

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**MUMBAI BENCH, COURT II**

**IA 1327 of 2020 In IA 661/2020**

**AND**

**IA 661 of 2020**

**In**

**CP (IB) 1138/MB/2017**

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

*In the Application of*

**Mr. Amit Gupta**

Having office address at:

R/o 8 Uggar Sain Bhawan, Railway Road, Opposite S. D. Model School, Karnal (Rural) Part (1), Karnal, Haryana.

**...Applicant/Intervenor**

V/s

**Mr. Anil Kohli**

Resolution Professional of

Dunar Foods Limited

Having office address at: 409-4<sup>th</sup> Floor, Ansal Bhavan. New Dehli-110001.

**...Respondent**

**AND**

**IA 1114 of 2020 IN IA 661 of 2020**

**IN**

**CP (IB) 1138/MB/2017**

*In the Application of*

**State Bank of India**

Having office address at: SAM Branch, Sector 8-C,  
Chandigarh-160009.

**...Applicant**

V/s

**Mr. Anil Kohli**

Resolution Professional of  
Dunar Foods Limited

Having office address at: 409-4<sup>th</sup> Floor, Ansal  
Bhavan. New Dehli-110001.

**...Respondent**

*In the matter of*

**STATE BANK OF INDIA**

**...Financial Creditor**

Versus

**DUNAR FOODS LIMITED & ORS**

**...Corporate Debtor**

**Order Delivered on 30.04.2021**

***Coram:***

Mr. H.P Chaturvedi : Hon'ble Member Judicial

Mr. Ravikumar Duraisamy : Hon'ble Member Technical

***Appearances:***

For the Successful Resolution

Applicant : Mr. Kevic Setalvad, Senior Counsel a/w Mr. Akash Shah P Shah.

For the Respondent : Mr. Abhishek Anand, Counsel a/w Ms. Nikita Abhyankar, Advocate i/b Gravitas Legal.

For the State Bank of India : Mr. Naveen Kumar, Advocate.

**ORDER**

***Per: H.P. Chaturvedi, Member (Judicial)***

1. These sets of IAs are preferred by the Applicant under section 60(5) of the Insolvency and Bankruptcy code, 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016 (hereinafter referred to as “IB Code”) for intervention and seeking appropriate directions of this Adjudicating Authority and has prayed for grant of reliefs as stated below.

**(a) Prayers as being sought for by IA 661 of 2020 (filed by Mr. Amit Gupta Successful Resolution Applicant) reads as under:**

- i. Allow the present application and pass an order that time to make the total payment under the Resolution Plan be reckoned from 27.01.2020 instead of 26.11.2019.

**(b) Prayers as being sought for in IA 1327 of 2020 (filed by Mr. Amit Gupta Successful Resolution Applicant) reads as under:**

- i. Permit the Successful Resolution Applicant to amend the Misc. Application No. 661 of 2020 by adding averments and carrying out amendment in the prayer clause;
- ii. Allow the present applicant and permit the Successful Resolution Applicant to make payment of the balance amount under the resolution plan within a period of 2 months from lifting/removing of all the attachments, charges, encumbrances and liens from the assets & properties of the Corporate Debtor.
- iii. Direct the Resolution Professional to take urgent steps to get the attachments, charges, encumbrances and lien from the assets & properties of the Corporate Debtor lifted and removed expeditiously.
- iv. Pass any other order/direction which this Hon'ble Court may deem fit and proper in the interest of justice and in the facts and circumstances of the present case.

**(c) Prayer sought for in the IA 1114 of 2020 filed by the State Bank of India (Financial Creditor) reads as under:**

- i. Order in IA No. 661 of 2020 filed by Sh. Amit Gupta, being the Successful Resolution Applicant as reserved on 26.02.2020 by this Hon'ble Adjudicating Authority be pronounced/released;

2. The brief facts of the present case those are necessary for disposal of these Applications are narrated as under:

i. The SBI being financial creditor has filed C.P. (IB) 1138 (MB) of 2017 before this Adjudicating Authority, the IB Petition came to be admitted and the CIRP in respect of the Corporate Debtor commenced vide an order dated 22.12.2017. Mr. Anil Kohli was appointed as the Interim Resolution Professional. Later on he was confirmed by the CoC to be appointed as the Resolution Professional. The Applicant Mr. Amit Gupta was the Successful Resolution Applicant as this Adjudicating Authority has approved his Resolution Plan vide order dated 26.11.2019 subject to certain directions to him.

3. **Submissions of the Applicant in IA 661 of 2020 and proposed to amend through amendment for the Application (IA 1327 of 2020) moved by him:**

(i) That the Company Petition No. (IB) 1138 (MB)/2017 was filed by the Financial Creditor (State Bank of India) for initiating Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor under Section 7 of the Code. It is submitted that this Tribunal vide its order dated 22.12.2017 admitted the petition and initiated the CIRP of the Corporate Debtor and appointed Mr. Anil Kohli as Resolution Professional.

(ii) The Applicant submits that the Resolution Plan submitted was approved by the Committee of Creditors (CoC) in the

meeting dated 04.06.2019 with a majority of 96.92% which became 100% after IDBI gave its consent. Accordingly, the Resolution Professional approached this Hon'ble Tribunal by filing an application (MA No. 2166/2019) under Section 30(6) of the Insolvency & Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) 2016 for approval of the Resolution Plan. This Hon'ble Adjudicating Authority vide order dated 26.11.2019 duly approved the Resolution Plan submitted by the Resolution Applicant subject to certain further directions.

- (iii) The Applicant submits that formerly this Hon'ble Adjudicating Authority was pleased to grant 30 months' time frame for making the total payment from the date of approval of the Resolution Plan. In this regard, this Hon'ble Tribunal, in paragraph 18(g) of its Order dated 26.11.2019 held – "*g) The total payment under the resolution plan shall be made within 30 months from the date of approval of resolution plan by this Bench.*" The Applicant submits that in terms of the order it started arranging for funds so that the total payment be made over the course of 30 months.
- (iv) However, the Applicant submits that Resolution Professional had filed an application before this Hon'ble Tribunal for correction of certain error occurred in the order dated 26.11.2019. It is submitted that the Resolution Professional opted not to make applicant / successful

resolution applicant as a party to the present Application, this Hon'ble Tribunal vide order dated 27.01.2020 carried out certain rectifications in the order dated 26.11.2019 based on the prayer made by the Resolution Professional and the time period mentioned in paragraph 18(g) of the order dated 26.11.2019 was reduced to 3 months from the date of approval of the Resolution Plan. Notably, this Applicant was not given a notice of the application made by the Resolution Professional seeking rectification of the said order dated 26.11.2019.

- (v) The Applicant submits that the Resolution Professional sent the copy of the order dated 27.01.2020 to the Applicant only on 11.02.2020. The Revised time schedule to make the payment of the amount was expiring on 25.02.2020. In the above circumstances, the Applicant had hardly any time to arrange balance funds to make the payment. Further the Applicant submits that it was in these circumstances that the Applicant made an Application before this Hon'ble Tribunal (being MA No. 661 of 2020) seeking extension of the time for making payment.
- (vi) The Applicant further submits that a payment of **Rs. 29.35 Crore (Rs. 10.00 Crores as EMD, Rs. 19.75 Crores as performance security deposit and Rs. 0.10 Crores to Operational Creditors)** under the Resolution Plan keeping in mind 30 months' time period against the total Resolution Plan consideration of **Rs. 87.10 Crore**. Thus, the Applicant

had to make payment of Rs. 57.75 Crore towards balance consideration towards Resolution Plan.

- (vii) Accordingly, the Applicant filed an application being MA No. 661/2020 requesting this Hon'ble Tribunal that time period for making payment of amount due under the Resolution Plan be reckoned from 27.01.2020 instead of 26.11.2019.
- (viii) The Applicant submits that due to Covid-19 pandemic and Nationwide Lockdown, announced on 24.03.2020, the functioning of the Courts/ Tribunals remained suspended therefore, the order in the Application being MA No. 661/2020 could not be pronounced. Therefore, this Hon'ble Tribunal vide order dated 19.08.2020 directed de novo hearing of the matter.
- (ix) The Applicant submits that the amendment application being IA 1327 of 2020 was filed in view of the facts and circumstances and new development in the matter which has caused hindrance/problems in the effective implementation of the resolution plan.
- (x) The Applicant submits that it is relevant to note that for the purposes of making payment as the successful Resolution Applicant, the Applicant had applied for funding. The fact that the Applicant intended to obtain funding from HDFC Bank Ltd has been recorded in paragraph 18(c) the said Order dated 26.11.2019. HDFC Bank Ltd addressed a letter dated 10.3.2020 to the effect that the Applicant's proposal

for funding could be processed only after receipt of the NOC from the MPID Court and ED etc., that the charges on the property are satisfied.

- (xi) The Applicant submits that it kept on enquiring from the Resolution Professional about the attachment proceedings initiated by the Directorate of Enforcement, Mumbai, Competent Authority under MPID Act, notices issued by the Custom & Excise Department etc, including removal of DEL status as per the Foreign Trade (Regulation) Rules 1993 and also removing lien marks on the immovable properties of Corporate Debtor, Dunar Foods Ltd.
- (xii) It is further submitted that Resolution Professional used to represent that he is taking care of the interest of the assets of the Corporate Debtor. The Applicant requested the Resolution professional to remove lien marked and encumbrance created in the properties/assets of Dunar Foods Ltd. / Corporate Debtor. The Resolution Professional vide email dated 12.12.2019 informed the Applicant that only operation of the Corporate Debtor has been handed over to the Applicant and not the Corporate Debtor. Resolution Professional further informed that any representation on behalf of Corporate Debtor can be done by the Resolution Professional chairing the Monitoring Committee. The Resolution Professional further informed that there are numerous matters adjudicated before various

court of law and warned the Applicant not to take up any matter except the operation.

- (xiii) The Applicant submits that the Resolution Professional had categorically informed that the Resolution Professional will keep on pursuing the legal matters and the Applicant does not have to get himself involved in the matters. The Applicant bona-fidly believed the Applicant will get clear and marketable title of the immovable properties / assets and trademark of Dunar Foods Ltd. free from all encumbrances, lien mark, attachment, injunction and proceedings by the Statutory Authority.
- (xiv) The Applicant submits that it is important to highlight that Paragraph 21 of the order dated 26.11.2019 which is produced herein below for the sake of convenience:

*“21. As far as question of waiver of outstanding statutory dues and other claims as on the date of approval of the Resolution Plan is concerned, the Resolution Applicant, who will step into the shoes of Corporate Debtor subsequent to approval of Resolution Plan by the Bench, shall not be held responsible for any outstanding statutory dues and other claims for the period before commencement of CIRP.”*

- (xv) It is specifically ordered by this Hon'ble Tribunal that the Applicant shall not be held responsible for any outstanding statutory dues and other claims for the period before

commencement of CIRP. However, the attachment and encumbrances have not been removed till date which has caused serious prejudice to the Applicant.

- (xvi) The Applicant submits that when resolution plan was filed the Applicant had given the source of fund for making payment under the resolution plan. The Applicant had filed EOI received from HDFC Bank for Rs. 77 Crore for making payment of the amount under the resolution plan. This Hon'ble Tribunal has mentioned this fact in paragraph 18(a) of the order dated 26.11.2019. However, due to attachment and encumbrances, the Bank has not sanctioned the loan.
- (xvii) It is submitted that immediately after commencement of Corporate Insolvency Resolution Process on 22.12.2017, the Directorate of Enforcement, Mumbai Zonal Office vide Provisional Attachment Order dated 26.12.2017 (PAO) attached the properties of the Corporate Debtor under Prevention of Money Laundering Act.
- (xviii) The Applicant submits that on 11.06.2018, the Ld. Adjudicating Authority under Prevention of Money laundering Act confirmed the Provisional Attachment order dated 26.12.2017. Thereafter, the Resolution Professional filed an appeal against the order dated 11.06.2018 before the Appellate Tribunal under Prevention of Money Laundering Act, New Delhi. The Ld. Appellate Tribunal under PMLA has issued notice on the said appeal filed by the Resolution Professional against the confirmation of attachment of the

Properties of the Corporate Debtor under PMLA. The said appeal is still pending before the Ld. Adjudicating Authority and is coming up for hearing on 19.10.2020. It is evident that the properties of the Corporate Debtor are under attachment under PMLA and the same can only be freed from encumbrances and attachment once the Appellate Tribunal under PMLA allows the appeal filed by the Resolution Professional.

- (xix) The Applicant submits that Competent Authority under MPID Act had issued Gazette Notification and attached the properties of the Corporate Debtor including trade mark vide gazette notification dated 28.08.2014 consequent upon registration of FIR being EOW CR No. 89/2013 against the Corporate Debtor and others. The Resolution Professional filed an application being MA No. 237/2018 before the MPID Court and had sought direction from the Ld. MPID Court for transfer of the properties attached by the Competent Authority under MPID Act to the Resolution Professional. The said application filed by the Resolution Professional was rejected vide order dated 28.12.2018.
- (xx) The Applicant further submits that aggrieved by the order dated 28.12.2018, the Resolution Professional filed an appeal being Criminal Appeal No. 163/2019 before the Hon'ble High Court of Judicature at Bombay. The Hon'ble High Court of Bombay vide order dated 15.04.2019 admitted the appeal. The Hon'ble High Court was pleased

to give liberty to the Resolution Professional to apply to the Hon'ble MPID Court in terms of paragraph 11 of the order dated 28.12.2018.

- (xxi) The Applicant submits that the Resolution Professional did not take any action immediately after passing of the order dated 15.04.2019 by the Hon'ble High Court of Bombay. The Successful Resolution Applicant came to know that the Resolution Professional filed an application before the Hon'ble MPID Court objecting to the attachment of the Properties by the Competent Authority under MPID Act only in the month of January 2020. The Successful Resolution Applicant submits that the Hon'ble MPID Court was pleased to hear arguments on the application / objections filed by the Resolution Professional on 13.03.2020 and the matter was, accordingly, adjourned to 19.03.2020 for order. On 19.03.2020, the matter was adjourned to 30.03.2020 for order. However, due to Covid-19, the matter has been adjourned from time to time and now is listed before the Ld. MPID Court on 28.08.2020.
- (xxii) It is submitted that the Resolution Professional filed an application (MA No. 129/2018) before Hon'ble NCLT, Mumbai Bench contending that the Directorate of Enforcement, Mumbai has issued Provisional Attachment Order dated 26.12.2017 after commencement of the CIRP on 22.12.2017 and therefore, the Provisional Attachment Order of the Directorate of Enforcement should be quashed.

This Hon'ble Tribunal vide order dated 16.05.2018 was pleased to pass order in the said application (MA NO. 129/2018) and was pleased to dispose of the application directing the Resolution Professional to contact to the EOW and the ED and take measures in terms of the said order.

- (xxiii) The Applicant submits that aggrieved by the order dated 16.05.2018 passed by this Hon'ble Tribunal, the Resolution Professional filed an appeal before the Ld. NCLAT, New Delhi being Company Appeal (AT) No. 389/2018. The Hon'ble NCLAT vide order dated 23.07.2018 was pleased to issue notice on the said appeal to the Directorate of Enforcement. The Applicant submits that the online search of the status of the aforesaid appeal would show that the aforesaid appeal was listed on more than 20 occasions for hearing and the next date of hearing in the said appeal in 08.09.2020.
- (xxiv) The Applicant submits that there still exist attachment on the assets / properties of the Corporate Debtor by the ED and Competent Authority under MPID Act. After passing of the order dated 26.11.2019 and 27.01.2020 the Successful Resolution Applicant has been continuously corresponding with the Resolution Professional and requested several times and there exists charge/ attachment of MPID Court, ED and also charge of excise department of Amritsar Property. The Successful Resolution Applicant requested the Resolution Professional to take serious actions in order to

lift and vacate the charges on the assets of the Corporate Debtor expeditiously and remove lien/ charges.

- (xxv) The Applicant submits that the Resolution Professional vide email dated 06.05.2020 informed the Successful Resolution Applicant that the Successful Resolution Applicant had accepted the Letter of Intent unconditionally and therefore, the Successful Resolution Applicant should make payment of the balance amount of Rs.57.75 Crore out of the total Resolution Plan consideration of Rs. 87.10 Crore. The Resolution Professional informed that 3 months period for making payment, even if the Resolution Applicant goes by the prayer of the Resolution professional (in MA 661/ 2020) expires on 27.04.2020. Accordingly, the Resolution Professional informed that consequences will follow subject to the orders of the Hon'ble NCLT. It is relevant to mention that the said communications were exchanged during the countrywide lockdown. Due to the lockdown and suspension of work of this Hon'ble Tribunal, even the orders in MA No. 661 of 2020 could not be pronounced.
- (xxvi) The Applicant submits that an email dated 12.05.2020 to the Resolution Professional / monitoring professional and requested to take appropriate steps for lifting of the attachments on the assets of the Corporate Debtor. It is relevant to mention that the Resolution Professional was appointed as Monitoring Professional for successful implementation of the Resolution Plan. Therefore, the

Monitoring Professional is under obligation to hand over the assets of the corporate debtor free from all attachments and encumbrances. However, the Monitoring Professional is not able to hand over the corporate debtor free from all attachments and encumbrances. There is no definite time for lifting and removal of attachments and encumbrances from the assets of the corporate debtor.

- (xxvii) The Applicant further submits that vide email dated 22.05.2020 referred to the contents of the Resolution Plan wherein the Successful Resolution Applicant categorically written that no future claim would lie against the Corporate Debtor.
- (xxviii) The Applicant submits that there is demand amounting to Rs.2,05,34,231/- of Punjab State Power Corporation Limited regarding pending claim of bill of electricity connection of the Corporate Debtor for the CIRP period i.e. from 06.12.2017 till 22.12.2017, i.e. prior to handing over the operation of Corporate Debtor to the Applicant pursuant to order dated 26.11.2019 passed by the Hon'ble Tribunal. The Applicant submits that due to non – settlement of the electricity dues by the Resolution Professional for the said CIRP period, bills are piling up which would lead to disconnection of the electricity in the factory premises. The Applicant cannot request the PSPCL to reduce the load or enhance the load unless the entire due for the CIRP period is settled by the Resolution Professional. Due to the above

issues, the Applicant had to shut down the factory which had 60% production capacity of the factory units of the Corporate Debtor.

- (xxix) The Applicant submits that the doctrine of clean slate stipulates that after the culmination of the CIRP, of the pending claims qua the Corporate Debtor shall be extinguished and the Successful Resolution Applicant shall take over the Corporate Debtor with clean slate. However, even after making the payment of Rs.29.35 Crore and every intent to pay the balance amount, the Corporate Debtor is not transferred to the Applicant free from all encumbrances, attachment and charges. The Successful Resolution Applicant has transferred the operations of the Corporate Debtor, however, in reality the Successful Resolution Applicant has no absolute control over the affairs of the Corporate Debtor.
- (xxx) It is submitted that the clean slate doctrine clearly shows that the Successful Resolution Applicant should not be saddled with past claims and attachments. Further, the intent of the legislation while enacting IBC is to ensure revival of the Corporate Debtor with clean slate so that the Successful Resolution Applicant may start the Corporate Debtor afresh free from all attachments, charges, and encumbrances. However, the Successful Resolution Applicant is not able to enjoy the assets of the Corporate Debtor free from claims, attachments, charges and lien etc.

(xxxi) The Applicant submits that by virtue of Section 32A of the IBC, there could be no question of the Applicant, as the successful Resolution Applicant, being saddled with the outstanding dues of the MPID, ED etc. Section 32A is retrospective in operation.

(xxxii) The Applicant while arguing has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *“Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (2019 SCC OnLine1478)”* held that:

*88. .... A successful resolution Applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution Applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution Applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.*

(xxxiii) The NCLAT in the case of *Committee of Creditors of Educomp Solutions Ltd. vs. Ebix Singapore Pte. Ltd. and Ors. (29.07.2020 - NCLAT) : (2020 SCC OnLine NCLAT 592)* held that :

97. “The 2<sup>nd</sup> respondent.....Further, the CBI and SFIO proceedings initiated against the 'Corporate Debtor' are pending and hence, and in any event Section 32A of the 'I&B' Code grants immunity to the 1st Respondent/'Resolution Applicant' in respect of the offences committed by the 'Corporate Debtor' before the start of 'CIRP'. Also, that it specifies that the assets of the 'Corporate Debtor' as represented will be available in the right manner as at the time of furnishing of 'Resolution Plan”

- (xxxiv) The Applicant further submits that it is relevant to mention that this Hon’ble Tribunal while approving the Resolution Plan vide order dated 26.11.2019 was pleased to grant liberty for filing application in connection with the implementation of the Resolution Plan. Relevant portion of the order dated 26.11.2019 is reproduced herein below:

“22...that liberty is hereby granted for moving any Miscellaneous Application if required in connection with implementation of this Resolution Plan.....”

- (xxxv) Thus, the Applicant has *inter-alia* invoked the jurisdiction of this Hon’ble Tribunal by filing this Application for implementation of the Resolution Plan based on the liberty granted to the applicant in *paragraph 22 Supra*. This Hon’ble Tribunal under Rule 11 of the NCLT Rules 2016 has its inherent powers to make any or such orders as may be

necessary for meeting the ends of justice or to prevent abuse of process of the Tribunal.

(xxxvi) The Applicant submits that the applicant had requested this Hon'ble Tribunal to grant relief in terms of the prayer made in the amendment Application so that resolution plan as approved by this Hon'ble Tribunal may be implemented and the Successful Resolution Applicant may get the assets of the Corporate Debtor free from all attachment, charges, encumbrances and liens etc. However, the situation remains the same. There is no progress made. Despite expiry of 1 year from the approval of the Resolution Plan all the attachments, encumbrances and charges are existing on the assets of the Corporate Debtor.

(xxxvii) In the meantime, State Bank of India (Financial Creditor) filed an application being MA No. 1114/2020 requesting this Hon'ble Tribunal to pronounce order in MA No. 661/2020. The Financial Creditor submits that due to delay in implementation of the Resolution Plan the CIRP cost is increasing which is prejudicial to all stakeholders, the Financial Creditor constitutes 80.03% of the CoC. Therefore, the Financial Creditor is seeking expeditious disposal of the Application filed by the Successful Resolution Applicant.

4. **Submissions of the Respondent/RP by way of Affidavit in Reply:**

- (i) The Respondent submits that 10th meeting of the CoC was convened on 11.01.2019, wherein the Respondent apprised of the members of the CoC that pursuant to the last meeting the revised plan was submitted by Mr Amit Gupta. CoC observed that as apprised during the last meeting both the plans suffer from certain shortcomings and also had conditions precedent. The two major conditions precedent stipulated in their plan (which now stands as final plan) i.e. one in respect of the two land parcels and other being the removal of the attachments on assets, were impediment in the resolution plan process as these conditions' precedent make plans non-starter and hence not feasible & viable. The CoC in its wisdom & authority advised the Resolution Applicants to cure the shortcomings and remove the conditions precedent and accorded a final opportunity to cure the same. CoC further impressed upon them to improve the financial consideration and the payment terms.
- (ii) It is further submitted that the Resolution Applicants requested that the plan without financial consideration to be submitted by Monday 14th Jan 2019 and financial consideration to be submitted in a sealed envelope by Tuesday 15th Jan 2019 by 11:30 AM. The RP will verify the compliances of the plans without financial consideration (i.e. only technical one) and subsequently the financial consideration part of only those plans will be

opened which are unconditional and compliant with the Code and regulations.

- (iii) **The Respondent submits that pursuant to above decision of CoC in its 10th meeting Shri Amit Gupta submitted the revised plan (both technical and financial) on 14.01.2019 removing conditions precedent and agreeing to the CoC observations. The original resolution plan proposed by M/s. PCL Foods was hence considered, which was found non-compliant with the Code having contained several conditions precedent and plan by Mr. Amit Gupta was considered compliant with the Code barring some curing which was required in some respects. Shri Amit Gupta (“PRA”) was advised to further cure the plan and further requested to incorporate a few other points as suggested by CoC.**
- (iv) **The Respondent submits that in the 11th meeting of the CoC convened on 28.03.2019, the Respondent apprised the CoC about the contours of the revised resolution plan submitted by Mr. Amit Gupta (Resolution Applicant). The members of the CoC decided to put the revised resolution plan for voting in the next meeting of the CoC and same was approved.**
- (v) **The Respondent submits that pursuant to approval of the Resolution Plan by the CoC, the Respondent issued a Letter of Intent dated 04.06.2019 to the Resolution Applicant inter-alia informing the resolution applicant that**

the revised resolution plan as submitted before the CoC was approved and **accordingly, the resolution applicant was requested to convey their unconditional acceptance. The resolution applicant duly submitted their unconditional acceptance.**

- (vi) The Respondent submits that an application being M.A. 2166/2019 for approval of resolution plan under section 30(6) and 31 of the Code. That this Hon'ble Adjudicating Authority vide order dated 26.11.2019 approved the Resolution Plan submitted under Section 31(1) of the Code.
- (vii) The Respondent submits that the first meeting of the lenders was held on 04.12.2019 which was duly attended by the Applicant wherein, it was discussed that there are certain inadvertent typographical errors in the order dated 26.11.2019 passed by this Hon'ble Adjudicating Authority. Upon discussions, the participants were apprised of that the rectification application being M.A. NO. 3977/2019 under Section 154 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules") is filed with this Hon'ble Tribunal for getting the same rectified on the same lines as was approved by the CoC in its 12th meeting held on 04.06.2019. The Respondent further submits that this Hon'ble Adjudicating vide order dated 27.01.2020 allowed the Application and made the requisite corrections.

(viii) The Respondent submits that the copy of the order dated 27.01.2020 was shared with the Applicant vide email dated 11.02.2020 i.e. immediately the next day when the order was published on website of NCLT.

(ix) The Respondent submits that as on date, the Resolution Applicant has only made the following payments: -

S.NO.	Amount of Payment (In INR)	Date of Payment
1.	EMD of Rs. 5 Crore	01.08.2018
2.	EMD of Rs. 5 Crore	06.06.2019
3.	Performance Security of Rs. 15 crore	11.06.2019
4.	Performance Security of Rs. 4.25 crore	03.07.2019
5.	Amount paid to Operational Creditors – Rs. 10 lakhs	14.01.2020

(x) The Respondent submits that Applicant did not serve a copy of the Amended Application within a period of one week as directed by this Hon'ble Adjudicating Authority and accordingly, the Respondent through his counsel sent an email seeking a copy of the application filed by the Applicant. Accordingly, a copy of an Amended Application was received on 29.08.2020 and the Respondent was shocked to see that the Applicant by way of amendment to Application being M.A. 661/2020 has not brought any additional and material facts on record rather has sought a completely new case and

**different relief from this Hon'ble Adjudicating Authority thereby under the garb of amendment is now trying to modify the terms and conditions of the approved Resolution Plan.**

- (xi) The Respondent submits that it is well settled position of law that as a general rule, leave to amend will be granted to enable the real question in issue between the parties to be raised in pleadings, where the amendment will occasion no injury to the opposite party and can be sufficiently compensated for by costs or other terms to be imposed by the order.
- (xii) The Respondent submits that it is pertinent to mention here that originally the Applicant filed an application being M.A. No. 661/2020 before this Hon'ble Adjudicating Authority seeking the following relief: -

**Allow the present application and pass an order that time to make the total payment under the Resolution Plan be reckoned from 27.01.2020 instead of 26.11.2019.**

**Further, the Respondent submits that that the grounds raised in the present application including seeking a condition precedent that the Applicant will only pay once the attachments will be lifted is not only the real question as the Resolution Applicant whilst submitting its resolution plan and whilst the same was approved**

**by the Committee of Creditors was well aware of that the same was never a condition precedent for making payments in terms of the approved resolution plan.**

**Under the garb of amendment, the Applicant is seeking relief, which is beyond the original relief sought.**

(xiii)The Respondent submits that the resolution plan as approved by this Hon'ble Adjudicating Authority and as per the Resolution Plan of the Applicant, the Applicant was required to make the entire payment within 3 months of the approval of the resolution plan. **Therefore, the Respondent submits that the Applicant has taken a contrary stand to its own resolution plan which he has himself signed and submitted.**

(xiv)The Respondent submits that the Applicant by not adhering to the terms of the approved resolution plan i.e. to make payment within 3 months of the approval date has admittedly contravened the resolution plan and is liable for the consequences under Section 74 of the I & B Code, 2016.

(xv) The Respondent submits that the Applicant in the present amendment application has not only changed the cause of action on which M.A. No. 661 of 20200 was filed but now is completely setting up a fresh case. The relief sought in the present application by the Applicant that the Applicant be permitted to make payment of the balance amount under the resolution plan within a period of 2 months from

lifting/removing of all the attachments, charges, encumbrances and liens from the assets & properties of the Corporate Debtor, which is not only a completely new relief, but the same is even beyond the Applicant's own admission and resolution plan.

(xvi) The Respondent submits that it has been duly recorded in the order dated 26.11.2019 passed by this Hon'ble Adjudicating Authority that the Applicant herein removed the condition precedent with regard to attachment on the assets of the Corporate Debtor. Relevant extract of the order dated 26.11.2019 is reproduced herein under: -

*“11. The RP has submitted that Mr. Amit Gupta submitted the revised plan (both technical and financial) on 14.01.2019 removing conditions precedent and agreeing to the CoC observations. Thereafter, in the 11th CoC meeting dated 28.03.2019, Mr. Amit Gupta filed a revised resolution plan on the advise of CoC to further cure the plan.”*

(xvii) The Respondent has relied on the judgment dated 08.11.2019 passed by the Hon'ble Supreme Court in the matter of Rahul Jain versus Rave Scans Pvt. Ltd. & Ors. in Civil Appeal No. 7940 of 2019 (Citation - (2019) 10 SCC 548: 2019 SCC Online SC 1447 at page 553) wherein it was held as under:

“13. In the present case, it is noticeable that no doubt, Hero was provided with 32.34% of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd. was provided with 75.63% of its admitted claim; other financial creditors (Indian Overseas Bank, Bank of Baroda and Punjab National Bank) were provided with 45% of their admitted claims. Given that the resolution process began well before the amended regulation came into force (in fact, January, 2017) and the resolution plan was prepared and approved before that event, the wide observations of the NCLAT, requiring the appellant to match the payout (offered to other financial creditors) to Hero, was not justified. The court notices that the liquidation value of the corporate debtor was ascertained at 36 crores. Against the said amount, the appellant offered 54 crores. The plan was approved and, except the objections of the dissenting creditor (i.e Hero), the plan has attained finality. Having regard to these factors and circumstances, it is held that the NCLAT’s order and directions were not justified. They are hereby set aside; the order of the NCLT is hereby restored.”

(xviii) The Respondent submits that the Applicant by way of the present application cannot seek a relief which will not only

modify the resolution plan but will also put a condition precedent in the resolution plan for implementation, which was not there when the resolution plan was submitted before the Committee of Creditors or before this Hon'ble Adjudicating Authority.

5. **Submissions of the Applicant by way of Rejoinder:**

- (i) The Applicant submits that the Resolution Professional has misconstrued the meeting of the CoC. It is submitted that the Applicant was persuaded by the Resolution Professional to file a revised plan and accordingly, the Applicant filed the revised plan.
- (ii) The Applicant submits that the revised Resolution Plan was filed on 07.01.2019. The Applicant has sought complete waiver of all the outstanding statutory and other claims and dues as on the date of approval of the Resolution Plan from this Hon'ble Tribunal. The Applicant had also sought waiver of all the ascertained and contingent claims, dues and debt as on the date of approval of the Resolution Plan by this Hon'ble Tribunal. The Applicant has categorically mentioned that the assets of the Corporate Debtor should be given free from any charge or lien by the financial creditor. The Applicant has also mentioned that all the assets of the Corporate Debtor tangible or intangible should be free from all encumbrances, lien and charge etc. from the law enforcing agency from the date of approval of the resolution plan and should be available for the use of the Applicant without any fetters.
- (iii) The Applicant submits that the Letter of Intent (“LOI”) was issued by the Resolution Professional. However, the issuance of LOI does not

mean that the assets of the Corporate Debtor cannot be utilized by the Applicant for an indefinite period due to the existence of the encumbrances/attachments/lien marks amounting to more than Rs. 5,600 Crores. There is no definite timeline for the removal of the attachments and encumbrances despite expiry of substantial period. It is the duty of the Resolution Professional to implement the Resolution Plan within the time granted by this Hon'ble Tribunal.

- (iv) Further, the Applicant submits that even if, it is assumed that the Resolution Applicant was to make payment within 3 months, the removal of attachment, lien and encumbrances are also to be completed within the same time period, i.e. 3 months. However, there is uncertainty about the removal of the attachments and encumbrances. It is evident that the Monitoring Professional has failed to complete its part of obligations within the time granted by this Hon'ble Tribunal.
- (v) The Applicant submits that due to declaration of lockdown, the Applicant has suffered in terms of business operations as the Applicant's substantial sum of money remains unutilized and the operations of the Corporate Debtor have also taken a tremendous hit.
- (vi) The Applicant denies the set-up of a new case or has sought new relief. Further the Applicant submits that the payment of balance amount under the resolution plan cannot be de-linked with making available attachment free, encumbrance free assets of the corporate debtor. It is well settled that technicalities should not be allowed to stand in the way while doing complete justice as the rules for procedure are meant for advancing the cause of justice. The Applicant has legitimate expectation that the entire assets of the Corporate

Debtor would be made available without any attachments, encumbrances and charges. The Resolution Professional has completely failed to make available the assets of Corporate Debtor free from any attachments, encumbrances and charges.

- (vii) The Respondent submits with respect to the issue of maintainability that, it is necessary to refer to Section 60(5) of the IBC and also Rule 11 of The National Company Law Tribunal Rules, the aforesaid Rule categorically states that this Hon'ble Tribunal is vested with such powers so as to pass such an order as may be necessary for meeting the ends of justice or to prevent abuse of the process of this Hon'ble Tribunal.
- (viii) The Respondent submits that this Hon'ble Tribunal was pleased to grant liberty to file amendment application. Therefore, it is not open for the Resolution Professional to raise this issue of maintainability.
- (ix) The Respondent submits that since the captioned miscellaneous application being *bona fide* in nature and allowing of the same by this Hon'ble Tribunal would not cause any prejudice whatsoever to the rights of the Respondent/Resolution Professional or even to the stakeholders of the Financial creditors.
- (x) The Respondent has placed reliance on the order of the Hon'ble National Company Law Tribunal, New Delhi Bench while dealing with an issue of amendment under The Companies Act, 2013 in the case of *Anil Dwarika Prasad Agarwal v. Mahamaya Infrabuild Pvt. Ltd. and Others* had held as under:

*“The law on the point of amendments is very liberal. In view of the pleadings already on record, this Bench is of the opinion that no new case is sought to be set up by the petitioners by way of*

*amendments. These shall also not cause any irreparable prejudice to the respondents as in a manner of speaking are taking care of the rebuttal to the submissions made by the respondents and which also find a mention in the Rejoinder on record. The amendments, upon incorporation, shall elucidate the pleadings. The amendment to the prayer clause is consequential to the pleadings.”*

- (xi) The Hon’ble National Company Law Tribunal, Mumbai Bench while dealing with an issue of amendment under The Companies Act, 2013 in case of Mr. Prabhat Jhunjunwala v. Unicom Skytech Ltd. and Ors. had held as under:

*4.1. “The precedent cited by Learned Representative is examined. In some of the cases a view has been taken that the Courts should be liberal in granting the prayer for amendment of pleadings. The only condition is that such amendment should not cause serious injustice or irreparable loss to the other side. It has also been held in some cases that the ‘rule of amendment is a rule of justice.’ The amendments which are necessary for determining the real question in controversy should not cause any injustice or prejudice to the other side. Some of the cases have said that under Order 6 Rule 17 of C.P.C. also allows amendment in the pleadings if found to be necessary to determine the real question of controversy. In one precedent cited a summary of the settled legal proposition pertaining to amendment of a Petition is enlisted. According to the said requirement of amendment as enumerated in the said precedent are that the Court may at any stage of proceedings can either allow or partly allow amendment for the purpose of determining the real question in controversy. The Tribunals are quasi-judicial authority*

*hence guided by the principals of natural justice. I therefore hold that, the amendment is not causing any prejudice to the Petitioner for disposal of the Petition and prima facie the amendments are necessary to adjudicate the petition. As a result, I hereby hold that the Petitioner shall amend the petition as indicated in CA 123 of 2016 and shall not go beyond the reliefs sought by filing an amended petition on or before 30th of January, 2017. Thereafter the Respondent is at liberty to file a Reply within 2 weeks time. On completion of the pleadings the matter be enlisted for hearing on 1st of March, 2017”.*

- (xii) The Hon’ble Supreme Court while dealing with the issue of amendment of pleadings in the case of Sampath Kumar v. Ayyakannu, (2002) 7 SCC 559 has held as under:

*9. “Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice*

*to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment”.*

- (xiii) The Applicant submits that the reliefs sought are in no manner seeking reliefs beyond the resolution plan as approved by this Hon’ble Tribunal. The Applicant has sought leave of this Hon’ble Tribunal on 19.08.2020. Further, this Hon’ble Tribunal was pleased to permit the Applicant to file an appropriate application. Therefore, the objections raised by the Resolution Professional is without any merits. The captioned interlocutory application has been necessarily filed for the purpose of implementation of the resolution plan.
- (xiv) The Applicant submits that there is no prayer made in the captioned interlocutory application except for implementation of the resolution plan approved by this Hon’ble Tribunal vide order dated 26.11.2019. This Hon’ble Tribunal was pleased to hold in paragraph 21 of the order dated 26.11.2019 that the Applicant shall not be held responsible for any outstanding statutory dues and other claims for the period before commencement of CIRP. It is the obligation of the Resolution professional to ensure that the direction contained in paragraph 21 of the order dated 26.11.2019 are implemented in the letter and spirit which the Resolution Professional has failed to do.
- (xv) The issues arose related to attachment by Enforcement Directorate has considered by Hon’ble National Company Law Tribunal which covers issue squarely by the order dated 09.04.2021 in the matter of **The Directorate of Enforcement Vs Sh Manoj Kumar Agarwal And**

**Ors.** in Company Appeal (AT) (Insolvency) No.575/2019 wherein it was held as under:

*“34. It appears to us that if the aims and objects of IBC are to be achieved, and maximisation of value is material so as to reach a resolution, above acts in time bound manner are to be performed and there cannot be obstructions of attachments and seizures existing. If the property is under attachment or seizure, or possession is taken over, keeping the corporate debtor a going concern would be serious issues. Without the properties in possession of IRP/RP getting valuation done during CIRP or even liquidation stage, would be issues. Attachment remaining in force would affect value of the property and prospective applicants may not respond in the manner in which they would, if the property is not under active attachment or seizure.*

*38. In PMLA offence of money laundering is defined and punishment prescribed in Chapter 2. Chapter 7 deals with special courts for trial of offence punishable under Section 4 which is found in Chapter 2. The offences are triable by Special Courts under Section 44 and the offence are cognizable and non-bailable as per Section 45. Section 46 applies Code of Criminal Procedure before Special Court. There is provision of Appeal and Revision to the High Courts under Section 47 of PMLA. Thus, there is demarcation with regard to the attachment of property done under Section 5 of PMLA which is to be adjudicated under Section 8 before the Adjudicating Authority who has to deal with confirmation of attachment under Section 8 (3) of PMLA. On confirmation, the attachment continues during investigation for a period not exceeding 365 days or pendency of the proceedings relating to the offence under PMLA before a Court or under the corresponding law*

*of any other country or before the Competent Court of any jurisdiction outside India as the case may be. The attachment confirmed by Adjudicating Authority becomes final after an order of confiscation passed under sub-section 5 or sub-section 7 of Section 8 or Section 58B or sub-section (2-A) of Section 60 by the special Court. It appears that because of such demarcations, the Government stated before the Hon'ble Supreme Court of India that the functions as regards the Adjudicating Authority are civil in nature to the extent that it does not decide on the criminality of the offence nor does it has power to impose penalty or impose punishment.*

*39. Taking aid from this, it appears to us that after the attachment when matter goes before the Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature. That being so, Section 14 of IBC would be attracted and applies. In present matter, the Provisional Attachment took place on 29th May, 2018 and corrigendum was issued on 14th June, 2018. The CIRP started on 16th July, 2018. Once moratorium was ordered, even if the Appellant moved the Adjudicating Authority under PMLA, further action before Adjudicating Authority under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done on 20th November, 2018, the same will have to be ignored. Section 14 of IBC will hit institution and continuation of proceedings before Adjudicating Authority under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur. (.....)*

***42. In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is***

*belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.”*

6. On the basis of above narrated factual and legal matrix of the present case, we examined the merits of the present IA in the light of the latest decisions of the Hon’ble Supreme Court in **Ghanshyam Mishra and Sons Private Limited v/s Edelwise Assets Reconstruction Company Limited** and further in the matter of **JayPee Kensington Boulevard Apartments Welfare LTD Association and others v/s NBCC (India) and CoC of Essar Steel v/s Satish Kumar Gupta** along with decision of Hon’ble NCLAT in the matter of Directorate of Enforcement v/s Manoj Kumar Agrawal etc.
7. The relevant portion of the order pronounced by the Hon’ble Supreme Court in the Ghanshyam Mishra case is being reproduced herein below.

*87. We have no hesitation to say, that the word “other Stakeholders” would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omissions, certain tax authorities were not abiding by the mandate of IB Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. We therefore, hold that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.*

88. *There is another reason, which persuades us to take the said view.*

*Sub-section (10) of Section 3 of the IB Code defined “Creditor” thus:*

*“(10) “Creditor” means any person to whom a debt is owed and includes a Financial Creditor, an Operational Creditor, and Secured Creditor, an Unsecured Creditor and a Decree holder.*

89. *Sub Sections (20) and (21) of Section 5 of the IB Code define “Operational Creditor” and “operational debt” respectively as such:*

*(20) “Operational Creditor” means a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred:*

*(21) “Operational Debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority:*

90. *“Creditor” therefore, has been defined to mean any person to whom a debt is owed and includes a Financial Creditor, an Operational Creditor, a Secured Creditor, an Unsecured Creditor and a Decree Holder.*

*“Operational Creditor” has been defined to mean a person to whom an Operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.*

*“Operational Debt” has been defined to mean a claim in respect of the provision of goods or services including employment or a debt in*

*respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.*

*91. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of Sub-Section (10) of Section 3 of the IB Code read with Sub-Section (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any Local authority would come within the ambit of “Operational Creditor”. The Central Government, any State Government or any local authority to whom an Operational Debt is owed would come within the ambit of “Operational Creditor” as defined under Sub-Section (20) of Section 5 of the IB Code. Consequently, a person to whom a debt is owed would be covered by the definition of creditor as defined under sub-section (10) of Section 3 of the IB code. As such, even without the 2019 amendment, the Central Government, any State Government and any local authority to whom a debt is owed, including the statutory dues, would be covered by the term ‘creditor’ and in any case, by the term ‘other stakeholders’ as provided in sub-section (1) of Section 31 of the IB Code.*

*92. The Division Bench of the Rajasthan High Court in D.B Civil Writ Petition No. 9480 of 2019 in the case of **Ultra Tech Nathdwara Cement Ltd. vs. Union of India and others.**, by judgment and order dated 07.04.2020 has taken a view, that the demand notices, issued by the Central Goods and Services Tax Department, for a period prior to the*

date on which NCLT has granted its approval to the Resolution Plan, are not permissible in law. While doing so, the Rajasthan High Court has relied on the judgment of this Court in the case of **Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra)**.

93. The Calcutta High Court in the case of **Akshay Jhunjhunwala and Anr. Vs. Union of India through the Ministry of Corporate Affairs and ors**, has also taken a view, that the claim of Operational Creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. We are in agreement with the views taken by these Courts.

94. Therefore, in our considered view, the aforesaid provisions leave no manner of doubt to hold, that the 2019 amendment is declaratory and clarificatory in nature. We also hold that even if 2019 amendment was not effected, still in the light of the view taken by us, the Central Government, any State Government or any local authority would be bound by the resolution plan, once it is approved by the Adjudicating Authority (i.e. NCLT).

### **Conclusion**

95. In the result, we answer the questions framed by us as under:

- i. That once a Resolution Plan is duly approved by the Adjudicating Authority under Sub-Section (1) of Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor and its

*employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to claim, which is not part of the Resolution Plan.*

- ii. *Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the Resolution Plan, shall stand extinguished and no proceedings in respect of such dues of the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.*

In addition to above the Hon'ble Supreme Court in the matter of Jaypee Kensington v/s NBCC (India) Limited also pleased to observe and held as under;

**Summation of findings: final order and conclusion**

*216. For what has been discussed and held on the relevant points for determination, our findings and conclusions are as follows:*

- A. *The Adjudicating Authority has limited jurisdiction in the matter of approval of a Resolution Plan, which is well-defined and circumscribed by Section 30(2) and 31 of the Code. In the adjudicatory process concerning a Resolution Plan under IBC,*

*there is not scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial terms of the Resolution Plan approved by Committee of Creditors. If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the Resolution Plan vis-à-vis the specified parameter, it would only send the Resolution Plan back to the Committee of Creditors, for re-submission after satisfying the parameter delineated by the Code and exposted by this Court.*

- B. The process of simultaneous voting over two plans for electing one of them cannot be faulted in the present case; and approval of the Resolution Plan of NBCC is not vitiated because of simultaneous consideration and voting over two Resolution Plans by the Committee of Creditors.*
- C. The stipulations in the Resolution Plan, as regards dealing with YEIDA and with the terms of Concession Agreement, have rightly not been approved by the Adjudicating Authority but, for the stipulations which have not been approved, the only correct course for the Adjudicating Authority was to send the plan back to the Committee of Creditors for reconsideration.*
- D. The Adjudicating Authority has not erred in disapproving the proposed treatment of dissenting Financial Creditor like ICICI Bank Limited in the Resolution Plan; but has erred in modifying the related terms of the Resolution Plan and in not sending the matter back to the Committee of Creditors for reconsideration.*

*E. The Adjudicating Authority has erred in issuing directions to the Resolution Applicant to make provision to clear the dues of unclaimed fixed deposit holders. Paragraph 125 of the impugned order dated 03.03.2020 is set aside.*

8. We place reliance on the above stated Judicial precedents of Hon'ble Supreme Court, while examining the merits of the present IAs in light of the facts and circumstances in the present case. It is evident that the Successful Resolution Applicant earlier had sought such prayer in IA No. 661 of 2020 that his time for making total payment under the approved Resolution Plan be reckoned from 27<sup>th</sup> January 2020 (the date on which the order of approving the Resolution Plan was rectified) instead of 26<sup>th</sup> November 2019 (the date on which the Resolution Plan was approved by this Adjudicating Authority).
9. It is expedient to refer certain facts which needs consideration of this bench for disposal of the present Applications that after the order dated 26<sup>th</sup> November 2019 of previous bench by approving the Resolution Plan, the Resolution Professional had moved an Application seeking for some rectification in such order for removal of certain typographical error which had occurred in para 18(g) of the order dated 26<sup>th</sup> November 2019. It was mentioned therein that total amount due under the Resolution Plan shall be payable within 30 months from the date of approval of the Resolution Plan. The Resolution Professional had contended that such was not just and proper being contrary to the terms and conditions of the Resolution Plan already approved and duly

accepted by the Resolution Applicant, unconditionally further approved in terms of the approved Resolution Plan the payment ought to have been made within 30 days from the date of approval of Plan by this Adjudicating Authority.

The above stated Application was considered by the previous bench in MA No. 3977 of 2019 and the same was allowed vide its order dated 27<sup>th</sup> January 2020. Whereby, the order approving the Resolution Plan was rectified to this extent that such payment of total amount due under the Resolution Plan shall be payable within three months from the date of approval of Resolution Plan by this Adjudicating Authority (i.e. 26<sup>th</sup> November 2019). Such order resulted in filing of IA No. 661 of 2020 by Mr. Amit Gupta being Successful Resolution Applicant making the Resolution Professional as a Respondent seeking such prayer/direction that such reduced time line for making total payment of amount due under the approved Resolution Plan should be reckoned from 27<sup>th</sup> January 2020 instead of 26<sup>th</sup> November 2019.

10. Subsequent thereto and during the course of hearing the Successful Resolution Applicant moved another IA No. 1327 of 2020 seeking further additional relief that suitable modification to be carried in the Resolution Plan already approved by this Adjudicating Authority and to give waiver in making payment of statutory dues and other dues those were prior to commencement of CIRP and further to get lift certain attachments and other restraining orders as were passed by the Statutory Authorities as his precondition for making payment of the outstanding amount due under the Resolution Plan. It would be paid only after encumbrance free

transfer of the assets of the Corporate Debtor is made in his favour. Therefore, the Resolution Professional be directed to take suitable urgent/necessary steps to get the attachment lifted and remove charges, encumbrances and lien from the assets and properties of the Corporate Debtor. Learned Senior Advocate appearing for the Resolution Applicant placed reliance on the doctrine of clean slate and in the light of an amendment took place in Section 32A of the IBC, 2016, which as per the contention of Mr. Kevic Setelvad, Learned Senior Counsel for the Resolution Applicant. is having a retrospective effect. In support of his contention he placed reliance on the Judgment of the Supreme Court in the matter of CoC of Essar Steel v/s Satish Kumar Gupta and others.

11. We have duly considered the submission of the Learned Senior Advocate for the Resolution Applicant Mr. Kevic Setalvad along with Learned Counsel for the RP Mr. Abhishek Anand and Nikita Abhyankar and Advocate Mr. Navin Kumar Learned Counsel for the State Bank of India, Financial Creditor Applicant in IA No. 1114 of 2020.
12. We have also gone through the pleadings (which includes IA, reply, rejoinder, additional affidavit etc.) of these IAs and perused the documents and material available on record.
13. We duly considered that merits of the present IA on the basis of facts and circumstances of the case in hand and in light of the latest decision of the Hon'ble Supreme Court in the matter of Ghanshyam Mishra and Sons Private Limited V/s Edelweiss Asset Reconstruction Company Limited in Civil Appeal No. 8129

of 2019. Further in Jaypee Kensington Boulevard Apartments Welfare Association and Others V/s NBCC (India) Limited and other in Civil Appeal No. 3395 of 2020, read with other landmark decision of the Hon'ble Supreme Court in the matter of CoC of Essar Steel v/s Satish Kumar Gupta. The legal position/issues which are subject matter of present IAs have already been dealt with and now settled by the Hon'ble Supreme Court in the above referred decisions. The Hon'ble Supreme Court by clarifying the statutory amendment to Section 32A of the IB Code, 2016 has pleased to hold that it is clarificatory in nature and it would have retrospective effect. Which means that such provision shall be made applicable from the date of the inception of the Code, i.e. 1<sup>st</sup> December 2016. By taking in to consideration of the above settled legal position all the liability of the Corporate Debtor which are prior to CIRP and prior to approval of the Resolution Plan and before transfer of the assets of the Corporate Debtor to the Resolution Applicant shall stand extinguished. The Successful Resolution Applicant is eligible to have encumbrance free transfer of the assets of the Corporate Debtor after approval of the Resolution Plan. Therefore, the Applicant can approach the concerned Statutory Authority/Central/State Government, on the strength of the Hon'ble Supreme Court ruling and in the light of this Order and can get lifted the attachment/removed the prohibitory orders creating encumbrances on the assets of the Corporate Debtor.

14. Further, the Hon'ble Supreme Court in another landmark in its Suo-Moto Write Petition 665 of 2021 has considered the plight

being faced in the matter of the litigant parties and took cognizance for extension of Limitation being faced during the situation of Covid-19 and it was pleased to exclude the period of limitation from 15<sup>th</sup> March 2020 till 14<sup>th</sup> March 2021.

15. The Supreme Court was gracious enough to observe further that in case if any balance period of limitation is not available then all person shall have limitation period of 90 days from 15<sup>th</sup> March 2021 and in the event actual balance period of limitation is available then the period greater than 90 days shall be applicable. The Hon'ble Supreme Court has now pleased to extend further such period until further order. Such order of the Hon'ble Supreme Court in the matter of recognizance for Extension of Limitation. (Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020 order dated 27.04.2021 read with earlier order dated 23.03.2021) as under.

*“We also take judicial notice of the fact that the steep rise in Covid-19 virus cases is not limited to Delhi alone, but it has engulfed the entire nation. The extraordinary situation caused by the sudden and second outburst of Covid-19 virus, thus, requires extraordinary measures to minimize the hardship of litigant-public in all the states. We therefore, restore the order dated 23<sup>rd</sup> March 2020 and in Continuation of the Order dated 8<sup>th</sup> March 2021 direct that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders.”*

16. Therefore, we find that in view of the above legal position the most of the reliefs as being sought for by the Successful Resolution Applicant through the proposed amendment has now been dealt with and taken care of by the decision of the **Hon'ble Supreme Court in the matter of Ghanshyam Mishra and Sons Private Limited v/s Edelweiss Asset Reconstruction Company Limited**, hence such proposed amendment now has become infructuous. Moreover another prayer seeking modification of the terms and conditions in the approved Resolution Plan, which was agreed to and accepted unconditionally by the Applicant while approving the Resolution Plan cannot be entertained at this stage because the approved Resolution Plan cannot be modified by this Adjudicating Authority as it is vested with no jurisdiction to modify such Resolution Plan in the light of recent decision of **the Hon'ble Supreme Court in the matter of Jaypee Kingston Bonevalad Apartments Welfare Association V/s NBCC India Limited and others**. The accepting and modifying terms and conditions laid down in the Resolution fall within the domain of commercial wisdom of the CoC and this Adjudicating Authority is not expected to substitute its view in such Resolution plan approved by the CoC. Moreover, the Applicant himself having due negotiation with the CoC has accepted all the terms and condition of the Resolution Plan unconditionally. Therefore, it is neither proper nor open to the Resolution Applicant to put some precondition for making payment of remaining amount due under the Resolution Plan. It is also evident that the Resolution Applicant has already made some part payment to the extent of rupees thirty-five crore

and above in the beginning. Hence, such proposed amendment is not legally permissible. Hence such prayer cannot be allowed and is rejected. Since the order in IA 661/2020 is being pronounced by this common order therefore the IA 1114/2020 filed the State Bank of India is allowed and stands disposed of.

17. In the light of above stated facts and legal position the prayer sought for in this IA No. 661 of 2020 is partly/conditionally allowed that the time granted for making payment of outstanding amount due under the Resolution Plan shall be reckoned from 27<sup>th</sup> January 2020, provided that the Resolution Applicant shall also be liable to make payment of interest accrued there on from the due date of remaining amount due with interest at the commercial rate of 12% per annum. The payment of interest shall be payable from the date it become due and payable as per the terms and conditions of the Resolution Plan. It shall accrue till the entire payment is made.
18. The Resolution Applicant is granted liberty to approach concerned Government Authority/s of Central and State Government for getting lifted the attachment/removal of prohibitory order/s encumbrance over the assets of the Corporate Debtor those were prior to CIRP and before the transfer of assets of the Corporate Debtor to the Resolution Applicant having approved the Resolution Plan. He can obtain necessary approval as per **Section 31(4) of the IBC** and other relief in the light of the Hon'ble Supreme Court decision in the matter of **Ghanshyam Mishra and Sons Private Limited v/s Edelweiss Asset Reconstruction**

**Company and in the matter of the COC of Essar Steel v/s Satish Kumar Gupta.**

19. Needless to clarify that three-month period reckoned from 27<sup>th</sup> January 2020 has already ended during the lockdown period hence the Applicant will get benefit of the decision of the **Hon'ble Supreme Court passed in Suo-Moto W.P. by granting exemption of the period of lockdown till 15.03.2021 and now till further order.**
20. Notwithstanding the above Hon'ble Supreme Court in its another landmark decision in the matter of **Gajendra Sharma v/s UOI** duly considered the plight of borrower and entrepreneur in making payment of EMI during Covid-19 situation and lockdown period but also observed that the date of making payment of such due instalment can be deferred but there can be no waiver of interest accrued thereon even during such pandemic situation. Hence the Applicant also in the present matter is equally liable to pay interest on amount due for such delayed/deferred period in the light of the above decision in the matter of Gajendra Sharma V/s Union of India (WP Civil No. 825 of 2020 dated 27.11.2020) read with another decision dated 23.03.2021 in the matter of **Small-Scale Industrial Manufacturers Association v/s UOI.**
21. Equally the monitoring committee as well as the former RP, being a member of monitoring committee also are hereby directed to extend necessary co-operation to the Successful Resolution Applicant for moving appropriate Application before the concerned Statutory Authority/Central/State/Government Authorities, in compliance of Section 31(4) of the IBC, to get lifted

the attachment for removal of encumbrance if any over the property/assets of the Corporate Debtor on the strength of the Hon'ble Supreme Court decision and in the light of the present order.

22. With the aforesaid observation/direction these sets of IAs stands disposed of accordingly.

**Sd/-**

**RAVIKUMAR DURAISAMY**  
**MEMBER (TECHNICAL)**  
30.04.2021  
SAM/Ankit

**Sd/-**

**H.P. CHATURVEDI**  
**MEMBER (JUDICIAL)**