IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II, HYDERABAD

I.A. No. 477/2021, I.A. No. 632/2021 & 270/2022 in
C.P. (IB) No. 420/7/HDB/2018
Under Section 60(5) of the IB Code, 2016,
r/w Rule 11 of the National Company Law Tribunal Rules, 2016.

In the matter of
M/S LANCO AMARKANTAK POWER LIMITED

Between:

1. Edelweiss Asset Reconstruction Co. Ltd.
   Having its office at Edelweiss House, 1st floor,
   Off CST Road, Kalina, Mumbai - 400.

2. Canara Bank (including merged Syndicate Bank),
   Having its office at 2nd floor, T. Subba Rami Reddy Complex,
   1-7-1, S.P. Road, Secunderabad – 500003.

3. UCO BANK,
   Having its office at Flagship Corporate Branch,
   6-3-1108, Ground Floor, Navabharat Chambers,
   Raj Bhavan Road, Somajiguda, Hyderabad- 500 082.

… Applicants

A N D

Saurabh Kumar Tikmani,
Resolutional Professional of Lanco Amarkantak Power Limited,
Having its office at KPMG Restructuring Services LLP,
1st Floor Lodha Excelus, Appolo Mills Compound,
N.M. Joshi Marg, Mahalaxmi,
Mumbai, Maharashtra – 400011 & Others

… Respondents

Date of Order: 19.10.2022

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Member, Judicial
Sri Veera Brahma Rao Arekapudi, Member, Technical

Counsels present:

For the Applicant: Mr. C.S. Vaidyanathan and Mr. Arun Kathpalia, Senior Advocates, assisted by Mr. Rohan Aloor and Shardul Amarchand Mangaldas & Co.

For the RP: Mr. Ritin Rai, Senior Advocate, assisted by Mr. Abhishek Swaroop for Saraf and Partners

For the CoC: Mr. Vivek Reddy, Senior Advocate, assisted by Ms. Rubaina Khatoon & Trilegal

PER :
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, MEMBER, JUDICIAL

I. Under consideration are interlocutory applications filed by some of the financial creditors (hereinafter referred to as the “Applicants”) of M/S Lanco Amarkantak Power Limited (hereinafter referred to as the “Corporate Debtor”, under Section 60(5) of the Insolvency and Bankruptcy IB Code, 2016 (hereinafter referred to as “the IB Code, 2016”), read with Rule 11 of the NCLT Rules, 2016, seeking the reliefs, mentioned hereunder, against the Resolution Professional of the Corporate Debtor and the remaining lenders of the Corporate Debtor forming part of the Committee of Creditors (hereinafter referred to as the "majority CoC and collectively referred to as the "Respondents"):

I.A. No. 477 of 2021:

i) To direct the Respondents to consider a fair and equitable distribution mechanism and determination of liquidation value which duly takes into account the charge ranking and priority of the secured creditors and value of their security interest;

ii) To direct the Respondents to not consider any distribution mechanism and determination of liquidation value which is in contravention of the Code, more particularly Section 30 and 53 of the IB Code, 2016; and

iii) To direct the Respondents to determine the final distribution mechanism immediately and in any event at least ten (10) days before voting on the resolution plan.

I.A. No. 632 of 2021:

i) To set aside the decision of the majority lenders in favour of a distribution mechanism which does not take into account the charge

ranking, *inter se* priority of the secured creditors and value of their security interest and is in contravention of the Code, more particularly Sections 30 and 53 of the IB Code, 2016, i.e., the non-compliant distribution mechanism;

ii) To direct the majority lenders to consider and vote in favour of a distribution mechanism which is compliant with the IB Code, 2016, and provides for the minimum guaranteed amount for a potential dissenting financial creditor computed in terms of Section 30 read with Section 53 of the IB Code, 2016;

iii) To direct the Respondents to take into account the updated cash reserves while computing the liquidation value of the Corporate Debtor as well as while computing the amount to be paid to a potential dissenting financial creditor, in terms of Section 30(2) read with Section 53 of the IB Code, 2016; and

iv) To direct that voting on the Resolution Plan for the Corporate Debtor to be stayed until the disposal of the present application in terms of the reliefs sought in prayers (A), (B) and (C) above.

I.A. No. 270 of 2022;

i) To pass an order setting aside the decision of the Respondent Nos. 2 to 11, to vote in favour of the RFRP, including impugned RFRP Clause, and the Evaluation Matrix, dated 17.02.2022; and

ii) To pass an order directing the Respondents to re-consider and vote in favour of a revised RFRP and Evaluation Matrix for the Corporate Debtor, in terms of Regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in compliance with the provisions of the Code and the applicable laws.

II. The averments, in common, leading to the instant Applications, as stated by the Applicant, are as follows:

a) The Corporate Debtor is an unlisted public limited company, incorporated in the year 2001 and is engaged in implementing and operating a coal-based thermal power plant in Pathadi Village, Kobra District, Chattisgarh.

b) The said power plant is bifurcated into three phases. As on the insolvency commencement date, Phase – I was operational since 09.04.2010, Phase – II was still incomplete and under construction, and the work for Phase – III had not commenced as yet.

c) Financial assistance was taken by the Corporate Debtor for each phase separately. Such assistance was in turn provided against security created over assets and cash flows of each phase, in favour of the respective lenders who lent for the respective phase.

d) The IDFC had disbursed a total of INR 850 Crores, as rupee term loan facilities, to the Corporate Debtor, which was utilized towards refinancing of Phase-I debt. The Applicant No.1 had purchased the financial assets of the Corporate Debtor from the IDFC, vide an Assignment Agreement, dated 22.03.2017.

e) The Applicant No.2 had disbursed a total of INR 126.76 Crores, as rupee term facilities. The Applicant No.3 disbursed a total of INR 25 Crores to the Corporate Debtor.

f) Owing to the defaults committed by the Corporate Debtor, on its obligation towards the phase II Lenders, the Axis Bank Limited, which is a Phase-II lender, filed an application under section 7 of the IB Code, 2016, before this Tribunal, which was admitted vide order, dated 05.09.2019.

g) During the meeting of the CoC, dated 11.10.2019, the CoC resolved to appoint Mr. Saurabh Kumar Tikmani as the Resolution Professional ("RP")

of the Corporate Debtor. The Phase – II of the Corporate Debtor is still incomplete and under construction.

h) The revenue generated from Phase –I of the Corporate Debtor was exclusively charged to Phase-I lenders, who were being serviced from the said cash generated from the operations of Phase-I, prior to initiation of the CIRP. The cash generated from operations of Phase-I would have been sufficient to pay the entire outstanding due to the Phase – I lenders in the next 4-5 years, approximately.

i) The CoC, during its 3rd and 4th meetings, dated 10.12.2019 and 23.12.2019 respectively, discussed and voted in favour of a 'Hybrid Model' and a 'Hybrid Evaluation Matrix', which would take into account the project dynamics, capture the value of the three separate phases and maximise the overall value of the Corporate Debtor. The Hybrid Evaluation Matrix entailed separate and distinct evaluation matrixes, comprising unique qualitative and quantitative parameters, which were prepared for each of the aforementioned phases of the Corporate Debtor.

j) Thereafter, vide email, dated 14.10.2020, the Resolution Professional informed the members of the CoC of the distribution model, vide which the CoC members were informed of the liquidation values attributable to them. This computation of the liquidation value was carried out on a 'project phase-wise' basis. It was envisaged that the proceeds from the Resolution Plan were to be distributed between the lenders in the ratio of liquidation value arrived at, after giving due consideration to the charge ranking, priority and value of the security interest held by each of such lenders. The model envisaged that the entire liquidation value of Phase-I was to be allocated to the Phase-I lenders and distributed in accordance with the security charge of each of the Phase-I Lenders.

S.no	Lender	Total admitted claim (crores)	Liquidation value (crores)
1.	Edelweiss Asset Reconstruction Co. Ltd.	458.80	232
2.	Canara Bank (including merged Syndicate Bank)	171.16	133
3.	UCO Bank	8.32	7

k) No comments or observations to the contrary were provided by any CoC member and all the members tacitly agreed to the said distribution model which was based on the security charge/ranking held by each of the lenders.

l) The above-mentioned distribution mechanism was the correct mechanism inasmuch as the said mechanism gave due consideration to the distinct qualitative and quantitative parameters against which each of the phases of the Corporate Debtor regard to the inter se priority among the secured creditors was therefore, fair, equitable and complaint with the code.

m) The various alternatives of distribution mechanism were discussed in detail at various meetings of the Core Committee. All such alternative distribution mechanisms envisaged distribution of proceeds from the Resolution Plan on the basis of the *inter se* security between the CoC members.

n) Shockingly however, the majority lenders suddenly committed a *volte face,* from the 22nd CoC meeting onwards and introduced a completely modified distribution mechanism. The modified distribution mechanism entailed allocation of proceeds from the Resolution Plan amongst the CoC members on the basis of admitted claims of all the secured creditors of the Corporate Debtor, while completely ignoring the demarcation between the Phase-I, Phase-II and Phase-III lenders, as well as the security held by each of the individual secured creditors of the Corporate Debtor. The mechanism envisaged liquidation value for each of the secured creditor which was

computed without giving any regard to the security interest held by each of such secured creditors- making it derogatory to the mechanism envisaged under Section 53 of the IB Code, 2016, read with Section 30.

o) The modified distribution mechanism proposed by the majority lenders had been suggested as an afterthought solely to deprive the Phase-I lenders of their rightful entitlement of proceeds from the Resolution Plan, through an opaque and arbitrary mechanism.

p) The modified mechanism is in gross violation of Section 30(4) of the IB Code, 2016, as per which, the CoC is required to ensure that the manner of distribution between the creditors, taking into account the order of priority among the creditors as laid down in Section 53(1) of the IB Code, 2016, as also the value of the secured interest of a secured creditor – failure of which shall render the resolution plan infeasible and unviable in terms of the IB Code, 2016.

q) The modified distribution mechanism deprives the Applicants of their rightful entitlement in terms of the IB Code, 2016, as well as robbing a potential dissenting financial creditor of even its assured minimum safeguard by not even calculating the liquidation value in terms of provisions of the IB Code, 2016.

r) The modified distribution mechanism is contrary to the established project financing norms inasmuch as the modified distribution mechanism places the Phase-I lenders at par with the Phase-II lenders, even though they have a separate security structure and risk profile. No explanation whatsoever has been given by the Resolution Professional or the majority lenders behind the rationale for diluting the demarcation between the different phases of the Corporate Debtor.

s) The modified distribution mechanism is also a complete departure from the express provisions of the IB Code, 2016, in as much as the computation of liquidation value as envisaged under the new distribution mechanism is in

violation of the methodology envisaged in express terms under the IB Code, 2016.

t) The majority lenders have deliberately delayed the determination of the final distribution mechanism which is to be applied for proceeds from the resolution plan. The issue of finalization of the distribution mechanism was also made a voting agenda for the 24th CoC meeting scheduled for 16.07.2021 and when the said meeting was postponed to be rescheduled on 02.08.2021, the same was removed from the agenda list, without assigning any reason. In the 25th CoC meeting, the majority lenders voted in favour of the determination of the distribution mechanism to be further delayed and to be carried out along with the voting upon the Resolution Plan for the Corporate Debtor.

u) The final distribution mechanism is one of the most important factors which shall be taken into consideration by the financial creditors of the Corporate Debtor prior to voting upon the Resolution Plan. The proposal of the majority lenders to simultaneously vote upon the distribution mechanism and the Resolution Plan for the Corporate Debtor, is unsustainable and devastatingly impacts the rights of the Applicants.

v) Since the methodology for computation of liquidation value has already been envisaged in the IB Code, 2016, under Section 53, there is no scope left for the majority lenders to arbitrarily impose their own method of computation of liquidation value. The majority lenders are seeking to compute liquidation value based on the admitted claims of the creditors,

w) The 22nd CoC meeting, dated 01.07.2021, it has been opined by the CoC that dissenting financial creditors need not to be paid in the least the value of their security interest.

x) The conclusion can be that even if security interest is presumed to be relinquished the Applicants shall maintain their priority in repayment in accordance with the value of their security.

y) If *inter se* priority is not given due consideration and all the secured creditors are made to rank equally for the purposes of distribution under Section 53(1)(b) of the IB Code, 2016, then practically no secured creditor would ever choose to relinquish its security to the liquidation estate.

z) The modified distribution mechanism does not even guarantee the minimum liquidation value, dissenting financial creditors is in violation of the provisions of the IB Code, 2016.

aa) The cash flows from the operation of Phase-I are exclusively charged to Phase – I lenders.

bb) The RP has not included the updated cash reserves, which are in excess of INR 565 Crores (approx.) in the computation of liquidation value of the Corporate Debtor.

cc) Section 30(4) of the IB Code, 2016, categorically provides that the CoC shall vote on a resolution plan only after considering its feasibility, viability and the manner of distribution. By delaying proposing voting on distribution mechanism along with resolution plan, the CoC would be acting completely contrary to the provisions of the Code.

dd) Under these circumstances, the Applicants preferred the I.A. No. 477 of 2021, seeking the reliefs, as referred to above.

ee) Pursuant to the filing of I.A. No. 477 of 2021, during the 28th CoC meeting, dated 08.10.2021, the CoC finally agreed to declare the voting results of the final distribution mechanism, prior to the commencement of the voting on the resolution plans. Thereafter, *via* voting results declared on 23.10.2021, the brute majority of the CoC voted in favour of the non-compliant distribution mechanism.

ff) The lenders who have voted against the non-compliant distribution mechanism constitute 15.22% of the CoC members and represent the majority of the Phase-I lenders (i.e., 59.1%), since the remaining CoC members are lenders in both Phases I and II. However, the majority of the

CoC (which holds 84.8% of the total voting share) have substantially higher exposure in Phase-II of the Corporate Debtor, which is under construction.

gg) It is clear that majority of the CoC has taken an undue advantage of its position to further their vested interests, while at the same time depriving the Phase-I lenders of their exclusive valuable security interest and pre-insolvency entitlements. The majority CoC in the present facts has deployed illegal and wrongful means to ensure unconscionable gains for Phase-II lenders, at the sole expense of the Phase-I lenders.

hh) Aggrieved by the voting in favour of the non-compliant distribution mechanism by the brute majority of the CoC, the Applicants approached this Tribunal by way of the I.A. No. 632 of 2021, *inter alia* challenging the non-compliant distribution mechanism wherein both the proceeds from a Resolution Plan and the liquidation value payable to a dissenting financial creditor were to be computed and distributed on the basis of admitted claims of the creditors, in complete derogation of fair and equitable treatment considering the nature, quality, value and extent of security interests held by lenders of each phase and the provisions of the IB Code, 2016, which required due deference to be given to such factum of differentiation between the creditors.

ii) During the pendency of the above-mentioned applications, Phase-II lenders, the PFC and the REC, apprised the CoC of their intention to propose a lender-backed plan with the technical support of the NTPC. The CoC directed the Resolution Professional to seek extension of the CIRP timelines and file an appropriate application before this Tribunal to permit the presentation of a lenders-backed plan. Consequently, by way of order, dated 18.01.2022, this Tribunal permitted issuance of fresh expression of interest in the ongoing CIRP.

jj) Pertinently, in the second round of issuance of expression of interest and RFRP, the majority members of the CoC in a concerted, *malafide* and

choreographed attempt to deprive the Phase-I lenders of their security interest, approved the RFRP which envisaged that the cash and receivables (which, as on 23.09.2022, amounts to approximately INR 1,388 Crores), which had been generated solely from the assets secured in favour of the Phase-I lenders and exclusively charged in favour of the Phase-I lenders, were to be distributed amongst all the secured lenders of all three phases "*in proportion of their admitted claims*", as prescribed by Clause XXIII of the RFRP, dated 17.02.2022. Not only was this in abrogation of the exclusive security interest created in favour of Phase-I lenders, but despite the fact that the distribution mechanism proposed by the CoC had been pending challenge and *sub judice* before this Tribunal.

kk) In addition to the above, the majority of the CoC also voted in favour of a completely different Evaluation Matrix which: (i) diluted the distinction between the three different phases and mixed up all three phases of LAPL; (ii) envisaged scoring LAPL "*as a whole without any phase wise demarcation*"; and (iii) constituted an about-turn by the CoC from its earlier well-reasoned decision to follow a 'Hybrid Model' and 'Hybrid Evaluation Matrix' in the present CIRP.

III. The averments, as made in the counters of the Respondents, are as below:

a) The decision of approving the RFRP is within the exclusive domain of the CoC and the Resolution Professional has a limited role in the same. The Resolution Professional had tabled the RFRP drafts before the members of the CoC for their views, comments, suggested changes and deliberation. The Impugned RFRP Clause and the Evaluation Matrix were deliberated at length and finalized pursuant to inputs from the members of the CoC.

b) The impugned RFRP Clause deals with the issue concerning the distribution of consideration expected to be received by the members of the CoC and the same has been considered by the members of the CoC after detailed deliberations, considering the legality of the same and after due application of their respective commercial wisdom.

c) It is a settled position of law that distribution of consideration received pursuant to successful culmination of the CIRP is within the exclusive domain of the members of the CoC and CoC's commercial wisdom in that regard is paramount and non-justiciable.

d) In respect of the RFRP, the Resolution Professional presented and tabled comments and suggestion from all the parties, including the Applicant, which were considered and deliberated prior to finalization of the RFRP and voting thereupon. This is clear from the discussions that took place in the 34th CoC meeting. The issue concerning the impugned RFRP Clause was further discussed in the 35th CoC meeting. The RFRP was finally approved in the 37th CoC meeting after another round of discussions and deliberations.

e) As is evident from the minutes of the various CoC meetings, the Resolution Professional has been pro-active in its attempts to bring resolution to differences. To that end, the RP even recommended in the 37th meeting of the CoC that two separate RFRPs be tabled before the CoC for their consideration and voting. However, the Applicants themselves rejected this suggestion.

f) The Resolution Professional was cognizant of the pending interlocutory applications, but proceeded in the aforesaid manner, in view of the direction of this Tribunal, dated 06.10.2021, whereby it was observed that the Resolution Professional is required to *"proceed with CIRP as per law"*.

g) Decisions relating to the distribution of proceeds received by the CoC is within the exclusive domain of the CoC.

h) It is pertinent to take note of the settled position of law laid down by the Hon'ble Supreme Court of India in the case of *India Resurgence ARC Private*

Limited v. M/s Amit Metaliks Limited & Anr. [Civil Appeal No. 1700 of 2021]. The appellant therein made certain assertions similar to the ones made by the Applicant in the present applications. Dismissing the appellants' arguments, the Hon'ble Supreme Court referred to Appellate Tribunal's observations regarding the intent of legislature whilst inserting the amendment to Section 30(4) of the Code, as follows:

> "*… The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.*"

i) It is pertinent to note that it is not the case of the Applicant that creditors belonging to the same class being similarly situated are denied fair and equitable treatment in any of the proposed distribution mechanisms in the Corporate Debtor's CIRP.

j) The approval of the RFRP under Regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, is a process linked to commercial decision of the CoC.

k) Appreciating the limited scope of judicial review in areas that are exclusively within the domain of the commercial wisdom of the CoC, Hon'ble Supreme Court of India, in the *India Resurgence* case, went on the make the following observation –

> "*… Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own*

dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal."

l) Multiple judicial precedents have held that ascertaining a distribution mechanism for distribution of proceeds of the resolution plan is within the exclusive domain of the CoC. Such decision is taken by the CoC by weighing in on various aspects set out in Section 30(4) as per CoC's commercial wisdom. CoC expresses its commercial wisdom collectively through decisions taken by majority votes casted by the members of the CoC.

m) It is apposite to note that Corporate Debtor has undertaken consortium lending and security interest over its immovable property is not exclusively charged in favour of the Applicant. The security interest over the assets of the Corporate Debtor is shared amongst the consortium of lenders and various lenders have their respective charges over the same, including some of the Respondents.

n) Additionally, and as held by the Hon'ble Supreme Court of India in India Resurgence Case, order of priority and value of security are "*guidelines*" that may be considered by the CoC while assessing the feasibility and viability of the resolution plan. The "*bottomline*" is that distribution should be fair and equitable and creditors forming part of the same class should be treated equally.

o) Evaluation Matrix is independent from the distribution mechanism. The Applicants have alleged that 'Hybrid Evaluation Matrix', previously deliberated by the members of the CoC, was accepted and finalized by CoC acknowledging the uniqueness of Corporate Debtor's CIRP and subsequent discussions and developments were tailored around this understanding. There is nothing in the minutes of the CoC meetings reflective of any final approval by the CoC, tacit or otherwise.

p) As such, it is inaccurate for the Applicant to contend that the CoC had conclusively decided in favour of the *"Hybrid Evaluation Matrix"*. It is

apparent from the minutes of the 4th CoC meeting that the members were merely deliberating upon the possible distribution mechanisms and the final decision in this regard was left open for consideration at an appropriate time.

q) The current Evaluation Matrix is also not intended to have any impact on the distribution mechanism and this understanding is clear from the specific disclaimer provided in Evaluation Matrix, which is set out below –

> "*This EM provides a set of parameters that would be applied (in the manner mentioned herein) for consideration of the resolution plans submitted in the Corporate Debtor's CIRP and for the approval of best resolution plan. The CoC will independently verify the feasibility and viability of each resolution plan, including the manner of distribution proposed. Accordingly, it is clarified that the parameters enumerated in this EM will not impact the distribution of the Consideration received under the resolution plans which will be a separate and independent exercise undertaken by the CoC.*"

r) It is not mandatory for the COC, while approving a resolution plan, to take into account the priority and value of security interest of a secured creditor.

s) Ex-facie, the language used under Section 30(4) of IB Code, 2016, in respect of considering security interest is "*may*", as opposed to the term "*shall*", rendering the requirement non-mandatory. This aspect of the provision has been succinctly dealt with by the Hon'ble Supreme Court in the matter of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.* [(2020) 8 SCC 531], wherein it was clarified that the usage of the term "*may*" in Section 30(4) of the Code is merely directory and not mandatory.

t) The said issue again came up for consideration before Hon'ble Supreme Court in the matter of *India Resurgence ARC Private Limited v. Amit Metaliks Limited and Another [2021 SCC OnLine SC 409]*. In the said matter, the Appellant, who had a minuscule voting share of 3.94% in the CoC, expressed reservations on the proposed distribution, particularly with reference to the value of the security interest held by it and was aggrieved

by the fact that the proposed distribution amount was much lower than the value of the security in its favour. The said Appellant chose to remain a dissenting financial creditor, while the resolution plan got approved by 95.35% of voting share of the CoC. The Hon'ble Supreme Court held as under:

"14. The provisions of amended sub-section (4) of Section 30 of the Code, on which excessive reliance is placed on behalf of the appellant, in our view, do not make out any case for interference with the resolution plan at the instance of the appellant. The purport and effect of the amendment to sub-section (4) of Section 30 of the Code, by way of subclause (b) of Section 6 of the Amending Act of 2019, was also explained by this Court in Essar Steel(supra), as duly taken note of by the Appellate Authority (vide the extraction hereinbefore).The NCLAT was, therefore, right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment."

u) In view of the above, it is settled law that the manner of distribution of proceeds on the basis of order of priority as laid down under Section 53, including the priority and value of security interest of the secured creditor – is merely one of the option available for the consideration by the CoC. Such an option, as stated in Section 30(4), is directory in nature and not mandatory. In any event of the matter, it is not the case of the Applicant that creditors belonging to the same class being similarly situated are denied fair and equitable treatment in any of the proposed distribution mechanisms in the Corporate Debtor's CIRP, as alleged or at all. Rather the distribution mechanism approved by the Majority CoC is fair,

reasonable and equitable in as much as the distribution proposed therein provides equal recovery to each of the financial creditors.

v) There is no contravention of Section 30(4) read with Section 53(1) of the IB Code, 2016. The grievance of the Applicant is that the impugned Clause XXIII of the RFRP, as approved by the Majority CoC in its 37th Meeting held on 17 February 2022 – whereby the cash and receivables (which are alleged to be exclusively charged in favour of the Phase 1 lenders) are sought to be distributed to all the lenders on the basis of their admitted claims – does not take into account the charge ranking, *inter se* priority and value of security interest among the secured creditors. Hence the same is violative of Sections 30(2) and 30(4) read with Section 53 of the Code.

w) Ex – facie the above-mentioned plea appears to be completely misplaced in as much as the distribution mechanism as approved by the Majority CoC seeks to allocate the plan proceeds as well as the cash and receivables in the most equitable manner amongst the respective financial creditors in the ratio of their admitted claims.

x) Further, the consideration or non-consideration of value and priority of the security interest of the secured creditors is a decision which falls within the exclusive domain of the COC, and the same is non – justiciable. As such, as the applicable law stands, such decision is not amenable to judicial scrutiny, and it is non-justiciable.

y) The Applicant has contended that the distribution mechanism approved by Majority CoC is in violation of Section 30(2) read with Section 53 of the Code as it does away with the allocation of the entire liquidation value which was to be paid to Phase 1 lender.

z) It is clear that the Applicant cannot contend that a dissenting financial creditor is necessarily to be paid, the minimum value of security interest held by it. Section 30(2)(b)(ii) of the Code merely states that a dissenting financial creditor shall receive a payment which shall not be less than the

amount to be paid to such creditors in accordance with Section 53(1) of the Code. Further, Section 53 which deals with the distribution of the assets of the Corporate Debtor under liquidation, merely provides the order / priority of payment to the stakeholders. It does not even remotely suggest that the value of security needs to be considered while deciding the distribution of a proceeds of the resolution plan under Section 30(2)(b)(ii) of the Code. In any event, the Hon'ble Supreme Court in the matter of *Essar Steel* (Supra) has held that Section 53 of the Code, is not engrafted in sub-section 30(2)(b) of the Code. Section 53 is only referred therein only to establish that a certain minimum figure is to be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the CoC that is free to determine what amounts be paid to different classes and sub-classes of creditors.

aa) In the matter of *Srei Equipment Finance Limited v. Mr. Prabhakar Nandiraju, Resolution Professional MIC Electronics Limited,* vide judgment dated 03.02.2021, the Hon'ble National Company Law Appellate Tribunal, New Delhi, has delt with the similar facts and issues and arguments as being raised by the Applicant herein and squarely dismissed them. The relevant paragraphs of the judgment are as follows:

> *"20. […] The Resolution Plan submitted by Respondents 1 to 3 makes provision to pay Appellant only Rs.8.64 Crores out of admitted amount of Rs.32.29 Crores. It is stated that the admitted amount is challenged in Company Appeal No.552 of 2019. Appellant claims that being dissenting Financial Creditor, Appellant is entitled to at least value of secured assets which at the time of execution of Loan Agreement was Rs.35,02,00,000/-. According to Appellant, the average liquidation value of the securities of Appellant is Rs.12.98 Crores. The Appellant is, however, being paid only Rs.8.64 Crores and thus it is necessary to interfere in the Resolution Plan which has been approved.*

> *21. […] The mandate of Section 30(2) and Section 30(4) of the Amended Act and CIRP Regulations has been complied with while arriving at the amount payable. Commercial wisdom of COC cannot be trespassed in judicial review unless there is non-compliance of Section 30(2), 30(4) of IBC and Regulation 39 of CIRP Regulations, 2016, the challenge of the Appellant is merely to the quantum. The approved Resolution Plan is binding on all the stakeholders.*
>
> *…*
>
> *31. We have gone through the material placed before us and keep in view provisions of amended Section 30(1)(2)(ii) and read the same with Section 53(1) of IBC with paragraphs – 2 and 3 of the Affidavit filed by the Resolution Professional is material. The Resolution Professional has accepted that the average value of the secured asset of the Appellant is Rs.12.86 Crores and has given his calculation in para – 3 of the Affidavit that even if the amended Section was to be applied, the figure arrived at under Section 53 (1) for the Appellant would be Rs.8.60 Crores. It is claimed that this has been provided in the Resolution Plan.*
>
> *32. In view of the above, the challenge put up by the Appellant to the Resolution Plan with regard to provisions made for the Appellant in the Resolution Plan even if looked at from the alternative angle considering the amended provisions of Section 30 of IBC, would not survive."*

bb) The only objective of the Applicant seems to delay the CIRP and drag the Corporate Debtor into liquidation, thereby trying to realize and recover their claim basis its security interest. The CIRP of the Corporate Debtor is at an advanced stage wherein fresh EOIs have been submitted by multiple potential resolution applicants, including lenders themselves. Hence, for the said reason alone, the attempt of the Applicant to somehow drag this process into liquidation must not be countenanced, and the present Applications ought to be dismissed forthwith.

IV. Both sides have filed written submissions/additional submissions, along with case law.

V. In the light of the pleadings and the contest put forth by the parties, I have framed the following point for consideration:

Whether the decision of the majority members of the CoC to include Clause XXIII in RFRP besides to accept the Evaluation Matrix, dated 17.02.2022, is liable to be set aside on the plea that the same did not take into consideration the charge ranking, inter se priority of the secured creditors and value of their security interest of the Applicants?

VI. Since the facts involved in the instant interlocutory applications are common and intrinsically connected, all the applications are taken up together and disposed of by this common order.

VII. I have heard Mr. C.S Vaidyanathan and Mr. Arun Kathpalia, Learned Senior Counsels for the Petitioners, and Mr. Vivek Reddy and Mr. Ritin Rai, Learned Senior Counsels for the Respondents. Perused the record, the written submissions, additional written submissions and case law placed before us by both the sides.

<u>Point:</u>

Whether the decision of the majority members of the CoC to include Clause XXIII in RFRP besides accepting the Evaluation Matrix, dated 17.02.2022, is liable to be set aside on the plea that the same did not take into consideration the charge ranking, inter se priority of the secured creditors and value of their security interest of the Applicants?

Analysis & Discussion

(A) Clause XXIII of RFRP, dated 17.02.2022

VIII. At the outset, it may be stated that the prayer of the Applicants in the instant Applications, being to set aside the decision of the Respondents No. 2 to 11 to retain Clause XXIII and the Evaluation Matrix of the RFRP-II, dated 17.02.2022, and to pass an order directing the Respondents to reconsider and vote in favour of a revised RFRP and Evaluation Matrix for the Corporate Debtor, in terms of the IB Code, 2016 and Regulation 36(B) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is incumbent on the Applicants to establish that the impugned Clause XXIII in the RFRP and the Evaluation Matrix are not in conformity with the provisions of the IB Code, 2016 and the relevant Regulations.

IX. The Clause XXIII of RFRP-II, states that "any cash lying in any trust and retention account or any other bank account of the Corporate Debtor, as on the Transfer Date" and "any receivables invoiced by the Corporate Debtor or identified as receivables in the Corporate Debtor's books of account as on the Transfer Date" will be distributed to the secured financial creditors "in proportion of their admitted claims". Additionally, it was also stipulated in the EM-II that "the parameters enumerated in this EM will not impact the distribution of the Consideration received under the resolution plan which will be a separate and independent exercise undertaken by the CoC".

X. In so far as the Evaluation Matrix, dated 17.02.2022, voted by the majority CoC, is concerned, the Learned Senior Counsels for the Applicants contend that the same dilutes the necessary phase-wise demarcation and wrongfully treats secured creditors of different phases at par. The majority CoC has decided to follow a mechanism which overlooks the necessary 'phase-

wise' demarcation of the Corporate Debtor and arbitrarily demolishes the different phases of the Corporate Debtor, while placing the Phase-I lenders at par with the Phase-II and Phase-III lenders, even though they have separate security structure and risk profile and admittedly only Phase-I is fully operational and generating revenue.

XI. According to the Learned Senior Counsels for the Applicants, mere initiation of the CIRP cannot completely override the differential bargains made by the creditors amongst themselves and with the corporate debtor prior to providing finance or permitting security creation in favour of new lenders and priorities of claims established prior to insolvency proceedings under commercial or other applicable laws should be upheld in insolvency proceedings. In many ways, the differential bargains amongst the creditors are negotiated to provide for clear mutual rights and status in a situation of insolvency. However, the impugned RFRP Clause has prematurely foreclosed the possibility of a resolution applicant proposing: (i) satisfaction of debt of Phase-I lenders by partially utilizing the cash and receivables of the Corporate Debtor; (ii) utilizing the balance amount to either satisfy the debt of Phase-II or Phase-III lenders or towards construction of Phase-II and Phase-III of the Corporate Debtor. The possibility that a resolution applicant may wish to let a Phase-I potential dissenting creditor enforce their exclusive security over the cash and receivables has been pre-maturely and unfairly foreclosed by the majority CoC.

XII. According to the Learned Senior Counsel for the Applicants, Section 25(2)(h) of the IB Code, 2016, and Regulation 36B of the CIRP Regulations nowhere stipulate that, in its invitation to the prospective resolution applicants, the Resolution Professional shall provide for the manner of distribution of proceeds from the resolution plan amongst the creditors. The impugned RFRP Clause XXIII is, therefore, completely

beyond the scope of Section 25(2)(h) of the IB Code, 2016, read with Regulation 36B of the CIRP Regulations. The Learned Senior Counsel in this regard placed reliance on the principle that ' that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all', laid down in *Taylor v. Taylor* and contended that inclusion of the impugned Clause XXIII in the RFRP, is nothing but violation of this rule and the same needs to be set aside.

XIII. *Per contra*, the Learned Senior Counsels for the Respondents further contend that sub-clause 2(h) of Section 25 of the IB Code, 2016, requires a Resolution Professional to invite prospective resolution applicants, who fulfil, firstly, such criteria as may be laid down by him with the approval of CoC, having regard to the complexity and scale of operations of the business of the corporate debtor and, secondly, such other conditions as may be specified by the Board, to submit a resolution plan or plans. The language of Section 25(2)(h) is clear in that it enables the CoC to lay down criteria specific to each corporate debtor which the CoC might find relevant for its assessment. This is over and above the conditions that may be stipulated by the Board.

XIV. The Learned Senior Counsels further contend that certain minimum requirements in Regulation 36B of the CIRP Regulations are prescribed by the Board. Where anything is prohibited under Regulation 36B, the same has been expressly stated in Regulation 36B. For instance, Regulation 36B (4) states that "*the request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan*." According to the Learned Senior Counsels, no prohibition is mentioned in Regulation 36B in relation to clauses such as Clause XXIII. Therefore, the Applicant's arguments, if accepted by this Tribunal, would amount to adding a prohibition under the Regulations which is otherwise not prescribed. According to the Learned Senior Counsels, the CoC in its

commercial wisdom, deemed it relevant to include Clause XXIII in the RFRP-II, that appeared necessary from its perspective for assessment of resolutions plans. The Learned Senior Counsels also contend that the rule in *Taylor* v. *Taylor* has no application in this regard.

XV. In the above back drop, I proceed to examine whether Clause XXIII of RFRP-II contravenes Section 25(2)(h) of the IB Code, 2016 or Regulation 36B of the CIRP Regulations.

XVI. Admittedly, two RFRPs, dated 23.12.2019 and 17.02.2020 are the subject matter of challenge in these Applications. The first RFRP and EM, dated 23.12.2019 ("RFRP-I" and "EM-I"), were approved by the CoC after discussions in the 3rd and 4th meeting of the CoC. The Clause XXVII of the RFRP-I, states that "*any cash lying in any trust and retention account or any other bank account of the Corporate Debtor, as on the Transfer Date, shall be released to the Designated Lender who shall distribute such amounts to the Secured Creditors in proportion of their admitted claims.*". It was further recorded that "*the parameters enumerated in this EM will not impact the distribution of the Consideration received under the resolution plan which will be a separate and independent exercise undertaken by the CoC.*"

XVII. The minutes of the 4th CoC meeting discloses that the distribution mechanism was to be decided by the CoC independently. The minutes of the meetings of the 12th Core Committee meeting and the minutes of the 19th and 22nd meetings of the CoC disclose that deliberations took place regarding the distribution mechanism. During the 28th meeting of the CoC, two alternatives were placed for voting of the CoC. Option 1 contemplated distribution of proceeds by taking into account the security interest of each creditor while Option 2 contemplated distribution of proceeds in the ratio of the admitted claims of each of the creditors. By an overwhelming majority of 84.80%, the CoC voted in favour of Option 2. However, both

resolution plans received by the Resolution Professional were rejected by the CoC. Thereafter, *vide* resolution passed in the 30th CoC meeting, the CoC directed the Resolution Professional to approach this Tribunal and seek its approval for fresh issue of EoI. Following the grant of permission by this Tribunal *vide* order dated 18.01.2022, the Resolution Professional issued fresh invitation for EoI.

XVIII. The second round of CIRP, revisions to the RFRP-I were circulated by the Resolution Professional *vide* email dated 18.01.2022 inviting comments from members of the CoC. Notably, in response to the draft circulated, the Applicants did not object to the inclusion of a clause laying out the distribution of cash lying with the Corporate Debtor. Rather, the only objection registered by the Applicants was in respect of the manner of distribution, which should be in accordance with the security interest of the creditors. I, hereby, extract the said objections of the Applicant sent *vide* letter, dated 16.08.2022:

4. *Relevant to highlight that inter alia, the draft of the RERP circulated by the RP vide its email dated 14 February 2022 ("Draft RFRP") envisages, at Clause 6 (XXIII), that the successful resolution applicant shall undertake to release: (i) cash lying in the trust and retention account or any other account of the Corporate Debtor: and (ii) all receivables invoiced by the Corporate Debtor or identified as receivables in the Corporate Debtor's books, to the Designated Lender (Power Finance corporation Limited). The Draft RFRP further envisages that said Lender shall, subject to applicable law, distribute the afore-stated amounts to the Secured Financial Creditors of the Corporate Debtor in proportion of their admitted claims.*
5. *Accordingly, EARCL inter alia, had taken specific objection to the afore-stated clause in the Draft RFRP basis the following grounds:*
   i. The only phase of the Corporate Debtor which was and continues to generate revenue is Phase-I and cash flows from the operation of Phase-I are exclusively charged in favor of the lenders of Phase-I of the Corporate Debtor. Accordingly, the cash and receivables of the Corporate Debtor shall be distributed only amongst the Phase-I lenders;

ii. On the issue of methodology of distribution of proceeds from the resolution plan for the Corporate Debtor, EARCL along with Canara Bank and UCO Bank have already approached the Hon'ble NCLT, Hyderabad Bench (vide, I.A. No. 477 of 2021 & I.A. No. 632 of 2021 in C.P. (IB) No. 420/7/HDB/2018), whereby the afore-stated issue of distribution of proceeds from the resolution plan is presently pending adjudication before the Hon'ble NCLT, Hyderabad Bench. Accordingly, considering that this issue is presently sub judice, EARCL had urged the CoC as well as the RP to suitably amend the afore-stated clause in the Draft RFRP."

XIX. The above clearly shows that the Applicant had not specifically raised objections regarding the inclusion of a clause such as Clause XXIII in the RFRP.

XX. The minutes of the 34th CoC meeting dated 25.01.2022, in fact discloses the objection of the Applicant is as follows:

"*Edelweiss ARC had also provided few comments on RFRP and Evaluation matrix (EM). Consequently, the Chairperson presented consolidated list of comments on RFRP and EM for discussion during the CoC meeting. Detailed deliberations were undertaken by the CoC members on consolidated list of comments on RFRP.*"

XXI. The minutes of the 35th CoC meeting, dated 02.02.2022, the 36th CoC meeting dated 11.02.2022 and the 37th CoC meeting, dated 17.02.2022, disclose that similar deliberations were held and in view of the Applicant's stance *vis-à-vis* the Clause XXIII in RFRP-II, the Resolution Professional proposed that 2 versions of the RFRP be placed for a vote, i.e., version 1, which incorporates the Applicant's suggestions and, version 2, which was circulated along with the agenda for the 37th Coc meeting. However, as recorded in the minutes of the 37th CoC meeting, the Applicant rejected the Resolution Professional's suggestion and "directed the RP to put only one version of RFRP", which is, version 2, as explained above. Following this, Resolution Professional was constrained to put only 1 RFRP for vote among CoC members. The RFRP-II and EM-II were finalized and

approved by a majority vote of 85.62% on 17.02.2022. Like in the RFRP-I, *supra*, the Clause XXIII of RFRP-II similarly states that "*any cash lying in any trust and retention account or any other bank account of the Corporate Debtor, as on the Transfer Date*" and "*any receivables invoiced by the Corporate Debtor or identified as receivables in the Corporate Debtor's books of account as on the Transfer Date*" will be distributed to the secured financial creditors "*in proportion of their admitted claims*". Additionally, it was also stipulated in the EM-II that "*the parameters enumerated in this EM will not impact the distribution of the Consideration received under the resolution plan which will be a separate and independent exercise undertaken by the CoC*".

XXII. Now, I shall refer to Section 25 (2)(h) of the IB Code, 2016 and Regulation 36B of the CIRP Regulations, which are extracted hereunder:

(i) Section 25(2)(h)

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—
(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans;

(ii) 36B. Request for resolution plans

(1) The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to –
(a) every prospective resolution applicant in the provisional list; and
(b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.
(2) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with

corresponding timelines. (3) The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).
(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan. 101
(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.
Explanation I.– For the purposes of this sub-regulation, "performance security" shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.
Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.]
(5) Any modification in the request for resolution plan or the evaluation matrix issued under sub-regulation (1), shall be deemed to be a fresh issue and shall be subject to timeline under sub-regulation (3).
[Provided that such modifications shall not be made more than once.]
(6) The resolution professional may, with the approval of the committee, extend the timeline for submission of resolution plans.
(6A) If the resolution professional, does not receive a resolution plan in response to the request under this regulation, he may, with the approval of the committee, issue request for resolution plan for sale of one or more of assets of the corporate debtor.
(7) The resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list: Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-regulation.

XXIII. According to the Learned Senior Counsels for the Applicants, Section 25(2)(h) of the IB Code, 2016, and Regulation 36B of the CIRP Regulations, do not require the Resolution Professional to provide for the

manner of distribution of proceeds amongst the creditors, while inviting the prospective resolution applicants, to submit their resolution plans. However, it is pertinent to note that the language, "invite prospective resolution applicants, who full fill such criteria as may be laid down by him, with the approval of the committee of creditors", used in Section 25(2)(h), amply signifies that the said provision enables the Resolution Professional, while inviting the prospective resolution applicants, to lay down the criteria which the CoC might find relevant for its assessment, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans. Therefore, inclusion of Clause XXIII in the RFRP is nothing but the "criteria", which the majority members of the CoC in their commercial wisdom felt relevant, cannot and shall not be considered as an act prohibited under Regulation 36B of the CIRP Regulations.

XXIV. In so far as reliance placed by the Learned Senior Counsels for the Applicants, on the principle laid down in *Taylor v. Taylor* [1875] is concerned, it may be stated that Section 25(2)(h) which needs to be read with Regulation 36B, *supra,* expressly cast a duty on the Resolution Professional to prepare a criteria, with the approval of the CoC, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Insolvency and Bankruptcy Board of India, for the purpose of a resolution plan. Admittedly, the majority members of the CoC have approved the RFRP, with Clause XXIII. So much so, I am unable to find any force in the submissions of the Learned Senior Counsels for the Applicants that the Resolution Professional, in the process of laying down the criteria, breached the principle laid down in *Taylor v. Taylor, supra.*

XXV. I am, therefore, unable to find anything that offends what is expressly stated in Regulation 36B, in the course adopted by the Resolution Professional. So much so, as rightly argued by the Learned Senior Counsels for the Respondents, in the absence of any express prohibition in Regulation 36B in including a clause like Clause XXIII in the RFRP, with the concurrence of the requisite majority of the COC, the Applicant's arguments, if accepted, would amount to adding a prohibition under the Regulations, which is otherwise not prescribed. Needless to say, matters of this nature shall be left to the commercial wisdom of the CoC as it is for the CoC to consider what is deemed fit and relevant to include in the RFRP-II, in its perspective.

XXVI. That apart, the submission of the Learned Senior Counsels for the Respondents that a clause such as Clause XXIII of RFRP-I & II, is ordinarily inserted for transparency and to avoid any confusion in the future regarding treatment of funds available with the Corporate Debtor and generated over the course of the CIRP, is sustainable, in as much as such clauses also bring more clarity and ensure that all prospective resolution applicants are on the same page as regards the funds available with the corporate debtor while submitting their plans. A perusal of the orders in the following matters, namely, order of the Hon'ble NCLAT in *JSW Steel Ltd.* v. *Mahender Kumar Khandelwal & Ors.* [CA (AT) (Ins.) No. 957 of 2019 (order dt. 17.02.2020)], orders of the NCLT, Mumbai in *IDBI Bank Limited* v. *Mr. Abhijit Guhathakurtha*, in I.A. No. 977 of 2021 in C.P. (IB) No. 1832 of 2017 (order dt. 10.11.2021) and *Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation Limited* v. *Committee of Creditors & Ors.*, in I.A. No. 449 of 2021 in C.P. (IB) No. 4258 of 2017, makes it clear that clauses such as Clause XXIII are routinely included in RFRPs. In fact, admittedly, the first RFRP, in this case also, contained a similar clause which was voted for by the majority members

of the CoC. I, therefore, reject the argument of the petitioners that impugned Clause XXIII of the RFRPs, *supra*, is *ultra vires* section 25(2)(h) of the IB Code, 2016.

XXVII. Having considered the Point above, on the factual matrix of the case, I shall now proceed to find whether the reliefs sought for in these Applications are sustainable under law.

XXVIII. At the outset I must say that the legal perspective, in so far as the order of priority amongst creditors, including the priority and value of the security interest of a secured creditor in distribution of the cash and receivables of the corporate debtor undergoing CIRP, post 2019 amendment to Section 30 of the IB Code, 2016, is as clear as crystal, as can be traced not only from Section 30 of the IB Code, 2016, but also from several rulings of Hon'ble Supreme Court, as such the same is no longer *res integra*.

XXIX. Hon'ble Supreme Court of India, in *Essar Steel, supra,* having reiterated that "existence of certain intrinsic assumptions relating to the CoC on which the principle of 'commercial wisdom' has been recognized, the assumptions are that the CoC has the requisite expertise to assess the viability of the corporate debtor and verify the commercial feasibility of the proposed resolution plan; that their actions are a consequence of a thorough examination and assessment of the proposed resolution plan, and that their decisions are a result of deliberations and voting in the CoC meetings.", further held that "subject to Section 30(2), the mechanism of distributing payments to the creditors falls within the exclusive commercial realm of the CoC."

XXX. In the very same ruling, Hon'ble Supreme Court, upheld the constitutional validity of the amendment made in the year 2019, to Section 30 of the IB Code, 2016, and the said reads as under:

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

XXXI. A bare perusal of the language used by the Legislature in the amended Section 30(4), with respect to considering the security interest, shows that the word used being "may", the same is directory and not mandatory. That apart, the said provision is only an enabling provision and does not impose any mandate on the CoC to distribute payments to creditors based on the value of security held by them. Section 30 (4) of the IB Code only says that the CoC may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53 of the IB Code, including priority and value of security interest of secured creditors, while approving the resolution plan, so much so, the argument that, as the CoC failed to take into the account the pre-CIRP preferential financial bargains made by the Applicants with the Corporate Debtor; as such the impugned decisions are liable to be set aside, is untenable.

XXXII. An identical issue had cropped up in the matter of *India Resurgence*, *supra*, wherein it was similarly contended by the Appellant therein that the *CoC could not have approved the resolution plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor* even though the legislature in its wisdom has amended Section 30(4) of the IB Code, 2016, requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the IB Code, 2016, including the priority and value of the security interest of a secured creditor, and Hon'ble Supreme Court, held that *'it needs hardly any elaboration that financial proposal in*

the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction'. Thus, it is noteworthy from the ruling above, that in the scheme of the IB Code, 2016, every dissatisfaction, like that of the Applicants herein, does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

XXXIII. Hon'ble Supreme Court, in *Essar Steel, supra,* went on record that the submissions on behalf of the appellant therein with reference to the value of its security interest neither carry any meaning nor any substance, and held that '*what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the IB Code, 2016, and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant therein cannot suggest a higher amount to be paid to it with reference to the value of the security interest'* – a finding which is squarely applicable to the facts of the case at hand.

XXXIV. Therefore, the well settled legal position in so far as the same relates to the priority in payment amongst different classes of creditors, essentially being the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the Applicants herein cannot seek a higher amount to be paid to them on the basis of the value of their security interest by pleading dissatisfaction.

XXXV. Here I may point out that according to Mr. Arun Kathpalia, the Learned Senior Counsel, the decision in *India Resurgence, supra*, is inconsistent with the ruling in *Essar Steels*, and as the decision in *Essar Steels* since rendered by a three-judge Bench, the same shall prevail over

the decision in *India Resurgence*, which has been rendered by a two-judge Bench. However, Mr. C.S. Vaidyanathan, the Learned Senior Counsel who later continued the submissions on behalf of the Applicants, took a stand that both *Essar Steels* as well as *India Resurgence* are in favour of the Applicants. It is also important to note that the Applicants also endeavoured to contend that the rulings in *Essar Steels* and *India Resurgence* were rendered under different set of facts, by contending that the case on hand involves a unique set of facts, such as pre-insolvency lending agreements executed in a phase-wise manner, each lending being independent from the other, the lenders (Applicants herein) of Phase-I of the Corporate Debtor have been conferred an exclusive charge over the assets of Phase-I, thereby making each phase an independent unit for the purpose of the lending arrangement. It is further contended that among the three phases that the project is divided into, only the Phase-I has been fully commissioned and is generating revenues and the other two phases are still under construction and are not generating any revenue. The revenue generated from Phase-I of the Corporate Debtor was exclusively charged to Phase-I lenders, by way of a 'trust and retention account'. The Phase-I lenders were being serviced from the said cash generated from the operations of Phase-I, prior to initiation of the CIRP. All the revenue being generated by the operation of the Phase-I is being accumulated in the said 'trust and retention account', as such, the law as laid in the rulings *supra,* cannot squarely be applied to the case on hand.

XXXVI. Admittedly, the Applicant being an Asset Reconstruction Company had, in the year 2017, acquired the asset of the Corporate Debtor, which was under stress, as such when the company acquired is under financial stress, the possibilities of such company admitting into resolution under the IB Code, being wide, the resolution of such company, if ordered, shall be for the Corporate Debtor as a whole and will not be project-wise. Unit

or phase-wise insolvency of the Corporate Debtor is unknown to the IB Code. Therefore, the argument by the Applicant that the project, since is divided into phases and that the Applicant being the exclusive secured creditor having preferential rights, the pre-insolvency rights of the Applicant need to be taken care of by giving preference to the security interest, rather than to the admitted claim, by not treating the Corporate Debtor as a whole for the purpose of CIRP, is misconceived and hence, cannot be entertained.

XXXVII. In so far as the reliance placed by the Applicants on the references, which the *Essar Steel* judgement contained, namely the BLRC Report and UNCITRAL Guide on Insolvency, I may state that, in *Axis Bank Ltd.* v. *Vidarbha Industries Power Ltd.*, Hon'ble Supreme Court, while upholding the ruling in *Axis Bank Ltd.* v. *Vidarbha Industries Power Ltd.* [(2022) 8 SCC 352], which stated that that the NCLT has the discretion to admit or reject a valid initiation of the insolvency process by a financial creditor under Section 7 of the IB Code, 2016, held that "*to interpret words and provisions of a statute, it may become necessary for the judges to embark upon lengthy discussions. The words of judges interpreting statutes are not to be interpreted as statutes*." (emphasis is mine) Needless to say that the statutory interpretation of section 30 (4) of the IB Code, 2016 and the related Regulations, as regards what amount is to be paid to different classes or subclasses of creditors, since held to be essentially the commercial wisdom of the Committee of Creditors, a dissenting secured creditor like the appellant herein cannot suggest a higher amount to be paid to, by relying on the references above. That apart, Hon'ble Supreme Court in *Essar Steel, supra,* after having quoted the above references, ultimately held as follows:

"It is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors… what is left to the majority

decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. There is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations. The CoC does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissenting creditors".

Thus, when the statutory provisions relating to RFRP and Evaluation Matrix being unambiguous, I find no reason to rely on the BLRC Report and UNCITRAL Guide on Insolvency, in order to take a view which is not in consonance with the settled law and the IB Code, 2016.

(B) Evaluation Matrix

XXXVIII. According to the Learned Senior Counsel for the Applicants, the Valuation Report, dated 25.09.2020, prepared by BDO Valuation Advisory LLP, included the cash reserves amounting to INR 9 Crores (approx.) and receivables for an amount of INR 186 Crores (approx.) (as on the insolvency commencement date) in the computation of liquidation value of the Corporate Debtor and the said cash and receivables have ballooned to INR 1388 Crores as on 23.09.2022. However, these updated cash and receivables amounting to INR 1388 Crores have not been taken into account by the Resolution Professional while computing the liquidation value of the Corporate Debtor. The Learned Senior Counsels further contends that as a matter of practice, the Committee of Creditors in several pending insolvency resolution processes have been obtaining fresh

valuation in those instances where delay or other circumstances justify re-visiting valuations. Therefore, the updated cash and receivables ought to be taken into account in computation of liquidation value of the Corporate Debtor, as this will automatically increase the liquidation value of each of the potential dissenting financial creditor as well.

XXXIX. However, the Learned Senior Counsels for the Respondents contend that the argument that the liquidation value calculated as on the CIRP commencement date does not provide the true value as the CIRP has been pending for over 1000 days, is an afterthought and was raised for the first time in the written submissions. According to the Learned Senior Counsels, the Resolution Professional is bound to follow the instructions laid down in the CIRP Regulations while calculating the liquidation value and cannot re-calculate the liquidation value on any date, except insolvency commencement date. Moreover, the Applicant has not prayed for any re-calculation of the liquidation value on account of the prolonged CIRP.

XL. It may be stated that the term ‘liquidation value’ is defined under Regulation 2(1)(k) of the CIRP Regulations, as “estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.” Therefore, as rightly argued, the liquidation value is to be calculated as per the value existing on the date of insolvency commencement, as such the earnings of the Corporate Debtor over the course of CIRP are irrelevant to the computation of liquidation value, qua the Applicant. In fact, such increased value cannot be considered by the Resolution Professional/ CoC in view of the provisions of Regulations 2(1)(k) and 35 of the CIRP Regulations, which prescribe the manner of calculating the liquidation value. The Resolution Professional, since followed the instructions laid down in CIRP Regulations while calculating the liquidation value, I hold that any interference at this stage, as regards the liquidation value, is uncalled for.

XLI. Therefore, in conclusion, having considered the factual matrix of the case, the submissions of the Learned Senior Counsels for both sides and the case law, I am of the firm view that these Applications, apart from being devoid of any merit or substance, are frivolous. I, therefore, dismiss these Applications with costs of Rs. 10,00,000/- (Rupees Ten Lakh Only), payable by the Applicants to Bharat Kosh.

XLII. In the result, the instant Applications are dismissed with costs of Rs. 10,00,000/-.

Sd/-

(Dr. N.V. Ramakrishna Badarinath)
Member, Judicial

PER :
SRI VEERA BRAHMA RAO AREKAPUDI,
MEMBER, TECHNICAL

1. Having had the opportunity to go through the opinion of my learned brother, I am unable to bring myself to agree with the conclusion reached therein and the reasons therefor. Hence, I find that there is a necessity to deliver my opinion in the instant Applications. The facts of the matter and the submissions made by the learned senior advocates appearing for the parties, have been recorded in detail by my learned brother and there is no need to reproduce the same.
2. At the outset, I find it appropriate to state that I am conscious of the fact that the NCLT is bound to give primacy to the commercial wisdom of the CoC, a dictum which has been laid down by the Hon'ble Supreme Court in a catena of judgements. As a consequence, I am also mindful of the limitations of the

NCLT in interfering with the decisions of the CoC, that are made in exercise of its commercial wisdom. Reiterating these principles, I may proceed further.

3. It is of utmost importance to note the difference in the factual matrix of the case at hand and that of the cases of *Essar Steel (India) Ltd. Committee of Creditors* v. *Satish Kumar Gupta* [(2020) 8 SCC 531] and *India Resurgence ARC Pvt. Ltd.* v. *Amit Metaliks Ltd.* [2021 SCC OnLine SC 409], which have been relied on, by both the sides.
4. The aspect which, according to me, makes a highly significant difference that is impossible to ignore, is the fact that in the instant case, there has been a clear demarcation between the different phases of the Corporate Debtor, right from its inception, with respect to the financial assistance that was provided by the creditors of the Corporate Debtor. All the commercial bargains between the creditors and the Corporate Debtor, and the financial agreements between them, have been designed and entered into, while giving due consideration to this fact.
5. While it is true that the Corporate Debtor is placed in the resolution process as a whole, the pre-insolvency lending agreements have been executed in a phase-wise manner, each independent from the other. As a result, the lenders of Phase-I of the Corporate Debtor have been conferred an exclusive charge over the assets of Phase-I, as if each phase is an independent unit for the purpose of the lending arrangement.
6. It is also extremely significant to note that among the three phases that the project is divided into, admittedly, only the Phase-I has been fully commissioned and is generating revenues. The other two phases are still under construction and are not generating any revenue. Further, the revenue generated from Phase-I of the Corporate Debtor was exclusively charged to Phase-I lenders, by way of a 'trust and retention account', having been opened for the said purpose. The Phase-I lenders were being serviced from the said cash generated from the operations of Phase-I, prior to initiation of the CIRP.

All the revenue being generated by the operation of the Phase-I is being accumulated in the said 'trust and retention account'.

7. It is this fundamental difference in the facts of the instant matter and those in the cases of *Essar Steel* and *India Resurgence,* which in my opinion makes a world of difference.

8. Keeping this distinction in mind, I find, in my considered view that the assertions made by the Applicants do find support in the decisions of the Hon'ble Supreme Court, as referred to above, specially in the case of *Essar Steel*.

9. However, when questioned about the fact that the factual matrix in the cases of *Essar Steel* and *India Resurgence,* that have been relied on by the Respondents, do not involve a distinction between the lenders on a phase-wise basis of the projects therein, the learned senior counsel for the Respondents responded that such a distinction is immaterial and it is the commercial wisdom of the CoC that is paramount, even if the CoC disregards the lending agreements and commercial arrangements between the creditors and the Corporate Debtor.

10. In this context, it is vital to refer to the observations made by the Hon'ble Supreme Court in *Essar Steel* in which it was emphasised that equitable treatment of creditors is equitable treatment only within the same class. In paragraph 49, the Hon'ble Court, citing from American jurisprudence, opined that while protecting creditors in general is, no doubt, an important objective of the IB Code, 2016, protecting creditors from each other is also important. It was further elaborated that what is meant by protecting creditors from each other is only that a Bankruptcy Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

11. The Hon'ble Apex Court highlighted the importance of valuing security interests separately from interests of creditors who do not have security, while relying on the IMF paper on Development of Standards for Security Interest. It is also pertinent to refer to "Principles of International Insolvency", authored by Philip R. Wood, which states that secured creditors are super-priority creditors on insolvency and Security must stand up on insolvency which is when it is needed most. The case at hand is a classic example of when the security of secured creditors must ideally come to their rescue.
12. The argument of the Applicants that the RFRP-II incentivises them to vote against the Resolution Plan adhering to it is also strengthened by the observations of the Hon'ble Supreme Court in paragraph 54, in which the perils of treating unequals equally was hinted at and it was opined that if an "equality for all" approach in recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved.
13. The importance of giving due regard to security interest of creditors was referred to through another judgement of the Hon'ble Court in *Swiss Ribbons (P) Ltd.* v. *Union of India* [(2019) 4 SCC 17], in which it was elucidated that most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the IB Code, 2016, as persons who will resolve stressed assets and bring a corporate debtor back to its feet.
14. I also respectfully note that the judgement in *Essar Steel* has reiterated that full freedom and discretion has been given to the CoC to classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of

the Code, thereby stymying the corporate resolution process itself. While the discretion conferred on the CoC is duly acknowledged, it must also be kept in mind that it is of utmost importance that the pre-existing and pre-insolvency rights of the creditors are not trampled upon under the exercise of the commercial wisdom of the CoC.

15. I must not lose sight of the fact that the RFRP, containing the impugned clause, is ultimately going to be the basis for the preparation of the contents of the Resolution Plan. Once the Resolution Plan is put forth before the Adjudicating Authority for its approval, judicial mind is applied to see as to whether such plan fulfils the mandatory requirements under the Code, which involves firstly, compliance with Section 30(2) of the Code; secondly, whether the plan is fair and equitable and balances the interests of all the stakeholders; and thirdly, whether the plan maximises the value of assets. Such approval of NCLT is never a formality, but a necessity, as held by the Hon'ble Supreme Court in *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC India Ltd.* [(2022) 1 SCC 401].

16. Drawing from the above, it is probable that a Resolution Plan that has been prepared from the RFRP containing the impugned clause, will fall foul of the provisions of the IB Code, 2016, in as much as it would not be fair and equitable in balancing the interests of the stakeholders as it would have treated equally secured and unsecured creditors, who are on a different footing based on the security interest that they hold, especially with respect to the financial demarcations of the phases of the Corporate Debtor.

17. With regard to the due consideration which must be accorded to the security interests possessed by the secured creditors, I may usefully make a reference to the UNCITRAL Guide on Insolvency, which states as under:

> *The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their*

relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

18. It is elaborated in the said Guide that the *'primary purpose of classifying claims is to satisfy the requirements to provide fair and equitable treatment to creditors, treating similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same menu of terms by the reorganization plan. It is one way to ensure that priority claims are treated in accordance with the priority established under the insolvency law. It may also make it easier to treat the claims of major creditors who can be persuaded to receive different treatment from the general class of unsecured creditors, where that treatment may be necessary to make the plan feasible.'*

19. Pertinently, the Guide speaks of the vitality of giving credence to the pre-insolvency commercial bargains and arrangements in the following words: *While many creditors will be similarly situated with respect to the kinds of claims they hold based on similar legal or contractual rights, others will have superior claims or hold superior rights. For these reasons, insolvency laws generally rank creditors for the purposes of distribution of the proceeds of the estate in liquidation by reference to their claims, an approach not inconsistent with the objective of equitable treatment. To the extent that different creditors have struck different commercial bargains with the debtor, the ranking of creditors may be justified by the desirability for the insolvency system to recognize and respect the different bargains, preserve legitimate commercial*

expectations, foster predictability in commercial relationships and promote the equal treatment of similarly situated creditors. Establishing a clear and predictable ranking system for distribution can help to ensure that creditors are certain of their rights at the time of entering into commercial arrangements with the debtor and, in the case of secured credit, facilitate its provision.

20. The authorities referred to above reinforce the decisive and far-reaching import of security interest and the ranking derived therefrom, which has to be respected in insolvency proceedings.

21. It is pertinent to note here that it is borne out from the record that the CoC had initially discussed a "Hybrid Model" of distribution and a "Hybrid" Evaluation Matrix, which would take into account the project dynamics, capture the value of the three separate phases and maximise the overall value of the Corporate Debtor. It has been stated that such Hybrid Evaluation Matrix entailed separate and distinct evaluation matrixes, comprising unique qualitative and quantitative parameters, which were prepared for each of the aforementioned phases of the Corporate Debtor. The said discussions took place during the 3rd and 4th meetings of the CoC, dated 10.12.2019 and 23.12.2019, respectively.

22. It is further seen from the record that vide email, dated 14.10.2020, the Resolution Professional informed the members of the CoC of the distribution model, vide which the CoC members were informed of the liquidation values attributable to them. It is stated that this computation of the liquidation value was carried out on a ‘project phase-wise’ basis. In this model, as proposed by the Resolution Professional in his wisdom, it was envisaged that the proceeds from the Resolution Plan were to be distributed between the lenders in the ratio of liquidation value arrived at, after giving due consideration to the charge ranking, priority and value of the security interest held by each of such lenders. Most importantly, the model envisaged that the entire liquidation

value of Phase-I was to be allocated to the Phase-I lenders and distributed in accordance with the security charge of each of the Phase-I Lenders.

23. However, the majority of the CoC, from the 22nd CoC meeting onwards, introduced and pushed a completely modified distribution mechanism. It is stated that the modified distribution mechanism entailed allocation of proceeds from the Resolution Plan amongst the CoC members on the basis of admitted claims of all the secured creditors of the Corporate Debtor, while completely ignoring the demarcation between the Phase-I, Phase-II and Phase-III lenders, as well as the security held by each of the individual secured creditors of the Corporate Debtor. The mechanism envisaged liquidation value for each of the secured creditor which was computed without giving any regard to the security interest held by each of such secured creditors.

24. It is understood that the majority CoC, with its brute majority, bulldozed the previous proposal and arrived at the present mechanism, to the detriment of the lenders of Phase-I, thereby denying the said lenders the benefits that rightfully accrue to them by virtue of the lending agreements and commercial bargains that were entered into pre-insolvency.

25. When a query was addressed to the learned senior counsel for the Respondents on whether the IB Code, 2016, provides for information to be provided to the prospective resolution applicants regarding the distribution of the proceeds from the resolution plan among the creditors, it was submitted that while the IB Code, 2016, does not explicitly provide for such information to be extended to the prospective resolution applicants, it does not prevent the same either.

26. In defence of their actions, the Respondents have argued that the impugned clause XXIII in the RFRP, dated 17.02.2022, has been included to usher in transparency with regard to the distribution of proceeds from the resolution plan and to avoid any confusion in the future regarding the treatment of funds available with the Corporate Debtor, and that these clauses ensure that all prospective resolution applicants are on the same page as regards the funds

available with the corporate debtor while submitting their plans – an argument which seems to be ill-founded and fallacious.

27. It is important to note that the prospective resolution applicant is in no way concerned with the distribution of proceeds among the creditors of the Corporate Debtor and such an activity is exclusively within the domain of the CoC. Thus, including such a clause is uncalled for and it appears to me that it has been inserted to pre-empt the secured creditors of Phase-I of the project, from claiming their due share in the resolution proceeds, with their interests being protected vide the pre-insolvency entitlements and commercial bargains, which as elaborated above, must be preserved and given due credence to, during the CIRP.

28. The second major prayer of the Applicants is in I.A. No. 632 of 2021, in which it has been prayed that the Respondents be directed to take into account the updated cash reserves while computing the liquidation value of the Corporate Debtor.

29. Valuation of assets is an activity which is of utmost importance in the corporate insolvency resolution process under the IB Code, 2016. Regulation 2(1)(k) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, defines "liquidation value" as the 'estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date'.

30. A bare reading of the aforementioned regulation shows that the estimate of the realisable value of the assets of the corporate debtor, on the date of commencement the insolvency will be considered as the liquidation value, for the purpose of the insolvency resolution process. Such value will be used to determine the amounts that may be payable to operational creditors and/or financial creditors who do not vote in favour of the resolution plan, as provided under Section 30(2)(b). Though the regulations require that the

resolution plan must ensure the payment of liquidation value to operational creditors, the same shall be paid in priority to any financial creditor. Similarly, the liquidation value due to the dissenting financial creditor must be paid in priority to any consenting financial creditors.

31. Further, such information about the liquidation value may be extremely beneficial to the creditors of the Corporate Debtor to enable them to make decisions on the prospective resolution plans that may be received. The comprehensive understanding and assessment of liquidation value is vital to safeguard the interests of stakeholders, as this value leads to the successful formulation of a resolution plan and the adverse consequences incorrect valuation of liquidation value may be far-reaching.

32. Regulation 35 of the CIRP Regulations, refers to the 'insolvency commencement date', as on which date the liquidation value is estimated. According to Section 5(12) of the IB Code, 2016, 'insolvency commencement date' means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or section 10, as the case may be.

33. I am conscious of the fact that the liquidation value is to be calculated on the date of the commencement of insolvency. However, in the instant case, by way of order, dated 18.01.2022, this Tribunal permitted issuance of fresh expression of interest in the ongoing CIRP. It is quite obvious that the said order, dated 18.01.2022, tantamounts to starting fresh insolvency proceedings against the Corporate Debtor, all over again. It may be recollected that CIRP was initiated way back in the year 2019, vide order of this Tribunal, dated 05.09.2019. As can be seen, there is a lapse of around 28 months since the order dated 05.09.2019, initiating CIRP till the order, dated 18.01.2022, permitting issuance of a fresh expression of interest, was passed.

34. Subsequent to the fresh expression of interest, Request for Resolution Plan (RFRP), Evaluation Matrix, Information Memorandum and other relevant information of the Corporate Debtor are supplied to the shortlisted prospective resolution applicants, and it is in these documents that the liquidation value assumes importance.

35. In my considered view, when a fresh expression of interest is issued, the value of the assets of the Corporate Debtor as around such date must be taken into consideration because it is this value that will be extremely useful to the aforementioned documents that will, invariably, be issued afresh, subsequent to the fresh expression of interest. Further, Regulation 35(1) mandates that the Resolution Professional shall provide the fair value and the liquidation value to every member of the CoC, after the receipt of resolution plans. Much water has flown under the bridge since the calculation of the liquidation value, that had been calculated much earlier, as the CIRP has been pending for more than 1000 days. The creditors cannot be expected to make an informed decision, while exercising their commercial wisdom, without being equipped with latest information regarding the valuation of the assets of the Corporate Debtor. The argument of the Applicants that the liquidation value calculated as on the CIRP commencement date does not provide the true value as the CIRP has been pending for over 1000 days, is, in my opinion, a legitimate concern.

36. On an application by the Resolution Professional, this Tribunal permitted issuance of fresh expression of interest in the CIRP, by way of order, dated 18.01.2022, to facilitate a lenders-backed resolution plan. At this stage, when the proceedings in the resolution process of the Corporate Debtor practically began all over again after a period of more than a year, with a fresh expression of interest being issued, the Resolution Professional ought to have conducted a fresh valuation of the assets of the Corporate Debtor, to arrive at the liquidation value, which holds a high degree of importance in the fresh round of proceedings, especially in the light of the fact that the cash reserves in the

'trust and retention account' of the Corporate Debtor increased manifold. Instead of determining the updated liquidation value at that point of time, the Resolution Professional conveniently chose to take shelter under the liquidation value that had been calculated long before, an act which clearly points to the failure of the Resolution Professional in discharging his duties effectively.

37. In *Binani Industries Ltd.* v. *Bank of Baroda* [2018 SCC Online NCLAT 521], the Hon'ble National Company Law Appellate Tribunal held that 'the first objective of the IB Code, 2016, is "resolution". The second order objective is "maximisation of value of assets of the 'corporate debtor' and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests".'
38. The manner in which the majority CoC is proceeding, it seems but obvious to me that the afore-stated objectives of the IB Code, 2016, are being abandoned and sacrificed by the majority CoC in trying to recover as much of their dues as possible, at the cost of other creditors of the Corporate Debtor.
39. The new mechanism of distribution that has been voted for certainly does not incentivise the Phase-I lenders to proceed in a resolution-oriented manner and instead, it motivates them to proceed towards the liquidation of the Corporate Debtor – a scenario that is least advised under the IB Code, 2016.
40. Further, the objective of the maximisation of assets seems to be taking a backseat in view of the reluctance of the Resolution Professional in conducting a fresh valuation of the assets of the Corporate Debtor, in the light of increased cash reserves in the 'trust and retention account' of the Corporate Debtor. Failing to take the increased cash reserves into consideration certainly militates against the maximisation of assets, as decisions/ actions based on the previous assessments/information are not bound to be accurate, thereby being detrimental to all the stakeholders involved.

41. It is settled that the role of the CoC in a corporate insolvency resolution process is to maximise the asset value and balance the interest of all stakeholders, while keeping the concern going. However, the conduct of the majority CoC seems to be contrary to the established objectives of the IB Code, 2016 and the role of the CoC because it is evident that the interests of all the stakeholders are not bring accorded due consideration in effect and the majority is trampling over the rights of the other secured creditors, with the exercise of its brute majority.
42. Based on the discussion above and for the reasons therein, I deem it appropriate that the instant Applications must be allowed and the security interests of the secured creditors of Phase-I and their *inter se* priority over creditors of the other Phases must be upheld and protected.
43. Before concluding, I deem it appropriate to add that I do not think that I am going against the spirit of the judgements of the Hon'ble Supreme Court by giving allowing the instant Applications. Instead, allowing the Applications would amount to upholding the objects of the IB Code, 2016 and following the principles laid down by the Hon'ble Apex Court, in as much as equitable treatment of the creditors of the Corporate Debtor, maximisation of the value of the assets of the Corporate Debtor and striving for the resolution of the Corporate Debtor, instead of pushing it into liquidation, are concerned.
44. I, hereby, set aside the decision of the majority of the CoC in voting in favour of the RFRP, containing the impugned Clause XXIII and direct the CoC to consider an equitable mechanism of distribution of proceeds of the resolution plan, by giving due credence to the security interests held by the secured creditors in a phase-wise manner, in accordance with the pre-insolvency commercial bargains, prior to the date of commencement of the CIRP. I further direct the Resolution Professional and the CoC that the liquidation value of the Corporate Debtor be estimated afresh, as on the date of this order,

by taking into consideration the increased amounts of money in the 'trust and retention account' of the Corporate Debtor.

45. In view of the aforementioned directions, prayers (i) and (ii) in I.A. No. 477 of 2021 are allowed. Prayers (i), (ii) and (iii) in I.A. No. 632 of 2021 are allowed, while prayer (iv) is infructuous. Further, prayers (i) and (ii) in I.A. No. 270 of 2022 are allowed.

Sd/-

(Veera Brahma Rao Arekapudi)
Member, Technical

In view of the divergent opinions on whether the instant Applications deserve to be allowed or dismissed, the point arising in the Applications have to be answered by a larger bench or by the Hon'ble President, as the case may be. The said point is as under:

> *Whether the decision of the majority members of the CoC to include Clause XXIII in RFRP besides to accept the Evaluation Matrix, dated 17.02.2022, is liable to be set aside on the plea that the same did not take into consideration the charge ranking, inter se priority of the secured creditors and value of their security interest of the Applicants?*

Hence, the Applications be sent to the Hon'ble President, under Section 419(5) of the Companies Act, 2013.

Sd/-	Sd/-
(Veera Brahma Rao Arekapudi)	**(Dr. N.V. Ramakrishna Badarinath)**
Member, Technical	Member, Judicial