

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 983 & 984 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.443 of 2021 and IA No.1847 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Bank of Baroda

...Appellants

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant:

Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates

For Respondents:

Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates for R-1.

Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP.

Company Appeal (AT) (Insolvency) No. 1163 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.443 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Formation Textile LLC

...Appellant

Versus

Bank of Baroda & Ors.

...Respondents

Present:

For Appellant:

Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates.

For Respondents:

Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates for R-1 to R-16 (CoC/ Bank of Baroda).

Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP

Company Appeal (AT) (Insolvency) No. 1026 & 1027 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.443 of 2021 and IA No.1847 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

**Charu Desai Erstwhile Resolution Professional of Gb
Global Ltd. Formerly Known as Mandhana Industries
Ltd.**

...Appellant

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant: Ms. Pooja Mahajan, Ms. Samridhi Shrimali,
Advocates.

For Respondents: Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj
Tiwari, Advocates for R-1.
Mr. Gopal Jain, Sr. Advocate with Mr. Madhav
Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal,
Ms. Prachi Jain, Advocates for R-4 (CoC/ Bank of
Baroda).

**Company Appeal (AT) (Insolvency) No. 1098 & 1099 of 2023
& I.A. No. 3800 of 2023**

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.443 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Vishal Dyes & Chemicals & Ors.

...Appellant

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant: Mr. Bishwajit Dubey and Ms. Aishwarya Singh,
Advocates.

For Respondents: Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates for R-1.
 Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates for R-5 (CoC/ Bank of Baroda).
 Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP.

Company Appeal (AT) (Insolvency) No. 1100 & 1101 of 2023
& I.A. No. 3806 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.1785 & 443 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Anglomonto Resource Pvt. Ltd.

...Appellant

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant: Mr. Bishwajit Dubey and Ms. Aishwarya Singh, Advocates.

For Respondents: Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates for R-1.
 Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates for R-7 & 8 (CoC/ Bank of Baroda).
 Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP.

Company Appeal (AT) (Insolvency) No. 1236 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.443 of 2021 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Gimatex Industries Pvt. Ltd.

...Appellant

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant: Mr. Bishwajit Dubey and Ms. Aishwarya Singh,

Company Appeal (AT) (Insolvency) Nos. 983 & 984 of 2023, 1163 of 2023, 1026 & 1027 of 2023, 1098 & 1099 of 2023, 1100 & 1101 of 2023, 1236 of 2023 & 1237 of 2023

Advocates.

For Respondents: Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates for R-1.
Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates for R-7 & 8 (CoC/ Bank of Baroda).
Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP.

Company Appeal (AT) (Insolvency) No. 1237 of 2023

(Arising out of Order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench - I, in IA No.1052/2022 in CP(IB) No.1399/MB/C-I/2017)

IN THE MATTER OF:

Gimatex Industries Pvt. Ltd.

...Appellant

Versus

Formation Textile LLC & Ors.

...Respondents

Present:

For Appellant: Mr. Bishwajit Dubey and Ms. Aishwarya Singh, Advocates.

For Respondents: Mr. Amrut Joshi, Mr. Prakhar Tandon, Mr. Anuj Tiwari, Advocates for R-1.
Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Surabhi Khattar, Ms. Pallavi Agarwal, Ms. Prachi Jain, Advocates for R-7 & 8 (CoC/ Bank of Baroda).
Ms. Pooja Mahajan, Ms. Samridhi Shrimali, Advocates for Erstwhile RP.

J U D G M E N T
(22nd April, 2025)

Ashok Bhushan, J.

These Appeals arise out of the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor- 'Mandhana Industries Limited' (M/s.

GB Global Limited). Challenge in the above appeals are two separate orders dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-1. Company Appeal (AT) (Insolvency) No.983-984 of 2023 and Company Appeal (AT) (Insolvency) No.1163 of 2023 as well as Company Appeal (AT) (Insolvency) No.1026-1027 of 2023 arise out of the order dated 06.07.2023 passed in IA No.443 of 2021 filed by Formation Textiles LLC and IA No.1847 of 2021 filed by the Bank of Baroda, the CoC. All other Appeals challenges the order dated 06.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in IA No.1986 of 2021, IA No.1785 of 2021 and IA No.1052 of 2022. Company Appeal (AT) (Insolvency) No.983-984 of 2023 have been filed by the Financial Creditor. Company Appeal (AT) (Insolvency) No.1163 of 2023 has been filed by Formation Textiles LLC, the erstwhile Successful Resolution Applicant. Company Appeal (AT) (Insolvency) No.1026-1027 of 2023 have been filed by Charu Desai, erstwhile Resolution Professional of M/s. GB Global Limited and other Appeals have been filed by the Operational Creditors who have filed application seeking direction for payment of their operational debts.

2. Background facts of the case and sequence of the events need to be noticed for deciding all these Appeals are:-

2.1. On the application filed by the Bank of Baroda under Section 7, the Corporate Debtor- 'Mandhana Industries Limited' (M/s. GB Global Limited) was admitted to the CIRP by order dated 29.09.2017 passed by the

Adjudicating Authority. Ms. Chari Desai was appointed as IRP who was subsequently confirmed as a Resolution Professional. The Resolution Professional issued a Process Memorandum (Invitation for Submission of Resolution Plan for Mandhana Industries Limited in March, 2018). The last date for submission of the Expression of Interest (EoI) was extended to 18th May, 2018. On 23.05.2018, Formation Textiles LLC (hereinafter referred to as "Formation") submitted its EoI. Last date for submission of the Resolution Plan was fixed as 08.06.2018. On 30.05.2018, Formation and other Resolution Applicants were given access to the data room for completing its diligence on the Corporate Debtor. On 08.06.2018, Resolution Professional received Resolution Plans and EMD from Finquest, FTL and GBTL Limited. On 13.06.2018, Formation executed the Indemnity Undertaking with the Resolution Professional, the CoC and its advisors. In 16th CoC meeting held on 14.06.2018, after considering all plans, Finquest was declared as H-1 bidder and Formation as H-2. On 15.06.2018, Formation sent an e-mail raising integrity issues and stated that the Formation will continue the next step and will continue the process. On 17.06.2018, Formation sent an e-mail to the Resolution Professional claiming that its bid was the most competitive and superior insisting upon the Resolution Professional to organize an open bidding process of Swiss Challenge for rebidding. In 17th CoC meeting held on 20.06.2018, CoC took a decision that 270 days for completion of the CoC being coming to an end on 25.06.2018, the Resolution Plan of Finquest should be proceeded with. On 20.06.2018, the Formation unilaterally emailed its revised bid revealing

upward revisions made by them to their initial bid. Pursuant to the revised process for negotiation, Formation was to be given a chance to put their best bid and submit their revised bid by June 27, 2018. On 28.06.2018, CoC in the 19th meeting again declared Finquest as the H1 bidder and Formation as H2 bidder. Formation dissatisfied with Finquest declared as H1 bidder filed an IA before the Adjudicating Authority praying for open bidding. On 03.07.2018, the Adjudicating Authority directed to conduct an open bidding process. On 04.07.2018, the 21st meeting of the CoC was held for conducting the open bidding process between Formation and Finquest. In compliance with the order of the Adjudicating Authority dated 03.07.2018, after conclusion of outbidding process Formation was declared as H1 on 04.07.2018. The CoC on 06th-07th July, 2018 approved the Resolution Plan of Formation by 80.92% of vote share. On 7th-9th July, 2018, Letter of Intent (LoI) was issued by Resolution Professional to Formation. Formation accepted the LoI unconditionally. On 09.07.2018, Resolution Professional filed an application for approval of the plan of Formation. On 09.07.2018, Resolution Professional also filed an application under Section 66 for avoidance transactions. On 11.07.2018, Formation furnished performance bank guarantee (PBG) of Rs.50,00,00,000.00/-. On 24.09.2018, a letter was sent by Formation to the Resolution Professional demanding Resolution Professional to refund the PBG. Formation also communicated its reservation of rights to withdraw its Resolution Plan without and liabilities and obligations. It also communicated that it shall consider reduction in the financial offer of Rs.480,00,00,000/- under its Resolution Plan by

Rs.5,00,00,000/- per 15 days of delay in obtaining approval and management control of the Corporate Debtor. Again on 29.10.2018, Formation wrote to the Resolution Professional. Resolution Professional informed the Formation that the process of approval of the plan is a judicial process and timeline is not in the control of the Resolution Professional and the CoC. Adjudicating Authority on 30.11.2018 approved the Resolution Plan of the Formation. Formation requested time till 31.01.2019 for bringing upfront payment. On 15.12.2018, Formation sent an e-mail to the Resolution Professional that it had already provided Rs.55,00,00,000/- and are ready and willing to deposit the remaining Rs.21,00,00,000/- to increase the authorised share capital. They prayed that management and control of the corporate debtor be handed over by 17.12.2018. Upfront payment of Rs.226 Crores which was to be made within 30 days from the effective date was not done. There were several correspondences between the Formation and the Resolution Professional. On 30.01.2019, Bank of Baroda confirmed that amount of Rs.38 Crores have been received from Formation in the account of the Bank. On 31.01.2019 process of complete handover of the corporate debtor was completed. Formation took over management and control over corporate debtor from Resolution Professional on 31.01.2019. Handover letter required Formation to pay remaining portion of the upfront consideration including the infusion towards ECB commitment of Rs.99 Crores and certain other requirements. 45 days from the date of the handover expired on 18.03.2019 where Formation did not take steps as per the Resolution Plan. On 04.04.2019, the Bank of Baroda wrote to the

Formation to comply with the terms of the Resolution Plan. The letter also mentioned receipt of Rs.93.82 Crores comprising of Rs.5 Crores EMD, Rs.50 Crores of performance bank guarantee and Rs.38.82 Crores towards part payment of Formation's equity component. On 13.06.2019 Formation filed MA No.2223 of 2019 before the Adjudicating Authority seeking modification of its Resolution Plan and revision of its offer/bid and reduction of the same from what was stated in the approved Resolution Plan. Bank of Baroda for CoC filed an MA No.2326 of 2019 on 25.06.2019 directing the Resolution Applicants to implement the Resolution Plan to make immediate payments including payment towards the CIRP costs, Financial Creditors, Operational Creditors. Alternatively, it was prayed that the order be passed to recommence the CIRP process of the corporate debtor and allow invitation of fresh bids by the Resolution Professional. Another prayer was made for seeking direction to liquidate the corporate debtor. Several other prayers were made in the application. Amendment application 3904 of 2019 dated 27.11.2019 was filed by the Formation praying for amendment in MA No.2223 of 2019. Formation also prayed for setting aside the order dated 30.11.2018.

2.2. Resolution Professional has also filed MA No.2326 of 2019 seeking a direction to Formation to implement the plan. Resolution Professional has filed IA No. 2124 of 2019 on 11.06.2019 seeking direction of release of the outstanding CIRP costs. Adjudicating Authority heard the IA No.2326 of 2019 filed by the Bank of Baroda and IA No.2124 of 2019 filed by the Resolution Professional and passed an order on 05.12.2019 directing as an

interim measure that possession of the corporate debtor be handed over to the CoC by Formation who in turn will hand over the same to the erstwhile Resolution Professional. Adjudicating Authority further directed restoration of the CIRP and erstwhile Resolution Professional to continue as Resolution Professional.

2.3. After the order dated 05.12.2019, CoC meeting was held on 10.12.2019 where decision was taken to forfeit/ invoke the performance bank guarantee given by Formation on account of its failure to implement the plan which decision was approved by 96.89% vote share of the CoC. On 08.01.2020, Formation handed over the possession of the corporate debtor to the CoC. On 21.01.2020, Formation filed MA No.427 of 2020 seeking refund of Rs.93 Crores with some other prayers. An additional affidavit was filed by the Bank of Baroda seeking direction for inviting fresh Resolution Plan for the corporate debtor. On 05.02.2020, Adjudicating Authority allowed Resolution Professional to invite fresh Resolution Plan from Prospective Resolution Applicants by providing an additional period of 70 days to undertake the process. MA No.2326 of 2019 filed by the Bank of Baroda was partly allowed with liberty to file an appropriate application with respect to the remaining prayers. Resolution Professional issued fresh EoI, however, in view of the lockdown order issued by the Central Government and the State Government in the wake of COVID-19 Pandemic, the period of 70 days stood extended. The Resolution Plan was received from Dev Land & Housing Private Limited (DLH) on 10.09.2020. On 31.12.2020, Resolution Plan of DLH was approved with 67.01% vote shares. On 06.01.2021,

Resolution Professional filed an application IA No.19 of 2021 for approval of the plan of DLH. On 15.02.2021, in view of filing of IA No.443 of 2021, MA No.2223 of 2019 and MA No.2442 of 2020 filed by Formation was dismissed as withdrawn. MA No.734 of 2021 was also filed by Formation opposing the Resolution Plan of DLH. Adjudicating Authority on 19.05.2021 passed an order approving the Resolution Plan of DLH. Adjudicating Authority also dismissed Formation's MA No.734 of 2021 observing that Formation who could not implement the plan has come up with frivolous application making bald allegation to scuttle the approval of the DLH's Resolution Plan. Adjudicating Authority also directed that fixed deposit of Rs.42.99 Crores shall be retained intact and shall abide by the orders passed by the Adjudicating Authority as and when felt necessary. Formation filed MA No.734 of 2021 seeking direction to Resolution Professional and the CoC to not hand over the management of the corporate debtor to DLH. On 06.05.2021, control of the corporate debtor was handed over to the DLH. On 15.07.2021, IA No.1847 of 2021 has been filed by the Bank of Baroda for CoC seeking indemnification for the losses caused by FTL.

Facts with respect to Appellants who have filed application as Operational Creditors

2.4. After approval of the Resolution Plan of Formation on 30.11.2018, it took the control of the corporate debtor and continued with the control and possession of the corporate debtor till the control of corporate debtor was handed back to the CoC on 08.01.2020. During the period when Formation

was in control of the corporate debtor as SRA it incurred various operational debts totalling to Rs.22.30 Crores on behalf of the corporate debtor for supply of goods and services with regard to which different IAs have been filed by the operational creditors. The Appellants noted above filed their IAs after approval of the Resolution Plan of DLH. IA No.1986 of 2021 was filed by Vishal Dyes & Chemicals & Ors. praying for direction to make the payment to the applicant out of the deposit of Rs.42.99 Crores made by Formation Textiles. The application was filed by Vishal Dyes & Chemicals along with 36 other creditors who have supplied goods and services to the corporate debtor at the time when Formation was running the corporate debtor. Similarly, Appellants in Company Appeal (AT) (Insolvency) No.1100-1101 have filed the IA No.1785 of 2021 which was by Anglomonto Resource Pvt. Ltd. seeking a direction to pay the balance amount due on account of supply of non-cooking imported coal from 17.09.2019 to 08.01.2020. Appellant in Company Appeal (AT) (Insolvency) No.1236 of 2023 who claimed to have supplied goods from 13.11.2018 till 06.09.2019 who also prayed for setting aside the order of the Adjudicating Authority passed in IA No.443 of 2021 and sought direction to make payment to their outstanding dues. Another Appeal Company Appeal (AT) (Insolvency) No.1237 of 2023 have been filed by Gimatex Industries Pvt. Ltd. praying for setting aside the order passed by the Adjudicating Authority in IA No.1052 of 2022 dated 06.07.2023 and further seeking direction to Respondent to remit unpaid debt amounting to Rs.98,55,827/-. It was also prayed that in alternative, the direction be given to remit the unpaid debt from the fixed deposit

amount of Rs.42.99 Crores which was infused by Formation. Adjudicating Authority vide its order dated 06.07.2023 rejected the IAs filed by Interim Trade Creditors being IA No.1785 of 2021 filed by Anglomonto Resource Pvt. Ltd., IA No.1986 of 2021 filed by Vishal Dyes & Chemicals and 36 others, IA No.1052 of 2022 filed by Gimatex Industries Pvt. Ltd., IA No.561 of 2021 filed by Charu Desai, erstwhile Resolution Professional was also dismissed as infructuous. Adjudicating Authority has observed that remedy of the applicants (Interim Trade Creditors) was to challenge the order dated 19.05.2021 by which Resolution Plan of DLH was approved. It was observed that no objection was raised by Interim Trade Creditors between 06.01.2019 till 19.05.2021, with regard to their claims and objections have been filed at belated stage. Aggrieved by the said order rejecting IAs filed by Interim Trade Creditors, Appeals have been filed as noted above.

3. Company Appeal (AT) (Insolvency) No.983-984 of 2023 and Company Appeal (AT) (Insolvency) No.1026-1027 of 2023 came for consideration on 01.08.2023 on which date after hearing Counsel for the parties, while issuing notice we have passed interim order staying the direction issued in paragraph 75 of the order for refund of the amount. Interim order has been continued from time to time.

4. We have heard Shri Gopal Jain, Learned Senior Counsel appearing for the Bank of Baroda, the CoC, Shri Amrut Joshi, Learned Counsel appearing for Formation Textile LLC, Ms. Pooja Mahajan, Learned Counsel appearing

for Charu Desai and Shri Bishwajit Dubey, Learned Counsel has appeared for appeals filed by Interim Trade Creditors.

4.1. Shri Gopal Jain, Learned Senior Counsel has advanced submission on behalf of the CoC as Appellant in Company Appeal (AT) (Insolvency) No.983-984 of 2023 and as Respondents in Company Appeal (AT) (Insolvency) No.1163 of 2023 and other Appeals. Resolution Professional has advanced submission on behalf of the Appellant in Company Appeal (AT) (Insolvency) No.1026-1027 of 2023 as well as Respondents in other Appeals. Shri Amrut Joshi has advanced his submission on behalf of the Appellant in Company Appeal (AT) (Insolvency) No.1163 of 2023 filed by Formation and Respondents in other Appeals. Shri Bishwajit Dubey, Learned Counsel has appeared for Appellant on behalf of Interim Trade Creditors. Submissions on behalf of the Bank of Baroda as Appellant as well as Respondents in other Appeals, submissions of Counsel for the CoC (Bank of Baroda), submissions of the Resolution Professional as Appellant as well as Respondents in other Appeals being common, we shall noticed their submissions as submissions for the Appellant.

4.2. Counsel for the Formation Textile LLC has made limited submission in support of its appeal Company Appeal (AT) (Insolvency) No.1163 of 2023 but has made submissions as Respondents opposing appeals of all other Appellants. Thus, the submission of Formation as Appellants and Respondents shall be noticed separately.

4.3. Submission on behalf of the interim trade creditors is common of all the Appellants, it shall be sufficient to notice submission of the Appellant as submission in Company Appeal (AT) (Insolvency) No.1098 & 1099 of 2023- Vishal Dyes & Chemicals & Ors. and submissions made by CoC, Resolution Professional and Formation Textile LLC replying the submissions of interim trade creditors separately.

4.4. We proceed to consider the submissions of the parties in two parts. 1st part of the submission relates to submission in Company Appeal (AT) (Insolvency) No.983-984 of 2023, Company Appeal (AT) (Insolvency) No.1026 & 1027 of 2023 and Company Appeal (AT) (Insolvency) No.1163 of 2023 where challenge to order dated 06.07.2023 has been raised while allowing IA No.443 of 2021 filed by Formation and rejecting IA No.1847 of 2021 filed by Bank of Baroda. 2nd part of the submissions relates to the submission pertaining to the appeals filed by interim trade creditors namely— Vishal Dyes & Chemicals and other appeals.

Part-1

5. Shri Gopal Jain, Learned Senior Counsel appearing for the Bank of Baroda (CoC) challenging the order dated 06.07.2023 allowing IA No.443 of 2021 filed by Formation and rejecting IA No.1847 of 2021 has made following submissions:-

5.1. Shri Gopal Jain submits that there are several incorrect findings recorded by the Adjudicating Authority while allowing IA No.443 of 2021.

Adjudicating Authority has incorrectly construed the CoC's application seeking recommencement of the CIRP as allowing Formation to exit the CIRP process or withdraw from the Resolution Plan without any liability. The CoC and the Resolution Professional has pleaded in various applications and reply that Formation has failed to implement the Resolution Plan. CoC never prayed that Formation be exited with no liability. The finding returned by the Adjudicating Authority that CoC and the Resolution Professional has not treated the approved Resolution Plan had been contravened by the Formation is incorrect. Adjudicating Authority by its order dated 05.12.2019 never permitted Formation to exit. Directions issued were interim in nature and there had to be decision on consequences by the Adjudicating Authority in which Adjudicating Authority completely failed. The observations of the Adjudicating Authority in the impugned order that no penal action can be taken against Formation on the ground of contravention of the Resolution Plan or its failure to implement, is against the process document. The observations of the Adjudicating Authority that Adjudicating Authority on the request of the CoC or the Resolution Professional has allowed the Formation to exit in its order dated 05.12.2019 is erroneous and not based on facts. The present was a case where Formation failed to implement the Resolution Plan and has also filed an application praying for setting aside of the plan approval order which clearly proves the act of Formation in not implementing the plan. Formation always wanted to get away from the Resolution Plan and application IA No.443 of 2021 was filed on incorrect basis. The CoC and the Resolution Professional has provided all necessary

information in the Information Memorandum for preparation of the Resolution Plan. All Resolution Applicants were to make their own due-diligence before submission of the Resolution Plan. The case set up by Formation that he was not made aware of the avoidance application and financial statement of the corporate debtor were inflated cannot be a reason to permit the SRA to withdraw from Resolution Plan and refuse to implement the Resolution Plan. The CoC under the process document has right to forfeit the PBG and EMD in event the SRA fails to implement the Resolution Plan. Counsel for the CoC has referred to various clauses of the process memorandum which we shall notice while considering the submissions in detail. Formation has deliberately and intentionally delayed the payment of upfront consideration as well as other payments. As per the Resolution Plan, PBG and EMD cannot be adjusted towards Formation's upfront consideration under the Resolution Plan. Formation itself has not treated the PBG and EMD as part of upfront payment in the audited financial statement. Forensic Audit Report was asked for by the Resolution Professional for the purposes of filing avoidance application and SRA was well aware of the application to be filed under Section 66 since in the Resolution Plan it provided CIRP costs up to the extent of Rs.25 Lakhs for prosecuting the avoidance application. The conduct of Formation has resulted in grave financial consequences for all stakeholders of the corporate debtor. The application which was filed by the CoC IA No.1847 of 2021 deserves to be considered on merit and allow. The Resolution Plan which was submitted by DLH in subsequent process was much lower in the

amount which clearly prove that stakeholders suffered a major loss and Formation was liable to make good the loss he having submitted undertaking to indemnify the CoC. The Resolution Plan submitted by DLF was only Rs.151 Crores whereas plan submitted by Formation was Rs.460 Crores. The CoC has rightly invoked/ forfeited the PBG and EMD in terms of the provisions of the process memorandum and the LoI. Adjudicating Authority committed error in directing refund of amount of Rs.93.2 Crores to the Formation without any basis. Formation who caused substantial loss to the stakeholders and the corporate debtor cannot be given benefit of its own wrong. SRA who failed to implement the plan cannot claim refund of the amount PBG and EMD. Without considering the application filed by the CoC, Adjudicating Authority on the ground that IA No.443 of 2021 has been allowed application of CoC need no consideration, has erroneously rejected the application. Application IA No.1847 of 2021 deserved to be allowed in view of the facts which have been brought by the CoC in its application. The PBG and the EMD cannot be allowed to be adjusted in the equity infusion and upfront consideration under the Resolution Plan. In the CIRP process when Finquest was declared as H1, it was Formation who gave revised and higher bid and obtained an order from NCLT for *inter se* bidding and it was after Formation was declared as H-1, the plan was approved. The judgment of the Hon'ble Supreme Court in ***“Ebix Singapore Pvt. Ltd. vs. CoC of Educomp Solutions Ltd. & Anr.- 2021 SCC OnLine SC 707”*** clearly prohibited Formation to withdraw from the plan and find out excuses for not implementing the plan. Formation was clearly bound by the approval of the

Resolution Plan and was obliged to implement the Resolution Plan. Formation has not implemented the plan as plan has already failed and consequences for non-implementation of the plan had been rightly taken by the CoC by forfeiting the PBG and EMD. The Adjudicating Authority in the impugned order has not followed the earlier orders passed by it on 05.12.2019 and 19.05.2021. The decision taken by the Adjudicating Authority in the impugned order is clearly against the intent and purpose of the order dated 05.12.2019. The Company was handed over back to the CoC and Resolution Professional only due to reason that the Formation failed to implement the plan and has filed an application praying for recall of the order approving the Resolution Plan. Present is a case of clear violation of letter of intent and process memorandum by Formation. Order passed by the Adjudicating Authority in IA No.443 of 2021 deserves to be set aside.

6. Shri Amrut Joshi, learned Counsel appearing for Formation has advanced his submission in support of Company Appeal (AT) (Ins.) No.1163 of 2023 and has advanced his response in Company Appeal (AT) (Ins.) Nos.983 & 984 of 2023 filed by the Bank of Baroda, Committee of Creditors as well as Respondent in Company Appeal (AT) (Ins.) No.1026 and 1027 of 2023.

7. Coming to Company Appeal (AT) (Ins.) No.1163 of 2023 filed by the Formation Textiles, challenging the order dated 06.07.2023 passed in IA No.443 of 2021, learned Counsel has submitted that it is aggrieved only by part of order by which Adjudicating Authority while directing refund of

Rs.93.82 crores has not directed for payment with interest @12%, whereas Adjudicating Authority has directed refund only with Bank interest. It is submitted that Adjudicating Authority ought to have granted refund of the amount along with interest @ 12% to be calculated from expiry of 60 days from failure to allot the shares. Learned Counsel has referred to Section 42(6) of the Companies Act, 2013 in support of his submission that order of refund ought to have been granted as per the provisions of Section 42(6) of the Companies Act, 2013, i.e. along with interest @ 12%.

8. The submissions advanced by learned Counsel for the Formation refuting the submissions of learned Counsel in Appeal(s) filed by the CoC and those filed by the RP, are similar, we proceed to notice the submissions as common submissions on behalf of the Formation. Learned Counsel for the Formation submits that RP has failed in its duty to disclose the relevant information to the Resolution Applicant. The Formation was given access to the VDR on 30.05.2018. The RP had engaged TR Chadha & Co. to carry out a Forensic Audit of CD on 27.02.2018, which information was never disclosed to the Resolution Applicant at the relevant time. Final Forensic Audit Report was received by the RP and the CoC on 02.06.2018, which Forensic Audit Report or the material information contained therein are relevant information for the purposes of Section 29 of the IBC. Learned Counsel for the Appellant has referred to and relied on Explanation to Section 29. Referring to Regulation 36, sub-regulation (2) of the CIRP Regulations, learned Counsel submits that the Regulations also enjoins the RP to provide relevant information and relied on Clauses (a), (e), (h) of the

Regulation 36, sub-regulation (2). It is submitted that making a Resolution Plan was depended on relevant information. It is submitted that relevant information has to include financial position of the CD. The RP is obliged to provide most accurate information available at its disposal for the purpose of showing the financial position of the CD. The Forensic Audit Report establishes that the real financial position has been suppressed. Learned Counsel has referred to an order dated 04.10.2024 passed by Adjudicating Authority in Application under Section 66 of the IBC. It is submitted that disclaimers given by the RP in the Process Memorandum is not sufficient to dilute or bypass any statutory mandate. The mere fact that in the Resolution Plan, Formation has provided for CIRP cost of Rs.25 lakhs for Application under Sections 43, 45, 50 and 66, does not mean that Formation was well aware of Forensic Audit Report and the clauses in Resolution Plan was general in nature. It is submitted that the CD has disclosed its inflated financials in its Annual Reports. The Inflated Financial Reports could not have been basis for an adequate Resolution Plan. It was only after Formation got financials of the CD on 30.01.2019, it came to know about the Forensic Audit Report. The judgment of the Hon'ble Supreme Court relied by the Appellant of ***Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Ltd. & Anr. – (2022) 2 SCC 401*** is clearly distinguishable and not applicable in the facts of the present case. In the ***Ebix Singapore*** case, the Plan was approved by the CoC and as pending consideration before the Adjudicating Authority, whereas in the present case Formation had sought modification and

subsequently withdrawal of the Plan, which however did not go through. Therefore, CIRP was directed to be reinitiated and Formation was allowed to withdraw on an Application filed by the CoC being MA No.2326 of 2019. Hence, the peculiar situation which was present in the present case, was not there in the judgment of the Hon'ble Supreme Court in **Ebix Singapore**. In the present case, the Resolution Plan was vitiated by statutory non-compliance on the part of the RP, which was not the case before the Hon'ble Supreme Court in the case of **Ebix Singapore**. Learned Counsel for the Formation submits that the EMD of Rs.5 crores and PBG of Rs.50 crores was treated to be inclusive towards equity infusion by the CoC and the RP. Learned Counsel for the Appellant has relied on RP's email dated 09.01.2019, where Formation was required to infuse the balance amount of equity as set out in Item No.2 in the Table in the 'share application account'. Learned Counsel for the Formation also relies on Minutes of the Meeting of Financial Creditors held on 21.01.2019. Email of RP dated 30.01.2019 has also been relied to support his submission that payment of PBG as well as the EMD was treated as part of the equity infusion and it was after equity infusion by the SRA, the control and management of the CD was handed over on 30.01.2019. The relevant clauses of Process Memorandum claiming invocation of the PBG are not applicable. The invocation of PBG of Rs.50 crores, which was made towards the money required toward the equity component, could not have been done by the CoC. Clauses 14.2, 14.6 and Clause 15.1 of the Process Memorandum are not attracted, in the facts of the present case. It is further submitted that Regulation 36B(4A) of the

CIRP Regulations is also not applicable, which provision was introduced to subsequent to approval of Resolution Plan. Learned Counsel for the Formation submits that amount, which was treated to be equity infusion, could not have been retained by the CoC and has rightly been directed to be refunded by the Adjudicating Authority. Infact, the CoC and RP played a fraud on Formation by inducing it to part of mandatory infusion while not doing their own duty under the IBC. It is submitted that the Appeals filed by the CoC as well as the RP deserve to be dismissed with cost.

9. Ms. Pooja Mahajan, Learned Counsel appearing for the RP in support of Company Appeal (AT) (Ins.) No.1026 & 1027 of 2023 submits that Adjudicating Authority has recorded incorrect finding in the impugned order dated 06.07.2023. The finding of the Adjudicating Authority that RP did not treat the Plan as being contravened is against the materials on record. During the hearing on 05.12.2019, both the RP and the CoC submitted that SRA has not implemented the Plan, since the Formation has already filed an Application for recall of the Plan approval order, the NCLT as an interim measure directed to handover the CD back to CoC and RP. At no point of time, there was any request made by RP to Formation to hand back control to the RP. The RP has throughout taken a stand that SRA has breached the Resolution Plan. The RP had filed MA No.2124 of 2019 seeking release of the unpaid CIRP costs, which was not paid as per the Resolution Plan. The Adjudicating Authority also has erroneously held that there was no knowledge to Formation that RP had identified avoidance transactions and RP and CoC did not inform Formation about the Forensic

Audit Report or inflated financial statements. Learned Counsel submits that transaction audit report is called for identification of transaction that may fall under Section 43, 45, 50 & 66 of the IBC. The Forensic Audit Report was neither prepared or commissioned for the purpose of assisting the Resolution Applicant's in conducting their due diligence or for inclusion in the Information Memorandum. Forensic Audit Report was received by the RP on 22.06.2018, while the Information Memorandum was shared with the Formation on 30.05.2018 and the Plan was received from the Formation on 08.06.2018. Neither the IBC nor Regulation 36 of CIRP Regulations mandate sharing of any such reports with the Resolution Applicant. Had the intent of the CIRP Regulations was to mandate disclosure of such Reports, Regulation 36 would have specifically included the same as disclosure item. The requirement to share the avoidance applications with the Resolution Applicants was specifically inserted in Regulation 35A with effect from 24.01.2019, where treatment of avoidance applications was introduced as a mandatory requirement under a Resolution Plan. The aforesaid changes in the Regulation, were subsequent to approval of the Plan of Formation, which took place on 07.07.2018. The submission made by learned Counsel for the Formation of non-supply of Transaction Audit Report is only ruse or bogey to find an excuse for not implementing the Resolution Plan, which excuses are unacceptable and without any basis. It is submitted that Formation was very well aware of the filing of avoidance application. During the negotiation with Resolution Applicants, the Resolution Applicants were informed that the RP will be filing avoidance

application and proceed for the same should be passed on to the creditors. Learned Counsel for the Respondent referred to 21st CoC Meeting held on 04.07.2018, which record that Formation and Finquest were asked to include a provision in the Resolution Plan with respect to avoidance transactions and that any recoveries will be paid out to the Financial Creditors. It was also discussed that costs with respect to the same, subject to cap of Rs.25 lakhs would be paid by the Resolution Applicants. The Formation being aware of the proposed filing of avoidance application, has included a condition in the Resolution Plan to pay cost of Rs.25 lakhs for the application. The submission of the Formation is that financials of the CD were inflated and inflated financials were provided to them by the RP and the allegation in averments in IA No.443 of 2021 by the Formation is that RP provided heavily inflated financials of Financial Year 2015-16, which showed substantial income/ turnover of Rs.1547 crores and Rs.1657 crores. However, upon takeover, when Formation analyzed the actual production capacity of CD, it realized that the income generated cannot exceed more than Rs.600 crores. Learned Counsel for the RP submitted that RP is not liable for what is stated in the CD's financial statements 2015-16, which were prepared by ex-management. It is submitted that Formation was required to undertake its own due-diligence as to the production capacity of CD. It is submitted that financials for 2017-18 were also with the Formation, which disclosed significant income/ turnover decline. The RP has right-sized the financials of the CD for the quarter ending 31.12.2017. The financials for the year 2017-18 shown substantial income. The

Formation's claim of prejudice due to heavily inflated past financial statements are baseless. The Formation, which was advised by reputed consultants, cannot be heard in saying that it did not correctly did its due diligence. The submission of the Formation that material non-disclosure had impact on non-implementation is without any basis. The Plan having submitted by the Formation, which got approved by the CoC and Adjudicating Authority, Formation is bound by the said Plan and cannot be heard in saying that Plan was submitted by the Formation on the basis of not having all relevant information. All relevant information were provided by the RP in the Information Memorandum and all Resolution Applicants were required to do their due diligence. The Formation after having conducted its due diligence and after having advised by reputed consultants, cannot be heard in saying that due to lack of full information, it is unable to implement the Resolution Plan. It is submitted that it was the Formation, who was vigorously pursuing its Plan and revised its bid upwards and obtained an order from the Adjudicating Authority for conducting *inter-se* bidding between two Resolution Applicants, i.e. Finquest and Formation. The revised financials were given by the Formation on its own to succeed in the resolution process. Initial application, which was filed by the Formation MA No.2124 of 2019 was primarily based on prospective tax liabilities of around Rs.200 crores and initially the Formation proposed that its payout in the Plan be reduced. It is submitted that PBG and EMD cannot be considered towards the Formation upfront consideration under the Resolution Plan.

10. Now we come to the submissions advanced by the Learned Counsel appearing for Interim Trade Creditors, who has filed Appeal challenging the order rejecting their applications filed before the Adjudicating Authority, seeking a direction for payment of their outstanding amount from the Formation. Shri Bishwajit Dubey, learned Counsel appearing for the Interim Trade Creditors submits that Appellants have supplied goods and services to the CD at the time when CD was under the control and management of Formation. It is submitted that in the Plan of Dev Land & Housing Pvt. Ltd. ("**DLH**"), which was approved on 19.05.2021, an amount of Rs.1.63 crores was proposed. The Plan further indicated that Formation had infused Rs.42.99 crores in the CD, which was reflected in the current liability and the amount was kept as a fixed deposit with the Bank of Baroda, which was also directed by the Adjudicating Authority. When the CIRP re-commenced, the Appellant had no opportunity to file any claim, since no claim was invited by the RP. The total claim of Interim Trade Creditors was computed by RP was as Rs.20.9 crores, is still payable to the Interim Trade Creditors, which has also been noted by the Adjudicating Authority in its order dated 19.05.2021. The amount of Rs.42.99 crores, which was the amount infused by the Formation, being kept in the fixed deposit, the Interim Trade Creditors are entitled to receive their payouts of Rs.20.9 crores from the said amount. It is submitted that the Interim Trade Creditors having supplied goods and services to the Formation, the Formation is liable to pay the said amount. The Appellant – Interim Trade Creditors were not required to challenge the order dated 19.05.2021

approving the Resolution Plan of DLH, nor Appellant can claim any amount from DLH – Successful Resolution Applicant, whose Plan has been approved. It is submitted that the amount of claim of the Interim Trade Creditors is not disputed and it is the RP, who has computed and also filed an Application before the Adjudicating Authority seeking direction to make payment of outstanding amount of Interim Trade Creditors. Learned Counsel for the Appellant has also submitted that there was no occasion for issuing any direction for refund of Rs.93.8 crores to the Formation and order passed on 06.07.2023 in IA No.443 of 2021 allowing refund also need to be set aside. The observation of the Adjudicating Authority that the Appellant ought to have challenged the DLH Plan approval order is not correct. It is submitted that Adjudicating Authority in passing the order dated 06.07.2023, rejecting the Application of Interim Trade Creditors has even gone behind its earlier order passed on 19.05.2019. The Adjudicating Authority has no jurisdiction to review its earlier orders. The RP having confirmed the amount payable to the Appellant, Adjudicating Authority ought to have allowed the Application filed by the Interim Trade Creditors. The Adjudicating Authority ought to have considered the claim of the Appellant on merits and have abdicated its jurisdiction in not considering the claim of the Appellant by issuing appropriate directions to the Formation for payment of the amount. The amount of Rs.42.99 crores kept in the fixed deposit under the order dated 19.05.2021, is required to be utilized towards the payment to Appellant herein. The order of the Adjudicating Authority is against the scheme of IBC. The Appellant having already filed the

Application, their claim was very much before the Adjudicating Authority and observation of the Adjudicating Authority that claim needs to be decided in separate proceedings, is wholly erroneous.

11. Learned Counsel appearing for the Bank of Baroda in replying to the submissions made by the Interim Trade Creditors submits that the amount claimed by the Interim Trade Creditors is not CIRP cost, nor the CoC can be directed to make the payment. It is submitted that it was during Formation's management that the Interim Trade Creditors claimed to have supplied their goods and services and it was Formation, which failed to make the payment to the Creditors to supply goods and services. Dues pertaining to the period when Formation was in custody and control of the CD. It is submitted that CoC is not liable to make the payment to the Appellant.

12. Learned Counsel for the RP submits that RP has already filed an application before the Adjudicating Authority with regard to payment of Interim Trade Creditors seeking a direction for making payment, it is for this Tribunal to consider and take appropriate decision.

13. Learned Counsel for the Formation refuting the submissions made on behalf of Interim Trade Creditors submits that DLH in their Resolution Plan has offered to deal with the claim of Interim Trade Creditors and offered an amount of Rs.1.63 crores against their outstanding and the DLH Resolution Plan being approved on 19.05.2021, no further claim can be considered of the Interim Trade Creditors. It is submitted that no pending dues can be

claimed after approval of the Resolution Plan. The Interim Trade Creditors cannot indirectly seek a review of the order dated 19.05.2021 before the Adjudicating Authority. The Interim Trade Creditors having failed to challenge the order dated 19.05.2021 by filing an Appeal before this Tribunal, it not open for the Interim Trade Creditors to file their respective submissions before the Adjudicating Authority. There is no provision of law, which can permit filing of such application. It is submitted that Adjudicating Authority cannot be conferred with the jurisdiction to entertain an application, which is not vested in it. It is submitted that liberty granted in order dated 19.05.2021, cannot grant the Adjudicating Authority the jurisdiction to adjudicate upon the dispute raised by Interim Trade Creditors. There is no jurisdiction in the Adjudicating Authority to adjudicate and award compensation and damages to a party. The Formation cannot be held liable for dues of Interim Trade Creditors for supply of goods and services to the CD. Now the CD having taken by DLH, the claim of Interim Trade Creditors cannot be entertained beyond what is granted in DLH's Resolution Plan. There is no provision in the IBC, which can enable Interim Trade Creditors to seek summary order for recovery of their dues, without a trial and that too against the Formation with whom there is no privity of contract.

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

15. From the submissions of learned Counsel for the parties and materials on record, following are the questions, which arise for consideration in these Appeal(s):

- (1) Whether under the Process Memorandum (March 2018) issued by RP, the action of CoC to invoke PBG on 10.12.2018 was not covered by any of Clauses of Process Memorandum and invocation of PBG was unsustainable?
- (2) Whether the finding of the Adjudicating Authority that CoC and RP had not treated that approved Resolution Plan had been contravened by the Formation are based on materials on record?
- (3) Whether sufficient materials were placed by CoC and RP before the Adjudicating Authority to establish that Formation has failed to implement the approved Resolution Plan?
- (4) Whether the amount of PBG and earnest money has to be adjusted in the equity infusion, which was required to be made by the SRA under the Resolution Plan, had the PBG lost its nature and character to enable the CoC to invoke the PBG after the RP's treated it towards equity infusion?
- (5) Whether the RP was obliged under Section 29 read with Regulation 36, sub-regulation (2) of the CIRP Regulations 2016 to include the Transaction Audit Report in the Information Memorandum and share the same to Formation, failure of

which makes the implementation of the Resolution Plan voidable?

- (6) Whether the RP had not provided the correct financial position of the CD to RA, due to which performance of Resolution Plan became voidable?
- (7) Whether the Formation had made out a case for direction to refund the amount of Rs.93.08 crores and the order of Adjudicating Authority directing such refund is sustainable?
- (8) Whether the Application filed by the RP as well as Application filed by Interim Trade Creditors (who are Appellant before us) were maintainable before the Adjudicating Authority in view of the approval of Resolution Plan of DLH on 19.05.2021 and Adjudicating Authority has rightly taken the view that Application of Interim Trade Creditors has to be decided in appropriate proceedings and not by Adjudicating Authority?
- (9) Whether Interim Trade Creditors had made out a case for issuing a direction to make payment of their outstanding amount of Rs.20.09 crores towards goods and services provided to CD, when it was under control of the Formation?
- (10) Whether Formation was entitled to claim interest @ 12% as prayed in IA No.443 of 2021?
- (11) Whether the Adjudicating Authority is right in observing that in view of the order passed in IA 443 of 2021, there is nothing to adjudicate in IA No.1847 of 2021 filed by the Bank of Baroda

and if not, what relief to be granted to the Bank of Baroda in IA No.1847 of 2021?

(12) Relief to which Appellants' are entitled, if any?

Question No.(1) :

Whether under the Process Memorandum (March 2018) issued by RP, the action of CoC to invoke PBG on 10.12.2018 was not covered by any of Clauses of Process Memorandum and invocation of PBG was unsustainable?

16. The CoC has invoked the PBG on 10.12.2019. The CoC in its Meeting dated 10.12.2019 decided to invoke the PBG on account of failure of SRA to implement the Resolution Plan, which Resolution Plan approved by 96.89% vote share of the CoC. The RP vide email dated 17.01.2020 has informed the Formation about invocation of PBG. The email dated 17.01.2020 sent to Formation reads as follows:

"To,

Mr. Piyush Viradia,
Formation Textiles LLC.
A limited liability company incorporated under the laws of the United States of America, having its principal office at 16, Arcadien Drive Suite C, Paramus, New Jersey, 07625, USA and the Resolution Applicant in the Corporate Insolvency Resolution Process of Mandhana Industries Limited.

Dear Sir,

Sub: Invocation of the Performance Guarantee submitted by Formation Textiles LLC in the Corporate Insolvency Resolution Process ("CIRP") of Mandhana Industries Limited (new GB Global Limited) ("Corporate Debtor").

This is with reference to the CIRP of the Corporate Debtor and the non-implementation of the approved Resolution Plan that was submitted by you.

The Committee of Creditors (“CoC”) has requested me, in my capacity as the Resolution Professional to inform you that as decided during the 22nd meeting of the CoC, held on 10th December 2019, the CoC (in accordance with the terms of the Process Memorandum dated 6th March 2018 and the Letter of Intent dated 7th July 2018) has approved the invocation/ forfeiture of the Performance Bank Guarantee on account of your failure to implement the Resolution Plan.

This is for your information and record.

For GB Global Limited (Formerly known as Mandhana Industries Limited)

Charu Desai
(On behalf of the CoC of GB Global Limited)”

17. The email clearly communicate that decision to invoke the PBG was taken on account of failure of SRA to implement the Resolution Plan. The submission advanced on behalf of the Formation as noted above is that the invocation of PBG in the facts of present case was not covered by any of Clauses of Process Memorandum. We, thus, need to notice the Clauses of Process Memorandum to find out as to whether CoC could have invoked the PBG and also whether invocation of the PBG by the CoC is sustainable or unsustainable. The Process Memorandum was issued by the RP in March 2018, which invited for submission of Resolution Plans for the CD (can also be referred to as “RFRP”). Clause 10.2 deals with ‘Issuance of Performance Guarantee’. Clause 10.2.1 provides as follows:

“10.2.1. The Successful Resolution Applicant shall, within 7 (seven) days of issuance of the Letter of Intent by the Resolution Professional (on behalf of the CoC) in accordance with Clause 10.1 (Acceptance of Letter of Intent) above, furnish or cause to be furnished an unconditional and irrevocable performance bank guarantee of INR 50,00,00,000 (Indian Rupees Fifty crores) from a scheduled commercial bank in favour of the Guarantee Beneficiary, with respect to the implementation of the Successful Resolution Plan ("Performance Guarantee"). The Performance Guarantee shall be in the format prescribed in Format IX (Performance Bank Guarantee) of this Process Memorandum.”

18. Clause 14 of the RFRP deals with ‘Performance Guarantee’. Clause 14.2, which provided for Performance Guarantee validity period and invocation by the beneficiary is as follows:

“**14.2** The Performance Guarantee shall be valid from the date of issuance of the Letter of Intent for a period of 12 (twelve) months (“PBG Validity Period”). The Performance Guarantee shall be re-issued or extended at least 7 (seven) days prior to the expiry of the PBG Validity Period in the event the implementation of the Successful Resolution Plan is not complete on such date, failing which the Performance Guarantee may be immediately invoked or enforced by the Guarantee Beneficiary, subject to the approval of the CoC.”

19. Clause 14.6 also deals with right to invoke the Performance Guarantee. Clause 14.6 is as follows:

“**14.6.** Other than as set out in Clause 14.2 (Performance Guarantee), the Guarantee Beneficiary shall, subject to the approval of the CoC, have the right to invoke the Performance Guarantee for a period of 30 (thirty) days from the last date of the PBG Validity Period and, without prejudice to Clause 14.2 (Performance Guarantee), the Performance Guarantee can be invoked at any time, if:

- (a) any of the conditions under the Letter of Intent or Resolution Plan are breached,
- (b) if the Resolution Applicant fails to re-issue or extend the Performance Bank Guarantee in accordance with Clause 14.2 (Performance Guarantee) above by the date referred to therein; or
- (c) failure of the Successful Resolution Applicant to implement the Resolution Plan to the satisfaction of the CoC, including the non-receipt of required approvals for implementation of Resolution Plan of the Successful Resolution Applicant within the timelines specified in the Resolution Plan or 45 (forty five) days from the acceptance of the Letter of Intent or any other such extended period as may be prescribed by the CoC or the Adjudicating Authority.”

20. When we look into Clause 14.2 and 14.6 of the RFRP, the Clause 14.2 clearly contemplate *“in the event the implementation of the Successful Resolution Plan is not complete on such date, failing which the Performance Guarantee may be immediately invoked or enforced by the Guarantee Beneficiary, subject to the approval of the CoC”*. Clause 14.6 provides -without prejudice to Clause 14.2 (Performance Guarantee), the Performance Guarantee can be invoked at any time, if any of the conditions under Letter of Intent or Resolution Plan are breached or failure of the Successful Resolution Applicant to implement the Resolution Plan to the satisfaction of the CoC. Thus, Clause 14.6 contemplated invocation of Performance Guarantee on failure of the Successful Resolution Applicant to implement the Resolution Plan to the satisfaction of the CoC.

21. Learned Counsel for the Formation submits that in view of the fact that Resolution Plan is itself vitiated on account of non-disclosure of relevant information by the RP and CoC, there is no question of implementation of vitiated Resolution Plan. The above submissions of the Formation cannot be accepted. In the facts of the present case, when Resolution Plan was submitted by the SRA, which was considered and approved and the approved Resolution Plan is statutory binding on the SRA by virtue of Section 31, sub-section (1) and as per law laid down by the Hon'ble Supreme Court in **Ebix Singapore** (supra). Learned Counsel for the Formation has also referred to Clause 14.2 to 14.6 and 15.1 of the Process Memorandum to submit that invocation of PBG of Rs.50 crores was made towards the money required for equity component. Thus, there is no question of Clause 14.6(c) being attracted, since the Resolution Plan itself was vitiated. It is submitted that Clause 15.1 was also not attracted, since Resolution Plan submitted by Formation was approved and the said clause applies only when there is withdrawal prior to approval by Adjudicating Authority. Clause 14.6 as noted above empowers the CoC to invoke the Performance Guarantee, if Resolution Plan has not been implemented by the SRA to the satisfaction of the CoC. Clause 14.6, thus, clearly contemplate the situation when Performance Guarantee can be invoked. The present is not a case where CoC has exercised Clause 15.1. Clause 15.1 is neither attracted nor has been invoked by the CoC. However, Clause 15.4 reserve the right to CoC to take any action against the Successful Resolution

Applicant including invocation of PBG as well earnest money. Clause 15.4 is as follows:

“15.4 In the event, the Successful Resolution Applicant does not comply with any other requirement as required for implementation of the Successful Resolution Plan, the Resolution Professional and the CoC reserve the right to take any action against the Successful Resolution Applicant in accordance with this Process Memorandum. Resolution Plan and/or under the Applicable Law, including but not limited to:

- (a) revoking the Letter of Intent;
- (b) The Resolution Professional, with the consultation of the CoC, may cancel the Resolution Plan submitted by the Successful Resolution Applicant, which would result in the actions detailed under Clause 15.3 (Default by Successful Resolution Applicant and its consequences) set out above; and
- (c) The Guarantee Beneficiary may invoke the Performance Guarantee and the Earnest Money, provided by the Successful Resolution Applicant, while submitting the Resolution Plan, subject to the approval of the CoC.”

22. We have also noted the email dated 17.01.2020, by which decision of the CoC was communicated to the Formation, which clearly mentions that CoC has invoked the Performance Guarantee since SRA has failed to implement the Resolution Plan.

23. The CoC, thus, has invoked its power under Clause 14.2 to 14.6 and 15.4 for invocation of the PBG, which is fully in accord with the Process Memorandum and the submission of the Formation that CoC could not have invoked the PBG in the facts of the present case is without any substance.

Question Nos.(2) and (3)

Whether the finding of the Adjudicating Authority that CoC and RP had not treated that approved Resolution Plan had been contravened by the Formation are based on materials on record?

Whether sufficient materials were placed by CoC and RP before the Adjudicating Authority to establish that Formation has failed to implement the approved Resolution Plan?

Question Nos. (2) and (3) being inter-related are taken together.

24. The Adjudicating Authority in paragraph 50 of the impugned order has returned a finding that CoC and RP had not treated that the approval Resolution Plan had been contravened by the Formation and Adjudicating Authority allowed the application of Formation Textile to exit. The findings returned by the Adjudicating Authority in paragraph 50 are as follows:

“50. The aforesaid facts show that the CoC or the RP had not treated that the approved resolution plan had been contravened by the applicant-formation to attract liquidation under Section 33 (3) of the Code. The Adjudicating Authority had also not held that the Applicant-Formation Textiles LLC had contravened its resolution plan and thereby to pass an order under Section 33 (3) of the Code. Taking into consideration, the difficulties placed by the applicant-formation in implementing its resolution plan, it allowed Applicant-Formation Textiles LLC to exit; order to transfer the Corporate Debtor to the CoC who in turn was directed to hand over the same to RP and further allowed re-commencement of the Corporate Debtor.”

25. The Resolution Plan submitted by Formation under Chapter-IV containing the heading ‘Funding/ Repayment/ Restructuring of Debt’, under Clause 2 dealt with the ‘upfront payment’. The CIRP cost was also to be paid within 30 days. Clauses 2 and 3.1 of Chapter-IV are as follows:

“2. UPRONT PAYMENT

The upfront payment of Rs. 226 Crores to be infused into the Company (Rs. 51 Crores for working capital expenses and need based capex and additional Rs.175 Crore as upfront payment as provided in the table above) shall be done in the following manner,

- Equity capital of Rs. 76.00 Crores and
- Rs. 150.00 Crores as Rupee denominated External Commercial Borrowings (ECBs) in MIL, within a period of 30 days from the Effective Date. The Resolution Applicant is also permitted to infuse this amount (either fully or partially), as dollar ECB or loan as may be permissible.

A copy of bank statement evidencing the availability of funds is submitted with Resolution Plan. Further details of the funds flow envisaged is set out in further detail in Chapter V.

The Upfront Equity Infusion shall be undertaken by way of preferential allotment of Equity Shares to the Resolution Applicant by the Company, in accordance with Applicable Law.

Additionally, the CIRP costs upto Rs. 4 Crore and payment of Rs. 2.224 Crore towards admitted claims of Workmen & Employee (Rs. 1.59 Crore) and admitted claims of Operational Creditors (Rs. 0.634 Crores) shall be made upfront within 30 days from Effective Date from the cash balance available in the Company.

3. CIRP COSTS

3.1 The Resolution Applicant proposes that CIRP Costs of upto Rs. 4 Crore shall be paid upfront within 30 days from Effective Date over and above the value to Financial Creditors from the cash balance available with the Company. This amount will be paid in priority to the repayment of any other debt amount. It is envisaged that CIRP cost will be paid on actuals and it is expected that it shall not exceed”

26. We have noticed above that RP had to file an application seeking direction to the Formation to release the CIRP costs being MA No.2124 of

2019, which MA was filed on 11.06.2019. The filing of the application by the RP, clearly indicated that SRA has not paid the CIRP costs within the time allowed in the Resolution Plan. On 13.06.2019, Formation has filed IA No.2223 of 2019 seeking modification of Resolution Plan and revision of its offer bid and reduction of the same from what was stated in the approved Resolution Plan. The Bank of Baroda on behalf of CoC has filed MA No.2326 of 2019 on 25.06.2019. In the application, the Bank of Baroda has made prayers, which clearly indicate that Bank of Baroda was complaining of non-implementation of Resolution Plan by the Formation. A direction was sought for payment towards CIRP costs, Financial Creditors and other creditors. Prayer was also made seeking liberty to approach second highest bidder and further in alternate to direct for liquidation. The prayers made in IA filed by the Bank of Baroda are as follows:

- “A. That this Hon’ble Tribunal be pleased to direct Formation Textiles LLC, Mr. Piyush Viradia and/or Mr. Jiten Parikh to implement the Resolution Plan and all the actions envisaged therein, without any modification or deviations from the commitments made thereunder in its entirety, on an urgent and with immediate effect and in a time-bound manner;
- B. That this Hon'ble Tribunal be pleased to direct Formation Textiles LLC, Mr. Piyush Viradia and/or Mr. Jiten Parikh to make immediate payments as envisaged under the Resolution Plan including payment towards the CIRP costs, Financial Creditors, operational creditors, including that of the workmen and employees, statutory authorities and others stakeholders if any; or
- C. Alternative to prayer clause (a) and (b) above, that this Hon'ble Tribunal be pleased to recommence the CIRP of the Corporate

Debtor and to allow invitation of fresh bids by the Resolution Professional in the CIRP of the Corporate Debtor with an aim to reviving the Corporate Debtor as a going concern, and to prevent the Corporate Debtor going into liquidation;

- D. Alternative to prayer clause (a) and (b) above, that this Hon'ble Tribunal be pleased to recommence the CIRP of the Corporate Debtor and direct the Resolution Professional and the Committee of Creditors of the Corporate Debtor to approach the second highest bidder, namely Respondent No. 6, to gauge its interest in still submitting a Resolution Plan in the CIRP of the Corporate Debtor;
- E. Alternative to prayer clauses (a) to (d) above pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down under Chapter III of the Insolvency and Bankruptcy Code, 2016,
- F. That this Hon'ble Tribunal be pleased to pass an order under Section 74(3) of the Insolvency and Bankruptcy Code 2016 against Respondent No. 1 and/or Respondent No. 2 for contravention of the terms of the Resolution Plan;
- G. That pending the hearing and final disposal of the Application before this Hon'ble Tribunal, Respondent Nos. 1 and 5 be called upon to, on affidavit, place on record the steps taken by them for implementation of the Resolution Plan and further all the steps taken by it in the running of the Corporate Debtor, in order to ascertain the status of the Corporate Debtor today including disclosing any progress reports filed by them before this Hon'ble Tribunal;
- H. That pending the hearing and final disposal of the Application before this Hon'ble Tribunal, Formation Textiles LLC and N.V. Dand & Associates be directed to, on affidavit, place on record the steps taken by them for implementation of the Resolution Plan and further all the steps taken by it in the running of the Corporate Debtor, in order to ascertain the status of the

Corporate Debtor today including disclosing any progress reports filed by them before this Hon'ble Tribunal;

- I. That pending the hearing and final disposal of the Application this Hon'ble Tribunal, this Hon'ble Tribunal be pleased to direct that the management and control of the Corporate Debtor is given to a third party agency appointed by this Hon'ble Tribunal so that the assets of the Corporate Debtor are not further depleted and are protected from any acts of the Respondent Nos 1 to 3;
- J. That in the alternative to prayer (i), pending the hearing and final disposal of the Application before this Hon'ble Tribunal, this Hon'ble Tribunal be pleased to direct Formation Textiles LLC, Mr. Piyush Viradia and Mr. Jiten Parikh to maintain status quo in relation to the Corporate Debtor, except for the day to day operations of the Corporate Debtors, reports of ought to be submitted by the Formation Textiles LLC, Mr. Piyush Viradia and Mr. Jiten Parikh before this Hon'ble Tribunal on a weekly basis.
- K. That pending the hearing and final disposal of the Application, this Hon'ble Tribunal be pleased to direct the Respondent No. I to pay the amount of interest at the rate of 10% being accrued to the financial creditors on account of the continuing debt of Rs. 305,00,00,000/- (Rupees Three Hundred and Five Crores Only) payable monthly since the date of Respondent No. I taking over the control and management of the Corporate Debtor i.e. 31^a January 2019, per Clause 4.3 of with Clause 3 of Chapter V of the Resolution Plan.
- L. For costs;
- M. For such other orders as this Hon'ble Tribunal deems fit in the facts and circumstances of the case."

27. The pleadings made by RP as well as CoC before the Adjudicating Authority as well as submissions, which have been noticed by Adjudicating

Authority in its order passed on 05.12.2019, clearly indicate that both CoC and RP complained that SRA has not been able to implement the Resolution Plan. The Adjudicating Authority as noted above, returned a finding that both the CoC and RP had not treated the SRA to have contravened the Plan and CoC and RP have permitted the SRA to exit, are the findings, which are not substantiated from any materials on record. In this context, we need to notice MA No.2326 of 2019, which was filed by the Bank of Baroda. The Formation has filed MA No.2223 of 2019, where it sought an order permitting FTL to revise its offer or reduce the same and various amendments were also sought in the said MA. By MA No.2223 of 2019, Formation also sought setting aside/ recall of the Plan approval order. Copy of MA No.2223 of 2019 has been brought on record as Annexure-A2 to the rejoinder affidavit filed in Company Appeal (AT) (Ins.) No.983-984 of 2023, where the Formation has made following prayers:

- “(a) For an Order from this Hon'ble Tribunal permitting the Applicant to revise its offer/bid and reduce the same in line with the actual worth/ valuation of MIL;
- (b) For an Order and Direction from this Tribunal allowing the appointment by the Applicant of an independent auditor/agency to carry out a forensic audit of MIL to accurately determine its accurate worth/valuation;
- (c) For an Order from this Tribunal expressly allowing the liabilities to be extinguished in terms of Chapter VII of the Resolution Plan;
- (d) In the alternative to prayer (c), an order directing the Resolution Professional and the COC to remit amounts to the Applicant to the extent of the undisclosed liabilities of VAT,

Income Tax, Customs Authorities, i.e. comes around a sum of Rs. 2,00,00,000/- (Rupees Two Crore Only)

- (e) For a declaration from this Hon'ble Tribunal that the total sum of Rs. 93 crores invested by the Applicant in MIL is towards the initial equity infusion of Rs. 76 crores (for subscription of 76 million of equity shares) and for payment of approx. 17.5 crores to financial creditors who have opted for cash option instead of equity shares of MIL;
- (f) For an Order from this Hon'ble Tribunal directing the Resolution Professional/ COC Members to forthwith take all steps necessary to transfer the 76 million equity shares of MIL (pertaining to the Applicant's shareholding in MIL) in favour of and in the name of the Applicant in consideration of the equity infusion of Rs. 76 crores having been received from the Applicant;
- (g) In the interim until such time that the present Application is disposed off, for an order granting status quo on further payments to be made by the Applicant;
- (h) Pending the hearing and final disposal of the present Application, an Order and Direction may be passed by this Tribunal allowing the appointment by the Applicant of an independent auditor/agency to carry out a forensic audit of MIL to accurately determine its accurate worth/valuation
- (i) for costs;
- (j) such other and further reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.”

28. The amendments made in MA No.2223 of 2019 by MA 3904 of 2019, where Formation prayed for setting aside and recalling order dated 30.11.2018 approving the Resolution Plan. The amendments, which was made in MA 2223 are at page 198 of the rejoinder, which are as follows:

“Applicant filed Misc. Application No. 2223 of 2019 seeking an Order from this Hon'ble Tribunal to permit the Applicant to revise its bid an

reduce the same in line with the actual worth/valuation of MIL and to allow the appointment by the Applicant for an independent auditor/agency to carry out a forensic audit of MIL to accurately determine its accurate worth/valuation. The Applicant also prayed a Declaration from this Hon'ble Tribunal that the total sum of Rs. 93 Crores invested by the Applicant in MIL is towards the initial equity infusion of Rs. 76 Crores and for payment of approx. 17.5 Crores to Financial Creditors who have opted for cash option instead of equity shares of MIL, and, directing the Resolution Professional/ COC Members to take necessary steps to transfer the 76 million equity shares of MIL in favour of and in the name of the Applicant consideration of the equity infusion of Rs. 76 Crores having been received from the Applicant. By the present Application the Applicant seeks to amend Misc. Application No. 2223 of 2019.”

29. When the Formation has been praying for recall of the Plan approval order, the intent was clear and loud that Formation was not implementing the Resolution Plan, nor they were interested in implementing the Resolution Plan. Learned Counsel for the RP and CoC have categorically submitted before the Adjudicating Authority by means of various applications and oral submissions that SRA has failed to implement the Resolution Plan.

30. We may also refer to the order dated 05.12.2019, on which much reliance has been placed by learned Counsel for the Formation, also did not record any finding that CoC and RP has not treated that approved Resolution Plan have been contravened. The submission of the CoC has been captured by the Adjudicating Authority in order dated 05.12.2019 in following words:

“Ld. Sr. Counsel representing the Banks also contends that the unit has been handed over to the Successful Resolution Applicant on “as is where is” condition and all the information that was required to be provided has already been provided and the successful Resolution Applicant had defaulted in making the payments as per the resolution plan.”

31. Thus, the Adjudicating Authority itself has noticed the submission of the CoC that Resolution Applicant has defaulted in making the payment as per the Resolution Plan. We, thus, are of the view that the findings returned by the Adjudicating Authority in paragraph 50 that CoC and RP had not treated that the approved resolution plan had been contravened by the applicant-Formation, is unsustainable. We, further are of the view that there was sufficient material placed by the CoC and RP by means of various applications and affidavits filed before the Adjudicating Authority that the Formation has failed to implement the approved Resolution Plan.

32. The Adjudicating Authority while deciding IA No.734/MB/2021 filed by the Formation Textiles LLC in its order dated 19.05.2021 has clearly held that the Applicant (Formation Textiles LLC) could not implement the Resolution Plan. It is useful to extract observation made by the Adjudicating Authority in order dated 19.05.2021 in paragraph 5(vi), which is as follows:

“5(vi). The Applicant who could not implement the Resolution Plan submitted by him has come up before us with this frivolous Application and making bald allegations by taking on his hand a single transaction of the year 2010 and trying to scuttle the approval of the fresh Resolution Plan, which is pending approval.”

33. The above observation also clearly indicate that Adjudicating Authority has also observed that Appellant has failed to implement the Resolution Plan. We, thus, are of the view that there was sufficient material on record to hold that Applicant – Formation failed to implement the Plan which is clearly proved and beyond any pale of doubt.

Question Nos.(2) and (3) are answered accordingly.

Question No.(4)

Whether the amount of PBG and earnest money has to be adjusted in the equity infusion, which was required to be made by the SRA under the Resolution Plan, had the PBG lost its nature and character to enable the CoC to invoke the PBG after the RP's treated it towards equity infusion?

34. The submission which has been made on behalf of learned Counsel for the Formation is that amount of PBG of Rs.50 crores and earnest money have been adjusted in the equity infusion, which was to be made by the SRA, hence, the PBG of Rs.50 crores lost its character and nature, which resulted in inability of CoC to invoke the PBG, which submission has been refuted by learned Counsel for the RP and the CoC. It is submitted that equity infusion by the SRA was in addition to the PBG.

35. Before we enter into respective submissions of the parties, we need to notice relevant Clauses of Process Memorandum. We have noted above the issuance of Performance Guarantee has been dealt in Clause 10.2 and Performance Guarantee has been further been dealt in Clause 14. Clause 14.8 of the Process Memorandum clearly provides for answer to the

submission raised by the Formation. Clause 14.8 prohibit Performance Guarantee to be set-off or used as part of the consideration that the Successful Resolution Applicant proposes to offer. Clause 14.8 is as follows:

“**14.8.** The Performance Guarantee shall not be set-off against or used as part of the consideration that the Successful Resolution Applicant proposes to offer in relation to the Company, even if expressly indicated ns such by the Resolution Applicant in the Resolution Plan.”

36. The above clause, thus, clearly provides that Performance Guarantee is not to be set-off against any payment, which is to be made by the SRA. We have noted that the equity capital of Rs.76 crores was to made as per the Resolution Plan. Clause 2 of Chapter-IV, we have already extracted above, which indicate that upfront payment of Rs.226 crores should be infused in the Company. Rs.175 crores as upfront payment, including Rs.76 crores as equity capital and Rs.150 crores as external commercial borrowings. The submission of the Appellant – Formation is that the amount of Performance Guarantee of Rs.50 crores and Rs.5 crores EMD was treated towards the equity infusion, since Formation was informed to deposit Rs.21 crores more to complete the equity infusion. When, Clause 14.8 of the Process Memorandum clearly prohibits any set-off against or used of the Performance Guarantee as part of consideration that the SRA proposes to offer in the Plan, the submission of the Appellant, which run counter to specific Clause 14.8, cannot be accepted. In this context, we may refer to the judgment of the Hon’ble Supreme Court in **Civil Appeal Nos.5023-5024 of 2024 – State Bank of Inida & Ors. vs. The Consortium of Mr.**

Murari Lal Jalan and Mr. Florian Fritsch & Anr. decided on 07.11.2024.

In the above case also the SRA had given a PBG of Rs.150 crores. The first tranche of payment was to be made by 31.01.2024 amounting to Rs.350 crores. In the Appeal, which was before the NCLAT, the SRA submitted that in pursuance of the order passed by the Hon'ble Supreme Court dated 18.01.2024, SRA has deposited an amount of Rs.200 crores and Rs.150 crores was already infused towards PBG security, be adjusted in the payment of Rs.350 crores, which was to be paid by 31.01.2024. The said submission of the SRA was accepted and this Tribunal took the view that as per the Resolution Plan for first tranche of payment, the PBG can be adjusted. The order of the NCLAT came to be challenged in the aforesaid Appeal by the State Bank of India and Hon'ble Supreme Court framed one of the question, i.e. Question-I, which is to the following effect:

“I. The adjustment of the PBG was impermissible under the terms of the Resolution Plan read with Regulation 36B(4A) of the 2016 Regulations.”

37. The said question was considered and answered by the Hon'ble Supreme Court in negative holding that PBG cannot be adjusted towards payment, which has to be made by SRA. The Hon'ble Supreme Court in the above context has noticed the relevant Clauses of RFRP and that of Resolution Plan. The submission of SRA relying on Clause 64.4 was noticed in paragraph 99 of the judgment, which arguments was noticed and rejected. Paragraph 99 of the judgment is as follows:

“99. It is the case of the SRA that as per Clause 6.4.4 on the “*Treatment of Financial Creditors*” and the table adduced under the heading “*Summary of payment and security package*”, the PBG of Rs. 150 Crore could have been adjusted against the payment of the first tranche. It was submitted that in the last column of the table, the “Date of Release of Security” is provided. In the very first head in the column on date of release of security, the expression “PBG adjusted” has been mentioned against the first tranche of cash payment to be made to the Financial Creditors. Further, in the explanation given to the said table under Clause 6.4.4(a)(i), against the heading “Date of Release of Security”, there is no mention of the PBG while the other two types of security find a mention. It was submitted that the only good reason for this exclusion was the understanding that the PBG was adjustable against the obligation of the SRA towards payment of the first tranche. Further, it is the case of the SRA that since a revolving security package was agreed to under Clause 6.4.4, other types of security were envisioned for the subsequent tranches of payment and therefore, no issue could have been raised in adjusting the PBG towards the first tranche. However, we find it extremely difficult to agree with the stance of the SRA for multiple reasons which are detailed below.”

38. The Hon'ble Supreme Court in paragraph 102 held that provisions of RFRP, specially those related to Performance Security or PBG, were binding on the SRA. Paragraph 102 of the judgment is as follows:

“102. Furthermore, in the Covering Letter adduced with the Resolution Plan, the SRA stated as thus:

“4. We hereby undertake that we, and our Representatives, shall at all times, be in compliance with the provisions of the RFRP, the Non-Disclosure Agreement, the IB Code and the CIRP Regulations.

xxx

xxx

xxx

c. Acceptance

We hereby unconditionally and irrevocably agree and accept the terms of the RFRP and that the decision made by the Resolution Professional, CoC and/or the Adjudicating Authority in respect of any matter with respect to, or arising out of, the RFRP and the Resolution Plan Submission Process shall be binding on us...

xxx

xxx

xxx

10. We confirm that we have not taken any deviations so as to be deemed non-responsive with respect to the provisions of the RFRP, the IB Code and the CIRP Regulations.”

(emphasis supplied)

A bare reading of the above also strengthens the conclusion that the SRA has to remain compliant with the terms of the RFRP, at all times, in addition to being obedient to the terms of the Resolution Plan. Therefore, to say that the RFRP was merely a wish list of the CoC which was informed to the applicants at the time of inviting plans is incorrect, to say the least. The provisions of the RFRP, especially those provisions related to the Performance Security or PBG, were binding on the SRA.”

39. In paragraph 111, the Hon'ble Supreme Court held that Clause of RFRP, which is binding on the SRA, cannot be given a go by, by clause of Resolution Plan. In paragraph 111, following was held:

“**111.** Now, if the intention under the RFRP, the Resolution Plan (under Clauses 7.3 and 9.4) and Regulation 36B(4A) was that the PBG had to be kept alive till the completion of implementation of the Resolution Plan by the SRA and that it cannot be set-off against any payment obligation, then how do we reconcile such an intention with the expression “PBG adjusted” mentioned under Clause 6.4.4 of the Resolution Plan? As mentioned above, Clauses 7.3 and 9.4 respectively of the Resolution Plan incorporated the terms of the RFRP into the Resolution Plan. Clause 3.13.9 of the RFRP states that the PBG shall not be set off against any payment or consideration which is to be made by the SRA, even if expressly provided so under

the Resolution Plan. Clause 6.4.4 is quite ambiguous in its construction regarding the question whether the PBG can be specifically adjusted against the first tranche payment. Although in the Summary of Payments and Security Package, under the column titled "Date of release of security", the expression "PBG adjusted" exists, yet Clause 6.4.4(a)(i) which furnishes some additional clarity on the Summary of Payments and Security Package provides no mention of the PBG under the heading "Date of release of Security", while the other two forms of security i.e., the BKC property and Dubai property No.1 are mentioned. The argument of the counsel for the Respondent is that this omission indicates that the PBG would be adjusted under the first tranche payment. However, in our considered opinion irrespective of whether Clause 6.4.4 expressly or impliedly provided for the PBG to be adjusted, such a provision would create a dissonance with Clause 3.13.9 of the RFRP which has also been made binding on the SRA through Clauses 7.3 and 9.4 respectively of the Resolution Plan. Therefore, such an adjustment should not be allowed in the facts of the present case.

40. The above judgment of the Hon'ble Supreme Court has clearly laid down that Clauses of RFRP, which required PBG be kept alive till complete implementation of Resolution Plan and shall not be set-off against any payment to be made by SRA. The Clauses of RFRP are binding on the SRA. In view of the aforesaid Clause, no submission on behalf of the Appellant that the amount of PBG should be treated towards equity infusion can be accepted.

41. Learned Counsel for the SRA has referred to the emails sent by the RP on 03.01.2021, 09.01.2019 and 30.01.2019. In the reply filed by the Formation in Company Appeal (AT) (Ins.) No.983-984 of 2019, the said emails have been brought on record along with the legal submission filed by

Formation. The above emails have been filed along with the legal submissions and the RP had no opportunity to respond and clarify in the pleadings. We are of the view that in view of the Clause 14.8 of the RFRP as noted above, any communication by RP on the above regard, has no relevance. Neither RP nor CoC or SRA had any right or jurisdiction to act in breach of Clause 14.8.

42. Learned Counsel for the Appellant has also referred to the Minutes of the Meeting of Financial Creditor held on 21.01.2019, where it is recorded *“Bank of Baroda informed the lender that Rs.55 crores was lying with them and if Formation brings further Rs.21 crores, they shall take control of 70% of the equity of MIL”*. The above Minutes of the Financial Creditor, does not help the Appellant to contend that payment of PBG towards was for equity infusion. The equity infusion is clear consideration, which is to be paid by the SRA as per Resolution Plan and is clearly distinct from PBG. Hence, the submission of the Appellant that the PBG having been accepted towards equity infusion, the PBG lying with the CoC has lost its character and could not have been invoked, cannot be accepted. We hold that PBG given by the Appellant – SRA was as per the RFRP had to continue till 100% implementation of the Resolution Plan and the said PBG cannot be treated as equity infusion as per the Resolution Plan.

Question No.4 is answered accordingly.

Question No. (5)

Whether the RP was obliged under Section 29 read with Regulation 36, sub-regulation (2) of the CIRP Regulations 2016 to include the Transaction Audit Report in the Information Memorandum and share the same to Formation, failure of which makes the implementation of the Resolution Plan voidable?

43. The submission which has been advanced by learned counsel for the Formation is that RP was obliged to include the transaction audit report in the information memorandum by virtue of Section 29 of the IBC read with Regulation 36(2) of the CIRP Regulations, 2016 and RP having neither amended the information memorandum nor having shared the transaction audit report with the resolution applicant, performance of resolution plan became voidable.

44. RP on the other hand, refuted the submission and submits that there is no statutory prescription for sharing the transaction audit report with the resolution applicant. RP submitted that transaction audit report is called for to advise the RP to identify the avoidance transaction and the said report is not prepared or commissioned for purposes of assisting the resolution applicant in conducting their due diligence or for inclusion with the information memorandum.

45. Learned counsel for the Formation has relied on Section 29 of the IBC, which provides for preparation of information memorandum. Section 29 of the IBC is as follows:

“29. Preparation of information memorandum.

(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information^{1A} with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation.—For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.”

46. Learned counsel for the Formation has relied on explanation, which provides that relevant information means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor and any other matter pertaining to the corporate debtor as may be specified. Regulation 36(2) of the CIRP Regulations, 2016 on which reliance has been placed, provides as follows:

“36. Information memorandum.

(2) The information memorandum shall highlight the key selling propositions and contain all relevant information which serves as a

comprehensive document conveying significant information about the corporate debtor including its operations, financial statements, to the prospective resolution applicant and shall contain the following details of the corporate debtor:

(a) assets and liabilities 6[including contingent liabilities] with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: 'Description' includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, 7[geographical coordinates of fixed assets] and any other relevant details.]

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) [***]

(k) [***]

(ka) fair value:

Provided that the committee may decide not to disclose the fair value if, for reasons to be recorded in writing, it considers such non-disclosure to be beneficial for the resolution process.

(j) company overview including snapshot of business performance, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the corporate debtor such as brought forward losses¹¹ in the income tax returns, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities.

(k) Details of business evolution, industry overview and key growth drivers in case of a corporate debtor having book value of total assets exceeding one hundred crores rupees as per the last available financial statements.

(l) other information, which the resolution professional deems relevant to the committee.”

47. The present is not a case where Appellant’s case is that the financial statement and audited financial statement of the corporate debtor of the last two financial years have not been provided. It is also not the case that provisional financial statement for the current financial year made upto the date not earlier than 14 days from the date of the application has not been provided.

48. Learned counsel for the Appellant during his submission has also referred to Regulation 36(2)(h) which required details of all materials and litigation and ongoing investigation or proceeding initiated by government and statutory authority. The above clause is confined to litigation and

ongoing investigation or proceeding initiated by government or statutory authorities. The said clause obviously cannot relate to transaction audit report which has been directed by the RP for identification by the RP of the avoidance transaction. The provisions of Section 29 explanation as well as Regulation 36(2) thus cannot read to mean, as it existed at the relevant time, that transaction audit report was contemplated as an information which was required to be included in the information memorandum.

49. Learned counsel for the RP has referred to Regulation 35A (3A) which was inserted with effect from 16.09.2022, which requires RP to forward a copy of the application to the Prospective Resolution Applicant. Application referred to in Regulation 35(3A) is avoidance application as referred to in 35A (1), thus on the date when the information memorandum was prepared in the present case and also on the date when resolution plan was considered. The Regulation 35A (3A) was not even inserted so as to require RP to share the application. It is the case of the RP that application for avoidance of transaction was filed on 09.07.2018 on the date when application for approval of the resolution plan i.e. on 07.07.2018 was filed before the adjudicating authority.

50. Learned counsel for the RP has also referred to Regulation 38(2)(d), which requires that resolution plan shall provide for the manner in which proceeding in respect of avoidance transaction if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II to the Code will be pursued after the approval of the RP and the manner in which the proceeds if any from such proceeding shall be distributed. It is submitted

that sub-clause (d) was inserted subsequent to approval of the resolution plan of Formation, hence had no applicability in the present case. Learned counsel for the RP has also submitted that the information memorandum was already prepared and shared with Formation on 30.05.2018 and Final Transaction Audit Report was received only on 22.06.2018. The resolution plan from resolution applicants were already received on 08.06.2018, hence there was no occasion to refer the same either in the information memorandum or share the same to the resolution applicant who had already filed their plan by 08.06.2018. Learned counsel for the RP, however, has referred to the minutes of 21st meeting of the CoC held on 04.07.2018, where resolution applicant was asked to include provision of cost with regard to avoidance application. The copy of the minutes of 21st meeting held on 04.07.2018 has been brought on the record as Annexure A-9 to the Company Appeal (AT) (Ins.) Nos. 1026 & 1027/2023. It is relevant to notice the following part of the minutes:

“The RAs were also apprised of the below terms and information which should be incorporated in their revised resolution plan:

1. If any contributions are made to/recoveries made by the Corporate Debtor pursuant to Order of Adjudicating Authority under any Application made by the Resolution Professional U/s 43/45/50/66 of the Code, the same shall be paid out to lenders in the proportion as provided herein and is going to be over and above the value to be paid out to them as per the Final Resolution Plan. All cost~ associated with the said application shall be treated as CIRP costs. On being asked, it was clarified that the said costs can be capped to INR 25 Lakhs.”

51. In pursuance of the minutes of the meeting held on 04.07.2018, the Formation by submitting a resolution plan dated 06.07.2018 has included Clause 3.2, which pertain to the cost for application by the RP under Sections 43, 45, 50 & 56 of the Code. Clause 3.2 of the resolution plan is as follows:

“3.2 We understand that any cost for making an application by the Resolution Professional under Sections 43, 45, 50, 66 of the Code, shall be treated as part of CIRP costs upto a cap of Rs. 25 lacs duly netted off by any recoveries made in any such cases. Any recoveries over and above costs incurred in relation to the application shall be transferred directly to the Financial Creditors.”

52. The minutes of the meeting 04.07.2018 where Formation was present as well as clause 3.2 of the resolution plan of the Formation clearly indicates that the resolution applicant knew about the avoidance applications for which cost of 25 Lakh was provided in the resolution plan. Learned counsel for the Formation tried to explain the Claus 3.2 by submitting that the said clause is a general clause and cannot be read to mean that Formation was aware about the filing of transaction application or the transaction audit report. The minutes of the meeting dated 04.07.2018 contemplated for such exigency, i.e., filing of avoidance application and required the resolution applicant to provide for the cost, thus filing of the avoidance application was very well contemplated for which the resolution applicants were required to make provisions in the plan and the Formation having included the same in the plan cannot be heard in saying that they were not aware of any avoidance application to be filed.

53. The findings of the adjudicating authority that RP and CoC did not inform the applicant Formation of forensic audit report and the application under Section 60(6), having direct effect on the financial position of the corporate debtor, they come in the purview of relevant information under estimation to Section 29 cannot be supported.

54. We, thus are of the view that Formation cannot raise any issue regarding non-sharing of transaction audit report or not including the transaction audit report in the information memorandum for wriggling out from its obligation in the resolution plan, which had approved by the adjudicating authority on 30.11.2018. The finding of the adjudicating authority returned in paragraph 61 that non-disclosure of the above information, performance of terms of resolution plan becomes voidable is also an incorrect finding. Non-sharing of transaction audit report in no manner can affect implementation of the resolution plan and it is far fetched to hold that due to not sharing of the said transaction audit report, the performance of the resolution plan became voidable.

55. There is material on record to indicate that earnest money was invoked in October 2018 itself by the CoC, on Formation not extending the EMD as per provisions of the Process Memorandum. The PBG was invoked on 10.12.2019, which we have already upheld in foregoing discussions.

Question No.(6)

Whether the RP had not provided the correct financial position of the CD to RA, due to which performance of Resolution Plan became voidable?

56. The present is a case where information memorandum dated 09.11.2017 was prepared and access to the Formation to the virtual data rooms was also provided on 30.05.2018. Financials of financial year 2015–16 were prepared by the ex-management and were part of the information memorandum. The RP also provided provisional financial for quarter ending 31.12.2017, which was disclosed to the Formation income turnover in 9 months period ending on 31.12.2017 was also mentioned which was income turnover of 251 Crore.

57. Learned counsel for the Formation submitted that financials of the corporate debtor were inflated. Financials of the corporate debtor which were uploaded with the MCA were prepared by ex-management and included in the information memorandum. Financial statements of financial year 2015-16 were available to all resolution applicants.

58. The Clause 3.2 of RFRP, which dealt with “representations, warranties, undertakings and acknowledgements”. The warranties and undertakings by the resolution applicants have contained in 3.2 which clause is as follows:

“3.2 Representations, warranties, undertakings and acknowledgement

By accessing/obtaining this Process Memorandum and upon obtaining access to the Data Room and Information Memorandum, the Resolution Applicant shall be deemed to have made the following representations, warranties, undertakings and acknowledgements:

(a) The Resolution Applicant has made its own independent appraisal of the Company and accepted the risk of inadequacy error or mistake in the information provided in the Process Memorandum, Data Room,

Information Memorandum or any other information furnished by or on behalf of the Resolution Professional.

(b) The Resolution Applicant shall indemnify and hold harmless the Resolution Professional, its advisors and/or the members of the CoC and/or CoC's Advisor, from and against all Losses which may arise against the Resolution Professional and / or the members of the CoC and/or their advisors (including the CoC's Advisor), suffered or incurred in respect of, arising out of, or in any way connected with this Process Memorandum, EOI, the Resolution Plan, the Confidentiality Agreement and/or any other document/undertaking executed by it in relation to the Resolution Plan Process or arising out of or pursuant to the obligations of the Resolution Applicant therein (including on account of breach of such obligations by the Resolution Applicant).

(c) The Resolution Applicant represents that this Resolution Applicant is in compliance with the requirements set out under the Applicable Laws.

(d) The Resolution Applicant represents to the Resolution Professional and the CoC that it has the necessary financial resources available for the purpose of implementation of the Resolution Plan as approved by the Adjudicating Authority.

(e) The Resolution Applicant acknowledges that, the implementation of the Resolution Plan will be on "as is where is" basis.

(f) The Resolution Applicant acknowledges that neither the Resolution Professional nor, the members of the CoC, nor their respective advisors are providing any representations or warranties regarding the status of business, business prospects, or assets of the Company and the Resolution Professional or the CoC and their respective advisors assume no such liability whatsoever in this respect.

(g) The Resolution Applicant represents to the Resolution Professional, and the CoC, that it has obtained all the requisite corporate authorizations and regulatory approvals (if any) required for submission of the Resolution Plan."

59. All resolution applicants were required to make their due diligence by submitting a resolution plan. It is useful to quote Clause 4.3 of the RFRP, which is as follows:

“4.3 Without prejudice to the terms of Annexure I (Data Room Rules), the information and documents provide in the Data Room Have been provided by the Resolution Professional in good faith and based on the information and documents provided by the Company to the Resolution Professional. The Resolution Professional or its Representatives and advisors have not verified any of the information, data or documents contained in the Data Room and shall not accept any responsibility or liability, whatsoever, in respect of any statements or omissions contained in the Data Room, or the accuracy, correctness, completeness or reliability of information, data or documents contained therein. By having access to the Data Room, the Resolution Applicant shall be deemed to have full knowledge of the condition of the Company, its assets, relevant documents, information, etc. as contained in the Data Room and is expected to undertake its own independent due diligence on the Company and satisfy itself of the matter contained therein for participation in the Plan Process.”

60. The above clause clearly contemplated resolution applicant to undertake its own independent due diligence on the company and satisfy itself of the matter contained therein for participation in the plan process. In the above context, we may refer to the judgment of the Hon'ble Supreme Court in **‘Deccan Value Investors LP & Anr.’ Vs. ‘Dinkar Venkatasubramanian & Anr.’** reported in **2024 SCC OnLine SC 804**. In the above case, also Successful Resolution Applicant had contended that it was prevented and were handicapped because of lack of information or

other fraud on the part of the RP. In paragraph 7 of the judgment, the arguments of the SRA have been captured, which is as follows:

“7. On facts and to justify the withdrawal, it was submitted that in the present case, the successful resolution applicants were prevented, and were handicapped because of lack of information or rather fraud on the part of the resolution professional.

Four aspects were highlighted:

(a) It was concealed that 70 per cent. of the revenue of the corporate debtor came from trading, and not from manufacturing.

(b) The Mott Macdonald Report dated September 30, 2016 is factually incorrect and flawed.

(c) Misleading and false statement was made with regard to the uninstalled imported components of 12,500 M.T. Press, which were stored in the land of a sister concern-Clover Forging and Machining P. Ltd.

(d) The successful resolution applicants were misled in view of the non-reliability of financial data. There was ongoing financial/forensic audit.”

Rejecting the arguments in paragraphs 8 & 9, following was held:

“8. The aforesaid reasons or grounds taken by the successful resolution applicants do not qualify and cannot be treated as a fraud on the part of the resolution professional. This is not a case where misinformation or wrong information was given to the resolution applicants.

9. We have been taken through the information memorandum, as well as, the data in the virtual data room, access to which was granted to the prospective resolution applicant(s), before they had submitted their resolution plan(s).”

61. Hon’ble Supreme Court further has observed that resolution plans are not prepared by lay persons and they are submitted after financial

statements and data examined by domain and financial experts. In paragraphs 15 & 16 of the judgment, Hon'ble Supreme Court laid down following:

“15. The resolution plans are not prepared and submitted by lay persons. They are submitted after the financial statements and data are examined by domain and financial experts, who scan, appraise evaluate the material as available for its usefulness, with caution and scepticism. Inadequacies and paltriness of data are accounted and chronicled for valuations and the risk involved. It is rather strange to argue that the super specialists and financial experts were gullible and misunderstood the details, figures or data. The assumption is that the resolution applicant would submit the revival/resolution plan specifying the monetary amount and other obligations, after in-depth analysis of the fiscal and commercial viability of the corporate debtor. Pointing out the ambiguities or lack of specific details or data, post acceptance of the resolution plan by the committee of creditors, should be rejected, except in an egregious case where data and facts are fudged or concealed. Absence or ambiguity of details and particulars should put the parties to caution, and it is for them to ascertain details, and exercise discretion to submit or not submit the resolution plan.

16. Records of the corporate debtor, who are in financial distress, may suffer from data asymmetry, debatable or even wrong data. Thus, the provision for transactional audit, etc., but this takes time and is not necessary before information memorandum or virtual data room is set up. Financial experts being aware, do tread with caution. Information memorandum is not to be tested applying “the true picture of risk” obligation, albeit as observed by the National Company Law Appellate Tribunal the resolution professional's obligation to provide information has to be understood on “best effort” basis.”

62. Hon'ble Supreme Court allowed the appeal and set aside the order of the NCLAT interfering with the order of NCLT approving the resolution plan.

We find substance in the submission of the RP that SRA is only raising a bogey of not being disclosed the relevant information, including financials to wriggle out from its obligation of the approved resolution plan.

63. The judgment of the Hon'ble Supreme Court in **'Ebix Singapore' (Supra)**, clearly binds SRA from its obligation and it cannot be allowed to wriggle out there its obligation as sought to be made in the present case. The submission which has been raised by learned counsel for the Formation distinguishing the judgment of the Hon'ble Supreme Court in **'Ebix Singapore' (Supra)**, have no substance. One of the distinguishing features sought to be drawn by learned counsel for the Formation is that **'Ebix Singapore' (Supra)**, was a case where resolution plan was approved by CoC and was pending consideration before the adjudicating authority, whereas in the present case plan has already been approved by adjudicating authority on 30.11.2018. When the plan is approved by the adjudicating authority, obligations on the SRA to implement the plan becomes obligation which are to be statutorily enforced. Thus, on the said ground, the judgment of the Hon'ble Supreme Court in **'Ebix Singapore' (Supra)**, cannot be distinguished nor SRA can be allowed to wriggle out from its obligation on the exclusion and pretext as was raised before the adjudicating authority. Adjudicating Authority committed an error in holding that due to not providing correct financial provisions of the corporate debtor to resolution applicant performance of the resolution plan became voidable. The said findings are incorrect findings and has been recorded without correct appreciation of facts and law.

Question No.(7)

Whether the Formation had made out a case for direction to refund the amount of Rs.93.08 crores and the order of Adjudicating Authority directing such refund is sustainable?

64. Adjudicating authority vide impugned order dated 06.07.2023 has allowed I.A.443/2021 filed by the Formation. In I.A.443/2021, following prayers were made:

- “a) Set aside the Resolution dated 10 December 2019 passed by the CoC (alongwith the RP) approving the invocation/forfeiture of the Performance Guarantee of the Applicant for being illegal and against the provisions of the Code.
- b) Direct the Resolution Professional and Committee of Creditors of GB Global Ltd. (erstwhile Mandhani Industries Limited) to refund to the Applicant forthwith the sum of Rs. 93.82Crores, alongwith interest @ 12% p.a. from the date of infusion, infused by the Applicant towards implementation of the Resolution Plan;
- c) Pending the hearing and final disposal of the present Application, an Order and Direction may be passed by this Tribunal allowing the appointment by the Applicant of an independent auditor / agency to carry out a Forensic Audit of MIL to accurately determine its accurate worth / valuation;
- d) Pending the hearing and final disposal of the present Application, Direction may be passed by this Tribunal directing the Resolution Professional and CoC to disclose on oath the particulars/ details of the utilization of Rs 93.82 Crores infused by the applicant in MIL;
- e) Pending the hearing and final disposal of this Application, restrain the Resolution Professional and Committee of Creditors of GB Global Ltd. (erstwhile Mandhana Industries Ltd.) from appropriating or utilizing the sum of Rs. 93.82Crores in any manner whatsoever;

f) For costs;

g) Such other and further reliefs as this Hon 'ble Tribunal may deem fit in the facts and circumstances of the case.”

65. The application is dated 17.02.2021, which was filed after Bank of Baroda invoked the performance bank guarantee on 10.12.2019. The principal prayer of the Formation was to set aside the decision of the CoC dated 10.12.2019 forfeiting the performance bank guarantee which was claimed to be against the RFRP. We have already while deciding Question No. (1) has held that invocation of performance bank guarantee on 10.12.2018 by the CoC was in accordance with the process memorandum. The reasons given by adjudicating authority allowing the I.A.443/2021 were:

- i. CoC and RP had not treated that approved resolution plan had been contravened by the Formation.
- ii. Adjudicating authority had also not by its earlier order held that Formation had contravened the resolution plan and thereby to pass an order under Section 33(3) of the code.
- iii. Taking into consideration, the difficulties faced by the applicant-Formation in implementing the resolution plan, adjudicating authority allowed the application Formation textile to exit.

66. Further reasons given in paragraph 50 of the order is that no penal action can be taken against Formation on the ground of contravention on its resolution plan of its failure to implement having allowed by the adjudicating authority to exit on the request of the CoC and the RP.

67. We have already while considering Question No.(2) held that RP and CoC has never treated that approved resolution plan had not been contravened by the Formation. RP and CoC have always pleaded and argued that Formation has not implemented the resolution plan and has failed to implement the plan, we have already found that there was sufficient material on record to establish that Formation had failed to implement the approved resolution plan while considering Question No. (3).

68. It is relevant to notice that adjudicating authority in its order dated 05.02.2020 has held that resolution applicant (Formation failed to implement the resolution plan). Adjudicating authority vide order dated 05.12.2020 allowed the RP to invite fresh resolution plan from prospective resolution applicant by providing 70 days' time.

69. Learned counsel for the Formation has submitted that findings returned in paragraph 13 of the order dated 05.02.2020 were subsequently corrected on 28.02.2022 by the adjudicating authority. In the above reference, we need to notice the findings which were returned in paragraph 13 of the order dated 05.02.2020. In order 05.02.2020 in paragraph 13 following was held by adjudicating authority:

“13. This Bench is of the considered view that this is a rare and an exceptional case where the Resolution Applicant failed to implement the resolution plan.”

70. The submission of the learned counsel for the Formation is that order was corrected to the effect that Formation expressed certain difficulties to implement the resolution plan. The observation of the adjudicating

authority as submitted by the learned counsel for the Formation that Formation expressed certain difficulties to implement the resolution plan are clear indication that adjudicating authority noticed that Formation failed to implement the resolution plan. Thus, the factum of Formation failing to implement the resolution plan is writ large on the materials on the record. Adjudicating authority also committed error in holding that RP and CoC could not have forfeited the earnest money as well as the PBG. Observations in paragraph 74 of the adjudicating authority are to the following effect:

“74. In view of above decisions, it is amply clear that RP and CoC/Bank of Baroda in the present case cannot forfeit the earnest money as well as the performance bank guarantee and other sums infused by the applicant-formation especially where subsequently a resolution plan by another entity has been approved. The subsequent approval of the resolution plan shows that the lender/CoC have suffered no loss or damage. In the aforementioned cases, where even at the stage of liquidation, when asset of the Corporate Debtor has further suffered substantial loss, the liquidator has been directed to refund the amount in view of the settled position of law with regard to forfeiture in the nature of penalty. The necessary corollary to the aforesaid is that the RP and CoC in the present case, who have not suffered any loss and in terms of their own discretion deemed it fit in seeking approval of another resolution process and have consequently been able to approve another resolution plan, must not be allowed unjust enrichment by permitting forfeiture of not only the earnest money (Rs.5 crores) but also performance bank guarantee (Rs.55 crores) and such other sums infused towards the Corporate Debtor i.e. (Rs.38.82 crores) such unjust enrichment in face of settled position of law by the Hon'ble Supreme Court and decision of NCLT as well as in terms of the process memorandum, as discussed above, would be untenable in the eye of law. Thus, we are of the considered

opinion that the CoC/Bank of Baroda has no jurisdiction to forfeit the total amount of Rs. 93.82 crores infused by the Applicant-Formation in the Corporate Debtor-MIL, especially in view of the fact the subsequently another resolution plan has been approved and the CoC stands to loose nothing.”

71. Observation of the adjudicating authority are that CoC be not allowed unjust enrichment by permitting forfeiture of not only the earnest money, but also PBG and other sum infused towards the corporate debtor. We fail to see that by invocation of PBG which is part of the RFRP and there being existing default on part of the SRA, how the CoC can be said to be unjustly enrich itself by invocation. The above findings of the adjudicating authority are wholly erroneous and contrary to the express provision of RFRP. Adjudicating Authority has wrongly concluded that CoC has no jurisdiction to forfeit the amount of 93.82 Crore infused by the applicant.

72. Insofar as the forfeiture of PBG and earnest money, the same is fully covered by the RFRP as noted above, thus we uphold the invocation of PBG and earnest money deposit by the CoC, which is in accordance with the RFRP. The question still remains as to whether direction of the Adjudicating Authority regarding refund of equity infusion can be sustained. We have noticed above that equity infusion by the Formation was Rs.38.2 crores, which included payment of Rs.17 crores for buying out the equity shares of the lenders. The materials on record indicate that Formation, who had to infuse equity capital to the amount of Rs.76 crores, had not infused the said amount and for computation of equity of Rs.76 crores, amount of earnest money deposited and PBG cannot be included, we we have already noticed

above. The Bank of Baroda has also informed the Formation by letter dated 04.04.2019 that Formation has not made the equity infusion as was required. In letter dated 04.04.2019 written by the Bank of Baroda to the Formation, following was stated:

“We wish to place on record that till date, FTL has brought in a cumulative amount of INR 93.82 Crores, comprising of the following:

- (i) INR 5 Crores remaining In cash as EMD, in compliance with Clause 13.1 of the Request for Proposal document (“RfP”);
- (ii) INR 50 Crores deposited by FTL In the form of cash equivalent of the performance bank guarantee that was to be provided under Clause 10.2.1 of the RfP; and
- (iii) INR 38.82 Crores towards part payment of FTL's equity component under the resolution plan, as well as for purposes of buying out the financial creditor's share of the equity held in MIL.

FTL is yet to bring in the remaining amount towards the Upfront Equity Infusion and also the entire ECB Infusion to the tune of INR 160 Crores on an upfront basis. Such amounts should be brought in on an immediate basis, in order to ensure compliance with the terms of the resolution plan. Further, FTL must also immediately finalize the loan documents for continuation of debt owed to the financial creditors to the tune of INR 305 Crores.

In light of the inordinate delay in the implementation of the resolution plan till date by FTL as specified hereinabove. Bank of Baroda, on behalf of itself and the other financial creditors hereby requests you to take the necessary steps and actions to ensure the implementation of the terms of your resolution plan, within a period of fifteen (15) days from the date of this letter.

Please note that any failure on part of FTL to comply with the terms of its resolution plan would constrain the financial creditors to resort to the remedies available to them under the RfP and applicable law.

We expect that you shall ensure the complete implementation of the resolution plan in all respects within the timelines specified above.”

73. The Adjudicating Authority also in the impugned order in paragraph 44 has observed that due to Bank of Baroda’s objection, the equity infusion did not result in transfer of shares of CD to Formation. In paragraph 44 of the impugned order, following has been observed:

“44. It was because of Bank of Baroda’s objections letter dated 04.04.2019 to SEBI, the equity infusion did not result into transfer of shares of Corporate Debtor-MIL to Applicant-Formation Textiles LLC who was the original (earlier) successful Resolution Applicant.”

74. There is enough material on record to indicate that Rs.38 crores, which Formation has to infuse towards the equity, is lying in the Escrow Account of the Bank of Baroda as a current liability. The Formation has referred to the Report submitted by the RP to the Bombay Stock Exchange, part of which Report was also brought on record by Formation along with IA No.443 of 2021. It is useful to refer to paragraph 43 of the IA of Formation, which is as follows:

“46. The Applicant further states that there is no provision in the Code allowing forfeiture of money infused by the Applicant herein. The aforesaid facts show that Resolution Professional and / or the Committee of Creditors are in the process of appropriating / utilizing the sum of Rs. 50 Crores for running the business of the Corporate Debtor. Applicant apprehends that the Resolution Professional and / or the Committee of Creditors are also in the process of doing the

same in so far as the balance sum of Rs. 43 Crores is concerned. If the Resolution Professional and / or the Committee of Creditors are allowed to appropriate / utilize the sum of Rs. 93 Crores, it would severely prejudice the rights of FTL in the said Application in the event that FTL's relief of recall / setting aside of the Order dated November 30, Resolution Professional and Committee of Creditors ought to be restrained from appropriating / utilizing the sum of Rs.93 Crores during the pendency of the present Application.”

75. We have also noticed that Adjudicating Authority in order dated 19.05.2021 while approving the Resolution Plan of DLH has also noted and directed the amount of Rs.42.99 crores in fixed deposits. It is for ready reference, we extract paragraph 3(k) of the order dated 19.05.2021 passed in IA No.19 of 2021, which is to the following effect:

“K. UTILIZATION OF FIXED DEPOITS OF FORMER SRA (FTL) LYING WITH THE CORPORATE DEBTOR:

As a part of the Resolution Plan, it has been submitted that the former SRA has infused . 42.99 Crores into the Corporate Debtor which is reflected in the current liability and the amount is kept as a fixed deposit with Bank of Baroda, the lead bank. This amount was infused as share application money. But the shares were not issued. It is stated by the new SRA that such amount infused by the former SRA is not an asset over which it or the Corporate Debtor would have any interest and the treatment of this amount shall be at the instructions of the Financial Creditors in accordance with the orders of the Adjudicating Authority. As already stated by the (new) SRA in its Resolution Plan, we hereby direct that such fixed deposits of ₹. 42.99 Crores shall be retained intact and shall abide by orders passed by this Authority as and when felt necessary.”

76. The above order of Adjudicating Authority clearly indicate that amount of Rs.42.99 crores shall be retained intact and shall abide by order

passed by the Adjudicating Authority as and when felt necessary. Equity infusion of Rs.38.2 crores, which probably due to earn interest was kept in fixed deposit, hence, Rs.42.99 crores required consideration while passing order dated 06.07.2023. The case of the CoC and the RP before the Adjudicating Authority was only with regard to invocation of PBG on 10.12.2018 by the CoC, which was communicated on 17.01.2020 to the Formation. The letter dated 17.01.2020 written by the RP to the Formation has been brought on record in Company Appeal (AT) (Ins.) No.1026-1027 of 2021. For the sake of ready reference, the same is reproduced again:

“To,

Mr. Piyush Viradia,
Formation Textiles LLC.
A limited liability company incorporated
under the laws of the United States of
America, having its principal office at 16,
Arcadien Drive Suite C, Paramus, New
Jersey, 07625, USA and the Resolution
Applicant in the Corporate Insolvency
Resolution Process of Mandhana
Industries Limited.

Dear Sir,

Sub: Invocation of the Performance Guarantee submitted by
Formation Textiles LLC in the Corporate Insolvency Resolution
Process (“CIRP”) of Mandhana Industries Limited (new GB
Global Limited) (“Corporate Debtor”).

This is with reference to the CIRP of the Corporate Debtor and the
non-implementation of the approved Resolution Plan that was
submitted by you.

The Committee of Creditors (“CoC”) has requested me, in my capacity
as the Resolution Professional to inform you that as decided during
the 22nd meeting of the CoC, held on 10th December 2019, the CoC (in
accordance with the terms of the Process Memorandum dated 6th
March 2018 and the Letter of Intent dated 7th July 2018) has

approved the invocation/ forfeiture of the Performance Bank Guarantee on account of your failure to implement the Resolution Plan.

This is for your information and record.

For GB Global Limited (Formerly known as Mandhana Industries Limited)

Charu Desai
(On behalf of the CoC of GB Global Limited)"

77. Thus the Bank has forfeited the PBG and EMD, which was earlier done in October 2018. Thus, only the aforesaid two amounts were forfeited by the CoC, which was rightly forfeited by the CoC, which could not have been directed to be refunded by the CoC. We, however, of the view that with regard to Rs.38.2 crores, which by adding interest was kept in fixed deposit of Rs.42.99 crores, orders were required for utilization of the said amount. We, thus, are of the view that order of Adjudicating Authority of 06.07.2023, insofar as it directed refund of the EMD and PBG, cannot be sustained and it deserve to be set aside. With regard to other part of the amount of Rs.38.2 crores, which was subsequently kept in fixed deposit of Rs.42.99 crores, orders were necessary to be passed for utilization of the said amount. This aspect, we shall consider while considering the Appeal(s) filed by Interim Trade Creditors and appropriate directions shall be passed therein.

78. In conclusion, we are of the view that direction of adjudicating Authority to refund 93.82 Crore to the Formation cannot be upheld, and the said direction need to be set aside subject to further orders in this batch of

appeals, which need to be considered while considering the appeals filed by Interim Trade Creditors.

Question Nos. (8) & (9)

Whether the Application filed by the RP as well as Application filed by Interim Trade Creditors (who are Appellant before us) were maintainable before the Adjudicating Authority in view of the approval of Resolution Plan of DLH on 19.05.2021 and Adjudicating Authority has rightly taken the view that Application of Interim Trade Creditors has to be decided in appropriate proceedings and not by Adjudicating Authority?

Whether Interim Trade Creditors had made out a case for issuing a direction to make payment of their outstanding amount of Rs.20.09 crores towards goods and services provided to CD, when it was under control of the Formation?

79. Question No. VIII & IX relate to the application filed by Interim Trade Creditors for payment of their outstanding dues, which was consequent to supply of goods and service to the corporate debtor during the period when Formation was in management and in control of the corporate debtor.

80. The RP has filed an application I.A.561/2021, before the adjudicating Authority. Interim Trade Creditors have also filed application seeking a direction for payment of their outstanding dues. The RP in its application 561/2021 as well as in reply filed to the IAs filed by Interim Trade Creditors have given the sequence of the events and details and has noted the liabilities of 22.53 Crore towards Interim Trade Creditors, it was pleaded that resolution plan of DLH only provided for payment of 1,63,00,000/-. It is useful to note the pleadings of the RP in I.A.1968/2021, where details of

DLH resolution plan and extract order dated 19.05.2021 have been noticed in paragraphs 4.22, 4.23 & 4.24 of the reply of the RP:

“4.22. It is also pertinent to note that the DLH Resolution Plan provided for full payment of unpaid CIRP costs, including the following –

- a) CIRP 1 costs (29 September 2017- 31 January 2019) of approx. INR 3.91 Crores which was incurred during CIRP 1 of the Corporate Debtor till control was taken over by FTL; and
- b) CIRP 2 costs being the CIRP costs incurred after the CIRP of the Corporate Debtor was restored on 5 December 2019. As on 19 May 2021 these were INR 21.22 Crores.

4.23. As regards the Interim Trade Creditors' Dues, the DLH Resolution Plan provided that such dues shall be settled, discharged and extinguished in full and reduced to nil by payment of INR 1,63,00,000 (Indian Rupees One Crore Sixty Three Lakhs only). The DLH Resolution Plan further provided as follows-

"Since the Resolution Professional was not in charge of the management of operations of the Corporate Debtor when the Corporate Debtor was under the control of the Prior SRA, the costs in relation to the Prior SRA Period are not being treated as CIRP Cost, and the treatment that is being provided to the costs of the Prior SRA Period is in line with the other creditors of the Corporate Debtor. In case it is held that the costs in relation to the prior SRA Period are CIRP Cost, then the same shall be paid like CIRP Cost in the manner set out hereinabove. For avoidance of doubt it is hereinafter clarified that the total amount allocated by the Resolution Applicant for CIRP Cost will not be more than the Allotted CIRP Cost Amount. In case the CIRP Cost does exceed the Allotted CIRP Cost Amount, then any such excess amount, will be deducted from the FC Discharge Amount. At no point intime would the Resolution Applicant be required to make an additional payment for such

costs and such costs shall form a part of the Total Financial Outlay. "

...

...

"Even though no amount has been admitted by the Resolution Professional for Operational Debt in relation to the Prior SRA Period, we note that the books of the Corporate Debtor have a liability of JNR 22.53 crores (Indian Rupees Twenty Two Crores Fifty Three Lakh only) (as detailed in Annexure IV). We understand that when the Prior SRA took over the Corporate Debtor for the Prior SRA Period, no payouts were made to these creditors. Considering their claims are not even admitted, they are effectively not even Operational Creditors as recognized under the Code. However, considering these creditors are also essential to the business of the Corporate Debtor, and keeping in mind the principles of equity, we have allotted an amount of INR I, 63, 00,000 (Indian Rupees One Crore Sixty Three Lakhs only) to be paid to such creditors, who's liability have been incurred during the Prior SRA Period. As mentioned in other portions of this Resolution Plan, at no point of time are the dues owed to such creditors in any way categorized as CIRP costs unless held otherwise by the Adjudicating Authority. In case such dues are held to be CIRP Cost, the same shall be dealt with as detailed in clause 4.3 (i) (e) above."

4.24. However, in the DLH Plan Approval Order, this Hon'ble Adjudicating Authority expressed its disapproval of the above provision, observing that the liabilities towards this category of interim trade creditors had been created by Respondent No. 1 (FTL) during the period when the Corporate Debtor was under its management. This Hon'ble Adjudicating Authority, inter alia, held that the issue of treatment of interim trade creditor dues could be decided only after hearing such category of operational creditors in an appropriate proceeding as and when initiated. Relevant extracts from the DLH Plan Approval Order are reproduced below –

"It is submitted that the former SRA has created a liability towards the Operational Creditors to the extent of D. 22.53 Crores and a sum of D.1.63 Crores is provided to them under

this Resolution Plan. Hence, there is a balance of 20.9 Crores payable to this category of the Operational Creditors. For this balance amount payable, the CoC has submitted that this category of Operational Creditor shall be treated as pre-CIRP Operational Creditors. However, we are unable to concede to such submission. The rights of this category of Operational Creditors cannot be decided the way opined/suggested by the CoC. It is to be noted that these creditors cannot even file their claims. This does not relate to pre-CIRP liability but a liability created by the former SRA. We feel that the commercial wisdom of the CoC cannot be stretched to a situation where the rights of these creditors can be decided by the CoC. In fact, the liabilities were created by the former SRA during the period the Company was under its management. A decision relating to such liability by the CoC adversely affecting the rights of these category of creditors to the extent of around 20.9 Crores, could not be decided without hearing the affected parties. Hence in our considered opinion the CoC cannot be held competent to take such a decision and such a decision would not come within the domain of its commercial wisdom. This issue has to be decided only after hearing such category of Operational Creditors in an appropriate proceeding as and when initiated. However, we are making it clear that the present RA (DLH) shall not in any manner be held accountable for this liability of 20.9 Crores." (Emphasis Supplied)

81. The RP in its submission have pleaded that Formation is liable to make good the balance outstanding Interim Trade Creditors due amounting to 20.35 Crore. In paragraph 5 of the same reply, RP has pleaded as follows:

“5. In light of the above, it is submitted that it is the Respondent No. 1 (FTL) which is liable to make good the balance outstanding Interim Trade Creditors' dues, amounting to INR 20.35 crores, and pay this amount to the Corporate Debtor as these costs/ liabilities were

incurred during the period when FTL was in management and control of the Corporate Debtor pursuant to approval of its resolution plan, which it eventually failed to implement. An application (I.A. 561 of 2021) seeking directions against FTL to pay for the liabilities incurred during the interim period when it was in management and control of the Corporate Debtor has already been filed by the Respondent No. 3 and is pending adjudication before this Hon'ble Adjudicating Authority. The Respondent No. 3 craves leave to refer to and rely upon the contents of I.A. 561 of 2021 before this Hon'ble Adjudicating Authority, as and when necessary, and the same are incorporated here by reference. Further, an application LA. 1847 of 2021 has also been filed before this Hon'ble Adjudicating Authority on behalf of Bank of Baroda seeking payment of compensation for losses to the CoC due to the non-implementation of its resolution plan by FTL. LA. 1847 of 2021 is also pending adjudication. Copy of the LA. 561 of 2021 is annexed and marked as Annexure A.”

82. Adjudicating authority proceeded to reject the application filed by Interim Trade Creditors. In paragraph 16 of the impugned order dated 06.07.2023, rejected the IA of Interim Trade Creditors, adjudicating authority made following observation:

“16. STATUS OF THE OPERATIONAL CREDITORS DURING THE PERIOD IN WHICH THE CORPORATE DEBTOR WAS UNDER THE CONTROL OF THE FORMER SRA (FTL):

It is submitted that the former SRA has created a liability towards the Operational Creditors to the extent of Rs.22.53 Crores and a sum of Rs. 1.63 Crores is provided to them under this Resolution Plan. Hence, there is a balance of Rs. 20.9 Crores payable to this category of the Operational Creditors. For this balance amount payable, the CoC has submitted that this category of Operational Creditor shall be treated as pre-CIRP Operational Creditors. However, we are unable to concede to such submission. The rights of this category of Operational Creditors cannot be decided the way opined/suggested by the CoC. It

is to be noted that these creditors cannot even file their claims. This does not relate to pre-CIRP liability but a liability created by the former SRA. We feel that the commercial wisdom of the CoC cannot be stretched to a situation where the rights of these creditors can be decided by the CoC. In fact, the liabilities were created by the former SRA during the period the Company was under its management. A decision relating to such liability by the CoC adversely affecting the rights of these category of creditors to the extent of around Rs.20.9 Crores, could not be decided without hearing the affected parties. Hence in our considered opinion the CoC cannot be held competent to take such a decision and such a decision would not come within the domain of its commercial wisdom. This issue has to be decided only after hearing such category of Operational Creditors in an appropriate proceeding as and when initiated. However, we are making it clear that the present RA (DLH) shall not in any manner be held accountable for this liability of Rs.20.9 Crores.”

83. In above paragraph, adjudicating authority has observed “this issue has to be decided only after hearing such categories of operational creditor in an appropriate proceeding and as and when initiated”. The above observation clearly indicates that adjudicating authority has abdicated its jurisdiction to consider the said claim of operational creditor and has observed that it should be decided in an appropriate proceeding as and when initiated. The application by Interim Trade Creditors were filed before the adjudicating authority in the same CIRP proceedings where the Interim Trade Creditors has supplied goods and services to the corporate debtor at the time when it was in the control and management of Formation. We fail to see that why the said issues could not be examined by the adjudicating authority, which arose out of CIRP process. It is true that after the approval of the resolution plan by the Formation, Formation took control and

management of the corporate on 30.01.2019 and the steps taken by the SRA, under which it could not implement the resolution plan was subject matter of various application filed before the adjudicating authority, which applications were entertained and decided by adjudicating authority by various orders as noted above. The application filed by Interim Trade Creditors were also one said of such application which was filed for payment of their outstanding dues arising out of goods and services supplied to the corporate debtor.

84. We had already noticed the observation of the order of the adjudicating authority dated 19.05.2021, passed in I.A. 19/2021, approving the resolution plan of DLH. In paragraph 3I, adjudicating authority has noted about the liability towards operational creditor of Rs. 22.53 Crore and payment of only Rs.1.63 Crore under the resolution plan, which observation we have already noticed. Adjudicating Authority also in the above paragraph has held that present resolution applicant (DLH) shall not in any manner be responsible for liability of Rs.20.9 Crore. However, under paragraph 3K, the adjudicating authority has directed for keeping Rs.42.99 Crore in a fixed deposit which was to abide by orders passed by adjudicating authority as and when felt necessary. When the application filed by Interim Trade Creditors came for consideration before the adjudicating Authority with regard to order dated 06.07.2023 has been passed, that was the appropriate stage when decision was to be taken with regard to liability of Rs.20.9 Crore and discharged for said liability out of amount of Rs.42.99 Crore which was kept in the fixed deposit. When we look into the impugned

order passed by adjudicating authority dated 06.07.2023, in paragraph 24 of the said order, adjudicating authority made following observations:

“**24.** It is only on 17.01.2020, the Resolution Professional sent a letter to Applicant-Formation Textiles LLC intimating that the committee of creditors in its meeting held on 10.12.2019 had approved the invocation/forfeiture of the performance guarantee on account its failure to implement the resolution plan.”

85. The above observations clearly indicate that adjudicating authority noticed the earlier observation that Formation has failed in implementing the resolution plan and has also created liability to the extent of Rs.22.53 Crore out of which Rs.20.9 Crore still remains unpaid to the operational creditor. The Tribunal also noted that liberty was granted to the operational creditor to initiate appropriate action against the parties concerned for unpaid debt due to R-1 to R-3. The above observations were made in reference to the order dated 19.05.2021 and as observed above, the application filed by Interim Trade Creditors were proceeding initiated by Interim Trade Creditors for payment of due of Rs.20.9 Crore.

86. The adjudicating authority observed in paragraph 37 that the order dated 19.05.2021 has made difficult for adjudicating authority to interfere in such a case. We fail to see that how the order 19.05.2021 created any impediment in the jurisdiction of the adjudicating authority to decide the application filed by Interim Trade Creditors when such applications were filed by liberty granted by adjudicating authority itself as has been noticed by the adjudicating authority. We are of the view that adjudicating authority while deciding the applications of the Interim Trade Creditors has

abdicated its jurisdiction in considering their claim and has made observation rejecting the claim of Interim Trade Creditors which are unsustainable. Adjudicating authority has also made observation that no objection were made by Interim Trade Creditors between 06.01.2019 and 19.05.2021 with regard to their claim. By order dated 05.02.2020 which was passed by adjudicating authority directing for re-commencement of CIRP, no schedule was given for inviting any claims and under the order of the adjudicating authority, RP was directed to invite only application for invitation for fresh resolution plan. Thus, there was no occasion for Interim Trade Creditors to file its claim, the adjudicating authority being conscious of the liability which was incurred by the Formation during the period it had control and management has noted liabilities of Rs.22.53 Crore out of which only Rs.1.63 Crore was paid in the resolution plan. It was due to the above reasons that liberty was reserved to the Interim Trade Creditors and direction was issued to keep the amount of Rs.42.99 Crore in the fixed deposit. The application filed by Interim Trade Creditors was occasion for the Adjudicating Authority to consider the application. Adjudicating authority with regard to application filed by RP Charu Desai observes that after approval of the resolution plan, RP has become *functus officio*, hence the application is infructuous. The adjudicating authority, however, in no manner was precluded from considering the pleadings made by RP in reply to the I.A. filed by the Interim Trade Creditors as noted above. RP has recommended for payment to Interim Trade Creditors who supplied goods and services and there is no dispute with regard to quantum of the amount,

we fail to see any valid reason forthcoming in the order dated 06.12.2021, rejecting the application. Adjudicating Authority found an easy escape route by observing that it had no jurisdiction in view of the approval of resolution plan on 19.05.2021, which observations cannot be approved.

87. We, thus are of the view that Interim Trade Creditors were entitled for payment of their balance dues of Rs.20.9 Crore and the said debts could have been very well discharged from fixed deposit of Rs.42.99 Crore which was kept in the fixed deposit under the orders of the adjudicating authority dated 19.02.2021.

88. We, thus are satisfied that application filed by Interim Trade Creditors deserves to be allowed and respondents are directed to pay the balance outstanding amount of Rs.20.9 Crore from the fixed sum of Rs.42.99 Crore which is lying in the fixed deposit with the CoC. The CoC shall take steps to discharge the said amount. We have noted above that Formation has infused Rs.38 Crore in addition to amount of Rs.55 Crores, Rs.50 Crore of PBG and Rs.5 Crore of EMD, which Rs.38 Crore were towards the equity infusion. It is undisputed that no equity share could be allotted to the Formation. We, thus are of the view that after discharging the dues of Interim Trade Creditors of Rs.20.9 Crores along with the interest earned on it, the balance amount of Rs.42.99 Crore which was kept in the fixed deposit towards amount infused by the Formation, thus rest of the amount along with interest earned on it need to be refunded to the Formation, i.e., amount of Rs.22.09 Crore with interest earned on it.

Question No.(10)**Whether Formation was entitled to claim interest @ 12% as prayed in IA No.443 of 2021?**

89. The Formation in IA No.442 of 2021 has prayed for refund of amount along with interest @ 12% per annum, which prayer is contained in prayer (b):

“b) Direct the Resolution Professional and Committee of Creditors of GB Global Ltd. (erstwhile Mandhani Industries Limited) to refund to the Applicant forthwith the sum of Rs.93.82 crores, along with interest @ 12% p.a. from the date of infusion, infused by the Applicant towards implementation of the Resolution Plan;”

90. The Formation in support of its contention that Formation is entitled to 12% interest has relied on Section 42, sub-section (6) of the Companies Act, 2013. The submission of Formation is that Company failed to allot its securities within 60 days, hence the amount to be treated as deposit and the Appellant – Formation was entitled to 12% interest.

91. We have noticed above that towards equity the Formation – SRA was to infuse an amount of Rs.76 crores. The Formation has deposited only Rs.38.82 crores as a part payment towards the equity including Rs.17 crores towards lenders share equity. The Appellant’s case is that although email sent by RP clearly indicate the amount of Rs.55 crores was for PBG, Rs.5 crores as earnest money and Rs.21 crores asked from the SRA, which meant that RP and CoC treated the amount of PBG and earnest money towards equity. We have already considered the issue in foregoing

paragraphs that as per the provisions of Process Memorandum, no consideration as per the Resolution Plan can be set-off with the equity requirement. There being specific clause in the Process Memorandum, the case of Formation that the payment of earnest money towards PBG could be treated towards equity payment, cannot be accepted. Further, insofar as the emails, which were sent by the RP and the CoC, asking the Formation to pay balance amount of Rs.21 crores, towards the equity, suffice it to say that both RP and CoC have taken a stand that Formation has not paid the balance amount of equity. In this reference the letter written by Bank of Baroda to Formation dated 04.04.2019 is referred to, in which letter the Bank of Baroda clearly informed that Formation has paid only Rs.38.82 towards part payment of FTL's equity component under the Resolution Plan as well as for purposes of buying out the Financial Creditor's share of the equity held in MIL. Further, Bank of Baroda on 22.07.2019 has written to National Stock Exchange informing that SRA has not been able to make payment towards equity, hence, shares be not allotted. In the letter dated 22.07.2019, which was sent by the Bank of Baroda to the Securities and Exchange Board and Bombay Stock Exchange as well as to the CD in paragraph-16, following has been stated:

- “16. In light of the aforesaid, the request of the Resolution Applicant for allotment of securities as requested in the aforesaid letters should not be granted, pending the hearing disposal of the Miscellaneous Applications. Bank of Baroda states that allowing allotment of shares as sought for by the Resolution Applicant would not only render the captioned Miscellaneous Applications infructuous but also directly affect the interest of the creditors of the Corporate Debtor.”

92. Thus, the above clearly indicate that the Formation has not paid entire amount, which was required to be paid in the equity. Hence, the claim of interest @ 12% cannot be accepted.

93. There is one more reason due to which above prayer of the Formation could not be accepted. The Formation has relied on Section 42, sub-section (6) of the Companies Act, 2013, which is as follows:

“42(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities”

94. The said Section 42 was with respect to provisions in the Companies Act pertaining to share on a private placement basis. The above provision cannot be pressed into service where equity is required to be provided under the Resolution Plan. The consequence of providing or not providing the equity has to be read from Resolution Plan itself. Hence, the provision of Section 42, sub-section (6), cannot be pressed by the Formation. We, thus, are of the view that prayer of the Formation for claiming interest @ 12% could not have been granted.

Question No.(10) is answered accordingly.

Question No.(11)

Whether the Adjudicating Authority is right in observing that in view of the order passed in IA 443 of 2021, there is nothing to adjudicate in IA No.1847 of 2021 filed by the Bank of Baroda and if not, what relief to be granted to the Bank of Baroda in IA No.1847 of 2021?

95. The Bank of Baroda has filed IA No.1847 of 2021 praying for following reliefs:

- (i) direct Respondent No. 1 to 3 to compensate and pay to the Committee of Creditors of Mandhana Industries Limited for the losses amounting to Rs. 249,00,00,000.00/- (Indian Rupees Two Hundred and Forty Nine Crores) caused on account of non-implementation of the Resolution Plan submitted by Respondent No.1, and the consequent deterioration in the value and goodwill of the Corporate Debtor which has directly resulted in the diminished recovery for the various stakeholders;
- (ii) direct Respondent No. 1 to 3 to compensate and pay to the Committee of Creditors of Mandhana Industries Limited of the loss of interest amounting to Rs. 64,40,27,271.31.00/- (Rupees Sixty Four Crores Forty Lakhs Twenty Seven Thousand Two Hundred Seventy One and Thirty One Paisa) as on January 31, 2021 (calculated from February 01, 2019 till January 31, 2021), on account of loss of interest @ 10%, in terms of Clause 3 under "Chapter V-Transaction Structure" of the Resolution Plan, on the continuing debt of Rs. 305,00,00,000.00/- (Indian Rupees Three Hundred and Five Crores only) payable monthly by Respondent No. I from the date of Formation taking over the control and management of the Corporate Debtor (i.e., January 31, 2019);

- (iii) direct Respondent No.1 to 3 to compensate and pay to the Committee of Creditors of Mandhana Industries Limited to the litigation/ legal advisory cost amounting to approximately 2,00,00,000.00.00/- (Rupees Two Crores Only) or actual cost incurred, on account of filing of numerous and frivolous applications/ proceedings both in India and USA by Respondent No.1 or on account of proceedings which are a direct result of the mala fide conduct of Respondent No.1;
- (iv) direct Respondent No.1 to 3 to pay to the COC, interest @ 10% in accordance with Clause 3 under “Chapter V-Transaction Structure” of the Resolution Plan, on the sum of Rs. 305,00,00,000.00/- (Indian Rupees Three Hundred and Five Crores only), from February 01, 2021 till the date of realisation;
- (v) Direct Respondent No. 1 to 3 to compensate the COC for the litigation costs which continue to be incurred by the COC, in defending the numerous applications/proceedings initiated by Respondent no.1 to 3 with respect to the CIRP of the Corporate Debtor and costs for the proceedings arising on account of its failure to implement the Resolution Plan, from the date of filing of the present Application till the date of conclusion of all such proceedings;
- (vi) Direct Respondent No. 1 to 3 to pay costs for the present application;
- (vii) pass any such other order(s) as it may be necessary in the facts and circumstances of this case.”

96. In paragraph 7 of the Application, pleadings have been made by the Bank of Baroda that Application has been filed on behalf of the CoC of the CD seeking payment and compensation towards the huge amount of losses to the Financial Creditors on account of failure of Formation to implement its Resolution Plan. In the Application, the Bank of Baroda has mentioned that Formation has failed to comply with the requirement for renewal or

extension of the earnest money, hence, the same was invoked in October 2018 itself. We have already noticed that invocation of PBG was made by CoC on 10.12.2018, which was communicated by the RP by letter dated 17.01.2020. The prayers made in the Application as noted above, clearly indicate that Bank of Baroda was asking for compensation and different amount towards compensation was prayed for in the Application. The Application filed by the Bank of Baroda was opposed by the Formation. One of the preliminary objection taken in the reply as contained in paragraph-7 of the reply to the Application is as follows:

- “7. It is submitted that there is no provision under the Code which empowers the Tribunal to adjudicate and award compensation and damages to the party. It is settled that the Code is complete code in itself and the remedies provided by it holistically covers all the matters under it. Thus, Code cannot be guided by other legislature enactments. Further NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the Code. Therefore, considering the provisions of the Code, the Adjudicating Authority has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor, however, the frivolous dispute raised herein has nothing to do with the insolvency process of the Corporate Debtor. It is pertinent to mention that the Adjudicating Authority cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of Code.”

97. The Adjudicating Authority while disposing of the said Application – IA No.1847 of 2021, held following in paragraph 76 of the order:

“76. In view of the order passed in IA No. 443 of 2021, there is nothing to adjudicate in IA 1847 of 2021 filed by Bank of Baroda. Hence IA No. 1847 of 2021 is disposed of.

98. We are, although of the view that order passed in IA No.443 of 2021 was with regard to refund of amount to the Formation and that itself could not have been a reason for the Adjudicating Authority relying on its order in IA No.443 of 2021 observing that there is nothing to adjudicate in IA No.1847 of 2021. Learned Counsel for the Bank of Baroda in his Appeal while challenging the order passed by the Adjudicating Authority submitted that IA No.1847 of 2021 was required to be considered on merits. The SRA has given indemnity to the CoC. Learned Counsel for the Bank of Baroda has referred to Clause 3.2 of the Process Memorandum.

99. When we look into the prayers made in IA No.1847 of 2021, the IA clearly prays for award of compensation and damages to the CoC. The law is well settled that insofar as breach of any undertaking or Clauses, which provide for forfeiture of any amount, there is no question of referring to Section 74 of the Indian Contract Act, 1872 and the said amount can be awarded. However, when damages or loss is difficult to prove, Court is empowered to award liquidated amount. The Hon'ble Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority and Anr. – (2015) 4 SCC 136*** has clarified the law. The Adjudicating Authority on breach of any terms and conditions by the SRA could very well have directed for payment of amount, which is contemplated in the Process Memorandum, under which the Resolution Plan is submitted. We, however, are of the view that Adjudicating Authority could not have proceeded to adjudicate about

the compensation or damages, which are not liquidated damages in exercise of jurisdiction under Section 60, sub-section (5) (c) of the IBC. We, thus, uphold the decision of the Adjudicating Authority disposing of IA No.1847 of 2021 for the reasons as indicated above.

Question No.(11) is answered accordingly.

Question No.(12)

Relief to which Appellants' are entitled, if any?

100. In view of the forgoing discussions, we dispose of all the above Appeals in following manner:

- i. Company Appeal (AT) (Ins.) Nos. 983 and 1026 of 2023, insofar as it relates to order dated 06.07.2023 passed in IA NO.443 of 2021 is allowed. Order passed by Adjudicating Authority in IA No.443 of 2021 directing for refund of amount of Rs.93.82 Crores is set-aside and modified to the extent that Formation shall be entitled to refund of only Rs.22.09 Crores along with interest earned on it, which was kept in the fixed deposit of Rs.42.99 Crores under the orders of Adjudicating Authority.
- ii. Company Appeal (AT) (Ins.) Nos.984 and 1027 of 2023, insofar as it relates to order dated 06.07.2023 passed in IA No.1847 of 2021 are dismissed. Order passed by Adjudicating Authority while rejecting IA No.1847 of 2021 is upheld, but for the reasons as indicated in this order.

- iii. Company Appeal (AT) (Ins.) No. 1163/2023 filed by Formation Textile is dismissed.
- iv. Company Appeal (AT) (Ins.) Nos. 1098, 1099, 1100, 1101, 1236 & 1237/2023 are allowed. The respondent, CoC is directed to make payment of outstanding amounts of Interim Trade Creditors of Rs.20.9 Crores along with interest earned on it out of the fixed deposit amount of Rs.42.99 Crore. The payment to the Interim Trade Creditors shall be made by the CoC within a period of 30 days from today. Order dated 06.07.2023 is set aside and I.A. Nos.1785/2021, 1986/2021 & 1052/2022 are allowed to the extent as indicated above.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

Anjali/Ashwani/Himanshu