

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 951 of 2021

IN THE MATTER OF:

Santanu T. Ray, Resolution Professional

Of Zicom SAAS Private Limited,
having his office at: AAA Insolvency Professionals LLP
A-301, BSEL Tech Park, Sector 30A,
Opp. Vashi Railway Station, Vashi,
Navi Mumbai – 400 705

... Appellant

VERSUS

1. Tata Capital Financial Services Limited

registered office at: Tower A, 11th Floor,
Peninsula Business Park, GanpatraoKadam
Marg, Lower Parel, Mumbai – 400 013

... Respondent No. 1

2. Central Bank of India

Committee of Creditors of Zicom Sass Pvt. Ltd.
Stressed Assets Management Branch,
Ground Floor, Chandermukhi Building,
Nariman Point, Mumbai – 400021
Email Id: agmifb3873@centralbank.co.in

dgmifb3873@centralbank.co.in

simums@gmail.com

... Respondent No. 2

3. Union Bank of India

Committee of Creditors of Zicom Sass Pvt. Ltd.

349 Business Point Western Express Highway

Andheri East, Mumbai – 400069

Email Id: samvmumbai@unionbankofindia.com

arb.msm@unionbankofindia.com

dyrh.mumbaiwest@unionbankofindia.com

... Respondent No. 3

4. Punjab National Bank

Committee of Creditors of Zicom Sass Pvt. Ltd.

Zonal Sastra Centre,

#181-A1, 18th Floor, 'E' Wing,

Maker Tower, Cuffe Parade, Mumbai – 400005

Email Id: zs8356@pnb.co.in

pnbzscmum@gmail.com

... Respondent No. 4

5. Khemani Distributors and Marketing Limited

Committee of Creditors of Zicom Sass pvt. Ltd.

Registered office at: D 91-92,

Laxmi Narayan Ind. Estate, Near BRC Temple, Udhana,

Surat – 394210

... Respondent No. 5

Present:

For Appellant: Mr. Amar Dave, Mr. Anup Jain, Mr. Udit Gupta and Ms. Rohit Gupta and Ms. Rubina Khan, Advocates.

For Respondents: Mr. Abhijeet Sinha, Mr. R. Sudhinder, Mr. Nikhil Kumar Singh, Mr. Saikat Sarkar and Ms. Ekta Bhasin, Advocates for R-1.

Ms. Pratiksha Agrawal, Mr. Nishit Dhruva and Mr. Prakash Shinde, Advocates for R-2 & 4.

Mr. Prateek Sekasaria, Mr. Kunal Kanungo, Ms. Tanushree Sogani, Mr. Nishant Chotani and Mr. Atishay Jain, Advocates for R-3.

Ms. Nirupama Kar and Mr. Prabhat Shetty, Advocates for CoC.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present Appeal has been filed by the Appellant ‘Santanu T. Ray’, ‘Resolution Professional’ of the Corporate Debtor, Zicom SAAS Private Limited, under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short ‘IBC’) against the order dated 02.09.2021 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Mumbai Bench) in I.A. No. 1511 of 2021 in C.P. (IB) No. 219 of 2019.
2. The Appellant, Mr. Santanu T Ray, Resolution Professional (in short ‘RP’) is aggrieved by the direction of the Adjudicating Authority (National

Company Law Tribunal, Mumbai Bench) directing him, the Committee of Creditors (in short 'CoC') (R-2) and the Resolution Applicant (R-3) to include additional, belated and unverified claim of Rs. 3,14,81,158/- of (R-1) in the Resolution Plan of the Corporate Debtor (in short 'CD'). The Resolution Plan of the CD has been approved by 98.85% of the Members of the CoC.

3. The 'Corporate Insolvency Resolution Process' (in short 'CIRP') of the CD (Zicom SAAS Private Limited) was initiated vide Adjudicating Authority order dated 18.03.2020 and the Appellant is the RP of the CD duly confirmed by the Members of the CoC.
4. The RP made the public announcement on 13.08.2020. The creditors of the CD were asked to submit their claims with proof on or before 25.08.2020. Even 90 days time period for filing of claim as stipulated in CIRP Regulations expired on 09.11.2020, however, the Respondent No. 1 "Tata Capital Financial Services Limited" submitted its claim on 17.11.2020 as Financial Creditor. The RP informed the Respondent No. 1 that their claim fall under the category of Operational Creditor and then the Respondent No. 1 submitted its **revised claim of Rs. 1.05 Crores on 13.01.2021**. The Appellant after various meetings and after seeking various clarifications admitted the claim of Rs. 95 lacs and informed the Respondent No. 1 accordingly. The Expression of Interest (EOI) from the Prospective Resolution Applicants wherein invited by the Appellant on

24.10.2020 and last date for submission of EOI was 19.11.2020. **The last date for submission of Resolution Plan was 14.01.2021**, which was subsequently extended to 04.02.2021.

5. The Resolution Plans were received by the Appellant on 04.02.2021 and the same was placed before the CoC on 06.02.2021 for their consideration. The CoC on various occasions negotiated with the prospective Resolution Applicants for improving the offers. The Respondent No. 1 filed an Additional Claim of Rs. 11.79 Crores with the RP on 11.08.2020. It was submitted by the Ld. Counsel for the Appellant that the R1 has delayed by 256 days in filing their additional claim. It has also submitted by the Appellant that vide his email dated 26.04.2021 conveyed to the Respondent No. 1 that since their claim is filed at a belated stage when the Resolution Plan was finalized and is pending before the CoC for approval. The said claim cannot be considered as the same is time barred. It was also submitted that the Respondent No. 1 vide email dated 28.04.2021 requested for consideration of their claim which was replied negatively by the Appellant vide email dated 21.05.2021. It was also submitted by the counsel for the Appellant that 270 days of the CIRP was expiring on 15.06.2021 itself so the RP filed I.A. No. 1300 of 2021 praying for sanction / approval of the Adjudicating Authority to the Resolution plan approved by the CoC with a 98.85% voting rights. It is brought to our notice that the Respondent No. 1 filed

an Application bearing I.A. No. 1511 of 2021 on 05.07.2021 again belatedly and this time after more than two months of the Appellant rejecting their claims and at the same time the Resolution Plan was approved by the CoC and was pending for approval by the Adjudicating Authority. It was also submitted by the counsel for the Appellant that the Adjudicating Authority heard the same I.A on 28.07.2021 and reserved the matter for orders and the order was pronounced on 02.09.2021 and the order was uploaded on the website of NCLT on 20.09.2021 and hence the Appellant received the said order on 20.09.2021. The Appellant has accordingly filed the present Appeal on 20.10.2021.

6. The Adjudicating Authority has referred to the Master Lease Agreement dated 14.05.2015 whereby certain security systems and related assets manufactured by 'Honeywell' were leased to the Corporate Debtor in CIRP/Appellant in the Appeal (Respondent before the Adjudicating Authority) for monthly lease rental. The Adjudicating Authority has divided the claim of the R1 (in Appeal) of Rs. 11.79 Crores into two parts Rs. 8.65 Crores approx as arrears as on Insolvency Commencement Date of which (Rs. 95.15 Lacs has already been admitted by the RP) and Rs. 3,14,81,158/- towards the charges incurred during the CIRP period for running the business of the Corporate Debtor as an ongoing concern. The Adjudicating Authority has allowed the amount of Rs. 3,14,81,158/- as claimed by the Respondent No. 1 to be included in the CIRP costs as

the assets were used by the CD during the course of the CIRP period and has disallowed the amount of Rs. 8.65 Crores on the ground of default of the Respondent No. 1 in submitting the claim after the expiry of stipulated time of 90 days.

7. It is the case of the Appellant that even the amount of Rs. 3,14,81,158/- as claimed by the Respondent No. 1 to be included in the CIRP costs is without any verification or adjudication by the RP, without any approved/ratification by the CoC/R2 and without any adjudication by the Adjudicating Authority is wholly untenable and not allowable within the framework of Insolvency and Bankruptcy Code and related Regulations. As per the laid down provision of the Code and CIRP Regulations, the Appellant/RP is required to verify the claim on merits, the claim is even barred by the limitations prescribed under the Regulations. The Ld. Counsel for the Appellant/RP has empathically demonstrated that the Appellant has verified the claim based on the direction of Adjudicating Authority given on 30.11.2021 and the Appellant/RP after verifying the claim with records has found the said alleged claim of Rs. 3,14,81,158/- is inadmissible in law and in fact has cited the several reasons for the same including the followings:

- (i) The claim form filed by the R1 depicts a claim of Rs. 1,05,71,482.26 as per column 4 of the form B dated

13.01.2021 appearing at pg. no. 11 of the submissions by the Appellant by vide diary no. 32064 dated 10.12.2021.

The computation of the above said due amount is appearing at pg. 19 of the above said submissions. Hence, what the claim has been submitted is itself not tallying with the figures provided at Annexure 3 (pg. 19) and in the form B at Pg. 11.

(ii). It was also stated by the counsel for the Appellant/RP that the Respondent No. 1 has not raised any invoice or intimation making such a claim of lease rental from date of order of admission or commencement of CIRP process. It is only at this stage the additional claim has been lodged, it is also not supported by any invoice as furnished to the RP/Appellant.

8. The Appellant / RP still analyzed the claim based on document furnished alongwith Form B by the Respondent No. 1 and found that same is still not admissible for numerous reason as depicted below:-

(i) As per master lease agreement dated 14.05.2015 executed between the CD and Respondent No. 1, 23 lease summary schedules were executed (*appearing at Annexure 1 Pg. No. 7 of the submissions made by the Appellant vide diary no. 32064*

dated 10.12.2021). They also stated that the first lease commenced on 10.06.2015 and last rental date was 09.06.2017 and end of life equipment was 08.06.2020, last bill month 30.06.2017 and similarly the serial no. 23 rental start date is 01.06.2016 and last rental date is 30.06.2020 with end of life of equipment is 30.06.2021 and the last bill month is 31.05.2020.

(ii) It was also pointed out by the Ld. Counsel for the Appellant/RP that schedule 1 clearly sets out the last rental date in terms of the contractual arrangement between the parties and in most of the cases the last rental date is of 2017, 2018 and 2019. Accordingly, defined life of equipment is also stated in the last column of the annexure at pg. 7 of the above document. The Counsel for the Appellant has stated that how the lesser can make the claim beyond the life of the equipment as agreed between the parties. How even billing can be done beyond the life of the equipment.

(iii) It was also stated by the Ld. Counsel for the Appellant/RP that they have not received any rental income from those equipments during the CIRP process. CIRP has commenced in terms of the order pronounced by the Adjudicating Authority

on 18.03.2020 in CP No. 219/I&BP/2019 in the matter of PNB Asset Recovery Management Branch, Mumbai Vs. CD Zicom Sass Pvt. Ltd. On 11.06.2021, the Resolution Process for the Corporate Debtor concluded when the CoC members after negotiations and final e-voting dated 11.06.2021 accepted and approved the Resolution Plan submitted by the Resolution Applicant/R3 with 98.85% voting rights.

(iv) Ld. Counsel for the Appellant/RP also stated that CIRP is a time bound process in which every steps to be completed within specific duration. Filing of claim and admission of claim is a step prior to making of information memorandum. This is crucial because the creditors as well as the Resolution Applicant will be required to consider the overall condition of the Company before predicating in the process as well as making decision as to the fate of the Company. If the claims are to be permitted after preparation of Information Memorandum and submissions of the Resolution Plan then it will be never to possible to complete the CIRP process. Furthermore, if the Adjudicating Authority was to consider the claim after sanctioned of the Resolution Plan by the CoC then the entire process will have to be reworked to ascertain again

whether the Creditor is eligible to get the payment? and how much of the amount will have to be considered not just by the Resolution Applicant but also by the CoC with a underline impact that it will affect everyone's entitlement.

(v) They have also cited the Regulation 12(2) vide Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018 (w.e.f. 04.07.2018). Prior to the amendment, the Regulation 12(2) read as under:-

“12. Submission of proof of claims.

.....(2) A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.”

(vi) Post amendment in 2018 as aforesaid, the amended Regulation 12(2) is reproduced herein below and read as under:-

“12. Submission of proof of claims.

.....(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.”

(vii) The Regulation 12(2) contemplates a scenario where claim is not filed within the time stipulated in the public announcement. It is in this scenario this regulation permits filing of the claim on or before 90th day of insolvency commencement date. Prior to amendment, the extended term to file claim was till the approval or resolution plan by the committee of creditors. The said time limit was curtailed and restricted to 90 days from the insolvency commencement date, vide the said amendment of 2018. Therefore, regulation fixes the outer limit for filing of the claim if it is filed after delay. This in fact curtails the power to further condone the delay or to further extend the time. If the delay in the present case is condoned then the same will nullify the amendment made to Regulation 12(2).

(viii) Although the Adjudicating Authority took note of the judgment of the Hon'ble Appellate Tribunal in the matter of Office of the Asst. State Tax Commissioner State Tax, Department, Government of Maharashtra Vs. Shri Parthiv Parikh Resolution Professional, M/s Jaihind Projects Ltd. & Ors. (CA (AT) (Ins) No. 583 of 2020), but failed to appreciate

the purpose and the law settled vide said Judgment, wherein it was held as under:-

“12. Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 outlines the process for submission of the Information Memorandum and contents to be included therein to each member of the Committee of Creditors within two weeks of IRP’s appointment. It is to be noted that Regulation 36(2)(d) mentions that the Information Memorandum shall contain ‘a list of creditors containing the name of creditors, the amounts claimed by them, the amounts of their claims admitted and the security interest, if any, in respect of such claims;’ among other particulars.

13. Further, in the same Regulations, very clear timeline has been prescribed under Regulation 12(2) for submission of claim with proof by financial and corporate debtor, quite obviously to enable the potential resolution applicants to submit realistic and workable resolution plans after due diligence, and which can be taken up further for finalisation. The relevant regulation is reproduced hereunder:13

*“12. Submission of proof of claims. – xxxxxx (2)
A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may*

be, on or before the ninetieth day of the insolvency commencement date. Xxxxx ”

The purpose of issuing public notice is to make all the interested parties/stakeholders aware of the initiation of the CIRP of the Corporate Debtor and the information memorandum which is issued subsequently, after the collection and collation of claims of the operational and financial creditors is to provide the Resolution Applicant all relevant information so that the applicant can make a legally and financially sound Resolution Plan for the Corporate Debtor as is required under Section 29 of the IBC. Such Resolution Plan has to be submitted to the Resolution Professional under Section 30 of IBC, which is considered by the Committee of Creditors for approval and the final approval of the Resolution Plan is provided by the Adjudicating Authority under Section 31 of the IBC. It is quite logical to say that these actions have to be taken Company Appeal (AT) (Ins) No.583 of 2020 Page 12 of 17 with alacrity so that the successful Resolution Applicant, if any, can take the reins of the management of the Corporate Debtor in good time for its proper management and consequent revival.....

..... 15. Thus, it is clear that much water had flown under the bridge from the date of issue of public notice (on 02.11.2018) and the extended time period of ninety days as provided under Regulation 12(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Resolution Plan as approved by the COC was submitted

to the Adjudicating Authority for necessary approval under Section 30. Any interruption in the CIR Process at this stage by including a delayed claim/s would have meant setting the clock back and sending matter back to COC & RP. It cannot be ruled out that if the claim of the Operational Creditor State Tax Department, Government of Maharashtra was accepted at such a late stage, there could have been other such applicants too, who would have demanded accommodation on the same ground allowing late submission of their claims once this window would have opened. It would be trite to emphasise the fact that this would have meant complete disruption of the CIRP and the timelines stipulated therein. Delay would defeat Resolution as this would have resulted in the CIRP and approval of successful Resolution Plan to continue for an indefinite period of time, which is certainly not the intention of IBC. A real hazard in such an event could be liquidation, and corporate death, of an otherwise functional and corporate debtor, with which Resolution Plan approved is set to come out of the Red.....

....20. In the light of the aforementioned discussion, we find that Adjudicating Authority has dealt with the issue of approval of the resolution plan submitted by the Resolution Professional and, inter alia, rejecting the claim of the Appellant in accordance with the requirements of the statute, and in keeping with the overall objective and scheme of the IBC”

(ix) It was also stated by the Ld. Counsel for the Appellant that it is beyond any doubt and now **a settled law that the**

outer time line for filing any claim is 90 days from the date of Insolvency commencement, which in this case expired on 09.11.2020. There is no provision for condonation of delay in filing the claim. Section 42 of the Code provides the power to condone the delay in liquidation proceedings, but no such power is imbedded in the code for condonation of delay in filing the claim in CIRP Process. A lot of stress was given that the CIRP is to be completed within the particular time frame. Neither inherent power nor any other Hon'ble Apex Judgment provides for such power to the Adjudicating Authority to consider the claim after the Resolution Plan is approved by the CoC, Adjudicating Authority is to work within the framework laid down in the Code and the related Regulations. Regulation 14 as depicted below also does not authorized creditors to modify or vary his claim at such belated stage of approval of Resolution Plan. Regulation 14 is also not applicable with respect to alleged CIRP Costs.

“14. Determination of amount of claim.

(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under subregulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.”

(x) It was also pointed out by the Appellant that the Hon’ble Supreme Court Judgment in the case of Ghanshayam Mishra and Sons Pvt. Ltd. Through the Authorized Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors. Civil Appeal No. 8129 of 2019 which has no Application in the present case and the Judgment specifically deals with the issue that the claims which were not part of the CIRP cannot be recovered at a belated stage. It has also not decided the issue of condonation of delay, as it was not even the issue before the Hon’ble Apex Court. The judgment only deals with the issue in respect of the claim arising pre-CIRP and not during CIRP Period.

(xi) The claimant has filed first claim (Form B) of Rs. 1,05,71,482.26/- on 13.01.2021 appearing at Pg. No. 10 of the Additional Document filed by the Appellant vide diary no. 49430 dated 30.11.2021 and subsequently revised its claim (Form B) on 22.04.2021 appearing at Pg. No. 98 of the same for an

amount of Rs. 8,65,06,092/- and has subsequently filed I.A. No. 1511 of 2021 in CP (IB) No. 219 of 2019 on 05.07.2021 appearing at Pg. 104-105 of Appeal paper book on 05th July, 2021 for Rs. 12,49,19,520/-. All this has been done after completion of the process of receipt of Resolution Plan even the said I.A was challenged after sanction of Resolution Plan by CoC and after filing of Application for approval of the Resolution Plan before the Adjudicating Authority. The Appellant has also pointed out at Pg. 14 of the Appeal Paper Book vide Para z as below:-

“The Adjudicating Authority ought to have considered that it is a classic case where a party like Tata who has all means and infrastructure to file claims inspite of knowledge of commencement of CIRP filed its claim after almost 8 months of the process having commenced, and now attempting to derail the entire CIRP Process and push the Corporate Debtor into liquidation.”

(xii) The Ld. Counsel for the Appellant also pointed out that if any resolution plan of Rs. 15 Crores an amount of Rs. 3.14 Crores (Provisioned for 8 months CIRP Process or so) is to be paid as CIRP costs, the entire plan will not just fall but the Company/CD will have to face the Liquidation proceeding. Needless to mention but it is a fact that the Company has no immovable assets and the Company is only having running projects for which the value

has been raised in the resolution plan and the amount is to be offered by the Resolution Applicant. The Counsel for the Appellant also pointed out that the value offered by the Resolution Applicant is more than the value of liquidation and realizable value.

(xiii). Based on the above submission and the facts of the case, the counsel for the Appellant/RP also submitted that the present appeal requires positive consideration by this Tribunal.

Submissions of Respondent No.2 & 3

9. As far as the Respondent No.3 is concerned, the ld. Counsel for the party stated that the R3 is a 'Successful Resolution Applicant' whose plan has been approved by the CoC with 98.85% voting rights on 11th June, 2021. The company is in the business of sharing distribution of consumer goods and is a tier one partner for 'Hindustan Unilever Limited' for distribution of their product. It was also stated by the R3 that the Adjudicating Authority has violated the principle of natural justice as it has not been heard whereas its stake is high in the present case. They have also stated that the annexure attached to the claim form of R1 in IA No. 1511 of 2021 as stated above in which the Adjudicating Authority has passed the order was without annexure of the claim. The claim is not falling within the definition of Insolvency Resolution Process cost as provided under Section 5(13)(e) r/w related regulations. It has also

alleged that Corporate Debtor was not paying the alleged rent prior to CIRP commencement and if the Master Lease Agreement has expired, Moratorium does not prohibit to repossess the goods in terms of the Clause 17 of the Master Lease Agreement. The claim of the R1 is purely in the nature of damages / compensation which first necessarily requires adjudication before allowing a single penny out of that. They have also stated that the original claim filed on 13.01.2021 by R1 for a sum of Rs. 1.05 Crore includes an amount of Rs.43,54,502.92 for market value of the Leased Equipment which amount has again been included in the claim of Rs.3.14 Crore, which has been allowed by the Adjudicating Authority. It is unfortunate to submit that the outstanding rental dues for the post insolvency commencement date includes the amount of fair market value of the equipments also.

10. Similarly, the Respondent No.2 representing the CoC has vehemently and strongly submitted additionally that the R1 was never providing the details to the RP/CoC and no way it can be included even under Regulation 31(e) as CIRP cost as it is no way connected to the CIRP process, no revenue was earned against these leased equipments by the CD during CIRP. For the rest of the issues, she adopted the submissions of the Appellant & R3. She has accordingly submitted for setting aside the impugned order.

Submissions of Respondent No.1

11. It is the case of the Respondent No.1 that they have entered into 'Operating Lease facility' vide its sanction letter dated 06th May, 2015 to CD/Appellant for leasing security system devices and other peripheral assets /goods wherein goods purchased by the R1 would then be leased to the CD on monthly lease rentals. The R1 has entered into a 'Master Lease Agreement' on 14th May, 2015 with the CD/Appellant whereby the agreements provides for periodic lease rental payment to be paid by the CD to the R1. The Operating part of the lease term and lease rental are provided *at page 149 para 2 of the lease deed of the Appeal paper book*. It is also provided that the CD will install, use, operate and maintain the goods in good working condition and repair them at his own costs and expenses. The CD will bear the entire risks of the goods and indemnify the Respondent No.1 against any loss. As per the Ld. Counsel for the R1 the agreements provides for that at the expiration of the lease term / renewal term, the CD must notify the R1 by issuing a notice that the CD intends to return the goods to the R1. They have also submitted that the CD shall return the goods at its own costs on expiration, termination and early termination of the lease deed/period. Lease becomes operational even after its expiry, if the CD has not informed the R1 for returning the same. The R1 has also accepted that originally it was filed a claim of Rs. 1.05 Crore plus which was raised to Rs.11.79 Crore as on 11th August,

2020. The R1's claim of the later stages includes the claim for pre- CIRP lease rental and post - CIRP lease rental. It is also stated by the Ld. counsel for the R1 that the CIRP costs are dynamic and can never be fixed or static as their costs incurred to the CD as a going concern. They have also stated that these lease goods / services are required to keep the business of the CD as a going concern during CIRP period and have cited Section 5(13), Section 14(2) & 2(a), Section 20, Section 25, Section 30(2) of the I& B Code and also referred to Regulation 31 & 32 of the related CIRP regulations to supplement their stand that the order passed by the Adjudicating Authority is in order. They have also cited the judgment of this Tribunal of M V Projects Vs. Divya Jyoti Sponge Iron Pvt. Ltd. & Ors holding that that if a supplier has supplied the goods during the period of the CIRP to keep the company as a going concern, "It was the duty of the RP to include such cost towards Resolution Process Cost for payment in favour of Appellant for non-inclusion of the same, it can be held that the 'Resolution Plan' in question is in violation of Section 30(2) (a) of the I& B Code."

12. The Ld counsel for the R1 has further stated that the RP /Appellant cannot avoid payments to R1 due to lack of invoices. **The Ld counsel for the R1 further stated that there is no requirement of calculation and verification of the CIRP costs as the Adjudicating Authority has already allowed the partial amount under the revised**

Form-B to be paid as CIRP costs. The Ld counsel for the R1 has further submitted that the RP is not an Adjudicating Authority and every claim must be verified and admitted by him and have cited the judgments as follows:

“The duty of the RP to collage, verify, revise and update the claims as and when relevant/additional information is received by the RP. Furthermore, the claims are crystallized only after the approval of Resolution plan by the Adjudicating Authority as per Section 31 of the Code. [Swiss Ribbons Pvt. Ltd and Ors. Vs. Union of India and Ors.; Ghanashyam Mishra and Sons Pvt. Ltd Vs. Edelweiss Asset Reconstruction Company Limited and Ors. 2021 SCC online SC 313] Section 25 of the Code r/w Regulations 14(2) of the CIRP Regulation].

13. The Ld. Counsel for the R1 has emphatically submitted that revised Form-B is not a fresh claim but only a revised claim which includes lease rental for CIRP period. The Ld counsel for the R1 has cited the various Judgments of Hon’ble Supreme Court as well as this Tribunal to supplement his case has given below:

- Prerna Singh Vs. Committee of Creditors, Xalta Food and Beverages Pvt. Ltd and ors, NCLAT, Contempt case (AT) No. 03 of 2020 and CA(AT)(Ins) No. 104 of 2019 held at para 19 to 21:

“19. Section 14(1) (d) provides that during the moratorium period the lessor or an owner of the property cannot recover the possession of the property from the Corporate Debtor. Regulation 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is as under:-

“31. Insolvency resolution process costs. “Insolvency resolution process costs” under Section 5(13)(e) shall mean-

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and*
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”*

20 As per Regulation 31 Insolvency Resolution Process costs under Section 5(13) (e) mean defined in clause (a) to (e). for the present case, Regulation 31 (b) is relevant which provides that amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1) (d). Due to moratorium period the lessor could not recover the possession of the property from the Corporate Debtor. Thus, the right of lessor to recover rent are affected on account of moratorium. Therefore, the lessor is entitled to recover the rent and which shall include in CIRP costs.

21. Thus, we find no substance in the argument that the rent cannot be included in the CIRP costs.”

- M V Projects Vs. Divya Jyoti Sponge Iron Pvt. Ltd. &Ors., NCLAT CA(AT) (Ins) No. 481 of 2018 held at para 25:

“In view of the aforesaid provision, if the Appellant has supplied the goods during the period of the ‘Corporate Insolvency Resolution Process’ to keep the company as a going concern, it was the duty of the ‘Resolution Professional’ to include such cost towards ‘Resolution Process Cost’ for payment in favour of Appellant for non-inclusion of the same, it can be held that the ‘Resolution Plan’ in question is in violation of Section 30(2) (a) of the ‘I&B Code’.”

- Alok Kaushik Vs. Bhuvaneshwari Ramnathan, Supreme Court, (2021) 5 SCC 787 held at para 18 to 20:

“18. In a recent judgment in Gujarat Urja Vikas Nigam Limited vs Amit Gupta and Others 2, this Court clarified the jurisdiction of the NCLT/NCLAT under Section 60(5)(c) 3 of the following terms : (SCC para 69)

69. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were

distributed earlier across multiple fora...Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing so, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.” (emphasis supplied)”

19.Though the CIRP was set aside later, the claim of the appellant as registered valuer related to the period when he was discharging his functions as a registered valuer appointed as an incident of the CIRP. The NCLT would have been justified in exercising its jurisdiction under Section 60(5)(c) of the IBC and, in exercise of our jurisdiction under Article 142 of the Constitution, we accordingly order and direct that in a situation such as the present case, the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the

amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations defines ‘insolvency resolution process cost’ to include the fees of other professionals appointed by the RP. Whether any work has been done as claimed and if so, the nature of the work done by the valuer is something which need not detain this Court, since it is purely a factual matter to be assessed by the Adjudicating Authority.

20.The NCLT in its order dated 29 June 2020, while dismissing the application of the appellant for the payment of fees, observed that the Insolvency and Bankruptcy Board of India (“IBBI”) is the competent authority to deal with allegations against the RP relating to their failure to discharge statutory duties (para 8). Section 217 of the IBC empowers a person aggrieved by the functioning of an RP to file a complaint to the IBBI. If the IBBI believes on the receipt of the complaint that any RP has contravened the provisions of IBC, or the rules, regulations or directions issued by the IBBI, it can, under Section 218 of the IBC, direct an inspection or investigation. Under Section 220 of the IBC, IBBI can constitute a disciplinary committee to consider the report

submitted by the investigating authority. If the disciplinary committee is satisfied that sufficient cause exists, it can impose a penalty. The availability of a grievance redressal mechanism under the IBC against an insolvency professional does not divest the NCLT of its jurisdiction under Section 60(5)(c) of the IBC to consider the amount payable to the appellant. In any event, the purpose of such a grievance redressal mechanism is to penalize errant conduct of the RP and not to determine the claims of other professionals which form part of the CIRP costs.”

- Executive Engineer, Uttar Gujarat VIJ Company Ltd Vs. Mr. Devang P Samapat, RP of M/s. Kanoovi Food Pvt. Ltd. NCLAT, CA(AT) (Ins) No. 371 & 372 of 2021 held at para 11 & 12:

“11. Illustration of Regulation 32 makes the distinction clear. If the electricity consumption was for manufacturing and output of the Biscuits which is the normal operation of the Corporate Debtor, in that case dues arising from such supply of electricity during moratorium would have to be paid during moratorium. Sub-section 2A of Section 14 read with Regulations referred above makes it clear that if the supply is for managing the operations of the Corporate Debtor the supply cannot be interrupted during moratorium except where Corporate Debtor has not paid dues arising from such supply during the moratorium period. In present

matter the consumption is stated to have been for running of office and security of Corporate Debtor. In that case, the same will be part of the CIRP Costs which can be recovered when the Resolution Plan is approved or would form part of Section 53 if the Liquidation has been initiated.

12. As such, for these reasons, in the facts of the matter, we are unable to disagree with the Adjudicating Authority when in its order dated 21st October, 2020 it was observed that the electricity charges during CIRP would form part of CIRP Costs.”

- *Swiss Ribbons Pvt. Ltd and Anr. Vs. Union of India and Ors., Supreme Court, (2019) 4 SCC 17 held at para 88 & 89:*

“88. It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:

—18. Duties of interim resolution professional.—(1) The interim resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term —assets‡ shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.‡

89. Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:

*—10. Substantiation of claims.—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.‡ xxx
xxxxxx —*

12. Submission of proof of claims.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement,

may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

13. Verification of claims.—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

14. *Determination of amount of claim.*—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him. (2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.¶ It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a —determination¶ under Regulation 35A, he is only to apply to the Adjudicating Authority for appropriate relief based on the determination made as follows:

—35A. *Preferential and other transactions.*—(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board. (3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.”

- S Rajendran, RP of PRC International Hotel Pvt. Ltd. Vs. Jonathan Muralidarane, 2019 SCC Online NCLAT 758 held at para 3:

“3. Having heard learned Counsel for the Appellant, we are of the opinion that the ‘Resolution Professional’ had no jurisdiction to “determine” the claim as pleaded in the Appeal. He could have only “collated” the claim, based on evidence and the record of the ‘Corporate Debtor’ or as filed by Jonathan Muralidarane (‘Financial Creditor’). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the ‘Resolution Professional’ should not have moved in Appeal, as in any manner, he will not be affected.”

- Ghanaashyam Mishra & Sons Pvt. Ltd Vs. Edelweiss Asset Reconstruction Company Limited (2021) 9 SCC 657 held at para 93:

“93. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important

duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an ongoing concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in subsection (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution

applicant submits its plans, would go haywire and the plan would be unworkable.”

- Rajendra Kumar Bhutta Vs. Mhada&Anr. (2020) 13 SCC 208 held at para 25:

“25.when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the

corporate debtor may finally be put back on its feet albeit with a new management.”

- Victory Iron Works Limited Vs. JitendraLohia RP of Avani Towers Pvt. Ltd. 2021 SCC Online NCLAT 128 held at para 21:

“21. There are certain facts which are very clear from the deliberation of submissions including the pleadings by the parties that M/s. Energy Properties Pvt. Ltd. is the owner of the property and the Corporate Debtor (in CIRP) is a Developer of the Property in terms of the Development Agreement dated 16.06.2008 and they will be governed by inter - se agreements. Here the Adjudicating Authority has not gone into the issue of ownership of the property, he has restricted its role as provided in Section 14 of the 'Code' vide Section 14(1)(d) including its explanations. It is also undisputed fact that the Corporate Debtor (In CIRP) is holding the development right and the Development Agreement dated 16.06.2008 has not been terminated before the commencement of CIRP. In all such situations Section 14 of the 'Code' is applicable till it reaches the stage of approval of Resolution Plan or Liquidation. However, the RP is to appropriately disclose the status of the 'Property' in the Information Memorandum and other documents as required in the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016.

- Gujarat Urja Vikas Nigam Limited Vs. Amit gupta & Ors. in Civil Appeal No. 9241 of 2019 held at para 69 to 72:

“69The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor’s assets and hamper the prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in Innoventive (supra) this court observed that —one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process¹. The principle was reiterated in Arcelor Mittal (supra) where this court held that —the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by

the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings¹. Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

70. It is appropriate to refer to the observations in the Report of the BLRC, wherein it noted the role of the NCLT, as the Adjudicating Authority for the CIRP, in the following terms:

“An adjudicating authority ensures adherence to the process At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of

violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator.”

As such, it is important to remember that the NCLT’s jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the IBC, which sought to make the process driven by trained resolution professionals.

71. In the present case, the PPA was terminated solely on the ground of insolvency, since the event of default contemplated under Article 9.2.1(e) was the commencement of insolvency proceedings against the Corporate Debtor. In the absence of the insolvency of the Corporate Debtor, there would be no ground to terminate the PPA. The termination is not on a ground independent of the insolvency. The present dispute solely arises out of and relates to the insolvency of the Corporate Debtor.

72. Ms Ramachandran and Mr. Diwan have contended that CA 1956, PIA and BRA do not contain any provisions equivalent to Sections 25(2)(b) and 18(f)(vi) of the IBC which empower the RP to exercise rights for the benefit of the Corporate Debtor in certain adjudicatory proceedings. They submit that Section 60(5)(c) of the IBC must be read in consonance with Sections 25(2)(b) and 18(f)(iv), which would be rendered nugatory if NCLT becomes the

exclusive forum for the enforcement of all the Corporate Debtor's rights. Section 25(2)(b) of the IBC provides:

Section 25 - Duties of resolution professional

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

....

(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;

Section 18(f)(vi) provides: —

Section 18 - Duties of interim resolution professional The interim resolution professional shall perform the following duties, namely:-

.....

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

.....

(vi) assets subject to the determination of ownership by a court or authority;”

- Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Ors., (2020) 13 SCC 308 held at para 37 to 38:

“37.From a combined reading of Subsection (4) and Sub section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be Subsection (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Subsection (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” appearing in Clause (c) of Subsection (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated

in Section 60(5) cannot be stretched so far as to bring absurd results. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystalised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT.)

38. It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty bound under Section 20(1) to preserve the value of the property of the Corporate Debtor and that the word “property” is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the Corporate Debtor.”

- Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain RP, SK Wheels Pvt. Ltd. Civil Appeal No. 3045 of 2020 held at para 26 to 29:

“26. On behalf of the appellant, it has been further submitted that the NCLAT misread Section 14 of the IBC, which has no application to the present case. Section 14 of the IBC provides thus:

“Section 14 - Moratorium (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in

respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.--For the purposes of this sub-Section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to—

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.” (emphasis added)

Admittedly, the appellant is neither supplying any goods or services to the Corporate Debtor in terms of Section 14 (2) nor is it recovering any property that is in possession or occupation of the Corporate Debtor as the owner or lessor of such property as envisioned under Section 14 (1) (d). It is availing of the services of the Corporate Debtor and is using the property that has been leased to it by the Corporate Debtor. Thus, Section 14 is indeed not applicable to the present

case. However, in *Gujarat Urja (supra)* it was held that the NCLT's jurisdiction is not limited by Section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under Section 60(5)(c) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process. This Court observed:

“91. The residuary jurisdiction of NCLT under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a “going concern”. We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised

on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters de hors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5) (c) would be in contradiction of the holding of this Court in Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443].”

27. Before the initiation of the CIRP, the appellant had on multiple instances communicated to the Corporate Debtor that there were deficiencies in its services. The Corporate Debtor was put on notice that the penalty and termination clauses of the Facilities Agreement may be invoked. This is evident from the appellant’s communications dated 1 August 2018, 17 September 2018, 1 October 2018 and 11 October 2018. In its email dated 13 October 2018 the appellant specifically noted that the housekeeping staff being provided by the Corporate Debtor was

inadequate. The appellant was apparently constrained to deploy its own staff for housekeeping, evinced from its email dated 19 November 2018. The Corporate Debtor has admitted that the appellant was using its own housekeeping staff and deducting the costs from the invoice. The appellant again intimated the Corporate Debtor to change faulty batteries of the UPS and provide cleaning products in its email dated 3 February 2019. The termination notice dated 10 June 2019 also clearly lays down the deficiencies in the services of the Corporate Debtor. The termination notice enumerated the following deficiencies:

“1. Not maintaining the minimum level of skill set of personal on exam and non-exam days which is non-compliance as per Annexure B, Table C, and also a process violation.

2. Furnishing and Designing guidelines (Annexure B, Table D) not being adhered a) Furniture broken condition b) Temperature and ventilation in labs, server room and UPS rooms not being maintained c)

Deploying housing staff d) Cleanliness and up keeping of the center

3. Branding and Navigation not in synchronization with Annexure F of facility agreement.”

28. In Gujarat Urja (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that “....NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor... The nexus with the insolvency of the corporate debtor must exist” (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

29.It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen de hors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.”

Summary and Observations;

14. We have carefully gone through the submissions made by the Ld counsel for the parties and the documents available on records and laid

down provisions of the I & B Code, 2016, and we are having the following observations:-

- a. It is not in dispute that the CIRP of the Corporate Debtor was initiated vide impugned order dated 18th March, 2020 passed by the 'Adjudicating Authority' and the 'Resolution Professional' of the Corporate Debtor is the Appellant in the Appeal.
- b. It is also not in dispute that the 'Resolution Professional' was confirmed by the members of the CoC and made public announcement on 13th August, 2020 and have asked the creditors to submit their claims with proof on or before 25th August, 2020. It is the fact of the case that even 90 days time period for filing of claim as stipulated in the CIRP Regulations expired on 09th November, 2020.
- c. The Respondent No.1 has submitted originally its claim as 'Financial Creditor' on 17th November, 2020 and submitted the revised claim as 'Operational Creditor', as suggested by the 'Resolution Professional' on 13th January, 2021 with the amount of claim of Rs.1.05 Crore which includes Rs. 10,52,940.05 towards lease rental dues & Rs. 43,54,502.92 towards fair market value of assets (page 19 of the written submission of the Appellant); out of which the Resolution Professional/ Appellant has already admitted the claim of Rs. 95 lacs and informed the Respondent No.1. The second additional claim of

Rs.11.79 Crore approx. was filed on 23rd April, 2021 i.e. after the delay of 256 days in filing their claim.

- d. The 'Expression of Interest' from the 'Prospective Resolution Applicant' were invited on 24th October, 2020 with the last date of submission was 19th November, 2020 and a last for submission of Resolution Plan was 14th January, 2021 originally.
- e. The CoC approved the Resolution Plan on 11th June, 2021 and the 'Resolution Professional' has filed IA No. 1300 of 2021 praying for sanction/approval of the Adjudicating Authority to the Resolution Plan approved by the CoC with a 98.85% voting right as 270 days of the CIRP was expiring on 15th June, 2021 itself.
- f. The 'bone of contention' between the Appellant and the Resolution Professional and Respondent No.1 is the amount of Rs.3,14,81,158/- allowed as CIRP costs by the 'Adjudicating Authority' through the impugned order dated 02nd September, 2021 without verification of costs and other details by 'Resolution Professional' or without recommendation of 'CoC' even seems without any scrutiny by the 'Adjudicating Authority'.
- g. The origination of the dues are with reference to the 'Master Lease Agreement' dated 14th May, 2015 entered by the Respondent No.1 with the Corporate Debtor/Appellant whereby the agreements

provided for periodic lease rental payment to be paid by the CD to the R1.

- h. The Master Lease Agreement (appearing at page 28 to 44 of the Written Submission of the Appellant) as per page 42 of the Written Submission of the Appellant, the goods value / lease value as on 14th May, 2015 is Rs. 10 Crore. As per page 31 of the Written Submission of the Appellant vide Clause 2(g) the due lease rental will be notified by the Lesser / Respondent No.1 to the Lessee / Appellant /Resolution Professional by **raising an invoice**. As available at page 29 of the Written Submission of the Appellant vide Clause 1(n), the lease term is for the term or tenor of the lease of goods as specified in the relevant Lease Summary Schedule. Such lease terms shall commence from the commencement date as mentioned in the Lease Summary Schedule and end on the earlier of (a) the expiry of lease term mentioned in the Lease Summary Schedule or the expiry of renewed term or on the date of termination of this agreement etc. Clause 16 & 17 of the Agreement involving event of default and consequences event of default are enumerated hereunder:

- further notice to the Lessee.
16. Event of Default
- 16.1 The happening of all or any of the following events shall constitute an Event of Default under this Agreement:
- a) If the Lessee or any Guarantor or any Security provider fails to pay any sums payable under this Agreement or any other Document and such failure continues for 5 (five) Business Days from the due date.
 - b) If the Lessee or Guarantor or any Security provider fails or neglects to observe or perform or commits or allows to be committed a breach of any of the terms, conditions, provisions or stipulations of this lease or of any Document on its part to be observed and performed (other than failure to pay any sum hereunder when due and payable) and if such breach is remediable, fails to remedy the same within 5 (five) Business Days of notice by the Lessor specifying such default and requiring such default to be remedied.
 - c) If any representation or warranty made or deemed to be made by the Lessee or any Guarantor or any Security provider in or pursuant to this lease or in any Document is or proves to have been incorrect or shall become incorrect.
 - d) In case the Lessee or Security provider or Guarantor takes any action or legal proceedings are threatened against the Lessee or Security provider or Guarantor for its winding up, dissolution, administration or re-organisation, or if the Lessee or Security provider or Guarantor is a natural person, any death or incompetency of such Lessee or Security provider or Guarantor.
 - e) If the Lessee or Security provider or any Guarantor does or suffers any act or thing or omits to do or suffer any act or thing whereby or in consequence of which (i) the Goods may be or is likely to be distrained, endangered, attached or taken in execution under any legal process or public authority, or (ii) which gives to the Lessor reasonable grounds to consider that Lessor's rights or security may be prejudiced or be in Jeopardy, (ii) any execution, distress or legal process is levied against, or possession is seized of the whole or any material part of the property, undertaking or assets of the Lessee or any Security provider or Guarantor.
 - f) If the Lessee or any Security provider or Guarantor commits a default or is in breach of its obligations in respect of any other agreement entered into with the Lessor or any other bank / financial institution / non-banking financial company/lender and it is not cured within the cure period as mentioned therein (if any).
 - g) At the sole discretion of the Lessor, if there is reasonable apprehension that the Lessee or any Security provider or Guarantor is unable to pay its debts or if any order has

hereby authorizes the Lessor to enter, with or without legal process, any premises where the Goods are believed to be and take possession thereof. In taking such possession, the Lessor may (a) do all such acts or things as a reasonable person would do to protect its property from undue infringement or to recover its property unlawfully detained by anyone; (b) make such use of force as may be required; (c) break, remove or demolish any structure or lock, thing or object that in any way obstructs the removal of the Goods; (d) take possession of the Goods with anything mounted on it, contained in it, affixed or attached to it, permanently or otherwise, and whether belonging to the Lessee or any other Person, at the sole risk, cost and liability of the Lessee.

- c) If the location where the Goods are kept or used is owned by a third party, the Lessee must take all necessary action and provide all the necessary support and co-operation upon request (including, without limitation, by issuing instructions to any third party, making any personnel/ management available, to the extent needed, etc.) to ensure that the Lessor can, at the Lessee's costs, remove the Goods from the third party premises, and that such removal of the Goods shall be free of any and all charges or liens, including any duties and Taxes which may be payable.
- d) In the event the Lessor is unable to recover the Goods from the Lessee in good condition with reasonable wear and tear excepted for any reason whatsoever, Lessor shall be entitled to receive/ recover from the Lessee as liquidated damages for loss of the Goods and not as a penalty, a sum equal to the Replacement Value of the Goods on the date on which the Event of Default occurs. The Replacement Value shall be determined, at Lessee's cost, in such manner as may be required by the Lessor. The Lessee recognizes that such Replacement Value may be determined on the basis of certain estimates. The Replacement Value so determined shall be final and binding on the Lessee. In addition to the Replacement Value, as the Goods would cause an opportunity loss to the Lessor, the Lessor shall be entitled to charge the Lessee the loss that the Lessor would suffer in the time taken to get a similar Goods ready and providing such Goods on lease to other suppliers of the customers of the Lessee. The Lessor shall indicate the amount of such expected loss and the same would be binding on the Lessee.
- e) To take possession of the Goods and hold and keep idle the same or any portion thereof, without incurring any liability for keeping the same idle.
- f) Notwithstanding anything contained in this Agreement and without prejudice to any other rights of the Lessor, Lessee agree that the Lessor shall be entitled, subsequent to the repossession and prior to its sale in terms of this Agreement, at the Lessor's sole and absolute discretion, to carry out such repairs, improvements or refurbishments (collectively "Refurbishments") to the Goods as it may deem fit. The Lessee agrees and acknowledges that any costs incurred towards the Refurbishments ("Refurbishment Cost") shall be borne and payable by Lessee or any Guarantor or any Security provider.
- g) To sell the Goods or any part thereof at private or public sale, in bulk or in parcels, or redeploy the same without notice and without having the Goods present at the place of sale, and Lessor may use Lessee's premises for any or all of the foregoing without

- liability for rent, costs, damages or otherwise and all costs related to such sale shall be borne by the Lessee.
- h) To recover the entire amount of the Lease Rentals for the Lease Term, as if the lease had not been terminated to the end of such Lease Term and such that the Lessee shall pay to the Lessor (a) arrears of Lease Rentals upto the date of termination of the lease, and (b) the unexpired residual Lease Rentals of the Lease Term for which the Lessee would have been bound to pay to the Lessor had the lease continued, and (c) any other amounts payable under this Agreement or any Lease Summary Schedule or any other Document.
- i) To recover from Lessee, any advances paid to Manufacturer along with interest thereon.
- j) To forfeit the Security Deposit, if any.

- i. It is also pointed out that the entire claim of Rs. 3.14 crore if divided into two parts and the same will reflect as follows:
- “i. Claim towards Fair Market Value – Rs. 43.54 lacs.
- ii. Claim towards Extension rental – 2.71 crore.”
- j. It is very much clear from the details available at page 19 of the written submission of the Resolution Professional as also at page 4(r) Rs. 43.54 lacs claim towards fair market value is already admitted in the figure of Rs.95 lacs of the admitted claim and how again the same

figure can be included in additional claim. Hence, it is erroneously claimed amount and, therefore, the Adjudicating Authority has committed an error towards directing payment again for release of the same amount.

- k. The balance amount claim of Rs. 2.71 crore is towards extension rental claim. Now the question comes here if Fair Market Value of the Equipment has already been claimed then how additionally these extension rental claim again be made. Furthermore, no invoice has been raised for such a claim whereas as per Clause 2(g) of the Master Lease Agreement as appearing at page 31 of the Written Submission of the Appellant and invoice needs to be raised by the Respondent No.1 on the Appellant for making such claim. The Resolution Professional being the professional and custodian of Corporate Debtor in CIRP goods during CIRP has confirmed that no invoices has been raised for such a claim then how such a claim can be admitted.
- l. The submission of the Ld Counsel for the Respondent No.1 that there is no need for submission of invoice during so called deemed extension; it does not seems to be tenable as also the submission of the Ld. Counsel for the Respondent no.1 that there is no requirement of calculation and verification of CIRP costs by the Resolution Professional / CoC as the Adjudicating Authority has already allowed the partially amount is also not tenable as it is unheard that the

Resolution Professional should pay the amount without any verification.

m. For bringing a clarity on the concept of CIRP cost and related issues we are depicted herein below the related provisions of the Code – Section 5(13), Section 14, Section 20, Section 25, Section 30 related Regulation IBBI CIRP Regulation 2016 vide Chapter –IX- 31, 32, 33 & 34 :

“Section 5(13) - "insolvency resolution process costs"

means—

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

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

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

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

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

Section 14 - Moratorium

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage

the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to

—

[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor

under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

“Section 20: Management of operations of corporate debtor as going concern.

(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

(a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered

property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern.”

“Section 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: Submission of resolution plan.

(1) A resolution applicant may submit a resolution plan 1 [along with an affidavit stating that he is eligible1A under section 29A] to the resolution professional prepared on the basis of the information memorandum.

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

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [payment] of other debts of the corporate debtor;

[(b) provides for the payment of 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.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

[Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in subsection (2).

[(4) The committee of creditors may approve a resolution plan by a vote of not less than 5 [sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in subsection (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]

Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.]

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.”

**CHAPTER IX of IBBI CORPORATE Insolvency
RESOLUTION PROCESS, REGULATION 2016 ON
INSOLVENCY RESOLUTION PROCESS COSTS**

31. Insolvency resolution process costs.

“Insolvency resolution process costs” under Section 5(13)(e) shall mean-

(a) amounts due to suppliers of essential goods and services under Regulation 32;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;

(d) expenses incurred on or by the resolution professional fixed under Regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

32. Essential supplies.

The essential goods and services referred to in section 14(2) shall mean- (1) electricity; (2) water; (3) telecommunication services; and (4) information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor. Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

33. Costs of the interim resolution professional.

(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

[Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.]

34. Resolution professional costs.

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

[Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.

From the above, it is very much clear that the Resolution Professional is to provide for essential supplies which means electricity, water, telecommunication service, and information technology services are to be considered in CIRP cost and as far as other costs are concerned it

is be approved by the CoC. Furthermore, the lease schedule working as appearing at Annexure I page 7 of the written submission of the Resolution Professional, the rental start date of the first leased equipment was from 10th June, 2015 to 09th June, 2017 and for the last 23rd equipment, the rental start date was 01st July, 2016 and last rental date was 30th June, 2020. So the term of the lease deed has already expired by June, 2020 prior to public announcement which was made on 13th August, 2020 asking the creditors to submit their claims and the Respondent No.1 has already submitted its claim 13th January, 2021 of Rs. 1.05 Crore approx., which included Rs. 11 lacs approx. towards lease rental dues and claim towards Fair Market Value – Rs. 43.54 lacs. The Resolution Professional has already considered Rs. 95 lac in total out of Rs.1.05 Crore. Hence, we are not in a position to accept even the claim towards extension rental of Rs. 2.71 Crore.

n. Now let us review the citations submitted by the Ld. Counsel for the Respondent No.1;

- M V Projects Vs. Divya Jyoti Sponge Iron Pvt. Ltd. & Ors., NCLAT CA(AT) (Ins) No. 481 of 2018;

We agree that Resolution Process costs has to be included in the plan and based on input available with the Resolution Professional, the RP has admitted the claim based on input

provided by the Respondent No.1 even after lapse of 90 days after the due date submission of the claim by the Respondent No.1 (i.e. 13th January, 2021) of Rs. 95 lacs out of Rs. 1.05 Crore approx. It is also very much clear that the **Corporate Debtor has not derived any income from these leased assets and the lease assets have also ended its life** as per details provided at page 7 Annexure 1 of the Written submission of the Appellant in the last column of the Annexure. **The Fair Market Value of these equipments amounting to Rs. 43.54 lacs have already been admitted by the Resolution Professional as stated above.**

- Alok Kaushik Vs. Bhuvaneshwari Ramnathan, Supreme Court, (2021) 5 SCC 787

It is very much clear from para 69 cited by the Respondent No.1 that the NCLT and NCLAT is to ensure that they do not supplant the legitimate jurisdiction of other courts when the dispute does not solely relate to insolvency of the Corporate Debtor. Apparently it looks that as far as cost aspect are concerned in terms of the provisions of the Code as stated above and based on claims submitted in response to public announcement, the Resolution Professional has covered substantially the entire amount. However, if the

interpretation of contractual clauses are involved then it is not under the jurisdiction of Adjudicating Authority to interpret and comment **without ascertaining the approval of CoC as it is their commercial wisdom of CoC which cannot be taken away by the Adjudicating Authority on the commercial issues or on commercial terms and conditions, it may be done by a Civil Court.**

- Executive Engineer, Uttar Gujarat VIJ Company Ltd Vs. Mr. Devang P Samapat, RP of M/s. Kanoovi Food Pvt. Ltd. NCLAT, CA(AT) (Ins) No. 371 & 372 of 2021

Para 11 has cited by the Respondent No.1 in the above Judgment relates to electricity consumption which is already a part of Regulation 32 towards essential supplies. The claim in this case is not in respect of essential supplies of electricity. Hence, this citations is not applicable to this case.

- Swiss Ribbons Pvt. Ltd and Anr. Vs. Union of India and Ors., Supreme Court, (2019) 4 SCC 17

The Resolution Professional has no adjudicatory powers. It is beyond challenge. However, in this case the Resolution Professional has complied with para 89 of the above judgment by vetting and verifying the claims made

by the Respondent No.1 in response to public announcement and has admitted the claim duly approved by the CoC. So we do not find any infringement of Hon'ble Apex Court Judgment also.

- Ghanaashyam Mishra & Sons Pvt. Ltd Vs. Edelweiss Asset Reconstruction Company Limited (2021) 9 SCC 657

Para 93 of the judgment has categorically mentioned that the legislative intent is to freeze all the claims so that the Resolution Applicants start on a clean slate and is not flung with any surprise claims.

This case is a surprise claim as the amount of Rs. 1 Crore originally given to the Resolution Professional has been enlarged to Rs. 11 Crore at a later stage and not included in the figures of Information Memorandum. Hence, not admissible.

Similarly in all other citations as given by the Respondent No.1 is not tenable to supplement its case.

- o. Hence, after careful consideration of all the issues raised by the Appellant and the Respondents, we find merit in the Appeal and the Appeal deserves to be allowed not only on one account but on multiple accounts as stated above. Accordingly, we are not in a

position to uphold the order of the Adjudicating Authority and it needs to be set aside and is set aside. The Appeal is allowed.

Pending application, if any, stands disposed of.

Interim order, if any, passed by this Tribunal stands disposed of. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi

25th March, 2022

Raushan.K