NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 947 of 2021

(Arising out of Order dated 07.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.51 of 2020 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

Stressed Assets Stabilization Fund (SASF) ... Appellant

Vs

Piyush Periwal & Ors. ... Respondents

Present:

For Appellant: **Mr. Ritin Rai, Sr. Advocate, Mr. Sidhartha Barua, Ms. Tahira Kathpalia, Mr. Akash, Mr. Praful Jindal, Advocates**

For Respondents: **Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar, Advocates.**

With

Company Appeal (AT) (Insolvency) No. 1001 of 2021

(Arising out of Order dated 07.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.51 of 2020 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

Sandeep Khaitan, Resolution Professional
of National Plywood Industries Ltd. ...Appellant

Versus

Piyush Periwal & Ors. ...Respondents

Present:

For Appellant: **Mr. Abhishek Prasad, Advocate.**

For Respondents: **Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar, Advocates.**

Lzafeer Ahmad. B.F. for R-3

With

Company Appeal (AT) (Insolvency) No. 525 of 2022

(Arising out of Order dated 08.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.43 of 2021 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

PLBB Products Pvt. Ltd. …Appellant

Versus

Madhulika Periwal & Ors. …Respondents
(Substituted vide order
dt. 09.01.2024 in IA No.5654/2023)

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Saikat Sarkar, Ms. Akanksha Kaushik, Ms. Heena Kochar, Ms. Meena, Advocates, Lzafeer Ahmad. B.F.**

For Respondents: **Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar and Mr. Kaustubh Prakash, Advocates.**

With

Company Appeal (AT) (Insolvency) No. 526 of 2022

&

I.A. No. 2474 of 2022

(Arising out of Order dated 08.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.27 of 2021 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

Stressed Assets Stabilization Fund (SASF) …Appellant

Versus

Madhulika Periwal & Ors. …Respondents
(Substituted vide order
dt. 09.01.2024 in IA No.5651/2023)

Present:

For Appellant: **Ms. Madhavi Divan, learned ASG, Mr. Ritin Rai, Sr. Advocate with Mr. Sidhartha Barua, Mr. Praful Jindal, Ms. Tahira Kathpalia, Advocates.**

For Respondents: **Mr. Amit Pareek, RP**

Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar, Advocates.

With

Company Appeal (AT) (Insolvency) No. 499 of 2022

(Arising out of Order dated 08.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.43 of 2021 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

Stressed Assets Stabilization Fund (SASF) …Appellant

Versus

Madhulika Periwal & Ors. …Respondents
(Substituted vide order
dt. 09.01.2024 in IA No.5656/2023)

Present:

For Appellant: **Ms. Madhavi Divan, learned ASG, Mr. Ritin Rai, Sr. Advocate with Mr. Sidhartha Barua, Mr. Praful Jindal, Ms. Tahira Kathpalia, Advocates.**

For Respondents: **Mr. Amit Pareek, RP**

Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar, Advocates.

Mr. Kaustubh Prakash, Advocate for R-3.

With

Company Appeal (AT) (Insolvency) No. 612 of 2022

(Arising out of Order dated 08.04.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Guwahati Bench, Guwahati in IA No.43 of 2021 in C.P. (IB) No.09/GB/ 2019)

IN THE MATTER OF:

Sandeep Khaitan …Appellant

Versus

Madhulika Periwal & Ors. …Respondents
(Substituted vide order
dt. 09.01.2024 in IA No.5649/2023)

Present:

For Appellant: **Mr. Jayant Mehta, Sr. Advocate with Mr. Abhishek Pasad and Mr. P.D.V. Srikar, Advocates.**

For Respondents: **Mr. Jishnu Saha, Sr. Advocate with Mr. Abhijeet Sarkar, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

These six Appeals arising out of Corporate Insolvency Resolution Process ("**CIRP**") of the Corporate Debtor – National Plywood Industries Ltd., have been heard together and are being decided by this common judgment.

2. The Company Appeal (AT) (Insolvency) No. 947 of 2021, 499 of 2022 and 526 of 2022 have been filed by Financial Creditor – Stressed Assets Stabilization Fund ("**SASF**"). The Company Appeal (AT) (Insolvency) No. 1001 of 2021 has been filed by Sandeep Khaitan, Resolution Professional ("**RP**"); The Company Appeal (AT) (Insolvency) No. 612 of 2022 has been filed by Sandeep Khaitan, erstwhile RP; and The Company Appeal (AT) (Insolvency) No. 525 of 2022 has been filed by PLBB Products Pvt. Ltd., the Resolution Applicant, who has filed the Resolution Plan in the CIRP of the Corporate Debtor.

3. The Company Appeal (AT) (Insolvency) No. 947 of 2021, filed by the Financial Creditor - SASF and Company Appeal (AT) (Insolvency) No. 1001 of 2021 filed by Sandeep Khaitan, RP challenges the order dated 07.10.2021 passed in IA No.51 of 2020 filed by RP under Section 43, 44, 45, 48, 66 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**"), which Application has been rejected by the Adjudicating Authority by the impugned order.

4. Company Appeal (AT) (Insolvency) No. 526 of 2022 has been filed by the Financial Creditor (SASF) challenging the order dated 08.04.2022 passed by the Adjudicating Authority in IA No.27 of 2021 filed by Piyush Periwal, Respondent No.1, the Promoter of the Corporate Debtor praying for reexamination of the claim of Financial Creditor, which Application has been allowed by the Adjudicating Authority.

5. Company Appeal (AT) (Insolvency) No. 499 of 2022 has been filed by the Financial Creditor – SASF; Company Appeal (AT) (Insolvency) No. 612 of 2022 filed by erstwhile RP and Company Appeal (AT) (Insolvency) No. 525 of 2022 filed by PLBB Products Pvt. Ltd. – Resolution Applicant, have been filed challenging order dated 08.04.2022 passed in IA No.43 of 2021, which was filed by Piyush Periwal, the Promoter of the Corporate Debtor, which Application has been allowed by the Adjudicating Authority, directing for termination of CIRP from the stage of Second EOI and replacement of the RP – Sandeep Khaitan and appointment of new RP – Amit Pareek.

6. The above Appeals challenges following three orders passed by the Adjudicating Authority:

(i) Order dated 07.10.2021 passed by the Adjudicating Authority in IA no.51 of 2020 filed by RP under Section 43, 44, 45, 46, 48 and 66 of the Code.

(ii) Order dated 08.04.2022 passed by the Adjudicating Authority in IA No.27 of 2021 filed by Piyush Periwal, the Promoter of the Corporate Debtor seeking direction for re-examination and re-verification of the claim of the Financial Creditor.

(iii) Order dated 08.04.2022 passed in IA No.43 of 2021, which IA was filed by Piyush Periwal, the Promoter of the Corporate Debtor, which IA was allowed by the Adjudicating Authority by terminating the CIRP from Second EOI and replacement of RP.

7. The sequence and events giving rise to the present Appeals are:

(i) On 27.03.1997, the IDBI Bank sanctioned a loan of Rs.320 lakhs to National Boards Limited ("**NBL**"). The National Boards Limited (hereinafter referred to as the "**Principal Borrower**") availed loan amounting to Rs.307.71 lakhs. The Corporate Debtor – National Plywood Industries Ltd., gave a corporate guarantee dated 16.07.1997 against the loan sanctioned to Principal Borrower along with two personal guarantors. The immovable and movable properties of Principal Borrower were mortgaged and hypothecated to IDBI Bank under the Loan Agreement.

(ii) The Principal Borrower committed default in the payment of the loan. The IDBI Bank by letter dated 09.11.2001 recalled the Loan Facility. On 03.12.2001, the IDBI invoked the

corporate guarantee and raised demand of Rs.5,42,94,868/- on the Corporate Debtor.

(iii) On 08.01.2002, the IDBI filed OA No.27 of 2002 before the Debts Recovery Tribunal ("**DRT**") Guwahati against the Principal Borrower for recovery of its dues. In OA No.27 of 2002, the Corporate Debtor was not made the party, although, the corporate guarantee was invoked on 03.12.2001.

(iv) The Corporate Debtor, who was in plywood industry also suffered loss due to ban imposed by Hon'ble Supreme Court on felling of any kind of trees in the forest areas of the North-Eastern region of India. The Corporate Debtor became a sick unit and registered with BIFR under Reference Case No.259 of 2003 and IDBI was appointed as Operating Agency under the BIFR.

(v) The IDBI by its Assignment Deed dated 30.09.2004, assigned the debt of NBL – Principal Borrower to the Appellant SASF.

(vi) The DRT vide its judgment and order dated 03.01.2005, granted a Decree of Rs.5,42,94,868/- along with 12% interest against the Principal Borrower. The Judgment and Decree directed that land of Principal Borrower mortgaged with IDBI to be sold by SASF to recover the loan as the first charge from the sale proceeds. The Principal Borrower and SASF after

issuance of Recovery Certificate dated 05.01.2005 for an amount of Rs.542.95 lakhs entered into a Negotiated Settlement for Rs.215.89 lakhs comprising cash payment of Rs.153.89 lakhs and convertible debentures of Rs.62 lakhs. The Corporate Debtor was not party to the Negotiated Settlement. On request of the SASF, the mortgaged assets of the Principal Borrower were attached and sale of some of the immovable assets of the Principal Borrower was also permitted. From the sale proceeds of the Principal Borrower, an amount of Rs.92.24 lakhs was paid to the SASF. On 09.11.2011, an order was passed by DRT on an Application filed by the SASF for restraining the Principal Borrower to sale the assets for paying the balance settlement amount. On 24.09.2012, the SASF revoked the Negotiated Settlement.

(vii) The SASF did not appear before the DRT in execution proceedings of Recovery Certificate. The DRT passed an order on 16.11.2018 directing Execution Proceeding to be adjourned *sine-die* due to repeated non-appearance of SASF.

(viii) It is relevant to notice here that although the Corporate Debtor was registered as sick industries under the Sick Industrial Companies (Special Provisions) Act, 1985 under reference No.259 of 2003, the IDBI/ SASF filed OA No.36 of 2003 against the Corporate Debtor for recovery of certain dues pertaining to

certain Financial Facilities extended by IDBI to the Corporate Debtor. The IDBI also obtained a Decree on 05.08.2004. After the CD was registered in BIFR, the IDBI/ SASF entered into Negotiated Settlement with CD and entire payment under Negotiated Settlement were paid by the Corporate Debtor and No Due Certificate was issued on 15.07.2016 by SASF.

(ix) The SASF did not pursue proceedings before DRT and after 18 years of invoking of the corporate guarantee, SASF filed Section 7 Application against the Corporate Debtor on 12.03.2019 being CP (IB) No.09/2019 claiming a grossly inflated claim of Rs.133.55 Crores against the loan of Rs.3.0771 crores disbursed to the Principal Borrower. On 26.08.2019, the Adjudicating Authority admitted Section 7 Application filed by SASF. Piyush Periwal, the Promoter of the Corporate Debtor filed an Appeal being Company Appeal (AT) (Insolvency) No.932 of 2019 challenging the order of admission in CIRP of the Corporate Debtor. The SASF filed a claim of Rs.16.12 Crores in CIRP under Form-C on 07.09.2019. The IRP admitted the claim of SASF.

(x) An IA No.89 of 2020 was filed by Piyush Periwal, the Promoter of the Corporate Debtor, challenging the admitted claim of Rs.16.12 Crores. On 09.12.2020, the Adjudicating Authority disposed of the IA directing the RP to minutely verify the claim

and reverify the claim of SASF. The RP submitted a compliance Report dated 24.12.2020 again verifying the claim as Rs.16.12 crores.

(xi) This Appellate Tribunal in Company Appeal (AT) (Insolvency) No.932 of 2019 vide order dated 25.11.2019 upheld the order of admission passed by the Adjudicating Authority. Piyush Periwal filed Civil Appeal No.9142/2019 before the Hon'ble Supreme Court, challenging order of the Appellate Tribunal. On 20.01.2020, the Hon'ble Supreme Court set-aside the order of NCLAT and remanded the matter to the Appellate Tribunal to consider afresh.

(xii) On 24.11.2020, this Appellate Tribunal held that Section 7 Application filed by the SASF is not barred by time. This Appellate Tribunal by giving the benefit of period during which the Corporate Debtor was under BIFR held that the Application filed under Section 7 was not barred by time. The Appeal filed against the order dated 24.11.2020 was also dismissed by the Hon'ble Supreme Court on 16.12.2020.

(xiii) On 07.11.2019, first Form-G was published, inviting Expression of Interest from the Prospective Resolution Applicants. In pursuance to Form-G RP received two Expression of Interests, one from Piyush Periwal, Promoter of

the Corporate Debtor and another from JSVM Plywood Industries Ltd. The RFRP was issued by the RP. No Resolution Plan was received by the RP. On 24.03.2020, the Central Government declared complete lock down. On 27.06.2020, Second Form-G was published in the newspaper. Only PLBB Products Pvt. Ltd. submitted a Resolution Plan on 05.09.2020. The PLBB Resolution Plan was approved by the Committee of Creditors ("**CoC**") on 06.11.2020

(xiv) Piyush Periwal filed an IA No.05 of 2021 praying for direction from the Adjudicating Authority to permit the Promoter/ Management of the Corporate Debtor to submit a Resolution Plan. On 10.02.2021, the Adjudicating Authority disposed of IA No.05 of 2021 allowing the Suspended Management to submit a Resolution Plan. Resolution Plan was also submitted by Piyush Periwal, Promoter of the Corporate Debtor.

(xv) On 09.04.2021, Piyush Periwal filed an IA No.27 of 2021, seeking direction to RP to re-examine and reverify the claim of SASF in view of the facts and grounds as pleaded in IA No.27 of 2021.

(xvi) On 01.06.2021, Resolution Plan submitted by the PLBB was approved by the CoC. RP filed IA No.31 of 2021 before the Adjudicating Authority for approval of the Resolution Plan.

(xvii) Piyush Periwal, the Promoter/ Director, filed IA No.43 of 2021 seeking a direction for removal of RP. Further direction was also sought for setting aside all acts of RP in which RP has been instrumental.

(xviii) On 18.09.2020, RP has filed an IA No.51 of 2020 under Section 43, 45, 49 r/w Section 44, 48, 66 of the Code. IA No.51 of 2020 came to be rejected by the Adjudicating Authority vide order dated 07.10.2021.

(xix) IA No.27 of 2021 as well as IA No.43 of 2021 were heard by the Adjudicating Authority and by order dated 08.04.2022 IA Nos.27 and 43 of 2021 filed by Piyush Periwal, the Promoter of the Corporate Debtor were allowed. The Adjudicating Authority by the impugned order dated 08.04.2021 removed the RP, citing the lack of transparency, conflict of interest and non-compliance of provisions of the Code. CIRP of the Corporate Debtor was directed to be terminated from the Second EOI stage and new RP was appointed. Direction was issued to start the process from stage of Invitation of EOI publishing in widely circulated newspaper of Assam, West Bengal and Tamil Nadu. Direction was also issued to RP to ensure that unit may start production within 45 days. Certain other directions were also issued to the new RP by the impugned order dated 08.04.2021. Apart from deciding IA

Nos.27 and 43 of 2021, several other IAs were also disposed of by the order of the same date. We however, in the present Appeal are only concerned with the order passed by the Adjudicating Authority in IA Nos.27 and 43 of 2021 and IA No.51 of 2020.

8. As noted above against IA No.27 of 2021 Company Appeal (AT) (Insolvency) No.526 of 2022 has been filed by SASF, which need to be considered first. Against the order passed in IA No.43 of 2021, Company Appeal (AT) (Insolvency) No.499 of 2022 has been filed by SASF and against order in IA No.43 of 2021, Company Appeal (AT) (Insolvency) No.612 of 2022 has been filed by Sandeep Khaitan, erstwhile RP. Company Appeal (AT) (Insolvency) No.525 of 2022 has been filed by PLBB Products Pvt. Ltd., which three Appeals shall be considered together. Rest of the two Appeal, i.e., Company Appeal (AT) (Insolvency) No.947 and 1001 of 2021 filed against the order dated 07.10.2021 in IA No.51 of 2020, shall be considered together.

9. Consequently, the Appeals are divided in three Group, i.e., Group-A, which consists challenge of order dated 08.04.2022 in IA No.27 of 2021; Group-B, which consists challenge of order dated 08.04.2022 in IA No.43 of 2021; and Group-C, which consists challenge of order dated 07.10.2021 in IA No.51 of 2020. We shall thus proceed to consider submission of both the parties separately with regard to Group-A, B and C.

10. Before we enter into submissions raised by learned Counsel for the parties in the above Group of Appeals, it is relevant to notice that Respondent No.1 in all these Appeals, i.e., Piyush Periwal, the Promoter and Director of the Corporate Debtor died on 15.07.2023, during the pendency of these Appeals. I.A. Nos. 5654 of 2023, 5649 of 2023, 5651 of 2023 and 5656 of 2023 were filed by Madhulika Periwal claiming to be substituted in place of Respondent No.1, which Applications were allowed by order dated 09.01.2024, permitting Madhulika Periwal to prosecute the Appeal in place of Respondent No.1.

11. We have heard Madahvi Diwan, learned ASG; Shri Ritin Rai, learned Senior Counsel with Sidharth Barua and Praful Jindal, learned Counsel appearing for Financial Creditor – SASF; Shri Jayant Mehta, learned Senior Counsel appeared for the Resolution Professional; Shri Abhijeet Sinha, learned Senior Counsel appeared for the PLBB Products Pvt. Ltd.; Shri Jishnu Saha, learned Senior Counsel and Shri Abhijeet Sarkar, learned Counsel has appeared for Respondent No.1, the Promoter/ Director.

12. It is relevant to notice that learned Counsel for the Appellants had submitted that no right to sue survives after death of Respondent No.1 – Piyush Periwal. It was contended by the learned Counsel for Appellant that Piyush Periwal submitted Resolution Plan in his individual capacity and after the death of Piyush Periwal, the said Resolution Plan cannot be allowed to be prosecuted by his wife. The learned Counsel for Respondent,

refuting the submissions contend that Respondent No.1 has filed various Applications as well as Resolution Plan in the CIRP of the Corporate Debtor as Promoter and Suspended Director of the Corporate Debtor. Madhulika Periwal also being Director and shareholder and Promoter of the Corporate Debtor is entitled to prosecute the Appeals. In the Application filed by Madhulika Periwal, relevant facts regarding the shareholding has been pleaded. It was pleaded that Madhulika Periwal is single largest shareholder and owns 40.43% shareholding of the Corporate Debtor. It was further pleaded that Madhulika Periwal was always the shareholder and Promoter of the Corporate Debtor, which fact is already on the record.

13. Piyush Periwal admittedly Promoter/ Director of the Corporate Debtor has filed the Resolution Plan as Promoter/ Director of the Corporate Debtor, the Corporate Debtor being MSME Company. The learned Counsel for the Applicant has relied on the Declaration at Annexure-A-D. given by Piyush Periwal in support of the Resolution Plan, in para-1 of the Declaration, following was stated

> *"I am submitting the Expression of Interest for Resolution Plan as a Promoter of National Plywood Industries (MSME Udyog Aadhaar no.976190718587) and not a wilful defaulter"*

14. The Resolution Plan submitted on behalf of the MSME as per relevant provisions of the Code, being Promoter of the Corporate Debtor, we are of the view that Resolution Plan submitted by Promoter of the Corporate

Debtor, which was MSME, can very well be pursued by other Directors of the MSME, including Madhulika Periwal, who is also a Director and Shareholder of the Corporate Debtor. We, thus, are of the view that Madhulika Periwal is fully entitle not only to prosecute the Appeals on behalf of Respondent No.1, but also is entitled to contest the Appeals as Shareholder, Promoter and Director of the Corporate Debtor.

15. We now proceed to undertake Appeal in Group-A, i.e. Company Appeal (AT) (Insolvency) No.526 of 2022.

16. Company Appeal (AT) (Insolvency) No.526 of 2022 has been filed by the SASF, challenging the order dated 08.04.2022 passed by National Company Law Tribunal Guwahati Bench, Guwahati in IA No.27 OF 2021. In IA no.27 of 2021, following prayers have been made:

> "i. *An order be made directing the Resolution Professional (Respondent No. 5) to revise the claim of SASF (Respondent No. 1) from Rs. 16,12,23,210.00 to a sum not exceeding Rs. 1,23,65,000.00*
>
> *ii. To draw a proceeding under section 65 and 75 against the respondent no. 2 to 4 for filing a malicious application and making false statements before this Honble Tribunal and also be individually held financially liable under Section 75 of the IBC.*

iii. To pass such other and further reliefs that this Honble Tribunal may deem fit and proper in the facts and circumstances of this case.

iv. Pending the determination of the true financial entitlement of Respondent No. 1 against the Corporate Debtor, an order be made restraining the Respondent No. 1 from participating or voting in any other proceeding of the Committee of Creditors and in any event restraining it from overriding the decision of the other members of the same;

v. To pass such other and further reliefs that this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of this case."

17. The Adjudicating Authority referring to order passed in IA No.43 of 2021 has disposed of the Application by following order:

"2. Heard both the sides at length. An order has been passed by this bench today in IA No. 43 of 2021 in C.P. (IB)No. 09/GB/2019. The Petitioner and the Respondent No. 1 are at the liberty to file any additional/relevant documents, if any, in support of their claim with the new RP within 10 days from the date the order is uploaded on the e-portal/website. The RP is also given 7 days' time thereafter to examine and finalise their claim in accordance with the provisions of Insolvency & Bankruptcy Code, 2016, Rules and Regulations.

3. Hence, IA No. 27 of 2021 in C.P. (IB)No. 09/GB/2019 is disposed of with the above observations."

18. We have noticed above the background facts giving rise to IA No.27 of 2021. Prior to IA No.27 of 2021, Respondent No.1 had filed another IA No.89 of 2020. We may recapitulate the sequence of events in the above reference. Section 7 Application against the Corporate Debtor filed by the Financial Creditor was admitted by order dated 26.08.2019. In pursuance of the publication issued by the IRP, the Financial Creditor filed its claim of Rs.16.12 Crores. The RP admitted the claim of Rs.16.12 Crores field by the Financial Creditor. Respondent No.1 filed an IA No.89 of 2020 on 30.11.2019 seeking rejection of SASF claim as admitted by RP. It is useful to notice the prayers made in IA 89 of 2020, which is to the following effect:

"7.1 Allow the present application and pass a direction to respondent no. 2 to set aside and reject the claim lodged by the respondent no.1 with Resolution Professional in C.P. (IB)/09/GB/2019.

7.2 Pass such other and further reliefs that this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of this case."

19. The Adjudicating Authority disposed of the IA No.89 of 2020 by its order dated 09.12.2020. The Adjudicating Authority noticed the grounds taken by the Piyush Periwal in the Application in paragraph 1.3 and after hearing both the parties, disposed of the Application directing the RP to verify the claim amount of Financial Creditor minutely and transact the

proceedings with utmost dedication strictly and in accordance with the provisions of the Code. The prayer of the Promoter/ Director to set aside the claim lodged by Financial Creditor was rejected. After the above order passed by the Adjudicating Authority, the RP filed a Compliance Report on 24.12.2020 verifying the same amount of claim, which was admitted by RP, i.e. Rs.16.12 Crores. After the Compliance Report submitted by the RP, the Promoter/ Director filed the IA No.27 of 2021, which came to be decided on 08.04.2022 by the impugned order. IA No.89 of 2020 as well as IA No.27 of 2021 relates to the claim, which was submitted by the Financial Creditor. The Promoter/ Director has raised objection to the claim admitted by the RP of the Financial Creditor.

20. The amount of claim, which is admitted by the RP in the CIRP is one of the most important factors on which whole CIRP is built up. The admitted claim of the Financial Creditor is the basis on which Resolution Plan is submitted in the CIRP and is also basis of any Promoter/ Director of MSME to submit a Plan for revival of the Corporate Debtor. In these two Applications, Respondent No.1 has objected to the admission of inflated and incorrect claim by the RP, whereas on the other side the Appellant/ Financial Creditors as well as RP's case is that admission of the claim was in accordance with the Decree passed by the DRT on 03.01.2005 and the calculation of the claim is in accordance with the Decree as well as Negotiated Settlement.

21. We now proceed to note the respective submissions of learned Counsel for the parties advanced with regard to claim of Financial Creditor admitted by RP.

22. Learned Counsel for the Appellant challenging the order of Adjudicating Authority dated 08.04.2022 in IA no.27 of 2021 submits that the Adjudicating Authority committed error in issuing direction to the RP to reverify the claim of the Financial Creditor. It is submitted that Adjudicating Authority has earlier passed an order in IA No.89 of 2020 on 09.12.2020 by which the prayer of the Promoter/ Director to reject the claim of the Financial Creditor was rejected. The order passed on 09.12.2020 operated as res-judicata for any further consideration to the challenge of the admission of the claim of the Financial Creditor. It is submitted that IA No.27 of 2021 was filed with the delay and ought not to have been entertained by the Adjudicating Authority. It is submitted that the claim filed by the Financial Creditor of Rs.16.12 Crores was in accordance with the Decree passed by the DRT dated 03.01.2005. It is submitted that Negotiated Settlement having been revoked by the Financial Creditor on 24.09.2012, the Financial Creditor was entitled to claim amount, i.e., Decretal amount plus interest as per the Decree dated 03.01.2005. It is submitted that calculation of interest and claim of Financial Creditor was in accordance with law. It is submitted that in the balance sheet of Principal Borrower as on 31.03.2018 the debt of Rs.450.70 lakhs was reflected, which was without any reason reduced to Rs.123.65

in the balance sheet of Principal Borrower as on 31.03.2019. The balance sheets of the Principal Borrower was also looked into by the RP before admitting the claim of the Financial Creditor. It is submitted that the Corporate Debtor being guarantor of the loan sanctioned to Principal Borrower is liable to the amount, which was payable by the Principal Borrower and the Financial Creditor was free to act against the guarantor as that of Principal Borrower. The liability of corporate guarantor never came to an end. The Financial Creditor did not initiate proceedings against Corporate Debtor on account of Corporate Debtor being in BIFR till 30.11.2016. The liability of guarantor is co-extensive and co-terminus with that of the Principal Borrower. There was no error in admitting the claim of the Financial Creditor by the RP. The Adjudicating Authority committed error in issuing direction in IA 27 of 2021 to the new RP to reverify the claim. The new RP in pursuance of the order has now substantially reduced the claim of the Financial Creditor and the voting share has also been substantially reduced.

23. Learned Counsel for the Promoter/ Director submits that Corporate Debtor was not party to Decree dated 03.01.2005 passed by the DRT in Application filed by the Financial Creditor against the Principal Borrower. The Corporate Debtor has given guarantee to the loan obtained by Principal Borrower from the from the Financial Creditor of Rs.3.2 Crores. The Financial Creditor invoked the corporate guarantee on 03.12.2001, but had not initiated any proceedings. It is submitted that there being no Decree

against the Corporate Debtor, no amount can be realised as per the Decree from the Corporate Debtor. It is submitted that Negotiated Settlement was entered between Financial Creditor and the Principal Borrower, under which Negotiated Settlement the Principal Borrower was to make payment of Rs.215.89 lakhs and convertible debentures of Rs.62 lakhs. In Negotiated Settlement, the Corporate Debtor was not the party. As per the Decree dated 03.01.2005, the Financial Creditor could have realised the amount by sale of hypothecated and mortgaged assets and the Financial Creditor proceeded to recover the amount by permitting sale of the assets of the Principal Borrower and amount of Rs.92 lakhs were paid by the Principal Borrower by sale of the assets. The Negotiated Settlement was revoked by the Financial Creditor on 24.09.2012. There is no occasion for claiming any amount from Corporate Debtor on the basis of Decree dated 03.01.2005, nor any interest liability will run against the Corporate Debtor from the date of Decree. The amount due against the Principal Borrower as per OTS was only Rs.123.65 lakhs, which remained unpaid and at best, the liability of the Corporate Debtor was to the aforesaid amount. The RP incorrectly calculated the liability of interest from the date of the Decree from 03.01.2005 against the Corporate Debtor. Whereas, after invocation of the guarantee, no steps was taken against the Corporate Debtor and Negotiated Settlement was entered with Principal Borrower and certain amounts were also realised from Principal Borrower. The RP admitted the inflated claim of the Financial Creditor to unduly help the Financial Creditor. The admission of the liability of interest against the Corporate

Debtor from the date of filing of the Application in OA No.27 of 2002 was wholly erroneous and incorrect. Due to entering with Negotiated Settlement with the Principal Borrower on 30.04.2005, the liability of Corporate Debtor stood extinguished under Section 125 of the Contract Act. It is submitted that the proceedings initiated against the Corporate Debtor were recovery proceedings and not for insolvency resolution of the Corporate Debtor. The Financial Creditor who was proceeding to recover the amount as per the Decree dated 03.01.2005 by sale of immovable assets of the Principal Borrower, abandoned the proceedings, which has been noticed by the DRT in its order dated 16.11.2018. Instead of proceeding with the execution proceedings for recovery of the Decree against the Principal Borrower, the Financial Creditor filed Section 7 Application as a recovery measure, which is clearly against the intent and purpose of IBC. The admission of inflated claim of Financial Creditor has adversely affected the entire CIRP and the Financial Creditor having assigned the voting share of 71 and subsequently 87%, carried the CIRP proceedings having requisite majority according to its wish and objects. In the balance sheet of Principal Borrower as on 31.03.2019, which is a relevant document and is prior to initiation of filing of Section 7 Application, the liability of Principal Borrower was mentioned as of only Rs.123.65 lakhs, which balance sheet available with the RP has been ignored. The admission of inflated claim by RP is wholly erroneous and Promoter/ Director has immediately challenged the said admission by filing IA No.89 of 2020 and when a Compliance Report was submitted by RP,

immediately IA No.27 of 2021 was filed, which remained pending and only decided on 08.04.2022. Thus, entire process undertaken by CoC and the RP are illegal and nullity and deserved to be set aside.

24. The learned Counsel for Respondent No.1 further submits that as per Negotiated Settlement the time was not the essence of the contract, since as per Negotiated Settlement, entire agreed amount of Rs.215.89 lakhs was to be paid by 31.03.2008 and the Negotiated Settlement contained a Clause that on account of delay in payment, the interest of 10.25% shall be chargeable. This clearly indicated that time was not the essence of the contract. Hence, the Principal Borrower not being able to pay the entire amount within the time, the Negotiated Settlement could not have been avoided by the Financial Creditor and Financial Creditor at best was entitled to claim @ 10.25% as provided in Negotiated Settlement. The Negotiated Settlement clearly contained a waiver that interest and other liabilities, which cannot be now revived. The calculation by the RP of the claim of the Financial Creditor of interest from the date of filing of Application as per Decree dated 03.01.2005 was wholly incorrect. No interest could have been levied from the date of filing of the Application, in view of the Negotiated Settlement dated 30.04.2005. By incorrect admission of the claim of the Financial Creditor, whole CIRP is vitiated. The Financial Creditor as per the admission of its claim has been allocated initially 71.37% voting share, which was subsequently increased to 87.76%. The RP appointed by the impugned order dated 08.04.2022

reverified the claim and only allocated 24.68% voting share to the Financial Creditor. The above clearly indicate that whole CIRP was proceeded contrary to the provisions of the Code.

25. The bone of contention between the parties is regarding the quantum of claim submitted by the Financial Creditor and verified and admitted by the RP. The Financial Creditor after publication by the IRP in pursuance of admission of Section 7 Application, filed its claim in Form-C on 07.09.2019. Total amount of the claim was Rs.16,12,23,209.72. Detailed calculation, which was given in Annexure-I of the claimed Form is as follows:

"Annexure-I
Calculation of claim amount

Sr.No.	Particulars	Details
A	Amount adjudicated by DRT vide Recovery Certificate dated January 05, 2005 (Rs.)	5,42,94,868.00
B	Date of commencement of charging of Interest on above amount	12%
C	Date of commencement of charging of Interest on above amount	November 01, 2001
D	Date of Admission of CIRP application at NCLT	August 26, 2019
E	D-C [In days]	6,507
F	Interest Amount [A*B/365*E] (Rs.)	11,61,52,341.72
G	Total of Adjudicated Amount and Interest Amount [A+F] (Rs.)	17,04,47,209.72
H	Amount received in the past (Rs.)	92,24,000.00
I	Total Amount to be claimed as on August 26, 2019 [G-H] (Rs.)	16,12,23,209.72"

26. Now, we have to look into as to whether the aforesaid claim could have been rightly admitted by the RP in the CIRP of the Corporate Debtor.

As noted above, the OA No.27 of 2002 was filed by the IDBI, in which Decree was passed on 03.01.2005. It is useful to extract the operative portion of the Decree at paragraph 13, which is to the following effect:

> *"13. The applicant is entitled to put the hypothecated and mortgaged properties as described in schedule of the application on sale and to appropriate the value as first charge, keeping the option open for defendant No.4 and 5 to place their second peri-passu charge over those properties. The applicant is entitled to recover Rs.5,42,94,868/- with interest thereon @ 12% p.a. from the date of filing of the application till recovery and cost of the application from the defendant No.1, 2 & 3 who are jointly and severally liable. Issue certificate accordingly."*

27. After passing of the Decree, there was Negotiated Settlement entered between the parties for total amount of Rs.215.89 lakhs. The Negotiated Settlement also noticed the waiver of balance principal and simple interest and further interest and liquidated damages. Appendix-I, of the Negotiated Settlement contained certain terms and conditions. It is useful to notice Clauses 1, 2, 3, and 4 of the Appendix-I, which are as follows:

> *"1. In case NBL fails to honor its commitments in accordance with the agreed NS arrangement as per the envisaged time frame, the SASF shall have the absolute right to revoke the arrangement and*

reappropriate the amount received as per existing loan documents.

2. *The company shall undertake to suitably increase the NS amount of SASF in case it agrees to pay higher pro rata amount to any other lender.*
3. *All the loan and security documents will remain in full force till such time the arrangement is satisfactorily concluded/ implemented in full on the envisaged lines.*
4. *In case of default on the due date as per NS, the same would attract interest at the rate of 10.25% p.a."*

28. The Negotiated Settlement was revoked by the Financial Creditor on 24.09.2012. The question to be considered is as to whether in view of Negotiated Settlement entered between the Principal Borrower and Financial Creditor on 30.04.2005, which was revoked only on 24.09.2012, according to the Financial Creditor, whether any interest liability shall run against the Principal Borrower as per the Decree dated 03.01.2005. When the Negotiated Settlement intervened, the liability of interest could not have run, as per the Financial Creditor till 24.09.2012, when the Negotiated Settlement was in operation. As per the Decree, the amounts were to be realised by sale of hypothecated and mortgaged assets of the Principal Borrower. There is material on record that after the Negotiated Settlement, the Principal Borrower sought consent of the Financial Creditor to sell the assets to pay the amount to the Financial Creditor, which fact was also noticed by the DRT and Principal Borrower was permitted to sale his

immovable property. The Principal Borrower sold the immovable assets and deposited the amount of Rs.92 lakhs with the Financial Creditor towards the Negotiated Settlement amount.

29. When we look into the claim Form filed by the Financial Creditor, which has been admitted by the RP, the interest has been charged @ 12% from 01.11.2001 till 26.08.2019. The charging of interest from 01.11.2001 as per the Decree dated 03.01.2005 is unsustainable, due to Negotiated Settlement entered between the parties on 30.04.2005, which according to the Appellant remained in operation till 24.09.2012, thus, the charging of the interest on the face of it is unsustainable. The Financial Creditor has claimed interest from 01.11.2001 till 26.08.2019, i.e., for 18 years, which is clearly unsustainable. The RP inspite of direction from the Adjudicating Authority to reverify the claim minutely and transact the proceedings has again reiterated the same claim by its Compliance Report, filed in December 2020. Thus, the admission of the claim by the RP was clearly inflated and gave undue advantage and benefit to the Financial Creditor in the CoC, since it was assigned voting share to the extent of 87.76%.

30. One more submission, which has been advanced by learned Counsel for Respondent No.1 needs consideration. The learned Counsel for Respondent No.1 has relied on Section 55 of the Indian Contract Act, 1872, which provides as follows:

> ***"55. Effect of failure to perform at a fixed time, in contract in which time is essential.—***

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."

31. The submission is that in view of there being Clause for payment of interest @ 10.25% on delayed payments, the time was not essence of the contract. Further the Financial Creditor accepted the amount of Rs.92 lakhs deposited by the Principal Borrower by sale of land from time to time, which was accepted beyond the time stipulated in the contract, i.e., 31.03.2008. When time was not clearly the essence of the contract, which is clear from the conduct of the Financial Creditor itself, the Financial Creditor at best was entitled for compensation @ 10.25%, which was contemplated in the Negotiated Settlement. The contract did not remain voidable at the option of the Financial Creditor in view of the provision for payment of 10.25% interest on delayed payment. Thus, we are of the view that the Financial Creditor was entitled for payment of interest @ 10.25% on unpaid amount as per the Negotiated Settlement. It is admitted case of the parties that after the Negotiated Settlement, the Principal Borrower sold its assets and paid Rs.92.24 lakhs. Hence, total amount due was only Rs.123.65 lakhs.

32. The learned Counsel for the Appellant has referred to the balance sheet of the Principal Borrower as on 31.03.2018 where according to the learned Counsel for the Appellant indebtedness of Rs.450.70 lakhs was noticed. The balance sheet of the Principal Borrower as on 31.03.2019 was the relevant balance sheet, which was the balance sheet prior to filing of Section 7 Application, in which balance sheet total debt of the Financial Creditor was mentioned as Rs.123.65 lakhs, which has been ignored by the

RP. The Corporate Debtor was the corporate guarantor and the guarantee was although invoked on 03.12.2001, but no proceeding was initiated against the Corporate Debtor for 18 years and for the first time, an Application under Section 7 was filed in the year 2019. It is also relevant to notice that the Corporate Debtor had also taken several financial facilities from IDBI Bank. The IDBI bank has filed OA No.36 of 2003 against the Corporate Debtor in which Recovery Certificate was issued on 05.08.2004 against the Corporate Debtor. In the aforesaid proceeding, Negotiated Settlement amount of Rs.668.63 lakhs was entered between IDBI Bank/ SASF, where the entire Negotiated Settlement was paid by the Corporate Debtor and Recovery Certificate issued in OA No.36 of 2003 was set aside by the Debts Recovery Appellate Tribunal and ultimately no due certificate was issued by the Financial Creditor on 15.07.2016, which is on the record. It is, thus, clear that even during the period when Corporate Debtor was in BIFR, Financial Creditor proceeded to recover its dues and received the entire amount as per the Negotiated Settlement and issued a No Due Certificate to the Corporate Debtor.

33. The Financial Creditor did not initiate any proceedings against the corporate guarantor for last 18 years and now after 18 years, it wants to recover the amount due to the Principal Borrower along with interest as per Decree dated 03.01.2005. The interest on the amount for last 18 years is being charged, although the Financial Creditor did not take any action against the Corporate Debtor and now seeking to recover the amount from

the Corporate Debtor. It is also relevant to notice that in the proceeding before the DRT, where the DRT granted permission to sale the assets of the Principal Borrower and pay the amount, an Application was filed by the Financial Creditor, praying that the assets of the Principal Borrower will be re-valued and till revaluation is done, the sale of the assets be stopped . The DRT noticed the prayers of the Financial Creditor in order dated 09.09.2011 that now the Financial Creditor is praying for restraining the Principal Borrower from further sale of mortgaged assets. Thus, it was the Financial Creditor, who filed an Application, stopping the further sale by the Principal Borrower of its assets due to which the further amount could not be paid by the Principal Borrower. It is further relevant to notice that the proceedings before the DRT were adjourned sine-die by the DRT noticing that the Financial Creditor is not appearing in the matter. It is useful to extract, following from the order dated 16.11.2018:

> *"As per record, SASF has not appeared in the proceeding for more than two years. There are numbers of writ pending before the Hon'ble Gauhati High Court related to the mortgage property. SASF has not filed any report regarding status of the pending writs.*
> *It is clearly evident that SASF is not interested to proceed in this case. As a result this Tribunal is unable to take any step for recover of certificate amount due to noncooperation of SASF.*
> *Hence, the matter is adjourned sine die, till such date SASF made its appearance and file proper affidavit to cooperate with the Tribunal in this matter.*

Nodal Officer of CHB is directed to hand over a copy of the day's order to the Zonal Head/Regional Head of CHB".

34. The above facts indicate that it was the Financial Creditor, who did not permit the Principal Borrower to pay the balance amount under the Negotiated Settlement by creating a restraint on the sale by the Principal Borrower, which proceeding was ultimately adjourned by DRT. Thus, on the one hand the Financial Creditor itself created situation where the Principal Borrower could not make the payment by sale of its land as was earlier permitted and under which process Rs.92.25 lakhs was already paid. the Financial Creditor is now trying to take advantage of its own wrong, i.e., not permitting the Principal Borrower to pay the amount and now it has jumped suddenly with Section 7 Application, claiming entire amount from the corporate guarantor, with regard to whom it has not initiated any proceedings from last 18 years. The present is a clear case where the Financial Creditor is trying to take benefit of its own wrong, which cannot be allowed.

35. Next submission of the learned Counsel for the Appellant is that in view of the order passed in IA No.89 of 2020, IA No.27 of 2021 could not have been entertained. IA No.89 of 2020 was filed by the Promoter/ Director challenging the acceptance of claim by the RP of the Financial Creditor, which Application was disposed of by Adjudicating Authority by order dated 09.12.2020. In order dated 09.12.2020, the Adjudicating

Authority has noticed the grounds taken by the Promoter/ Director on the claim of Rs.16,12,23,210/-. Paragraph 1.3 to 1.9 of the order contains the case of the Promoter/ Director, which is as follows:

> *"**1.3** It is further stated that the CD protested the said claim of Rs.16,12,23,210.00 (Rupees Sixteen Crores Twelve lacs Twenty Three thousand Two hundred Ten only) lodged by the respondent No.1 on the following grounds:-*
>
> *(i) That in view of the Negotiated Settlement (NS) dated 30.04.2005, the CD (Principal Borrower National Boards Ltd.) paid an amount of Rs.92.24 lacs to the respondent herein, the balance amount being Rs.123.65 lacs, Rs.61.65 lacs being the cash component to be recovered by selling the assets and Rs.62.00 lacs to be received in the form of Zero Nonconvertible Debenture. It is important to point out that at the time of extending the loan facility to the financial creditor the lender (IDBI) had created a pari passu charge in respect of movable and immovable property belonging to the Principal Borrower (National Boards Ltd.). After obtaining a decree and negotiating a settlement with the principal borrower in 2005, sometimes in the year 2009, the respondent filed a recovery application in the pending OA (OA No.27/2002) seeking an order of attachment for the aforesaid movable and immovable property which was mortgaged to IDBI in 1997, in order to realize the balance outstanding amount of Rs.61.65 lacs under the negotiated settlement. The prayer in the application was*

allowed by the order dated 24.03.2009 and the present respondent was allowed to attach the aforesaid property, Subsequent thereto, in 2011, the respondent again approached the DRT and sought permission to revalue the land which stood mortgaged in favour of the respondent and restraining the principal borrower from selling the properties (the sale proceeds of which were to be used to repay the respondent No.1), thereby vitiating the process of selling of the assets to repay the respondent No.1. However, till 2018 the respondent has not taken any step to revalue the property and realise the aforesaid outstanding amount. In this context it is relevant to point out that the last order passed by the DR,.T in the aforesaid OA No.27/2002. The DRT by its order dated 16.11.2018 noted as under:-

> *"As per record, SASF has not appeared in the proceeding for more than two years. There are numbers of writ pending before the Hon'ble Gauhati High Court related to the mortgage property. SASF has not filed any report regarding status of the pending writs. It is clearly evident that SASF is not interested to proceed in this case. As a result this Tribunal is unable to take any step for recover of certificate amount due to non-cooperation of SASF. Hence, the matter is adjourned sine die, till such date SASF made its appearance and file proper affidavit to cooperate with the Tribunal in*

this matter. Nodal Officer of CHS is directed to hand over a copy of the days order to the Zonal Head/Regional Head of CHS"

Hence, from the above fact it is evident that there is no default on the part of Principal Borrower or Corporate Debtor. Further, it is surprising that on one hand the respondent has failed and neglected to take steps in accordance with the orders obtained by the respondent from the DRT and on the other side the respondent is adding up interest and projecting a large figure to prejudice the NPIL (Corporate Debtor).

(ii) Another significant point in the above context is that the respondent had obtained a decree in OA No.27/2002 by the ORT on 03.01.2005. Further it is also relevant to point out that in the aforesaid OA the respondent had not arrayed the present appellant as a party. It is therefore submitted that the decree essentially operated against the principal borrower and others who were party to the OA and not against the present CD- NPIL. Additionally, the respondent and the principal borrower entered into a negotiated settlement on 30.04.2005. Even at the time of entering into the negotiated settlement, the respondent did not put the CD-NPIL on notice. It is therefore submitted that the entire process from obtaining of decree to entering into a negotiated settlement was done in the absence of the CD-NPIL.

1.4 *It is further submitted that the DRT is seized with the matter and a recovery proceeding in respect of the same decreed certificated dated 05.01.2005 pending before the DRT cannot be instituted before NCLT, unless the proceeding pending before DRT at the behest of IDBI of which the respondent is the successor in interest is withdrawn.*

1.5 *It is also submitted that the respondent No.1 deliberately imposed the interest for the period from 21.02.2003 to 01.12.2016 and projected a malicious claim of Rs.16, 12,23,210.00 against the CD - NPIL, while the CD-NPIL was under BIFR and declared as a sick company and a moratorium order under Section of The Sick Industrial Companies (Special Provisions) Act, 1985 was passed by BIFR with respect to the CD-NPIL directing that the operation of all or any of the contracts, assurance of property, agreements, settlements, awards, standing orders or other instruments in force, to which the CD-NPIL is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board.*

1.6. *It is stated that the respondent No.2 without verifying the books of account of the Principal Borrowers (NBL) and the CD - NPIL and other available documents, accepted the impugned claim of Rs.16,12,23,210.00 of*

the respondent NO.1 arbitrarily and mechanically, violating the Regulation 14 of CIRP Regulations.

1.7 *It is further submitted that the present application is being filed under Section 60(5) of the IBC Code, 2016 seeking to challenge the claim lodged by the FC(SASF) the respondent No.1 herein, with the RP(respondent No.2) appointed by the Adjudicating Authority - NCLT, Guwahati in CP (IB) No.09/GB/2019 vide order dated 26.08.2019, thereby admitting the claim of the FC by the RP overruling the objection of the CD-NPIL that the claim is not maintainable in law.*

1.8 *It is further submitted that the impugned claim lodged by the responde"nt No, 1, is prejudicial to the shareholders of the CD- NPIL and militates against the essential principle of the IBC, 2016 because one of the objects of the Code of 2016 (Act 31 of 2016) is maximisation of value of assets of persons to promote entrepreneurship.*

1.9 *That the decree dated 05.01.205, passed by the DRT, Guwahati cannot be enforced against the CD- NPIL as because the Corporate Guarantor (NPIL) was not a party to the said proceedings."*

36. The Adjudicating Authority after noticing the aforesaid facts, heard the Application and in paragraph 8 and 9, issued following directions:

*"**8.** Hence, the prayer made by the petitioner (Promoter Director) here to give direction to the RP to set aside the claim lodged by the FC, is rejected.*

9. *The RP is hereby directed to verify the claim amount of the FC minutely and transact the proceedings with*

utmost dedication strictly and in accordance with the provisions of the "Code", Rules and Regulations of IBC / IBBI."

37. From the above order, it is clear that the prayer of the Appellant – Promoter/ Director to set-aside the claim of Financial Creditor was rejected. However, RP was directed to verify the claim of Financial Creditor minutely and transact the proceedings with utmost dedication strictly and in accordance with the provisions of the Code. The submission of learned Counsel for the Appellant that order dated 09.12.2020 operates as *res-judicata* towards the Application, i.e., IA No.27 of 2021, cannot be accepted. There was positive direction by the Adjudicating Authority to verify the claim amount of Financial Creditor minutely and transact the proceedings with utmost dedication strictly and in accordance with the provisions of the Code. The above is clear indication that the Adjudicating Authority found substance in the contention of the Promoter/ Director regarding the inflated claim submitted by the Financial Creditor and directed the RP to reverify. Thus, the submission of the Appellant that the order dated 09.12.2020 operates as re-judicata cannot be accepted.

38. The second submission of the learned Counsel for the Appellant that there was huge delay in filing IA No.27 of 2021, also cannot be countenanced. The Financial Creditor filed its claim of Rs.16.12 crores with RP on 09.09.2019, which was immediately challenged by filing IA No.89 of 2020 on 20.11.2019 by the Promoter/ Director and the said IA was disposed of by the Adjudicating Authority on 09.12.2020. In

pursuance of the order the RP filed a Compliance Report on 24.12.2020, reiterating its admission of claim of Rs.16.12 Crore, on which Application was filed immediately by the Promoter/ Director being IA No.27 of 2021. Thus, the submission that there was delay in filing the Application cannot be entertained. It is to be noted that IA No.27 of 2021 was pending for consideration, during which the CIRP proceeded and the IA No.27 of 2021 could be decided only on 08.04.2022. The fact that Application was decided on 08.04.2022 cannot be treated to any adverse to the challenge of the admission of the claim of the Financial Creditor, which was put to challenge by filing Application by Promoter/ Director.

39. The amount of claim of Financial Creditor in the CIRP has relevant part to play. The amount of claim admitted results in allocation of voting share to the Financial Creditors. The SASF was initially allotted 71.05% share, which was subsequently increased to 87.76%. With the voting share, which is more than the requisite majority required to take a decision in a CoC, the Financial Creditor was on driving seat. We having found that the claim as admitted by the RP of the Financial Creditor is inflated and incorrect and the correct claim was directed by the Adjudicating Authority to be determined by new RP by order dated 08.04.2022, the wrong admission of the claim by RP has disastrous result in the entire CIRP. We may in this context notice the judgment of this Tribunal, where this Tribunal has held that error in constitution of CoC has adverse effect on the CIRP. This Tribunal in **Jayanta Banerjee vs. Shashi Agarwal and Anr.**

– Company Appeal (AT) (Insolvency) No.348 of 2020 in paragraph 85 and 87 has laid down following:

> *"**85.** Based on the above discussion, we are the considered opinion that the Constitution of the Committee of Creditors violates the proviso to Section 21 (2) of the I & B code 2016 read with 12(3) of CIRP Regulations. Therefore, the Constitution of the creditors' committee is a nullity in the eye of law that vitiates the entire CIRP. Liquidation is like a death knell for the corporate entity/corporate person. Liquidation based on the resolution of the CoC, which consists of related party Financial Creditors having 77.20 % vote share, is a matter of grave concern. Hon'ble Supreme Court in the case of Phonix ARC (supra) has described the entering of such related party Financial Creditors in the Committee of Creditors **as an act of commercial contrivances through which these entities sought to enter the COC,** which could affect the other independent Financial Creditors. An order for liquidation of corporate debtor based on the sole decision of related parties Financial Creditors could be fatal for the existence of the corporate debtor, cannot be sustained. **It is also pertinent to mention that when the Constitution of the Committee of Creditors itself is found to be tainted, then the decision of that COC cannot be validated on the pretext of exercise of commercial wisdom.***
>
> ***87.** We further observe that the corporate insolvency process in the instant case is totally in disregard of the provision of the Code and Regulations thereunder. The formation of the Committee of Creditors in the instant*

case is a nullity in the eyes of the law. Since the illegally constituted committee of creditors took the decisions at every stage of CIRP. Therefore, the entire corporate insolvency resolution process of the Corporate Debtor is found to be vitiated. Therefore the impugned order of liquidation passed by the Adjudicating Authority deserves to be set aside."

40. This Tribunal also in the above case held that when the constitution of the Committee of Creditors itself is found to be tainted, then the decision of that of CoC cannot be validated. To the same effect there is another judgment of this Tribunal passed in ***Company Appeal (AT) (Insolvency) No.583 of 2022 – Edelweiss Asset Reconstruction Company Ltd. vs. Mohit Goyal***, where this Tribunal laid down following in paragraphs 19 and 20:

*"**19.** The need to have a properly constituted CoC needs no special emphasis for the CoC plays a pivotal role in the insolvency regime being the supreme decision making body in the CIRP of the Corporate Debtor. In the IBC scheme of 2016, the creditors of the corporate debtor have been granted vast powers, and responsibilities and have in fact been put in the driver's seat. The creditors are to take absolute control of the management of the corporate debtor and have been endowed with the authority to take key decisions. With a creditor-in-control management, the CoC is expected to apply their commercial wisdom for the benefit of the corporate debtor. And with this in view, the IRP is saddled with the*

crucial responsibility of properly constituting the CoC and also to assign voting share to each creditor based on the financial debts owed to such creditor and without that done, there cannot be a meeting of the CoC. We cannot lose focus that the Interim Resolution Professional/ Resolution Professional is an administrator of the IBC and is expected to function under the guidance and directions of a validly constituted CoC that control the Corporate Debtor. In the present case, the IRP constituted the CoC on the basis of provisional list of claims and yet chose to exclude the Appellant/Financial creditor from the CoC on the ground that there was a need to verify the provisional claims submitted by him. This conduct is unjustified in that the exclusion of Financial Creditor from the CoC or delayed inclusion of the Financial Creditor on the CoC is prejudicial to the best interests of the Corporate Debtor. In our considered view, the undue haste shown by the IRP in certifying the constitution of the CoC; excluding a secured financial creditor therefrom on a flimsy pretext and also proceeding ahead with a meeting of an invalidly constituted CoC is not in sync with the form and spirit of the IBC and therefore cannot be countenanced.

20. *This brings us to the next issue for our consideration which is to determine whether the decisions taken by this CoC which was not validly constituted deserves to be set aside. Under the IBC, the role assigned to the CoC is of critical significance. Section 28(1) of the IBC clearly enunciates that the Resolution Professional, prior to taking various actions in the CIRP process, needs the prior approval of the CoC and is*

required to seek the vote of the creditors. The success of CIRP of the Corporate Debtor therefore largely depends upon a validly constituted CoC. For putting in place a validly constituted CoC, the IRP after due collation of claims has to form the CoC from among the financial creditors and each creditor has to be assigned the voting share on the financial debts owed to such creditor. Section 21(2) of the IBC provides that the CoC shall comprise all financial creditors of the Corporate Debtor. In the present case, the non-inclusion of the Appellant/Financial Creditor on the CoC before holding the first meeting was thus an infraction of the IBC. The CoC, therefore not having been validly constituted, the logical corollary is that decisions taken in the first meeting of the CoC stood vitiated."

41. Further in ***Bimalesh Bhardwaj and Ors. vs. Value Infratech India Pvt. Ltd. – Company Appeal (AT) (Insolvency) No.112 of 2021***, this Tribunal in paragraph 27 and 28 laid down following:

*"**27.** Thus we find that the CoC was not constituted in accordance with the provisions of IBC. In the matter, the CIRP was not pursued with fairness and due diligence by the Resolution Professional and the resolution for liquidation of the Corporate Debtor was taken in a meeting with an improper voting share ascribed to Respondent No. 4 and taken in unseemly haste. These are actions of omissions and commissions, which we cannot absolve the Resolution Professional from his conduct should be investigated by Insolvency and Bankruptcy Board of India and action as appropriate*

may be taken against the present Resolution Professional.

28. *In the result, we direct the following:-*

(i) The CoC as constituted in the CIRP of the Corporate Debtor was not in accordance with provisions of IBC, therefore its constitution is quashed.

(ii) The claims of various financial creditors including home buyers should be appropriately fixed, keeping in view the order of this Tribunal in CA (AT) (Ins) 29 of 2020.

(iii) The application IA No. 1898 of 2020 wherein an application for exclusion of time spent in pursuing the application before the Adjudicating Authority under sections 19(2) and 21-A of the IBC should be preferred before the Adjudicating Authority for appropriate order"

42. This Tribunal in the above cases held that improper voting share ascribed to Financial Creditor has led to the liquidation of the Corporate Debtor, which was not approved. Lastly, this Tribunal in ***Company Appeal (AT) (Insolvency) No.42 of 2022 – Hindalco Industries Ltd. vs. Hirakud Industrial Works Ltd.*** in paragraph 112 has again reiterated the same proposition, which is to the following effect:

*"**112.** Based on the above discussion, we are of the considered opinion that the Constitution of the Committee of Creditors violates the proviso to Section 21(2) of the I & B Code 2016 read with 12(3) of CIRP Regulations. Therefore, the Constitution of the creditors' committee is*

a nullity in the eye of law that vitiates the entire CIRP. Liquidation is like a death knell for the corporate entity/corporate person. Liquidation based on the resolution of the CoC, which consists of related party Financial Creditors having 77.20% vote share, is a matter of grave concern. Hon'ble Supreme Court in the case of Phoenix ARC (supra) has taken note of the entering of such related party Financial Creditors in the Committee of Creditors as 'an act of commercial contrivances through which these entities sought to enter the COC, which could affect the other independent Financial Creditors'. It is also pertinent to mention that when the Constitution of the Committee of Creditors itself is found to be tainted, then the decisions of that COC cannot be validated on any pretext even it is about exercise of commercial wisdom."

43. The above judgments clearly indicate that if the vote share is wrongly allocated to the Financial Creditor in the CoC, it gravely affects in carrying out the process of CIRP, as in the present case, inflated admission of claim of the Financial Creditor, resulted in serious consequences in the CIRP. In view of the aforesaid, we are of the view that Adjudicating Authority did not commit any error in issuing directions in IA No.27 of 2021, directing the new RP to again verify the claim and take further proceedings in accordance with the verified claim.

44. There is one more aspect of the matter, which cannot be lost sight of. The present is a case where the Financial Creditor has initiated proceedings against the Corporate Debtor after 18 years of invoking the guarantee.

Guarantee was invoked on 03.12.2001 and Section 7 Application was filed on 12.03.2019. It is also relevant to notice that Corporate Debtor was in BIFR and it came out of BIFR only on 30.11.2016 and after 20.10.2017, it started earning profit. The Corporate Debtor was MSME and was running for last 54 years and it collapsed after initiation of CIRP by the Financial Creditor. We have already noticed above that Financial Creditor was proceeding to recover its dues from Principal Borrower and after one time settlement dated 30.04.2005, the Principal Borrower sold its immovable properties to pay its dues under the Negotiated Settlement and it paid Rs.92.24 lakhs. The proceeding under which the Principal Borrower was selling its assets and repaying its dues was got interrupted by the Financial Creditor itself by filing an Application and obtaining an order dated 09.09.2011 from DRT. Further, the Financial Creditor did not prosecute further proceedings, even after restraining the Principal Borrower to sale its assets. Ultimately, DRT has adjourned the proceedings *sine-die* on 16.11.2018 as noted above. Thus, it was due to its own reasons, the Financial Creditor interdicted the proceedings of sale the immovable assets of the Principal Borrower and stopped the midway, due to which the Principal Borrower could not further sell its immovable properties further and clear the entire debt. On the other hand, the Financial Creditor filed Section 7 Application against the Corporate Debtor in 2019, abandoning the proceedings, which it was prosecuting against the Principal Borrower. It is also relevant to notice that SASF was the operating Agency in BIFR with regard to the Corporate Debtor and in the proceedings before the BIFR

the debt as per guarantee was not even included in the inventory of debt. Though the Financial Creditor has initiated proceedings vide OA No.36 of 2003 regarding the Financial Facilities extended to the Corporate Debtor, which it recovered successfully and No Due Certificate was issued to the Corporate Debtor on 15.07.2016 by the Financial Creditor.

45. In view of the above background, filing of Section 7 Application by the Financial Creditor against the Corporate Debtor is nothing but steps towards recovery of dues of the Financial Creditor and not for any insolvency resolution of the Corporate Debtor. The Corporate Debtor after coming out from the BIFR has recovered from its insolvency and started earning profit, which has been noticed by Adjudicating Authority in the order dated 08.04.2022 in IA No.43 of 2021. We may refer to para 14.1(iii), (iv), (v), (vi) of the impugned order, which is to the following effect:

> "14.1.iii ***CD in BIFR from 2003-2016:*** *Under the aegis of BIFR, secured lenders including Stress Assets Stabilization Fund (SASF) were repaid by 2016 and No Dues Certificates (NDCs) were issued. Since then, the CD had no institutional/ secured lender. Funds thereafter have been reportedly brought in through the promoter group, associates and well-wishers of the CD.* ***Due to the upward growth of the CD after coming out from under the BIFR, the CD was re-listed on the BSE in 2018 after 15 years of suspension.*** *Balance Sheet shows that the investors, including NBFCs, HNI investors, and public shareholders have invested funds in equity capital.*

iv. ***The reported performance of the CD from 2017-2019 (in Rs. Lakhs)***

Year	***Turnover***	***Profit after Tax***
2016-2017	*4870.86*	*23.07*
2017-2018	*4436.72*	*43.59*
2018-2019	*4114.07*	*71.97*

v. Liabilities of the CD were reduced during 2017-2019 and Net Worth of the CD improved by 3284.42 lakhs from FY 2017-FY 2019. With the capital infusion and financial support, ***the CD survived the rigors of financial sickness under BIFR, revived its operations and generated profits from 2016- 2019.***

vi. ***Hence, before the commencement of CIRP on 26.08.2019, the CD was not facing any financial crisis and but it was a healthy, profit-making going concern with rising revenues.***

46. In this context, we may notice that the Adjudicating Authority in paragraph 14.2 (vii) has noticed that the Unit, which was running well before the CIRP has crumbled production, which is as follows:

> *"14.2 vii. The Unit, running well before the CIRP, is now crumbled, production ceased from 07.07.2020 and layoff declared on 28.01.2021. This has happened for the Corporate Guarantee given by the CD for a loan of Rs 3.07 crores availed by the Principal Borrower from IDBI in 1997."*

47. The Adjudicating Authority further in paragraph 15.3 has held that due to many unwarranted decision taken in the CIRP, 48 years of running

unit after surviving under BIFR, collapsed. Paragraph 15.3 of the order of the Adjudicating Authority is as follows:

> *"**15.3** As per the records available from both the sides, the R1 has not acted as per the provision of the IBC as the CoC Member having voting share of 87.76%. They have mostly concentrated on the point of Commercial Wisdom but have never restrained the R2 from taking so many unwarranted decisions which have resulted into the collapse of a 48 years MSME Running unit, after survival under BIFR, for a guarantee amount of Rs. 3.20 crores given by it in 1997 for PB."*

48. The facts of the present case and sequence of events clearly indicate that Section 7 Application was nothing but proceedings to recover the dues and was not for any purpose of insolvency resolution of the Corporate Debtor. The present was a fist case where powers under Section 65 of the IBC were to be exercised and proceedings of CIRP required to be closed against the Corporate Debtor. However, in view of the orders passed by this Tribunal, under which the proceedings of CIRP proceeded too far, we desist from passing any such order and we are of the view that CIRP be completed as per the directions issued by the Adjudicating Authority in its order dated 08.04.2022 passed in IA No. 43 of 2021.

49. In view of the foregoing discussions, we are of the view that there is no merit in Company Appeal (AT) (Insolvency) No. 526 of 2022, which deserves to be dismissed and is hereby dismissed.

Appeal in Group B

50. These group of Appeals include - Company Appeal (AT) (Insolvency) No. 499 of 2022 filed by Financial Creditor; Company Appeal (AT) (Insolvency) No. 612 of 2022, filed by Sandeep Khaitan, erstwhile RP; and Company Appeal (AT) (Insolvency) No. 525 of 2022, filed by PLBB Products Pvt. Ltd. ("**PLBB**"). All the Appeals having been filed challenging the same order, they are decided by this common judgment.

51. IA No.43 of 2021 was filed before the Adjudicating Authority by the Promoter/ Director, where following prayers were made:

> *"7.1 An order be made removing the respondent no.2 as the Resolution Professional in the matter.*
>
> *7.2 An order be made setting aside all acts of the RP in which the RP had been instrumental, as unfair, biased, motivated and lacking in transparency.*
>
> *7.3 An order be made removing the respondent no. 3 in the matter.*
>
> *7.4 An order be made disqualifying the respondent no.4 as a Resolution Applicant in this matter.*
>
> *7.5 Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may seem fit and proper.*
>
> *7.6 To grant any further relief that this Hon'ble Court may deem fit and proper for the ends of justice."*

52. The Adjudicating Authority in the impugned order has noted the submissions advanced by Promoter/ Director in support of the Application. The submissions made on behalf of the Promoter/ Director with regard to

Financial Creditor and Resolution Professional, have been noted in paragraph 15 and 16 of the impugned order respectively. It is useful to notice the substance of the submissions raised by the Promoter/ Director in support of the Application, by noticing paragraphs 15.1, 15.2, 15.3, 16 and 16.1, which are as follows:

> *"**15.1** Inflated Claim Amount: The R1 has filed the IBC application under section 7 against the Petitioner as a Corporate Guarantor, after 18 years claiming Rs. 133.34 crores against the dues from the Principal Borrower of Rs. 2.15 crores and hence the amount claimed is highly inflated for which the Application under Section 7 has been admitted. Though the Respondent No. 1 has changed the claim amount to Rs. 16.12 crores but with this claim amount, the R1 is having 87.76% voting share in CoC and gets all matters approved what it desires.*
>
> *i. The submission of the R1 that their officers are deputed on a temporary basis from IDBI Bank and hence, the account of the Corporate Debtor has been handled by various officers during the course of the years. Hence, the outstanding amounts in any loan account are part of the institutional records and there is no discretion on any of the officers to put an outstanding amount at their discretion.*
>
> *ii. ii. It is found from the records submitted by the parties that the Original Lender had disbursed only Rs. 3.08 Crores to the Principal Borrower out of the sanctioned loan amount of Rs. 3.20 Crores in 1997 The R1 has filed claim amount of Rs. 133.34 crores in the Application which is 43 times*

of the loan amount for a period of 21 years This calculation is unheard of when Base Rate, MCLR Capping interest rate are in operation in the Country. Although R1 has reduced its claim from Rs 133.34 crores to Rs 16.12 crores during the process of CIRP but the left over amount of the Negotiated Settlement took place in 2005 is Rs 1.23 crores.

iii. The submission of the R1 does not hold good. The guarantor's liability cannot exceed that of the Principal Borrower. This is not a Recovery Forum. IA no 27/2021 filed by the Petitioner in this respect has been remanded to the new RP today to look afresh the prayer made in the IA in reference to the amount claimed by the R1.

15.2 *Submission of the Petitioner that Respondent No. 1 approved of M/s PLBB Products Private Limited (Respondent No.4) as a Resolution Applicant of the CD in the second roll-out of EOI's despite Respondent No.4 being ineligible to file a Resolution Plan on several fronts, such as the fact that Respondent No.4 was not an entity at the time of submission of EOI's on 12.07.2020 and was only incorporated on 20.07.2020. The Petitioner further submits that R1 has allowed the R2 to take so many decisions, which are not permitted under the IBC, for its own interest including the decision of the initiation of the second EOI, not publishing the Form G in widely circulated newspapers, filing of false FIR, allowing modification in Resolution Plan after the submission for approval, filing of applications for change in Trade mark of the CD during CIRP Period etc.*

15.3 *As per the records available from both the sides, the R1 has not acted as per the provision of the IBC as the CoC Member having voting share of 87.76%. They have mostly concentrated on the point of Commercial Wisdom but have never restrained the R2 from taking so many unwarranted decisions which have resulted into the collapse of a 48 years MSME Running unit, after survival under BIFR, for a guarantee amount of Rs. 3.20 crores given by it in 1997 for PB.*

16. *Submissions by the Petitioner in respect of the RP -R 2:*

16.1 *The invitation for the second rollout of EOI was in collusion to allow a backdoor entry to Respondent No.4.*

i. The second roll-out of the Resolution Plan process was initiated by the Respondent Nos. 1 and 2 despite the original process pending with two successful submissions of EOIs. The first Form G inviting EOIs was published in November 2019 in widely circulated newspapers Whereas, the Form G of the second EOI was rolled out by the Respondent No.2 on 27.06.2020 only published in one local newspaper chain in Assam, The Assam Rising and its sister publication Dainandin Barta, having a reported circulation of 28,000 copies.

ii. R2 submits that the reason for publication of 2nd EOI was to facilitate value optimization; availability of potential players to have more resolution applicants and there is no case of collusion.

iii. As per the records made available, the second rollout of EOI was published in one local

newspaper chain in Assam only when the CD is having Registered Office, Corporate Office and Units in Assam and Tamil Nadu. Accordingly, the first Form G inviting EOIs was published in November 2019 in widely circulated, newspapers in Assam, West Bengal and Tamil Nadu, including Aajkaal, Amar Assam, Financial Express and North East Times with a collective circulation of over 5,00,000 copies to attract more Resolution Plan as per the provisions of IBC. The R2 could not clarify or submit the reason for not publishing in widely circulated News papers as required. When the second EOI was not published in widely circulated papers, one of the main objectives of the IBC for maximization of value of assets is defeated by the action of the R2. The submission of the R2 is contrary to his own action.

iv. Hence the contention of the Petitioner that the invitation for the second rollout of EOI was in collusion to allow a backdoor entry to the Respondent No.4 is not ruled out.

v. An inclusion of SPVs and SPCs in the Eligibility Criteria for filing EOIs was only done in the second roll-out of invitations for EOIs and not in the first. The entire second roll-out, with this new inclusion, was done purely to allow PLBB Products Pvt Ltd (PLBB), Respondent No.4 (R4) to file a resolution plan for the CD. Respondent No.4, at the time of filing the EOI, was not even an entity, not an SPV, SPC or Consortium, and neither Respondent No.4 nor its promoters had any prior experience in the

industry in which the CD operates. All norms of propriety were violated, and rules bent by the Respondent No. 2 to allow the Respondent No.4 to file their EOI as an entity which had not even come into existence. Even the Articles and Memorandum of Association of the Respondent No.4 (a non-entity at the time of submission of EOI) does not include the SPV/SPC criteria. Norms were blatantly flouted by the Respondent Nos 1 to 3 in collusion to camouflage the deviation permitted by them to allow the Respondent No.4 to become a successful Resolution Applicant.

vi. Records made available to us confirm that the Respondent No.4 was not an entity at the time of submission of EOI's on 12.07.2020 and it was only incorporated on 20.07.2020."

53. The Adjudicating Authority also has noted the submissions of the Promoter/ Director against Respondent No.3 and Respondent No.5, which need no consideration in view of the reasons given hereafter by us. The Adjudicating Authority after noticing the submissions of the parties in detail from paragraphs 2 to 13 and paragraphs 14 to 16, recorded its decision in paragraph 20. The reason for taking the decision by the Adjudicating Authority are contained in paragraph 20 onwards, which are relevant to notice. Paragraphs 20, 20.1 to 20.4 are as follows:

*"**20. Decision**: Lack of transparency, Conflict of interests, Non Compliances of provisions of IBC, Termination of CIRP from the Second EOI stage and*

replacement of the present RP with a new RP to start EOI afresh.

20.1 *The success of the corporate insolvency resolution depends strictly in terms of provisions of the I&B Code and Regulations made thereunder. In this case the process is tainted from the stage of Second EOI publishing in one local newspaper chain in Assam instead of publishing in widely circulated newspapers published at the places of Registered Office, Corporate Office and major Units of the CD, allowing a Resolution Applicant to file EOI when the Entity was not in existence and modifications in the Resolution Plan after the same had been submitted before the AA for approval. The RP has not performed his duties in a fair and transparent manner as required under the CODE He himself has offered his services to the promoters of the other company of RA when the Resolution Plan of the RA is under process for approval. The RP has filed FIR/ Criminal case, instead of taking up the matter before the AA under Section 74 of IBC for redressal of the issue, which had gone up to the Hon'ble Supreme Court, for one payment of Rs 32.50 lacs made by the Suspended Management to the Supplier of Raw materials to the CD during the Covid Period to sustain production of the Unit, though the CD was under moratorium. The unwarranted action of the RP in filing the FIR has resulted into the freezing of the accounts including the accounts of the Suppliers and closure of the production of a 48 years old the CD which was running well before the RP took over the charge on initiation of the CIRP. The RP had filed two new trademark applications for the CD's brands with a new*

logo on his own even during the process of CIRP when the production is closed from July 2020.

20.2 *It is observed that the R1, R2, R3, R4 were entirely focusing on one point in their submissions, pleadings and arguments during the entire proceedings that the jurisdiction of the Hon'ble Adjudicating Authority is limited to the statutory provisions of the Code, which does not vest the Hon'ble Adjudicating Authority with any equity jurisdiction to entertain a challenge against a CoC approved resolution plan. We are well aware of the provisions of IBC and judgements of the Hon'ble Supreme Court in the matter but the fact is that the process of CIRP is tainted from the second roll-out of EOI, then the stages of Commercial wisdom of the CoC and the approval of the Resolution Plan by the CoC do not arise.*

20.3 *Hence, considering the points mentioned above including the observations made in the points no points no 14 to 20.2 We are of the considered view that the provisions of the I&B Code and Regulations made thereunder have not been complied from the stage of the second EoI. Transparency, Confidentiality and fairness have not been maintained. Conflicts of interests have been established.*

20.4 *In the interests of all stakeholders with transparency in the resolution process and in order to achieve the main objectives of the IBC, 2016 in a time bound manner for maximization of the value of assets and promotion of entrepreneurship, availability of credit and balancing the interest of the stakeholders the CIRP Process from the stage of Second EoI stands terminated*

and the present RP is replaced with the appointment of a new RP (not IRP) Mr. Amit Pareek, CS, [Reg. No. IBBI/IPA-002/IPN00413/2017-2018/11205] from the IBBI panel allotted to this Bench to act from today. We are making it clear that the objectives of the IBC must not be defeated. No one shall be allowed to misuse the provisions of IBC/Regulations to push an old running 48 years old MSME Unit into the Forced Closure or Liquidation or Hostile Takeover affecting the livelihood of hundreds of employees, workers, creditors, vendors, and dependents."

54. The directions in IA No.43 of 2021 are contained in paragraph 20.4 as noticed above. The directions issued by the Adjudicating Authority in paragraph 20.4, are in to the following effect:

"(i) The CIRP process from the stage of Second EoI stands terminated; and

(ii) Present RP is replaced with the appointment of new RP"

55. The challenge to the aforesaid order has been raised by Financial Creditor, erstwhile RP and the PLBB/ Resolution Applicant. The learned Counsel for the Financial Creditor challenging the order contends that the finding of the Adjudicating Authority that there was collusion between Financial Creditor, RP and Respondent No.4 has not been substantiated. The learned Counsel for the Appellant submitted that the CIRP process was conducted in accordance with the prescribed procedure and regulations therein. The mentioning of claim of Rs.133.55 Crores in Section 7

Application was due to the fact that in SAFS officials of IDBI were taken and they as per the records maintained by IDBI, has computed the amount of Rs.133.55 Crores, which was neither deliberate nor was with any intent to prejudice the Corporate Debtor. It is submitted that the claim, which was filed by the Financial Creditor was only for Rs.16.12 Crores, which was verified by the RP and accepted. It is submitted that the CoC decided to roll out from second EOI, since no Resolution Plan was received in pursuance of Form-G. Even the Promoter/ Director did not file any Resolution Plan in response to first Form-G. The opportunity was given to the Promoter/ Director to increase the Plan value, which is reflected in the Minutes of 15th CoC and equal opportunity was provided to Respondent No.4 to revise its Resolution Plan and Resolution Plan which was revised by Respondent No.4, was only with regard to CIRP costs, which increased due to prolonging of the proceedings. After evaluating the Resolution Plan, the CoC approved the Resolution Plan of Respondent No.4 in its commercial wisdom, which cannot be allowed to question before the Adjudicating Authority. The Adjudicating Authority had no jurisdiction to pass the impugned order in IA 43 of 2021.

56. The learned Counsel for the RP, challenging the impugned order submits that the allegations made by the Promoter/ Director that there was collusion between Respondents – SASF, RP and PLBB has not been substantiated. There was no conflict of interest with Respondents - SASF, RP and PLBB. The mere fact that RP has given his consent to act as IRP in an Application filed by the Damayanti Tea Industries, which had common

Promoter with PLBB, is not a proof of any collusion. More so, subsequently, the consent given by RP was withdrawn. It is further submitted that allegation that Respondent No.5/ Praful Jindal appeared for RP before this Appellate Tribunal in Appeal arising out of CIRP process is wholly incorrect. Respondent No.5 was never engaged by Respondent No.2, nor he appeared on behalf of Respondent No.2. The recording in the proceeding that Respondent No.5 appeared for Respondent No.2 was incorrect. The Respondent No.5 always appeared for Financial Creditor, which was clearly stated before the Adjudicating Authority. Respondent No.4/ PLBB was fully eligible to submits its Resolution Plan. The mere fact that it was incorporated subsequently, i.e. on 20.07.2020, does not have any effect on its eligibility, since it was mentioned in the Application that Respondent No.4 is in the process of incorporation. The allegation that Respondent No.2 and the CoC rollout second EOI to give backdoor entry to Respondent No.4 is wholly incorrect. The second Form-G was issued since no Resolution Plan was received in pursuance to first EOI. Even the Promoter/ Director did not file any Resolution Plan. The second Form-G was issued to fulfill the object of maximization of value of the Corporate Debtor. It is further incorrect to suggest that the RP and CoC permitted Respondent No.4 to modify the Resolution Plan from time to time. Only change made by Respondent No.4 was to increase the CIRP cost. Side-by-side perusal of the Resolution Plan would show that Resolution Plan of Respondent No.4 was better than Plan of Promoter/ Director. More so, it was the commercial wisdom of CoC to approve the Resolution Plan, the

Promoter Director cannot seek any direction that CoC should approve the Plan of Promoter/ Director. The approval of Resolution Plan by the CoC cannot be questioned before the Adjudicating Authority, which is a settled law. The Promoter/ Director diverted the funds of Corporate Debtor and made a payment of Rs.32 lakhs to an entity, who had supplied material, which payment was directed to be reversed by order of the Hon'ble Supreme Court and ultimately the said amount was refunded. The RP has filed the First Information Report against the Promoter/ Director due to the aforesaid diversion of fund. The allegation that RP allowed the production to stop and did not keep the Corporate Debtor as going concern is not correct. By the impugned order, the Adjudicating Authority has turned back the clock of the CIRP from second EOI, which is clear contravention of Section 12 of the Code. The allegation that Respondent No.4 was not eligible to submit a Resolution Plan is incorrect. There was no collusion with Respondent Nos.2 and 4 and allegation in respect of the same are without any basis. Allegation that second Form-G was not published in several newspapers, as was done in the first Form-G, has no consequence, since even in response to second Form-G, apart from Respondent No.4, three more entities had submitted their EOI, but those EOI having been submitted after the last date, under the advice of CoC, they were not considered. The allegation made by Promoter/ Director against the RP were all unfounded and complaints were filed before the IBBI, which complaints were closed. The allegation that family of Respondent No.2 is in the business of Plywood is not correct. The father of Respondent No.2 was

small retail trader of Plywood. The Adjudicating Authority could not have passed an order removing the RP. The RP can be removed only in accordance with Section 27 of the Code. When the statute provides for a thing to be done in a particular way, it must be done in that manner alone, or not at all. The allegations of collusion against Respondent No.2 are all incorrect.

57. Shri Jishnu Saha, learned Senior Counsel appearing for Respondent No.1 refuting the submission of the learned Counsel for the Appellants, contends that entire sequence of event and process, which was undertaken by SASF with the aid and advice of RP clearly indicates that entire process was undertaken to benefit SASF. The RP has accepted inflated claim of SASF and inspite of direction by the Adjudicating Authority on 09.12.2020, did not correct the claim. Acceptance of inflated claim was with an object to give such a vote share to the Financial Creditor, under which SASF can control the entire CoC. The second EOI was rolled out by the Financial Creditor and the RP, to only benefit Respondent No.4. The fact that PLBB was not even incorporated on the date when it submitted its Resolution Plan, makes it clear that somehow RP and Financial Creditor wanted PLBB to take over the Corporate Debtor. The PLBB's Resolution Plan has not disclosed any source of fund and despite the lacking of the aforesaid eligibility requirement, the Plan was placed before the CoC. Infact, Member of Respondent No.1 himself has raised a query during the proceeding of the CoC that PLBB has not disclosed the source of fund. The Minutes of 15

CoC Meeting noticed that the representative of SASF has made an enquiry about the source of funding. The CoC Meeting, which was convened on 25.05.2021 to consider the Resolution Plan, was requested to be adjourned by several other Members of the CoC, since the said Meeting was convened in the second wave of Covid, which request was not accepted and in the Meeting held on 28.05.2021, the SASF was the sole Member of the CoC, who presented and approved the Plan. The RP has shown complete bias in favour of SASF and PLBB as he accepted the inflated and incorrect claim of SASF. The RP inspite of direction of Adjudicating Authority did not amend its error, which indicates that the mind set of RP, was to allow the Financial Creditor to dominate the CoC. It is submitted that PLBB, which was an entity, not even incorporated when the Plan was submitted and it having not disclosed any source of found and it had no experience in the field in which Corporate Debtor was working, accepting the Resolution Plan of PLBB clearly indicates the bias of the Financial Creditor and the RP. The RP has given his consent to be the IRP in another matter for M/s Damayanti Tea Industries, a related party, which was being run by the Promoters of PLBB, clearly shows the collusion between RP and PLBB. The MSME unit of the Promoter/ Director, which was running for last 58 years and after coming out from the BIFR was earning profit in 2016-17, 2017-18 and 2018-19 was suddenly put to closure. After the first approval of Plan of Respondent No.4, the Promoters of Respondent No.4 visited the factory premises of the Corporate Debtor and had communicated that they want number of staff to be reduced. The said visit of Promoter was in December

2020 and immediately the RP issued a lay off notice in January 2021. Infact, RP was acting to benefit Respondent No.4 and there was clear nexus between SASF and RP. The entire CIRP was conducted by RP in the manner, which shows lack of transparency and collusion and Adjudicating Authority has rightly taken a decision to scrap the CIRP from Second EOI and replace the RP. Replacement of RP cannot be faulted, since the Adjudicating Authority was satisfied about the allegations made by the Promoter/ Director and in view of the findings returned by the Adjudicating Authority in paragraph 20, it is clear that there was lack of transparency in the process. It is submitted that the challenge in the IA No.43 of 2021 was not challenge to the commercial wisdom of the CoC in approving the Resolution Plan of PLBB, rather challenge was to the entire process of CIRP conducted by RP. The Promoter/ Director of the Corporate Debtor was not given an opportunity, since the only intent of SASF and RP was to give maximum benefit to SASF in the proceeding.

58. We have considered the submission of learned Counsel for the parties and have perused the record.

59. While deciding Company Appeal (AT) (Insolvency) No. 526 of 2022 filed by the Financial Creditor, challenging the order of the Adjudicating Authority in IA No.27 of 2021, we have already held that admission of claim of Financial Creditor of Rs.16.12 Crores by the RP was incorrect. It has been held that RP inspite of directions of the Adjudicating Authority dated 09.12.2020 in IA No.89 of 2020, to minutely verify the claim, the RP still

admitted the entire claim and stuck to its earlier decision. We have held that the claim of Rs.16.12 Crores as submitted by Financial Creditor, details of which contained in Annexure-I, Form-C submitted in 2019 was not correct. The RP has computed the interest @ 12% from 01.11.2001, the date of filing of the Application by the Financial Creditor, till the filing of Section 7 Application. Whereas, there was Negotiated Settlement dated 30.04.2005 between Financial Creditor and the Principal Borrower, under which settlement, out of Rs.215.89 lakhs, Rs.92.24 lakhs were paid by the Principal Borrower by selling his immovable land. We have already noticed that it was the Financial Creditor, who stopped the further sale of the assets by Principal Borrower, so that Principal Borrower could not make entire payment under the Negotiable Settlement. We have already held that quantum of claim of Financial Creditor was a major factor for CIRP as the quantum is directly related to vote share to be allocated to Financial Creditor. When vote share to the Financial Creditor of 87.76% has been held not to be in accordance with law, the process undertaken by the CoC with the decision of the Financial Creditor having 87.76% vote share cannot be approved. We are of the view that decision to terminate the entire process after rollout of Second EOI can be fully supported by our conclusion that claim of Financial Creditor was wrongly accepted for Rs.16.12 Crores, which was not corrected, even after the directions given by the Adjudicating Authority. Further, the fact that RP has not correctly verified the claim of the Financial Creditor and inspite of directions of Adjudicating Authority, did not amend its opinion, is sufficient enough to

replace the RP. We are, thus, of the view that in view of our reasons and conclusions given while deciding Company Appeal (AT) (Insolvency) No. 526 of 2022, the decision of the Adjudicating Authority to terminate the CIRP process from the stage of Second EOI and replacement of RP can be sustained.

60. The learned Counsel for the parties have made elaborate submissions with regard to findings recorded by the Adjudicating Authority in the impugned order regarding lack of transparency, conflict of interest and non-compliance of provisions of the Code.

61. The learned Counsel for the RP has emphatically submitted that Adjudicating Authority had no jurisdiction to pass an order replacing the RP. He submits that RP can be replaced only in accordance with Section 27 of the Code, when a Resolution is passed by the CoC for such replacement. There can be no doubt to the scheme of the Code for removal of the RP by the CoC which has to pass a Resolution. The Adjudicating Authority, who has appointed the RP cannot be said to lack jurisdiction to take a decision to replace the RP, when the facts and circumstances of a particular case warrants. In the present case, where serious allegations were made against the RP, regarding not conducting the CIRP transparently, the Adjudicating Authority did not lack jurisdiction to pass an order for replacement of the RP. The jurisdiction of Adjudicating Authority to pass an order replacing the RP has also been accepted by this Tribunal in ***Company Appeal (AT) (INS.) No.1443 of 2022 – Srigopal***

Choudary vs. SREI Equipment Finance Ltd., wherein in paragraph 14 and 16, this Tribunal held following:

> *"**14.** We are of the opinion that the Adjudicating Authority being the appointing authority of IRP/RP was well within its jurisdiction to pass an order for removal of the RP particularly in a situation where the RP had not taken any steps to convene a meeting of the CoC for the purposes of removal of RP.*
>
> ***16.** After going through the material available on record we are satisfied that the Adjudicating Authority with an object to implement the provisions of IBC in its letter and spirit has rightly exercised its inherent jurisdiction by way of passing order of removing the appellant as RP of the CD. This fact which is reflected on record is sufficient to draw an inference that the Appellant was proceeding contrary to the statutory provisions as contained in the IBC and also delaying the smooth conclusion of CIRP. We are of the considered opinion that there is no defect in the impugned order warranting interference by this Tribunal. On the contrary the conduct of the appellant/RP which was observed by the Adjudicating Authority and reflected so in the impugned order is sufficient enough to direct IBBI to conduct an inquiry regarding the role played by the RP in this matter."*

62. We, thus, do not accept the submission of learned Counsel for the RP that Adjudicating Authority lack jurisdiction to pass an order replacing the RP.

63. Coming to the conflict of interest, we have already taken the view that observations made in the impugned order against Respondent No.3, i.e.,

Anand Verma were uncalled for. We have already allowed ***Company Appeal (AT) (Insolvency) No. 804 of 2022*** filed by Anand Varma, Advocate challenging adverse observations made against him, which Appeal was decided on 04.11.2022. We are also of the view that the plea taken on behalf of Respondent No.5/ Praful Jindal, who was an Advocate, appearing for Financial Creditor was correct that Respondent No.5 never appeared for the RP and he always appeared for the Financial Creditor. Thus, there is no question of any conflict of interest with regard to Respondent No.5 with other Respondents. We thus are of the view that adverse observations made against Respondent No.5, Praful Jindal in the above order also deserves to be set aside and ordered accordingly.

64. Insofar as observation made in the impugned order by the Adjudicating Authority regarding and RP are concerned, we are of the view that said observations were made only for the purposes of deciding the Application and the observations cannot furnish any foundation for initiating any action against RP in any Forum. We, thus, observe and clarify that observations made against RP be not treated regarding integrity of RP and the observations will be confined and treated as observation for the purpose of case only and the said observations shall not be made basis for initiating any proceedings against RP in any Forum.

65. As observed above, the decision of the Adjudicating Authority in IA No.43 of 2021 for terminating the CIRP from Second EOI and replacement of RP can be sustained by our reasons and conclusions while deciding

Company Appeal (AT) (Insolvency) No. 526 of 2022, hence, we need not delve upon various other contentions raised by respective parties regarding the collusion between SASF, RP and PLBB.

66. Insofar as Financial Creditor is concerned, the Adjudicating Authority in paragraph 22 has observed that information which was submitted by Financial Creditor in Section 7 Application were incorrect. However, Adjudicating Authority has taken the view that present is not a case where any proceeding under Section 75 of the Code be proceeded with. We fully concur with the view taken by the Adjudicating Authority in paragraph 22 of the impugned order, which is to the following effect:

> *"**22.** The action of the FC attracts the provisions of Section 75 of IBC for incorrect information about claim amount furnished in the Application filed before this Bench. However, considering the submissions of the FC and the lack of exposure on the part of the officials of the FC in filing the Application under Section 7 of IBC, we take a lenient view and the prayer made by the Petitioner to proceed in the matter is rejected."*

67. In view of our forging discussions and conclusions, we dispose of Company Appeal (AT) (Insolvency) Nos. 499 of 2022, 525 of 2022 and 612 of 2022 in following manner:

(I) The order of Adjudicating Authority dated 08.04.2022 passed in IA No.43 of 2021 to the extent it terminates the CIRP from

the stage of Second EOI as well as replacement of the RP is upheld.

(II) The adverse observations made by the Adjudicating Authority against Respondent No.5 in the impugned order, i.e., Counsel who was appearing for Financial Creditor are deleted. Ordered accordingly.

(III) Observations made by the Adjudicating Authority against the RP shall not to be treated as adverse to the integrity of RP and not be made basis for initiating any proceeding or action against the RP in any Forum.

(IV) The new RP, who has been appointed under the impugned order shall conclude the entire CIRP process within 90 days from today, under the supervision and control of Committee of Creditors.

Appeal in Group C

68. These Group of Appeals are Company Appeal (AT) (Insolvency) No. 947 of 2021 filed by SASF and Company Appeal (AT) (Insolvency) No. 1001 of 2021 filed by Sandeep Khaitan, RP. In these Appeals, the order passed by the Adjudicating Authority dated 07.10.2021 in IA No.51 of 2020 filed by the RP has been challenged. By the impugned order, the Adjudicating Authority has rejected IA No.51 of 2020. Aggrieved by the said order, both the Appeals have been filed.

69. The Application IA No.51 of 2020 was filed by the RP alleging preferential, undervalued and fraudulent transactions undertaken by suspended Director of the Corporate Debtor. The RP in the Application has questioned 13 transactions as preferential, undervalued and fraudulent. The RP placed reliance on Report of Forensic Auditor – BDO India LLP dated 26.08.2020. The IA No.51 of 2020 was contested by Respondent No.1 – Promoter/ Director by filing a detailed reply. Both, the RP as well as Suspended Director filed the written submissions and brief in support of their respective submissions. The Adjudicating Authority after considering the submission of both the parties, by the impugned order held that the suspended Management has not undertaken any transactions which can be brought under Section 43, 45, 49, 44, 48 and 66 of the IBC. The contention raised by Suspended Director that transactions referred to in the Application were taken in ordinary course of business or transfer/ sales made for securing new value of the CD, has been accepted. Aggrieved by the said order, RP as well as Financial Creditor has come up in this Appeal.

70. We may refer to the facts and submissions raised in Company Appeal (AT) (Insolvency) No. 1001 of 2021 filed by RP for deciding both the Appeal. The submissions, which have been advanced in these Appeals being more or less similar, they are cumulatively referred as submissions on behalf of the Appellant.

71. The learned Counsel for the Appellant, challenging the order dated 07.10.2021 submits that the order passed by the Adjudicating Authority

does not contain any reasons. The Adjudicating Authority has only recorded its conclusions, although in detailed it has noted the rival submissions raised by both the parties. It is submitted that order being passed without giving any reason, deserves to be set aside on this ground alone. It has been submitted by learned Counsel for the Appellant that Forensic Report was received on 26.08.2020, which pointed towards the preferential and undervalued transactions and the RP applied its mind to the Forensic Report as well as the materials on record and has formed the opinion that transactions undertaken by Ex-Management are preferential, undervalued and fraudulent. Hence, an Application was filed giving details of 13 such transactions, which were questioned. It is submitted that although Adjudicating Authority has noted the case of the Appellant in paragraph 4 of the order in detail, but has failed to advert to the said averments/ contentions. It is submitted that reason given by the Adjudicating Authority that MSME unit even after surviving from BIFR was earning profit without taking loan from the Financial Creditor, was not a relevant consideration for deciding the Application filed under Section 43, 44, 45, 46, 48 and 49. It is submitted that sufficient materials were before the Adjudicating Authority to come to the conclusion that transactions questioned were preferential, undervalued and fraudulent. Whereas, the Adjudicating Authority without adverting to the relevant materials and submissions raised by the Appellant, rejected the Application, which order is unsustainable. The reasoning applied by Adjudicating Authority that CD was profit making concern before initiation of the CIRP is completely

irrelevant and does not find any mention in Section 43, 44, 45, 46, 48 and 49. Further, the said consideration is factually incorrect. The reliance of Adjudicating Authority on the judgment of this Appellate Tribunal dated 07.09.2021, as quoted in the impugned order was not any finding of the Adjudicating Authority, but only recording of submission. It is submitted that transaction conducted by the CD with related parties and transactions questioned by the RP were within the lookback period as provided under Code. The transactions undertaken by the Ex-Management were with the sole object to divert the assets and funds of CD, fall within the parameter identified by Hon'ble Supreme Court in ***Anuj Jain IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd. – (2020) 8 SCC 401***.

72. Learned Counsel for Respondent No.1 refuting the submission of learned Counsel for the Appellant submits that Promoter/ Director had filed a detailed reply to all allegations pertaining to 13 transactions mentioned in Application filed by the RP. It is submitted that the Corporate Debtor, who was MSME and was running from last 58 years, survived from BIFR and after coming out from the BIFR started earning profits, which is reflected in the balance sheet for the years 2016-17, 2017-18 and 2018-19, which has been noticed by the Adjudicating Authority. There was no secured or Bank debt on the Corporate Debtor and the SASF, who has filed Section 7 Application against the Corporate Debtor has filed the Application on the basis of corporate guarantee, which was invoked on 03.12.2001. The period from 2003 to 2016, when the Corporate Debtor was in BIFR, the

SASF itself had filed proceedings for recovery pertaining to financial assistance obtained from IDBI/ SASF. The entire amount due to the Financial Creditor was paid as per the Negotiated Settlement and No Due Certificate was issued by SASF on 14.07.2016, which indicates that the Corporate Debtor has discharged all its liabilities against the Financial Creditor. There was no institution or secured creditor of the Corporate Debtor, hence, there was no occasion to enter into any preferential or undervalued transaction. It is submitted that RP was biased with the Corporate Debtor and was siding with the Financial Creditor from the very beginning. Even the transaction Audit Report obtained from BDO India LLP was obtained from an entity, who has nexus with the RP. It is submitted that this Appellate Tribunal in ***Company Appeal (AT) (Insolvency) No.160 of 2021 – PLBB Products Pvt. Ltd. vs. Piyush Periwal***, itself has noted the allegations of the Promoter/ Direct that RP has also appointed a professional Firm for forensic audit, which reflects the biasness and conflict of interest. The learned Counsel for Respondent No.1 has referred to following observation in the order dated 07.09.2021 of this Appellate tribunal:

> *"**The Resolution Professional has also appointed a known professional firm which has done several professional assignments with him before appointing them as the 'forensic auditors' of the CD which** reflects the biasness, conflict of interest, coercion or undue influence on the other side and allegations against the promoter."*

73. It is further submitted by learned Counsel for Respondent No.1 that the RP himself has approved all the transactions and signed the relevant balance sheets and no objections were raised at the time for preparing the balance sheet signed by the RP, and were looked into by RP and his expert team. It is submitted that neither the Forensic Auditor nor the Appellant looked into the materials and reply, which was submitted by Respondent No.1. The Forensic Auditor chose to ignore the evidence submitted in compliance of their query, which address the transactions elaborately in the Forensic Audit Report dated 26.08.2020. The Appellant as well as the Forensic Auditor has deliberately only selected the outflow of funds while ignoring the inflow of funds from the same party, both of which were done in regular course of business. It is submitted Section 43, sub-section (3) itself contain an exclusion for transactions done in ordinary course of business and are not covered in preferential transactions. The Respondent No.1 has successfully proved before the Adjudicating Authority that transaction was done in ordinary course of business with the related party, who has supplied the materials. It is submitted that the Corporate Debtor was in BIFR and has taken funds from various individuals and related parties, which after coming from the BIFR, as soon as the surplus fund was available were returned, which were not preferential transactions. No financial assistance was taken from any Institution/ Bank or Institutional Organization by the Corporate Debtor after coming out from the BIFR. The submission of the Respondent No.1 that the fact that Corporate Debtor was

earning profit after coming out from the BIFR is relevant and indicates that there was no necessity for the Corporate Debtor to enter into any preferential, undervalued or fraudulent transaction.

74. We have considered the submissions of learned Counsel for the parties and have perused the records.

75. The Adjudicating Authority has passed a very detailed order running into 58 pages while deciding IA No.51 of 2020. A perusal of the order indicated that in paragraph-4, the Adjudicating Authority noted the brief facts of the case as submitted by the RP. In paragraph-5 and 6, order of the Hon'ble Supreme Court and NCLAT order dated 07.09.2021 was noted. In paragraph-7, details of written submissions of RP and paragraph-8 contains submission of Respondent No.1 – Promoter/ Director. Paragraph-9 deals with brief background of the Corporate Debtor. Paragraph-10 contains the reasons given by Respondent No.1 for non-applicability of judgment of the Hon'ble Supreme Court in ***Anuj Jain***. Paragraph-11 is regarding details of dates on which Application was heard. Paragraph-12 contain observations of the Adjudicating Authority and paragraph-13, 14 and 15 contains the conclusion and finding of the Adjudicating Authority.

76. When we look into the entire order passed by the Adjudicating Authority, it is clear that all contention of both the parties have elaborately been noticed. As noted above, the case of the Respondent No.1 was that transactions, which are questioned by RP were transactions done in the

ordinary course of business. The learned Counsel for the Appellant has referred to the judgment of the Hon'ble Supreme Court in ***Anuj Jain IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd. – (2020) 8 SCC 401***, where the Hon'ble Supreme Court had occasion to consider Section 43 and 44 of the IBC. The Hon'ble Supreme Court has analyzed Section 43 of the Code and has laid down following in paragraphs 21.1, 21.2, 21.3 and 21.4:

> *"**21.1.** Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the adjudicating authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit [It may be intended benefit or may even be unintended benefit.] of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53. [Section 53*

IBC makes provision for distribution of the proceeds from sale of the liquidation assets, in case of liquidation of the corporate debtor.]

21.2. *However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways : (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43.*

21.3. *However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of Section 43 of the Code, it may yet remain outside the ambit of sub-section (2) because of the exclusion provided in sub-section (3) of Section 43.*

21.4. *Sub-section (3) of Section 43 specifically excludes some of the transfers from the ambit of sub-section (2).*

Such exclusion is provided to : (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee [Whether the expression "or", as occurring in between the expressions "corporate debtor" and "transferee" in clause (a) of sub-section (3) of Section 43, is to be read as "and" has been one of the significant questions raised in this matter and shall be dealt with hereafter later.] ; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of Section 43(3) and subject to fulfilment of other requirements of sub-clause (ii) thereof. The meaning of the expression "new value" has also been explained in this provision."

77. There can be no quarrel to the proposition laid down by the Hon'ble Supreme Court in the above case regarding the requirement to be fulfilled for holding transaction to be undervalued transaction. The Hon'ble Supreme Court has also noticed that even if a transaction of transfer otherwise answers to and comes within the scope of sub-section (4) and (2) of Section 43 of the Code, it will remain outside the ambit of sub-section (2) of Section 43, if it is covered by exclusion in Section 43 (3).

78. One of the submission, which has been advanced by learned Counsel for the Appellant is that the fact that Corporate Debtor was earning profit before the initiation of CIRP, is irrelevant for deciding an Application under Section 43 and 44. As noted above, the transactions, which are covered by

Section 43, sub-section (3) are to be excluded, even if they fall in the definition of Section 43(2) and (4) as held by Hon'ble Supreme Court in ***Anuj Jain***'s case, whether a transaction is done in the ordinary course of business can be considered taking into consideration overall facts and circumstances and normal transactions undertaken by the Corporate Debtor. Thus, we are of the view that if a transaction is done in the ordinary course of business, the nature of transaction and the status of the Corporate Debtor is relevant, including the background fact and transactions, which were undertaken prior to initiation of CIRP and the fact that Corporate Debtor was earning profit cannot be said to be irrelevant.

79. The learned Counsel for the Appellant has given much emphasis on its submission that order impugned does not contain any reason and the facts and submissions advanced by the Appellant have not been adverted. As noted above, only paragraphs 13 and 15 of the judgment of the Adjudicating Authority contains the conclusions or findings for deciding the Application, which are as follows:

> *"**13.** Considering all the points mentioned above, We do not find any reason not to accept the submissions/ contentions of the CD, an MSME Unit, that the Suspended Management has not undertaken any transactions which can be bought under Section 43,45,49 or Section 44,48,66 of IBC and all transactions were done under regular course of business of the CD, without giving preference to any creditors falling under the same class.*

> ***15.*** *We are of the considered view that the submission of the Suspended Management/CD, MSME Unit are acceptable and we do not have any hesitation to accept the contentions of the CD that the transactions referred to in this Application by the Petitioner have taken place in the ordinary course of business or transfer/ sales made for securing new value of the CD. "*

80. When we look into the aforesaid paragraphs, it is clear that Adjudicating Authority has only recorded its conclusion, paragraphs-13 and 15 cannot be said to contain any reason, on the basis of which the Application was rejected. The conclusion in an order has to follow the reasons for coming to the conclusion. Both the parties have elaborately made their submissions and referred to the various materials in support of their respective submissions. The Adjudicating Authority ought to have adverted to them and thereafter should have recorded its reasons and conclusion. We, thus, find substance in the Appellant's submission that order of the Adjudicating Authority does not contain any reason for coming to the conclusions.

81. In the facts of the present case, ends of justice will be served in setting aside the order dated 07.10.2021 and remitting the matter before the Adjudicating Authority for deciding IA No.51 of 2020 afresh. The new RP, who has now been appointed by subsequent order dated 08.04.2022, as noticed above, shall take steps for early disposal of IA No.51 of 2020.

82. In view of the above, Company Appeal (AT) (Insolvency) No. 947 of 2021 and Company Appeal (AT) (Insolvency) No. 1001 of 2021 are allowed. The order dated 07.10.2021 is set aside. IA No.51 of 2020 is revived to be heard by Adjudicating Authority afresh. We also request the Adjudicating Authority to decide the Application at an early date. In result all the above Appeal are decided in following manner:

(I) Company Appeal (AT) (Insolvency) No. 526 of 2022: There is no merit in the Appeal. The Appeal is dismissed.

(**II) Company Appeal (AT) (Insolvency) Nos. 499 of 2022, 525 of 2022 and 612 of 2022. The Appeals are disposed of in following manner:**

(i) The order of Adjudicating Authority dated 08.04.2022 passed in IA No.43 of 2021 to the extent it terminates the CIRP from the stage of Second EOI as well as replacement of the RP is upheld.

(ii) The adverse observations made by the Adjudicating Authority against Respondent No.5 in the impugned order, i.e., Counsel who was appearing for Financial Creditor are deleted. Ordered accordingly.

(iii) Observations made by the Adjudicating Authority against the RP shall not to be treated as adverse to the integrity of RP and not be made basis for initiating any proceeding or action against the RP in any Forum.

(iv) The new RP, who has been appointed under the impugned order shall conclude the entire CIRP process

within 90 days from today, under the supervision and control of Committee of Creditors.

(III) Company Appeal (AT) (Insolvency) No. 947 of 2021 filed by SASF and Company Appeal (AT) (Insolvency) No. 1001 of 2021 are allowed. The order dated 07.10.2021 is set aside. IA No.51 of 2020 is revived to be heard by Adjudicating Authority afresh. We also request the Adjudicating Authority to decide the Application at an early date.

The parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI

8th February, 2024

Ashwani