NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.370 of 2021

AND

Company Appeal (AT) (Insolvency) No.376-377 of 2021

AND

Company Appeal (AT) (Insolvency) No.393 of 2021

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Company Appeal (AT) (Insolvency) No. 370, 376-377 & 393 of 2021

[Arising out of common impugned Order dated May 19, 2021 in I.A. No. 2431 of 2020 in Company Petition (I.B.) No. 4258/MB/C-II/2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench-II]

1. Company Appeal (AT) (Insolvency) No. 370 of 2021

IN THE MATTER OF:

Union Bank of India
on behalf of the Committee of Creditors
of Dewan Housing Finance Corporation Limited
Having its office at:
M-93, Connaught Place, New Delhi
Email: raunak.dhillon@cyrilshroff.com **Appellant**

Versus

1. **Mr Kapil Wadhawan**
   Presently in judicial custody at Taloja Prison
   Through his Advocates
   Rashmikant & Partners
   Having its office at:
   1-1, Kalpataru Heritage, 1st Floor
   127, M.G. Road, Mumbai – 400001
   Email: rnplegal@rashmikantpartner.com **Respondent No.1**

2. **Dewan Housing Finance Corporation Limited**
   Through the Administrator
   Mr R. Subramaniakumar
   Having registered office at:
   6111 Floor, HDIL Towers, Anant Kanekar
   Marg, Station Rd, Bandra (East),
   Mumbai – 400051
   Email: dhfladministrator@dhfl.com **Respondent No.2**

3. **The Reserve Bank of India**
   Having its address at:
   New Central Office Building
   Shahid Bhagat Singh Road
   Fort, Mumbai – 400001
   Email: rdmumbai@rbi.org.in **Respondent No.3**

Present:

For Appellant : Mr Tushar Mehta, SGI with Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain, Ms Isha Malik and Ms Fatema Kachwalla Advocates.

For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA).

Ms Liz Mathew, Ms Sonali Jain, Mr Rohan Rajadhyaksha, Mr Naveen Rath, Advocates for Administrator.

Mr Ashish S Kamat and Mr M.F. Philip, Advocates for R-3/RBI.

With

2. Company Appeal (AT) (Insolvency) No. 376-377 of 2021

IN THE MATTER OF:

The Administrator
Dewan Housing Finance Corporation Limited
HDIL Towers, 6th Floor
Anant Kanekar Marg, Bandra (East) Mumbai
Maharashtra – 400051 **Appellant**

Versus

1. Mr Kapil Wadhawan
Presently in judicial custody,
Taloja Central Jail, Inampuri
Taloja, Navi Mumbai
Maharashtra – 410208 **Respondent No.1**

2. The Committee of Creditors of Dewan Housing Finance Limited
Through Lead Bank – Union Bank of India,
Union Bank Bhavan, 239
Vidhan Bhavan Marg
Nariman Point, Mumbai
Maharashtra – 400021 **Respondent No.2**

3. The Reserve Bank of India

New Central Office Building
Shahid Bhagat Singh Road
Fort, Mumbai, Maharashtra – 400001 **Respondent No.3**

4. Piramal Capital & Housing Finance Limited
4th Floor, Piramal Towers
Peninsula Corporate Park
Ganapatrao Kadam Marg,
Lower Parel West, Mumbai
Maharashtra – 400012 **Respondent No.4**

Present:

For Appellant : Ms Liz Mathew, Ms Sonali Jain, Mr Rohan Rajadhyaksha, Mr Naveen Rath, Advocates

For Respondent : Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA).

Mr Ashish S Kamat and Mr M.F. Philip, Advocates for R-3/RBI.

Ms Isha Malik and Ms Fatema Kachwalla, Advocates Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain and Mr Aniruddh Gambhir, Advocates for COC.

With

3. Company Appeal (AT) (Insolvency) No. 393 of 2021

IN THE MATTER OF:

Piramal Capital & Housing Finance Limited
Having its registered office at:
4th Floor, Piramal Tower
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400013
Email: Bipin.Singh@piramal.com **Appellant**

Versus

1. Kapil Wadhawan
Presently in Judicial Custody,

Taloja Central Jail, Inampuri Taloja
Navi Mumbai, Maharashtra – 410208
Through his Counsel
M/s Rashmikant & Partners
address at: 1-1, Kalpataru Heritage
1st Floor, 127 M.G. Road, Mumbai – 400001
Email: rnplegal@rashmikantpartners.com **Respondent No.1**

2. **The Administrator**
Dewan Housing Finance Corporation Limited
Having its registered office at:
6th Floor, HDIL Towers,
Anant Kanekar Marg
Station Road, Bandra (East)
Mumbai – 400051
Email: dhfladministrator@dhfl.com **Respondent No.2**

3. **Committee of Creditors of Dewan Housing Finance Limited**
Having its registered office at:
6th Floor, HDIL Towers,
Anant Kanekar Marg
Station Road, Bandra (East)
Mumbai – 400051
Email: richa.roy@cyrilshroff.com **Respondent No.3**

4. **The Reserve Bank of India**
Having its address office at:
New Central Office Building
Shahid Bhagat Singh Road
Fort, Mumbai – 400001
Email: suharsh.sinha@azbpartners.com/
csahoo@rbi.org.in/ssangale@rbi.org.in **Respondent No.4**

Present:

For Appellant : **Mr Ashish Bhan, Mr Ketan Gaur, Ms Chitra Rentala, Mr Aayush Mitruka, Mr Kaustub Narendran, Ms Samriddhi Shukla, Ms Lisa Mishra and Mr Vishal Hablani, Advocates for Intervenor (Piramal Capital & Housing Finance Ltd., SRA).**

For Respondent : **Mr Raunak Dhillon, Mr Animesh Bisht, Ms Saloni Kapadia, Ms Madhavi Khanna, Mr Shubhankar Jain, Mr Aniruddh Gambhir, Advocates for COC. Mr Ashish S Kamat and Mr M.F. Philip, Advocates for R-3/RBI.**

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

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

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

1. These Appeals CA (AT) (Ins) 370 of 2021, C.A. (AT) (Ins) 376-377 of 2021, C.A. (AT) (Ins) 393 of 2021 emanate from a common impugned order dated May 19, 2021, passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench II, in I.A. No. 2431 of 2020 in Company Petition (I.B.) No. 4258/MB/C-II/2019, whereby the Adjudicating Authority has inter alia directed the Administrator of DHFL to place the letter dated December 29, 2020 ("**Second Settlement Proposal**") sent by Mr Kapil Wadhawan before the CoC for its consideration, decision, voting and to inform the Adjudicating Authority within ten days from the date of the impugned Order and partly allowed I.A. No. 2431 of 2020 in Company Petition (I.B.) No. 4258/MB/C-II/2019 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code').

Brief Facts

2. The facts of the present appeal are also similar to the above common set of appeals. The Union Bank of India files this appeal on behalf of the CoC of DHFL against the Order of the Adjudicating Authority in I.A. No. 2431 of 2020 under the common Company Petition No. 4258 of 2019, whereby Adjudicating Authority has directed the Administrator to place the Settlement Proposal dated December 29, 2020, sent by Respondent No. 1, i.e. Kapil

Wadhwan before the CoC for its consideration. During the pendency of the present Appeal, Adjudicating Authority has passed an Order approving the Resolution Plan (pronounced on June 7 2021).

3. Company Appeal (AT) (Ins.) No. 370 of 2021 is filed by Union Bank of India on behalf of the Committee of Creditors against the Order dated May 19, 2021, passed in IA No.2431 of 2021 in CP No.4258 of 2019, whereby the Adjudicating Authority / NCLT has inter alia directed the Respondent No.2, i.e. the Administrator of DHFL (for brevity 'Administrator') to place the letter dated December 29 2021 (second settlement offer) sent by Respondent No.1 i.e. Mr Kapil Wadhwan erstwhile Promoter and Director of DHFL before the CoC for its consideration, decision, voting and inform to the Adjudicating Authority the outcome of the same within 10 days from the date of impugned order-I. Accordingly, in the impugned order-I, the following direction given as under has been issued by the Adjudicating Authority :

Ist Impugned "ORDER"

"Therefore, in accordance with the provisions of section 60 (5)(c) of I&B code and also by exercising the powers under rule 11 of NCLT Rules 2016 this Adjudicating Authority hereby directs the Administrator to place the 2nd Settlement Proposal of the applicant Mr Kapil Wadhawan before COC for its consideration, decision, voting and inform the outcome of the same within 10 days from today and list the matter on 31.5.2021. Accordingly, the IA 2431 of 2020 in C.P. (I.B.) 4258 of 2019 is partly allowed and stands disposed of."

4. The Adjudicating Authority, while disposing of IA 2431 of 2021, made the following observation which is necessary to mention here:

"81. We have carefully examined the application, reply of the Respondent's viz. Administrator, COC, RBI and judgments cited by the Counsels. From the records it is noted that Mr. Kapil Wadhawan one of the main promoters of the Corporate Debtor had addressed various letters to the Administrator, COC and also submitted a Settlement Proposal dated December 13 2020 (1st Settlement Proposal) but did not receive any reply; therefore, submitted the Second Settlement Proposal dated December 29 2020 (2nd Settlement Proposal). The main prayer of the Applicant Mr Kapil Wadhawan, was CoC be directed to consider the 2nd Settlement Proposal submitted by the Applicant, to vote upon the same and to take a decision thereupon.

82. The submission of R1 that CoC has considered and chosen to not accept the Applicant's proposal is not supported by any record, evidence therefore is not accepted.

83. It was also sought to be urged by the Respondents that the Applicant, as one of the Promoters, was purportedly responsible for the present financial health of the Corporate Debtor and that no proposal ought to be entertained from such a Promoter, if we accept this contentions of the Respondent, settlement proposal, One Time Settlement proposal cannot be offered by the Promoters and cannot be accepted by Banks, Financial institutions, Creditors which is a generally prevailing practice and not an acceptable proposition.

84. From, the Settlement Proposals it is noted that the Applicant has offered approx. Rs 91,158 crores which is more than Rs. 54,512 crores of the next highest bidder who offered Rs. 37,250 Crores. Since this settlement proposal is substantially higher / more than 1½ times of the value of the

highest bidder the same needs due consideration/ reconsideration by the Administrator/ COC. Upon perusal of his letters/ Settlement Proposal it is noted that an amount of approx. Rs. 9,062 crores lying with the Corporate Debtor as on September 30 2020 as per the balance sheet of the Company will be utilised fully for upfront repayment of the outstanding debts of small investors and the major breakup would be to NCDs held by public an amount of approx. Rs. 1,340 crores, towards ECB approx. Rs. 2,747 crores and public deposits of approx. Rs. 5,287 crores. It appears that with the settlement proposal thousands of the small investors, Fixed Deposit holders would be paid fully thereby thousands of small investors would get hundred percent (100%) of their principal sum outstanding. The proposal is given by none other than the promoter of the Corporate Debtor who had repaid approx. Rs 41,000/- crores of liability between Sep 2018 and June 2019 without any fresh borrowing, infusion of funds by selling equity and personal assets as per his submissions. If the proposal is considered and the terms and conditions are acceptable to the members of COC in their Commercial Wisdom, ultimately, it would benefit majorly the Financial Creditors (Banks, Financial Institutions) and thousands of small investors. Ultimately the money lent by the Banks to the corporate debtor is also public money therefore the proposal needs due consideration in view of the quantum of money offered in the 2nd Settlement Proposal. Therefore, the Adjudicating Authority is of the considered view that the 2nd proposal deserves to be examined on merits and put for deciding, voting of the members of COC and if the same is commercially found not favourable with the COC members then the proposal can be rejected. He also submitted that this proposal is submitted based on the limited information available currently and he can increase the offer

after negotiation. We have not made any comments, expressed our opinion on the feasibility, viability of the settlement proposal of the applicant Mr. Kapil Wadhwan.

85. Though the letters, Settlement Proposals were addressed to the Administrator, COC it is seen from the records that AZB Partners the legal team of the DHFL have written/replied to him and apparently the same is communicated without the knowledge, Approval of the Administrator, the members of COC therefore, the same cannot be treated as a reply from the Administrator, COC, appropriate Authority.

86. The submissions by the Administrator, COC that his settlement proposal has been placed on the website, Virtual Data Room (VDR) is not akin to placing for consideration, voting of COC rather its just an information and treated casually. The resolution plans submitted by three other entities were discussed, negotiations were held then voted upon.

87. Further the applicant also mentioned that the proposal is not made available to FD, NCD holders who constitute more than 65% of vote share of members of COC, apparently the same is not disputed by the respondents like the Administrator, COC. If the 2nd Settlement Proposal is viable, feasible and acceptable after exercising Commercial Wisdom of COC it would immensely benefit the members of COC and in turn would benefit the Public Depositors, NCD holders etc. COC by exercising their commercial wisdom can decide suitably. This direction is being issued by this Adjudicating Authority because the same would be in the interest of justice, equity, balancing of interest, interest of various stakeholders, in the interest of maximisation of value of assets of the corporate debtor, the special situation and to avoid further litigations by the applicant approaching appellate forums and smooth process of

considering the Plan. By this direction 10 days' time is granted to the Administrator to place the 2nd Settlement Proposal of the applicant before the members of COC including the FD, NCD holders for consideration, decision, voting and to submit the outcome of the voting results.

88. We are also conscious of the fact that the Plan of the Successful Resolution Applicant has been submitted to NCLT and hearings are just concluded and the same is under consideration of this Adjudicating Authority. We are also aware that number of I.A.s have been filed by various entities either opposing the Plan, claiming their outstanding dues, challenging the distribution method, avoidance applications etc and the same would take some time to finally decide on the IA 449/2021 filed seeking Approval of the Resolution Plan. Adjudicating Authority in the mean while directs the Administrator to place the 2nd Settlement Proposal before the COC for its consideration, decision, voting as a simultaneous process without losing time.

93. By taking into consideration the above stated factual aspect and Legal position of the present case and by following above stated Judicial precedents, we feel appropriate to observe that CoC ought to have considered such settlement proposal of the applicant as per norms and its commercial wisdom which we did not to have been followed by the CoC in the present matter. From the Submissions of the respondents, they treat this Settlement Proposal as a resolution plan but factually that is not case as discussed supra.

94. Additionally, the Applicant has requested that an "independent" valuation be conducted of the Corporate Debtor's assets, and the report shared with the Applicant for which

Respondent 1 submits that this request has no basis in law. We accept the stand of R1 and the prayer is not acceptable since valuation exercise had already been completed in the CIR Process, therefore this prayer is rejected.

95. While observing so, we are conscious about our jurisdiction that this Adjudicating Authority cannot substitute its view of over the Commercial Wisdom that may be exercised by the CoC in respect of the present Applicant, however there appears to be some procedural irregularity by not considering a settlement proposal which is around 150 % higher value of the Resolution Plan approved. Hence it needs due consideration and cannot be kept aside nor contention of the applicant in the present I.A. can be brush aside that an Ex-promoter cannot move a proposal of settlement in the light of the above referred decision of Hon'ble NCLAT and by following by above referred decision of Hon'ble Supreme Court. Hence following Order."

(verbatim copy)

5. After passing of the first impugned Order, dated May 19 2021, whereby the Adjudicating Authority disposed of the IA No.2431 of 2020 filed under Section 60(5)(c) of the I&B Code, 2016 read with rule 11, NCLT Rules, directed the Administrator to place 'the second settlement proposal of Kapil Wadhwan' before the CoC for its consideration, decision and voting and inform the outcome of the same within ten days was orally requested to stay the said Order, rejected by the Adjudicating Authority with the following observation i.e. **Impugned Order-II:**

"**ORDER**

"The matter is taken up through Virtual Hearing (V.C.). Ld. Sr. Counsel Mr. J.P. Sen appeared for the Applicant Mr. Kapil

Wadhwan. Ld. Sr. Counsel Mr. Ravi Kadam appeared for the Administrator. Ld. Sr. Counsel Mr. Janak Dwarkadas appeared for the CoC. Order pronounced in open court and I.A. is partly allowed and CoC was directed to consider the settlement proposal of the applicant within ten days from today by exercising its commercial wisdom and to take appropriate decision there on the matter be listed on 31.05.2021 for further hearing.

After the Order was pronounced Ld. Sr. Counsel Mr. Ravi Kadam along with Ld. Sr. Counsel Mr. Janak Dwarkadas appearing for the Administrator and the CoC respectively made joint request for stay of the implementation of the present Order however Ld. Sr. Counsel Mr. J.P. Sen appearing for the applicant vehemently opposed the stay.

Having heard the Ld. Counsels from both the sides and considering the urgency and practical situation and timelines in the matter the importance of timeline involved in this matter such request cannot be acceded to hence is declined. The Court officer is directed to communicate a copy of this Order to all the concerned parties at the earliest through email."

(verbatim copy)

6. **Appellant/ Union Bank Of India's (on behalf of CoC) Submissions**

6.1 Appellant submitted that the CoC by the Impugned Orders is being compelled to consider the Second Offer of Mr Kapil Wadhawan without any provision of law requiring the CoC to consider such offer is in direct contravention with the Code and CIRP Regulations. Adjudicating Authority has acknowledged that there is no provision in the Code or the Regulations thereunder by which it is empowered to pass the Impugned Orders. Hence,

the Adjudicating Authority has passed the Impugned Orders by exercising its inherent power under Rule 11 of the National Company Law Tribunal Rules, 2017 ("NCLT Rules") and Section 60(5) of the Code.

6.2 Further, Respondent No. 1/Mr Kapil Wadhawan, throughout the CIRP of the Corporate Debtor, has been sending various letters and proposals, including the First Offer, all of which have been placed before the CoC, and the CoC was also of the view that such proposals cannot be considered. The Second Offer is nothing but the First Offer in a different form. Such an order compelling the CoC to consider every offer by the promoter, who was once in control of the corporate debtor, would greatly and gravely hamper the CIRP and cause inordinate delays, and materially as well as adversely impact the sanctity of the process in which the CIRP of the Corporate Debtor has been conducted since its inception.

6.3 Appellant contends that Adjudicating Authority vide the Impugned Orders has asked the CoC to consider the Second Offer, which has neither been submitted in compliance with the RFRP nor compliance with Section 12A of the Code (and related regulations) and such a direction of the Hon'ble Adjudicating Authority passed after:

a) the CoC of the Corporate Debtor has, by an overwhelming majority, approved the Resolution Plan submitted by DHFL;

b) The Administrator has already filed the Plan Approval Application.

c) The Plan Approval Application has been heard and reserved for orders by the Adjudicating Authority;

d) The RBI has granted its no-objection certificate regarding the Piramal Resolution Plan contemplated in Rule 5(d)(iii) of the FSP Rules.

e) These directions are whole without jurisdiction, are prejudicial to the stakeholders' interests and are very likely to adversely impact the timely conclusion of the CIRP of the Corporate Debtor.

6.4 Appellant contended that only a Resolution Plan compliant with the provisions of the Code or an Application under Section 12A of the IBC could be placed before the CoC. It is undisputed that the Second Offer is neither a compliant Resolution Plan nor an application under Section 12A. Appellant further contended that Inherent powers could not override express provisions of law. The provisions in relation to settlement proposals are codified under Section 12A of IBC and Regulation 30A of the CIRP Regulations. Undisputedly the Second Offer is neither a proposal under Section 12A nor a Resolution Plan. That being the case, there is no provision of law that permits the Adjudicating Authority to compel the CoC to consider an offer that is not a settlement U/S 12A nor even a proposal as per the provisions of the Code. It is further submitted that the Adjudicating Authority could not grant any reliefs contrary to the express provisions of the Code.

7. **First Respondent's Submission**

7.1 First Respondent submits that the second settlement proposal is different from the first settlement proposal. The only similarity is that it continues to be 150% higher than the Plan of the successful Resolution Applicant. Also, a perusal of the Minutes of the meeting extracts dated December 24, 2020, wherein the First Settlement Proposal was purportedly discussed, would show that the said proposal was never considered on merits and was rejected on hyper technicalities.

7.2 Respondent No. 1 argued that the objections by the Appellant alleging lack of jurisdiction on the part of the Adjudicating Authority are misconceived. Section 60 (5) of the I&B Code defines the powers of the Adjudicating Authority in the broadest possible terms. Further, the Adjudicating Authority has the inherent power to make such Order as may be necessary for the ends of justice or to prevent the abuse of the Tribunal's process.

7.3 Respondent No. 1 further argued that the objection by the Appellant that the impugned Order will interfere with the Commercial Wisdom of the CoC is incorrect as the Adjudicating Authority had merely directed consideration of the Settlement proposal and not interfere with the commercial wisdom of CoC as it is not a case wherein the CoC rejected the Settlement Proposal. But, rather a case, wherein the offer mentioned above was never even considered and hence does not fall within the ambit of "Commercial Wisdom", and there is no question of interference with the same.

7.4 Respondent No. 1 further argued that the Resolution Plan of Piramal is not in the interest of creditors, and therefore the 'second settlement proposal'

must be considered. Piramal offers a far low amount than can be recovered even if DHFL was run by an Administrator appointed by Respondent No. 3.

8. **IIIrd Respondents /Reserve Bank of India's Submission**

1. INITIATION OF CIRP OF DHFL

a) The Appellant's in the captioned appeals have challenged the Order passed by the Adjudicating Authority/NCLT dated May 19, 2020, in Interlocutory Application being IANo. 2431 of 2020, directing the Administrator of the DHFL to convene a CoC meeting and place the 'IInd settlement proposal' offered by the Kapil Wadhawan for consideration, decision and voting and to inform the NCLT of the outcome within ten days from the date of the Order.

b) Erstwhile Board of Directors of the Dewan Housing Finance Corporation limited was superseded by the RBI on November 20 2019, exercising the powers under Section 45-IE (1) of the Reserve Bank of India Act, 1934, issued a press release on November 20, 2019, that the erstwhile Board of Directors of the DHFL was superseded "owing to governance concerns and default by the DHFL in meeting with various payment obligations."

c) No allegation regarding the lack of good faith or malafides can be attributed to a statutory authority like RBI to exercise its powers as per the statutory provisions. Further, both the decisions, i.e. to supersede the Board of Directors of the DHFL and the

admission order dated December 3, 2019, by Adjudicating Authority/NCLT, have not been challenged by Mr Kapil Wadhawan, therefore, have attained finality.

d) Along with the supersession of the Board of Directors of DHFL, RBI appointed Mr R. Subramaniakumar (ex-MD and CEO of Indian Overseas Bank) as the Administrator of DHFL under Section 45-IE (2) of RBI Act on November 20, 2019. On November 22, 2019, in the exercise of the powers conferred under Section 45-IE (5)(a) of the RBI Act, RBI constituted a three-member Advisory Committee to assist the Administrator in discharge of his duties (Para 4, Pg. 312, Reply of RBI to IA 2431 of 2020, Annex. A/19, Appeal No. 370/2021).

e) After that, under Section 227 read with Clause (zk) of sub-section (2) of Section 239 of Insolvency and Bankruptcy Code, 2016 ("IBC"), read with Rules 5 and 6 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019 (for brevity "FSP Rules'), RBI on November 29, 2019, initiated insolvency proceedings against DHFL by filing the Company Petition No. 4258 of 2019 before NCLT Mumbai.

f) The NCLT Mumbai, by its Order dated December 3, 2019, admitted the petition above and confirmed the appointment of Shri R. Subramaniakumar as the Administrator of DHFL

("Administrator") under the FSP Rules and initiated CIRP against DHFL.

g) Appellant contends that these urgent and extraordinary steps were taken because DHFL had huge debts and loans of approximately Rs. 87,247 crores. To protect and preserve the assets of DHFL and ensure that the Company is managed as a going concern, RBI appointed the Administrator and CIRP was initiated against DHFL. As such, the steps taken by RBI to initiate CIRP was not only on being legally authorised and competent only but also in the public interest. RBI takes the same in exercising statutory powers and is within its domain. The same does not commend any judicial review.

RBI'S LIMITED ROLE DURING CIRP[1]

h) Under the provisions of IBC, the Administrator of DHFL held meetings of CoC from time to time. The CIRP process is enunciated under the provisions of IBC and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 ("CIRP Regulations"). The Administrator of DHFL, along with the CoC, has completed the process of CIRP, wherein the CoC approved the Resolution Plan submitted by the 'Piramal Group' by a majority of 93.65 % votes in favour the Resolution Plan.

[1] Corporate Insolvency Resolution Process

i) RBI as a Financial Sector Regulator/ Appropriate Regulator, i.e. took appropriate steps, from time to time, which among other things included the following:

(i) superseded the Board of Directors of DHFL due to governance issues and defaults;

(ii) appointed Administrator and Advisory Committee to assist the Administrator under RBI Act;

(iii) filed the Company Petition for initiation of CIRP under IBC, which was admitted by NCLT Mumbai on December 03, 2019.

j) After the commencement of CIRP of any Financial Service Provider like DHFL, the provisions of IBC or that of FSP Rules do not envisage any specific role for the Financial Sector Regulator, i.e. RBI during the CIRP, except for the issuance of 'no-objection' (NOC) based on the 'fit and proper criteria' to the persons, who would be in control or management of the Financial Service Provider after the Approval of resolution plan by the CoC.

k) Rule 5 (d) of the FSP Rules, which is relevant in this regard, makes it clear that once the CoC has approved the Resolution Plan, the Administrator of the DHFL has to obtain 'no-objection' from RBI under Rule 5 (d) of the FSP Rules. Apart from the same, neither the Code nor the 'FSP Rules' cast any other obligation on

RBI vis-à-vis the CIRP process, which is left to be run by the Administrator and the CoC as per its commercial wisdom.

l) Accordingly, RBI cannot and has not intervened in the CIRP process as any such interference would be wholly contrary and inconsistent with the spirit of the IBC and FSP Rules and will have the effect of derailing the CIRP.

m) On January 25, 2021, the Administrator applied with RBI seeking 'no-objection' concerning the Successful Resolution Applicant as required under Rule 5 (d) of the FSP Rules. On February 16, 2021, RBI granted its 'no-objection' in Rule 5 (d) (iii) of the FSP Rules. After following the provisions of IBC, reading with FSP Rules, and carrying out a due diligence process on the "fit and proper" criteria of persons who would be in control/management of 'DHFL' after the Approval of the Resolution Plan.

n) As per FSP rules, RBI is empowered to provide "No Objection" about "fit and proper" criteria of a new entity having control ownership/ management and does not relate to merits or commercial terms of such a resolution plan or distribution mechanism provided under it, since it is left to the prudence/ commercial judgement of CoC under the IBC, as upheld by the Hon'ble Supreme Court in the case of K. Sashidhar vs Indian Overseas Bank & Ors. (2019) 12 SCC 150, which is not to be

interfered within the light of the legislative scheme, as interpreted by various decisions of the Supreme Court.

o) The alleged settlement proposals of Kapil Wadhawan were addressed to CoC and the Administrator. This being so, the direction sought by Kapil Wadhawan against RBI to direct the Administrator to place such purported settlement proposal before CoC is against the provisions of the 'FSP Rules' and legally unsustainable as it is beyond the scope of the role of the Financial Sector Regulator who has applied for initiation of CIRP. Further, the reliefs sought are rendered infructuous. Therefore, the Order dated May 19, 2021, passed by NCLT Mumbai, ought to be rejected.

9. **ANALYSIS**

9.1 We have heard the argument of the learned counsel for the parties and perused the record. Based on the Appeals, the following issues have arisen before this Appellate Tribunal.

Whether after Approval of the resolution plan by the COC and pending Approval, the Adjudicating Authority can direct the COC to convene a meeting and place the settlement proposal as offered for consideration, decision and voting on that within a certain period?

9.2 Admittedly in the instant case, the Adjudicating Authority vide the Impugned Order had directed the COC to consider the 'IInd Settlement Offer

of Ist Respondent when the Resolution Plan after Approval from CoC was pending adjudication u/s 31 of the Code.

9.3 The CoC contends that the settlement offer was neither submitted in compliance with the RFRP nor with Section 12 A of the I&B Code and related Regulations. Such a direction of the Adjudicating Authority was passed despite that the CoC of the corporate debtor had by an overwhelming majority approved the Resolution Plan of DHFL. The Administrator had already filed the plan approval application, and that application was heard and reserved for orders by the learned Adjudicating Authority.

9.4 It is pertinent to mention that the Hon'ble Supreme Court in the case of Ebix Singapore Private Limited versus Committee of Creditors of Educomp Solutions Ltd, reported in 2021 SCC online SC 707, has very recently dealt with the same issue which has arisen in this appeal. In this case, Hon'ble Supreme Court had observed that;

> ***"126. <u>Since the interpretation of the IBBI (CIRP)(Fourth Amendment) Regulations 2020 and the impact on the Resolution Applicants and the CoC to negotiate the terms of the Resolution Plan is not before this Court and the present appeal essentially seeks to determine the nature of the Resolution Plan after its Approval by the CoC and prior to its Approval by the Adjudicating Authority,</u>*** *this Court will proceed to determine of the nature of such a Plan, on the assumption of the law as it stood then, i.e., Regulation 39(3) which directed that "[t]he committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit". This*

power of the CoC to suggest modifications invariably entailed an element of negotiation with the Resolution Applicants, who would make suitable revisions and re-submit their Resolution Plans. The scope of a commercial bargain with the Resolution Applicants evinces a sense of a negotiated agreement that is arrived between the parties, which resembles an exercise of contractual freedom by the CoC and the Resolution Applicant.

127. If this court were to hold that CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. This would mean that certain principles of contract law, for example those relating to discharge, penalties, remedies and damages would become applicable to CoC-approved Resolution Plans. For instance, in the United States, plans confirmed by courts have been characterised as contracts, whose breach can even give rise to contractual remedies. In In re Hoffinger Indus, Inc, a bankruptcy court in Arkansas has held that "a confirmed plan should be enforceable and amenable to damages between contractually bound parties." Indeed, it has been argued before us that Resolution Plans should be enforced through the contractual remedy of specific performance. Further, a determination that Resolution Plans are contracts in the period between Approval by the CoC and the Approval of the Adjudicating Authority would require us to analyse whether all elements of contract formation have been satisfied, including the question of whether the acceptance of the Resolution Plan by the CoC fulfils

the criteria laid down under Section 7 of the Contract Act or whether the conditionality of seeking Approval from the Adjudicating Authority makes the Resolution Plan a contingent contract. Our intent of laying down the consequences of our determination of Resolution Plans as contracts is to highlight the importance of ascertaining the nature of a CoC-approved Resolution Plan, prior to its Approval by the Adjudicating Authority.

128. The text of the IBC does not specify whether Resolution Plans at the second stage of the process, i.e., in the intervening period of submission to and Approval by the Adjudicating Authority, are pure contracts. As noted previously, by specifications such as eligibility for resolution applicants, the contents of the I.M. and duties of the R.P. to prospective Resolution Applicants and statutory procedures on timelines and voting, strictly govern the insolvency process even prior to the submission of the Plan to the Adjudicating Authority. The CoC, who the appellants allege is in the nature of a free contracting party, is governed by the binding principles of the statute with regard to the contents and nature of the statutory plan that it approves under Section 30(4) and even its own composition.

129. Section 30(4) provides that the consent of all the members of the CoC, though a unanimous vote is not required and a sixty-six per cent vote is sufficient for Approval of a resolution plan. The constitution of the CoC is based on specific scenarios envisaged in the statute and accounts for varying compositions, based on factors such as the nature and quantum of debt owed. For example, if it comprises of operational creditors alone,

the percentage of debt owed between the operational and financial creditors and other such variables impact voting thresholds inter se members of the CoC. A sixty-six per cent vote of the CoC is required to approve a Resolution Plan. The dissenting creditors are deemed to have given their Approval and are bound by the decision of the majority of the CoC. The dissenting creditors are bound as a result of the statutory provision and not because they have actually consented to be parties to such an arrangement. Other elements governing the Resolution Plan indicate that the entire process from initiation and leading up to its acceptance by the CoC takes place within the framework of the IBC. In addition, the IBC provides penalties for non-compliance with the Resolution Plan after its Approval under Section 31 and forfeiture of the PBG for failing to implement the Resolution Plan or contributing to the failure of its implementation. The violation of the terms of the Resolution Plan does not give rise to a claim of damages, rather it leads to prosecution and imposition of punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.

130. *The CoC even with the requisite majority, while approving the Resolution Plan must consider the feasibility and viability of the Plan and the manner of distribution proposed, which may take into account the Order of priority amongst creditors as laid down in sub-section (1) of section 53 of the IBC. The CoC cannot approve a Resolution Plan proposed by an*

applicant barred under Section 29A of the IBC. Regulation 37 and 38 of the CIRP Regulations govern the contents of a Resolution Plan. Furthermore, a Resolution Plan, if in compliance with the mandate of the IBC, cannot be rejected by the Adjudicating Authority and becomes binding on its Approval upon all stakeholders - including the Central and State Government, local authorities to whom statutory dues are owed, operational creditors who were not a part of the CoC and the workforce of the Corporate Debtor who would now be governed by a new management. Such features of a Resolution Plan, where a statute extensively governs the form, mode, manner and effect of Approval distinguishes it from a traditional contract, specifically in its ability to bind those who have not consented to it. In the pure contractual realm, an agreement binds parties who are privy to the contract. In the context of a resolution Plan governed by the IBC, the element of privity becomes inapplicable once the Adjudicating Authority confirms the Resolution Plan under Section 31(1) and declares it to be binding on all stakeholders, who are not a part of the negotiation stage or parties to the Resolution Plan. In fact, a commentator has noted that the purpose of bankruptcy law is to actually solve a specific 'contracting failure' that accompanies financial distress. Such a contracting failure arises because "financial distress involves too many parties with strategic bargaining incentives and too many contingencies for the firm and its creditors to define a set of rules of every scenario." Thus, insolvency law recognises that parties can take benefit of such 'incomplete contract' to hold each other up for their individual gain. In an attempt to solve the issue of incompleteness and the hold-up threat, the insolvency law provides procedural protections i.e., "the law puts in place guardrails that give the

parties room to bargain while keeping them from taking position that veer toward extreme hold up".

131. *It may be useful to refer to how this Court has analysed instruments that are analogous to a Resolution Plan. In SK Gupta v. KP Jain, this Court while discussing the nature of compromise or arrangements entered between a company and its creditors or members observed that such a compromise or arrangement once sanctioned by the court is not merely an agreement between parties because it binds even dissenting creditors or members through statutory force. This Court made the following observations:*

> *"12. The scheme when sanctioned* ***does not merely operate as an agreement between the parties*** *but has statutory force and is binding not only on the Company but even dissenting creditors or members, as the case may be. The effect of the sanctioned scheme is "to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity" [see J.K. (Bombay) Pvt. Ltd. v. New Kaiser-i-Hind Spg. & Wvg. Co. Ltd. [AIR 1970 SC 1041 : (1969) 2 SCR 866, 891: (1970) 40 Comp Cas 689]]..”*
>
> *(**emphasis supplied**)*

132. *While the above observations were made in the context of a scheme that has been sanctioned by the Court**, the Resolution Plan even prior to the Approval of the Adjudicating Authority is binding inter se the CoC and the successful Resolution Applicant**. The Resolution Plan cannot be construed purely as a 'contract' governed by the Contract Act, in the period intervening its acceptance***

by the CoC and the Approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that "[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors". The BLRC Report also mentions that, "the R.P. submits a binding agreement to the Adjudicator before the default maximum date". We have further discussed the statutory scheme of the IBC in Sections I and J of this judgment to establish that a Resolution Plan is binding inter se the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract.

133. *The BLRC Report, which furnished the first draft of the IBC and elaborated on the aims behind the overhaul of the insolvency regime, refers to a CoC-approved Resolution Plan as a 'binding contract' in one instance and refers to it as a 'binding agreement' in other instances. The report also refers to a CoC-approved Resolution Plan as a 'financial arrangement', 'revival plan' or a 'solution'. The interchangeability of the terms - 'agreement', 'contract', 'financial arrangement', 'revival plan' and 'solution' indicates that there is no clear intention of the BLRC in characterising the nature of the Resolution Plan as a contract. The binding effect of the Resolution Plan has the consequence of preventing the CoC or the Resolution Applicant to renege from its terms after the plan has been approved by the CoC through a voting mechanism.* ***The fleeting mention of a 'binding contract' on one occasion in the BLRC Report (which was a pre-legislative text that underwent***

subsequent modifications by the Legislature) to indicate the binding nature of the Resolution Plan and the finality of negotiations once it is approved by the CoC, does not establish the legal nature of the document, especially when it is not complemented by the text and design of the IBC.

134. Certain stages of the CIRP resemble the stages involved in the formation of a contract. Echoes of the process involved in the formation of a contract resonate in the steps antecedent to the Approval of a Resolution Plan such as: (i) the issuance of an RFRP may be equated to an invitation to offer; (ii) a Resolution Plan can be considered as a proposal or offer; and (iii) the Approval by the CoC may be similar to an acceptance of offer. The terms of the Resolution Plan contain a commercial bargain between the CoC and Resolution Applicant. There is also an intention to create legal relations with binding effect. However, it is the structure of the IBC which confers legal force on the CoC-approved Resolution Plan. The validity of the Resolution Plan is not premised upon the agreement or consent of those bound (although as a procedural step the IBC requires sixty-six percent votes of creditors), but upon its compliance with the procedure stipulated under the IBC.

****

144. The lack of an apparent international consensus on the issue of whether instruments like CoC-approved Resolution Plans are contracts, prior to the Court's sanction, is also attributable to the peculiarity of the insolvency regime in each jurisdiction. This Court will have to be wary of transplanting international doctrines

that are evolved as responses to the specific features of a jurisdiction's insolvency regime, without identifying an analogous framework in our insolvency regime.

145. The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC*. Regulation 39(3) of CIRP regulations, as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and submitted to the Adjudicating Authority. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts. **CoC-approved Resolution Plans, before the Approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act**. **The voting by the CoC also occurs only after the R.P. has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein**. The amended Regulation 39(3) further regulates the conduct of the CoC on voting on Resolution Plans and has*

introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on August 27 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC. ***These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties****. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC-approved Resolution Plans owing to the nature of the IBC.* ***Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the Approval of the Adjudicating Authority****. The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments. However, if the intention was to view a CoC-approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the*

IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and distort the mechanism of the IBC altogether. This Court in Laxmi Pat Surana v. Union Bank of India has held that the IBC is a self-contained Code. Thus, importing principles of any other law or a statute like the Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be 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". Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation**. **This Court in Amtek Auto (supra), had curbed a similar attempt by a successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the Approval by the Adjudicating Authority. Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC.**

148. *The evolution of the IBC framework, through an interplay of legislative amendments, regulations and judicial interpretation, consistently emphasises the predictability and timeliness of the IBC. The legislature and the IBBI have been proactive to introduce amendments to the procedural*

*framework, that respond to changes in the economy. For instance, Regulation 40(c), which came into effect on April 20 2020, was inserted in the CIRP Regulations to take into account the delay that may be caused to the CIRP on account of the lockdown being imposed by the Central Government due to the COVID-19 pandemic. Regulation 40(c) provides that the delay in completing any activity related to the CIRP because of imposition of lockdown will not be counted for the purposes of the timeline that has been stipulated under the statutory framework. If the CIRP is not completed within the prescribed timeline, the Corporator Debtor is sent into liquidation**. This understanding of the evolution of the law is critical to our task of judicial interpretation. We cannot afford to be swayed by abstract conceptions of equity and 'contractual freedom' of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC.***

149. *The IBC and the regulations provide a detailed procedure for the completion of CIRP. An application for initiation of CIRP is filed either by the financial creditor, operational creditor or the Corporate Debtor itself under Sections 7, 9 and 10 of the IBC, respectively. Once the application is admitted by the Adjudicating Authority, it passes the following orders under Section 13(1) of the IBC: (i) declaration of a moratorium for the purposes referred to in Section 14 of the IBC; (ii) causing a public announcement to be made for the initiation of CIRP and issuing a call for submissions of claims as may be specified under Section 15 of the IBC; and (iii) appointing an IRP in accordance with Section 16 of the IBC.*******

The nature of the statute indicates the clarity of its purpose - primacy of the interests of the creditors who are seeking to cut

their losses through a CIRP. Traditional models and understandings of equity or fairness that seek reliefs which are misaligned with the goals of the statute and upset the economic coordination envisaged between the parties, cannot be read into the statute through judicial interpretation. While parties have the freedom to negotiate certain commercial terms of the Resolution Plan to gain wide support, their ability to negotiate is circumscribed by the governing statute. A court cannot interpret the negotiated arrangements that are represented in the Resolution Plan in a manner that hampers the objectives of the IBC which is a speedy, predictable and timely resolution. The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives. ***A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the I.M., is assumed to have analysed the risks in the business of the Corporate Debtor and submitted a considered proposal. It cannot demand vesting of certain powers and rights which have been conspicuously omitted by the legislature under the statute, in furtherance of the policy objectives of the IBC. A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy. In Essar Steel (supra), a three judge Bench of this Court, affirmed a two judge Bench decision in K Sashidhar (supra), prohibiting the Adjudicating Authority from second-guessing the commercial wisdom***

of the parties or directing unilateral modification to the Resolution Plans. These are binding precedents. Absent a clear legislative provision, this court will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC to re-negotiate a submitted Resolution Plan or agree to its withdrawal, at the behest of the Resolution Applicant. The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of Approval or rejection, as the case may be, under Section 31. In Government of Andhra Pradesh v. P Laxmi Devi, while determining the constitutionality of a statute, this Court observed that it should be wary of transgressing into the domain of the legislature, especially in matters relating to economic and regulatory legislation. This Court observed:

> ***"80. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions."***
>
> ***(emphasis supplied)***

169. Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy. A court may be inept in laying down a detailed procedure for exercise of the power of withdrawal or modification by a successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. In this case, if Resolution Applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a Resolution Plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective Resolution Applicants who are seeking to participate in the process and the successful Resolution Applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry

of litigation which would cause the delay that the IBC seeks to disavow."

(emphasis supplied)

9.5 Further, the Hon'ble Supreme Court in case of Pratap Technocrats(P) Ltd v Monitoring Committee of Reliance Infratel Ltd reported in 2021 SCC Online SC 569 has held that;

"***Jurisdiction to approve a Resolution Plan***

26. The resolution plan was approved by the CoC, in compliance with the provisions of the IBC. The jurisdiction of the Adjudicating Authority under Section 31(1) is to determine whether the resolution plan, as approved by the CoC, complies with the requirements of Section 30(2). The NCLT is within its jurisdiction in approving a resolution plan which accords with the IBC. There is no equity-based jurisdiction with the NCLT, under the provisions of the IBC.

58. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating Authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate Authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. ***Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers****.*

59. In our view, neither the adjudicating Authority (NCLT) nor the appellate Authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors……"

(emphasis supplied)

38. *The Court, also held (in paragraph 62) that the legislative history of the IBC indicated that "there is a contra indication that the commercial or business decisions of financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority".*

39. *The above principles have been re-emphasised and taken further by a three-Judge Bench in Essar Steel India Limited (supra). The Court, speaking through Justice R F Narminan, held:*

> *"73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while*

the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

40. *The precedents laid down by this Court are in tandem with recommendations made in the UNCITRAL's Legislative Guide on Insolvency Law, which states that it is desirable that a court does not interfere with the commercial wisdom of the decisions taken by the creditors. The relevant extract is reproduced below:*

"63. The more complex the decisions the court is asked to make in terms of Approval or confirmation, the more relevant knowledge and expertise is required of the judges and the greater the potential for judges to interfere in what are essentially commercial decisions of creditors

to approve or reject a plan. In particular, it is highly desirable that the law not require or permit the court to review the economic and commercial basis of the decision of creditors (including issues of fairness that do not relate to the approval procedure, but rather to the substance of what has been agreed) nor that it be asked to review particular aspects of the plan in terms of their economic feasibility, unless the circumstances in which this power can be exercised are narrowly defined or the court has the competence and experience to exercise the necessary level of commercial and economic judgment.

50. **The ratio of the Judgement as observed in Paragraph 47 quoted below , in case of Pratap Technocrats (P) Ltd. v. Reliance Infratel Ltd. (Monitoring Committee), (2021) 10 SCC 623 4 is fully applicable in this case.**

*"47. Hence, once the requirements of IBC have been fulfilled, the adjudicating Authority and the appellate Authority are duty-bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the adjudicating Authority nor the appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework***."**

9.6 Based on the law laid down by Hon'ble Supreme Court in the cases mentioned above, it is clear that ;

a) Once the Resolution Plan is approved by a 100 per cent voting share of the CoC. The jurisdiction of the Adjudicating Authority was confined by the provisions of Section 31(1) to determining whether the

requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC.

b) Once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty-bound to abide by the discipline of the statutory provisions. Neither the Adjudicating Authority nor the Appellate Authority has an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.

c) The jurisdiction of the Adjudicating Authority is confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC.

d) There was no scope for negotiations between the parties once the CoC had approved the Resolution Plan. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the Approval by the Adjudicating Authority.

9.7 In the instant case, we found that after Approval of the Resolution Plan by the Committee of Creditors, the application was pending before the Adjudicating Authority under Section 31 of the Insolvency and Bankruptcy Code, 2016, for Approval of the resolution plan the Adjudicating Authority accordingly while disposing of the Interim Application, IA no. 2431 of 2020, directed the CoC to consider the 'IInd Settlement Proposal' of the First Respondent, i.e. Applicant/ Promoter, within ten days and take an appropriate decision.

9.8 Considering the ratio of the Judgement of the Hon'ble Supreme Court in the case of Ebix Singapore (supra), "there was no scope for negotiations between the parties once the CoC has approved the Resolution Plan. Thus, contractual principles and common law remedies, which do not find a rope in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC Approved Resolution Plan and the Approval by the Adjudicating Authority."

9.9 The said exercise was beyond the jurisdiction of the Adjudicating Authority hence unsustainable and liable to be set aside.

ORDER

Appeals CA (AT) (Ins) 370 of 2021, C.A. (AT) (Ins) 376-377 of 2021, C.A. (AT) (Ins) 393 of 2021filed against the common Impugned Order's, dated May 19, 2021, passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench II, in I.A. No. 2431 of 2020 in Company Petition (I.B.) No. 4258/MB/C-II/2019, directing the Administrator of DHFL to place the "**Second Settlement Proposal**" dated December 29, 2020, sent by first Respondent Mr Kapil Wadhawan before the CoC for its consideration, decision, voting and to inform the Adjudicating Authority within ten days from the date of the impugned Order are allowed. Consequently, both Impugned Order Dt 19.5.2021 are set aside.

Consequently, the impugned Orders passed in I.A. No. 2431 of 2020 in Company Petition (I.B.) No. 4258/MB/C-II/2019 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'I&B Code') is set-aside.

[Justice M. Venugopal]
Member (Judicial)

[Mr. V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
27th January ,2022

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