plan is quite apparent. The failure to provide valid bank guarantee in terms of Section 5 clause 12 (ii) of the Approved Resolution Plan to the satisfaction of the monitoring agency and the Financial Creditors is also a major default.

XXX

34. Therefore, in light of discussion above, in partial modification of the Impugned Order, **we direct that an enforceable bank guarantee of Rs. 10 crores, as is required to be submitted under the Approved Resolution Plan, should be submitted by the Successful Resolution Applicant within 30 days of this order.** The payments as are already over due in the Approved Resolution Plan should be done by the Successful Resolution Applicant within two months of this order. **In case Rs. 10 crores has been deposited with the Corporate Debtor by the Successful Resolution Applicant in lieu of the bank guarantee, that amount will be either adjusted against the pending amounts to be paid by the Successful Resolution Applicant or refunded to him within a period of 30 days.**

".

[Emphasis supplied]

46. Instead of complying with the aforesaid NCLAT Order, the Appellant filed an Appeal bearing Civil Appeal No. 1305-1306 of 2022 before the Hon'ble Supreme Court seeking modification of the NCLAT Order. The Appellant expressed its inability to comply with the NCLAT Order. The Hon'ble Supreme Court recorded the statements of the Counsel on behalf of the Appellant and noted that the Hon'ble Court is not inclined to interfere in the NCLAT Order. The Appellant's inability to comply with the plan's requirements are quite evident as noted in Hon'ble Supreme Court's order dated 28.02.2022, the relevant portion of which is extracted herein as follows:

"On the last date of hearing, we called upon the learned counsel to seek instructions as to whether the appellant is ready to comply with the order of the National Company Law Appellate Tribunal ("the NCLAT" for short) dated 05.01.2022, impugned in the instant proceedings.

Learned counsel, on instructions, submits that **it is not possible for the appellant to comply with the terms of the order passed by the NCLAT**.

> We are not inclined to interfere in the order impugned passed by NCLAT dated 05.01.2022.
> The civil appeals are accordingly dismissed.
>
> However, we grant liberty to initiate a fresh corporate insolvency resolution process(CIRP) and take all consequential actions in furtherance thereof, in accordance with law."
>
> [Emphasis supplied]

47. The Appellant's failure to provide valid bank guarantees in the internationally acceptable SWIFT format and the inability to meet the financial commitments as stipulated in the Resolution Plan constitute a clear violation of the terms agreed upon. Despite multiple extensions and opportunities provided by the CoC, NCLT and the NCLAT, the Appellant did not fulfil its obligations. This non-compliance justifies the forfeiture of the deposited amount under the provisions of the Resolution Plan and the CIRP Regulations.

On the Alleged Restraint by CoC

48. The Appellant's argument that the CoC restrained it from implementing the Resolution Plan is not supported by the facts. The records show that the bank details for the additional deposit were always available to the Appellant. The Appellant did manage to deposit INR 10 Crores on 27.08.2019, contradicting its claim that the CoC's actions were obstructive.

49. The correspondence between the CoC and the Appellant, including the emails and notices provided, indicates that the CoC was cooperative and provided ample opportunity for compliance. The Appellant's failure to deposit the remaining INR 5 Crores, despite being given an extended deadline, further undermines its claim of being restrained.

50. The Appellant contends that it had deposited the amount of INR 10 Cr. for share application money and accordingly it must be repatriated as per Foreign Exchange Management Act, 1999. It is to be noted that facts are different than being claimed by the Appellant. Briefly they are noted here as this was a very crucial period in this matter. The Appellant submitted periodic BGs, which were not in the internationally acceptable SWIFT format. Apparently, there was no valid Bank guarantee between 15.06.2019 and 18.07.2019, in violation of the Resolution Plan. With the latest bank guarantee set to expire on 30.08.2019, the Monitoring Agency (on behalf of the lenders) sent an email allowing a final opportunity to Appellant-Peter Beck to either provide a valid BG via SWIFT or depositing INR 15 Crore by 11 PM IST on 26.08.19 towards implementation of the Resolution Plan. However, only INR 10 crores was belatedly deposited by Appellant-Peter Beck, as against the requirement of depositing INR 15 crores. At the lenders meeting on 28.08.2019, it was noted that only INR 10 Crore had been deposited by the Appellant-Peter Beck, beyond the deadline on 27.08.2019. Even then, the lenders allowed a further postponement of deadline to 30.08.2019 for the balance INR 5 Crore. However, since the Appellant failed to deposit the INR 5 Crores, the lenders decided to seek renewal of the BG or to invoke the BG. Accordingly, SBI addressed a letter to Banque de Luxembourg requesting the latter to renew the bank guarantee expiring on 30.08.2019. Banque de Luxembourg issued a letter to SBI refusing to renew the bank guarantee or honour the invocation of the bank guarantee, stating that the bank guarantee cannot be considered as a valid bank guarantee but as a 'non-effective' bank guarantee. Subsequently, the Respondent No 2 informed Appellant-Peter

Beck to submit a valid and enforceable bank guarantee via SWIFT mode before 11.11.2019, the failure of which will be treated as a default. As a reply to which, Peter Beck sought return of its deposit stating that the sum of INR 10 crore was required to be returned as per applicable laws in respect of share application money, highlighting the fact that this remittance was never intended to be in lieu of the bank guarantee. To the contrary, Peter Beck had admitted in its emails dated 31.8.2019 that the amount deposited was in lieu of Bank Guarantee as evident from the Appellant's email which is on record. We find that the Appellant is approbating and reprobating on its stance qua the nature of INR 10 Cr. deposited with SBI.

On reference to IBBI:

51. The applicant, on 04.05.2022 filed the application before the Adjudicating Authority in IA No. 1360 of 2022 in CP No 246 of 2017 seeking refund of INR 10 Cr. In the meantime, since the Appellant had defaulted on the implementation of the plan and on account of the Appellant's failure to maintain the BG on 03.06.2022, Respondent No. 2-SBI filed Interlocutory Application No. 4003 of 2019 inter alia requesting the NCLT to allow a fresh process of resolution for the Corporate Debtor, and to annul the declaration of the Appellant as the SRA. On 10.01.2023, Respondent No. 2- SBI filed forfeiture application before the Adjudicating Authority in IA No. 2989 of 2023 in CP No 246 of 2017 seeking forfeiture of INR 10 Cr. Adjudicating Authority disposed of both the applications and, inter-alia, ordered as follows:

> "7.8. We find from the Order dated 28.2.2022 passed by Hon'ble Supreme Court that the SRA categorically expressed its inability to comply with the Order dated 5.1.2022 passed by Hon'ble NCLAT. It is pertinent to note that the Hon'ble NCLAT had modified the Order dated 2.2.2021 passed by this Tribunal on the willingness shown by the SRA before it to

implement the approved Resolution Plan. Hence, it clearly follows from this sequence of events that there had been last minute effort on the part of CoC, this Tribunal and Hon'ble NCLAT to save the approved Resolution Plan, but for the unwillingness expressed by the SRA before the Supreme Court, the approved Resolution plan failed.

7.9. It is clear from the foregoing discussion that the money deposited by the SRA was in lieu of Performance Bank Guarantee and has to be dealt accordingly. In terms of provisions contained in Regulation 36B(4A) of the CIRP Regulations and provisions contained in Resolution Plan, we feel no hesitation to hold that the money deposited by the SRA is liable to be forfeited and cannot be allowed to be refunded back. The argument that Regulation 36B(4A) cannot be applied retrospectively has no merit, as even otherwise also, the performance guarantee furnished initially by the SRA stipulates invocation thereof in the event of default in implementation of the approved plan.

7.10. As regards initiation of proceedings in terms of section 74(3) of the Code, we find that section 74(3) reads as under -

> *(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.*

7.11. This provision provides for imposition of fine or prosecution of any person on whom the approved resolution plan is binding in case such person knowingly and wilfully contravenes any of the term of approved resolution plan. From the above discussion, we find that there was a failure to provide the valid and subsisting bank guarantee and thereafter in payment of money due under the approved resolution plan. The Representative of the SRA are stated to have informed that the delays were caused due to two reasons, first being, Mr. Bernie Fogel, the fund manager was based out of Namibia, which had been "blacklisted with the Banking Industry" and, secondly, due to the requirement of submitting the Bank Guarantee via SWIFT. Whether eventual happening of first event was in knowledge of the SRA is a matter of fact and in view of insufficient evidences before us, we cannot hold that the SRA's failure was wilful. However, the inability to implement the modified directions of Hon'ble NCLAT which lead to initiation of fresh CIRP by the Hon'ble Supreme Court, was certainly in knowledge of the SRA, as the failure to furnish the valid and subsisting bank guarantee by an entrepreneur cannot be said to be onerous condition, the compliance of which may be said to be beyond their control. **Accordingly, we consider it appropriate to refer the matter to IBBI for taking appropriate action against the SRA, since this Bench cannot deal with the punishment aspect of the**

consequence for contravention under this section providing for imposition of fine or punishment or both."

[Emphasis supplied]

52. Adjudicating Authority while passing the impugned order has made observations, as highlighted above and ordered in the last para to refer the matter to IBBI for taking appropriate action against the SRA to deal with the punishment under Section 74(3) of the Code.

53. We find that reference to initiate proceedings under Section 74(3)[1] of the Code was not a prayer under IA 2989 of 2023, but the impugned order while disposing of IA No 2989 dealt with it. The prayer for this reference was in IA 4003 of 2019 and this was ordered to be infructuous vide orders 21.11.2023 of the Adjudicating Authority. In case this was to be taken up along with IA No. 2989 of 2023, as noted by the AA in its orders 21.11.2023, sufficient opportunity should have been given to the Appellant. In the instant case, we find that the Appellant had deposited INR 10 crores in place of the guarantee. It was availing legal remedies to redress its grievances at various levels. Furthermore, their security deposit of INR is being forfeited as per the AA's orders. We, therefore, do not find sufficient cause for proceeding under Section 74(3) of the Code as the appellant had deposited INR 10 crores as part of the conditions of the implementation of the resolution plan and cannot be

[1] **74. Punishment for contravention of moratorium or the resolution plan. –**
(1) XXX
(2) XXX
(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31**, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention**, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

said to be wilfully not implementing the Resolution Plan. However, it is a different matter that it could not proceed further for reasons better known to them.

54. Apart from the orders of forfeiture of INR 10 crs, we do not find justification to proceed any further under Section 74(3) of the Code and make a reference to IBBI for taking action against the Appellant under this section.

Conclusion

55. In light of the foregoing, it is evident that the forfeiture of INR 10 Crores by the CoC, led by SBI and approved by the AA, was lawful and in accordance with the Resolution Plan and the CIRP Regulations. The Appellant's failure to comply with the essential terms of the Resolution Plan, including the submission of valid bank guarantees and necessary financial commitments, warranted such forfeiture.

56. The Appellant's claims of being restrained from implementing the plan are unfounded and unsupported by the evidence. The CoC acted within its rights and provided reasonable opportunities for compliance, which the Appellant failed to utilize.

57. However, we do not find sufficient cause for initiation of proceedings in terms of Section 74(3) of the Code and accordingly we do not agree to refer it to IBBI for punishment.

Order

58. The Company Appeal (AT) (Insolvency) Nos. 371 and 372 of 2024 filed by Peter Beck und Partner Vermoegensverwaltung GMBH are hereby

dismissed. The order of the Learned NCLT dated 12.12.2023 in IA No. 1360 of 2022 and IA No. 2989 of 2023 stands affirmed. However, in the impugned order we set aside the observations at para 7.11 regarding reference to IBBI. The connected pending Interlocutory Applications, if any, are closed. No orders as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi
29th May, 2024

pks