

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH: COURT-IV**

**IA-2576 IN IA-2374/2021 IN  
C.P.(IB)-4469(MB)/2019**

Under Section 60(5)(c) of the Insolvency and  
Bankruptcy Code, 2016.

Application moved by:

**UTI Employees Sai Samruddhi Co-  
operative Housing Society**

... Applicant

Vs.

**Jayesh Sangharajaka, RP** ...Resp. 1

**CoC, Ornate Spaces Pvt. Ltd. & Ors.**

...Resp. 2

In the matter of

**IDBI Trusteeship Services Limited**

...Financial Creditor

Vs.

**Ornate Spaces Private Limited**

...Corporate Debtor

**Order Pronounced on : 06.10.2023**

Coram:

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

Appearances:

For the Applicant(s) : Mr. Partho Sarkar a/w Mr. Pratik Sarkar and Mr. Raunak i/b Vidhi Legal, Advocates.

For the Respondent(s) : Mr. Vikram Nankani, Sr. Counsel a/w Mr. Nausher Kohli, Mr. Ashish Parwani, Mr. Dikshat Mehra and Mr. Chintan Gandhi i/b Rajani Associates, Advocates.

### **ORDER**

Per: ***Prabhat Kumar, Member (Technical)***

1. This is an Application filed on 15.06.2023 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'the Code') by UTI Employees Sai Samruddhi Co-operative Housing Society (Applicant) pursuant to the liberty granted by Hon'ble NCLAT to highlight the objections of the instant Applicant to the Resolution Plan in the matter of Ornate Space Private Limited (Corporate Debtor) filed by the Resolution Professional (Respondent No.1) after its approval by CoC (Respondent No.2). The applicant's main contention is that the Resolution Plan is illegal and against the settled position in law.
2. The Applicant is seeking rejection of the plan and passing of an order initiating liquidation in the case of Corporate Debtor. The Applicant has raised the following issues –
  - 2.1. The CoC who has become *functus officio* after 26.07.2021 or on 31.08.2021 when the time sought in IA-2390/2021 (to seek extension till 31.08.2021, but was withdrawn subsequently after filing of another application seeking extension/exclusion, including the period comprised in IA-2390/2021 in IA-2421/2021, filed on 13.10.2021) expired. It is case of the applicant that the order in IA-2421/2021 passed by this bench allowing, the exclusion of

period on the ground of COVID-19 pandemic, was contested before Hon'ble NCLAT in appeal No. 669 of 2023. However, the prayer in IA-2421/2021 did not deal with the issue raised through the instant IA i.e. '*Can a functus officio COC seek to extend CIRP period until the filing of IA seeking approval of the Resolution Plan thereby rendering section 12 of the IBC otiose*'. We notice that the appeal against IA.2421/2021 was disposed of by Hon'ble NCLAT vide order dated 04.07.2023 disposed of this appeal stating that "*We have heard counsel for the parties and keeping in view of the fact that counsel for the parties have made a prayer that the present three appeals may also be disposed of in terms of the order passed in CA(AT) (Ins.) No. 755/2023, CA(AT) (Ins) No. 757 of 2023 & CA(AT) (Ins) No. 758 of 2023 in UTI Employees Sai Samruddhi Cooperative Housing Society vs. PNB Housing Finance Ltd & Ors on 02.06.2023, the present appeal are hereby disposed of in terms of the order passed in CA(AT) (Ins) No.755 of 2023, CA(AT) (Ins) No.757 of 2023 & CA(AT) (Ins) No. 758 of 2023 but with a rider that the adjudicating authority shall make all endeavours to decide the objections as early as possible but preferably within a period of three months from the date of filing of objections*".

2.1.1. We notice that the Hon'ble NCLAT had passed an order dated 02.06.2023 in CA(AT) (Ins) No.755 of 2023, CA(AT) (Ins) No.757 of 2023 & CA(AT) (Ins) No. 758 of 2023 stating that "*we are of the view that apart from the liberty which is being given to the Appellant to file objections, the order passed in other I.A's is upheld. However, we make it clear that objections of the Appellant which is to be filed as per order shall be decided on its merits without being influenced with any observation of this order or any observations made by the Adjudicating Authority.*" In other words, the Hon'ble NCLAT provided another opportunity to file objections, and directed us to consider the objections without being influenced by our observation in the earlier order on one hand, and also upholding the our findings in those orders on the other hand.

- 2.1.2. The applicant's contention is since the CIRP period came to an end on 26.07.2021 and Respondent No.1 filed an application on the same day seeking extension of time till 31.08.2021, the Applicant contends that, the CoC become *functus officio* at best on 31.08.2021 even if it is presumed that the said application would have been allowed by the adjudicating authority. However, the RP filed an application in IA-2421/2021 on 13.10.2021 seeking relaxation in CIRP period from 26.07.2021 to 12.10.2021 withdrawing IA-2390/2021, as that IA was still pending at that time. Further an application for approval of the Plan in IA-2374/2021 was also filed on 12.10.2021.
- 2.1.3. The applicant has pleaded that the CoC could not have acted after expiry of the period based on the application filed on 26.07.2021 and pending before this Tribunal even after 31.08.2021 and if, that is allowed it shall be against the section 12 of the Code. This bench finds that the Resolution Professional has stated in his submission in IA 2421/2021 that multiple rounds of discussion were held between CoC and all the Resolution Applicants, and also a withdrawal proposal u/s 12A of the Code was received from erstwhile promoters during the period from 26.07.2021 to 01.09.2021. The voting on the plan took place and M/s Ashdaan Properties Private limited was declared as Successful Resolution Applicant on 18.09.2021 by 81.36% vote. However, we notices that the Applicant has erroneously stated at SL. No. 14 of table at Page 17 of his Application, for the best reasons known to it, that the "*Provision for liquidation was approved with 81.36% of the vote and all resolution plans were rejected including that of Ashdaan Properties*".
- 2.1.4. The Respondent No.1 has submitted that the CIRP in this case commenced on 29.06.2020 and the plan was finally approved on 18.09.2021, the whole of period overlapped with COVID-19 lockdown period and sought exclusion under regulation 40C of the CIRP

Regulations and *Suo Moto* orders or limitation passed by Hon'ble Supreme Court of India [Suo Motu Writ Petition (C) No. 3 of 2020] as well as the Hon'ble NCLAT [Company Appeal (AT) (Insolvency) No.1 of 2020]. The Respondent No.1 has also relied upon various decisions, directing exclusion of the period of COVID-19 lockdown, where the provisions of Section 12 of the Code and Regulation 40C of the CIRP Regulations has also been discussed and allowed by various orders [*Mr. Anurag Goel, R.P. of Shree Ambika Sugars Ltd in IA.621/CHF/2021 and IA.626/CHF/2021 in IBA/1017/2019 by NCLT Chennai by its order dated September 29, 2021 and Indiabulls Housing Finance Ltd. vs Sandeep Chandna & Ors. Company Appeal (AT) (Insolvency) No. 619 of 2021 & IA.No.1818 of 2020*]. He has further submitted that, without prejudice to the above, in exceptional circumstances, the CIRP period can be allowed to continue beyond the 330 days' period to avoid the Corporate Debtor from being dragged into liquidation [*Trading Engineers International Limited Company Appeal (AT) (Insolvency) No.61 of 2021 read with Committee of Creditor of Essar Steel India Limited vs. Satish Kumar Gupta & (2020) 8 SCC 531*], and has also relied upon Para 6 of the order dated March 17, 2023 in I.A. 2421 of 2021 passed by this Bench.

2.1.5. We noticed that an exclusion of one month was allowed owing to COVID-19 lockdown vide order dated 11.02.2021 and thereafter another exclusion of 1 month 23 days was allowed vide order dated 03.06.2021. The CIRP commenced on June 29, 2020. Regulation 40C for relaxation of timelines under the CIRP provides that –

*“40C. Special provision relating to time-line. Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be*

*completed due to such lockdown, in relation to a corporate insolvency resolution process.”*

2.1.6. We feel that the words “*could not be completed due to such lockdown*” are of wider import and must be given meaning accordingly. It is widely known that the pace of activity during the COVID-19 outbreak was severely impacted because of restrictions on movement and place of working. This was further compounded by the fear imbibed in the mind of citizens as to its deadly impact on life of human beings. Even the Hon’ble Supreme Court of India in “*Suo-Motu Writ Petition (Civil) No. 3/2020*” has taken *Suo Motu* cognizance of the situation arising out of the challenging faced by the country of COVID-19 Virus and resultant difficulties that may be faced by litigants across the country and has vide its order dated 10.01.2022 excluded the period from 15.03.2020 till 28.02.2022 for filing of petitions/ applications/ suits/ appeals/ all other proceedings. The relaxation granted by Hon’ble Apex Court in the context of limitation further validates that it was immaterial whether a person could work or has worked on any day falling in aforesaid period of relaxation.

2.1.7. We noticed that the Adjudicating Authority has been granting exclusion of period stated in *Suo-Motu Writ Petition (supra)*, considering the factual matrix of each case. In the present case, the CIRP commenced on 29.06.2020 and this Bench has so far granted total exclusion of 2 months 23 days on previous two occasions. Vide this Application, the Applicant has further prayed for exclusion of period from 26.07.2021 to 12.10.2021 which comes to 2 months 17 days. If we allow present prayer, the total exclusion would come to 5 months 10 days and the extended period would itself fall under the period specified in *Suo-Motu Writ Petition (supra)*. It is further noticed that the CIRP in this case was commenced and completed during COVID period. It is

settled law that the resolution of the Corporate Debtor is a rule and liquidation is only an exception. Even, the Regulation 32A(1) inserted with effect from 25.07.2019 in IBBI (Liquidation Process) Regulations 2016 mandates that “ *Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of Regulation 32 shall maximise the value of the corporate debtor he shall endeavour to first sell under the said clauses*”. Sub-clauses (e) or (f) of regulation contemplates provide for sale of Corporate Debtor or its business as going concern and reinforces the rule that every effort should be made to keep the Corporate Debtor going.

2.1.8. The applicant has also stated that the CoC/RP without seeking modifications to the order dated 03.06.2021 passed by the Adjudicating Authority, it could not have undertaken activities outside the purpose for which extension by the adjudicating authority was granted on 03.06.2021. This bench finds that the order dated 03.06.2021 states as under –

*“1. This is an application filed seeking an extension of CIRP period. The applicant mentions that latest expression of interest (EOI) was issued on 12.05.2021 and response the Professional who is present states that he has received 7 responses from Prospective Resolution Applicants and therefore seeks an extension of time for completing the CIRP. He further mentions that the last date of receiving the resolution plans is 11.07.2021.*

*2. Further, the Resolution Professional also states that they would require additional 15 days time to assess the Resolution plan submitted by the Resolution Applicant.*

*3. The Resolution Professional seeks an extension of the CIRP period till 25.07.2021 and also seeks an exclusion of the CIRP. Hence, the CIRP will now come to an end on 26.07.2021”.*

2.1.9. We find that the order dated 03.06.2021 only specify that resolution professional would require additional 15 days time to assist the resolution plan, the last date of receipt of is 11.07.2021. On perusal of the records, we find that such extended period as well as the period excluded by us have been consumed in final evaluation and approval of plan by CoC in an attempt to keep the Corporate Debtor going.

2.1.10. Considering the facts that the resolution plan approved by the CoC is pending consideration before this Bench and approval thereof may resolve the Corporate Debtor, this Bench feels that exclusion of the period from 26.07.2021 to 12.10.2021 allowed by this bench vide its order dated order dated March 17, 2023 in I.A. 2421 of 2021 is not against the mandate of section 12 of the Code.

2.2. The applicant has also objected to the plan claiming that it takes away the entitlement of Society's Built-Up Area (BUA) and has determined loss to society's built up area, basis fungible area, as 8470.52 sq. mt. The applicant has relied upon the decision of Hon'ble Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association Vs. NBCC (India) Limited (2022) 1 SCC 401* to contend that the rights/entitlements of the applicant society cannot be altered by way of a Resolution Plan. The Ld. Counsel placed heavy reliance at para 141 of the said order where it is stated that "*it is needless to observe that even if in the scheme of IBC, a resolution plan could modify the terms of a contract any tinkering with the contract in question, that is, the concession agreement, could not have been carried out without the approval and consent of the authority concerned, that is, Yeida. Any doubt in that regard stands quelled with reference to Regulations 37 of the CIRP Regulations that requires a resolution plan to provide for various measures including "necessary approvals from the Central and State Governments and other authorities"*".

2.2.1. The Resolution Professional has submitted that MHADA stipulates certain conditions for development and one such condition is that the

development should comprise of 60% of BUA as MIG category units. This does not mean that 60% of the BUA has to be given to the Applicant. The executed and registered Development Agreement by and between the applicant and the Corporate Debtor is duly submitted to MHADA pursuant to which offer letters and LOI for the project development were granted. The Successful Resolution applicant has also clarified that, in event any additional FSI beyond 4.00 (as per MHADA's interpretation) becomes available on the Plot i.e. in excess of what is already granted for development by MHADA, the Resolution Applicant/the Corporate Debtor shall be entitled to utilize the same only after the prior written consent of the Applicant Society and as may be approved by MHADA. It is clarified that the compensatory area over and above admissible 4 FSI shall be available by paying applicable premium in accordance with applicable guidelines issued by MHADA and/or other competent authority. The Respondent No.1 explained that the working of loss of BUA to the society at page # 21 to 23 of the application is based on a premise that the developer will get the additional permissible FSI without incurring any further cost. However, as explained by the Counsel and by the RP in his reply also that the additional FSI would come at a price and will be subject to terms and conditions stipulated under the relevant policy of MHADA as applicable at particular point of time. Further, in terms of Clause 4.1 of the Development Agreement dated 18.05.2010 read with Clause 4.3, the Applicant society is not eligible for additional BUA till FSI of 4, and it has already been clarified by the Counsel of SRA that SRA shall be seeking specific approval of the society in case FSI goes beyond 4.

2.2.2. We find that the Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments Welfare Association (2021) ibclaw.in 63 SC* held so at para 103 of the decision after arriving at a conclusion that "*the contract in question, the CA, even though not a statutory one, is nevertheless a*

*contract entered into between the concessionaire and statutory authority, that is, YEIDA". The Hon'ble Supreme Court further held at para 171.1.1 that "In view of the above, all the contentions regarding operation of RERA and claim thereunder or any other claim for compensation or interest, when not standing in conformity with the approved resolution plan, deserve to be rejected. In fact, the question as to what kind of agreement should be entered into with financial creditors like homebuyers is essentially a matter falling within the arena of commercial decision; and needless to repeat that in the process of approval of a resolution plan, the factors related with commerce are left to the wisdom of the Committee of Creditors. When the Committee of Creditors has approved the proposals of NBCC in the resolution plan, the same cannot be tinkered with reference to the grievance of some of the homebuyers about deprivation of adequate interest or compensation.....".*

2.2.3. From the above discussion we find that the Hon'ble Supreme Court had drawn a distinction between a commercial contract between parties, of which none is statutory authority, and contracts where one of the party is a statutory authority. We find that the ratio of decision is that while contract between parties where none is a statutory authority can be altered/modified by way of resolution plan, which is approved by requisite majority of CoC in its commercial wisdom. We also find that the resolution plan does not contemplate to modify the tripartite agreement where MHADA is one of the party. We find that this distinction is borne out from submissions at para 160.5 of the decision in the case of *Jaypee Kensington Boulevard Apartments Welfare Association* (Supra) which came to be upheld in later paras, the relevant part of which is reproduced hereunder –

*"It is also submitted that resolution plan can alter the contracts with financial creditors and the Code gives wide powers to the resolution applicant to modify financial and operational contracts so as to best serve the interests of all the*

*stakeholders. It is submitted that, as per the proposal under the resolution plan, NBCC would construct and deliver the flats to homebuyers but would not be paying outstanding interests to any homebuyer, and such a proposition is permissible under Regulation 37(f) of CIRP Regulations, that permits a resolution plan to reduce any debts due to any creditors; and such an amendment to the contracts having been agreed to by the overwhelming majority of the CoC, remains binding on all the homebuyers”.*

2.2.4. The Hon’ble Supreme Court in *Jaypee Kensington Boulevard Apartments Welfare Association* finally has concluded at Para 170 that “*To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance”.*

2.2.5. Further, MHADA has not filed any objections so far to the plan application. It is noteworthy that the applicant had impleaded MHADA as Respondent No.3 in IA-651/2022 whereby the applicant had sought peaceful possession of the land allotted by MHADA for construction of tenements for the members of the applicant society; and had also impleaded MHADA in IA-2232/2022 as Respondent No.5 whereby the charge of Financial Creditor was sought to be nullified.

2.2.6. Further, for the Resolution Professional has dealt with each of every violation in the affidavit in reply dated 25.06.2023, which makes it clear that the allegation of violation of rights is not sustainable. Needless to say, we have already arrived at the finding that the contractual arrangement between parties where none is a statutory authority can be modified/alterd. At this juncture, we point out that the Ld. Counsel for the applicant agitated that the affidavit in reply is dated 25.06.2023, and whereas it is stated to be notarized on 26.06.2023. We feel that the date 25.06.2023 is a typed date, and an omission to update this date

when the affidavit actually came to be affirmed in front of notary on 26.06.2023 is an inadvertent error only.

2.2.7. We find that the Resolution Plan expressly contemplates the construction of commercial/residential complex in accordance with the terms agreed with the applicant society and MHADA under Tripartite agreement entered amongst them, hence, we do not find any clause of the resolution plan seeking to usurp the rights of applicants as alleged in the application.

2.3.Ld. Counsel for applicant has alleged that this tribunal while rejecting IA-651/2022 omitted certain words from the phrase which represent the context in which the concept of contractual freedom in resolution plan was elucidated by the Hon'ble Supreme Court in *Ebix Singapore (P) Limited (2022) 2 SCC 401*. The distinction between the concept of "contractual freedom" of the parties to freely negotiate terms of the resolution plan with unfettered discretion enunciated in *Ebix Singapore's* case & the impermissibility to terminate agreements that have created legal rights through the Resolution Plan. As was stated in engineering project's (which is the case of the instant applicant) is bare apparent.

2.3.1. This bench finds that the Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments Welfare Association (Supra)* has exhaustively dealt with the concept of contractual freedom and we have arrived at our finding after analysing the decision rendered therein at Para 2.2.3 above. Further, the allegation of misconstruction of decision in case of Ebix is not tenable in view of this proposition also.

2.4. The applicant has also raised an issue of forgery of society's Resolution stating that this objection is raised since PNB Housing Finance is included as a constituent of CoC basis a forged document of the Applicant Society which was a matter of record with the RP and also a matter of investigation by Ministry of Corporate Affairs, hence constitution of the CoC is vitiated,

and the Resolution Plan passed by it is tending to usurp the rights of the society in respect of the land allotted to the applicant society by MHADA.

2.4.1. We find that clause 36 of the Development Agreement dated 18.05.2010 executed between the society and the Corporate Debtor explicitly permits the Corporate Debtor to raise finances by creating charges, etc. on the free sale component as the developer may consider it appropriate. We also notice that the applicant has written a letter dated 13.06.2019 responding to the letter from PNB Housing Finance Limited, the Financial Creditor claiming mortgage over the free sale development rights. That society had given a conditional NOC pursuant to resolution passed by GBM held on 29.04.2014 whereby the developer was allowed to create mortgage on free sale/saleable component vide resolution dated 11.04.2014 whereby the applicant society is stated to have given its no objection to developer for creation of mortgage/assignment of the entire development rights and the saleable component available. We find from the records of IA-2232/2022 that the Financial Creditor has never the claimed charge over whole of the land parcel, however, it claims charge over the rights of the developer. Nonetheless, it is trite law that no person can pass any title/rights better than it has, so this objection also does not make the plan illegal.

2.5. The applicant has also raised an issue that the Resolution Plan is based on an asset i.e. the project land which is not the property of the Corporate Debtor as is corroborated by the Balance Sheet of the Corporate Debtor. This bench feels that it is not case of in the resolution plan that the land belongs to the Corporate Debtor. However, it is an undisputed fact that in physical possession and control of the land on the commencement of the CIRP, in relation to which a Financial Creditor acquired a vested right in the form of a charge over development rights vested in the Corporate Debtor

- by the development agreement. Accordingly, such development rights can be subject matter of the resolution plan and cannot make such plan as illegal.
- 2.6. The concessions reliefs claimed in the plan are allowed by this tribunal in accordance with the ratio of Hon'ble Supreme Case decision in the case of *Ghanashyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd 2021 SCC OnLine SC 313*,<sub>1</sub>, Accordingly, if any relief which is in contravention of law shall not be permissible and this proposition was accepted by the successful resolution applicant.
- 2.7. The applicant has also raised an objection to the levy of success fees by Respondent No.1 as ultra-vires the position settled in law by Hon'ble NCLAT in the case of Mr. Jayesh N. Sanghrajka, erstwhile RP of Ariisto Developers Private Limited Vs Monitoring Committee Company Appeal (AT) (Ins.) No.3921/2021 “ *if success fee is claimed when the Resolution plan is going through or after the Resolution Plan is approved, it would be in the nature of gift or reward. “Success fee”-term is contrary to what IBBI provided in its Circular dated 16.01.2018 that Insolvency Professional shall render services for a fee which is a reasonable reflection of his work. The fee has to be related to acts performed or to be performed for furtherance of the CIRP, for dues or expenses actually incurred. It has to be directly related to acts done or expenses incurred which are necessary for the CIRP. The role of the Resolution Professional has to be like a dispassionate person concerned with performance of his duties under the Code for reasonable fees and it cannot be result oriented*”.
- 2.7.1. We find that Regulation 34 and 34B provides that the CoC shall approve the fees and other expenses to be paid to the Resolution Professional. IBBI circular dated 12, June 2018 also makes it clear. Further, Regulation 34B(4) also provides for payment of performance linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary. We notice

that Regulation 34B was inserted w.e.f. 13.09.2022 and the Resolution Plan was approved by CoC on 18.09.2021 when the e-voting came to be concluded. The point for our consideration is whether the said amendment is clarificatory in nature and can have retrospective operation.

2.7.2. We find that para 6 of circular dated 12.06.2018 provides the observation of Society for Insolvency Practitioners of India, in its statement of best practices on “PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS” as under –

*6. Keeping the above in view, the IP is directed to ensure that:-*

*“(a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;*

*(b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;*

*(c) the fee or other expenses are determined by him on an arms’ length basis, in consonance with the requirements of integrity and independence;*

*(d) .....*”

2.7.3. Further, annexure-B to the circular prescribes guidelines to determine what is reasonable costs and reasonable fees and at para II(ii) states as under:

*(ii) An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:*

*(a) time based charging;*

*(b) prospective fee (up to a cap);*

*(c) fixed fee;*

*(d) percentage based charging;*

*(e) success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.*

2.7.4. The said circular further quotes Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct providing '*whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered*' as one of the factor while considering the fees is reasonable or not.

2.7.5. In view of above guidelines contained in the circular this bench feels that the instructions of 34B is clarificatory in nature, since said amendment seeks to formalize the variable component of the fees, allowed to be charged by the CoC in its commercial wisdom earlier in accordance with the prescriptive guidelines embodied in the circular dated 12.06.2018 whereby the norms were provided without any monetary ceiling.

2.8. The applicant has also relied upon following decisions to content tha the resolution plan seeks to confer rights and advantages to the resolution applicant which is against the law:

- a) Jaypee Kensington Boulevard Apartments Assn. V/s NBCC (2022) 1 SCC 401.
- b) Bank of India V/s Maxim Infrastructure & Real Estate Ltd. 2019 SCC OnLine NCLT 666.
- c) Engineering Projects Ltd. V/s Ram Ratan Kanoongo Company Appeal (AT) (Insolvency) No. 263 of 2022.
- d) Ansal Engineering Projects V/s Tehri Hydro Development Corpn. Ltd. (1996) 5 SCC 450.
- e) Monitoring Agency of Anush Finlease V/s SBI Company Appeal (AT) (Insolvency) No. 902 of 2020.
- f) Manohar Lal V/s Vinesh Anand (2001) 5 SCC 407.

g) Re: Stone India Ltd V/S NCLT Kolkata Bench I.A. (IB) 1387/KB/2022 & IA (IB) 1335/KB/2022.

h) Devendra Kr. V/s State of Uttaranchal, (2013) 9 SCC 363.

2.9. We have already distinguished the reliance on the *Jaypee Kensington Boulevard Apartments Assn* (Supra). We find that issue in *Engineering Projects Ltd. V/s Ram Ratan Kanoongo Company Appeal (AT) (Insolvency) No. 263 of 2022* was in relation to disbursement of proceeds of Bank Guarantee after commencement of CIRP, though the Bank Guarantees stood invoked prior to commencement of CIRP, accordingly, this decision does not lay down the principle as contended by the Applicant. In the case of *Bank of India V/s Maxim Infrastructure & Real Estate Ltd. 2019 SCC OnLine NCLT 666*, the Adjudicating authority had approved a resolution plan contemplating transfer of all assets / rights of the Corporate Debtor. In the case of *Ansal Engineering Projects V/s Tehri Hydro Development Corpn. Ltd. (1996) 5 SCC 450*, the issue under consideration was whether injunction against encashment of Bank Guarantee can restrain the beneficiary bank to invoke the Guarantee, and the Hon'ble Supreme Court held that the liability of issuing bank is absolute and unequivocal. In the case of *Monitoring Agency of Anush Finlease V/s SBI Company Appeal (AT) (Insolvency) No. 902 of 2020*, the issue was whether the margin money against Bank Guarantee can be subject matter of resolution plan, and it was held that margin money is construed as substratum of a trust created to pay to the beneficiary to whom the bank guarantee is given and cannot be treated as an asset of the Corporate Debtor. In the case of *Manohar Lal V/s Vinesh Anand (2001) 5 SCC 407*, the issue was whether Arbitrator can be termed to be a Court within meaning of Section 195 of CRPC. In the case of *Re: Stone India Ltd V/S NCLT Kolkata Bench I.A. (IB) 1387/KB/2022 & IA (IB) 1335/KB/2022*, the Adjudicating authority had approved a resolution plan and held that no blanket orders in relation to subsisting contracts can be granted in the absence of the parties to the

contracts and agreements. In the case of *Devendra Kr. V/s State of Uttaranchal, (2013) 9 SCC 363*, the issue was on suppression of material information and whether such suppression itself amounts to moral turpitude. Accordingly, reliance on these decisions is misplaced and in complete ignorance of the facts and issues involved therein.

3. In view of the aforesaid finding and discussion, this bench of the consider view that this application deserves to be **dismissed**.
4. After having held so, this bench would like to place on record the conduct of the applicant as recorded in its daily order dated 24.07.2023 and 03.08.2023 whereby the Counsel for the Applicant had raised the issue of contempt petition against the members of this bench and a Writ Petition seeking removal of Member from NCLT having been filed by the Applicant and sub-judice before Hon'ble Bombay High Court, despite communicating the their counsel in clear words vide daily order sheet dated 26.06.2023 that the Bench shall continue to hear their arguments without any bias. This bench could not comprehend the rational objective behind this persistent reminder by the Ld. Counsel for the Applicant. We also place on record that the Ld. Counsel for the applicant were heard for 50 minutes on 03.08.2023 and 30 minutes on 04.08.2023. This bench also places on record that most of the contention raised during the course of the arguments were on the issues already dealt with in earlier five IAs filed by the applicant and wherein also the applicant was heard for more than 60 minutes on various occasions. These facts are placed on record, so that the Hon'ble Appellate Authorities are aware of the facts of the proceedings having transpired before this Bench in both the rounds.

**Sd/-**  
**Prabhat Kumar**  
**Member (Technical)**

**Sd/-**  
**Kishore Vemulapalli**  
**Member (Judicial)**

06.10.2023/-