THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 1360 OF 2022

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016

Peter Beck Und Peter Vermoegensverwaltung Limited

…Applicant

Vs.

Sharon Bio Medicine Limited

…Respondent

I.A. 2989 OF 2023

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016

State Bank of India

…Applicant

Vs.

Peter Beck Und Peter Vermoegensverwaltung Limited

…Respondent

In the matter of

C.P.(IB) No. 246/MB/2017

Culrrossn Opportunitic SP. & Another

Financial Creditor

Vs.

Sharon Bio Medicine Limited.

Corporate Debtor

Order delivered on: 12.12.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances

For the Applicant in IA 1360/2022	:	Mr. Ankur Kashyap, Advocate a/w Mr. Kalash Babliwal, Advocate i/b Mr. Akash Menon
For the Respondent in IA 1360/2022	:	Mr. Chetan Kapadia, Sr. Advocate a/w Mr. Dheeraj Patil, Advocate
For the Applicant in IA 2989/2023	:	Mr. Chetan Kapadia, Sr. Advocate a/w Mr. Dheeraj Patil, Advocate
For the RP	:	Mr. Animesh Bisht, Advocate a/w Mr. Anush Mathkar, Mr. Jayesh Karnawat, Advocates i/b Cyril Amarchand Mangaldas

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This IA 1360/2022 is filed by M/s Peter Beck and Peter Vermoegenverwaltung Ltd., the successful Resolution Applicant ("Successful Resolution Applicant" or "SRA") in C.P. 246(I&BP)/NCLT/MAH/2017 seeking directions to the Respondents to refund INR 10 crores approx. deposited by the SRA in Abhyudaya Bank Account of M/s Sharon Bio-Medicine Limited ("Corporate Debtor"), along with applicable interest. The Corporate Debtor is Respondent No. 1; M/s State Bank of India, the financial creditor, is Respondent No. 2; and M/s E&Y Restructuring LLP is Respondent No. 3; and direction to Respondent No. 2 to takes all requisite steps and approvals required under law to refund INR 10 crores approx. deposited by the SRA in Abhyudaya Bank Account of the Corporate Debtor, along with applicable interest.
2. The Resolution Plan in respect of Respondent no.1 was approved vide Adjudicating Authority's order dated 28.2.2018 in 246/1&BP/NCLT/MAH/2017. The former promoter of the Corporate Debtor preferred an appeal in Hon'ble NCLAT. The Hon'ble NCLAT stayed the implementation of the Resolution plan and subsequently the said Appeal was dismissed by NCLAT on 19.12.2018 and further the Resolution Plan of the Applicant was approved by the Hon'ble Supreme Court vide order dated 05.04.2019.

    2.1. As per the approved resolution plan the SRA had to furnish a bank guarantee of INR 10 Crores for the period from which the Proposed Plan is approved by the Committee of Creditors ("CoC") till the Effective Date. In accordance with the approved resolution plan the SRA furnished a bank guarantee of INR 10 Crores in favour of the CoC on 19.2.2017 issued by Banque De Luxembourg. On 29.01.2019. The Applicant again furnished a bank guarantee of INR 10 Crores in favour

of the CoC issued by Baumann & CIE Banquiers, which was further renewed on 28.02.2019.

2.2. Subsequently on 04.07.2019, the Applicant in the meeting of the Monitoring Agency and Lenders Meeting inter alia explained that the existing bank guarantee could not be renewed since the consortium of lenders, led by Respondent No. 2, required a Bank Guarantee via SWIFT. This resulted in an operational problem with Baumann & CIE Banquiers. Further, the representative of Respondent No. 2 suggested that the Successful Resolution Applicant deposit INR 10 Cr. in lieu of the Bank Guarantee.

2.3. Thereafter the Applicant on 19.07.2019 again furnished a bank guarantee issued by Banque De Luxembourg which was denied by the CoC in the meeting held on 18.08.2019 since it was not in SWIFT format. The representative of SBI once again sought infusion of INR 10 crores in the Corporate Debtor in lieu of bank guarantee before it expired on 30th August 2019. The Successful Resolution Applicant requested that a letter of cancellation of bank guarantee be issued to Banque De Luxembourg, since it was a fully funded bank guarantee.

2.4. Subsequently 19.08.2019 an email was sent by the Monitoring Agency to the CoC and the SRA categorically acknowledging that the Financial Creditors have decided this, as a final opportunity, the Applicant all be permitted to submit the Bank Guarantee via SWIFT or deposit INR 15 Crores towards implementation of the Resolution Plan latest by 11 pm India Time on 26.08.2019.

2.5. Pursuant to the recommendations given by the CoC, the Applicant deposited Rs. 10.00 crores approx. (equivalent to USD 13,99,928) in

Abhyudaya Bank account of the Respondent no.1 in lieu of the bank guarantee and same were acknowledged by the CoC in meeting dated 28.08.2019. Only INR 10 Crores approx. could be deposited since the CoC stalled the deposit of balance INR 5 crores to prevent the allotment of shares of the Corporate Debtor.

3. It is the case of the Applicant that, thereafter, SBI ("Respondent no.2") did a volte face and instead of releasing the bank guarantee post receipt of funds, addressed a letter dated 30.08.2019 directly to Banque de Luxembourg stating that this letter be treated as invocation of the bank guarantee, if the same is not renewed. Because of the same, Banque de Luxembourg has frozen funds of INR 10 crores (approx.) of the Applicant. On account of such invocation, the entire banking relationship with Banque De Luxembourg was put at risk. It resulted in a strained banking relationship with international banks because of which the Applicant have not been unable to procure a bank guarantee in the format required by the CoC. The Applicant strongly objected to the aforesaid renewal/invocation despite consenting to infusion of funds in lieu of guarantee in terms of the email dated 19.8.2019. The Applicant requested that the aforesaid letter is withdrawn by Respondent No. 2 and the Bank Guarantee is released.

3.1. Subsequently, The Respondent no.2 filed IA No. 4003 of 2019 (“SBI Non-Implementation Application”) and Edelweiss Asset Reconstruction Co. Limited filed IA No. 2220 of 2020. ("Edelweiss Non-Implementation Application") in Company Petition No. 246/1&BP/NCLT/MAH/2017 (“Insolvency Petition”) before the Adjudicating authority praying that since the Successful Resolution Applicant had failed to implement the Resolution Plan as per in provisions, therefore CIRP should be re-initiated along with reinstating

the previous Resolution Professional and 90 days of extra period should be provided in CIRP to invite Expressions of Interest (EOI) for inviting Resolution Plans. The Adjudicating authority passed an interim order dated 2.2.2021 in said Non-Implementation Applications vide and gave directions to the Applicant to infuse a sum of INR 10 Crores being INR 5 crores towards CIRP Costs and INR 5 Crores towards the allocation of equity shares within two weeks towards implementation of the approved resolution plan of the Successful Resolution Applicant and further directed the CoC to write to the bank which had issued the bank guarantee for releasing the same and provide the account detail for depositing the sum. The Adjudicating Authority did so after concluding that no fruitful purpose will be served by invoking the Bank Guarantee, '*Since, an amount of Rs. 10 crores lave already been deposited against the Bank Guarantee*'.

3.2. Respondent no.2 & Edelweiss Asset Reconstruction Co. Ltd., instead of providing the bank account of the Corporate Debtor in which the funds had to be deposited, informed about the appeals (Company Appeal (AT) (Ins) No. 161 of 2021 and Company Appeal (AT) (1ms) No. 169 of 2021) filed by them before the Hon'ble NCLAT after the funds were brought onshore by the Successful Resolution Applicant and same were recorded in the order dated 19.02.2021 passed by this Tribunal in Company Petition No. 246/I&BP/NCLT/MAH/2017.

3.3. The Hon'ble NCLAT vide order dated 05.01.2022 in (Company Appeal (AT) (Ins) No. 161 of 2021 and Company Appeal (AT) (Ins) No. 169 of 2021) held that there is no express provision regarding re-initiation of CIRP in the IBC and further directed the Applicant herein to submit an enforceable bank guarantee of Rs. 10 Crores as is required to be submitted under the Approved Resolution Plan within 30 days of the

impugned order. Hon'ble NCLAT also directed that those payments that are already overdue in the Approved Resolution Plan should be done by the Applicant within two months of this impugned order and in case Rs. 10 Crores has been deposited with Corporate Debtor by the Applicants in lieu of the bank guarantee, the amount will be either adjusted against the pending amounts to be paid by the Successful Resolution Applicant or refunded to him within a period of 30 days.

3.4. The SRA filed a Civil Appeal 1304-1305 of 2022 against the order dated 05.01.2022 passed by Hon'ble NCLAT (Company Appeal (AT) (Ins) No. 161 of 2021 and Company Appeal (AT) (Ins) No. 169 of 2021) before the Hon'ble Supreme Court seeking partial modification of the impugned order to the effect that the SRA is not required to furnish bank guarantee as the SRA has already deposited INR 10 Crores in lieu of the bank guarantee. The present appeal was taken up on 21.02.2022 and the Hon'ble Supreme Court vide order dated 21.02.2022 granted time to Counsel appear for the Applicant for seeking instructions whether the SRA was inclined to comply the order of NCLAT dated 05.01.2022. Subsequently, on next date of hearing i.e., 28.02.2022, SRA showed his inability to comply with the impugned order in as much as it was not in a position to furnish a bank guarantee in the format required by CoC. Therefore, Hon'ble Supreme Court vide order 28.02.2022 dismissed the Appeal filed by the Applicant by not interfering with the impugned order dated 05.01.2022 passed by Hon'ble NCLAT and gave liberty to initiate fresh CIRP and take all consequential actions in furtherance thereof, in accordance with law.

3.5. The Applicant by way of present application is seeking the refund of INR 10 crores which were deposited by the Applicant in the bank account of Corporate Debtor/ Respondent no.1 in lieu of bank guarantee. Now when the resolution plan of the applicant has failed and new CIRP

is being initiated, the said amount is liable to be refunded to the Applicant. The Hon'ble NCLAT in the order dated 03.01.2022 has held that that the INR 10 Crores that has been deposited with the corporate Debtor by the Applicants in lieu of the bank guarantee will be either adjusted against the pending amounts to be paid by the Successful Resolution Applicant or refunded to him within a period of 30 days. As it is clear from the above stated facts and circumstances that there arises no possibility in which this amount of INR 10 crores can be adjusted against any pending amount, the same is bound to be refunded back to the Applicant.

3.6. The Hon'ble Supreme Court while granting liberty to initiate new CIRP in respect of the Corporate Debtor gave direction to take all consequential actions in furtherance thereof, in accordance with law. Therefore, as per existing law the said amount is to be repatriated to the SRA. The said amount was deposited in lieu of bank guarantee which was ultimately for the allocation of equity shares. Now since fresh CIRP has been initiated, the said amount which is lying with the Respondents is liable to be refunded back to the SRA in accordance with law.

4. The Respondent No. 1 through Resolution Professional has filed the reply to IA 1360 of 2022 has drawn our attention to clause 12 of Section 5 of the Resolution Plan , which reads as under –

> "*The Resolution Applicants shall not provide any personal or corporate guarantees in any form and manner other than a sum of INR 10 Cr. Which shall be furnished in the form of a bank guarantee or standby letter of credit for the period from which the Proposed Plan is approved by the CoC till the Effective Date ("Guarantee"). The Guarantee can be invoked only if the Resolution Applicants withdraws for no reasonable cause from*

the CIRP; or (ii) during the implementation of the Proposed Plan. It is expressly clarified that withdrawal by the Resolution Applicants on account non-receipt of any Approvals required for the Proposed Plan, as a result of which the RA cannot implement the Proposed Plan, shall not be valid grounds for invoking the Guarantee."

4.1. The 'Effective Date' is defined under the Resolution Plan as *"...the date on which the Resolution Applicants are allotted all Equity Shares in accordance with the Proposed Plan*."

4.2. It is also submitted that a meeting of the lenders and Montiroging Agency of the Corporate Debtor was held on 4.7.2019, wherein an update was sought from the Applicant in relation to the renewal of the Bank Guarantee which expired on 14.6.2019. The Representative of the SRA are stated to have informed that the delays were caused due to two reasons, first being, Mr. Bernie Fogel, the fund manager was based out of Namibia, which had been "blacklisted with the Banking Industry" and secondly, due to the requirement of submitting the Bank Guarantee via SWIFT. Accordingly, the additional time was granted to the SAR till 20.7.2019.

4.3. The SRA belatedly on 27.8.2019 deposited a sum of INR 10 crores (Instead of INR 15 Crore) in Abhyudaya Bank, by way of the transaction reference number – OrigBrCd=16IRSTT 2019000048 INREM TT UDD 1399928, and the SRA was informed that the balance of INR 5 Crores should be infused by 30.8.2019. It is at this juncture, that the Respondent No. 2 on 30.8.2019 addressed a letter to Banque De Luxembourg for renewal of Bank Guarantee dated 19.7.2019 for a further period of 60 days as it was expiring on 30.8.2019, and also informed the Bank that in case the Bank Guarantee is not extended/renewed, the said letter was to be treated as an invocation of the said Bank Guarantee.

5. The Respondent No. 2 has also filed reply in IA 1360/2020 stating that a Bank Guarantee of INR 10 crores was mandatorily required to be provided by the Applicant for the entire period between the approval of the resolution plan by the CoC till the 'Effective Date' (i.e. date of allotment of equity shares), however, the Applicant only provided short term Bank Guarantees. With the latest bank guarantee set to expire on 30.8.2019, the Respondent No. 3, appointed as the Monitoring Agency of the Corporate Debtor for supervision of the Resolution Plan sent an email dated 19.8.2019 allowing a last chance to the SRA to comply with its obligations by either providing a valid bank guarantee or depositing INR 15 Crore by 11 PM IST on 26.08.2019 to take the process of implementation forward, however, the SRA only remitted INR 10 Crores belatedly on 27.08.2019, which was informed to the lenders during the meeting of the Lenders and Respondent No. 3 on 28.8.2019. Since, the applicant failed to deposit the entire sum of INR 15 Crores towards implementation of the Resolution Plan, the Bank Guarantee sought to be renewed was invoked legitimately. However, the issuing Bank (Banque de Luxembourg) responded that the bank guarantee cannot be considered as a valid bank guarantee but was a 'non-effective' bank guarantee.

   5.1. It is further stated in the reply that the amount claimed by the SRA was deposited as share application money albeit in lieu of the Bank Guarantee, which was a mandatory requirement under the SRA's Resolution Plan, which is evidenced from the submission in Para 3 and Para 7 of IA no. 1360/2020 of the SRA.

   5.2. It is also stated that the Conduct of SRA post approval of the its Resolution Plan was irresponsible and malafide. The SRA grossly failed in its financial commitments under the Resolution Plan including, inter alia, payments towards CIRP costs and dues to the financial creditors and providing a valid and subsisting Bank Guarantee, thereby causing

delay of four years in implementation of the Resolution Plan since the Resolution Plan Approval Order was passed.

5.3. Our attention is drawn to Hon'ble NCLAT decision dated 5.1.2022 in CA(AT)(Ins) No. 169 of 2021 holding that "*The failure to provide valid bank guarantee in terms of Section 5 clause 12(ii) of the Approved Resolution Plan to the satisfaction of the monitoring agency and the financial creditors is also a major default*."

5.4. It is also emphasised that IBBI introduced Regulation 36B(4A) in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 providing for "*forfeiture of performance security if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule"*.

6. The Respondent No. 2 has filed an IA no. 2989/2023, on behalf of the secured financial creditors of Corporate Debor, which are arrayed as Proforma Respondents Nos. 2- 11 therein, under Section 60(5) of the Code seeking appropriate directions from this Tribunal for forfeiture and appropriation of the USD 13,99,928 equivalent to INR 10,06,85,725 (Rupees Ten Crore Six Lakh Eighty Five Thousand Seven Hundred Twenty Five Only) deposited by Successful Resolution Applicant (arrayed as "Respondent No. 1" in the Application No. 2989/2023) in Abhyudaya Co-operative Bank ("Proforma Respondent No. 2") on August 27, 2019 by way of the transaction reference number- OrigirCd-16 IRSTT 2019000048 INREM TT UDD 1399928 as Share Application Money ("Deposit") on account of non-implementation of approved Resolution Plan by the Defaulting Resolution Applicant.

6.1. It is the case of Applicant Secured Creditors of Corporate Debtor that the SRA miserably failed to implement the Resolution Plan and

contravened the terms of the Resolution Plan including keeping a subsisting and valid Bank Guarantee. Finally, after pursuing at various fora, the SRA categorically admitted to its unwillingness and inability to comply with the Resolution Plan before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court granted liberty to initiate fresh CIRP and take all consequential Actions vide order dated February 28, 2022.

6.2. The Abhyudaya Co-operative Bank ("Proforma Respondent No. 2") filed a reply to IA 2989/2023 stating that the State bank of India has joined it as the Proforma Respondent No. 2 is without any valid reason as it is merely Current Account holder of the Corporate Debtor and is not a lender or creditor of the Corporate Debtor.

6.3. The Respondent No. 1, who is Applicant in IA 1360/2022, has filed the reply stating that the contents of IA 1360/2022 be read as part and parcel to the Reply in IA 2989/2023, which is merely a counter blast to the IA 1360/2022. It has been stated that the issue of forfeiture was never raised by the CoC or its members before any of forums earlier when the Orders dated 2.2.2021, 05.1.2022 and 28.2.2022 came to be passed by this Tribunal, Hon'ble NCLAT and Hon'ble Supreme Court. It is stated that the Order dated 2.2.2021 passed by this Tribunal clearly stated that

> "*The Resolution Applicant assures that the balance sum of Rs. 10 crores will be infused within 2 weeks. No fruitful purpose presently would be served by invoking the Bank Guarantee. Since an amount of Rs. 10 crores has already been deposited against the Bank Guarantee, the CoC (State Bank of India) is directed to write to the Bank which have issued the Bank Guarantee for Rs. 10 crore releasing the Bank Guarantee.*
>
> *The Counsel for the Resolution Applicant submits that the CoC has not provided the Bank account Number where the sum of Rs. 10 crores can be deposited. The CoC is directed to provide the*

Account details in which a sum of Rs. 10 crores would be deposited by the Resolution Applicant."

6.3.1. It is contended that the Hon'ble NCLAT gave specific direction for the refund of this said amount to the Respondent No. 1 vide order dated 5.1.2022; subsequently, at the time of hearing in the Appeal filed by the Respondent No. 1 before the Hon'ble Supreme Court, the Respondent No. 1 requested the Hon'ble Supreme Court to give direction to the Applicant and the CoC to refund back the said amount, accordingly, the Hon'ble Supreme Court vide Order dated 28.2.2022 kept all the further contentions open as per law.

6.3.2. It is also argued that the minutes of the meeting of CoC and the monitoring Agency clearly evidence that the CoC decided that the Respondent No. 1 would be only allowed to implement the plan if it would make an upfront payment of INR 35 cores, in addition to the recovery under the approved Resolution Plan. The Plan Approval Order attained finality on 5.4.2019, when the appeal of the Suspended Promoters was rejected by the Hon'ble Supreme Court and the SRA deposited INR 10 Crores with the account of the Corporate Debtor on 27.8.2019 while the approval for capital reduction was received from the stock exchange on 5.7.3029. Hence, there was no delay attributable to SRA in implementation of plan as is alleged.

7. We have heard Learned Counsel and perused the material available on record.

7.1. The issue for consideration in the present application is whether the failure of approved Resolution Plan is attributable to the SRA thus denying refund of the amount of USD 13,99,928 equivalent to INR 10,06,85,725 (Rupees Ten Crore Six Lakh Eighty Five Thousand Seven Hundred Twenty Five Only) to the SRA and entitling the CoC to forfeit this amount.

7.2. It is undisputed fact that the SRA was under obligation to provide bankable Bank Guarantee of INR 10 Crore as performance guarantee for the period till the effective date i.e. date when the allotment of shares is made to SRA; such bank guarantee was provided till 30.08.2019, whereafter the Bank Guarantee was not provided in the manner it is acceptable to the Bankers i.e. through SWIFT mechanism. The SRA paid a sum of 13,99,928 equivalent to INR 10,06,85,725 (Rupees Ten Crore Six Lakh Eighty Five Thousand Seven Hundred Twenty Five Only) in the current account maintained with Abhyudaya Co-operative Bank Limited and later on this amount was allowed to be treated as amount in lieu of Bank Guarantee by the Hon'ble NCLAT. In appeal, the SRA was directed to deposit a further sum of Rs. 5 crores towards allotment of shares in case the sum of Rs. 10 Crores earlier deposited is offered as amount in lieu of Bank Guarantee; no other amount was deposited by the SRA after initial INR 10 Crores approx. The SRA expressed its inability to implement the Approved Resolution Plan before the Hon'ble Supreme Court and this plan was declared as having failed.

7.3. The SRA has contended that the CoC never provided the Bank Account details wherein the further sum of Rs. 10 Crore was to be remitted, due to invocation of Bank Guarantee by the State Bank of India through its letter dated 30.8.2019, Banque de Luxembourg didn't release the funds as said Bank Guarantee was fully funded guarantee. It was ready to remit a sum of Rs. 5.00 crores (being INR 15 crores to be paid towards Share Subscription as reduced by INR 10 crores already remitted) to the Corporate Debtor but the account details were not supplied by CoC and in terms of provisions of Foreign Exchange Management Act, the money remitted towards allotment of shares ought to be refunded back and cannot be allowed to be forfeited.

7.4. Per contra, the CoC has relied upon Regulation 36B(4A) of CIRP regulations to justify the forfeiture contending that the SRA has failed in providing performance bank guarantee and payment towards the Resolution Money, which ultimately culminated into the withdrawal of plan by the Resolution Applicant by making express submission regarding its inability to implement the plan.

7.5. We find that the Hon'ble NCLAT in its decision dated 5.1.2022 in CA(AT)(Ins) No. 169 of 2021 stated that "*The failure to provide valid bank guarantee in terms of Section 5 clause 12(ii) of the Approved Resolution Plan to the satisfaction of the monitoring agency and the financial creditors is also a major default*." It is pertinent to quote Para 24-26 of this Order dealing with the implementation of the plan and the finding of Hon'ble NCLAT.

> *24. As is seen from the table in the previous paragraph, after the resolution plan submitted by Respondent No. 1 was approved by the Adjudicating Authority on 28.2.2018, there were appeals, first before NCLAT, wherein a status quo order was given on 27.4.2018. Finally, the appeal was dismissed by NCLAT on 19.12.2018, whereafter an appeal against the order of the Appellant Tribunal was preferred before Hon'ble Supreme Court, which was also dismissed on 5.4.2019. Thus, the period from 28.2.2018 till 5.4.2019 was effectively taken up in litigation for which Respondent No. 1 cannot be held responsible. Out of this period, there was a status quo order passed by NCLAT for about eight months between 27.4.2018 and 19.12.2018.*
>
> *25. Therefore, we are of the opinion that effective implementation of the Successful Resolution Plan started only after 5.4.2019, when Hon'ble Supreme Court dismissed the appeal of former promoter/directors of the Corporate Debtor. It is quite apparent that the bank guarantee submitted by Respondent No. 1 was not*

enforced properly because it was not submitted in SWIFT mode. Respondent No. 1 has claimed that it is not responsible for non-enforceability of the Bank guarantee because it was due to the international banking practices. While bank guarantees were submitted later, they were not to the satisfaction of monitoring agency. Moreover, Respondent No. 1 failed to take steps towards implementation of the Resolution Plan, which included payment of CIRP costs and workmen dues and infusion of cash. Respondent No. 1 has submitted that CoC agreed to infusion of funds amounting to Rs. 10 crores in the Corporate Debtor in the lieu of bank guarantee, and based on this agreement Respondent No. 1 infused Rs. 10 crores in the Corporate Debtor before the expiry of the bank guarantee and honour its commitment and this amount remains with the Corporate Debtor till date.

26. Thus, the issue of non-adherence of the timelines in accordance with the Approved Resolution Plan is quite apparent. The failure to provide valid bank guarantee in terms of Section 5 clause 12(ii) of the Approved Resolution Plan to the satisfaction of monitoring agency and the financial creditors is also a major default."

7.6. Finally, the Hon'ble NCLAT after considering the submission of SRA that it is serious to implement the Plan, and submission of CoC that they was another round of CIRP, which is not provided expressly in the Code, the Hon'ble NCLAT, to save the Corporate Debtor from death, held that –

"*33. In view of the impugned order and the respective submissions by the Appellants and Respondent No. 1 it is clear that the main issue in question is the submission of an enforceable bank guarantee of Rs. 10 crores by Respondent No. 1. The other*

issues regarding compliance of already overdue provisions in the approved Resolution Plan have also been raised by the Appellant. 34. Therefore, in light of discussion above, in partial modification of the Impugned Order, we direct that an enforceable bank guarantee of Rs. 10 crores, as is required to be submitted under the Approved Resolution Plan, should be submitted by the Successful Resolution Applicant within 30 days of this order. The payments as are already overdue in the Approved Resolution Plan should be done by the Successful Resolution Applicant within two months of this order. In case Rs. 10 crores has been deposited with the Corporate Debtor by the Successful Resolution Applicant in lieu of the bank guarantee, that amount will be either adjusted against the pending amounts to be paid by the Successful Resolution Applicant or refunded to him within a period of 30 days".

7.7. We find that the Order dated 5.1.2022 passed by Hon'ble NCLAT was challenged in Appeal before Hon'ble Supreme Court and the order dated 28.2.2022 passed by the Hon'ble Supreme Court reads as under –

" *On the last date of hearing, we called upon the Learned counsel to seek instructions as to whether the appellant is ready to comply with the Order of the National Company Law appellate Tribunal ("the NCLAT" for short) dated 05.01.2022, impugned in the instant proceedings.*

Learned counsel, on instructions, submits that it is not possible for the appellant to comply with the terms of the order passed by the NCLAT.

We are not inclined to interfere in the order impugned passed by the NCLAT dated 05.01.2022. The civil appeals are accordingly dismissed.

……."

7.8. We find from the Order dated 28.2.2022 passed by Hon'ble Supreme Court that the SRA categorically expressed its inability to comply with the Order dated 5.1.2022 passed by Hon'ble NCLAT. It is pertinent to note that the Hon'ble NCLAT had modified the Order dated 2.2.2021 passed by this Tribunal on the willingness shown by the SRA before it to implement the approved Resolution Plan. Hence, it clearly follows from these sequence of events that there had been last minute effort on the part of CoC, this Tribunal and Hon'ble NCLAT to save the approved Resolution Plan, but for the unwillingness expressed by the SRA before the Supreme Court, the approved Resolution plan failed.

7.9. It is clear from the foregoing discussion that the money deposited by the SRA was in lieu of Performance Bank Guarantee and has to be dealt accordingly. In terms of provisions contained in Regulation 36B(4A) of the CIRP Regulations and provisions contained in Resolution Plan, we feel no hesitation to hold that the money deposited by the SRA is liable to be forfeited and can not be allowed to be refunded back. The argument that Regulation 36B(4A) can not be applied retrospectively has no merit, as even otherwise also, the performance guarantee furnished initially by the SRA stipulates invocation thereof in the event of default in implementation of the approved plan.

7.10. As regards initiation of proceedings in terms of section 74(3) of the Code, we find that section 74(3) reads as under -

> *(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.*

7.11. This provision provides for imposition of fine or prosecution of any person on whom the approved resolution plan is binding in case such person knowingly and wilfully contravenes any of the term of approved resolution plan. From the above discussion, we find that there was a failure to provide the valid and subsisting bank guarantee and thereafter in payment of money due under the approved resolution plan. The Representative of the SRA are stated to have informed that the delays were caused due to two reasons, first being, Mr. Bernie Fogel, the fund manager was based out of Namibia, which had been "blacklisted with the Banking Industry" and, secondly, due to the requirement of submitting the Bank Guarantee via SWIFT. Whether eventual happening of first event was in knowledge of the SRA is a matter of fact and in view of insufficient evidences before us, we can not hold that the SRA's failure was wilful. However, the inability to implement the modified directions of Hon'ble NCLAT which lead to initiation of fresh CIRP by the Hon'ble Supreme Court, was certainly in knowledge of the SRA, as the failure to furnish the valid and subsisting bank guarantee by an entrepreneur can not be said to be onerous condition, the compliance of which may be said to be beyond their control. Accordingly, we consider it appropriate to refer the matter to IBBI for taking appropriate action against the SRA, since this Bench can not deal with the punishment aspect of the consequence for contravention under this section providing for imposition of fine or punishment or both.

8. In view of the foregoing, IA 1360/2022 is disposed of as dismissed and IA 2989/2023 as allowed.

Sd/- **Sd/-**

Prabhat Kumar
Member (Technical)

Justice V.G. Bisht
Member (Judicial)