

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Ins.) No. 422 of 2021

IN THE MATTER OF:

M/s. Rana Saria Poly Pack Pvt. Ltd.
Through its Director
Having its registered office at
82, Nutan Cloth Market,
Outside Raipur Gate,
Raipur. Ahmedabad **...Appellant**

Versus

Uniworld Sugars Pvt. Ltd.
Having its registered office at
Plot No 112, Block A,
Sector-63.Noida.
Gautam Buddh Nagar – 201309
Uttar Pradesh, India
Through Head of Monitoring Committee
Namely the Resolution Professional
Mr. Pramod Kumar Sharma **...Respondent No.1**

NCIRCLE Exim LLP,
402, Minar apartments, Deccan Towers,
Basheer Bagh, Hyderabad-500001.
Through its authorized representative
Shri Nikhil Narayanan. **...Respondent No.2**

Present

For Appellant:- **Mr. Saurav Agrawal, Mr. Sahil Tagotra, Mr.**
Varad Nath, Ms. Archi Agarwal and Mr.
Pradeep G. Tulsian, Advocates

For Respondent:- **Mr. Gopal Jain, Sr. Advocate with Mr.**
Abhishek Anand, Mr. Nazim Khan,
Advocates for R-1.

**Mr. Mandeep Kalra, Ms. Radhika Narula,
Ms. Shrishti Singh, Ms. Divya Singh
Pundir, Ms. Kanak Malik, Mr. Rishabh
Lekhi and Mr. Kanay Pisal, Advocates for
R-2 (SRA)**

With

Company Appeal (AT) (Ins.) No. 741 of 2021

IN THE MATTER OF:

**Simbhaoli Sugars Limited
Having its registered office at
Simbhaoli-245207,
District Hapur, Uttar Pradesh, India
Through authorized representative
Name Sh. Satinder Kumar Tyagi** **...Appellant**

Versus

**1. Pramod Kumar Sharma,
Resolution Professional of
Uniworld Sugars Private Limited(USPL)
H. No. 16, Dashrath Kunj – B,
West Arjun Nagar, Agra,
Uttar Pradesh -282001.** **...Respondent No.1**

**2. Committee of Creditors of
Uniworld Sugars Private Limited (USPL)**
a) **IDBI Bank Ltd.
Through its authorized Representative
Videocon Tower, 1st floor,
Jhandewalan Extension,
New Delhi-110001.**
b) **Oriental Bank of Commerce,
Through its Authorized Representative
M/1/2/3, Connaught Place,
New Delhi-110001.**
c) **Union Bank of India,
Through its Authorized Representative
F-Block, Connaught Place, New Delhi-110001.** **...Respondent No.2**

**3. M/s. NCIRCLE Exim LLP, Resolution Applicant
Flat No. 402, Minar apartments, Deccan Tower,
Basheerbagh, Hyderabad,
Telangana-500001.**

...Respondent No.3

Present

For Appellant:- Mr. Rachit Batra, Advocate

**For Respondent:- Mr. Gopal Jain, Sr. Advocate with Mr.
Abhishek Anand, Mr. Nazim Khan,
Advocates for R-1.**

**Mr. Mandeep Kalra, Ms. Radhika Narula,
Ms. Shrishti Singh, Ms. Divya Singh
Pundir, Ms. Kanak Malik, Mr. Rishabh
Lekhi and Mr. Kanay Pisal, Advocates for
R-3 (SRA)**

J U D G M E N T

(Date: 12.04.2022)

(VIRTUAL MODE)

[Per.: Dr. Alok Srivastava, Member (Technical)]

The two appeals, namely first one preferred by Rana Saria Poly Pack Private Limited [CA (AT) (Ins) No. 422 of 2021] and the second one preferred by Simbhaoli Sugars Ltd. [CA (AT) (Ins) No. 741 of 2021] have been filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called 'IBC'). The appellants in both appeals are aggrieved by the order dated 17.3.2021 in IA No. 290 of 2020 in CP/IB/ALD/ No. 120 of 2017 (hereinafter called "Impugned Order"). Both the appeals are being disposed of by this common judgment as the issues raised in both the appeals pertain to the same Impugned Order.

2. The Appellant in CA No. 422 of 2021 M/s. Rana Saria Poly Pack Private Limited has stated that the corporate debtor - a Special Purpose Vehicle constituted as a Joint Venture Company of M/s. Simbhaoli Sugars Limited (in short 'SSL') and EDF Mann Group - took a loan of Rs. 100 crores from IDBI Bank to set up a refinery in the year 2012. These loans were secured by personal guarantees provided by the promoters of SSL and their shareholding in the SPV was also pledged in favour of IDBI Bank. Upon default by the corporate debtor, the personal bank guarantees of Mr. Gurmeet Singh Mann and Mr. Gurpal Singh (promoters of SSL) were invoked and DRT proceedings were initiated for recovery of the due amount. In the meanwhile, the appellant Rana Saria Poly Pack Private Limited filed a section 9 application against the corporate debtor which was admitted and the Corporate Insolvency Resolution Process (in short 'CIRP') was initiated against the corporate debtor. The Appellant has further stated that he submitted a claim of approximately Rs. 2.06 crores before the Resolution Professional as an operational creditor. During the on-going CIRP, the Resolution Professional filed various applications before the NCLT for realization of outstanding amounts totaling Rs. 85 crores from the promoters of the corporate debtor. The Appellant has further stated that since no resolution plan could be obtained in the CIRP, the Resolution Professional filed an application for liquidation of the corporate debtor on 25.2.2019 under section 33 of the IBC. In view of objections raised by the Simbhaoli Sugars and employees of the corporate debtor in these proceedings, the NCLT vide order dated 6.1.2020, directed the Resolution Professional to consider resolution plans received and place them before the Committee of Creditors (CoC). The Appellant has further claimed that it moved a caveat application under Rule 25 of the NCLT Rules, 2016 before the NCLT seeking permission to raise objections before passing of any order on *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

liquidation or resolution of the corporate debtor and this permission was granted vide order dated 13.3.2020. Thereafter the Appellant filed an IA No. 223 seeking directions to dissolve the CoC, among other reliefs, and later raised objections to IA No. 290/2020 filed by the Resolution Professional for approval of resolution plan. The application, namely IA No. 290 of 2020 was disposed of by the Impugned Order dated 17.3.2021, and the appellant being aggrieved by the said order, has filed this appeal.

3. In the CA (AT) (Ins) No. 741 of 2021 filed by the Appellant Simbhaoli Sugars Limited, the Appellant has stated that the resolution plan submitted by Respondent No. 3/M/s. NCIRCLE Exim LLP was approved vide the Impugned Order dated 17.3.2021 in respect of the corporate debtor Uniworld Sugars Pvt. Ltd. without considering the fact that the entire exercise of CIRP was carried out against the interest of the stakeholders and in violation of the mandatory provisions of IBC. He has added that the Resolution Professional and CoC proceeded to seek contrary reliefs from the Adjudicating Authority under Chapter II and Chapter III of the IBC, and once proceedings under section 33 in Chapter III of IBC had commenced upon filing of CA (AT) (Ins) No. 83 of 2019 by the Resolution Professional, the CoC became *functous officio* and could not consider and approve a resolution plan which was prepared in accordance with erroneously obtained report of the liquidation amount which was not acceptable to the stakeholders. He has further stated that the resolution plan approved by the Impugned Order has resulted in transfer of the business of the company at a value which is much below its actual worth causing loss to all the stakeholders including the creditors. He has also stated that various applications which involved

recovery of approximately Rs. 85 crores (namely CA No. 227 of 2018, CA No.235 of 2018 and CA No. 236 of 2018) were pending before the Adjudicating Authority, and while approving the faulty resolution plan, the Adjudicating Authority disposed of these CAs summarily without properly and fully considering the issues raised in them. The Appellant has also stated that the resolution plan is in violation of section 30(2)(b) of the IBC, which is a mandatory provision and has to be complied with in true letter and spirit, and furthermore, the liquidation value considered by the CoC has been done erroneously whereby no amount becomes payable to the Operational Creditors because of the low estimate of liquidation value in the third valuation. He has, in short, claimed that because of non-adherence to various legal provisions, the Impugned Order approving the resolution plan is liable to be set aside.

4. The Learned Counsel for Appellant/Rana Saria Poly Pack Pvt. Ltd. has argued that a resolution plan, based on an erroneous and undervalued liquidation value, was presented by the Successful Resolution Appellant (SRA) on the basis of a third valuation report, which was obtained without following the stipulated procedure in the Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution of Corporate Persons) Regulation, 2016 (in short 'CIRP Regulations') and the resolution plan so obtained and approved by the Adjudicating authority is not in accordance with the legal provisions of the IBC. He has specifically mentioned Regulations 27 and 35 of CIRP Regulations to urge that the use of word "shall" means it is mandatory to follow these regulations. Furthermore, he has urged that in the first two valuations, there is no significant difference, and therefore there was no need to obtain a third valuation report, whose low valuation has been taken as the

basis for formulation of the successful resolution plan. He has further argued that the Resolution Professional has followed the dictates of the Committee of Creditors ('CoC' in short) in obtaining a third valuation report, whereas the duty under Regulation 35 of the CIRP Regulations is cast on the Resolution Professional for obtaining valuation reports.

5. The Learned Counsel for Appellant has further referred to the minutes of the 20th meeting of the CoC (attached at pp.42-51 of the Rejoinder of Appellant to Respondent No.1's reply) to show that the members of CoC also had questions about going for a third valuation of the fair and liquidation value of corporate debtor's assets. In particular, he has referred to the discussion noted in the minutes of the 20th CoC meeting at pp.46-48 of the Rejoinder Affidavit to show that the Resolution Professional pointed out in the meeting that he had, in an earlier 15th meeting of the CoC, apprised the members that no further fresh valuation was required to which they had consented. The minutes also note the view of Ms. Nancy Agarwal, authorized representative of Union Bank of India that under Regulation 27 of CIRP Regulations, the Resolution Professional has been given the power to obtain a third valuation report in case of major disparity in the initial two valuations and that the cost of valuation should be included in the CIRP cost. The Learned Counsel for Appellant has urged that the cost of third valuation if met by CoC members will not be in accordance with CIRP regulations, and furthermore in undertaking the third valuation only one valuer for each class, namely, (i) Securities or Financial Assets, (ii) Land and Building, and (iii) Plant and Machinery, were appointed instead of two valuers as stipulated in the CIRP Regulations.

6. The Learned Counsel for Appellant has stated that using the liquidation valuation report obtained from the third valuation, the Resolution Professional submitted the compliance certificate in Form H (attached at pp.32-41 of the Rejoinder of Appellant to Respondent No. 1's Reply) wherein in clause 19 headlined "Liquidation Value", it is mentioned that "on 8.10.2020, the valuation was again done on the request of the CoC, for which the entire cost of the valuation was borne by the CoC and thereafter liquidation value was INR 52.69 crores." Moreover, the payments provided to creditors/ stakeholders is given in clause 5 of the compliance certificate (Form H) whereby secured financial creditors, who voted in favour of the resolution plan, have been provided Rs. 45.76 crores against an admitted claim of Rs. 53.61 crores and unsecured financial creditors have been provided a total amount of 'nil' against an admitted claim of Rs. 84.43 crores and a submitted claim of Rs.270.85 crores. He has also pointed out that the operational creditors have been provided amounts as given in the table below and the operational creditors in 'others' category has been provided only Rs.1.58 crores against an admitted claim of Rs.8.34crores. Moreover, the workmen and employees have also not received the full amount of their admitted claims. The relevant extract of Form H is as follows:-

**FORM H
COMPLIANCE CERTIFICATE**

(Under regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

xx xx xx xx

2. The details of the CIRP are as under:-

S.No.	Particulars	Description
1	Name of the CD	Uniwold Sugars Private Limited

2	<i>Date of Initiation of CIRP</i>	<i>29th May, 2018 (Order Received on 30th May, 2018)</i>
3	<i>Date of appointment of IRP</i>	<i>29th May, 2018</i>
4	<i>Date of Publication of Public announcement</i>	<i>01st June, 2018 in Financial Express. Hindi and English edition and 2nd June, 2018 in Jansatta Hindi edition.</i>
5	<i>Date of Constitution of CoC</i>	<i>19th June, 2018</i>
6	<i>Date of first meeting of CoC</i>	<i>28th June, 2018</i>
7	<i>Date of appointment of RP</i>	<i>7th July, 2018 (2nd CoC Meeting). Result of 1st voting was declared on 12 July, 2018.</i>
8	<i>Date of appointment of Registered Valuers</i>	<i>16th July, 2018</i>
9	<i>Date of Issue of Invitation for EOI.</i>	<i>21st August, 2018 (as per Form G dated 20.08.2018) published on 21.08.2018 in Business Standard. English edition and Jansatta Hindi edition.</i>
10	<i>Date of final List of Eligible Prospective Resolution Applicants</i>	<i>The Corporate Insolvency Resolution Process in the matter of Uniworld Sugars Private Limited was commenced w.e.f. 29.05.2018 and as on date of commencement of CIRP Regulation 36B of the IBBI CIRP Regulations was not into existence. It was inserted vide Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04-07-2018).</i>

Xx xx xx xx

7. The amounts provided for the stakeholders under the resolution plan is as under:

(Amount in Rs. Crore)

S. No.	Category of Stakeholders	Sub-Category of Stakeholders	Amount claimed	Amount Admitted	Amount Provided under the	Amount Provided to the Amount claimed

					Plan	
XX XX XX XX XX XX						
2.	Operational Creditors	(a)Related Party of corporate debtor	371.90	122.53	NIL	NIL
		(b)Other than (a) above:				
		(i)Government				
		(ii)Workmen	0.34	0.34	0.28	81.57%
		(iii)Employees	1.55	1.51	0.30	20.25%
		(iv)Others	10.05	8.34	1.58	18.940%
		Total (a)+(b)	383.84	132.72	2.16	

7. The Learned Counsel for appellant has urged that the issue of withdrawal of approximately Rs. 85 crores by the joint venture group promoters of the corporate debtor regarding whose recovery CAs were filed by the Resolution Professional before the Adjudicating Authority, which were not considered and dealt by the Adjudicating Authority in the Impugned Order and vide paragraph 36 of the Impugned Order these CAs have been summarily disposed of without considering them on merits, and this amount of Rs. 85 crores if received by the corporate debtor would have completely changed the quantum of payments to various creditors and stakeholders.

8. The Learned Counsel for Appellant has also claimed that the Forensic Auditor was appointed on 06.06.2020 and the Forensic Audit Report was available on 20.1.2021. The resolution plan was approved by the CoC on 27.10.2020 and it was awaiting approval by the Adjudicating Authority when the Forensic Audit Report was made available to the Resolution Professional, but it was not presented before the Adjudicating Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021

Authority who approved the resolution plan on 17.3.2021 without getting the benefit of the Forensic Audit Report, and this is clearly visible in para 11 of the Impugned Order.

9. The Learned Counsel for Appellant has also claimed that the forensic audit report has brought out a number of irregularities such as an entry of Rs. 44.59 crores which is unexplained (at page 21 of Forensic Audit Report submitted vide Diary No. 33108) and also that an amount of Rs.3.50 crores becomes Rs. 2.43 crores (at page 21 of the Forensic Audit Report). He has thus claimed that these irregularities, which have been brought out in the forensic audit report should have been brought before the Adjudicating Authority for a well-considered adjudication on the resolution plan. Therefore, he has urged, the Resolution Professional and the CoC have failed in their duty of bringing the Forensic Audit Report before the Adjudicating Authority. He has further pointed out that under section 35(n) and section 43 of IBC, the duties of the Resolution Professional are very clearly defined and the status report should have been placed before the CoC and the Adjudicating Authority by the Resolution Professional. Furthermore, when the Forensic Audit Report shows squandering away of the corporate debtor's assets, it amounts to defrauding the creditors and thus these irregularities are covered under section 66 of the IBC.

10. The Learned Senior Counsel for Appellant (in CA (AT)(Ins) No. 741 of 2021) has adverted to page No. 7 of the Appeal Paperbook in CA 741 of 2021 to point out that the liquidation value as per the evaluation carried out by valuer Jagdish Mistry and Parag Seth on 28.5.2018 are Rs. 126.30 crores and Rs. 121.01crores respectively, whereas the third valuation carried out on 8.10.2020, under the directions of CoC and paid for by *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

the CoC has estimated liquidation value as Rs. 52.69crores. He has urged that the third liquidation valuation which is significantly different from the first two valuations was done without any legal justification and hence consideration of the third liquidation valuation of Rs. 52.69 crores ignoring the first two valuations is neither justified nor legally tenable. He has also argued that the CIRP was initiated on 29.5.2018 and the 10th meeting of the CoC took place on 7.4.2019, when the CoC resolved not to seek any extension beyond the stipulated period of 270 days for the CIRP. Furthermore, an application for orders on liquidation of the corporate debtor was filed vide CA No. 83/2019, which was heard on 9.7.2019, wherein the fact that the CIRP is complete was brought to the notice of the Adjudicating Authority, who thought it fit at that stage to give one more opportunity to the corporate debtor to approach CoC to consider an alternative to avoid liquidation of the corporate debtor and apprise the tribunal by the next date of hearing. He has pointed out that while the Adjudicating Authority directed the Resolution Professional to approach the CoC to consider an alternative plan in place of liquidation proposal, no extension of the CIRP was either prayed for by the Resolution Professional or granted by the Adjudicating Authority and hence in the absence of a proper extension of the CIRP period any actions taken during the period beyond the proper period of CIRP was not legal.

11. Further, the Learned Counsel for Appellant in CA No. 422 of 2020 has pointed out that in hearing in CA No. 83/2019 (seeking orders for liquidation) on 25.3.2019 the fact of some IAs were pending consideration before the Adjudicating Authority was brought to its notice, whereupon the Adjudicating Authority ordered that pending IAs will be reheard. He has further pointed out that despite such orders of the Adjudicating Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021

Authority, the IAs which were ordered to be reheard were never reheard. He has urged that the 330 days of permissible 'extended' CIRP period also expired on 9.7.2019 but in the absence of any order for extension of the CIRP period, all the actions of the CoC taken thereafter are not valid in law. On these grounds too, he has urged that the Impugned Order dated 17.3.2021 should be quashed and set aside as it has considered the third valuation report, much after the permissible period of CIRP was over and no extension was granted.

12. The Learned Counsel for Appellant in CA No. 741 of 2021 has urged that the CIRP Regulations framed by the Insolvency and Bankruptcy Board of India (IBBI) are quite relevant which should be scrupulously followed in undertaking valuation of the assets of the corporate debtor and the Insolvency and Bankruptcy Board of India (IBBI) should be made irrelevant by the CoC exercising arbitrary powers for conducting evaluation of liquidation value. He has also pointed out that in the Maharashtra Seamless Limited case (supra), which has been cited by the Learned Senior Counsel of Respondent, no third valuation of liquidation value was undertaken and therefore this judgment is distinguishable on this ground. He has finally urged that the Impugned Order being bad in law should be set aside.

13. The Learned Senior Counsel for Respondent No.1/Resolution Professional has argued that the Appellant does not have *locus standi* to challenge the approval of the resolution plan, as it is based on commercial wisdom of the CoC, and therefore, an appeal against an order approving the resolution plan under Section 31 can be assailed only on grounds under section 61(3) of the IBC. In support, he has *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

cited the judgments of Hon'ble Supreme Court in the matter of **Committee of Creditors of Essar Steel vs. Satish Kumar Gupta (2020 8 SCC 531)** and also **K. Sashidaran vs. Indian Overseas Bank (Civil Appeal No. 10678 of 2018)** to maintain that the decision taken by the majority of creditors is binding on minority creditors and creditors who have no voting share, and therefore in the present case the Appellant has no *locus standi* to challenge the commercial wisdom of CoC and hence the approval of the resolution plan.

14. The Learned Senior Counsel for Respondent No. 1 has also cited the judgments of Hon'ble Apex Court in the matters of **Pratap Technocrats Pvt. Ltd. vs. Monitoring Committee of Reliance Infratel and Anr. [2021 SCC Online SC 569]** and in **India Resurgence ARC Pvt. Ltd. vs. M/s. Amit Metaliks and Anr. [2021 SCC OnLine SC 409]** to emphasize that the Hon'ble NCLAT has to only do a limited scrutiny of legal compliances of the resolution plan with the provisions of IBC and judicial review cannot be extended to carry out quantitative analysis vis-à-vis any individual creditor/stakeholder. He has claimed that admittedly the Appellant is an operational creditor and not part of CoC and amount due to the Appellant is less than 10% of the total debt and therefore appellant has no right to challenge the resolution plan.

15. The Learned Senior Counsel for Respondent No. 1 has also urged that while under regulation 27 of the CIRP Regulations, the onus is on the Resolution Professional to appoint two valuers to determine the fair and liquidation value of the corporate debtor's assets in accordance with regulation 35, there is no bar on the CoC for conducting a fresh valuation. The third valuation in the present case was undertaken after a lapse of more than two years from the date of first two *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

valuations and on the basis of the decision taken by the CoC in its 20th meeting. He has added that insofar as alleged high CIRP cost of Rs. 8 crores is concerned, it is approved by the CoC and therefore this decision cannot be challenged. He has urged that the object of the IBC is to effect financial revival of the corporate debtor and liquidation should be the last resort as has been held by the Hon'ble Apex Court in the matter of **Swiss Ribbons Pvt. Ltd. vs. Union of India (2019 4 SCC 17)** and **Kridhan Infrastructure Pvt. Ltd. vs. Venkatesan Sankar Narayan and Others (CA No. 3299 of 2020)** and therefore the Adjudicating Authority and the CoC have acted in furtherance of these aims and objectives of the IBC. He has also cited the judgment of Hon'ble Apex Court in the matter of **Maharashtra Seamless Ltd vs. Padmanabhan Venkatesh and Anr. 2021 SCC OnLine SC 569** wherein it is held that the object behind a valuation is to assist the CoC to take a well-considered decision on the resolution plan and once a resolution plan is approved by the CoC, the statutory mandate of the Adjudicating Authority under section 31(1) of the IBC is to ascertain that the resolution plan meets the requirement of Section 30 of the IBC, and the tribunal has to cede ground to commercial wisdom of the creditors than to assess the resolution plan on the basis of the quantitative analysis vis-à-vis the liquidation value.

16. The Learned Senior Counsel for Respondent No. 1 has stated that no objection was raised on the Forensic Audit Report by the erstwhile management and creditors and hence it would have had no adverse impact on the resolution plan, and also this report was not available to the Adjudicating Authority when the application for approval of the resolution plan was filed. Finally, he has urged that since the Impugned Order does not go against any legal provisions of IBC and the Adjudicating

Authority has acted well within its jurisdiction and mandate under law, the Impugned Order should not be interfered with.

17. The Learned Counsel for Respondent No. 3/Successful Resolution Applicant (M/s. NCIRCLE Exim LLP) in CA No. 741 of 2021 has argued that the resolution plan which was approved by the Adjudicating Authority was submitted in the year 2020, the SRA is still committed to implementing it. He has further claimed that though the payments to the operational creditors on the basis of the first, second and third valuation reports is 'nil' yet the SRA is providing some payments to the operational creditors under the approved resolution plan. He has also referred to the 'Form H' submitted by the Resolution Professional, wherein the facts of the three liquidation valuations have been brought out clearly. Furthermore, he has argued that in the e-mail dated 8.2.2021 sent by the Resolution Professional, none of the creditors have raised any issue on Forensic Audit Report and therefore, it does not make any material difference even if the Forensic Audit Report was not placed before the CoC and the Adjudicating Authority. He has further referred to the judgment of Hon'ble Supreme Court in **Maharashtra Seamless Limited case (supra)** wherein in paragraph 26, it is clearly held that there is no provision in the IBC or regulations made therein, in which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in regulation 35 of the CIRP Regulations and therefore the argument of the Learned Counsel of Appellant that the resolution plan is based on a low third liquidation valuation and is therefore faulty is not supported in the light of this judgment. He has also urged that there is no allegation made against the Successful Resolution Applicant in the present appeals and therefore the Successful Resolution Applicant should not be made to suffer if baseless *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

allegations are made about the liquidation valuation process and value.

18. On rejoining, the Learned Counsel for Appellant has reiterated that the third valuation of liquidation value was not done in accordance with the extant CIRP Regulations and the CoC could have only taken an informed decision on a resolution plan only on the basis of a properly obtained valuation report, and since it was not done, there was a material irregularity in the approval of the resolution plan. He has also urged that this tribunal should look into the fact that the so called land prices have been shown to fall sharply in the third valuation report and the explanations/justification for such a fall is based on the opinion of the CEO of the corporate debtor, who has conflict of interest being related to the erstwhile corporate debtor and hence, it should not be relied upon. He has also claimed that had there been liquidation of the corporate debtor, the operational creditor/Appellant would not have received a 'nil' payment. Further, he has pointed out, the Forensic Auditor's report was made available on 20.1.2021 and the Resolution Professional sent it for comments on 8.2.2021. Since the Forensic Audit Report was available on 20.1.2021, it was desirable that the Resolution Professional should have taken action on the omissions and commissions that came out in the report, even if he did not put it up before the CoC. He has cited the judgement in the matter of **Binani Industries Ltd. vs. Bank of Boarda and Another (2018 SCC Online NCLAT 521)**, wherein this Tribunal has held in para 48 that if the operational creditors are ignored and provided with liquidation value on the basis of misplaced notion and misreading of section 30(2)(b), then the objectives of IBC will not be achieved and in such a situation, such a plan can be held to be against the provisions of IBC.

19. The provisions of IBC and regulations made there under that are relevant to this case are reproduced below for ready reference:-

Regulation 27 of CIRP Regulations, 2016

27. Appointment of Professionals.- (1) *The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.*

(2) *The interim resolution professional or the resolution professional, as the case may be, may appoint any professional, in addition to registered valuers under sub-regulation (1), to assist him in discharge of his duties in conduct of the corporate insolvency resolution process, if he is of the opinion that the services of such professional are required and such services are not available with the corporate debtor.*

(3) *The interim resolution professional or the resolution professional, as the case may be, shall appoint a professional under this regulation on an arm's length basis following an objective and transparent process:*

Provided that the following persons shall not be appointed, namely: -

(a) a relative of the resolution professional;

(b) a related party of the corporate debtor;

(c) an auditor of the corporate debtor at any time during the period of five years preceding the insolvency commencement date;

(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

(4) *The invoice for fee and other expenses incurred by a professional appointed under this regulation shall be raised in the name of the professional and be paid directly into the bank account of such professional.*

Regulation 35 of CIRP Regulation, 2016

35. Fair value and Liquidation value. - (1) Fair value and liquidation value shall be determined in the following manner:-

(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;

(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29:

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.

Section 25 of IBC

25. Duties of resolution professional. - (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

Section 30(2) (b) (1) & (2) of IBC, 2016

30. Submission of resolution plan. –

XX XX XX XX

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

XX XX XX XX

(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than –

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors

Section 66 of IBC, 2016

66. Fraudulent trading or wrongful trading. - *(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.*

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10-A

20. Regulation 27 of CIRP Regulations outlines the procedure for appointment of registered valuers for determining the fair value and liquidation value of the corporate debtor. Regulation 35 provides the methodology of determining fair and liquidation value of the corporate debtor. It is laid down in the CIRP Regulations that two registered valuers should be appointed under regulation 27. These two registered valuers so appointed shall submit to the Resolution Professional an estimate of the fair value and liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor. Further Regulation 35 stipulates that that if in the opinion of Resolution Professional, the two estimates are significantly different, the Resolution Professional may appoint another registered valuer who shall submit an estimate of the value computed in the same manner and the average of two closest estimates of a value shall be considered as the fair value or the liquidation value. These estimations shall be communicated by the Resolution Professional to the members of the CoC after the receipt of the resolution plan, after receiving

an undertaking from the members that they shall maintain confidentiality of the same.

21. Thus, we note that the appointment of the registered valuers is to be done in accordance with the stipulated procedure in the CIRP Regulations and also how the fair and liquidation value will be estimated and later communicated to the members of CoC. Furthermore, we also note that a third valuation has to be undertaken in the event two estimates of valuations are significantly different, whereupon the Resolution Professional may appoint a third registered valuer.

22. Admittedly, two valuations were carried out by M/s. Jagdish Mistry and M/s. Parag Seth and the valuations obtained from them are as follows:-

Date	Name of Valuer	Liquidation value (in Rs.)	Fair value(in Rs.)
28.5.2018	Jagdish Mistry	126. 30 crore	184.95 crore
28.5.2018	Parag Seth	121.01 crore	175.29 crore

23. We note that under the CIRP Regulations no power has been given to CoC to call for any valuation of fair and liquidation value though we don't think there is any bar under IBC provisions for the CoC to call for a fresh valuation report. Assuming that the CoC were to call for a valuation report to assist itself in the decision making, we are of the opinion that the procedure and process as outlined in regulations 27 and 35 ought to be followed. The reasons for obtaining two valuations,

we feel, is so that a single valuation should not form the basis of decision making and in case it is far off the mark the entire exercise would become defective and faulty leading to incorrect formulation of resolution plan and payments to creditors. Further, the third valuation under regulation 35 is required only if the two estimates of fair and liquidation value obtained earlier are significantly different. Such check and balance in the appointment of registered valuers and estimation of fair and liquidation value in the CIRP Regulations to ensure that these valuations that form the basis of various provisions under the resolution plan are as close to the correct estimations as possible.

24. We note that members of the CoC in meeting (minutes attached at pp.42-51 of the Rejoinder of the Appellant to the replies of Respondents No.1 and 2), discussed the issue about the third valuation and the following is recorded thereon:-

“DISCUSS AND APPROVE THE in APPOINTMENT OF REGISTERED VALUERS AND APPROVE REMUNERATION OF SUCH REGISTERED VALUERS

RP explained that in 15th COC meeting matter of fresh valuation of assets was discussed, and the COC members in that meeting had consented that no further fresh valuation is required. However in 17th COC meeting the COC considered a third valuation report submitted by a resolution applicant (RA) in support of its resolution plan and took note of the same. This third party valuation was carried out by Sakuma Exports Limited one of the earlier Resolution Applicants and the said valuation report was circulated to the COC members of the corporate debtor on 21st May, 2020. In 17th Meeting, COC agreed that this valuation should be the basis of the approval of the resolution plan being submitted by NCircle. In 19th COC meeting which was called on the requisition of PNB in relation to some alleged disparity in the distribution of resolution plan amount (Requisition request was received just one day prior to the closing of ongoing E voting for 18th COC meeting). In that meeting PNB Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021

also raised some queries on third party valuation. However never proposed fresh valuation in 19th COC Meeting.

Mr. Mukul asked to Mr. Madaan whether there can be commercial wisdom to carry out the valuation at this stage. Mr. Madaan replied that he has started attending the COC Meetings since 15th COC meeting onwards, he has observed that regulation 27 with regards to valuations under the IBC has been duly complied by the RP way back in 2018. So far as the fresh valuation is concerned or consideration of any third party valuer's report is concerned, it is up to COC or individual Financial Creditor whether they consider original valuation or whether they wish to get a fresh and upto date valuation by third party or conducted by themselves. In this context, he quoted that one disciplinary case (Bhupesh Gupta-IP) adjudicated by IBBI just for the reason that he upon requisition of COC got the third valuation done and the cost of valuation was borne by corporate debtor. IBBI held that since there is no provision of fresh valuation within the IBC, 2016 therefore the cost of any such valuation would not be borne by the corporate debtor. In his explanation Mr. Madaan continued that in line of the said decision the cost of fresh valuation and other associated expenses should only be borne by the COC members. Mr. Madaan further submitted that lot of time has already been spent non this entire process, but resolution professional is duty bound by this law to conduct everything within a time frame he cannot wait fo9r an indefinite period of time.

Ms. Nancy of UBI said that regulation 27 says about the confidentiality of the valuation report however if COC accepts valuation from third party there is straight away violation of confidentiality. Mr. Madaan said RP regulation 27 has been duly complied by RP in 2018. Since the valuation which was conducted at behest of a third party or i.e. one of the RA Sakuma Exports regulation 27 would not apply. Mr. Madaan further explained that RA submitted the valuation report along with its plan and that plan has not been considered by the members. But from minutes it is found that for the purpose of considering another resolution plan that particular third party valuation was considered the as basis by the COC and that is absolutely up to members only whether they considered that valuation or not but there is no noncompliance of any of the provision of the code or regulation.

Mr. Nancy said that under regulation 27 in case of major valuation disparity in the valuation RP has power to take third

valuation report and the said cost be included in the CIRP cost. Mr. Madaan replied that as communicated to him, there was no major disparity between the two valuations of 2018 and, therefore, third valuation as per regulation 27 was not required. All the compliances have been done in 2018 and since there was no resolution plan, liquidation application was filed. Under special circumstances this particular resolution plan was being discussed by6 COC, is not in ordinary course of law but in pursuant of directions of Hon'ble NCLT and therefore it was upto COC to consider any valuation in its commercial wisdom."

24. Later, in the 21st meeting of the CoC (minutes attached at pp.52-68 of the Rejoinder of Appellant to the replies of Respondents No. 1 and 2), the matter of third valuation was discussed at agenda item no. 4 and the following is recorded:-

"xx xx xx xx

While discussing the valuation report received from the valuers appointed on behalf of the COC, PNB representative suggested that a clarification should be sought from previous valuers on difference between the earlier values and present values. RP replied that after more than two years gap it would be difficult to seek any clarification or justification of the previous valuers. He clarified that both the previous valuers and present valuers have mentioned the basis/approaches/methods/assumptions and limitations in their reports on which the valuation(s) have been carried out, therefore this exercise would not only be time consuming and but also incurring expenses. IDBI representative expressed his concerns non the valuation of land and he sought clarifications from RP. RP apprised the COC that the non-availability of connecting road to refinery and non-industrial approval of part of land are the main factors contributing to low valuation of Land. RP, then, requested Mr. Sanjay Tapriya CEO of the corporate debtor to explain the same in detail. CEO explained as how road lock pending conversion of part of land for industrial purposes and abundantly available land in vicinity has affected the valuation in last two years. He also added that presently in Kandla and surroundings where the refinery plant of corporate debtor is situated, there is no buyer for industrial land, with lack of further

industrialization no property is easily sellable over there and market has become very limited and volatile and Kandla is not having a regular Industrial area as well and therefore with lack of sellable proposition of industrial land the market price of existing land is close to agriculture land plus conversion thereof.”

25. In the instant case, we find that the first valuation by two registered valuers were made on 28.5.2018 and the two valuations of liquidation value were Rs.126.30 crores and Rs.121.01 crores, leading to average value of Rs.123.66 crores. We feel that even if the CoC thought it fit to get another valuation of a more recent date, it was desirable that the procedure outlined in regulations 27 and 35 should have been followed. The source of payment for valuation is not a material factor insofar as valuation figures are concerned nor will they have any impact on them. They are really disjointed activities. Moreover, in the present case the third valuation estimates the liquidation value as Rs. 52.69 crores, which is even less than half of the liquidation value estimated earlier and hence significantly different from the two earlier valuations. We therefore think that the procedure of obtaining a third valuation and then considering it as basis for deciding the payment particularly of the operational creditors under Section 30(20)(b) defective and not in accordance with the stipulated norms and procedure under the CIRP Regulations.

26. We also note that the CoC did consider the variance between the two earlier liquidation valuation estimates and the third one and desired explanation regarding the same. The explanation could have been obtained from the three valuers since they had carried out the valuation exercise and would be in a position to explain the methodology and reason for *Company Appeal (AT) (Ins.) Nos. 422 & 741 of 2021*

divergence in values. It, therefore, appears surprising that rather than obtain explanation from the earlier valuers, the CEO of the erstwhile corporate debtor, who would have been an interested party and could have had a clouded opinion, was approached to provide this explanation. We do not think such an explanation would be fair and free from being coloured with possible conflict of interest. Therefore, taking it as the basis for calculating payments under the resolution plan cannot be considered as an error-free exercise.

27. Thus it is quite clear that the members of the CoC had concerns about the appointment of the third valuer and later about the low liquidation value in the third report. The Resolution Profession also expressed an opinion about the low liquidation value obtained in the third report.

28. It is thus clear from the afore-mentioned minutes of CoC meetings that members did have objection about undertaking a fresh valuation (third valuation in the present case), but eventually the issue came down to the payment of expenses in relation to fresh valuation and the main issue about whether to undertake a third valuation or not was side-stepped. It is thus a case of missing the woods for the trees. Since the liquidation value forms the basis of deciding the *inter se* payments to creditors it requires that the valuation exercise be undertaken with absolute impartiality and. Hence, in our view the relevance and application of Regulations 27 and 35 are pertinent in the process of appointment of valuers and for establishing the need for a fresh valuation.

29. The Ld. Senior Counsel of Respondent has pointed out the observation of Hon'ble Supreme Court that a report obtained in the process of payment of insurance amount can form the basis of decision in the matter of **Sri Venkateswara Syndicate vs. Oriental Insurance Company Limited and Anr. [(2009 8 Supreme Court cases 507)]** wherein Hon'ble Supreme Court held that:

“**37.** The option to accept or not to accept the report is with the insurer. However, if the rejection of the report is arbitrary and based on no acceptable reasons, the courts or other forums can definitely step in and correct the error committed by the insurer while repudiating the claim of the insured. We hasten to add, if the reports are prepared in good faith, with due application of mind and in the absence of any error or ill motive, the insurance company is not expected to reject the report of the surveyors.

30. The observations in the abovementioned Sri Venkateswara Syndicate judgment (Supra) is distinguished in that while it relates to obtaining a report and its relevance for payment of insurance claim, in the present case the need, procedure and methodology for obtaining a third valuation is the relevant issue.

31. Another contention of the Learned Sr. Counsel for Respondents is that the CoC, in its commercial wisdom, has approved the resolution plan and the liquidation value is not necessary or even relevant for formulation of the resolution plan. Such an argument does not seem to be correct because payments to the operational creditors have to be made in accordance with the provision in section 30(2)(b) of the IBC, and the calculation of amounts of payments has to be made with

reference with the liquidation value and the order of priority given in section 53(1).

32. The Ld. Counsel for Respondents has adverted that Hon'ble Supreme Court has considered the issue of extension of CIRP period in order to obtain a resolution plan of the corporate debtor which was held to be a validly obtained resolution plan and eventually approved and held in the matter of **Binani Industries Limited vs. Bank of Baroda & Anr. (2018 SCC OnLine NCLAT 521)** as follows:-

"43. From the two 'resolution Plans', it will be clear that the Rajputana Properties Private Limited' in its 'resolution Plan' has discriminated some of the 'financial Creditors' who are equally situated and not balanced the other stakeholders, such as 'Operational Creditors'. Therefore, the Adjudicating Authority has rightly held the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' to be discriminatory.

60. "25. Duties of resolution professional. –
Xx xx xx xx
(6) The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans."

61. Therefore, according to learned Senior Counsel for the 'Committee of Creditors', if need be and if an extraordinary situation so arises, the 'Committee of Creditors' holds the discretion in conformity with the Regulations framed by the Board to extend the timeline over and beyond the 'process documents'. The said fact is also evidenced in the proviso to Clause 1.3.1 of the 'process document'.....

73. In exercise of powers conferred by Section 31 of the 'I&B Code' read with order of remand by the Hon'ble Supreme Court, we have gone through the records, revised 'resolution Plan' submitted by 'Ultratech Cement Limited, gist of which noticed earlier and being satisfied that the 'resolution Plan' approved by the 'Committee of Creditors' under sub-section (4) of Section 30 in its 17th meeting held on 28th May, 2018 meets the requirements as referred to in sub-section (2) of Section 30, we approve the revised

‘Resolution Plan’ submitted by ‘Ultratech Cement Limited’ which shall be binding on the ‘corporate debtor’ and its employees, members, Creditors, guarantor and other stakeholders involved in the ‘Resolution Plan’.”

As opposed to the contention of Ld. Counsel for Respondents, the Ld. Counsel for Appellant has sought to distinguish the observations in this judgment by stating that the CIRP period has to be extended by a formal and proper order of Adjudicating Authority which was not done in the instant case.

33. The relevance of liquidation value for fixing of payments to various classes of creditors is evident in the observations made in the judgment of Hon’ble Supreme Court in **Pratap Technocrats (P) Ltd. & Ors. v. Monitoring Committee of Reliance Infratel Limited and Anr. [(2021) 10 Supreme Court Cases 623]** wherein the following is held:-

“F Analysis

F.1 Clearing the ground

17. Before we deal with the legal submissions which have been canvassed during the course of the hearing, it is necessary to clear the ground on three factual aspects bearing on the outcome of the appeal:

Xx xx xx xx xx

(ii) Liquidation value

19. The second aspect relates to the liquidation value. On this, it has been clarified that the liquidation value due to the unsecured operational creditors would remain nil in all scenarios, including if the corpus of RFs. 800 crores is separately considered. The liquidation value of the corporate debtor is Rs.4339.58 crores. The amount being infused by the successful resolution applicant is Rs.3720 crores. The amount of Rs. 800 crores is a value ascribed under the approval resolution plan to be realized by the corporate debtor, pursuant to the remittance of proceeds in respect of the preference shares. Hence, cumulatively, the
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value being distributed under the approved valuation plan is Rs.4520 crores. It has been clarified that even if the liquidation value of the realizable value of the preference shares were to be considered in isolation for distribution amongst all the operational creditors, in terms of the priority contained in Section 53 (1) of the Code, the liquidation value due to the appellants would still remain at nil.”

34. A contention raised by the Ld. Senior Counsel of Respondents is that the judgment of Hon’ble Supreme Court in the matter of **Maharashtra Seamless Ltd. vs. Padmanabhan Venkatesh and Others [(2020) 11 Supreme Court Cases 467]** holds that commercial wisdom overrides the consideration on equity and payments are possible to be made below the liquidation value, wherein the following is held:-

“28. The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.

29. The other contention raised that upfront payment is below the revised liquidation value and therefore, the Plan could not be accepted. On the other hand, Hon'ble NCLAT has held in Company Appeal No.637/2018 that this Tribunal to decide the Application under Section 31 of IBC without being influenced by the previous order. When such is the case, the revised Liquidation value has no role to play while considering the resolution plan submitted by M/s MSL. The Tribunal has to test the resolution plan with reference to provisions of Section 30(2) of IBC. The Resolution Professional certified that Plan of M/s MSL is in conformity with provisions of Section 30(2) of the Code. So, the Liquidation Value prior to re-determination if taken into account, the upfront payment offered by M/s MSL is over and above the Liquidation Value. Therefore, the objection taken by the Director (Suspended Board) and also Indian Bank could not be taken into account in view of the direction of Hon'ble NCLAT."

35. In essence the judgment of Hon'ble Supreme lays down that the resolution plan should be compliant of sub-section (2) of section 30. The Ld. Counsel for Appellant has sought to distinguish this judgment by pointing out that in the instant case the very sub-stratum of obtaining a fresh liquidation report and the valuation contained therein are in question, and the quantum of liquidation value is relevant when deciding the payments to operational creditors under section 30(2)(b) of the IBC.

36. On the issue of the commercial wisdom of CoC being of prime relevance in allocating payments under the resolution plan, the Ld. Counsel of Respondents has cited the judgment in the matter of **Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors. [(2020) 8 Supreme Court Cases 531]** wherein Hon'ble Supreme Court has held as following:-

“46. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass 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.

37. Regarding the ‘commercial wisdom’ of CoC in approving a resolution plan Hon’ble Supreme Court has also held in its judgment dated 13.5.2021 held in the matter of **India Resurgence ARC Private Limited vs. Amit Metaliks Ltd.& Another [2021 SCC Online SC 409]** that the business decision taken in exercise of the commercial wisdom of Committee of Creditors cannot be interfered with unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. The relevant portion of this judgment is as hereunder:

*“10. As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority. In the case of **Jaypee Kensington (supra)**, this Court, after taking note of the previous decisions in **Essar Steel(supra)** as also in **K. Sashidhar v. Indian Overseas Bank and Ors.: (2019) 12 SCC 150** and **Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Ors.: (2020) 11 SCC 467**, summarised the principles as follows:*

“77. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval. 77.1. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to

examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

77.2. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority; or the resolution plan does not comply with any other criteria specified by the Board.

77.3. The material propositions laid down in Essar Steel (supra) on the extent of judicial review are that the Adjudicating Authority would see if CoC 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 have been taken care of. And, if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for resubmission after satisfying the parameters. Then, as observed in Maharashtra Seamless Ltd. (supra), there is no scope for the

Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.”

38. It is noted from the above-mentioned judgments that while ‘commercial wisdom’ of the CoC is the most important factor in the formulating and finalising a resolution plan, the commercial wisdom has to be exercised keeping in mind the key features of the IBC which would, inter alia, mean balancing the interests of the creditors which would establish the ‘viability and feasibility’ of the resolution plan.

39. Another issue that has been raised by the Learned Counsel for Appellant is the matter of conducting forensic audit of the corporate debtor and not placing the report of forensic audit for the consideration of the Adjudicating Authority. The matter of undertaking forensic audit was discussed by the CoC in its 20th meeting and it was conducted on the direction of the CoC. This report was received on 20.1.21 by the RP, who sent it to the creditors vide e-mail dated 8.2.2021. The Learned Counsel for Respondent has claimed that since the creditors did not raise any objection or concerns regarding the contents of the Forensic Audit report, it was not placed before the Adjudicating Authority. The Learned Counsel for Appellant has claimed that the CoC approved the resolution plan on 27.10.2020 which was subsequently submitted by the Resolution Professional for Adjudicating Authority’s approval. Hence when the Forensic Audit Report became available, the resolution plan was still under consideration of the Adjudicating

Authority, and hence it was desirable that the forensic audit report should have been put before the Adjudicating Authority, more so when it contained glaring instances of omission and commission with regard to the assets of the corporate debtor which could have been recovered thereby adding to the kitty available with the corporate debtor which could have accrued to the creditors.

40. There is the matter of three pending applications wherein payments amounting to a total amount of Rs. 85 crores were not adjudicated by the Adjudicating Authority appropriately and were dealt with in the Impugned Order in a summary manner. The details of these applications are as hereunder:-

1. CP No. (IB) 120/ALD/2017, CA No. 235/2018	Mr. Pramod Kumar Sharma RP of Uniworld Sugars Private Limited vs. ED & F Man Sugar Limited (UK)	Claim of Rs. 15 crore, receivable by the CD from ED&F Man Sugar Limited, UK being the value of the sugar exported.
2. CP No. (IB) 120/ALD/2017, CA No. 236/2018	Mr. Pramod Kumar Sharma RP of Uniworld Sugars Private Limited vs. ED & F Man Commodities India Private Limited	Claim of Rs. 69 crore, receivable by the CD from ED&F Man Commodities India Pvt. Ltd. being the cost of sugar sold.
3. CP No. (IB) 120/ALD/2017, CA No. 237/2018	Mr. Pramod Kumar Sharma RP of Uniworld Sugars Private Limited vs. ED & F Man Commodities India Private Limited	Claim made against erstwhile promoters.

41. It is noted that orders on these applications were reserved by the Adjudicating Authority on 28.2.2019. But after a change of bench, the applications were heard again. It was expected that the Adjudicating Authority would pass orders on these applications before finalising the resolution plan since these applications related to recovery of approximately Rs. 85 crores from the erstwhile promoters of the corporate debtor and if these applications would have been decided in the corporate debtor's favour they had the potential of changing the scheme of payments under the resolution plan.

42. The detailed discussion in aforementioned paragraphs regarding the third valuation report on fair and liquidation value and the approval of resolution plan of Rs. 54.02 crores make it clear that the quantum of liquidation value was relevant and material in allocating payments to be given to the workmen, employees and the operational creditors.

43. Section 30(2)(b) stipulates that the payment of debts of operational creditors should be in such a manner as may be specified by the IBBI, which shall not be less than the amount to be paid to such creditors in the event of the liquidation of the corporate debtor under section 53. Hence, the correct liquidation value of the corporate debtor assumes significance insofar as payments towards stakeholders and creditors are concerned. In order to assess the quantum of payments we disregard the third valuation of liquidation value for reasons that have been discussed extensively earlier in this judgment and assume that the liquidation value would be the average of the first two liquidation value estimations, which would be Rs.

123.66 crores. The full CIRP cost of Rs. 8 crores would be paid out of the assumed liquidation valuation of Rs.123.66 crores and Rs.115.66 crores will remain available for payment to workmen, employees, financial creditors and operational creditors. The appellant Simbhaoli Sugars has raised the issue of payments to creditors in its appeal.

44. After careful consideration of the rival submissions of the parties and the record and as per detailed discussion and analysis, we are of the view that the third valuation report of fair and liquidation should be discarded as it is not in accordance with the stipulated provision and procedure in the CIRP Regulations, and moreover the wide variance of the liquidation value of the third valuation report from the first two valuation reports also necessitates discarding of the third valuation report. Therefore, the average liquidation value of first two valuations viz. Rs. 123.66 crores should be the liquidation value on which various payments in the resolution plan should be based upon.

45. It is noted that the successful resolution plan was approved by the Adjudicating Authority on 17.3.2021 and it is now more than a year since the SRA has stepped in the shoes of the corporate debtor and has taken up implementation of the resolution plan. Hence it would serve the interests of the creditors and stakeholders in a fair and just manner if the SRA revises the payments to be given to stakeholders and creditors resolution plan in the light of the liquidation value of Rs. 123.66 crores and puts it up to the CoC for consideration and necessary approvals.

46. We, therefore, set aside the impugned order and the resolution plan only to the extent it relates to allocation of payments to the stakeholders and creditors and direct that the revision of payments and subsequent approval of the revised resolution plan should be completed within a period of two months from the date of this judgment.

47. We may also add that the pending applications, namely CA Nos. 235/2018, 236/2018 and 237/2018 and any other application which pertains to recovery of amounts and which could not be properly considered and adjudicated upon, should also be disposed of, preferably in the next two months, and any monies accrued in the kitty of the corporate debtor should be taken as adding to the liquidation value of the corporate debtor and to be utilized for payments to the creditors and stakeholders.

48. With the above-stated directions we dispose of these appeals. The parties shall bear their own costs.

(Justice Ashok Bhushan)
Chairperson

(Dr.Alok Srivastava)
Member (Technical)

New Delhi

12th April, 2022

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