

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – II, CHENNAI**

IA(IBC)/391(CHE)/2022

In

IBA/653/2020

(filed under section 60(5) of the Insolvency & Bankruptcy Code, 2016)

Premier Chennai Properties Limited
DAA, 5/32, First Cross Street,
Shenoy Nagar East,
Near Municipal Corporation Building,
Shenoy Nagar, Chennai – 600 030

... Applicant

-Versus-

1. Mr. Madhu Desikan
Interim Resolution Professional
¼, Vijay Lakshmi Apartment,
Balasubramanium Street,
Mylapore,
Chennai – 600 004
2. GK Industrial Park Private Limited
Represented by its Resolution Professional
30, Chennai Bye Pass Road,
Mannarpuram,
Trichy – 620 020
3. Edelweiss Asset Reconstruction Company Limited
Edelweiss House,
Off. C.S.T. Road, Kalina,
Mumbai – 400 098

... Respondents

Along with

IA(IBC)/1381(CHE)/2022

In

IBA/653/2020

(filed under section 30(6) of the Insolvency & Bankruptcy Code, 2016)

Mr. Sachin Shrinivasa Bhattad
Resolution professional,
Flat No. 1A, 1st Floor,
Vijay Towers, 139, Railway Lines,
Solapur, Maharashtra – 413 001

... Applicant

Along with
IA(IBC)/1453(CHE)/2022
In
IBA/653/2020

(filed under section 60(5) of the Insolvency & Bankruptcy Code, 2016)

Premier Chennai Properties Limited
DAA, 5/32, 1st Cross Street,
Shenoy Nagar East,
Near Municipal Corporation Building,
Shenoy Nagar,
Chennai – 600 030

... Applicant

-Versus-

1. Mr. Sachin Shrinivasa Bhattad
Resolution professional,
Flat No. 1A, 1st Floor,
Vijay Towers, 139, Railway Lines,
Solapur, Maharashtra – 413 001
2. Edelweiss Asset Reconstruction Company Limited
Edelweiss House,
Off. C.S.T. Road, Kalina,
Mumbai – 400 098

... Respondents

In the matter of

Edelweiss Asset Reconstruction Company Limited

... Financial Creditor

-Versus-

G K Industrial Park Private Limited

... Operational Creditor

Order Pronounced on 15th June 2023

CORAM
SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

Appearances-

For Resolution Professional : *Mr. Murari, Senior Advocate*
For Mr. Raj Kumar Jhabakh, Ms. Preeti Mohan,
Ms. Anisha Chandrakumar, Ms. Ragha Sudha,
Advocates

For Financial Creditor : *Mr. Srinath Sridevan, Senior Advocate*
For Mr. Bhagavath Krishnan PMN,
Mr. Guru Dhananjay, Advocates

For Unsuccessful Resolution Applicant : *Mr. MS Krishnan, Senior Advocate*
For Mr. Anirudh Krishnan, Mr. Adarsh Subramanian, Mr. Subramanian Vaidyanathan, Mr. Shiva K, Mr. N. Sasank Iyer, Mr. Advaidh Nelakanttan, Mr. K. Mohit Kumar, Mr. Ravish Venkataraman, Advocates

COMMON ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

The hearing of applications was conducted through video conferencing platform.

1. PREFATORY

IBA/653/2020 is an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the I&B Code, 2016) filed by Edelweiss Asset Reconstruction Company Limited in the capacity of a Financial Creditor against the Corporate Debtor viz., G K Industrial Park Private Limited. An order admitting the Corporate Debtor into Corporate Insolvency Resolution Process (CIRP) was passed by this Adjudicating Authority vide order dated 13.01.2022. One, Mr. Madhu Desikan was appointed as the Interim Resolution Professional. Thereafter, as approved by the Committee of Creditors (hereafter referred to as "CoC") Mr. Sachin Shrinivasa Bhattad was appointed as the Resolution Professional vide order dated 19.04.2023 by this Adjudicating Authority.

2. ORDER IN IA(IBC)/391(CHE)/2022 In IBA/653/2020

IA(IBC)/391(CHE)/2022 in IBA/653/2020 is an application filed by Premier Chennai Properties Limited (CPCL) in the capacity of a creditor seeking relief as follows:

- a. *Place the Applicant in the CoC and reconstitute the CoC;*
- b. *Direct Respondent No. 1 to admit the entire claim of Rs. 55,26,38,374/- filed by the Applicant;*
- c. *Direct the CoC to not hold any meetings and to not take any actions in relation to the CIRP of the Corporate Debtor during the Pendency of this Application before the Hon'ble Tribunal; and*
- d. *Pass any such other order/s and or direction/s as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.*

2.1 The Corporate Debtor had entered into three separate Inter-Corporate Deposit Agreement with Premier Chennai Properties Limited (the Applicant herein) on various dates for receipt of loan to the tune of Rs. 15,00,00,000/- (Rupees fifteen crore only). Thereafter, owing to the default on the part of the Corporate Debtor, the parties had entered into a Renewal Agreement dated 30.09.2015 thereby extending the terms of repayment of the loans obtained accordingly. The last tranche of loan amount was to be paid by 03.12.2016. Since, the Corporate Debtor was not able to pay the loans as per the terms of the renewal agreement dated 30.09.2015 and owing to the request made by the Corporate Debtor, the parties entered into 2nd Renewal Agreement on 28.09.2016 further extending the repayment period for another 12 months. Similarly, another 2 more Renewal Agreements (3rd & 4th Renewal Agreement)

were entered between the parties with the last date of payment as 03.12.2019. However, no payments were made by the Corporate Debtor till the date of initiation of CIRP.

2.2 Once the knowledge of CIRP was brought to the notice of the Applicant, the applicant has filed its claim to the tune of Rs. 55,26,38,374/- (inclusive of Principal + Interest + Late payment charges) under Form-C before the IRP vide e-mail dated 04.20.2022. The IRP vide his e-mail dated 18.02.2022 replied that the Applicant can be recognized as a Financial Creditor who is related Party (for the reasons given in Point 6 of Form C) submitting that M/s. Sunshine Holdings (Mauritius) Limited holds about 80.2% shares in the Corporate Debtor and holds about 96.8% shares in Premier Chennai Properties Limited. He also questioned the quantum of the claim. Thereafter, the IRP vide his e-mail dated 05.03.2022 intimated the Applicant that its claim to an extent of Rs. 42 crore has been admitted and the balance Rs. 13.01 crore is under consideration. The IRP declared the Applicant as related party to the Corporate Debtor and excluded the Applicant from the CoC.

2.3 The Applicant submits that as on the date of Inter-Corporate agreements entered between the parties i.e., 12.09.2014, the Applicant and the Corporate Debtor had two separate Holding Companies i.e., IIRF India Realty V Limited (IIRF V) held shares in the Corporate Debtor while Sunshine

Holdings (Mauritius) Limited (Sunshine) held shares in the Applicant Company. It was only with effect from 10.11.2020, when IIRF V merged into Sunshine on account of Corporate restructuring undertaken in Mauritius. It is submitted that only subsequent to such restructuring, the Companies came under the same holding Company. It is further submitted that, for determining whether a person is a related party or not, the date to be reckoned should be the date of transaction and not the date of commencement of CIRP or submission of claim form before the IRP/RP.

2.4 The Applicant submits that Sunshine Holdings is a 100% subsidiary of Investor India Realty Fund II LLC ('IIRF II). IIRF II is a private equity fund regulated by the Financial Services Commission in Mauritius. FSC is the integrated regulator for the non-bank financial services sector and global business in Mauritius. It is submitted that IIRF II through its various subsidiaries, has been making foreign direct investment in the construction development sector in India in compliance with the Foreign Direct Investment (FDI) policy of the Government of India and the Foreign Exchange Management Act, 1999. These investments have been made as a pure financial investment with a view to exit from them at a definite time after receiving a rate of return and the investments have not been made as a strategic investor. And thereby the Applicant is not hit by Section 21 (2) of the code and is entitled to be part of the CoC as an unrelated Financial Creditor.

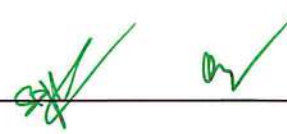
2.5 Respondents No. 1 & 2 in their reply have submitted that the Applicant herein cannot be included in the Committee of Creditors ("CoC") considering that the Applicant is a related party of the Corporate Debtor and therefore it is ineligible as per Section 21(2) of the Code. The Applicant herein had submitted Form-C on 04.02.2022 for a sum of Rs.55,26,38,374/- (Rupees Fifty Five Crores Twenty Six Lakhs Thirty Eight Thousand Three Hundred and Seventy Four only) out of which, Rs.42,25,30,057/- (Rupees Forty Two Crores Twenty Five Lakhs Thirty Thousand Fifty Seven only) was admitted by the erstwhile IRP vide email dated 18.02.2022. The erstwhile IRP had communicated the Applicant that he has been recognized as a "Financial Creditor". However, since the Applicant is found to be related party as defined under Section 5(24)(i) of the Code, the applicant cannot form part of CoC.

2.6 It is submitted that the applicant falls under the category of related party to the corporate debtor as defined under Section 5(24)(i) of the Code "*a Body Corporate which is a holding, subsidiary or an associate company of the Corporate Debtor, or a subsidiary of a holding company to which the Corporate Debtor is a subsidiary*". Reliance is placed upon Form-C dated 04.02.2022 submitted by the Applicant wherein it is mentioned in Clause (B), para-6 that "*Sunshine holdings (Mauritius) Limited, a Company incorporated in Mauritius, holds 96.8% of PCPL (Financial Creditor) and also holds 80.2% shares (on a fully diluted basis) of*

the Corporate Debtor". Therefore, the Respondent submits that, Sunshine Holdings (Mauritius) Limited is the holding company of both the Applicant and the Corporate Debtor by virtue of which, the Applicant is a related party to the Corporate Debtor as per the provisions of the Code.

2.7 Learned Senior Counsel for Respondents No. 1 & 2 submits that the Applicant has contended that the date to be reckoned for the purpose of determining whether a person is a related party, is the date of issuance of loan and not the date of commencement of CIRP. In this regard, the Respondent had submitted that a bare reading of Section 21(2) of the Code makes it clear that the date to be reckoned to ascertain whether a Financial Creditor is a related party is that the date of commencement of CIRP. The Respondents had further pointed out from the submissions of the Applicant that the holding company of the Applicant herein i.e. Sunshine Holdings (Mauritius) Limited has merged with the holding company of the Corporate Debtor i.e. IIRF India Realty V Limited with effect from 10.08.2020 and as a result of which, the Applicant and the Corporate Debtor now have a common holding company.

2.8 Learned Senior Counsel for Respondents No. 1 & 2 submits that with respect to late payment charges to the tune of Rs.13,01,08,317/- (Rupees Thirteen Crores One Lakh Eight Thousand Three Hundred and Seventeen



only) cannot be made part of the claim as the same is found to be unreasonable. It is further submitted that the late payment charges are still under verification by the Resolution Professional of the Corporate Debtor.

2.9 Learned Senior Counsel for the Respondents 1 & 2 had relied upon the judgment of the Hon'ble Supreme Court in "*Phoenix ARC Private Limited vs. Spade Financial Services Limited (Civil Appeal No. 5146 of 2019, decided on February 3, 2021)*" wherein Section 21(2) of the Code was interpreted and held as follows:

"Hence, while the default rule under the first proviso to Section 21(2) is that only those Financial Creditor that are related parties in praesenti would be debarred from the CoC, those related party Financial Creditors that cease to be related parties in order to circumvent the exclusion under the fist proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder."

2.10 Learned Senior Counsel for Respondent No. 3 by way of its reply has submitted similar counter points as against the averments made by the Applicant herein. It is submitted that the erstwhile IRP has rightly held the Applicant as a related party thereby restricting his participation in the CoC. The 3rd respondent has further submitted that the Applicant Company and the Corporate Debtor has had same person as Director by relying upon the annual returns of the Corporate Debtor for the year ending 31.03.2015.



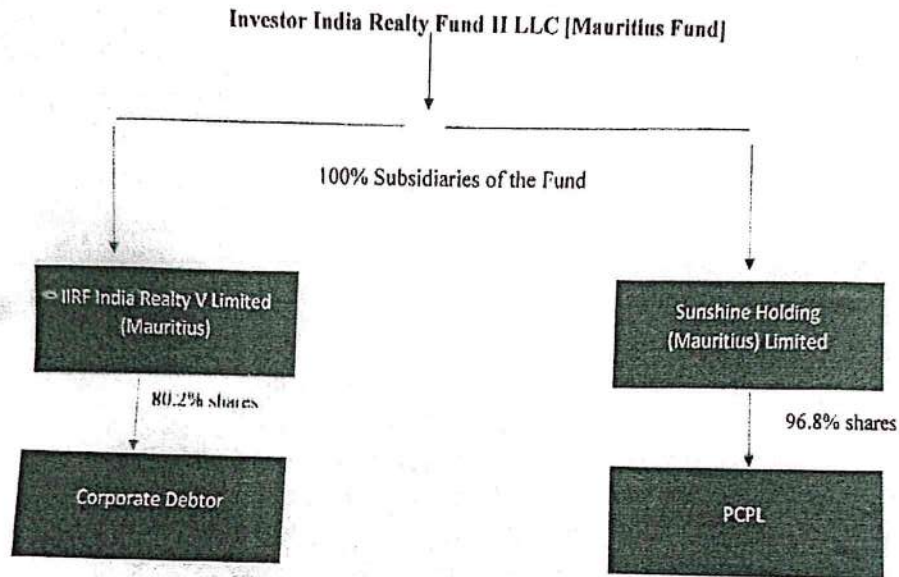
2.11 Learned Senior Counsel for the Applicant by way a rejoinder had submitted that the Corporate Debtor have not had any common directors till date from the date of execution of the Intercorporate Deposit Agreement. The Applicant by placing his reliance upon the annual returns of the Corporate Debtor for the year ended 31.03.2015 submits that Mr. Vinode Thomas ceased to be a director thereof with effect from 20.08.2014 whereas the Intercorporate Deposit Agreements were entered between the parties only on September 2014. In any case, Mr. Vinode Thomas was one of the several directors of the Applicant which also includes independent directors. The Applicant has further submitted that on the date of Intercorporate Deposit Agreement, the shares of the Applicant were listed on SME Exchange of the Bombay Stock Exchange and the Applicant had independent directors on its Board. Therefore, the allegations of the 3rd Respondent regarding commonality of directors is completely misrepresented. The Applicant submits that, at any point of time, either directly or indirectly, the Applicant was not involved in the decision-making process of the Corporate Debtor.

2.12 Heard the parties. Perused the documents on record.

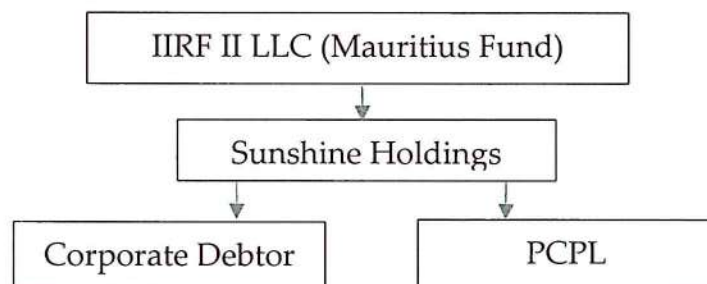
2.13 For a moment taking a closer look into the entities involved, it is observed that the Corporate Debtor and PCPL were held by two separate subsidiary companies of Investor India Realty Fund II LLC (Mauritius Fund)

(IIRF II) at the time of ICD Agreement i.e., during 2014. The structure elucidating the relationship between the companies is as follows,

c. In 2014 when the inter-corporate deposit agreement was entered into *inter alia* between the Corporate Debtor and PCPL, the structure was the following:



2.14 However, with effect from 10.11.2020 IIRF India Realty V Limited got amalgamated with Sunshine Holdings (Mauritius) Limited. As a result of which, the structure of Companies become as follows,



2.15 The contention of the Applicant simpliciter is that, it is not a related party to the Corporate Debtor as such the date to be reckoned to ascertain whether a Financial Creditor is a related party or not, is the date of transaction

and that the investments made are purely financial investments with a view to exit at a definite time after receiving a rate of return and is not made as a strategic investment.

2.16 In this context, it is relevant to extract Section 21(2) read with Section 5(24)(i) of the code which is as follows,

21. Committee of creditors. –

(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a [financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

.....
.....

5. Definitions. – In this Part, unless the context otherwise requires,

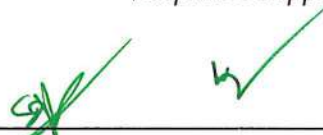
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(24) "related party", in relation to a corporate debtor, means-

.....
.....
.....

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(emphasis supplied)



2.17 From a meticulous reading of Section 5(24)(i) of the code as extracted above, it can be seen that a subsidiary of a holding Company to which the Corporate Debtor is a subsidiary is termed as a related party. From the facts and circumstances of the present case it is made out that Sunshine Holdings hold both the Corporate Debtor as well as the Applicant Company at the time of Commencement of CIRP. Thus, it is needless to say that the Applicant cannot be a member of the CoC, as the applicant prima facie is hit by virtue of Section 5(24)(i) of the code. Moreover, the provision under section 21 (2) of the code is also self-explanatory in nature, which bars those financial creditors related party of the corporate debtor, the right of representation, participation or voting in a meeting of the committee of creditors.

2.18 For the question as to from which date the IRP/RP is to reckon whether a Financial Creditor is a related party to the Corporate Debtor or not. It would be pertinent to extract Regulation 13 of the Insolvency & Bankruptcy Board of India (Resolution Process for Corporate Persons) Regulations, 2016 wherein it is mentioned that the IRP/RP shall verify the claim as on date of Commencement of CIRP. The same is as follows,

13. Verification of claims.

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt

of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

.....
.....

2.19 The Hon'ble Supreme Court of India in *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors.* (2021) 3 SCC 475 decided on February 01, 2021, has held as under,

1.4 Related Parties - Interpretation In Praesenti

82. An issue of interpretation in relation to the first proviso of Section 21(2) is whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt.

83 In *Arcelor Mittal India Private Limited vs. Satish Kumar Gupta (supra)*, the issue was whether ineligibility of the resolution applicant under Section 29- A(c) of the Code attached to an applicant at the date of commencement of the CIRP or at the time when the resolution plan is submitted by the resolution applicant. Speaking for this Court, Justice Rohinton F Nariman interpreted the pre-2018 amendment, framing of Section 29-A(c), in the following terms: "46. According to us, it is clear that the opening words of Section 29-A furnish a clue as to the time at which clause (c) is to operate. The opening words of Section 29-A state: "a person shall not be eligible to submit a resolution plan...". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset.

Further, the expression used is "has", which as Dr Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in clauses (d) and (g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words "at the time of submission of the resolution plan" is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in clause (c) of Section 29-A will attach."

84 Thus, facially, it would appear that the use of the simple present tense in the first proviso to Section 21(2) indicates that the disqualification applies in praesenti. Furthermore, this interpretation would also be supported by a reading of the first proviso to Section 21(2), in light of the definition of 'related party' under Section 5(24), which uses phrases such as 'is accustomed to act' or 'is associated' to define a related party in the present tense.

2.20 Therefore, we are of the considered view that the relationship between the parties at the present time should be taken into consideration to reckon the status of the Financial Creditor in light of the above Judgment.

2.21 For the reasons stated *supra* and also guided by the decision of the Hon'ble Supreme Court in the matter of *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors. (Supra)*, we are of the view that, the above application is not sustainable in law and is liable to be dismissed. We hold that the decision of the IRP/RP in this matter was correct.

2.22 Accordingly, **IA(IBC)/391(CHE)/2022 in IBA/653/2020 stands dismissed and disposed of.** No orders as to costs.

3. ORDER IN IA(IBC)/1381(CHE)/2022 In IBA/653/2020

IA(IBC)/1381(CHE)/2022 in IBA/653/2020 is an application filed by the Resolution Professional seeking reliefs as follows:

- a. *To condone the delay, given in the circumstances enumerated above. In the interest of the Corporate Debtor, in submission of the Resolution Plan;*
- b. *To approve the Resolution Plan filed by Successful Resolution Applicants i.e., M/s. Sunbeam Structural Private Limited which has been attached as Annexure 5.*
- c. *To direct that the Plan shall be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, and State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors other stakeholders involved in the Resolution Plan; and*
- d. *To pass such orders as this Hon'ble Tribunal may deem fit and necessary in the nature and circumstances of this case.*

3.1 The facts as elucidated in the application are that, M/s. G.K. Industrial Park Limited was admitted into CIRP vide order dated 13.01.2022 passed by this Adjudicating Authority by virtue of an application filed under Section 7 of the Code by M/s. Edelweiss Asset Reconstruction Company Limited. IA(IBC)1381(CHE)2022 filed by the Resolution Applicant under Section 30(6) of the Code is for approval of the Resolution Plan and other reliefs as extracted above. It is submitted that as per Section 12(1) of the Code, the CIRP process

is to be completed within a period of 180 days from the date of initiation of CIRP i.e. on or before 12.07.2022 in the instant matter. The Applicant submits that the CIRP period was extended by 90 days with exclusion of 5 days vide order dated 05.08.2022 by this Adjudicating Authority. Accordingly, 270 days of the CIRP period ends on 15.10.2022.

3.2 Not dwelling any further, on perusal of the documents filed along with the application including the Resolution Plan submitted by Mr. K.G. Muralidharan & Mrs. Annapoorni Muralidharan, Balance Sheet of the Corporate Debtor for the year ending 31.03.2022 and the MSME Certificate of the Corporate Debtor, it is seen that the plan proponents are the erstwhile directors/suspended directors of the Corporate Debtor, who are eligible under Section 29A of the Code to submit a Resolution Plan since the Corporate Debtor is an MSME. On mere perusal of the Udyam Registration Certificate issued by the Ministry of Micro, Small & Medium Enterprises it is observed that the date of the Udyam Registration is 18.04.2022. However, during the course of argument when the Ld. Resolution Professional was sought to explain about the procurement of Udyam Registration Certificate, it was brought to the knowledge of this Adjudicating Authority that the certificate was not applied/obtained by the Resolution Professional and the same was applied/obtained by the promoters of the Corporate Debtor and was subsequently ratified by the CoC and the RP.

3.3 we may state that it is the duty and the responsibility of the Interim Resolution Profession or the Resolution Professional to act on behalf of the Corporate Debtor post commencement of CIRP. In Company Appeal (AT) (INS) No.07 of 2021 in the matter of *Mr. S. Irudhayarajan vs. Mr. G.V. Ravikumar* it was held by the Hon'ble NCLAT as under,

"in short, without the Respondent/Liquidator taking necessary steps, no such application to secure a MSME Certificate was to be filed and suffice it for this "Tribunal" to point out that in the instant case, the proponents of the scheme obtaining a MSME Registration Certificate on 03.01.2020 without the knowledge of the Liquidator and either ignoring or brushing aside him are clearly unsustainable in the eye of law."

3.4 Thus, from the act of brushing aside the Resolution Professional and the promoter having obtained the MSME Registration Certificate, this Adjudicating Authority cannot proceed further as there can be no estoppel against the law laid. It is the case where the provision requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner, it has no existence in the eye of law at all. It is therefore clear that the act of the suspended directors/plan proponent cannot be entertained in the eye of law at all.

3.5 A perusal of the balance sheet of the corporate debtor for the year ending 31.03.2020, 31.03.2021 & 31.03.2022 the particulars under Long term

loans and advances show that the Corporate Debtor has advanced Rs. 10,05,24,573/- to Mr. K.G Muralidharan, one of the directors for purchase of land and Rs. 23,48,000/- for purchase of land to GK Sons Engineering Private Limited, in which the director is interested. The advance is neither returned nor the land was purchased in the name of the Corporate Debtor. The independent Auditor vide his Report annexed along with the balance sheet for the year ending 31.03.2020 dated 05.11.2021 has observed as follows,

"The Company has advanced Rs. 10,05,24,573/- to Sri. K.G Muralidharan, one of the directors for purchase of land and has also advanced Rs. 23,48,000/- for purchase of land to GK Sons Engineering Private Limited, in which the director is interested. The advance has neither been returned nor the land purchased in the name of the Company. In our opinion advance is prejudicial to the interest of the Company".

3.6 The Notes to Accounts for the year ending 31.03.2020 showing related party transaction and the notes to balance sheet (long term advances & loans//) as on 31.03.2022 are extracted below,

17. Related party transactions

Nature of Relationship	Name of the Party	Nature of Transaction	Transaction During the Year	Closing Balance
Enterprise in which key management personnel exercise significant influence	Trichirappalli engineering and technology cluster	Rental expenses	3,54,172	2,84,105
Enterprise in which key management personnel exercise significant influence	Trichirappalli engineering and technology cluster	Lease Rental Income	1,65,000	2,84,105
Enterprise in which key management personnel exercise significant influence	GKsons engineering private limited	Advances given purchase of land	Nil	23,48,000
Key Management personnel	K G Muralidharan	Advances given purchase of land	Nil	10,05,24,573
Fellow subsidiary	Premier chennai properties limited	Unsecured Loan	Nil	15,00,00,000
Fellow subsidiary	Premier chennai properties limited	Interest Payable on Loan	Nil	7,76,37,997

Note 12 Long Term Loans & Advances	As on 31 st March 2022	As on 31 st March 202
Advances for purchase of Land	100.516.18	100.524.57
Director	2.348.00	2.348.00
Company in which director is interested	407.58	406.86

(Rs.in '000)

3.7 Upon noticing the above transaction, and on verification of Form-H, it is seen that 'No Application' for Fraudulent Transaction under Section 66 of Code was filed by the Resolution professional. Surprisingly, the RP has recoded "None Observed" under the Regulation 39 (2) Compliance of Resolution plan column of Form-H.

For ready reference Regulation 39 (2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is extracted hereunder,

39. Approval of resolution plan.

(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -

- (a) preferential transactions under section 43;*
- (b) undervalued transactions under section 45;*
- (c) extortionate credit transactions under section 50; and*
- (d) fraudulent transactions under section 66,*

and the orders, if any, of the adjudicating authority in respect of such transactions

3.8 It is a settled law that the decision "whether a particular rule/provision is mandatory or directory" is not a mechanical exercise. It requires contextual

reading of the provision in the statute. The primary consideration is the relation of that provision to the general object intended to be secured by the legislation. i.e. the intention of the legislature/regulator. Treating Regulation 39(2) of the CIRP Regulations as directory would defeat the intent behind the said regulation.

3.9 During the course of hearing, when the Resolution Professional was sought to respond to the above referred observations, the Resolution professional graciously responded that the said transaction is beyond the look back period. *Ad rem* we would like to place our reliance upon the order passed by the Hon'ble NCLAT, Principal Bench – New Delhi in the matter of *Amardeep Singh Bhatia Vs. Abhishek Nagori Liquidator for Asian Natural Resources (India) Ltd.* delivered on 28.11.2022 where it has held as under,

“11. Now we address to ‘Fraudulent Trading’ or ‘Wrongful Trading’ as provided for under Section 66 of the Code.

For ready reference, the said Section is being reproduced as hereunder:

“66. Fraudulent trading or wrongful trading. –

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if- (a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and (b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.]

Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

12. There is no look back period specified under Section 66, which refers to 'Fraudulent Transactions'. If the Liquidator finds that there is a fraud committed by the 'Corporate Debtor' at any time, he can approach the Adjudicating Authority and file an Application seeking necessary directions.

3.10 Thus, from the above it is manifest that there is no look back period for filing an application under Section 66 of the Code and the RP has failed to comply with the requirements as stipulated by the regulator. The act of the Resolution Professional brushing aside his powers & duties is strictly viewed by this Adjudicating Authority.

3.11 Hence, for the aforesaid reasons we are of the considered view that the Resolution Professional of GK Industrial Park Private Limited has failed to exercise his duties as envisaged under the code read with attended regulations in respect of the Corporate Debtor and hence, is required to be replaced. This Adjudicating Authority relies upon the order passed by the Hon'ble NCLAT in *Company Appeal (AT) (CH) (Ins.) No. 269/2022 ((2022) ibclaw.in 1067 NCLAT)*, where it has held as under,

"48. Issue No. (III) Whether the 'Adjudicating Authority' can remove the 'Liquidator' ?

- To be able to understand Whether the adjudicating authority can remove a Liquidator, we need to understand where resides the power to remove a Liquidator.*
- I & B Code, 2016 does not explicitly state the grounds for removing the liquidator. In the absence of specific provisions, we may resort to Section 33 & 34 of the I & B Code, 2016 and Section 276 of the Companies Act, 2013, which provides for the removal and replacement of liquidators on various grounds.*
- Reference can be made to Section 16 of the General Clauses Act, 1897, which states as follows:*

"16. Power to appoint to include power to suspend or dismiss. Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power."

[emphasis supplied]

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- Further, the reference can also be made to the judgment in the case of *State of Tamil Nadu and Ors. vs. M.N. Sundararajan* (1980) 4 SCC 592 wherein it has been stated as under:

"9. The question is, whether the expression "appointments" used in this Government Order, dated June 13, 1973, will include 'termination' of service or 'compulsory retirement' from service, also. It is a fundamental principle of interpretation that unless a contrary intention appears from the context, a power to appoint should include a power to terminate the appointment. including termination of the person appointed by his compulsorily retirement in accordance with the terms and conditions of his service. This fundamental principle underlies Section 16 of the General Clauses Act, In other words, the power to terminate the appointment by compulsory retirement or otherwise is a necessary adjunct of the power of appointment and is exercised as an incident to or consequences of the power" In the case of *Heckett Engineering Co. vs. Their Workmen* (1977) 4 SCC 377 it has been stated

"14. We may also in this connection recall the provisions of Section 16 of the General Clauses Act, 1897, Whether or not the section in terms applies to the aforesaid Standing Orders of the Company which are certified under Section 5(3) of the Industrial Employment Standing Order Act, 1946 may be a moot point but the general doctrine underlying the section can well be made applicable to a case of the present nature for it is now firmly established that the power to terminate service is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power (See *Lekhray Satramdas*

Lalvani v Deputy Custodian-cum-Managing Officer and Ors. MANU/SC/0010/1965 [1966]1SCR120 and Kutoor Vengayil Rayarappan Nayanar v. Kutoor Vengayil Madhavi Amma and Ors. [1949] F.C.R. 66. In Kutoor Vengayil Rayarappan Nayanar v. Kutoor Vengayil Valia Madhavi Amma and Ors. (supra) Mahajan, J. (as he then was) speaking for the Federal Court approved the statement of Woodroffe On Receivers, Fourth Edition, that the power to terminate flows naturally and as a necessary sequence from the power to create. In other words, it is a necessary adjunct of the power of appointment and is exercised as an incident to, or consequence of that power; the authority to call such officer into being necessarily implies the authority to terminate his functions. "

- This 'Appellate Tribunal' also notes that in recent judgement passed by Principal Bench, NCLAT vide order dated 13.10.2022 in Company Appeal (AT) (Ins.) No. 1234 of 2022 as held:

"The Liquidator does not have any personal right to continue in the Liquidation Process and the reasons which have been noted in the order are sufficient to exercise even the inherent power by NCLT to replace the Liquidator. It is not a fit case to interfere in exercise of our Appellate Jurisdiction."

[emphasis supplied]

This clearly establishes that, no Liquidator, has any 'personal rights', to continue in 'Liquidation' and the 'Adjudicating Authority', can order for 'Replacement' of the 'Liquidator', recording sufficient reasons, as per 'Law'.

Further, since the 'Adjudicating Authority', is vested with the power, to 'appoint a Liquidator', under Section 33 and 34 of the I & B Code, 2016. It is by the virtue of the Section 16 of the General Clauses Act, 1897, that an 'Adjudicating Authority', who also, has the power, to remove the 'Liquidator'.


Combined reading of above Case Laws and Provisions along with Section 33 and Section 34 of the I & B Code, 2016, would make it clear that the 'Adjudicating Authority', which had the 'powers', to appoint the 'Liquidator', will also have the powers, to remove the 'Liquidator' for reasons, the 'Adjudicating Authority', may find fit, just, valid and proper."

For ready reference of Section 34 of I& B Code, 2016

Section 34. Appointment of liquidator and fee to be paid. - (1) Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under [Chapter II [or for the pre-packaged insolvency resolution process under Chapter III-A] shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form,] shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).

(2) On the appointment of a liquidator under this section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

(3) The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.



(4) The Adjudicating Authority shall by order replace the resolution professional, if-

(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded [in writing; or]

[(c) the resolution professional fails to submit written consent under sub-section (1).]

(5) For the purposes of [clauses (a) and (c)] of sub-section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

(6) The Board shall propose the name of another insolvency professional 6 [along with written consent from the insolvency professional in the specified form] within ten days of the direction issued by the Adjudicating Authority under sub-section (5).

(7) The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

(8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

For ready reference of Section 30(2) of I& B Code, 2016

30. Submission of resolution plan. –

(1) A resolution applicant may submit a resolution plan [along with an affidavit stating that he is eligible under section 29A] to the

resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [payment] of other debts of the corporate debtor;

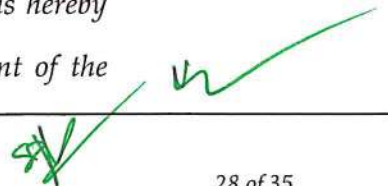
[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the



Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force

(f) conforms to such other requirements as may be specified by the Board. [Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given

3.12 Accordingly, taking into consideration the facts and circumstances of the instant case and the judicial ruling as referred above we hereby appoint **Mr. SUDHIR GS** (Reg. No. IBBI/IPA-001/IP-P-02744/2022-2023/14183) (sudhircaip@gmail.com) from the latest IP Panel list provided by IBBI, for the

period from January 2023 to June 2023 as the Resolution Professional in respect of the Corporate Debtor.

3.13 The present Resolution Professional is directed to handover all the documents, properties, bank accounts etc., relating to the Corporate Debtor to the newly appointed Resolution Professional within 5 working days from the date of this order. Accordingly, the Present Resolution Professional Shri. Sachin Shrinivasa Bhattad is discharged from his duties.

3.14 In the above said circumstances, we set the clock back to Form-G Stage by extending CIRP period by a further period of 90 days from the date of this order, with a direction to the incoming Resolution Professional to convene the meeting of Committee of Creditors and place this order before the CoC to decide on the next phase of the Corporate Debtor within a period of 7 days from the date of this order.

3.15 The incoming Resolution Professional is directed to submit the output of the meeting before the Adjudicating Authority within 2 days from the date of the meeting and accordingly file necessary application thereafter.

3.16 The incoming Resolution Professional is directed to file application under appropriate sections of IBC, 2016 for any such



Preferential/undervalued, Fraudulent or Wrongful trading upon his detailed analysis.

3.17 The registry of the Tribunal is directed to forward a copy of this order to the IBBI & IIPPI (md.iiipi@icai.in), for necessary actions.

3.18 Accordingly, *IA(IBC)/1381(CHE)/2022 in IBA/653/2020* is dismissed.
No orders as to costs.

4. ORDER IN IA(IBC)/1453(CHE)/2022 In IBA/653/2020

IA(IBC)/1453(CHE)/2022 in IBA/653/2020 is an application filed by M/s. Premier Chennai Properties Limited in the capacity of Unsuccessful Resolution Applicant whose resolution plan has been rejected seeking reliefs as follows:

Interim Reliefs

- (a) *Stay the operation of the Resolution and/or Minutes vide which the Resolution Plan of Mr. K.G. Muralidharan and Mrs. Annapoorni Muralidharan, the Promoters of the Corporate Debtor has been approved by Respondent No.2 during the pendency of the present Application; and*
- (b) *Direct the 1st Respondent – Resolution Professional to place on record all the details and relevant documents pertaining to the registration of the Corporate Debtor as a Micro, Small and Medium Enterprise.*

Final Reliefs

- (a) *Allow the present Application and quash and/or set aside the Resolution and/or minutes passed by Respondent No. 2(in its*

capacity as the sole member of the COC) vide which the Resolution Plan of Mr. K.G. Muralidharan and Mrs. Annapoorni Muralidharan, the Promoters of the Corporate Debtor has been approved by Respondent No.2 (in its capacity as the sole member of the COC), and

- (b) *Pass such other order/s and or direction/s as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.*

4.1 The Applicant has submitted that the SRA/Suspended Director had defrauded the Corporate Debtor, and that the SRA/Suspended Director in collusion with the Resolution Professional has made up for the approval of the Resolution plan. It is further submitted that the MSME Certificate is obtained by the SRA/Suspended Director himself, after the commencement of CIRP which is prohibited by law. It is also submitted that as on date of initiation of CIRP the directors stood disqualified as per section 164(2) of Companies Act, 2013 read with attended rules, and thereof, the SRA shall become ineligible to submit Resolution Plan by virtue of Section 29A(e) of the code.

4.2 The Resolution Professional has filed para wise reply. At the outset, it is submitted that the Applicant has failed to establish that the Resolution Plan approved by the CoC is non-complaint with the requirements of the code. Thus, in respect of the objections raised by the Applicant, it is required to be forgone and even under the eye of law the Applicant is estopped from raising such objections.



4.3 Heard the parties. Perused the documents on record.

4.4 The sum and substances of the above raised objections have been taken care of *supra* vide the order in IA(IBC)/1381(CHE)/2022.

4.5 It is also pertinent to refer to the order passed by the Hon'ble Supreme Court of India in the matter of *Arcelormittal India Private Limited Vs Satish Kumar Gupta & Ors (2019) 2 SCC 1*. While dealing with the objections raised by the unsuccessful Resolution Applicant, in para No. 76 to 79 it was held as follows;

76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.

77. However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(i), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29A(c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29A(c). A conspectus of all these provisions would show that the Resolution Professional is

required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law. Regulation 36A of the CIRP Regulations specifically provides as follows:-

"(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-

(a) the provisions of clause (h) of sub-section (2) of section 25; (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest. (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8). (10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. (11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list. (12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."

78. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by

him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

79. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

(emphasis supplied)

4.6 It is clear from the aforesaid judgment that an un-successful Resolution Applicant has no vested interest to challenge the Resolution Plan which has been approved by the COC.

4.7 Following the decision of the Hon'ble Supreme Court and in view of the order passed in IA(IBC)/1381(CHE)/2022 *supra*, the Application IA(IBC)/1453(CHE)/2022 in IBA/653/2020 stands **dismissed**. No orders as to costs.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

SANJIV JAIN
MEMBER (JUDICIAL)