NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.129 & 130 of 2023

[Arising out of Order dated 13.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in I.A. No. 3398 of 2022 and I.A. 3508 of 2022 in C.P. (I.B.) No. 2205/MB/C-I/ 2019 passed by the National Company Law Tribunal, Mumbai Bench]

IN THE MATTER OF:

State Bank of India
Stressed Assets Management, Branch-I,
"The Arcade", 2nd Floor, World Trade Center,
Cuffe Parade, Colaba, Mumbai- 400 045.

JC Flowers Asset Reconstruction Private Limited,
Registered office at 12th Floor,
Crompton Greaves House,
Dr. Annie Besant Road,
Worli, Mumbai,
Maharashtra -400 030

Punjab National Bank
Zonal Sastra Centre
Mumbai, Maharashtra- 400099. **...Appellant**

Vs.

The Consortium of Mr. Murari Lal Jalan
And Mr. Florian Fritsch.
Successful Resolution Applicant of Jet Airways Limited
Having its office at:
16th Floor, Tower II, Indiabulls Finance Centre,
S.B. Marg, Elphinstone (W), Mumbai,
Maharashtra – 400013.

Mr. Ashish Chhawchharia
Authorised Representative of Monitoring
Committee of Jet Airways (India), Limited,
Having office at Global One,
Jet Airways, 3rd Floor, 252 LBS Marg, Kurla
West Mumbai – 400070.

...Respondents

Cont'd.../

Present:

For Appellant: **Mr. Tushar Mehta, SG and Mr. N. Venkatraman, ASG, with Mr. Sanjay Kapur, Mr. Devesh Dubey, Mr. Arjun Bhatia, Ms. Isha Virmani, Advocates for SBI.**

For Respondents: **Mr. Krishnendu Datta & Mr. Abhijeet Sinha, Sr. Advocates, Ms. Arveena Sharma, Ms. Shruti Pandey, Ms. Pooja Mahajan, Mr. Aashish Vats, Mr. Rajat Sinha, Mr. Saurabh Bahchawat, Advocates for R-1.**

Mr. Raghav Chadha, Advocate for R-2.

Mr. Gaurav H. Sethi, Mr. Deeptanshu Chandra, Mr. Rahul Pawar, Mr. Anmol J., Mr. Anant Bajpai, Advocates for Bhartiya Kamgar Mazdoor Sangh.

Mr. Pawan Shree Agrawal, Mr. Rishabh Chauhan, for the Applicant in IA No. 2887-2888 of 2023 and 1163-1164.

Mr. Vikas Mehta and Mr. Mayan Prasad, Ms. Anshula Grover, Advocates for JAMEWA.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeals have been filed against the order dated 13.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Court-1, Mumbai Bench in I.A. No.3398 of 2022 (Implementation Application) and I.A. No.3508 of 2022 (Exclusion Application). The Adjudicating Authority by the impugned order has allowed both the applications. Aggrieved by which order these Appeals have been filed by the Appellants – State Bank of India, JC Flowers Asset Reconstruction Private Limited and Punjab National Bank, Lenders in the Monitoring Committee (hereinafter referred to as 'MC Lenders')

challenging the order dated 13.01.2023. The Appellant's raises various issues pertaining to implementation of Resolution Plan of Jet Airways Limited, the first aviation company which has been resolved in this country under the Insolvency and Bankruptcy Code, 2016. The brief facts regarding approval of Resolution Plan of Jet Airways Limited and subsequent events and facts giving rise to this appeal need to be first noted for deciding these appeals. Subsequent to impugned order dated 13.01.2023 passed by the Adjudicating Authority a series of litigation was initiated by Appellants which also need to be noticed in detail.

Background facts leading to approval of Resolution Plan of Jet Airways Ltd.

2. On an application filed by the State Bank of India under Section 7 of the I&B Code, CIRP was initiated against the Corporate Debtor of Jet Airways Ltd. by order dated 20.06.2019. Jet Airways Ltd. which was one of the premier airlines in country had stopped its operations since, April, 2019. In pursuance of request for Resolution Plan, Resolution Plan was submitted by the Respondent No.1 - Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch (hereinafter referred to as 'Successful Resolution Applicant' in short 'SRA'). Based on the assessment of the commercial feasibility and viability of the resolution plan, including the future cash flow and revenue projections, commercial proposal and Techno-Economic Evaluation, after several rounds of negotiations, the CoC approved the Resolution Plan dated 12.09.2020 along with the first addendum dated 02.10.2020 with a majority of 99.22% vote share. On an application filed by the Resolution Professional, the

Adjudicating Authority vide its order dated 22.06.2021 approved the Resolution Plan. Several Appeals were filed challenging order dated 22.06.2021 in this Tribunal. This Tribunal vide order dated 21.10.2022 approved the Resolution Plan. Against the approval of Resolution Plan passed by order dated 21.10.2022, Appeals were filed in the Hon'ble Supreme Court which too were dismissed on 30.01.2023.

3. As per the Resolution Plan, the effective date was contemplated as 90 days from the Plan approval date with liberty to the SRA to approach the Adjudicating Authority for exclusion of time. On applications filed by the SRA, the Adjudicating Authority granted extension and exclusion. Under last exclusion granted on 11.04.2022 effective date was extended upto 25.05.2022. As per Clause 7.6.1 of the Resolution Plan the obligation of the SRA to recommence operations as an aviation company, being the business proposed to be acquired by the SRA, was subject to the fulfilment of Sub-clause (a), (b), (c), (d) and (e) of the clause.

4. On 20.05.2022, the DG, Civil Aviation re-issued the Air Operation Certificate (AOC) for the Corporate Debtor certifying that the Corporate Debtor was authorized to perform commercial air operations in India. After receipt of AOC on 20.05.2022, the SRA sent an email to the Resolution Professional informing that the SRA has fulfilled all condition precedents as required under the Resolution Plan. On 21.05.2022, the SRA filed upto date Status Report with the Adjudicating Authority intimating the Adjudicating Authority about fulfilment of condition precedent as per the approved Resolution Plan and 20.05.2022 being the Effective Date. Copy of the Status Report was also

shared with the MC Lenders. On 21.05.2022, an email was sent to MC Lenders confirming the fulfilment of all condition precedents under the Resolution Plan, which paved way for implementation of approved Resolution Plan. The Resolution Professional informed the SRA on 20.05.2022 that the Monitoring Committee is examining documents submitted by the SRA to ascertain that all condition precedents under the approved Resolution Plan has been fulfilled or not.

5. On 27.05.2022 in compliance to Clause 6.4.12 of the plan, the SRA submitted Performance Bank Guarantee for an amount of Rs.87.50 Crore to the MC Lenders completing the deposit of INR 150 crore towards Performance Bank Guarantee (PBG). Several letters were written by the SRA to MC Lenders from time to time informing about achieving of the effective date and asking the Monitoring Committee to take steps to enable implementation of Resolution Plan including allowing the SRA to bring first tranche of the funds in to the Corporate Debtor. In various meetings of the Monitoring Committee issue of achievement of effective date was deliberated. In Joint Lenders Meeting also the lenders deliberated over fulfilment of condition precedent by SRA. In the Joint Lenders Meeting held on 29.09.2022 a decision was taken by all MC Lenders that the SRA may file an application to the Adjudicating Authority towards seeking necessary direction regarding fulfilment of the condition precedent. In Joint Lender Meeting, it was stated on behalf of the MC Lenders that they will fully support the implementation of the Resolution Plan.

6. In accordance with the decision taken in the Joint Lenders Meeting dated 29.09.2022, SRA in October, 2022 filed the Implementation Application seeking direction to Respondents to allow the SRA to infuse the funds into the Corporate Debtor and take control and management of the Corporate Debtor and execute the necessary documents in this regard so that the Resolution Plan can be implemented, which application was numbered as I.A. No.3398 of 2022. Another application I.A. No.3508 of 2022 was filed by the SRA praying for exclusion of period from 20.05.2022 till the date Implementation Application is decided from 180 days for infusion of the first tranche of funds and achievement of the closing date. Both the applications filed by the SRA were opposed by the MC Lenders. MC Lenders stated before the Adjudicating Authority that apart from condition precedent as mentioned in Clause (a) and (e), no other condition precedent has been achieved by the SRA. It was stated on behalf of the MC Lenders that although the DGCA has issued the Air Operation Certificate on 20.05.2022 but remaining condition precedents are yet to be fulfilled. It was further pleaded that mere acceptance of bank guarantee on 27.05.2022 does not mean that the MC Lenders has accepted that the condition precedents have been fulfilled. The MC Lenders with intend to require the SRA to give an undertaking, a draft undertaking was shared with the SRA by the MC Lenders. MC Lenders opposed the application filed by the SRA contending that effective date is not achieved since condition precedents are not fulfilled by the SRA except the Air Operation Certificate and demerger of employees.

7. The Adjudicating Authority heard the elaborate submissions made by the SRA, MC Lenders and by order dated 13.01.2023 held that the SRA has completed all condition precedents provided in Clause 7.6.1 of the Resolution Plan. Following was held in I.A. No.3398 of 2023:

> *"126. In the background of above facts and for the reasons stated above we hold that in addition to CPs (I) & (V) which are admittedly complied, remaining CPs (II), (III), (IV) are also duly complied.*
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> *127. Application bearing **IA No. 3398 of 2022** is thus **disposed of** as Allowed in terms of prayer clause (a) thereof."*

8. On I.A. No.3508 of 2023, the Adjudicating Authority granted exclusion of period for 180 days till 16.11.2022 for taking control of the Corporate Debtor. Following was held in Para 128:

> *"128. Upon hearing the submission of the counsel for the Applicant in IA 3508 of 2022 and going through the pleadings and the circumstances involved in the applications in totality, we are of the view that this is a fit case for granting exclusion, in the interests of justice and in achieving the primary objective of maximization of assets and resolution of Corporate Debtor. We grant exclusion of period for 180 days i.e. till 16.11.2022 for taking control of the Corporate Debtor."*

9. Aggrieved by the order dated 13.01.2023 passed in I.A. No. 3398 of 2023 (Implementation Application) and I.A. No.3508 of 2023 (Exclusion Application) these two appeals have been filed. In the Appeals, the Appellants have raised various grounds to challenge the order dated 13.01.2023. In the Appeals following reliefs have been sought by the Appellant:

> *"(a) Set aside the Impugned Order dated January 13, 2023 passed by the Hon'ble National Company Law Tribunal, Mumbai in I.A No. 3358 of 2022 and I.A. No.3508 of 2022 filed in Company Petition (I.B.) No. 2205 of 2019; and*
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> *(b) Hold and/or clarify that the Conditions Precedent as contained in Clause 7.6.1 of the Resolution Plan have not been met and remand the Resolution Plan to the CoC for fresh consideration/approval, in light of the non-fulfillment of the Conditions Precedent thereby altering the commercial wisdom basis which the CoC had originally approved the Resolution Plan; and*
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> *(c) Pass such other or further order(s) or direction(s) as this Hon'ble Appellate Tribunal may deem fit and proper in light of the above mentioned facts and circumstances of the present case."*

10. The Appeal was heard by this Tribunal on 03.03.2023 and after hearing learned counsel for the Appellant and learned counsel for the SRA passing of interim order was declined. In Para 15 and 16 of the order following was directed:

> *"15. The steps regarding the implementation of the plan has to be taken by the SRA which need to be overseen and cooperated by the Monitoring Committee. Learned Sr. Counsel appearing for the SRA has submitted that SRA shall discharge all its obligations under the Resolution Plan for successful implementation of the resolution plan. In view of the above, we see no reason to pass any Interim Order as on date reserving the right to the parties to pray for any interim direction after pleadings are complete.*
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> *16. Let Reply-Affidavits be filed within two weeks. Rejoinder may be filed within two weeks, thereafter. List this Appeal "For Admission (After Notice)" on 11th April, 2023."*

11. The Appellant aggrieved by the order dated 03.03.2023 passed by this Tribunal in these Appeals filed Civil Appeal No.3736-3737 of 2023 in the Hon'ble Supreme Court. In the Civil Appeals no interim order was passed by the Hon'ble Supreme Court.

12. In Company Appeal (AT) (Ins) No.129 & 130 of 2023, I.A. No.1975 of 2023 was filed by the Appellants and I.A. No. 2028-2029 of 2023 and I.A. No.2159-2160 was filed by the SRA. All three I.As. came to be heard by this Tribunal and by order dated 26.05.2023 this Tribunal allowed I.A. No.1975 of 2023. In Para 13 of the order, I.A. No.1975 of 2023 was allowed in following manner:

> *"13. The IA No.1975 of 2023 filed by the MC Lenders, seeks permission for appointment of Board of Directors of the Corporate Debtor. The Application as noted above is not opposed by the SRA and it is stated that the appointment of Board of Directors to the Corporate Debtor is the step, which is essential for taking various regulatory actions as part of general corporate compliances under law. We allow the IA No.1975 of 2023 in terms of prayer (a)."*

13. I.A. Nos.2028-2029 of 2023 were filed by the SRA praying for exclusion of time from 16.11.2022 till the Company Appeal (AT) (Insolvency) Nos. 129 & 130 of 2023 is decided. The said I.A. was allowed by granting exclusion of time from 16.11.2022 till 03.03.2023 on which date interim order was declined. In Para 17 following order was passed:

> *"17. After considering the facts and sequence of events in the present case, we are of the view that SRA is entitled for exclusion of period from 16.11.2022 till 03.03.2023, when this Tribunal in the present Appeal passed an order declining the interim relief as prayed by the MC Lenders. IA Nos.2028-2029 is thus allowed, excluding the period from 16.11.2022 till 03.03.2023. As undertaken by the SRA, the IA No.1863 of 2023 pending before the Adjudicating Authority shall be withdrawn. IA No.2028-2029 of 2023 is allowed accordingly."*

14. In I.A. No.2159-2160 of 2023, this Tribunal directed the MC Lenders not to invoke the Performance Bank Guarantee and for invocation the

MC Lenders may take leave of the Adjudicating Authority. In I.A. No.2159-2160 of 2023 following order was passed in Para 20:

> *"20. In view of the aforesaid, we direct that MC Lenders shall not invoke the Performance Bank Guarantee in the facts of the present case as on date, and for invocation, if any, MC Lenders may take leave of the Adjudicating Authority. The IA Nos.2159-2160 is disposed of accordingly."*

15. Aggrieved by the order dated 26.05.2023 passed by this Tribunal, Appellants have filed Civil Appeal Nos.4131-4134 of 2023 in the Hon'ble Supreme Court in which Appeals no interim order was passed by the Hon'ble Supreme Court.

16. During course of hearing of these appeals an affidavit was filed by the Appellants on 16.08.2023. The SRA filed two applications I.A. No.3801-3802 of 2023 in which I.A. several prayers were made. In the said I.A. an order was passed by this Tribunal on 28.08.2023. In Para 10 of the order prayers in the I.A. were noticed which are to the following effect:

> *"10. I.A. No. 3801-3802 of 2023 has been filed by the SRA praying for following reliefs:*
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> > *"It is, therefore, most respectfully prayed that this Hon'ble Appellate Tribunal may be pleased to:*
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> > *(a) Direct the MC Lenders to adjust or otherwise apportion the PBG of INR 150 Crores as per the terms of the Resolution Plan towards the part payment of the first tranche under the Resolution Plan;*
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> > *(b) Allow the Successful RA to infuse INR 100 Crores as share application money in the*

designated bank account of the Corporate Debtor on or by 31 August 2023;

(c) *Allow the Successful RA to infuse the remaining sum of INR 100 Crores, as share application money in the designated bank account of the Corporate Debtor on or before 30 September 2023;*

(d) *Pass necessary, specific and time bound directions to the MC Lenders, the Corporate Debtor, the concerned registrar of companies, the relevant stock exchanges, Ministry of Corporate Affairs, Government of India and all concerned government/ statutory authorities and departments to complete all statutory compliances and necessary steps including the issuance of new equity shares to the Successful RA as per the Resolution Plan by 15 October 2023;*

(e) *Pass necessary directions that in case new equity shares of the Corporate Debtor are not issued to the Successful RA as per the Resolution Plan against for INR 350 Crores latest by 15 October 2023, direct the MC Lenders and the Corporate Debtor be directed to, jointly or severally, forthwith refund all amounts deposited/ infused/ invested by the Successful RA in the Corporate Debtor until such date without any delay, protest, demur, cavil, deductions, or claims within 24 hours from 15 October 2023;*

(f) *Pass necessary directions to the effect that the amounts deposited by the Successful RA with the Corporate Debtor until 30 September 2023 including the upfront amounts lie in the designated share application account of the Corporate Debtor and is not be disbursed/ utilized or otherwise apportioned by the Corporate Debtor or the MC Lenders for any purposes other than implementation of the Resolution Plan and that to only after allotment of shares of the Corporate Debtor to the Successful RA or refunded to the Successful RA in the manner stated above;*

> *(g) Pass necessary directions to the effect that in case the PF/ Gratuity Application is not allowed, the Resolution Plan cannot be implemented under Section 30 (2) (e) and in such event direct the MC Lenders and the Corporate Debtor to jointly or severally, forthwith refund all amounts deposited/ infused/ invested by the Successful RA in the Corporate Debtor until such date including share application money of INR 200 Crores and PBG amounts of INR 150 Crores without any delay, protest, demur, cavil, deductions, or claims within 24 hours from 15 October 2023;*
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> *(h) pass any other such order(s) as this Hon'ble Appellate Authority may deem fit and proper in the facts and circumstances of this case."*

17. With regard to SRA's prayer for extension of 30 days' time for deposit of Rs.100 Crore, no objection was raised. The SRA was asked to deposit Rs.100 Crore by 31.08.2023 and another Rs.100 Crore by 30.09.2023. It was contended by the Appellants that the SRA has to deposit further Rs.150 Crores to complete the first tranche payment of Rs.350 Crores. This Tribunal heard the parties and passed order dated 28.08.2023 allowing prayer (a) in the application for directing the Appellants to adjust the Performance Bank Guarantee of Rs.150 Crores as per the terms of the Resolution Plan towards the part payment of the first tranche under the Resolution Plan. Against order dated 28.08.2023 passed by this Tribunal deciding I.A. No.3801-3802 of 2023, Appellants filed Civil Appeal No.6427-6428 of 2023 before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its order dated 18.01.2024 disposed of all the Civil Appeals No. 3736-3737 of 2023, Civil Appeal No. 4131-4134 of 2023 and Civil Appeal No. 6427-6428 of 2023. The order passed by this Tribunal dated 28.08.2023 was modified in part. Hon'ble Supreme Court

in its order dated 18.01.2024 noticed that Appeals against order dated 13.01.2023 are pending for consideration before NCLAT. The Hon'ble Supreme Court took the view that as per SBI Affidavit dated 16.08.2023, the Lenders were not to contest the issues pertaining to the grant or exclusion of time in terms of the order s passed by the NCLT on 13.01.2023 and 26.05.2023 as well as on compliance of the conditions precedent, in event the SRA infused an amount of Rs.350 crores. The Hon'ble Supreme Court took the view that order of this Tribunal dated 28.08.2023 permitting adjustment of Performance Bank Guarantee was not as per terms envisaged in Affidavit dated 16.08.223. Hon'ble Supreme Court in Paras 25, 26, 27 and 28 issued following directions:

> *"25. The lenders have argued in the appeals that there has been a failure on the part of the SRA to comply with the conditions precedent. If the SRA were to comply with the terms as envisaged in SBI's affidavit dated 16 August 2023, evidently issues pertaining to compliance with the conditions precedent were not to be pressed thereafter. In order to furnish this SRA a final opportunity to comply and consistent with the above position, we issue the following directions:*
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> *(i) The SRA shall peremptorily on or before 31 January 2024, deposit an amount of Rs.150 crores into the designated account of SBI, failing which the consequences under the Resolution Plan shall follow;*
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> *(ii) The PBG of Rs.150 crores shall continue to remain in operation and effect, pending the final disposal*

of the appeal before NCLAT, and shall abide by the final outcome of the appeal and the directions that may be issued by NCLAT; and

(iii) Whether or not the SRA has been compliant with all the conditions of the Resolution Plan as well as of the conditions set out in paragraph 8 of the affidavit dated 16 August 2023 shall be decided by the NCLAT in the pending appeal.

26. The order dated 28 August 2023 of the NCLAT is modified in part in terms of the above directions and, hence, the permission which was granted to the SRA to adjust the last tranche of Rs.150 crores against the PBG shall stand substituted by the above directions.

27. The NCLAT is requested to endeavour an expeditious disposal of the appeal by the end of March 2024.

28. The appeals are accordingly disposed of."

18. After aforesaid order of the Hon'ble Supreme Court dated 18.01.2024, the SRA could not deposit amount of Rs.150 Crores on or before 31.01.2024 as permitted by the Hon'ble Supreme Court by its order dated 18.01.2024. The SRA having not infused the amount of Rs.150 Crores as permitted by the Hon'ble Supreme Court, the SRA being not entitle for the offer given by the Appellants dated 16.08.2023, these Appeals have to be heard on merit and decided in accordance with law.

19. We have heard learned counsel for the parties and reserved judgment in the Appeals on 22.02.2024 after completion of hearing. Learned counsel for both the parties have submitted their written submissions.

20. We have heard Shri N. Venkatraman, learned ASG for the Appellants. Shri Tushar Mehta, learned Solicitor General has also made submissions in support of the Appeals. We have heard Shri Krishnendu Datta, learned senior counsel and Shri Abhijeet Sinha, learned senior counsel for the Successful Resolution Applicant (SRA). Shri Raghav Chadha, learned counsel has appeared for Respondent No.2. We have also heard Shri Vikas Mehta, learned counsel appearing for JAMEWA and Shri Pawan Shree Agrawal, learned counsel appearing for association of aggrieved workmen of Jet Airways Ltd.

21. Shri N. Venkataraman, learned senior counsel for the Appellant commenced his submission relying on the order of the Hon'ble Supreme Court dated 18.01.2024 passed in Civil Appeal No.6427-6428 of 2023 and submitted that the SRA having not infused amount of Rs.150 Crores which was permitted to be infused by 31.01.2024, the entire Resolution Plan has failed and cannot be implemented. Shri Venkataraman submit that in pursuance of the direction of the Hon'ble Supreme Court dated 18.01.2024, in this appeal issue has arisen as to what is the consequence under the Resolution Plan in view of non-deposit of Rs.150 Crores by the SRA. Lenders should now be allowed to invoke PBG of Rs.150 Crores in view of non-deposit of amount and whether all conditions of the plan have been complied by the SRA consequent thereof. It is submitted that having failed to infuse funds as per order of the

Hon'ble Supreme Court dated 18.01.2024, the consequential breach of Section 33(3) of the Code need to follow and this Tribunal under inherent powers may pass appropriate order for liquidation. Shri Venkataraman submits that SRA having failed to infuse the first tranche payment within the time as per the Resolution Plan and as per extension granted by Hon'ble Supreme Court on 18.01.2024, consequences under Resolution Plan shall follow directing the Corporate Debtor to be sent for liquidation under Section 33(3) and Section 33(4) of the IBC. It is submitted that the SRA has also not fulfilled other conditions under the plan, even no security was created over Dubai property which was to be done on the effective date as per Clause 6.4.4, SRA has not fulfilled condition regarding upfront airport parking charges as per clause 6.3.1 (d) and not paid workmen dues. Shri N. Venkataraman reverting to non-fulfilment of condition precedents submits that Air Operation Certificate, which was granted by the DGCA on 20.05.2022 has expired and extension which was granted by DGCA by letter dated 27.07.2023 in CIRP period has also came to an end. There being no Air Operation Certificate, plan cannot be implemented. This condition precedent of having Air Operation Certificate was required much before handing over of Corporate Debtor, which was last take on the implementation of the Resolution Plan. The SRA is now seeking to modify the plan by making the condition of Air Operation Certificate as a subsequent requirement. It is further submitted that the Adjudicating Authority in its order dated 13.01.2023 on erroneous assumption held that issuance of Air Operation Certificate implies that business plan has also been approved whereas both conditions have been mentioned as two separate conditions under the Resolution Plan and therefore separately supposed to be

completed. The SRA has not produced letter or correspondence where it is mentioned that business plan has been approved. Thus, said condition remains unfulfilled. Coming to slots allotment approval, Shri Venkataraman submits that impugned order dated 13.01.2023 wrongly referring to plan approval order dated 22.06.2021 to hold that no historic slots could be granted to Corporate Debtor/SRA, this requirement was done away with the Adjudicating Authority by approving the Resolution Plan that did not provide for automatic reinstatement of all slots and direct the SRA to approach the relevant authorities for renewal of rights and benefits. The Adjudicating Authority in the impugned order proceeded on the incorrect basis that in event slots of Delhi and Mumbai have been granted by the competent authority, however, it failed to consider that said was subject to clearance of airport dues by the SRA and same has not been cleared till date. Requirement of condition precedent regarding International Traffic Rights clearance has also not been met. The Adjudicating Authority returned finding that said condition cannot be satisfied upfront since National Civil Aviation Policy cannot be complied at this stage and can only be achieved once the SRA recommences its business. It is submitted that the NCLT modified the Resolution Plan by making this condition subsequent condition, which is not permissible. The SRA has to fulfil all condition precedents before commencement of operation. It is submitted that after considering the clause of condition precedents, the CoC has voted in favour of the plan. It is further submitted that the way forward suggested by the SRA during course of submissions are not acceptable. Under the implementation Clause 7.7.1, taking over the Corporate Debtor is the last step after infusion of funds, creation of security in immovable properties of

the SRA by payment of costs to the agents in Dubai, which expenses are to be borne all by the SRA.

22. Shri Tushar Mehta, learned Solicitor General advanced additional submissions in support of the Appellants. Shri Tushar Mehta has also referred to and relied on judgment of the Hon'ble Supreme Court dated 18.01.2024 and submits that due to non-deposit of amount of Rs.150 Crore within the time allowed by the Hon'ble Supreme Court i.e. 31.01.202, the plan has failed and due to non-deposit of Rs.150 Crore, the consequences under the plan has to be followed i.e. the Corporate Debtor has to be liquidated. It is submitted that direction for liquidation can be passed by this Tribunal and it is not necessary for the Appellant to file any application under Section 33(3) of the IBC Code. The jurisdiction of the Adjudicating Authority can very well be exercised by this Tribunal and taking note of the subsequent events including failure of SRA to implement the plan, order of liquidation of the Corporate Debtor can very well be passed by this Tribunal. Shri Tushar Mehta has also referred and relied on Para 25 of the judgment of the Hon'ble Supreme Court dated 18.01.2024. Shri Tushar Mehta referring to the order dated 21.10.2022 passed by this Tribunal submits that while considering the appeal against order dated 22.06.2021 this Tribunal has already held that due to non-payment of full amount of provident fund and gratuity, the plan has become non-complaint of Section 30(2) of the Code.

23. Shri Krishnendu Datta, learned senior counsel for the Respondent opposing the submissions of learned counsel for the Appellants submits that this appeal arises out of order dated 13.01.2023 where the issue was as to

whether the SRA has completed the condition precedents for implementation of the plan as per Clause 7.6.1 or not. It is submitted that the SRA has completed all the condition precedents by 20.05.2022. AOC was issued by DGCA on 20.05.2022 completing the last requirement and immediately the SRA has communicated to the Resolution Professional and MC Lenders that SRA has completed all condition precedents, hence, the SRA be permitted to infuse funds towards equity share for obtaining equity shares. It is submitted that the MC Lenders from day one has been contesting that the SRA has not completed the condition precedents inspite of several letters and requests made to the MC Lenders. It was jointly decided in Joint Lenders Meeting (JLM) held on 29.09.2022 that application shall be filed by the SRA to obtain direction of the Adjudicating Authority. Although it was decided in the JLM that SRA will file application before the Adjudicating Authority, when SRA filed applications for implementation of plan and exclusion of time, the applications were opposed tooth and nail by MC Lenders. MC Lenders have not permitted the SRA to implement the plan by adopting obstructionist attitude. It is submitted that the Adjudicating Authority after hearing the parties elaborately has returned the findings that all condition precedents were fulfilled by the SRA and inspite of the order passed by the Adjudicating Authority dated 13.01.2023, the MC Lenders did not relent nor permitted the SRA to implement the plan. Challenging the order dated 13.01.2023 these appeals Company Appeal (AT) (Ins.) No.129 & 130 of 2023 have been filed. Even when this Tribunal by order dated 03.03.2023 declined the interim prayer prayed by the Appellants to stay the order dated 13.01.2023, plan was not permitted to be implemented and order dated 03.03.2023 was contested by the MC

Lenders before the Hon'ble Supreme Court. It is submitted that the affidavit dated 16.08.2023 was first welcome stand which came from the Appellants to the effect that on infusion of Rs.350 Crores by the SRA, the Appellant shall neither press the appeals before this Tribunal nor before the Hon'ble Supreme Court. Acting on the said representation by the Appellants, the SRA has infused Rs.100 Crores by 31.08.2023 and Rs.100 Crores by 30.09.2023. The SRA has contended before this Tribunal that the SRA is entitled to adjust PBG in first tranche of payment and to complete Rs.350 Crores, Rs.150 Crores of PBG be adjusted, which was allowed by order dated 28.08.2023, which direction stood modified by the Hon'ble Supreme Court by order dated 18.01.2024. It is submitted that the Hon'ble Supreme Court's order dated 18.01.2024 was in reference to the offer made by the Appellant vide its Affidavit dated 16.08.2023 i.e. infusion of Rs.350 Crores. The Hon'ble Supreme Court since did not permit adjustment of Rs.150 Crores PBG, hence, issued direction to the SRA to deposit said amount by 31.01.2024. The direction of the Hon'ble Supreme Court to deposit Rs.150 Crores by 31.01.2024 was in reference to the offer of the Appellant dated 16.08.2023 and non-deposit of the amount of Rs.150 Crores by 31.01.2024 at best leads to denial of benefit as was offered by affidavit dated 16.08.2023 i.e. offer of the Appellant to withdraw this Appeal and appeals before Hon'ble Supreme Court. The Appeals are heard on merit due to non-deposit of Rs.150 Crore by the SRA by 31.01.2024. The Hon'ble Supreme Court in its judgment dated 18.01.2024 noticing the pendency of this Appeal has observed in Para 19 of the judgment that Appeals have to be heard by this Tribunal and the Hon'ble Supreme Court clearly observed in Para 19 that the Supreme Court is not

expressing a final view on the merits of the appeal which fall for consideration before the NCLAT. It is submitted that these appeals thus have to be heard on merits.

24. Shri Krishnendu Datta, submits that in the present Appeals the issue raised is validity of order dated 13.01.2023 passed by the Adjudicating Authority and it has to be examined as to whether the order dated 13.01.2023 holding that the condition precedents have been fulfilled by SRA has been correctly passed or not. The SRA's categorical case was condition precedents were fulfilled on 20.05.2022 on which date DGCA issued Air Operation Certificate. SRA's case throughout have been that 20.05.2022 is the effective date on which date all condition precedents were achieved. It is submitted that the submission of Shri N. Venkataraman that as on date there is no Air Operation Certificate, hence plan cannot be implemented is incorrect. The correctness of the order has to be seen on the date when order was passed and Air Operation Certificate was valid on the date when order was passed and it was the Appellants – MC Lenders who did not permit the SRA to implement the plan and to start commercial operations. The Appellants cannot be permitted to take benefit of their own wrongs and misdeeds. It was only by carrying the commercial business and earning revenue by said operations SRA has to comply with all terms and conditions of the Resolution Plan. The mere fact that Air Operation Certificate granted on 20.05.2022 has come to an end cannot lead to conclusion that SRA has failed to achieve condition precedent on 20.05.2022. It is submitted that with regard to condition regarding Air Operation Certificate and regarding approval of

demerger of ground handling business, no objection was raised by the Appellant before the Adjudicating Authority, which was noticed by the Adjudicating Authority in Para 122 of the order. It is submitted that the SRA is fully entitled to make appropriate application for revalidation of Air Operation Certificate, which has lapsed due to inaction and misdeeds of the MC Lenders. The Air Operation Certificate lapsed due to non-operationalisation of the Corporate Debtor on default of MC Lenders by not allowing the SRA to operationalise Jet Airways. The condition precedent regarding approval of business plan has been fulfilled the Corporate Debtor having submitted the business plan on 05.08.2021 with the DGCA and MoCA for their consideration. There is no condition with regard to submission of business plan by the SRA separately. As per the Adjudicating Authority, the AOC is granted by DGCA only upon completion of all previous phases, which include pre-application phase, formal application phase, document evaluation phase and demonstration and inspection phase. The requirement of business plan is during phase three i.e. document evaluation phase. The submission of the Appellant that business plan has not been approved is fallacious and incorrect. Refuting the submission of the Appellant regarding slot allotment, Mr. Datta submitted that the Adjudicating Authority before approving the plan has called DGCA and MoCA officials and after hearing them passed the order approving the plan. The Adjudicating Authority has observed that all slots which were being used by Jet Airways cannot be reinstated. The Adjudicating Authority further held that considering the peculiar nature of slots allotment and its usage, the Corporate Debtor could seek slots periodically, as per requirements and the authorities concerned may consider such a request

favourably. It is submitted that the Successful Resolution Applicant has approached the concerned authority for slot allotment and 48 slots were granted favourably. As per the business plan, the SRA was initially required to secure 40 slots, however, as on the Effective Date, the SRA secured approval for more than 48 slots for recommencing Corporate Debtor's operations. Approval for Delhi and Mumbai slot were subject to payment of pending CIRP dues as per Clause 6.4.1(e). The slots were approved for Delhi and Mumbai and CIRP dues shall be paid as per IBC waterfall mechanism in priority and before start of commercial operation after closing date. The fulfilment of this condition has been challenged by MC Lenders when SRA has received slot approval for all slots listed in the Resolution Plan and business plan. The contention raised by the Appellants is wholly fallacious and incorrect. In so far as International Traffic Rights Clearance, Mr. Dutta submits that International Traffic Rights Clearance as per National Civil Aviation Policy, 2016 can be granted only after deployment of 20 aircraft or 20% of total capacity whichever is higher for domestic operations for clearance is achieved. On achievement of effective date, International Traffic Rights Clearance is not applicable to be obtained by SRA and same shall be obtained as per applicable laws only after the SRA recommences its business. Learned counsel for the Respondent further submits that the issue regarding Airport Charges is incorrect. In terms of the Resolution Plan, the SRA has to utilise the positive cash balance of the Corporate Debtor for meeting the CIRP Cost which specifically include the airport dues. The SRA is entitled to use funds available on Effective Date for making any payment to meet CIRP costs, hence, the Airport Charges which are part of the CIRP Cost has to be paid according

to the Resolution Plan. Shri Dutta further submits that delay in creating security in immoveable properties in Dubai are not attributable to the SRA. SRA in correspondence with the Lenders has requested for approval of signatory for transaction documents for purpose of creating security, which is clear from host of correspondence. It is MC Lenders who are to be blamed for no executing necessary documents for creation of security in Dubai properties which was offered in the Resolution Plan. Shri Dutta submits that the intent of the Appellant is to not permit the SRA to implement the plan is clear from their filing of application before the Adjudicating Authority in end of September, 2023 alleging non-compliance of Section 29A referring to some one year old newspaper reports with regard to Mr. Florian Fritsch. It is submitted that Section 29A compliance was examined, investigated and fully satisfied and only after satisfying Section 29A compliance the plan was considered and approved. Filing of application before the Adjudicating Authority alleging non-compliance of Section 29A is nothing but another step of MC Lenders to create obstruction in implementation of the Resolution Plan. Filing of the said application is irrelevant, by which the intent and purpose of the Appellant is to somehow create one or other obstruction in implementation of the Resolution Plan. It is submitted that the MC Lenders cannot approbate and reprobate at same time. Shri Dutta submits that the SRA is keen to implement the plan and SRA has all intent and wherewithal to implement the plan. The SRA has already made infusion of Rs.600 Crores in the Corporate Debtor; Rs.200 + Rs.150 Crores towards first tranche payment and Rs.270 Crores towards completion of condition precedents till date to start the operation of Corporate Debtor. A lot of opportunities have been lost by the

Corporate Debtor due to obstructions created by the Appellants in implementation of the Plan. The SRA has suggested way forward, which we shall consider while considering the submissions in detail.

25. Shri Abhijeet Sinha, learned senior counsel also appearing for the Successful Resolution Applicant has also advanced submissions in support of Respondent No.1. It is submitted that this Court has always saved companies even if there is any default in the compliance of time schedule by the Resolution Applicant. He submits that the rights of the parties have to be decided on the date when issues arose between the parties. The subsequent development which took place during the pendency of the litigation can at best be relevant for moulding the reliefs. Section 33(3) is not applicable since no application has been made. Right of relief has to be looked into on the date suit is filed.

26. We have heard learned counsel for the parties and perused the record. From the submissions of the Counsel for the parties and material of record, following are the issues which arise for consideration in these Appeals:-

(i) Whether on 20.05.2022 the Successful Resolution Applicant has completed all the condition precedents provided in Clause 7.6.1 of the Resolution Plan?

(ii) Whether condition precedents as under Clause 7.6.1 of the Resolution Plan were not achieved by the Successful Resolution Applicant as contended by the Appellant?

(iii) Whether the order dated 13.01.2023 passed by the Adjudicating Authority is unsustainable and sufficient grounds have been made by the Appellant to set aside the order?

(iv) Whether due to lapse of Air Operation Certificate granted by DGCA on 20.05.2022, as on date the Successful Resolution Applicant cannot implement the Resolution Plan?

(v) Whether direction of the Hon'ble Supreme Court permitting the Successful Resolution Applicant to infuse Rs.150 crore by 31.01.2024 was in reference to the offer made by the Appellant vide Affidavit dated 16.08.2023?

(vi) Whether the Successful Resolution Applicant having not been able to infuse Rs. 150 Crores by 31.01.2024 as directed by the Hon'ble Supreme Court vide its judgment dated 18.01.2024, the plan has failed and cannot be implemented by the Successful Resolution Applicant?

(vii) Whether sufficient grounds have been made out to direct for liquidation of the Corporate Debtor under Section 33 Sub-clause (3) in these Appeals?

(viii) What are the way forward towards implementation of the Resolution Plan?

Question Nos. i, ii, iii & iv:

27. The above questions being inter-related are being taken together. The instant Appeals being Company Appeal (AT) Ins. No. 129-130 of 2023

have been filed against the Order dated 13th January, 2023 in I.A. No. 3398 of 2022 and 3508 of 2022 filed by Successful Resolution Applicant (SRA in short). Before we come to the above applications' prayers made in there, the facts and events leading to filing of the above applications, we need to notice certain clauses of the Resolution Plan which are relevant in this context. As noted above, the Resolution Plan submitted by Respondent No. 1-SRA was approved by the Adjudicating Authority vide Order dated 22nd June, 2021. Clauses 7.6 dealt with "conditions to the implementation of the Resolution Plan". Clause 7.6.1 and 2 of the Resolution Plan are as follows:

> *"7.6.* ***Conditions to the Implementation of the Resolution Plan***
>
> *7.6.1.* ***Conditions Precedent –*** *The obligation of the Resolution Applicant to re-commence operations as an aviation company, being the business proposed to be acquired is subject to the fulfilment of the following conditions after the approval date ("**Conditions Precedent**"):*
>
> *(a) Validation of AOP of the Corporate Debtor by DCGA & MoCA-The AOP of the Corporate Debtor shall have been validated by the DGCA, the MoCA and any other relevant Government Authority and grant of all other mandatory approvals to the Corporate Debtor to enable it to recommence flying operations (including commercial/cargo operations) and related on-ground services.*
>
> *(b) Submission and approval of the Business Plan to DCGA & MoCA – The Business Plan of the Resolution Applicant shall have been submitted after the Approval*

Date to the DGCA and MoCA for their review, and approval. The Resolution Applicant agrees to modify its business plan to incorporate all reasonable changes required by the DGCA/MoCA, which otherwise does not make the business unviable for the Resolution Applicant.

(c) Slots Allotment Approval- The DGCA and MoCA shall have approved the reinstatement of all the suspended slots (including the bilateral rights and traffic rights) back to Jet Airways/Corporate Debtor. The slots (along with related bilateral rights and traffic rights) can be allotted to the Corporate Debtor gradually as per its Business Plan with immediate slots allotment approval (along with related bilateral rights and traffic rights) for sectors on which Jet 2.0 proposes to recommence operations after the Effective Date.

(d) International Traffic Rights Clearance – The Corporate Debtor shall have received the International Traffic Rights Clearance in compliance with Applicable Laws.

(e) Demerger-The Scheme filed as part of this Resolution Plan shall have been approved under Applicable Laws and the Demerged Employees shall have demerged from the Corporate Debtor to AGSL along with all their past dues, liabilities and outstanding's with effect from the Approval Date, without the requirement of any further consent or approval of any other stakeholder of AGSL (since we understand that AGSL currently does not have any creditor) or any stakeholder of the Corporate Debtor

(including existing or past employee or workmen or employees' unions of the Corporate Debtor).

7.6.2. ***Fulfilment of Conditions Precedent –*** *The date of fulfilment of all the Conditions Precedent as stated in clause 7.6.1. above shall be the effective date for the purposes of this Resolution Plan ("**Effective Date**")"*

28. The Resolution Plan had a clause 7.6.4 with the heading "Automatic Withdrawal". The said clause provided that the Resolution Applicant is confident of completing all the conditions precedent within 90 days from the approval date and if need, the Resolution Applicant seeks to extend the conditions precedent fulfilment period by another term by maximum 180 days. In the Plan approval order, with regard to effective date under direction "d" of the order dated 22nd June, 2021, following was directed:

"d. The Effective Date would mean the 90th day from the Approval Date. In case the SRA /Corporate Debtor fails to secure fulfilment of all the conditions precedent as stated in clause 7.6.1 of the Resolution plan, it would be at liberty to approach this Authority for appropriate orders with respect to the extension of timeline."

29. After the Plan Approval Order dated being 22nd June, 2021, the SRA filed applications before the Adjudicating Authority seeking extension/exclusion with respect to effective date. Last of such exclusion was granted by the Adjudicating Authority vide Order dated 11th April, 2022 by which exclusion of 65 days was allowed thereby extending the effective date to 25th May, 2022. On 20th May, 2022, DGCA reissued Air Operation

Certificate, Air Operation Certificate was valid from 20th May, 2022 to 19th May, 2023. Air Operation Certificate specified "this certificate certifies that M/s. JET Airways India Limited is authorised to perform commercial air operations as defined in the attached operation specification in accordance with the operation manual and rule 134 of the Air Craft Rule, 1937".

30. On 21st May, 2022, SRA e-filed up to date status report before the Adjudicating Authority intimating the Adjudicating Authority about the completion of the conditions precedent under the approved resolution plan and 20th May, 2022 being the effective date. It is useful to notice paragraph 3 to 5 of the status report dated 21st May, 2022 which is as follows:

> *"3. As per Clause 7.6.1. of the Resolution Plan, to operationalise the business of the Corporate Debtor, following conditions precedent were required to be fulfilled ("Conditions Precedent"):*
>
> *i. Validation of Air Operator Certificate ("AOC") of the Corporate Debtor by the Directorate General of Civil Aviation ("DGCA") and the Ministry of Civil Aviation ("MoCA")*
>
> *ii. Submission of the Business Plan to DGCA & MoCA*
>
> *iii. Slots allotment approval*
>
> *iv. International Traffic Rights clearance*
>
> *v. Approval of Demerger of ground handling business into Airjet Ground Services Limited ("AGSL")*
>
> *As on today, all the Conditions Precedent as required under Clause 7.6.1. of the Resolution Plan*

have been fulfilled. A report of the status of the Conditions Precedent is annexed as Annexure- B.

4. As per the order of this Hon'ble Adjudicating Authority dated 11th April 2022 in I.A. 686 of 2022 in CP (IB) No. 2205/MB/2019, which was upheld by the Hon'ble Appellate Tribunal by order dated 28 April 2022 in Company Appeal (AT) Ins. No. 473 of 2022, the period for fulfilment of Conditions Precedent was extended to 25th May, 2022. Hence, in the present case the Conditions Precedent have been fulfilled within the period granted by this Hon'ble Adjudicating Authority (upheld by Hon'ble Appellate Tribunal) to the Successful RA to fulfil the Conditions Precedent. Copy of order dated 11 April 2022 and 28 April 2022 is annexed as Annexure –C (Colly).

5. Further, per Clause 7.6.2 of the Resolution Plan the date of fulfilment of the Conditions Precedent is defined as the 'Effective Date' for the purpose of the Resolution Plan. Since the Conditions Precedent stands fulfilled on 20 May 2022, the 'Effective Date' as per Clause 7.6.2 of the Resolution Plan is 20 May 2022."

31. The SRA continuously wrote to the MC Lenders i.e. the Appellant that the effective date is 20th May, 2022 and all conditions precedent as provided under clause 7.6.1 have been achieved. The MC Lenders may take further steps as per the Resolution Plan so that SRA may implement the resolution plan. The MC Lenders did not accept the claim of SRA that conditions precedent have been achieved on 20th May, 2022. Various joint

lender meetings were held. On 04th June, 2022, MC Lenders shared a draft undertaking requiring the SRA to execute the undertaking. Draft undertaking contained 14 clauses with regard to which SRA was required to submit undertaking. In paragraph 99 to 100 of the Impugned Order, the Adjudicating Authority has noticed certain clauses of the draft proposed undertaking. It is useful to extract para 99 to 100 which are to the following effect:

> *"99. The draft Proposed Undertaking, inter alia, required an unconditional affirmation and agreement from the Applicant in relation to:*
>
> *a. fulfilment of the CPs and procurement of all slots (and related bilateral and traffic rights) as set out in the Resolution Plan and as approved in the Approval Order, as and when the Corporate Debtor has the aircrafts, attendant wherewithal, and logistical support in place, which according to the Resolution Plan would be in phases, with no deviation whatsoever;*
>
> *b. procurement of the International Traffic Rights clearance for the Corporate Debtor, inter alia, by complying with the legal/regulatory requirements for the said clearance in such time as required to adhere to the Business Plan of the Applicant's Resolution Plan, with no deviation whatsoever; and*
>
> *c. implementation of the Resolution Plan including (i) pay-outs towards CIRP costs, airport and parking charges, various creditors (ii) providing for any shortfall in meeting its financial obligations towards various stakeholders; and (iii) making necessary funds available to the stakeholders (including the Financial*

Creditors) in such manner as is acceptable to the Financial Creditors.

d. indemnifying and making good any and all direct, indirect or consequential claims, losses, damages, costs, expenses or liabilities incurred or likely to be incurred by the Financial Creditors and the former Resolution Professional of the Corporate Debtor (or reimburse such amounts as claimed by them) on account of or as a result of (i) breach of the said proposed Undertaking or any act/ omission/commission in deviation/ breach or violation of the terms contained therein; (ii) waiver/non-fulfilment of any of the Conditions Precedent as stipulated under the Resolution Plan; or (iii) implementation of the Resolution Plan in accordance with terms therein and as modified by the said proposed Undertaking, while also providing for any shortfall in meeting its financial obligations towards the stakeholders, including the Financial Creditors, and waived all rights or claims that the Applicant, may have in this respect, whether actual or contingent, whether present or in future.

e. Reserving the positive cash balance on the Effective Date including recoveries from Air Serbia Rentals in favour of the Assenting Financial creditors in accordance with and as provide for under the terms of the Resolution Plan.

100. Certain other relevant clauses of the aforementioned Proposed Undertaking have been reproduced below for convenience:

2. That it shall procure the International Traffic Rights clearance for the Corporate Debtor, inter alia, by achieving compliance with the: legal/ regulatory requirements for the said clearance. This includes compliance with the requirements under the National Civil Aviation Policy, 2016 and as directed by the Ministry of Civil Aviation, Government of India in its letter May 10, 2022 (among others) addressed, to the Corporate Debtor in this regard, in such time and within such, period as required to adhere to the Business Plan of the Successful Resolution Applicant's Resolution Plan, with no deviation whatsoever.

6. That it shall ensure that it remains committed towards the implementation of the Resolution Plan in full and ensure availability of sufficient and requisite funds to make payments and meet its: obligations, financial or otherwise, ***including in relation to commencement of business and operations of the Corporate Debtor as an aviation company, in accordance with the terms as envisaged under the Resolution Plan (and as modified by this Undertaking).***

12. That to the extent there is any conflict between the provisions of the Resolution Plan and this Undertaking, the contents of this Undertaking shall prevail; save and except as set out expressly in this Undertaking, - (as modified by this Unde1taking} read with Resolution Plan Approval Order shall continue to apply in fit!! force effect without any changes thereto.

15. ***The Resolution Applicant understands and acknowledges that the foregoing understanding***

> ***is subject to specific consent and approval by the Financial Creditors of the Corporate Debtor and the NCLT****. We further acknowledge and agree that the erstwhile Committee of Creditors! Assenting Financial Creditors reserves the right to negotiate (if required), by itself or through its advisors, te1ms of this Undertaking as submitted by the Resolution Applicant and any decision taken by the Assenting Financial Creditors shall be binding.*
>
> *[Proposed Undertaking at Annexure 0 (Colly.) of the Application Vol. III at pg. 411 & 412]"*

32. Several monitoring committee meetings as well as joint lenders meetings were held. In the Monitoring Committee Meeting, it was noted that there is divergent view on the status of the conditions precedent completion. Several joint lenders meetings were also held in which issue was deliberated by the lenders, a joint lender meeting was held on 29th September, 2022 in which it was decided that SRA in consultation with the lender counsel would draft and file Interlocutory Application before NCLT seeking necessary direction in relation to conditions precedent compliance and Resolution Plan Implementation subject to undertaking in favour of lenders. The SRA thereafter in pursuance of aforesaid joint lenders meetings shared the draft of application which has to be filed before the Adjudicating Authority with the Appellant, no further input having been given by the Appellants, application was filed being I.A. No. 3398 of 2022 (Implementation Application) by the SRA in October, 2022. In the implementation application, following prayers were made by the SRA:

"(a) Allow the Application and direct the Respondents to allow the SRA to infuse the funds into the Corporate Debtor and take control and management of the Corporate Debtor and execute the necessary documents in this regard so that the Resolution Plan can be implemented;

(b) pass interim/ ad-interim reliefs in terms of prayers (a) above.

(c) pass any other such order(s) as this Hon'ble Adjudicating Authority may deem fit and proper in the facts and circumstances of this case."

33. In the implementation application, all details with regard to SRA's claim, all completion of conditions precedent were pleaded. In the application, exclusion of period from 20th May, 2022 till the implementation application is decided by this Tribunal was sought to be excluded. Both the implementation application and exclusion application came to be heard by the Adjudicating Authority and after noticing the elaborate submissions made by the Counsel for the parties, the Adjudicating Authority returned its findings in paragraph 122 to 127. The Adjudicating Authority in para 122 has noticed the order of this Tribunal dated 21st October, 2022 in an appeal filed by JAMEWA and the Adjudicating Authority observed that this Tribunal has already held that SRA has complied all the necessary conditions specified to the satisfaction of MC. It further notices that clarification application being I.A. No. 4771 of 2022 was taken by the MC Lenders for clarification of the order which was rejected on 20th December, 2022. In paragraph 122 of the Order, following has been observed with regard to this Tribunal's order dated 21st June, 2022:

> *"122. We note that the Hon'ble NCLAT in its order dated 21.10.2022, in an appeal filed by JAMEWA and after hearing the parties and considering the JAMEWA's objections on completion of CPs has already held that the SRA has complied all the necessary CPs to the satisfaction of MC. It would not be out of place to reiterate that the MC lenders took out IA 4771 of 2022 seeking clarification of the Hon'ble NCLAT's order observing completion of all necessary CPs to the satisfaction of the MC which was rejected vide order dated 20.12.2022.*
>
> *……"*

34. Learned Counsel for the Appellants in these Appeals have questioned the above observations of the Adjudicating Authority relying on the order of this Appellate Tribunal which submission we have already noticed in the order dated 03rd March, 2023. We thus first need to consider the nature of observations made by this Tribunal in order dated 21.10.2022 and the clarification order passed on 20th December, 2022. The Order dated 21.10.2022 was passed by this Tribunal in an appeal which was filed by the Jet Aircraft Maintenance Engineers Welfare Association and Ors. challenging the plan approval order dated 22nd June, 2021. In the Appeal, questions were framed and one of the questions were Question No. IX framed in the Appeal was to the following effect:

> *"IX. Whether the Resolution Plan being contingent and conditional ought not to have been approved in view of the law laid down by the Hon'ble Supreme Court in "Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions Ltd. & Anr., (2022) 4 SCC 401 "?*

35. During the hearing, the argument was raised by the Appellant challenging the plan approval order on the ground that the resolution plan was conditional due to there being conditions precedent which were required to be fulfilled. The submission made on behalf of Resolution Applicant was also noted that conditions precedent has been fulfilled. Rejecting argument of Appellant that Resolution Plan being conditional in view of the judgment of Hon'ble Supreme Court in ***Ebix Singapore Pte Ltd. Vs. CoC of Educomp Solutions Pvt. Ltd, 2022 2 SCC 401*** was attracted as was submitted by the Appellant. After noticing the submission of the Appellant and Judgment of the Hon'ble Supreme Court, following was observed by this Tribunal in paragraph 109:

> *"109. When we look into the relevant clauses of the plan which has also been captured by the Resolution Applicant in Form H. Para 7.6.1 refers to condition precedents i.e. obligation of the Resolution Applicant to recommence operations as an aviation company subject to fulfilment of conditions after the approval date mentioned therein. Para 7.6.2 deals with fulfilment of condition precedents and Para 7.6.4 deals with automatic withdrawal. In view of the judgment of Hon'ble Supreme Court in "Ebix Singapore" (Supra), as noted above, after approval by the CoC, the clause for automatic withdrawal becomes redundant and Resolution Applicant has no jurisdiction to withdraw from the Resolution Plan. The condition precedents as mentioned in Para 7.6.1 are basically condition precedents required for aviation business which are must for any company carrying on aviation business. Enumeration of condition precedent is only for*

purposes of noticing obligations of the Resolution Applicant to recommence the operations as an aviation company after obtaining necessary approvals. Such condition precedent cannot be said to be any hindrance in the approval of the plan by the Adjudicating Authority. We, thus, do not find any substance in the submission of the Appellant that the resolution plan ought to have rejected in view of the condition precedent contained in the resolution plan. The Resolution Applicant has also completed all necessary condition precedents to the satisfaction of the Monitoring Committee. We, thus, are of the view that the judgment of Hon'ble Supreme Court in "Ebix Singapore" does not help the Appellant to support his contention that the Resolution Plan is liable to be rejected due to condition precedents."

36. We may also notice the clarification order passed by this Tribunal dated 20th December, 2022 in the application filed by the MC Lender which order is as follows:

"I.A. No. 4771 of 2022:- This application has been filed by the Committee of Creditors praying for clarification of the observations made in paragraph 109 of the judgment dated 21.10.2022.

We had framed the questions which fell for consideration in the group of appeals and paragraph 108 & 109 are the paragraphs in which the question no. 9 was answered.

Our observations in paragraph 108 & 109 were only for the purposes of answering the question framed as question no. 9 and the

submissions which are advanced before us by the parties.

We do not find any reason to accept the prayer made in the application for clarification of judgment, order being clear.

With these observations, the application is rejected."

37. When we look into the paragraph 109 of the order dated 21st October, 2022 of this Tribunal as well as order passed on clarification application dated 20th December, 2022, it is clear that what was observed in paragraph 109 was to repel the contention of the Appellant of the said Appeal that Resolution Plan being conditional could not have been approved. In the order, observation was made that Resolution Applicant has also completed all necessary conditions precedents to the satisfaction of the monitoring committee which fact was noted in the same appeal in an earlier order dated 30th May, 2022. In the order dated 21.10.2022, there was no inter se issue between the SRA and the MC Lenders regarding fulfilment of conditions precedent hence the observations made in the order cannot be treated to be any decision by this Tribunal in order dated 21.10.2022 with regard to fulfilment of conditions precedent.

38. We thus are of the view that the observation of the Adjudicating Authority that this Tribunal in order dated 21.10.2022 has also held that SRA has complied all necessary conditions precedent cannot be relied. We further notice that after making the aforesaid observations in paragraph 122 as extracted above the Adjudicating Authority proceeded to examine the rival

submissions with regard to satisfactory compliance of conditions precedent. In para 122 itself the Adjudicating Authority held that there is no dispute so far as satisfactory compliance of conditions precedent at Sr. No. (i) and (v) i.e. whether validation of Air Operator Certificate by DGCA and MoCA and approval of demerger of ground handling business into AGSL. We may notice the above observation in para 122 which are to the following effect:

> *"However having considered the rival submissions and on perusal of record with regards to satisfactory compliance of conditions precedent (CPs) it is noted that there is no dispute so far as satisfactory compliance of CPs at serial no. (i) and (v) as per approved plan i.e.:- (i) Validation of Air Operator Certificate by Directorate General of Civil Aviation (DGCA) and Ministry of Civil Aviation (MoCA) and (v) Approval of demerger of ground handling business into AGSL. In this background we have thus considered if the remaining three CPs are duly complied with by the applicant or otherwise."*

39. The Adjudicating Authority thereafter proceeded to examine other three conditions precedent on which MC Lender had raised objection regarding fulfilment. With regard to submission of approval of business plan by DGCA and MoCA, in paragraph 123, the Adjudicating Authority recorded a finding that the said condition precedent satisfactorily complied with. In para 123, following findings have been returned:

> *"123. As regards to CP No.2 i.e. Submission and approval of business plan to DGCA and MoCA:*

The business plan was submitted to above Authorities to fulfil compliance of DGCA's Show Cause Notice (SCN) to CD of April 2019. SCN states that Air Operator Certificate will be issued after MoCA approves the business plan. Thus, with issuance of Air Operator Certificate, it is implied that the business plan has been approved. Even otherwise, guidelines for issuance of Air Operator Certificate being CAP 3100 clearly states that the DGCA will review the detailed business plan of the Applicant before issuance of Air Operator Certificate and with issuance of Air Operator Certificate there is implied approval of MoCA In the background of above we find that this CP is satisfactorily complied with the issuance of AOC."

40. With regard to Slot Allotment Approval, the Adjudicating Authority held that the said condition is also found satisfactorily complied with. In paragraph 124, following was held:

"124. As regards to CP No.3 i.e. Slots Allotment Approval:

It is noted that plan approval order of this Tribunal dated 22nd June, 2021 stipulates that no historic slots will be granted to Corporate Debtor or SRA Admittedly, there is no challenge to this order thereby accepting the fact that old slot cannot be reinstated. Accordingly, this CP needs to be read with plan approval order, where Corporate Debtor shall be provided with such slots for which it applies. There is no dispute that slots for which SRA applied were granted to them by the concerned Competent Authority including the slots in Delhi and Mumbai, on settling the old dues and as

such it cannot be considered as non-allotment of slots, as SRA has received the slots it requested for in compliance with plan approval order. The SRA cannot get all previous slots as this condition needs to be read with plan approval order of this Tribunal.

In that view of the matter, above CPs is also found to be Satisfactorily complied with."

41. With regard to International Traffic Right Clearance i.e. condition precedent no. 4, the Adjudicating Authority answered the said in para 125 in following words:

"125. As regards to CP no. 4:

International Traffic Right Clearance: On perusal of the plan approval order dated 22nd June, 2021, it is found that no blanket approval can be granted upfront to the SRA as it has to approach the concerned authorities for grant of such approval as per applicable laws. As already stated above, the plan approval order has reached its finality, thus, accepting the fact that all the approval issued upfront cannot be reinstated. Accordingly, this condition precedent needs to be read with plan approval order. Even otherwise there is no dispute that under the approved plan, SRA has to re-commence with operation of six air crafts. The International Traffic Rights clearance is required to be obtained in compliance with the applicable laws which stipulates that minimum twenty air crafts are required to be deployed before applying for such clearance. In view of this, we find that this condition cannot be satisfied upfront and needs to be satisfied in compliance with applicable laws i.e. after the SRA has

twenty air crafts in operation which can only be achieved once the operation is re-commenced successfully. Accordingly, this condition can only be fulfilled after the SRA/ Applicants re-commences its business and not prior to its commencement.

It goes without saying that plan approved by this Tribunal has to be implemented without any modification much less than on satisfaction of any other undertaking and thus, the effective date and completion date of condition precedent under the plan shall have to be read as 20th May, 2022."

42. After recording the above findings, in para 126-127, the Adjudicating Authority directed as follows:

"126. In the background of above facts and for the reasons stated above we hold that in addition to CPs (I) & (V) which are admittedly complied, remaining CPs (II), (III), (IV) are also duly complied.

127. Application bearing IA No. 3398 of 2022 is thus disposed of as Allowed in terms of prayer clause (a) thereof."

43. The MC Lenders aggrieved by the aforesaid order passed by the Adjudicating Authority has filed these appeals and have questioned the findings of the Adjudicating Authority with regard to fulfilment of the aforesaid conditions.

44. The challenge in these appeals is to the orders dated 13th January, 2023. We thus need to first consider the submission advanced on behalf of

the Appellant challenging the findings recorded by the Adjudicating Authority regarding fulfilment of the aforesaid three conditions.

Submission and approval of the business plan to DGCA and MoCA

45. As noted above, under clause 7.6.1 (b) condition required to be fulfilled is as follows:

> "*(b) Submission and approval of the Business Plan to DCGA & MoCA – The Business Plan of the Resolution Applicant shall have been submitted after the Approval Date to the DGCA and MoCA for their review, and approval. The Resolution Applicant agrees to modify its business plan to incorporate all reasonable changes required by the DGCA/MoCA, which otherwise does not make the business unviable for the Resolution Applicant."*

46. The submission of the Appellant is that the Adjudicating Authority committed error in returning a finding and erroneously held that with the issuance of air operation certificate, it is implied that business plan has also been approved. It is submitted that air operation certificate was dealt in separate clause i.e. 7.6.1(a) and submission and approval of business plan was dealt with separate clause 7.6.1(b) hence by compliance of 7.6.1(a) there shall be no automatic compliance of 7.6.1(b). The SRA refuting the above submissions contends that said condition was included in the plan since Show Cause Notice dated 23rd April, 2019 was issued by DGCA prior to CIRP wherein the AOC of Corporate Debtor was suspended by the DGCA and Corporate Debtor was required to submit its revival plan including business

plan. The SRA submitted its business plan approval with DGCA and MoCA on 05th August, 2021. Learned Counsel for SRA has referred to letter dated 09th May, 2022 issued by the Government of India which has acknowledged submission of comprehensive revival plan on 05th August, 2021. The said letter further stated that operational plan submitted by Company for rectification process of air operator certificate is under examination in the DGCA. It is useful to extract the letter dated 09.05.2022 which is as follows:

> *"To*
>
> *M/s. Jet Airways India Limited*
> *[Kind Attn:- Capt. Priyapal Singh, Accountable Manager]*
> *Global One, 3rd Floor, 252 LBS Marg, Kurla (West),*
> *Mumbai-400070*
>
> ***Subject: Request for pre-application phase meeting for re-certification of Jet Airways and renewal of Air Operator Certificate-reg.***
>
> *Sir,*
>
> *I am directed to refer to DGCA's letter no. AV.14015/03/1992-AT-I dated 27.08.2021 forwarding therewith your letter no. JET2.0/AM/R/002 dated 05.08.2021 inter-alia enclosing a copy of comprehensive revival plan of the company. The Ministry of Civil Aviation (MoCA) acknowledges the submission of said comprehensive revival plan of the company for the proposed commencement of scheduled air operations wherein appropriate decisions are taken by the respective competent authorities as per the extant rules and regulations. Further, operational plan submitted by the*

Company for recertification process of Air Operator Certificate (AOC) is under examination in the Directorate General of Civil Aviation (DGCA).

2. Meanwhile, MoCA vide letter with even reference dated 26.11.2021 and 06.05.2022 have already communicated the security clearance in respect of S/Shri Murari Lal Jalan, Akash Garg & Akash Khandelwal and change in shareholding pattern of the Company/Firm for scheduled operator permit, respectively.

Yours faithfully
(U.K. Bhardwaj)
Under Secretary to the Govt. of India
…….”

47. Learned Counsel for the SRA has also relied on Air Operational Certification Manual relying on CAP 3100 Chapter II. It is submitted that certificate process comprises of five phases namely principal application, formal application, document evaluation, administration and inspection prior to certification and certification. The above Chapter II of Air Operator Certification Manual has been referred to and relied by SRA in support of his submission. A perusal of Air Operator Certification Manual CAP 3100 Chapter II fully supports the submissions of SRA that certificate consists of five stages and formal application for air operator certification necessarily includes business plan and without there being business plan submitted by applicant seeking air operation certification, no certification could be granted. The Adjudicating Authority has rightly held that “thus, with issuance of Air Operator Certificate, it is implied that the business plan has been approved” we do not find any error in the finding of the Adjudicating Authority that there

was no submission nor approval of the business plan by DGCA and MoCA, we thus uphold the above findings recorded by the Adjudicating Authority hence the SRA has fully complied the conditions precedent as required by clause 7.6.1(b).

Slot Allotment Approval

48. Clause 7.6.1(c) requires slots approval which is as follows:

> "*(c) Slots Allotment Approval- The DGCA and MoCA shall have approved the reinstatement of all the suspended slots (including the bilateral rights and traffic rights) back to Jet Airways/Corporate Debtor. The slots (along with related bilateral rights and traffic rights) can be allotted to the Corporate Debtor gradually as per its Business Plan with immediate slots allotment approval (along with related bilateral rights and traffic rights) for sectors on which Jet 2.0 proposes to recommence operations after the Effective Date.*

49. Learned Counsel for the Appellant challenging the findings of the Adjudicating Authority which has upheld the fulfilment of the above conditions submits that the Adjudicating Authority has wrongly interpreted the plan approval order dated 22nd June, 2021 to hold that this condition was substantially diluted by the approval order. It is submitted that the Adjudicating Authority while hearing the plan merely did not allow the prayer for automatic reinstatement of the slots to the Corporate Debtor as a matter of right and directed the SRA to approach the relevant authority for renewals of rights and benefits. It is submitted that the Adjudicating Authority also

proceeded on the incorrect basis that slots in Delhi and Mumbai has been allotted to SRA for immediate commencement of the operation however it failed to consider that slots are allotted subject to clearance of airport dues which are the responsibility of the SRA and same has not been secured till date. It is submitted that SRA does not have a single slot for operation and condition remained unfulfilled. Learned Counsel for the SRA has submitted that at the time of hearing of plan approval application, the Adjudicating Authority has directed the DGCA/MoCA to file their response, DGCA and MoCA objected to reinstatement of all previous slots of Corporate Debtor on the principal of historicity. The Adjudicating Authority after hearing all the parties held that reinstatement of slots is not permissible. The Adjudicating Authority however held that Corporate Debtor could seek slot periodically as per requirements and the authorities concerned may consider such a request favourably. In this context, we may refer to the order of the Adjudicating Authority dated 22nd June, 2021. The Adjudicating Authority in para 24 of the Order dated 22nd June, 2021 held as follows:

> *"24. The facts and circumstances would indicate that presently the slots cannot be restored to the Corporate Debtor on a historic basis. The thumb rule being 'use it or lose it'. Be that as it may, we must remember that running an Airline, much less reviving one, is not a facile business. It involves entire gamut of complex and diverse activities from land to sky and everything in between. In the present day air travel has rather become a necessity, than a luxury considered merely a decade back. Increase in the number of Airlines would encourage healthy competition and provide a*

level playing field to the operators. The result would only benefit the consumer, It is not in dispute that the Corporate Debtor had been one of the first leading and sought after Airlines in the Country, until the financial debacle and probably certain lack of professional management grounded it. Thus, when the Airline is sought to be revived, which is the sole object of the Code, all concerned need to make concerted efforts to see that the move succeeds. Not only that it would revive and resurrect a beleaguered Airline but would provide much needed fillip to the aviation scenario in the Country. Keeping in view the purpose of Insolvency Resolution we trust that the authorities concerned including the Government of India shall take a holistic approach and provide necessary assistance to the SRA I Corporate Debtor in terms of the guidelines in allocation of slots as and when they are sought, so that the Airlines takes off the ground and possibly regain its lost glory."

50. SRA as per the business plan was initially required to secure 46 slots for the first air craft however upto the effective date, SRA has secured more than 48 slots for recommencement of Corporate Debtor's Operations, details of slots secured by the Corporate Debtor already are noted at page 987 of the Volume 4 of the Appeal which indicates that 48 slots have been acquired by SRA for recommencement of Corporate Debtor's Operation. When the necessary slots as per business plan were acquired by SRA, we fail to see that on what basis the Appellant is contending that conditions precedent as under clause 7.6.1(c) was not fulfilled. The Adjudicating Authority in the impugned order after considering all relevant facts and circumstances and considering

the submission of the parties, has returned its finding in para 124 that slot for which SRA complied were granted to them by the concerned competent authority including the slots in Delhi and Mumbai.

Payment of Airport Charges

51. One of the submissions raised by Shree N. Venkatraman as noted above is that SRA having not paid Airport Charges, slot allotment cannot be said to be complied. It is submitted that it was the obligation of SRA to pay Airport Charges which having not been made, the SRA has not complied its obligation under the plan. Mr. Krishnendu Datta refuting the submissions of Learned Sr. Counsel for the Appellant submits that Airport Charges have to be paid as per the Resolution Plan as a CIRP Cost by taking into consideration the positive bank balance and also deduction from share of the dissenting financial creditors. He has referred to relevant clauses of the Resolution Plan in the aforesaid context.

52. Clause 6.4.1(e) on the said treatment of outstanding CIRP Costs provides "the detailed calculation of CIRP Costs as provided to the Resolution Applicant is enclosed as Annexure 2". Annexure 2 to the Resolution Plan Clause 6.4.1(m) of the Resolution Plan also provided the Resolution Applicant will be entitled to use funds available with the Corporate Debtor as on effective date for making any portion of the CIRP Payment. Clause 6.4.1(m) is as follows:

> *"Priority of Payment –* ***CIRP cost shall be fully paid and discharged after the Effective Date before payment is made to any of the Creditors as per***

> ***the Resolution Plan.*** *The Resolution Applicant will be entitled and will use funds available with the Corporate Debtor on the Effective Date for making any portion of CIRP payments."*

53. Clause 6.4.1(h) which dealt with treatment of outstanding CIRP Costs included parking charge (Airport Charges). Clause 6.4.1(h) is as follows:

> *"(h) Based on the information provided, the Resolution Applicant have assumed that the amounts standing to the credit of the bank account of the Corporate Debtor (including amounts estimated to be received subsequently) are sufficient to cover for the CIRP Costs of the Corporate Debtor (excluding parking charges, rental charges, employee dues, taxes etc). Accordingly, the Resolution Applicant has set aside a sum of Rs. 25 Crores as CIRP Costs towards payment of any such costs until the Approval Date. Any expenses incurred by the Corporate Debtor from the Approval Date until the Effective Date will be incurred out of the positive bank balance of the Corporate Debtor."*

54. The provisions of Resolution Plan as noted above clearly indicates that CIRP Costs includes Airport Charges. SRA is also entitled to use funds available with the Corporate Debtor as on effective date to meet any portion of CIRP costs. The submissions of the Appellant that the entire Airport Charges have to be borne by the SRA upfront cannot be accepted nor non-payment of Airport Charges by SRA as on date makes the allotment of slot unavailable to the SRA. Allotment of slot having been achieved by the SRA as noted above, non-payment of airport charges upfront by SRA cannot be said to be a reason

to not accept the fulfilment of condition of slot allotment. The payment of Airport Charges has to be made as per the Resolution Plan when the implementation of plans commenced as per the Resolution Plan. We thus do not find any substance in the submission of Learned Counsel for the Appellant that allotment of slot is not completed since Airport Charges have not been paid by the SRA.

55. With regard to submission of the Appellant that old dues of Airport Charges having not been settled, the Adjudicating Authority has rightly observed that settling of old dues cannot be conceded as non-allotment of slots. We thus fully concur with the finding of the Adjudicating Authority that conditions precedent under clause 7.6.1(c) were fulfilled.

International Traffic Rights Clearance

56. Clause 7.6.1(d) relates to international traffic rights clearance. Clause 7.6.1(d) is as follows:

> *"(d) International Traffic Rights Clearance – The Corporate Debtor shall have received the International Traffic Rights Clearance in compliance with Applicable Laws."*

57. Learned Counsel for the Appellant contends that SRA was under obligation to receive the International Traffic Rights Clearance before the expiry of the effective date. The said condition having not been fulfilled, SRA cannot be held to have complied with all the conditions precedent. It is submitted that while submitting the Resolution Plan, the SRA was well aware of the prevailing law and regulation concerning the initiation of international

operation, hence, SRA now cannot contend that this condition cannot be fulfilled before the commencement of the operation. The Adjudicating Authority has after considering the submissions of the parties held that the International Traffic Rights Clearance is required to be obtained in compliance with the applicable laws which stipulates that minimum twenty air crafts are required to be deployed before applying for such clearance. In view of this, we find that this condition cannot be satisfied upfront and needs to be satisfied in compliance with applicable laws i.e. after the SRA has twenty air crafts in operation which can only be achieved once the operation is re-commenced successfully. It is submitted by the SRA that it has approached the MoCA for upfront grant of international traffic rights clearance and MoCA by letter dated 10th May, 2022 clarified that international traffic rights clearance can only be granted as per Civil Aviation Policy 2016 which requires 20 aircraft or 20% of total capacity (in term of average number of seats on all departures put together), whichever is higher for domestic operations for the clearance. The letter dated 10th May, 2022 issued by Government of India clarified the grant of international traffic rights clearance and has been brought on record, which is at page 1440 volume 7 of the Appeal by which Government of India referring to its National Civil Aviation Policy 2016 stated in its letter dated 10th May, 2022 to the following effect:

> *"To,*
>
> *Mr. Mohd. Taufeeq,*
> *Jet Airways India Ltd.*
> *(mohd.taufeeq@jetairways.com)*

Subject: Re-Letter Dt. 27.01.2022 FOR Clarification for grant of International Traffic Clearance to Jet Airways India Ltd.

Sir,

I am directed to refer to you letter under reference and to say that in terms of Clause 8(b) of the National Civil Aviation Policy, 2016 an airline can commence international operations provided that it deploys 20 aircraft or 20% of total capacity (in term of average number of seats on all departures put together), whichever is higher for domestic operations. For this purpose, the published schedule of airlines will be the basis for monitoring, assuming that one aircraft would have six departures per day. Further, Para 2 of AIC 10/2022 on the Guidelines for Grant of Permission to Indian Air Transport Undertakings for Operation of Scheduled International Air Transport Services issued by the Directorate General of Civil Aviation dated 19.04.2022 prescribing the Eligibility Criteria may also be referred.

The Application of the Jet Airways, if it has a valid AOC and fulfils the above criteria, will be examined for international scheduled operations at appropriate time.

This issues with the approval of the Competent Authority.

Digitally Signed by Anup Pant
Date: 10-05-2022 10:35:44
(Anup Pant)
Under Secretary to the Government of India"

58. As per the business plan submitted by SRA, SRA had to commence its operation with only six narrow air crafts and the SRA could obtain the international traffic rights clearance only after deployment of the 20 aircraft or 20% of the capacity as noted above which is possible only after domestic air operations are commenced and amplified. When we look into the clause 7.6.1(d), it is clear that the said requirement was hedged with the condition **"in compliance with the applicable laws".** National Civil Aviation Policy, 2016 is an applicable law and said international traffic rights clearance can be granted only after fulfilment of the said condition which shall happen only after air operation are commenced and amplified to comply the aforesaid condition. The Adjudicating Authority thus has not committed any error in holding that conditions precedent cannot be satisfied upfront and need to be satisfied in compliance with applicable law i.e. after the SRA has 20 aircrafts in operation, it can only be granted once the air operation is recommenced successfully. We thus are of the view that condition 7.6.1(d) does not come in the way of implementation of the resolution plan and commencement of the air operation by Corporate Debtor and we uphold the findings of the Adjudicating Authority as above.

59. We have noticed that although before the Adjudicating Authority the Appellant did not challenge the fulfilment of condition (a) and (e) i.e. validation of AOC and demerger but during submission counsel for the Appellant submits that AOC having lapsed, the condition 7.6.1(a) is also not fulfilled which is submission that Air Operation Certificate was granted on 20th May, 2022 was valid till 19th May, 2023 and the extension granted by the

DGCA and MoCA vide letter dated 27th July, 2023 also lapsed after 03.09.2023.

60. The question to be considered is as to whether due to lapse of Air Operation Certificate on 19th May, 2023 and extension on 03.09.2023, it has to be held that SRA has not complied with condition no. 7.6.1(a). There can be no dispute between the parties that on the date when order was passed by the Adjudicating Authority i.e. 13th January, 2023, Air Operation Certificate dated 20th May, 2023 was in operation hence no infirmity can be found in the finding of the Adjudicating Authority that condition 7.6.1.(a) is fulfilled since the Air Operation Certificate was very much in operation.

61. Learned Counsel for the SRA has placed reliance on the Judgment of the Supreme Court in ***2022 2 SCC 256, Om Prakash Gupta Vs. Ranbir B Goyal*** where Hon'ble Supreme Court laid down that the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. In para 11 of the Judgment, following was held:

> *"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become*

inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770 : AIR 1975 SC 1409] this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed."

62. The Air Operation Certificate was very well in operation on the date when implementation application was filed by the SRA before the Adjudicating

Authority as well as on the date when order was passed by the Adjudicating Authority i.e. 13th January, 2023 hence no infirmity can be found in the findings of the Adjudicating Authority that condition 7.6.1(d) was fulfilled. The Air Operation Certificate was operative and granted till 19th May, 2023 and during this period SRA was not permitted to commence his operations because of challenge by the Appellant to fulfilment of the conditions precedent. The Order dated 13th January, 2023 passed by the Adjudicating Authority upholding the fulfilment of conditions precedent has been challenged by the Appellant in these Appeals and during pendency of these Appeals, MC Lenders did not take any steps nor discharge their part of obligation under the resolution plan hence it cannot be said that it was due to lapse of SRA that Air Operation Certificate could not be operationalised. SRA was always ready to operationalise its air operations but was not permitted by the Appellant. We thus do not accept the submission of the Appellant that due to lapse of air operation certificate during pendency of these Appeals before this Tribunal, it can be held that conditions precedent as required under 7.6.1.(a) was not fulfilled. We thus reject the submission of the Appellant that condition as required by 7.6.1(a) was not fulfilled.

63. In view of the foregoing discussions and conclusions, we are of the view that there is no infirmity in the order dated 13th January, 2023 passed by the Adjudicating Authority holding that conditions precedent for commencement of the air operation by the SRA were fulfilled.

64. We thus do not find any infirmity in the order dated 13th January, 2023 warranting any interference in these Appeals.

Question Nos. v, vi and vii:-

65. The above questions are interrelated, hence are being considered together.

66. First reliance has been placed by the learned Counsel for the Appellant on the order of the Hon'ble Supreme Court dated 18.01.2024 passed in Civil Appeal Nos.6427-6428 of 2023. The submissions of the Appellant on order dated 18.01.2024 have already been noticed by us in preceding paragraphs. We need to notice the judgment of the Hon'ble Supreme Court dated 18.01.2024 and its effect and consequences in the issues, which have arisen before us in these Appeals.

67. The Civil Appeal Nos.6427-6428 of 2023 have been filed by the Appellant, challenging the order of this Tribunal dated 28.08.2023 passed in IA No.3801-3802 of 2023. We have already noticed above that during the course of hearing of these Appeals - Company Appeal (AT) (Insolvency) Nos. 129 & 130 of 2023 an affidavit was filed by the Appellant dated 16.08.2023 expressing its offer with regard to the conditions mentioned in the affidavit and on fulfillment of which the Appellant undertook to withdraw the Company Appeal (AT) (Insolvency) Nos. 129 & 130 of 2023 as well as Appeal Nos.4131-4134 and 3736-3737 of 2023 filed before the Hon'ble Supreme Court. Paragraph-8 of the affidavit filed by the Appellant dated 16.08.2023 is as follows:

> *"8. In the present appeal, the lenders are agreeable that in case;*
>
> *a) SRA infuses Rs. 350 Crores by 31.08.2023, the date by which said payment is to be made as per the Resolution Plan, read with*

Order dated 26.05.2023 passed by this Hon'ble Tribunal; and

b) *SRA Undertakes to scrupulously follow the other terms and conditions of the resolution plan and*

c) *SRA complies with the liabilities relating to payment to the employees as per order of NCLAT dated 21.10.2022 which has been upheld by the Hon'ble Supreme Court in its order dated 30.01.2023,*

the Lenders would not contest the issues relating to granting of exclusion/ extension of time (in terms of the orders dt. 13.01.2023 passed by NCLT and order dt. 26.05.2023 passed by this Hon'ble Tribunal) as well as on the issue relating to compliance of condition precedent by the SRA and accordingly undertakes to withdraw the present Company Appeal (AT) Ins 129-130 of 2023 which is pending adjudication before this Hon'ble Tribunal along with Civil Appeal Nos. 4131-34 of 2023 & 3736-37 of 2023 filed before the Hon'ble Supreme Court, on the said two issues. In other words, lenders would not contest the granting of exclusions as well as on the issue regarding the compliance of Conditions Precedent, in case the aforesaid steps are taken by SRA without any further delay. Failing to comply with the conditions mentioned in Para 8(a) to (c) above, the Corporate Debtor should be directed to go into liquidation."

68. The SRA after affidavit dated 16.08.2023 undertook a stand that MC Lenders views are constructive and are positive steps towards the revival of the Corporate Debtor. IA Nos.3801-3802 of 2023 was filed by the SRA, where the Applicants made following prayers:

> *"(a) Direct the MC Lenders to adjust or otherwise apportion the PBG of INR 150 Crores as per the terms of the Resolution Plan towards the part payment of the first tranche under the Resolution Plan;*
>
> *(b) Allow the Successful RA to infuse INR 100 Crores as share application money in the designated bank account of the Corporate Debtor on or by 31 August 2023;*
>
> *(c) Allow the Successful RA to infuse the remaining sum of INR 100 Crores, as share application money in the designated bank account of the Corporate Debtor on or before 30 September 2023;*
>
> *(d) Pass necessary, specific and time bound directions to the MC Lenders, the Corporate Debtor, the concerned registrar of companies, the relevant stock exchanges, Ministry of Corporate Affairs, Government of India and all concerned government/ statutory authorities and departments to complete all statutory compliances and necessary steps including the issuance of new equity shares to the Successful RA as per the Resolution Plan by 15 October 2023;*

(e) pass necessary directions that in case new equity shares of the Corporate Debtor are not issued to the Successful RA as per the Resolution Plan against for INR 350 Crores latest by 15 October 2023, direct the MC Lenders and the Corporate Debtor be directed to, jointly or severally, forthwith refund all amounts deposited/ infused/ invested by the Successful RA in the Corporate Debtor until such date without any delay, protest, demur, cavil, deductions, or claims within 24 hours from 15 October 2023;

(f) Pass necessary directions to the effect that the amounts deposited by the Successful RA with the Corporate Debtor until 30 September 2023 including the upfront amounts lie in the designated share application account of the Corporate Debtor and is not be disbursed/ utilized or otherwise apportioned by the Corporate Debtor or the MC Lenders for any purposes other than implementation of the Resolution Plan and that to only after allotment of shares of the Corporate Debtor to the Successful RA or refunded to the Successful RA in the manner stated above;

(g) Pass necessary directions to the effect that in case the PF/ Gratuity Application is not allowed, the Resolution Plan cannot be implemented under Section 30 (2) (e) and in such event direct the MC Lenders and the Corporate Debtor to jointly or severally, forthwith refund all amounts deposited/ infused/ invested by the Successful

RA in the Corporate Debtor until such date including share application money of INR 200 Crores and PBG amounts of INR 150 Crores without any delay, protest, demur, cavil, deductions, or claims within 24 hours from 15 October 2023;

(h) pass any other such order(s) as this Hon'ble Appellate Authority may deem fit and proper in the facts and circumstances of this case."

69. This Tribunal heard learned Counsel for the Appellant as well as learned Counsel for the SRA on IA Nos.3801-3802 of 2023 as well as the affidavit dated 16.08.2023 filed by the Appellant and by its order dated 28.08.2023 allowed IA Nos.3801-3802 of 2023, insofar as prayers (a), (b) and (c) were concerned. The prayer (a) made in the Application that SRA be permitted to adjust the security PBG of INR 150 crores towards the payment of INR 350 crores was accepted. Prayer (b) and Prayer (c), which were for payment of INR 100 crores by 31.08.2023 and INR 100 crores by 30.09.2023 were also allowed. Operative portion of the order dated 28.08.2023 is in paragraph 31, which is as follows:

*"**31.** In view of the fore-going discussion, we partly allow I.A. No. 3801-3802 of 2023 in so far as prayer (a), (b) and (c) are concerned. Let I.A. No. 3801- 3802 of 2023 be listed on 04th October, 2023 for further consideration."*

70. Civil Appeal Nos.6427 and 6428 of 2023 were filed by the Appellant, challenging the order dated 28.08.2023 passed by this Tribunal, which Appeal has been decided by the Hon'ble Supreme Court vide its order dated

18.01.2024 along with Civil Appeal Nos.4131-4134 of 2023 and 3736-3737 of 2023. The Hon'ble Supreme Court vide its order dated 18.01.2024 held that order of this Tribunal dated 28.08.2023 allowing prayer (a) of the SRA, permitting adjustment of PBG of INR 150 crores was not in accordance with the affidavit of the Lenders dated 18.08.2023, where Lenders have required infusion of INR 350 Crores by the SRA. The arguments advanced on behalf of the learned Counsel for the Appellant, challenging the order aforesaid has been noticed by Hon'ble Supreme Court in paragraph-17 of the judgment, which is as follows:

> *"**17** Mr N Venkataraman, Additional Solicitor General appearing on behalf of SBI, submitted that:*
>
> *(i) By its affidavit dated 16 August 2023, SBI had clearly stipulated three conditions, among them being that the SRA must infuse Rs 350 crores by 31 August 2023;*
>
> *(ii) The plain meaning of the expression "infuse" is that the SRA was liable to pay three tranches of a total amount of Rs 350 crores and the NCLAT was not justified at the interim stage in permitting an adjustment of the PBG of Rs 150 crores against the obligation to deposit the last tranche;*
>
> *(iii) The SRA had to undertake to comply with the other terms and conditions of the Resolution Plan besides complying with the liabilities relating to the payment to*

the employees. As regards the payment to the employees, an appeal filed by the SRA before this Court against the order of the NCLAT dated 21 October 2022 was dismissed on 30 January 2023. Yet there is no compliance towards the employees and staff; and

(iv) There has been a default on the part of the SRA in complying with the conditions precedent spelt out in clause 7.6 and on various other aspects, including the payment of workmen's dues, airport dues and other matters."

71. The condition as was envisaged in the affidavit dated 16.08.2023 filed by the Appellant has been noticed in paragraph-20 of the judgment, which is as follows:

"20 *The occasion for an extension of time to the SRA for the deposit of Rs 350 crores arose as a consequence of the affidavit which was filed by SBI before the NCLAT on 16 August 2023. SBI's affidavit envisaged that the lenders would not contest the issues pertaining to (a) the grant or exclusion of time; or (b) extension in terms of the orders which were passed by the NCLT on 13 January 2023 and 26 May 2023; and (c) compliance of the conditions precedent by the SRA. SBI's offer was, however, subject to the fulfillment of three conditions. The three conditions were:*

(i) The SRA must infuse an amount of Rs 350 crores by 31 August 2023 (the date by

which the payment was to be made in terms of the Resolution Plan read with the order dated 26 May 2023 of NCLT);

(ii) The SRA must undertake to scrupulously follow the other terms and conditions of the Resolution Plan; and

(iii) The SRA must comply with the liabilities in regard to the payment to the employees in terms of the order of the NCLAT dated 21 October 2022 which has been upheld by this Court on 30 January 2023."

72. The Hon'ble Supreme Court in paragraph-21 took the view that order of this Tribunal allowing plea of SRA for adjustment and consequential release of the PBG at the interlocutory stage, is not in accordance with the tenor of paragraph-8 of the affidavit, which was filed by the SRA. The said observations have been clearly made in paragraph 21 of the judgment, is as follows:

"21 *Conditional on compliance with the three conditions set out above, SBI stated that it would be willing to withdraw both the company appeals which were pending before the NCLAT as well as the Civil Appeals which were pending before this Court, details of which were set out in the affidavit. The offer which was made by SBI on behalf of the lenders had to be complied with as it stood in the event that the SRA sought the benefit of the offer. According to the SRA, the PBG was liable to be released on adjustment in terms of the Resolution Plan. This is a matter*

which would have to await an adjudication by NCLAT in the pending appeal. The impugned order of the NCLAT, on the other hand, allowed the plea of the SRA for adjustment and consequential release of the PBG at the interlocutory stage. This prima facie would not be in accordance with the tenor of paragraph 8 of the affidavit which was filed by SBI in which it stated that the lenders would not contest the issues in the pending appeal conditional on compliance with the three conditions which were set out in the affidavit. Infusion of Rs 350 crores, as envisaged in the affidavit, could not have been substituted with a direction for adjustment of the PBG, at that stage. Infusion meant that the third tranche has to be paid in the same manner. Adjustment of the PBG was not permissible."

73. The Hon'ble Supreme Court in the above paragraph has held that adjustment of PBG was not permissible at the interlocutory stage. Further, learned Counsel for the Appellant has relied on paragraphs 25 and 26 of the judgment, where Hon'ble Supreme Court has made following observations:

"25 *The lenders have argued in the appeals that there has been a failure on the part of the SRA to comply with the conditions precedent. If the SRA were to comply with the terms as envisaged in SBI's affidavit dated 16 August 2023, evidently issues pertaining to compliance with the conditions precedent were not to be pressed thereafter. In order to furnish this SRA a final*

opportunity to comply and consistent with the above position, we issue the following directions:

(i) The SRA shall peremptorily on or before 31 January 2024, deposit an amount of Rs 150 crores into the designated account of SBI, failing which the consequences under the Resolution Plan shall follow;

(ii) The PBG of Rs 150 crores shall continue to remain in operation and effect, pending the final disposal of the appeal before NCLAT, and shall abide by the final outcome of the appeal and the directions that may be issued by NCLAT; and

(iii) Whether or not the SRA has been compliant with all the conditions of the Resolution Plan as well as of the conditions set out in paragraph 8 of the affidavit dated 16 August 2023 shall be decided by the NCLAT in the pending appeal."

26 *The order dated 28 August 2023 of the NCLAT is modified in part in terms of the above directions and, hence, the permission which was granted to the SRA to adjust the last tranche of Rs 150 crores against the PBG shall stand substituted by the above directions."*

74. From the perusal of the judgment of the Hon'ble Supreme Court as noticed above, it is clear that direction issued by Hon'ble Supreme Court to deposit the amount of INR 150 crores peremptorily by on or before 31.01.2024

was in reference to the affidavit dated 16.08.2023 by which the Appellant asked for infusion of INR 350 crores. Paragraph 26 of the judgment, contains a direction of the Hon'ble Supreme Court, by which order dated 28.08.2023 passed by this Tribunal has been modified in part. The Hon'ble Supreme Court clearly held "*the permission which was granted to the SRA to adjust the last tranche of Rs.150 crores against the PBG shall stand substituted by the above direction*". Meaning thereby, the order of this Tribunal to adjust the PBG of INR 150 crores was substituted by direction of Hon'ble Supreme Court that the said amount peremptorily be deposited on or before 31.01.2024 by SRA.

75. By order of the Hon'ble Supreme Court dated 18.01.2024, it is made clear that Hon'ble Supreme Court modified only part of the order passed by this Tribunal dated 28.08.2023, by which this Tribunal permitted the SRA to adjust INR 150 crores PBG, which part was modified by directing the SRA to peremptorily deposit the amount of INR 150 crores by 31.01.2024. Thus, it is clear that direction of the Hon'ble Supreme Court in order dated 18.01.2024 is in reference to affidavit dated 16.08.2023, which was filed by the Appellant in this Appeal and time for deposit of the amount of INR 150 crores was granted by Hon'ble Supreme Court, consequent to setting aside and modifying the direction of this Tribunal by which SRA was permitted to adjust the PBG of INR 150 crores. The opportunity was granted by Hon'ble Supreme Court to deposit the amount by 31.01.2024, since direction of this Tribunal was set aside by which PBG was to be adjusted.

76. From the above, it is clear that direction to deposit INR 150 crores by 31.01.2024 was only in relation to offer submitted by the Appellant by affidavit dated 16.08.2023. The learned Counsel for the Appellant – Shri N. Venkataraman, ASG as well as Shri Tushar Mehta, SG have contended that SRA having failed to deposit INR 150 crores, there is breach committed by SRA to the Resolution Plan and this Tribunal may pass an order for liquidation of the Corporate Debtor under Section 33, sub-section (3) of the IBC.

77. The consequence of non-deposit of INR 150 crores by the SRA by 31.01.2024, is that SRA was not entitled to take any benefit of the offer, which was given by the Appellant by affidavit dated 16.08.2023. Hence, the undertaking given by the Appellant to withdraw Company Appeal (AT) (Insolvency) Nos. 129 & 130 of 2023 as well as Appeal Nos.4131-4134 and 3736-3737 of 2023 was not to happen. On failure to comply with the offer made by Appellant by affidavit dated 16.08.2023, both the Appeals pending in this Tribunal are now to be decided on merits. The Hon'ble Supreme Court in paragraph 19 of the judgment has made it clear that observations made in the judgment are confined to the arrangement, which must operate during the pendency of the Appeal without this Court expressing a final view on the merits of the appeal, which will fall for consideration before the NCLAT. Paragraph 19 of the judgment of the Hon'ble Supreme Court is as follows:

> ***"19*** *While considering the rival submissions, it must be noted, at the outset, that the appeal, stemming from the NCLT's January 13 2023 order holding that the SRA is compliant with the*

conditions precedent is pending before the NCLAT. Hence, the observations in the present judgment are confined to the arrangement which must operate during the pendency of the appeal without this Court expressing a final view on the merits of the appeal, which will fall for consideration before the NCLAT."

78. Paragraph 19 of the judgment of the Hon'ble Supreme Court, makes it clear that the Hon'ble Supreme Court has not expressed any view on the merits of the Appeal, which was yet to be considered by this Tribunal and the question as to whether the SRA was compliant with the conditions precedent has to be decided in this Appeal. We having held that directions of the Hon'ble Supreme Court vide order dated 18.01.2024 are confined to the offer, which was submitted by the Appellant by affidavit dated 16.08.2023, non-fulfillment of the conditions by SRA by non-deposit of INR 150 crores by 31.01.2024 is that the SRA shall become disentitled to receive the offer given by the Appellant by affidavit that they will withdraw the Appeal in this Tribunal and the Hon'ble Supreme Court. The result is that the Appeals pending in this Tribunal has to be heard and decided on merits, SRA having not deposited the amount of INR 150 crores by 31.01.2024.

79. The submission of the Appellant that on account of non-deposit of INR 150 crores as directed by the Hon'ble Supreme Court, should lead to liquidation of the Corporate Debtor, cannot be accepted. The Hon'ble Supreme Court in its judgment dated 18.01.2024 has clearly held that its order modifying the direction of the Tribunal is confined only to the

permission granted to the SRA to adjust INR 150 crores PBG. Thus, modification of the order by the Hon'ble Supreme Court also has to confine to the adjustment of PBG. It was held by the Hon'ble Supreme Court that Appellant have asked for infusion of INR 350 crores and infusion does not include adjustment of PBG. The Hon'ble Supreme Court neither considered nor expressed any opinion on the question of liquidation of the Corporate Debtor, nor the order dated 18.01.2024 can be read to mean that non-compliance of the direction to deposit INR 150 crores by the SRA by 31.01.2024 should lead to liquidation of the Corporate Debtor. The submission of the Appellant that non-deposit of INR 150 crores leads to failure of Resolution Plan, cannot be accepted. As observed above, consequence of non-deposit of INR 150 crores is that these Appeals have to be heard on merits and the question, which has arisen in the Appeal has to be decided regarding compliance of conditions precedent by the SRA by 20.05.2022.

80. Further submission of the Appellant that this Tribunal may exercise jurisdiction under Section 33, sub-section (3) in directing liquidation of the Corporate Debtor due to non-compliance of deposit of INR 150 crores also cannot be accepted. For passing an order under Section 33, sub-section (3), there has to be adjudication that Resolution Plan approved by the Adjudicating Authority has been contravened by the Successful Resolution Applicant. We do not accept the submission of the Appellant that by non-deposit of INR 150 crores by 31.01.2024, the SRA has contravened the Resolution Plan and order be passed under Section 33, sub-section (3).

81. In view of our above observations and conclusions, we answer Question Nos. v, vi and vii in following manner:

Question No. v	:	Direction of Hon'ble Supreme Court permitting the Successful Resolution Applicant to infuse INR 150 crores by 31.01.2024 was in reference to offer made by Appellant in affidavit dated 16.08.2023
Question No. iv	:	The Successful Resolution Applicant having not been able to infuse funds by 31.01.2024 as directed by Hon'ble Supreme Court vide its judgment dated 18.01.2024, it cannot be held that Resolution Plan has failed and cannot be implemented by the SRA.
Question No. vii	:	No grounds have been made out to direct the liquidation of Corporate Debtor under Section 33, sub-section (3) in these Appeals.

Way Forward

82. This brings us now to Question No. viii delineated above. In the foregoing discussions, we have held that Adjudicating Authority has correctly by its impugned order dated 13.01.2023 held that condition precedents were achieved on 20.05.2022 by SRA. These Appeals has been filed by Lenders, challenging the aforesaid order dated 13.01.2023. We having upheld the order dated 13.01.2023, whether the Appeals have to be closed with the aforesaid order or there is requirement of consideration of any subsequent event or facts is a question, which has been addressed before us, which needs to be answered.

83. As observed above, the right of parties with regard to lis raised in a proceeding has to be decided on the date of institution of the proceeding, which is a settled proposition. We have considered the correctness of the order dated 13.01.2023 passed by Adjudicating Authority in accordance with the said proposition. The dispute, which arose between the parties, i.e., Lenders and SRA was with regard to steps regarding implementation of the Resolution Plan. The Resolution Plan having been approved, the same needs to be implemented. Implementation of Resolution Plan consists of various steps, which have to be completed within timeline as provided in the Resolution Plan. The time which has elapsed subsequent to effective date and the events, which have taken place subsequently are certainly relevant with regard to implementation of the Resolution Plan and cannot be refused to be taken into consideration. We in this reference, need to notice certain judgments of the Hon'ble Supreme Court, which throws considerable guidance for proceeding in the matter.

84. The first judgment, which needs to be noticed is a judgment of the Hon'ble Supreme Court in ***Pasupuleti Venkateswarlu vs. Motor & General Traders – (1975) 1 SCC 770***. One of the question, which arose for consideration in the above case is as to whether High Court could have taken cognizance of the subsequent events, repelling the submission of the Appellant that subsequent events cannot be taken into consideration, the Hon'ble Supreme Court laid down that although it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date of suitor institutes the legal proceeding, if a fact, arising after the lis has come

to court and has a fundamental impact on the right to relief or the manner of moulding it, the Tribunal is bound to take into consideration the events which stultify or render inept the decretal remedy. In paragraphs 4 and 5 of the judgment, following has been held:

> *"**4.** We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice — subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with*

the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict, in view of the inhibition written into Section 10(3)(iii) itself. We are not disposed to disturb this approach in law or finding of fact.

5. *The law we have set out is of ancient vintage. We will merely refer to Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri [AIR 1941 FC 5 : 1940 FCR 84] which is a leading case on the point. Gwyer, C.J., in the above case, referred to the rule adopted by the Supreme Court of the United States in Patterson v. State of Alabama [294 US 600, 607]:*

> *"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."*

and said that that view of the Court's powers was reaffirmed once again in the then recent case of Minnesota v. National Tea Co. [309 US 551, 555]. Sulaiman, J., in the same case [Lachmeshwar Prasad Shukla v. Keshwar Lal Chaudhuri, (supra)] relied on English cases and took the view that an appeal is by way of a re-hearing and the Court may make such

order as the Judge of the first instance could have made if the case had been beard by him at the date on which the appeal was heard (emphasis, ours). Varadachariar, J. dealt with the same point a little more comprehensively. We may content ourselves with excerpting one passage which brings out the point luminously (at p. 103):

> *"It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against.""*

85. The Hon'ble Supreme Court in the said case in paragraph-5 of the judgment has quoted with approval opinion of Varadachariar. J., which is to the following effect:

> *"It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against."*

86. As noted above, the lis between the parties, i.e. Lenders and the SRA being the implementation of the Resolution Plan, different steps and compliances of various clauses of Resolution Plan, time elapsed during litigation between the parties and time lapsed during the proceeding are relevant to be considered to find out the way forward.

87. The proposition laid down by the Hon'ble Supreme Court in ***Pasupuleti Venkateswarlu*** case was again reiterated by the Hon'ble Supreme Court in ***Om Prakash Gupta vs. Ranbir B. Goyal – (2002) 2 SCC 256***. In paragraph 11 of the judgment, following has been laid down by Hon'ble Supreme Court:

> *11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770 : AIR 1975 SC 1409] this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of*

> *other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed.*

88. We may also take note of the pronouncement of the Hon'ble Supreme Court in celebrated case of ***Swiss Ribbons Private Limited and another vs. Union of India and Others – (2019) 4 SCC 17***, where the Hon'ble Supreme Court has emphasized on primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor. In paragraph 28 of the judgment, following has been laid down:

> *"**28.** It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate*

debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

89. To the same effect is the subsequent judgment of the Hon'ble Supreme Court in ***(2020) 15 SCC 1 – Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.***, where the Hon'ble Supreme Court in paragraph 21 laid down following:

"21. The expositions abovementioned make it clear that the Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and other entrepreneurs in a time-bound manner so as to ensure maximisation of value of assets of such persons and to balance the interest of all the stakeholders. As regards corporate debtor, the primary focus of the Code is to ensure its revival and continuation by protecting it from its own management and, as far as feasible, to save it from liquidation. As tersely put by this Court in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17], the Code is thus a beneficial

legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.

21.1. *When the Corporate Insolvency Resolution Process is understood on the anvil of the aforementioned fundamentals on the spirit and intent of IBC, it is also evident that such a process is not intended to be adversarial to the corporate debtor but is essentially to protect its interests.*

21.2. *In relation to a financial creditor, the trigger for CIRP is default by the corporate debtor of rupees one lakh or more against the debt(s). When seeking initiation of CIRP qua a corporate debtor, the financial creditor is required to make the application in conformity with the requirements of Section 7 of the Code while divulging the necessary information and evidence, as required by the 2016 Rules. After completion of all other requirements, for admitting such an application of the financial creditor, the adjudicating authority has to be satisfied, as per sub-section (5) of Section 7 of the Code, that "default" has occurred and, in this process of consideration by the adjudicating authority, the corporate debtor is entitled to point out that default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. As observed by this Court, the legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default".*

90. The learned Counsel for the SRA has also relied on judgment of this Tribunal in ***CFM Asset Reconstruction Pvt. Ltd. vs. SS Natural Resources***

Pvt. Ltd. & Anr. – Company Appeal (AT) (Insolvency) No.396 of 2022 decided on 19.04.2022, in which case the Resolution Plan was approved and order approving the Resolution Plan came to be challenged before the NCLAT, which Appeal was dismissed on 04.03.2021. After dismissal of the Appeal, NCLT directed the Monitoring Agency to start taking steps for implementation of the Resolution Plan. The submission raised on behalf of one of the Financial Creditor was that Corporate Debtor should be sent to liquidation, since the payment as per Plan has not been made to the Financial Creditor. The Adjudicating Authority had rejected the submission of the Financial Creditor that Corporate Debtor had to be sent to liquidation. The Adjudicating Authority further granted five days' time to the SRA to transfer the amount in the Corporate Debtor's account, which order of the Adjudicating Authority came to be challenged by the Financial Creditor in the Appeal. The Appeal was dismissed by this Tribunal by upholding the order of the Adjudicating Authority. This Tribunal observed that even if certain delay has taken place in implementation of the Resolution Plan, no case has been made out to interfere with the order of the Adjudicating Authority. In paragraphs 21 to 24, following was held:

> *"**21.** In the above paragraphs, the Adjudicating Authority has given due consideration to the principles of law and the facts in the present case and sequence of the events. The Adjudicating Authority in its Order had noted that amount of Rs. 322 Crore was already parked by the SRA in an Account which was pointed out in the course of hearing on 22nd February, 2022 which amount was directed to be transferred by the*

Adjudicating Authority not later than 5 days from the date of the Order i.e. five days from 07th April, 2022. Dr. Singhvi during the course of the submission has made statement that entire amount has already been transferred to the Corporate Debtor as directed by the Adjudicating Authority on 07th April, 2022.

22. *When we analyze the facts and sequence of the events of the present case, we come to the conclusion that there is no lack of intention on the part of the SRA for implementation of the plan after the Judgment of the NCLAT dated 04.03.2021 including offer to deposit the entire amount in the Escrow Account, the pendency of the Appeal of the Vanguard before the Hon'ble Supreme Court and further making the payment of Rs. 12.49 Crores to the CIRP Cost on 18th June, 2021 and making Payment of Rs. 7 Crores for workmen which indicate the willingness of the SRA to implement the plan. The Adjudicating Authority has further noticed the submission of one of the creditors before it Punjab National Bank which clearly indicated that one opportunity be given to the SRA to implement the plan.*

23. *We are of the considered opinion that Order of the Adjudicating Authority giving five days' time as a last opportunity to transfer the amount in the Corporate Debtor's Account can in no manner be said to be contrary to the orders passed by the NCLAT dated 04.03.2021.*

24. *The Appellant who is born only on 23rd April, 2021 i.e., after the Order of the Adjudicating Authority want to push the Corporate Debtor to the Liquidation to realize its dues to the maximum, cannot be the reason for allowing the Application filed by the Appellant for*

liquidation and Adjudicating Authority after taking into consideration entire facts and circumstances did not commit any error in giving five days further time to the SRA to deposit the amount in the Account of the Corporate Debtor which Corporate Debtor did as stated before us. The implementation of the Resolution Plan although certain delay had occurred cannot be interfered with in exercise of our Appellate Jurisdiction. We are thus of the view that there is no merit in the Appeal, the Appeal is dismissed."

91. The learned Counsel for the Appellant has also relied on the judgment of the Hon'ble Supreme Court dated 18.01.2024.

92. We, thus, are of clear opinion that subsequent events specially, the time elapsed during pendency of the litigation has to be taken note of and appropriate remedial actions should be taken as noted above. The object of the IBC is to revive the Corporate Debtor. A Resolution Plan, which has been approved by the Adjudicating Authority and have been affirmed upto Hon'ble Supreme Court, which is binding on all, including the Lenders and SRA, every steps have to be taken by all concerned to ensure that Plan is implemented.

93. The implementation of Plan and revival of the business of the Corporate Debtor does not only generate revenue for making of the payments as contemplated in Resolution Plan, but is important for making payments to workers and employees. The workers and employees are waiting for their payments of provident fund, gratuity and other dues as per the Resolution Plan for last more than three years. Non-implementation of the Plan shall

have direct effect on the dues of workers and employees, which need to be avoided.

94. Under the heading 'Way Forward', we need to consider several factors and respective submissions of the parties including the steps for implementation of the Plan and payment of dues of workmen and employees.

95. Further steps towards implementation of the Plan are consequential steps to the upholding of the order dated 13.01.2023 of the Adjudicating Authority. As noted above, order dated 13.01.2023 of the Adjudicating Authority, holding that condition precedents have been achieved by SRA, the position was resisted by the SRA before the Monitoring Committee and before this Tribunal and before the Hon'ble Supreme Court, in this Appeal as well as different Appeals filed before the Hon'ble Supreme Court as noted above. The Lenders till the date of final arguments in this Appeal have been contesting that SRA has not achieved the condition precedent and effective date has not arrived. We having held that SRA has achieved the condition precedents on 20.05.2022, consequential steps have become necessary to be taken for implementation of the Plan, which could not proceed forward on account of stand taken by the Appellant as noted above. Before proceeding further, we may notice the implementation schedule as contained in paragraph 7.7 of the Resolution Plan. Paragraph 7.7. of implementation schedule is as follows:

> *"**7.7 <u>Implementation Schedule –</u>***
>
> ***7.7.1** The Resolution Applicant shall take the following steps in the order of sequence (except otherwise mentioned in any step for any part of the step) as an*

integral part of the Resolution Plan. It is provided that the procedure, timelines and the sequence or steps listed below are only indicative and that they may be re-arranged/ changed as may be required or directed based on discussions with the necessary Government Authorities/ stock exchange (on account of past non-compliances of the Corporate Debtor or otherwise) or for the purpose of advancing any payments to the stakeholders, and at all times in compliance with Applicable Laws:

Step	*Activity*	*Days*
1.	*Receipt of approval from the Competition Commission of India under the provisions of the Competition Act, 2002 read with the provision of the BIC.*	*Before approval of Resolution Plan by CoC*
2.	*Declaration of the Successful Resolution Applicant and Receipt of LOI from the CoC*	*X*
3.	*Unconditional acceptance of the LOI*	*X + 3*
4.	*Issuance of Performance Security Bank Guarantee*	*X + 7*
5.	*Finalization of the members of the Monitoring Committee*	*Between X and Approval Date*
6.	*Approval Date*	*Y*
7.	*Monitoring Committee to take control as per Clause 7.8.2*	*Y*
8.	*Fulfillment of Conditions Precedent as per Clause 7.6.1*	*After Y*
9.	*Filing of the certified copy of the Order of Approval received from Adjudicating Authority sanctioning the Resolution Plan with the relevant Government Authorities/ Stock Exchange/ Departments.*	*Y + 10*
10.	*Effective Date*	*Z*
11.	*Infusion of Rs.350 Crores in the Corporate Debtor*	*Z + 150*
12.	*Setting up the Contingency Fund*	*Z + 170*

13.	*Cancellation of shares (excluding Public Shares) as per Clause 7.4.1 (c)*	*Z + 170*
14.	*Reconstitution of Share Capital as per Clause 7.4.2 above.*	*Z + 170*
15.	*Steps towards issuance of equity shares as per Clause 7.4.3 above.*	*Z + 170*
16.	*Payment of CIRP Costs as per Clause 6.4.1*	*Z + 170*
17.	*Payment to the Operational Creditors (workmen and Employees including Authorized Representatives of Workmen and Employees) as per Clause 6.4.2.*	*Z + 175*
18.	*Payment to all the Operational Creditor (other than Workmen and Employees) as per Clause 6.4.3 above.*	*Z + 175*
19.	*Payment to Other Creditors and Stakeholders as per Clause 6.4.5. Clause 6.4.6, 6.4.7. and 6.4.8*	*Z + 175*
20.	*Payment to Dissenting Financial Creditors as per Clause 6.4.4 (m)(i).*	*Z + 176*
21.	*1st Tranche payment to Financial Creditors as per Clause 6.4.4.*	*Z + 180*
22.	*Monitoring Committee to be released and Reconstituted Board of Directors to take over the management of the Corporate Debtor.*	*Z + 180*
23.	*Closing Date.*	*Z + 180*
24.	*Redemption of Series B. Series C: and Series D ZCBs*	*Z + 365*
25.	*Necessary statutory approvals*	*Y + 365* *(in accordance with Sec 31(4) of the IBC)*
26.	*Redemption of Series A ZCB*	*Z + 730*
27.	*Release of charge (if any) over assets of the Corporate Debtor (which have not been previously released)*	*Z + 730*
28.	*Redemption of NCDs and release of any charge (if any)*	*Z + 5 Years"*

96. From the effective date, within 180 days, closing date has to be achieved. We have noted earlier that effective date being 20.05.2022, the extension was allowed till 15.05.2022 by Adjudicating Authority by order dated 13.01.2023, i.e., till 15.05.2023. By order dated 26.05.2023 passed in these Appeals the time for payment of first tranche was extended till 31.08.2023 and 30.09.2023. Since, these Appeals are being decided by our orders of today, the period from 30.09.2023 till date also needs to be excluded for achieving the implementation of the Resolution Plan.

97. The parties having various submission on different aspects of implementation of Resolution Plan, we proceed to examine them separately in following manner:

1. Exclusion of time.
2. Complementation of documentation of security of Dubai property.
3. Completion of payment of 350 crores, which is first tranche payment by the SRA.
4. Share reconstitution.
5. First tranche payment to creditors.
6. Workman Dues.
7. AOP
8. Closing date.
9. Role of Actions of MC Lenders.

Exclusion of Time

98. As noted above, the Effective Date was achieved by SRA on 20.05.2022 by completing all condition precedent as per Resolution Plan under Clause 7.6.1. From the Effective Date, within 180 days, the Resolution Applicant was required to make first tranche payment of INR 350 crores. Exclusion of time, subsequent to 20.05.2022 was granted by Adjudicating Authority vide order dated 13.01.2023 and thereafter by this Tribunal in Appeal by order dated 26.05.2023. As per the order passed by this Tribunal on 26.05.2023, the payment of first tranche amount by SRA was to be completed by 31.08.2023. On an Application filed by SRA, time for further payment of INR 100 crores was extended till 30.09.2023. As noted above, against the order dated 03.03.2023, 26.05.2023 and 28.08.2023 passed by this Tribunal, MC Lenders, i.e., Appellant filed Appeals in Hon'ble Supreme Court and have been challenging the orders passed by this Tribunal as well as the claim of the SRA that they have completed all condition precedents on 20.05.2022. Even during the final hearing in these Appeals, which took place subsequent to the Hon'ble Supreme Court order dated 18.01.2024, Appellants have been contending that SRA has not achieved the condition precedents as per Clause 7.6.1. We having upheld the order of Adjudicating Authority dated 13.01.2023 that SRA completed condition precedents, the SRA is entitled for exclusion of time till the date of this judgment. Time having been already excluded till 30.09.2023, in continuation of said exclusion, we further direct exclusion of time till the date of this judgment.

Complementation of documentation of security of Dubai property.

99. We have already noticed the Clause 6.4.4 under Heading "*Summary of payments and security package*". In Clause 6.4.4, PBG of INR 47.5 crores was only mentioned. However, in the Resolution Plan Clause 6.4.12 was substituted, where in addition to PBG of INR 47.5 crores, PBG of 102.5 crores was to be provided for Effective Date. Clause 6.4.12, as replaced by the addendum, is as follows:

> *"6.4.12 Request for the consideration of the CoC – As required under the RFRP the Resolution Applicant shall provide the performance security bank guarantee ("PBG") for a total sum of Rs.150 Crores. The PBG will be provided in two parts, with the first PBG of Rs.47.5 Crores provided within 7 (seven) days from the date of receipt of LOI; and PBG for the remaining sum of Rs.102.5 Crores provided on the Effective Date."*

100. The SRA within seven days from 20.05.2022, had made balance payment, totalling to INR 150 crores PBG. There is no dispute that INR 150 crores PBG has been provided by the SRA within the time prescribed.

101. There is dispute between the parties regarding creating mortgage over Dubai Property No.1, Dubai Property No.2 and Dubai Property No.3, which was contemplated in Clause 6.4.4. the learned Counsel for the Appellant submitted that for creating mortgage, an Application was made by SBI lead creditors to RBI for creation of security on 24.02.2022 and RBI vide its order dated 22.07.2022 has already approved the creation of mortgage on

balance security of Dubai properties. The Appellant having taken the stand that Effective Date has not achieved, since the SRA has not completed the condition precedents, did not move forward for creation of mortgage over the Dubai properties. Immediately after order dated 13.01.2023 passed by Adjudicating Authority holding that SRA has completed the condition precedents, SRA sent reminders to Lenders, seeking approval and signing of transaction document for the creation of security, the Lenders did not respond nor provided their response to the transaction document. On 3.10.2023, SRA again sent email to MC Lenders. MC Lenders have recently on 19.01.2024 engaged one valuer – ValuStart to conduct valuation of the properties.

102. Shri N. Venkataraman, learned ASG appearing for the Lenders submitted that SRA has not provided necessary expenses for charge creation, due to which process has been delayed. The learned Counsel for the SRA submits that SRA was always ready and still ready to bear all expenses for charge creation.

103. We notice that in the Resolution Plan itself Clause 6.4.4 provided that "*Security will be created at the cost of Resolution Applicant*". Thus, it is Resolution Applicant, who is to bear all costs for charge creation. The mortgage/ charge over Dubai properties is essential condition of the Plan for proceeding further. We are of the view that ends of justice will be met by issuing appropriate direction to the Lenders to take all steps for creation of charge and direction to the SRA to bear all expenses. We direct that the said process of creation of charge on Dubai Property No.1, Dubai Property No.2 and Dubai Property No.3 be completed within a period of 30 days from today.

Completion of payment of INR 350 crores, which is first tranche payment by the SRA.

104. As noted above, the SRA has already paid an amount of INR 100 crores by 31.08.2023 and INR 100 crores by 30.09.2023. INR 150 crores was not infused by the SRA as per the offer given by affidavit dated 16.08.2023 by the Appellant and Hon'ble Supreme Court has already held vide its order dated 18.01.2024 that SRA having not infused INR 150 crores, it is not entitled to take the benefit of affidavit dated 16.08.2023.

105. We have already held that SRA is not entitled for the benefit of affidavit dated 16.08.2023, having not infused INR 150 crores.

106. The question now to be considered is as to whether the Appellant is entitled to adjust INR 150 crores PBG, which is lying with SRA towards first tranche payment. We may refer to Summary of payments and security package as contained in Clause 6.4.4, which is as follows:

Head	Amount Payable	Security Offered	Value of Security	Date of Creation of Security	Date of Release of Security
Cash Payment	Up to Rs.185 Crores	PBG of Rs.47.5 Crores	Rs.393.5 Cr. (with BKC)	Effective Date	PBG adjusted
		BKC Property (if gien)	Or		To be released on sale of BKC
		Mortgage over Dubai Property No.1 valued at more than Rs.100 Crores	Rs.147.5 Cr. (without BKC		Year 5 or on complete payment, whichever is earlier
Cash Payment	Rs.195 Crores	BKC Property (if given)	Rs.445 Cr (with BKC)	Effective Date	To be released on sale of BKC

		Mortgage over Dubai Property No.1 value at more than Rs.100 Crores	Or Rs.200 Cr (without BKC)	Effective Date	Year 5 or on complete payment whichever is earlier
		Mortgage over Dubai Property No.2 valued at more than Rs.100 Crores		Effective Date	
Cash Payment	NVP of Rs.391 Crores (using the discount rate)	Mortgage over Dubai Property No.1 valued at more than Rs.100 Crores	Rs. 600 Crores	Effective Date	Year 5 or on complete payment whichever is earlier
		Mortgage over Dubai Property No.2 valued at more than Rs.100 Crores		Effective Date	
		Mortgage over Dubai Property No.3 valued at more than Rs.50 Crores		Effective Date	

107. The above Clause clearly indicates that in the first tranche payment, under the heading "*Date of Release of Security*", the expression used is 'PBG adjusted'. Thus, Resolution Plan clearly contemplated that in the first tranche payment INR 150 crores PBG is to be adjusted, which was a Clause of the Resolution Plan duly approved by the Lenders. We, thus, are of the view that SRA having already paid INR 200 crores, the amount of INR 150 crores, which is lying with the MC Lenders as PBG is to be adjusted in the first tranche payment for completing the payment of INR 150 crores. Thus, it

is held that SRA has completed the first tranche payment of INR 350 crores as per the Resolution Plan.

Share Re-constitution

108. Under the Resolution Plan, after payment of first tranche and creation of security, the shares have to be issued in the name of SRA. The Share Re-constitution has also to be completed as per the Resolution Plan by all concerned.

First Tranche Payment to Creditors.

109. After infusion of INR 350 crores by the SRA as noted above, the Resolution Plan contemplates first tranche payment to creditors, which disbursement be completed by Chairman of the Monitoring Committee – Mr. Ashish Chhawchharia, within 30 days after creation of security on SRA properties by MC Lenders. The first tranche payment shall include the payment to workmen and employees as provided in the Resolution Plan as well as to Financial Creditors. The payment of CIRP cost as per Resolution Plan has also to be paid.

110. The learned Counsel for the SRA has submitted that SRA shall also be making payment of provident fund of INR 12 crores payable to workmen and employees as per judgment and order of this Tribunal dated 21.10.2022 along with the payments of all dues of the workmen payable under the Resolution Plan. The SRA shall make payment of INR 12 crores as undertaken, in addition to the amount, which is required to be paid to the workmen and employees under the Resolution Plan.

Workmen and Employees Dues

111. The Association of Aggrieved Workmen of Jet Airways (India) Ltd. has filed IA Nos.1163 and 1164 of 2024 as well as IA Nos.2887 and 2888 of 2023 praying for various reliefs. IA Nos.5183 and 5184 of 2023 was also filed by the Association for being impleaded in IA No.3789 and 3790 of 2023. We have also heard Shri Pawan Shree Agrawal, learned Counsel appearing for Association of Aggrieved Workmen of Jet Airways (India) Ltd. as well as Shri Vikash Mehta, learned Counsel appearing for Jet Aircraft Maintenance Engineers Welfare Association (JAMEWA).

112. Learned Counsel appearing for the aforesaid Applicants have submitted that although Plan was approved as early on 21.06.2021, but workmen and employees have not been paid a single penny, which is causing great hardship and misery to the workmen and employees. It is submitted that this Tribunal vide its order dated 21.10.2022 in ***Company Appeal (AT) (Insolvency) No.752 of 2021 – Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors.*** while deciding the Appeal filed on behalf of JAMEWA and Association of Aggrieved Workmen of Jet Airways (India) Ltd. has held that workmen are entitled for their full provident fund and gratuity and this Tribunal vide its judgment dated 21.10.2022 has directed that full payment of provident fund and gratuity after adjusting the payments made under the Plan. The learned Counsel for the Applicants have referred to order of this Tribunal dated 21.10.2022 and the necessary directions issued

therein. We may extract the necessary directions issued by this Tribunal in its operative portion of the order, which is as follows:

> *"(I) The Appeal(s) of workmen and employees being Company Appeal (AT) (Insolvency) Nos. 643 of 2021, 752 of 2021, 801 of 2021, 915 of 2021, 771 of 2022 are partly allowed with following directions:*
>
> *(a) Successful Resolution Applicant is directed to make payment of unpaid provident fund to the workmen till date of insolvency commencement, after deducting the amount already paid towards provident fund in the Resolution Plan to the workmen.*
>
> *(b) The workmen are also entitled for payment of their gratuity dues as on insolvency commencement date, after adjusting any amount towards gratuity paid under the Resolution Plan.*
>
> *It is made clear that entitlement of those employees and workmen, who were demerged into AGSL shall not be there, since demerger has not been treated as termination of their services.*
>
> *(c) The employees are also entitled for the payment of their full provident fund, unpaid up to the date of insolvency commencement date. It is made clear that full payment of provident fund would be of that unpaid part of provident fund, which has not been deposited by the Corporate Debtor in the EPFO.*
>
> *(d) Employees shall also be entitled for the gratuity, which fell due up to insolvency commencement date.*
>
> *(e) The rest of the prayers of the workmen and employees are denied.*

(f) The Chairman of the Monitoring Committee, erstwhile Resolution Professional is directed to compute the payments to be made to workmen and employees within one month from today and communicate the same to the Successful Resolution Applicant to take steps for payment."

113. When we look into the above directions, it is clear that the amount to be paid by SRA towards provident fund and gratuity was the amount to be paid after adjustment of the amount received under the Plan. The above clearly indicate that the amount is to be received by the workmen and employees under the Plan first and thereafter, the amount has to be paid as per the order dated 21.10.2022 regarding full provident fund and gratuity.

114. We have already noticed above that learned Counsel for the SRA has undertaken that insofar as payment of provident fund to the workmen and employees under the order dated 21.10.2022, i.e., amounting to INR 12 crores, is concerned, the same shall be paid upfront along with the payment under the Plan. The SRA has undertaken to make the aforesaid additional payment along with payments under the Plan. In the IA Nos. 2887 and 2888 of 2023, several prayers have been made by the Association of Aggrieved Workmen of Jet Airways (India) Ltd. The Applicants were permitted to intervene in the matter and in this Appeal, which is an Appeal against the order passed by Adjudicating Authority dated 13.01.2023 by the Lenders. The issue is between the Lenders and SRA regarding completion of the condition precedent. However, this Tribunal has also noticed the subsequent events and time elapsed during the pendency of litigation.

115. The payment to workmen and employees was contemplated in the Resolution Plan. However, as noted above, the Resolution Plan could not be implemented by SRA for the reasons as indicated above. If the Plan could not be implemented, it is the workers and employees, who are the worst sufferers. Thus, the first step towards payment to workers and employees is the commencement of implementation of the Resolution Plan. We have already taken note that first tranche payment of INR 350 crores having been completed and we have already indicated that the Chairman of Monitoring Committee shall make disbursement as per the Plan to the workmen and employees, no further directions are required in the Applications.

Air Operation Certificate

116. We have noticed that Air Operation Certificate was granted to the Corporate Debtor on 20.05.2020 for a period of one year. The Corporate Debtor as per the Air Operation Certificate could very well have commenced the operations after completing the other conditions in the Plan. However, the SRA could not commence the operation due to the stand taken by the Lenders that SRA has not completed the condition precedent and inspite of the order passed by the Adjudicating Authority on 13.01.2023, declaring that SRA has completed the condition precedents, no steps were taken by the Lenders to proceed with the implementation of the Plan, rather Lender have filed Appeals in this Tribunal challenging the order dated 13.01.2023. Air Operation Certificate was also extended and extended period also came to an end by September 2023 due to the litigations pending between the parties as noted above. We, thus, are of the view that SRA has to make an appropriate

Application for re-issue of Air Operation Certificate, as was earlier re-issued by the Govt. of India, Office of the Director General of Civil Aviation. The SRA to immediately make an appropriate Application for re-issue of Air Operation Certificate and complete all necessary formalities, so that before the closing date, Air Operation Certificate may be re-issued. The Govt. of India, Office of Director General of Civil Aviation and Ministry of Civil Aviation may take necessary steps regarding the Air Operation Certificate in accordance with law. There being already sufficient delay, having caused in the implementation of the Resolution Plan and Air Operation Certificate issued, could not be used by SRA, due to the road blocks created in the implementation of the Resolution Plan, we are of the view that the Director General of Civil Aviation and Ministry of Civil Aviation shall take steps expeditiously. In event AOC is not received before closing day, the SRA shall take all steps to receive it within 90 days after the closing date.

Closing Date

117. On closing date as per the Resolution Plan, the SRA has to be handed over the Corporate Debtor for carrying its operations. We having issued necessary directions as above for taking various steps under the Resolution Plan, we are of the view that closing date be achieved within 90 days of this judgment. We hold that 90th day from this judgment would be the date to be treated as closing date, on which date the Monitoring Committee shall handover the Corporate Debtor to the SRA for carrying out the functions thereafter.

118. Learned counsel for the SRA has also prayed for liberty to approach Central Board for waiver of 100% damages as imposed under Section 14B of The Employees Provident Fund and Miscellaneous Provisions Act, 1952. The liability to pay damages under Section 14B has been upheld by our order dated 21.10.2022 in appeal filed by Regional Provident Fund Commissioner, but that order does not preclude the SRA to make a representation under Section 14B Proviso of 1952 Act, which view we have already taken in Company Appeal (AT) (Ins.) No.808 of 2022, Regional Provident Fund Commissioner vs. Shri Manish Kumar Bhagat & Ors. decided on 11.10.2023.

Role and actions of MC Lenders

119. After having noted the various contentions of both the parties and after going through sequence of events and happenings, which took place, we feel necessary to make our comments on the role and actions of MC Lenders.

120. Under the IBC and Regulations framed thereunder, the whole process for approval of Resolution Plan and its implementation has been laid down. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations, 2016**"), there have been amendment in Regulation 36B, which has been inserted with effect from 24.01.2019, which now provide for performance security. Regulation 36B (4A) is as follows:

> *"36B(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."

121. The Resolution Plan provides that performance security be given by SRA for implementation of the Resolution Plan. As noted above, PBG of INR 150 crores was already handed over by SRA to the Lenders. The BKC property has also been with the Lenders, whose security value have been noted in the Resolution Plan as INR 246 crores. We fail to see the reason for Lenders not proceeding to implement the Resolution Plan. The Lenders from the very beginning has taken the stand that unless the SRA execute Draft Undertaking, which was shared by Lender to SRA on 04.06.2022, the Plan implementation may not proceed. We have already noticed certain Clauses of Draft Undertaking, which has been extracted by the Adjudicating Authority in its judgment in paragraph-99 and 100. Clause 12 of the Draft Undertaking

provided that in case of any conflict between the provisions of the Resolution Plan, the Draft Undertaking shall prevail. Clause 12 of the Draft Undertaking is as follows:

> *"**12.** That to the extent there is any conflict between the provisions of the Resolution Plan and this Undertaking, the contents of this Undertaking shall prevail; save and except as set out expressly in this Undertaking, (as modified by this Undertaking} read with Resolution Plan Approval Order shall continue to apply in full force effect without any changes thereto."*

122. The above clearly indicates the mind-set of the Lenders, who wanted some more undertaking by the SRA in addition to what was contemplated in the Resolution Plan for Lender to proceed with the implementation. When the Resolution Plan itself provides for security and other requirement for implementation of the Resolution Plan, we fail to see the insistence of Lenders for execution of another Undertaking. The issue of Draft Undertaking was repeatedly raised by the Lenders in the joint Meeting of MC Lenders, which is matter of record.

123. We may further notice provision of Regulation 39 (9) of the CIRP Regulations, which provides as follows:

> *"**39[(9)** A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions."*

124. The creditors, who are aggrieved, have been given a statutory right to approach the Adjudicating Authority for a direction with regard to

implementation of Resolution Plan. The fact that the Lenders never filed any Application before the Adjudicating Authority bringing out any non-implementation by the SRA itself indicate that Lenders on their own were taking the stand that SRA has not achieved the condition precedent. We have already noticed that SRA filed the Application for implementation of the Plan after the joint Lenders' Meeting dated 29.09.2022.

125. One more fact needs to be noticed, which has been brought before us by learned Counsel for both the parties. It is submitted by learned Counsel for the SRA that when the payment of INR 100 crores was to be made by SRA by 30.09.2023, the Lenders filed an Application before the Adjudicating Authority on 25.09.2023, raising certain concern with regard to fulfilment of Section 29A with regard to Florian Fritsch on the basis of one year old newspaper report. The act of Lenders, filing an Application on 25.09.2023 before the Adjudicating Authority indicate their another attempt to somehow create a block in the process of implementation of the Resolution Plan.

126. The implementation of Resolution Plan is a collaborative process, which require positive action from all the parties, including the MC Lenders. The implementation of the Resolution Plan not only revives the Corporate Debtor, but it brings along with revival, new employment, generation of revenues etc. By non-implementation of the Plan, direct sufferers are the workers and employees, who have not received the payments. It is true that Lenders are entitled to take steps for protection of their amount, but that is not the only object of the IBC. The Lenders to protect their own financial interest cannot ignore the primary object of revival of the Corporate Debtor

and payments to other stake holders, including workmen and employees, who are entitled for their payments along with Financial Creditors. The Lenders by not taking positive steps for implementation of the Plan have not only adversely affected the interest of the SRA, but have also created circumstances, so that workmen and employees be not paid.

127. Instead of taking positive steps for implementation of the Resolution Plan, the learned Counsel for the Lenders in their oral submission have always been pressing for directing the liquidation of Corporate Debtor, which is neither acceptable nor legal.

128. We hope and trust that Lenders shall now play a positive and collaborative role to take steps, so that different milestones under the Resolution Plan should be achieved and Corporate Debtor be revived, so that hopes of many, including the workmen and employees be not belied. The revival of the Corporate Debtor shall be in the interest of Aviation Industry as well as to all concern.

129. In view of our foregoing discussions and conclusions, we dispose of these Appeals in following manner:

(1) The impugned order passed by Adjudicating Authority dated 13.01.2023 is upheld.

(2) The Monitoring Committee and MC Lenders as well as SRA are directed to take steps for creation of charge over the Dubai Property No.1, Dubai Property No.2 and Dubai Property No.3 within a period of 30 days from today. The SRA to bear all necessary expenses for creation of necessary charge.

(3) The Performance Bank Guarantee of INR 150 crores, which is lying with the Monitoring Committee/ MC Lenders, shall be adjusted towards the first tranche payment of INR 350 crores as INR 200 crores have already been paid by the SRA. By adjustment of PBG as per the Resolution Plan, the first tranche of payment of INR 350 crores shall be completed.

(4) Steps shall be taken for re-constitution of the shares as per the Resolution Plan forthwith.

(5) Out of the first tranche payment of INR 350 crores, payments shall be made to the workmen and employees and the creditors as per the Resolution Plan, including the payment of CIRP cost as per the Resolution Plan, which payment shall be completed within 60 days from the date of this judgment.

(6) The SRA shall submit an Application for re-issue of Air Operation Certificate which may be obtained within 90 days from the date of this judgment.

(7) The closing date shall be 90th day from the date of this judgment, on which date, handing over of the Corporate Debtor to the SRA by the Monitoring Committee shall be completed.

(8) Towards the payment of provident fund dues, as per the order dated 21.10.2022 passed by this Tribunal in Company Appeal (AT) (Insolvency) Nos. 643 of 2021, SRA has undertaken to make payment of provident fund upfront along with payment of dues of workmen and employees as per the Resolution Plan, which

payment of INR 12 crores as undertaken, shall be made in addition to the payments as directed above.

130. Before we close, we hope and trust that all concerned shall take steps to implement the Resolution Plan so as to make the first CIRP of Aviation Company in this country a success.

131. We also record our appreciation to learned Senior Counsel/ learned Counsel for the parties appearing in these Appeals for their valuable assistance to the Court in marshalling of facts and deciding questions of law as arisen in the present case.

All I.As. are disposed of.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

12th March, 2024

Archana/Ashwani/Basant B.