NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 454 of 2021

AND

Company Appeal (AT) (Insolvency) No. 455 of 2021

AND

Company Appeal (AT) (Insolvency) No. 750 of 2021

INDEX

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeals (AT) (Insolvency) No. 454, 455 and 750 of 2021

1. Company Appeals (AT) (Insolvency) No. 454

[Arising out of Common Order dated June 7, 2021, passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in IA No 623 of 2021 in IA 449 of 2021 Company Petition (IB) No. 4258/MB/2019]

IN THE MATTER OF:

63 Moons Technologies Limited
Formerly Known as Financial
Technologies (India) Ltd.
Represented by its Authorised Signatory
Having its corporate office at FT Tower
CTS Nos. 256 and 257, Suren Road, Chakala
Andheri (E), Mumbai – 400093
Email: info@63moons.com **Appellant**

Versus

1. **The Administrator of Dewan**
   Housing Finance Corporation Limited
   Having its office at:
   6th Floor, HDIL Towers, Anant Kanekar Marg
   Station Road, Bandra (East)
   Mumbai – 400051
   Email- dhfladministrator@dhfl.com **Respondent No.1**

2. **Piramal Capital & Housing Finance Limited**
   Having its office at:
   4th Floor, Piramal Tower,
   Peninsula Corporate Park,
   Ganpatrao Kadam Marg,
   Lower Parel (West)
   Lower Parel, Mumbai, Maharashtra – 400013
   Email: Bipin.singh@piramal.com **Respondent No.2**

3. **Committee of Creditors of Dewan**
   Housing Finance Corporation Ltd.
   Through Union Bank of India
   Having its office:
   M-93, Connaught Place, New Delhi
   Email: raunak.dillon@cyrilshroff.com **Respondent No.3**

Present:

For Appellant : Mr Navroz H. Seervai, Sr Advocate with Ms Misha Rohatgi Mohta, Mr Devansh Srivastava
Ms Priyanka Vora, Mr Mihir Kamdar, Mr Manik Joshi, Mr Rahul Sarda, Mr Arvind Lakhawat,
Mr Mantul Bajpai and Mr Vrushabh Vig, Advocates.

For Respondent : Dr Abhishek Manu Singhvi and Mr Ashish Dholakia, Sr Advocates with Mr Ketan Gaur,
Ms Lisa Mishra, Mr Vishal Hablani and
Mr Avishkar Singhvi, Mr Ashish Bhan, Mrs Chitra Rentala, Mr Aayush Mitruka, Ms Samriddhi Shukla Advocates for R-1/SRA (for Piramal Capital & Housing Finance Ltd.)
Mr Ramji Srinivasan, Sr Advocate with Ms Madhavi Khanna, Ms Rajshree Chaudhary, Ms Saloni Kapadia, Mr Animesh Bisht, Mr Raunak Dhillon and Mr Shubhankar Jain, Advocates for R-3/COC.

With

2. Company Appeal (AT) (Insolvency) No. 455 of 2021

IN THE MATTER OF:

63 Moons Technologies Limited
Formerly Known as Financial
Technologies (India) Ltd.
Represented by its Authorised Signatory
Having its corporate office at FT Tower
CTS Nos. 256 and 257, Suren Road, Chakala
Andheri (E), Mumbai – 400093
Email: info@63moons.com **Appellant**

Versus

1. The Administrator of Dewan
Housing Finance Corporation Limited
Having its office at:
6th Floor, HDIL Towers, Anant Kanekar Marg
Station Road, Bandra (East)
Mumbai – 400051
Email- dhfladministrator@dhfl.com **Respondent No.1**

2. Piramal Capital & Housing Finance Limited

Having its office at:
4th Floor, Piramal Tower,
Peninsula Corporate Park,
Ganpatrao Kadam Marg, Lower Parel (West)
Lower Parel, Mumbai, Maharashtra – 400013
Email: Bipin.singh@piramal.com **Respondent No.2**

3. Committee of Creditors of Dewan Housing Finance Corporation Ltd.
Through Union Bank of India
Having its office:
M-93, Connaught Place, New Delhi
Email: raunak.dillon@cyrilshroff.com **Respondent No.3**

Present:

For Appellant : Mr Anupam Lal Das, Sr Advocate, with Ms Priyanka Vora, Ms Misha Rohatgi Mohta, Mr Devansh Srivastava, Mr Mihir Kamdar, Mr Manik Joshi, Mr Rahul Sarda, Mr Arvind Lakhawat, Mr Krishanu Barua, Mr Mantul Bajpai and Mr Vrushabh Vig, Advocates.

For Respondent : Mr Ashish Dholakia, Sr Advocate with Mr Ketan Gaur, Ms Lisa Mishra and Mr Vishal Hablani, Mr Ashish Bhan, Mrs Chitra Rentala, Mr Aayush Mitruka, Ms Samriddhi Shukla, Advocates for R1/SRA (for Piramal Capital & Housing Finance Ltd.)
Mr Ramji Srinivasan, Sr Advocate with Ms Madhavi Khanna, Ms Rajshree Chaudhary, Ms Saloni Kapadia, Mr Animesh Bisht, Mr Raunak Dhillon and Mr Shubhankar Jain, Advocates for R-3/COC.

With

3. Company Appeal (AT) (Insolvency) No. 750 of 2021

IN THE MATTER OF:

1. Roopjyot Engineering Private Limited (formerly known as Jubiliant Enterprises Private Limited)
Having its office at:
11-B, Mittal Tower
Free Press Journal Marg, Nariman Point
Mumbai – 400 21 **...Appellant No.1**

2. Magico Exports & Consultants Limited
Having its office at:
82, Maker Chambers III
Nariman Point, Mumbai – 400 21 ...Appellant No.2

3. Richmond Traders Private Limited
Having its registered office at:
11-B, Mittal Towers
Free Press Journal Marg
Nariman Point, Mumbai – 400 21 ...Appellant No.3

4. Sunshine Fibre Private Limited
Having its registered office at:
82A, Maker Chambers III
Nariman Point, Mumbai – 400 21 Appellant No.4

Versus

1. The Administrator of Dewan Housing Finance Corporation Limited
Having its office at:
6th Floor, HDIL Towers
Anant Kanekar Marg, Station Road
Bandra (East), Mumbai – 400 051 ...Respondent No.1

2. Piramal Capital & Housing Finance Limited
4th Floor, Piramal Tower,
Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parel (West), Lower Parel
Mumbai, Maharashtra – 400013 ...Respondent No.2

3. Committee of Creditors of Dewan Housing Finance Corporation Ltd
Through Union Bank of India
Having its office:
M-93, Connaught Place
New Delhi – 110001 ...Respondent No.3

4. M/s Catalyst Trusteeship Limited
Windsor, 6th Floor, Office No.604
C.S.T. Road, Kalina, Santacruz (East)
Mumbai – 400098 ...Respondent No.4

Present:

For Appellant : Mr Krishnendu Datta, Sr Advocate with

		Ms Sharmistha Ghosh, Mr Rajat Sinha, Mr Mannat Sabharwal and Mr Dhruv Malik, Advocates.
For Respondent	**:**	**Mr Ashish Dholakia, Sr Advocate with Mr Ketan Gaur, Ms Lisa Mishra, Mr Kaustub Narendran, Mr Vishal Hablani, Mr Ashish Bhan, Mrs Chitra Rentala, Mr Aayush Mitruka and Ms Samriddhi Shukla, Advocates for R-1/SRA (for Piramal Capital & Housing Finance Ltd.) Mr Raunak Dhillon, Ms Madhavi Khanna, Ms Saloni Kapadia, Mr Animesh Bisht and Mr Shubhankar Jain, Advocates for R-3/COC.**

Glossary

DHFL	:	Dewan Housing Finance Corporation Ltd
CoC	:	Committee of Creditors
NHB	:	National Housing Bank
NCLT / Adjudicating Authority	:	National Company Law Tribunal
NCLAT / Appellate Authority	:	National Company Law Appellate Tribunal
F.D. Holders	:	Fixed Deposit Holders
AR	:	Authorized Representative of F.D. Holders
I&B Code	:	Insolvency and Bankruptcy Code
HFC	:	Housing Finance Companies
NBFC	:	Non-Banking Financial Companies
NHB Act	:	National Housing Bank Act, 1987

CIRP	:	Corporate Insolvency resolution Process
BUDSA	:	Banning of Unregulated Deposit Schemes Act, 2019
ILC report	:	Insolvency Law Committee Report

CORAM:
Hon'ble Mr Justice M. Venugopal, Member (J)
Hon'ble Mr V. P. Singh, Member (T)
Hon'ble Dr Ashok Kumar Mishra, Member (T)

J U D G M E N T
(Virtual Mode)

[Per; V. P. Singh, Member (T)]

1. These three Appeals emanate from the Common Order dated 07.06.2021 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench, Mumbai in IA No 623 of 2021 in IA 449 of 2021 Company Petition (IB) No. 4258/MB/2019, whereby the Adjudicating Authority has rejected IA No. 623/2021 under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**') filed for rejecting IA No. 449/2021 Applied for approval of Resolution Plan. The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. **Factual Background**

2.1 Owing to the governance of concerns and defaults by DHFL in meeting various payment obligations, the RBI has, by notification dated 20 November 2019, superseded the Board of Directors of DHFL and appointed this administrator to manage the affairs of DHFL. The RBI filed Company Petition under Section 227 r/w 239 (2)(zk) of the I&B Code,2016 and by order dated

3 December 2019 petition was admitted. During the CIRP of DHFL, claims were received by the Administrator. The total default admitted by DHFL, is to the tune of ₹ 90,000 crores approximately. Claims worth approximately ₹ 82,247 crores have been filed with Administrator during CIRP.

2.2 Respondent No. 1, Administrator of the 'Dewan Housing Finance Corporation Ltd' ("DHFL"), appointed M/s Grant Thornton as transaction auditors for unearthing transactions that could be avoided/ set aside under Sections 43 to 51& 66 of the Code. Accordingly, M/s Grant Thornton conducted the transaction audit and issued a report(s) to Respondent No. 1 containing particulars of preferential, undervalued, fraudulent and extortionate transactions entered into by DHFL, which could be set aside/ avoided under the provisions above. Based on the report(s) of M/s Grant Thornton, Respondent No. 1 has filed nine applications before the Hon'ble NCLT regarding preferential, undervalued, and Fraudulent Transactions defrauding creditors, fraud & wrongful trading. As of date, the said applications are pending before this Tribunal. A summary of these applications is set out hereinbelow:

I. 1st Application filed on August 30 2020, under Section 60 (5) & 66 of the Code. The Application is in respect of the investigation and observations of the transaction auditor, filed by the Administrator in respect of disbursements made by DHFL to certain entities, referred to as the Bandra Books Entities, under Section 60(5) and Section 66 of the Code on August 30, 2020, against Kapil Wadhawan, Dheeraj

Wadhawan, Township Developers India Ltd, Wadhawan Holdings Private Limited, Dheeraj Township Developers Private Limited, Wadhawan Consolidated Holdings Pvt. Ltd., Wadhawan Global Hotels & Resorts Pvt. Ltd, Wadhawan Lifestyle Retail Pvt. Ltd. and certain other entities. The amount involved therein is ₹17,394 crores.

II. 2nd Application was filed on September 27 2020, under Section 60 (5) & 66 of the Code. The Application is about certain irregularities in loan disbursements towards the development of SRA projects undertaken by DHFL in the past. The amount involved therein is ₹12,705.53 crores.

III. 3rd Application was filed on October 5 2020, under Sections 45, 46, 49, 60(5) and 66 of the Code. The Application is in relation to the undervalued and fraudulent nature of certain agreements entered into by the Company at the time the Company sold its stake in Pramercia Life Insurance Limited to DHFL Investments Limited and certain ICDs given by the DHFL to ICD entities. The amount involved therein is ₹2,150.84 crores.

IV. 4th, 5th and 6th Applications filed in December 2020 – The Applications are about:

a. Disbursement to specific entities in the form of loans against property and utilisation of the same towards premature

redemption of certain NCDs, undertaken by DHFL in the past under Sections 43, 45 and 66 of the Code - as Application "A".

b. Diversion of excess funds from the account of DHFL for purchase of NAPHA Building under Section 66 of the Code as Application "B".

c. Fraudulent and undervalued advancement of ICDs by DHFL to certain entities in the past and the subsequent creation of a pledge over the non-convertible debentures issued by DHFL under Sections 45 and 66 of the Code - as Application "C".

A copy of the letter dated December 13, 2020, issued by Respondent No. I to Stock Exchange summarising the said transaction is annexed with Appeal Paper book. The amount involved therein is ₹ 1,058.32 crores.

V. 7th Application filed on February 3 2021, under Sections 45, 60 (5) and 66 of the Code - The Application is about disbursement made to certain entities as developer loans and loans against property. The amount involved therein is ₹ 4,793.36 crores.

VI. 8th Application was filed on February 20 2021, under Section 45, 60 (5) and 66 of the Code. The Application is in relation to irregularities in disbursements of Other Large Product Loan (OLPL) by the DHFL in the past. The amount involved therein is ₹ 6,182.11 crores.

2.3 **The details of the Avoidance applications in the tabular chart are mentioned below;**

Rs. Crores (Approx)

Sr. No.	**Avoidance Application date**	**Reference**	**Section**	**Principal (In Crores)**	**Interest+ Notional amount**	**Total (In Crores)**
1.	30.08.2020	Bandra Books	**60(5) and 66**	**14046**	3348	17394
2.	27.09.2020	SRA Loans	**60(5) and 66**	**10980**	1726	12706
3.	05.10.2020	DIL Transaction	**45, 46, 49, 60(5) & 66**	**1740**	125	1865
				228	58	286
4.	12.12.2020	LAP Loans	**43, 45 and 66**	**592**	56	648
5.	12.12.2020	NAPHA Properties	**66**	**330**		330
6.	12.12.2020	ICD	**45 and 66**	**71**	9	80
7.	03.02.2020	DLAP Loans	**45, 60(5) & 66**	**4793**	766	5559
8.	20.02.2021	OLPL Loans	**45, 60(5) & 66**	**5382**	800	6182
	Total filed		**Total figures in crores**	**38161**	**6889**	**45050**

3. As for as the Appellant/applicant is concerned, the Administrator has admitted the claim of ₹ 224.05 crores (including interest). Accordingly, the applicant was classified as a "Financial Creditor" and thereby entitled to a

seat on the COC. Therefore, M/S Catalyst Trusteeship Limited ("catalysts") was appointed as the Debenture Trustee for the secured NCDs held by the applicant and other debenture holders. In its capacity as the Debenture Trustee, it has been representing the applicant and other debenture holders in the COC as per the requirement of Section 21 (6A) of the Code.

IA No 623/2021 in IA 449/2021 was filed by applicant Catalyst Trusteeship Limited in its capacity as 'debenture trustee' for the following reliefs;

a. *To dismiss the Interlocutory Application No.449 of 2021 filed by Respondent No.1 and reject the Resolution Plan of Respondent No.2.*

b. In the alternative, approve Respondent No.2's Resolution Plan, including any modification.

(i) Order and declare that any term in Respondent No. 2's Resolution Plan including any modification thereto either expressly or impliedly providing that the benefit of any orders passed in the avoidance application filed or to be filed by Respondent No. 1 under sections 43 to 51 or under section 66 of the Code or any one or more of these provisions, including appeal proceedings arising therefrom, and the recoveries/ contributions made consequent thereto shall in any manner whatsoever be for the benefit of Respondent No.2 including its nominee/assignee/any person claiming through or under it, and not for the benefit of the creditors of DHFL, is contrary to law, void ab initio, non-est, and bad in law.

(ii) Declare, order and direct that any recoveries/contributions made or the benefit of any orders passed in the avoidance applications filed or to be filed by Respondent No. 1 under sections 43 to 51 or under section 66 of the Code or any one or more of these

provisions, including appeal proceedings arising therefrom, shall be for the sole benefit of the creditors of DHFL

c. In the event this Hon'ble Tribunal is inclined to approve the Resolution Plan of Respondent No.2 with the modification that the recoveries/contributions made or the benefit of any orders passed in the avoidance applications filed or to be filed by Respondent No. 1 under sections 43 to 51 or under section 66 of the Code or any one or more of these provisions, including appeal proceedings arising therefrom, shall be for the sole benefit of the creditors of DHFL, in that event, to declare, order and direct that the avoidance applications filed Respondent No. 1 shall not abate and shall be continued even after the approval of Respondent No. 2's Resolution Plan and be further pleased to permit Respondent No. 1 or any other nominee(s) appointed by the CoC to pursue these avoidance applications and all proceedings arising from the orders passed therein.

The Adjudicating Authority disposed of the said Application with the observations as under;

2. *"As far as the claims of avoidance transactions, CoC has consciously decided that the money realised through these avoidance transactions would accrue to the members of the CoC and at the same time they have also consciously decided after lot of deliberations, negotiations that the monies realised if any under Section 66 of IBC i.e Fraudulent Transactions, CoC has ascribed the value of Rs.1 and if any positive money recovery the same would go to the Resolution Applicant/future Corporate Debtor.*

3. CoC is comprised of 77 Financial Creditors and deliberations they have protected their interest and ascribed the value based on their Commercial Wisdom and Adjudicating

Authority has limited jurisdiction to interfere with the same as per various judgments quoted in the detailed order passed in IA 449/2021 (Approving the Resolution Plan). During the course of various hearings Learned Senior Counsels appearing for the Administrator, CoC, Successful Resolution Applicant submitted that after hard bargain, various rounds of negotiations the plan amount was increased substantially by the Successful Resolution Applicant finally to Rs. 37,250 Crores. ***Respondents also submitted that 63 Moons Technologies Limited, the applicant also voted in favour of the Resolution Plan and it cannot agitate the same now when 94.5% of CoC members approved the Plan****. The CoC by exercising its Commercial Wisdom have accepted, approved the Resolution Plan including the monies to be recovered if any from the Fraudulent Transactions. Therefore, we as Adjudicating Authority reluctant to substitute our wisdom at this stage as against their Commercial Wisdom of the CoC. Further by following the judicial precedents, discipline and various Judgements of the Hon'ble Supreme Court we restrain ourselves from interfering with the commercial decision of the CoC.*

4. Ld. Sr. Counsel appearing from the side of the applicant argued that the matter be sent back to CoC for its reconsideration. However Ld. Senior Counsel appearing for the CoC vehemently argued that there is no case for sending back to CoC as they have already exercised their Commercial Wisdom and already taken a conscious decision after analysing various facts and considerations including Net Present Value (NPV) concept, as per general saying that a bird in hand is better than few in bush, risk of recovery is transferred to the Successful Resolution Applicant etc and

ascribed an amount of Rs.1 for this Section 66 Fraudulent Transactions.

5. Ld. Sr. Counsel for the Applicant relied upon the Judgment of Hon'ble Delhi High Court dated 26.11.2020 in the matter of Venus Recruiters Private Limited Vs. Union of India & Ors (W.P. No. 8705 of 2019).

6. Whereas Ld. Sr. Counsels for the Respondents relied upon the judgment of the Hon'ble NCLAT in the matter of Company Appeal (AT)(Insolvency) No. 1079 of 2020 in Interups Inc. Vs. Kuldeep Kumar Bassi and others. Wherein it was held that the judgment in the matter of Venus is misplaced. As it has not held that a Resolution Plan approved by the Adjudicating Authority will be vitiated/ liable to be set aside if an avoidance application is kept pending while Resolution Plan approval application is decided. Further the decision on CA 613/ 2019 is ***not a pre requisite for approval of Resolution Plan. Therefore, the Delhi High Court judgment is inapplicable to the present case****.*

7. Based on the above submissions, rival contentions the Adjudicating Authority is of the confirmed view that CoC has already taken a conscious decision comprising of 77 members; therefore we restrain from making any comments and sending the Plan back to CoC as pleaded by the applicant in IA 623 of 2021. Accordingly, IA No.623 of 2021 is dismissed and no order as to cost."

(verbatim copy)

4. **Appellants Submission**

4.1 The present Appeal raises an important legal issue viz. whether Successful Resolution Applicant can appropriate recoveries from avoidance applications filed u/s 66 of the Insolvency and Bankruptcy Code, 2016?

4.2 The Appellant's case is that the said issue is covered in favour of the Appellant by the judgement dated November 26, 2020, passed by the Hon'ble Delhi High Court in the case of Venus Recruiters Private Limited versus Union of India. However, despite the same, the learned NCLT has dismissed the said, IA 623 of 2021 filed in IA 449/MB/C-II/2019 in CP 4258/MB/C-II/2019 without giving any reasons and by misreading and miss applying the order dated March 15 2021, passed by this Tribunal in the case of Interrups Inc versus Kuldeep Kumar Bassi.

4.3 On March 2, 2020, Respondent No. 1 issued the request for a Resolution Plan ("RFRP") providing that the benefit of recoveries from Avoidance application filed under Sections 43, 45, 47, 49, 50 or 66 of the Code shall enure to the benefit of the creditors of the Corporate Debtor and shall be a pass-through amount to them.

4.4 However, in the COC meeting held on September 10 2020, modification of this stipulation was discussed purportedly "**in the mutual interest of COC members and the Resolution Applicant**", and it was decided that the prospective Resolution Applicants may ascribe a value "as best as the Resolution Applicant's could" to the transactions under Section 66 of the Code and purpose the manner of the dealing with recoveries therefrom.

4.5 Following this decision of the COC, an RFRP dated September 16, 2020, was issued requiring the Resolution Applicant's inter alia ascribed a realistic value to the Section 66 transactions.

4.6 However, the Resolution Plan of the Successful Resolution Applicant viz. Respondent No. 2 values the recoveries from Section 66 transactions, in respect of which applications for recovery of more than ₹ 45,000 crores have been filed by Respondent No. 1, at Rupees one notional value and seeks to appropriate the future recoveries from these transactions. In other words, by valuing the Section 66 transactions at an unrealistic and arbitrary value of ₹1, Respondent No. 2 has attempted to appropriate massive recoveries that are likely to result from the avoidance applications filed by Respondent No. 1.

4.7 The Appellant contends that as a matter of law and its correct interpretation-recoveries from avoidance transaction to enure the benefit of the DHFL's creditors. In support, authoritative external aids of interpretation based on which the Indian law has developed and case law cited and detailed written submissions were filed before the Adjudicating Authority/NCLT.

4.8 The Appellant cited the judgement of Hon'ble Delhi High Court in the case of Venus Recruiters Private Limited (supra) in which the Hon'ble High Court held that avoidance applications were meant to give benefit to the creditors of the Corporate Debtor, not for the Corporate Debtor in its new Avatar after the approval of the Resolution Plan and that avoidance applications will also not for the benefit of the Resolution Applicant after the Resolution was complete.

4.9 The question before the learned NCLT inter alia was; whether the stipulation in DHFL's Resolution Plan of recoveries from various transactions in enuring to the benefit of Respondent No. 2 amounted to illegality (as alleged by the Appellant before the NCLT); whether the same was within the commercial domain of the COC (as urged by the Respondent before the learned NCLT). Further, if it was illegality, could it be saved by any majority strength within the CoC voting in favour of the Resolution Plan?

4.10 Furthermore, before approving a Resolution Plan under Section 31 (1) of the Code, the learned NCLT is statutorily mandated to examine that the Resolution Plan does not contravene any of the provisions of the law. Therefore, illegality in a Resolution Plan cannot be saved by the argument of such illegality being a commercial decision within the commercial wisdom of COC.

4.11 Appellant alleges that after hearing IA No. 623 of 2021 on eight occasions over more than one month, the learned NCLT has, in the impugned order, not dealt with any of the submissions/arguments of the Appellant. In the impugned order, the learned NCLT has, while dismissing IA No. 623 of 2021, inter alia held as follows;

a) By exercising commercial wisdom, the COC has accepted and approved the Resolution Plan.

b) The NCLT was reluctant to "substitute its wisdom" as again the commercial wisdom of COC.

c) The NCLT restrained itself from interfering with the commercial decision of the COC.

d) The NCLT, while relying on the order dated March 15, 2021, passed by this Hon'ble Tribunal in the case of Interrups Inc (supra), held that this Hon'ble Tribunal had in this case "held that judgement in the matter of Venus is misplaced."

4.12 The learned NCLT misread and misapplied the ratio of the order dated March 15, 2021, passed by this Hon'ble Tribunal in the case of Interrups Inc (supra) and wrongly held that this Hon'ble Tribunal in the case held that judgement in the case of Venus Recruiters Private Limited (supra) was misplaced. What has been held by this Hon'ble Tribunal in para 9 of its order dated 15th March 2021 is that the reliance of the Appellant's, in that case, on the judgement of Hon'ble Delhi High Court in the case of Venus Recruiters Pvt Ltd was misplaced. Thus the Hon'ble Delhi High Court found on facts that the ratio laid down by Hon'ble Delhi High Court in the case of Venus Recruiters Private Limited (supra) was inapplicable to the case of Interrups Inc (supra). The ratio laid down by the Hon'ble Delhi High Court is that of the constitutional court and directly answering the issues before the NCLT was binding on the NCLT.

4.13 Appellant alleges that the impugned order is ex-facie an unreasonable and a non-speaking order. The learned NCLT has failed to consider the submissions and arguments of the Appellant and thereby failed to examine

the legal issue viz. whether a Successful Resolution Applicant can appropriate recoveries from avoidance applications filed under Section 66 of the Code as stated above. The Hon'ble Delhi High Court has, in the case of Venus Recruiters Private Limited (supra), issued an authoritative and binding pronouncement holding that avoidance applications were meant to give benefit to the creditors of the Corporate Debtor, not for the Corporate Debtor in its new avatar after the approval of the Resolution Plan and that avoidance applications were also not for the benefit of the Resolution Applicant after the Resolution was complete.

4.14 The Appellant adverted to the observations of the Hon'ble Supreme Court in paragraphs 10, 11, 13, 14, 18 to 20, 22 and 24 to 27 in the case of Asst Commissioner, Commercial Tax Department versus Shukla and Brothers, reported in (2010) 4 SCC 785. The ratio of the above judgement is that ;

a) Recording of reasons is an essential feature of the dispensation of justice, and the requirement of recording reasons is applicable with greater rigour to judicial proceedings;

b) Non-recording of reasons causes prejudice to the affected party and hampers the proper administration of justice;

c) In furtherance of principles of natural justice, the authority should give reasons for arriving at a conclusion showing the proper Application of mind;

d) A litigant has a legitimate expectation of knowing the reasons for rejection of his claim/player, and the recording of reasons would also be for the benefit of the higher or the Appellate Court;

e) It is no more *res Integra* in the stands unequivocally settled that Courts and Tribunals are required to pass reasoned judgements/orders.

5. **Ist Respondents Submission**

Respondent submits that the reliefs claimed by the Appellant are misconceived both in law and on facts. Accordingly, the Appeals deserve to be dismissed on the following grounds and reasons which are without prejudice to one another:

6. **APPEAL IS NOT MAINTAINABLE**

The Appellant has participated in the Corporate Insolvency Resolution Process ("CIRP) of the Corporate Debtor as a member of a class of secured creditors, i.e. NCD holders, represented as a class by the debenture trustee M/s 'Catalyst Trusteeship Lid'.

6.1 The present set of Appeals impugns the Adjudicating Authority's decision in dismissing IA 623 of 2021 filed by the Appellant. However, it must be remembered that this was not the first Application filed by the Appellant. Even before IA 623 of 2021 was filed on March 5, 2021, Appellant had filed IA 2352 of 2020 before the Adjudicating Authority on or around December 28, 2020 (Reply filed by Respondent No. 2 in Appeal 455 of 2021, p. 10), on

the same basis as IA 623 of 2021. At the hearing of IA 2352 of 2020, the Respondents had pointed out that the Application was premature, as it had been filed even before Resolution Plans had been voted on. Accordingly, the Appellant sought and was granted leave on January 21, 2021, to withdraw IA 2352 of 2021. This was granted with the limited leave to "agitate the entire issues/ grievances at the appropriate stage, i.e. when the application is moved for approval of Resolution Plan under Section 31 (1) of Insolvency and Bankruptcy Code, 2016".

6.2 In the interim, the Resolution Plan submitted by Respondent No. 3 was put to the vote on December 29, 2020. The voting window remained open from December 29, 2020, to January 14, 2021. An overwhelming majority approved the Resolution Plan submitted by Respondent No. 3 of 93.65% of the CoC. On January 14, 2021, the class of NCD holders (to which the Appellant belongs) voted in favour of the Resolution Plan by an internal majority of 98.94%. This is an undisputed position that this overwhelming internal majority within the class of NCD holders, who voted in favour, includes the Appellant itself.

6.3 The Appellant is seeking to challenge through these appeals the same Resolution Plan that it has itself voted in favour of individually and that its class has also voted in favour of by a majority of 98.94%. This is contrary to the scheme of Section 25A(3) of the IBC and the decision of the Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Lid & Ors. (2027 SCC Online SC 253) ("Jaypee") where

it has categorically been stated that once a class has voted in favour of the Resolution Plan, a constituent of the class cannot be heard in opposition to the Plan by way of objection or Appeal.

6.4 Therefore, the Appellant is estopped from raising any objections to the Resolution Plan, which it has approved in the first place. This amounts to a case of approbation and reprobation, which cannot be permitted in the interest of the CIR process envisaged in the Code. Accordingly, the order of the Adjudicating Authority permitting Appellant to withdraw IA 2352 of 2020 cannot be read as permitting the Appellant to vote in favour of the Resolution Plan and, at the same time, object to the Resolution Plan.

6.5 **APPELLANT CANNOT QUESTION COMMERCIAL WISDOM OF COC**

The current RFRP itself, and the clause in question, was formulated with the consent of the Appellant, which formed a part of the class of NCD holders which voted to amend the RFRP further to the 7th meeting of the CoC held on September 10, 2020, that required the PRAs to ascribe a value under the Resolution Plan to any recoveries that are likely to be made in respect of transactions impugned under Section 66 of the Code. In this regard, clause 2.13.3 of the Resolution Plan ascribed a value of INR 1 to recoveries. Accordingly, the Resolution Plan complies with the RFRP. In any event, the fact that Respondent No. 3 ascribed a value of INR 1 for avoidable transactions under Section 66 of the IBC was pointed out to the CoC by Respondent No. 1. Therefore, even if this was assumed to be a deviation (which is denied), the CoC is well within its rights to accept and approve a

departure from the RFRP, a contractual document, which is a conscious and aware commercial decision.

6.6 The Appellant has failed to point out any provision of the Code in support of its contention that the Resolution Plan is illegal and contrary to law'. The Appellant's only argument in this regard hinges on the Delhi High Court in Venus Recruiters Pvt. Ltd v Union of India & Ors. [WP(C) 8705/2019 & CM APPL 36026/2019] ("Venus"). However, the decision in Venus is inapplicable and distinguishable from the present case:

(i) The primary question in Venus was whether Avoidance Applications could survive the CIRP process and continue to be adjudicated upon after approval of the Resolution Plan.

(ii) The decision in Venus does not deal with the issue of entitlement to recoveries of avoidance applications in the event the Resolution Plan provides for a mechanism to deal with the same.

(iii) In Venus, neither the RFRP nor the Resolution Plan provided the treatment of proceeds arising from avoidable transactions. On the contrary, in the present case, as set out above, both the RFRP and the Resolution Plan set out requirements and provisions for dealing with proceeds from avoidable transactions. The Resolution Plan complies with the RFRP. The decision in Venus notes that if the proposed Resolution Plan makes a provision in respect of the Avoidance Applications, the same will operate.

6.7 In arguendo, it is submitted that the Resolution Plan complies with Venus Judgement. Venus states that the Resolution Plan must consider the amounts and benefits of transactions impugned as avoidable. The Resolution Plan does consider the possibility of recovery from applications filed in respect of avoidable transactions under Section 66 of the Code. It assigns a value (albeit nominal) to the same.

6.8 The creditors of the Corporate Debtor have, after several rounds of negotiations, in their commercial wisdom, considered the overall resolution amount proposed under the Resolution Plan and adopted the course of action that they believed was for their greatest benefit and would lead to value maximisation. This judgment and the commercial decision cannot now be second-guessed by the Appellant, especially after it has voted in favour of the Plan. (Committee of Creditors of Essar Steel India Limited Satish Kumar Gupta & Ors. ((2020) 8 SCC 531), para 67; Jaypee, paras 202-203)

6.9 In any event, it is also incorrect to say that Respondent No. 3 will be unjustly enriched. Accordingly, the amount of INR 1 offered by Respondent No. 3 for the avoidance transactions under Section 66 of the Code must not be viewed in isolation but must be considered in the context of the overall resolution amount proposed.

6.10 The Appellant also impugns the voting process and alleges that the vote on the Resolution Plan ought not to have, as part of the same voting item, sought votes on both the Resolution Plan and waiver of deviations from the

RFRP (App 454/2021, p.60). This is a flawed argument. The Resolution Plan is either accepted or rejected in its entirety. It is not possible to vote in favour of the Resolution Plan but simultaneously vote against specific terms in a plan. Similarly, a party cannot approve only certain terms in a plan, but vote against the Resolution Plan itself.

6.11 **FALSE ALLEGATIONS REGARDING VALUATION**

Appellant falsely alleges that the valuers ascribed nil value to avoidance applications. This false statement betrays Appellant's fundamental misunderstanding of valuations and the facts.

6.12 Valuers, when ascertaining fair value and liquidation value, value assets. They do not value transactions or avoidance applications. The registered valuers, in the present case, undertook the valuation in compliance with Regulation 35 of the CIRP Regulations, and any value ascribed to any specific assets is based on several factors, including the availability and quality of security. It is incorrect to say that any avoidance applications were valued at all, or in fact, ascribed nil value. It is settled law that valuation is a technical and complex exercise that is best left to the wisdom of experts. [G.L. Sultania & Anr. v. Securities and Exchange Board of India & Ors. (2007) 5 SCC 133)]

7. **IInd Respondent's Submission [Piramal Capital & Housing Finance Ltd, (SRA)]**

7.1 Respondent No. 2 submits that the Appellant is a Financial Creditor of DHFL holding NCD[1] worth ₹ 200 crores (0.2% on COC) and is a part of the class of NCD holders. In Section 21 (6A) of the Code, the Appellant was represented on the CoC by its debenture trustee, 'Catalyst Trusteeship Limited'. Admittedly and knowing well the provisions of the Resolution Plan, the Appellant voted in favour of the Resolution Plan within its class of NCD holders, and a thumping majority approved the Resolution Plan of 98.94% votes. Following this, the 'Catalyst' voted in favour of the Resolution Plan before the COC, and a majority approved the Resolution Plan of 93.65% votes of COC.

7.2 Having voted in favour of the Resolution Plan, it is impermissible under the law for the Appellant to then turn around and question the Resolution Plan. Given that the NCD holders as a class approved the Resolution Plan, the Appellant as an individual NCD holder cannot maintain any challenge to the Resolution Plan as there is estoppel under law. Reliance is placed on the judgement of Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments welfare Association versus NBCC, (2021) SCC online SC 253) (Paras 131 and 135).

7.3 The conduct of the Appellant also attracts the doctrine of estoppel/acquiescence. One day before the voting window for the Resolution Plan opened on December 29, 2020, to January 14 2021), the Appellant filed

[1] Non Convertible Debentures

IA No. 2352 of 2020, challenging the voting process/Resolution Plans. After that, the Appellant voted in favour of the Resolution Plan and withdrew IA 2352 of 2020 on January 15 2021. Reliance was placed on the judgement of Hon'ble Supreme Court in the case of Kalpraj Dharmshi v Kotak Investment Advisors Limited, (2021) SCC online SC 204, (Paras 113-115).

7.4 Respondent No. 3 further contends that the Appellant has failed to make any grounds under Section 61 (3) of the Code for interference with the Resolution Plan.

7.5 The CoC has further directed that the Resolution Plan is compliant with the law, and RFRP[2] does not warrant any interference.

8. **IIIrd Respondent's Submission (Committee of creditors)**

8.1 Respondent No. 3 contends that since the Appellant itself voted in favour of the Resolution Plan thus the Appellant is estopped and from raising any objections to the Resolution Plan, including on the legality of the Resolution Plan given the judgement of the Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments welfare Association (supra).

8.2 The treatment of recoveries arising from avoidance applications fall within the domain of the commercial wisdom of CoC, and there is nothing in the Code that prevents the COC from dealing with such recoveries.

[2]

a) It is a settled principle of law that CoC can deal with the debtor's assets in the present or that may come to the debtor in the future in its commercial wisdom.

b) The assets which are the subject matter of the avoidance applications are a subset of the total assets of DHFL and are largely in relation to the NPA. From the aforesaid, it is amply clear that the avoidance applications filed with regard to the assets of DHFL. The prospective Resolution Applicants have bid for the entire assets of DHFL, including assets that are the subject matter of avoidance transactions.

c) Under Section 66 of the Code, the Adjudicating Authority may direct any director or partner of the Corporate Debtor to contribute to the Corporate Debtor's assets as it is deemed fit. Thus, recoveries from avoidance applications are to be returned to the Corporate Debtor as it is the Corporate Debtor's assets.

d) Further, This Hon'ble Appellate Tribunal has held that the treatment of proceeds of avoidance applications is within the commercial wisdom of the COC and stated that such commercial understanding should be given effect without any modification. (JSW Steel Ltd v Mahender Kumar Khandelwal, CA/AT/INS 957 of 2019.)

e) Respondent No. 3 further contends that the judgement of the Hon'ble Delhi High Court in the case of Venus Recruiters (supra) is not

applicable in the present case. In the said judgement, it is held that an avoidance application for any preferential transaction is meant to benefit the creditors of the Corporate Debtor and not the Company. However, this cannot be interpreted to mean that CoC, upon negotiation and its commercial wisdom, cannot pass the benefit of the avoidance applications to the Successful Resolution Applicant, post the approval of the Resolution Plan, if they so wish.

f) The Venus recruiters only provide that property or sum acquired under an avoidance application should form part of the Resolution Plan and consider such amounts and benefits. It does not deal with how these assets are to be dealt with, which is provided only in the Resolution Plan.

g) The present Resolution Plan provides the manner and treatment of the benefit from the avoidance applications. The COC members have had negotiations and discussions on the said treatment, which has then been incorporated in the Resolution Plan. Hence, in the light of findings in Venus Recruiters, the Resolution Plan as it stands merits no interference.

h) Further, this Appellate Tribunal has already considered the interpretation of Venus recruiters Judgement in the interrups Inc case, wherein this Hon'ble Tribunal recorded that the Resolution Plan contemplated continuation of avoidance applications post the approval

of Resolution Plan and the proceeds from the avoidance applications being given to the Company and not to the creditors.

i) The Resolution Plan is in line with the RFRP and was finalised and submitted by the Resolution Applicant after negotiations. During its meeting held on September 10 2020, there was a detailed discussion about the treatment of proceeds from avoidance applications. Accordingly, the Resolution was placed before the CoC for modification to the RFRP under which the benefits of avoidance applications under Sections 43, 45, 47, 49, 50 of the Code to be passed on by the prospective Resolution Applicant (PRAs) to the COC, for avoidance applications under Section 66 of the Code, the PRA could ascribing value under the Resolution Plan to any recoveries that are likely to be made in respect thereof and the proposed manner of treatment of any proceeds arising therefrom which the CoC may evaluate. The said Resolution was voted upon by and passed by the requisite majority of the COC, the 98.8% of the 63 Moons Class. Accordingly, the Appellant is bound by such a vote cannot raise any objection on this ground.

j) In the 18th meeting of the COC held on December 24 2020, and December 25, 2020, the CoC and the Administrator have acknowledged that in the Resolution Plan submitted by the PRAs, there may be some deviation from the RFRP. The list of such deviations was placed before the CoC. In addition, by way of abundant caution, we have ascribed

rupees one value of avoidance application under Section 66 of the Code was also included as a deviation.

k) Further, it is a well-recognised principle of law that a notional value of rupees one can be ascribed when it is difficult to assess the actual amount and arriving at an estimate would be a "wild guess" (Essar Steel India Limited Committee of Creditors versus Satish Kumar Gupta, (2020) 8 SCC 531, para 155).

l) Further, the Appellant's contention about two separate resolutions, one seeking a vote on the Resolution Plan and the other seeking a vote on the deviations in the Resolution Plan from RFRP, is baseless in the light of the aforesaid, and there is no provision in the law which requires separate resolutions.

m) The Administrator from qualified independent valuers obtained the valuation report dated December 24 2020, setting out the Liquidation as per the mandatory requirements under Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016.

9. **Analysis**

The present appeal raises important questions, given as under for our consideration;

a) Whether the stipulation in DHFL's Resolution Plan of recoveries from Avoidance transactions enuring to the benefit to Resolution Applicant amounted to illegality?

b) Whether the action of approving the resolution plan to give the benefit of avoidance transactions to the Resolution Applicant was within the domain of commercial domain of the CoC?

c) Further if it was illegality, could it be saved by any majority strength within the CoC voting in favour of the Resolution Plan?

d) Can the Successful Resolution Applicant appropriate recoveries from avoidance applications filed under Section 66 of the Insolvency and Bankruptcy Code, 2016?

9.1 The present Appeal challenges an order dated 07.06.2021 passed by the National Company Law Tribunal, Mumbai Bench (the "NCLT") approving the Resolution Plan for Dewan Housing Finance Corporation Ltd ("DHFL") without deciding a legal issue viz. whether Respondent No.2 (Successful Resolution Applicant) can appropriate recoveries, if any, from avoidance applications filed by Respondent No. 1 under Section 66 of the Insolvency and Bankruptcy Code, 2016 (the "Code") involving amounts over ₹ Forty-five thousand crores at the cost of the DHFL's creditors, who are the ones defrauded by DHFL's promoters. The question that this Hon'ble Tribunal is inter alia concerned with while deciding this legal issue is whether the stipulation of future recoveries from Section 66 avoidance applications being

retained by the Successful Resolution Applicant amounts to illegality (as urged by the Appellant) or whether the same is within the commercial domain of the CoC (as suggested by the Respondents). For, if it was illegality, it could not be saved by any strength of majority or voting of the CoC.

9.2 The Appellant contends that IA No. 623 of 2021was filed before the NCLT, was argued in great detail for eight days, followed by detailed written submissions. However, without dealing with the oral & written submissions of any party and without recording reasons, the Ld. NCLT simply stated that it was "reluctant to substitute" its wisdom with the commercial wisdom of the CoC and the Ld. Therefore, NCLT "restrained from making any comments".

Impugned Order is a Non-Speaking Order-

9.3 The Appellant submits that the impugned order is unreasoned and non-speaking and runs afoul of the Hon'ble Supreme Court Judgement ratio in the case of Asstt. Commissioner. Commercial Tax Department v. Shukla & Bros. (2010) 4 SCC 785, wherein the Hon'ble Supreme Court goes on to observe that;

> "10**.** *The increasing institution of cases in all courts in India and its resultant burden upon the courts has invited attention of all concerned in the justice administration system. Despite heavy quantum of cases in courts, in our view, it would neither be permissible nor possible to state as a principle of law, that while exercising power of judicial review on administrative action and more particularly judgment of courts in appeal before the higher court, providing of reasons can never be dispensed with. The doctrine of audi alteram partem has three*

basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an opportunity of being heard. Secondly, the authority concerned should provide a fair and transparent procedure and lastly, ***the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order****. This has been uniformly applied by courts in India and abroad.*

12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing.

27. *By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an*

indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. [1974 ICR 120 (NIRC)] ***there are apt observations in this regard to say "failure to give reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove."***

(emphasis in bold supplied)

Reasons stated for assigning benefit of Avoidance Transaction to the SRA

9.4 It is necessary to go through some of the details leading to the decision of CoC to ensure the benefit of avoidance applications to the Successful Resolution Applicant.

9.5 After issuing a request for Resolution Plan on March 20 2020 (the "**March RFRP**") (Page 283 of the Appeal Vol-II), which invited prospective Resolution Applicants to submit Resolution Plans while adhering to the stipulation that benefit of recoveries from avoidance applications filed under Sections 43, 45, 47, 49,50 or 66 of the Code shall enure to the benefit of the

creditors of the Corporate Debtor and shall be a pass-through amount to them, **on the insistence of the prospective Resolution Applicants, on September 10, 2020, it was decided that the' March RFRP' should be modified** given the "**mutual interest of the CoC members and the Resolution Applicant**". In addition, a perusal of the minutes of the CoC meeting held on 10h September 2020 makes it clear that the prospective Resolution Applicants were required to ascribe a "value" to the Section 66 transactions as best as they could.

9.6 The Appellant states that until September 10, 2020, only one avoidance application for INR 17,394 crores had been filed (Page 269-270 of the Appeal Vol-II). Therefore, the contention that all avoidance applications (amounting to INR 45,050 crores) had been factored in a while deciding to modify the March RFRP is factually incorrect and made with the view to make this Hon'ble Tribunal believe that the said decision was taken with full knowledge of facts as regards the nature & extent of the fraudulent transactions.

9.7 Hon'ble Delhi High Court, in the above case, has held that avoidance applications are meant to give benefit to the creditors of the Corporate Debtor and not for the Corporate Debtor in its new avatar after the approval of the Resolution Plan. It was further held that avoidance applications were also not for the benefit of the Resolution Applicant after the Resolution was complete.

9.8 The Appellant contends that on the grounds mentioned below, which are in the alternative and without prejudice to each other, IInd Respondent's

Resolution Plan be sent back to the CoC for reconsideration and resubmission after complying with the provisions of the Code:

i. The stipulation in Respondent No.2's Resolution Plan that benefit of recoveries from Section 66 avoidance transactions ought to go to Respondent No. 2 is contrary to the provisions of the Code;

ii. That the said stipulation is contrary to the provisions of the Code is also clear from a meaningful reading of Venus Judgement of the Delhi High Court, which has inter alia interpreted the provisions of the Code pertaining to avoidance transactions;

iii. The same is also contrary to the express, authoritative treatise and Law Committee reports on the issue of treatment of recoveries from avoidance transactions:

iv. By ascribing a value of INR 1 to recoveries from Section 66 transactions. Respondent No. 2 has not factored in these recoveries, and retention of such recoveries would entail a return/rate of return that is higher than what is factored in the Resolution Plan resulting in unjust enrichment of Respondent No. 2 at the cost of the creditors such as the Appellant who have been defrauded by DHFL's promoters.

9.9 A mandatory statutory duty has been cast upon the Adjudicating Authority, in terms of Section 31 read with Section 30(2) of the Code, to ensure that a Resolution Plan which is placed before it for approval is compliant with the provisions of law. Despite the limited scope of enquiry in an application

for approval of a Resolution Plan, the jurisdiction of the Adjudicating Authority to go into the aspects of illegality in Resolution Plans and the Resolution Plans to be compliant with the provisions of law has been well recognised & accepted by Hon'ble Supreme Court of India in a number of judgements including in a recent judgement in the case of Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr. (2021 SCC Online SC 204, Para 148).

9.10 The Respondents have opposed the present Application inter alia on the following grounds:

i. The Appellant is estopped from challenging the resolution plan because it has voted in favour of Respondent No. 2's Resolution Plan, and the class of creditors to which the Appellant belongs has also voted in favour of Respondent No. 2's Resolution Plan;

ii. The decision regarding treatment of recoveries from avoidance applications is within the commercial wisdom' of the CoC, and the CoC has, in its commercial wisdom, decided that the recoveries should go to Respondent No. 2;

iii. Since the said decision is within the realm of commercial wisdom of the CoC, the Adjudicating Authority does not have the power or the jurisdiction to interfere with the same, and the CoC has considered it prudent to accept INR 1 for Section 66 avoidance transactions which are mired in litigation than to pursue the litigation in that behalf;

iv. The Venus Judgement of the Delhi High Court is distinguishable and not applicable to the facts of the present case.

Impact of Venus Judgement

9.11 It is essential to point out that both parties are claiming that Venus judgment supports their case. The Appellant relies on the observations of the Hon'ble High Court in Para 73, and Respondent relies on Paras 3 and 77 of the said judgement in their favour.

9.12 The learned Senior Counsel for the Respondent adverted to the observations of the Hon'ble High Court of Delhi in paragraphs 3 and 77 of the judgement in Venus Recruiters Private Limited v. Union of India, reported in 2020 SCC OnLine Del 1479 Hon'ble High Court of Delhi has held that;

> "3. *The question that has arisen is whether, under the Insolvency and Bankruptcy Code, 2016 (hereinafter, 'IBC'), an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under Section 43 after the approval of the Resolution Plan, is thus under challenge.*
>
> *77. Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under Section 31. The role of a RP is finite in nature. He or she cannot continue to act on behalf of the Corporate Debtor once the Plan is approved and the new management takes over. To continue a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent*

behind appointment of a RP. The Resolution Professional (RP), as the name itself suggests has to be a person who would enable the Resolution. The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist."

9.13 However, learned Senior Counsel for the Appellant had based its case on the observation of the Hon'ble High Court in paragraph 73, quoted below, of the same judgement.

"73. *An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor.* ***The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan****. This is clear from a perusal of Section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given to the Corporate Debtor for the benefit of the CoC.* ***The benefit of an avoidance application is not meant for the Company, after the Resolution Plan is considered by the CoC and approved by the NCLT."***

9.14 The learned Sr. Counsel for Respondent No. 3 placed reliance on the Judgement of this Tribunal in the case of **Interups Inc. vs Kuldeep Kumar Bassi and Ors. (15.03.2021 - NCLAT): reported in MANU/NL/0082/2021. In this case, it is held that :**

> *"9. -----The Code provides for time-bound resolution of a company and entertaining and EOI at this stage will make a mockery of the entire scheme of the Code. The Adjudicating Authority has limited jurisdiction to either approve the Resolution Plan or reject the Resolution Plan if it is not compliant with law, no more or no less.*
>
> *Pendency of avoidance applications does not vitiate the approved JSW Plan. Interups has contended that CA 613 (PB)/ 2019 titled Mr. Kuldeep Kumar Bassi Vs. Mr. Pradeep Aggarwal & Ors. (CA 613) which includes time exclusion had to be decided before the plan approval application.*
>
> ***Interups reliance on Delhi High Court's Judgment dated 26.11.2020 in Venus Recruiters Private Limited Vs. Union of India & Ors. (W.P. No. 8705 of 2019) ("Delhi High Court Judgment") is misplaced, as it has not held that a resolution plan approved by an Adjudicating Authority will be vitiated / liable to be set aside if an avoidance application is kept pending while the resolution plan approval application is decided. Further in para 89 of the Delhi High Court Judgment it has been held that "the NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a corporate debtor which is now under a new management unless provision is made in the final Resolution Plan". In the present case***

such a provision has been provided for in the JSW Plan. The same is reproduced below:

"1.12 (o) Reversal of preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading:

... The reversal of these transactions by the NCLT upon submission of the resolution plan to the NCLT for its approval, will be to the benefit of the Company and the Company will not be required to transfer any such amounts/assets to the creditors. Any claim from any counter party of the aforesaid transactions (in further) arising due to reversal of such transactions shall stand extinguished.

The Resolution Professional shall conduct and pursue the litigation for reversal of such transactions till their final disposal (including any appeals). The costs of such litigation for the Resolution Professional shall be borne by the Resolution Professional.

The decision on CA 613/2019 is not a pre-requisite for approval of resolution plan. Therefore, the Delhi High Court Judgment is inapplicable to the present case V. CIRP has come to an end.--"

(verbatim copy)

9.15 The learned Senior Counsel representing the respondents vehemently argued that the appellant's reliance on the decision of Hon'ble High Court of Delhi in Venus Recruiters (supra) case is misplaced in the present case because the factual matrics are significantly different in Venus Recruiters, where the central question for consideration was whether an avoidance

application under Section 43 could survive after the approval of Resolution Plan and not the treatment of proceeds of avoidance applications.

9.16 The observations of the Hon'ble Delhi High Court in Venus Recruiters that the benefits of avoidance transaction should be given to the creditors were when the relevant Resolution Plan did not provide any provision dealing with the treatment of recoveries arising from Resolution Plan. However, per contra in the instant case Resolution Plan specifically provides for treatment of recoveries arising out of or avoidance transactions. Further, Venus Recruiters do not deal with the situation when the COC gives up the proceeds of avoidance transactions to the Resolution Applicant in exchange for a higher upfront amount.

9.17 Respondents counsel vehemently argued that in the instant case, COC gives the proceeds of avoidance transaction to the Resolution Applicant in exchange for **the higher upfront amount.**

9.18 In response to the argument of Respondent's Counsel, Appellant submits that the NCLT misread and misapplied the ratio of the order dated March 15, 2021, passed by this Hon'ble Tribunal in the case of 'Interups Inc' (supra). It is wrongly observed that this Hon'ble Appellate Tribunal in 'Interups Inc' held that judgement in the case of 'Venus Recruiters Private Limited' (supra) was misplaced.' What has been held by this Hon'ble Tribunal in para 9 of its order dated 15th March 2021 is that the reliance of the Appellant's, in that case, on the judgement of Hon'ble Delhi High Court in the

case of Venus Recruiters Pvt Ltd was misplaced. Thus the Hon'ble Delhi High Court found on facts that the ratio laid down by Hon'ble Delhi High Court in the case of Venus Recruiters Private Limited (supra) was inapplicable to the case of Interups Inc (supra).

9.19 In the Venus case, the petitioner was aggrieved by an order passed by the NCLT, impleading it as a party in an application filed by the then resolution professional of the Corporate Debtor. The application so filed by the resolution professional was an application filed inter- alia under Sections 43 to 51 and Section 66 of the code.[3] The application filed by the RP challenging number of suspected transactions allegedly entered into by the Corporate Debtor viz. potential excess payment of lease rent to a party, preferential credit to certain customers, excess payment to certain manpower companies including the petitioner and contracted payment of interest to certain parties.[4]

9.20 The other party against whom the resolution professional sought to proceed under the said application did not challenge the order of the impleadment. It was only the petitioner who challenged the said order of impleadment. Therefore, insofar as the petitioner was concerned, the suspect transaction was allegedly a preferential transaction is assailable under Section 43 of the Code. It is in this background that the petitioner filed a writ

[3] paragraph 12 of the Venus judgement
[4] paragraphs 7-9 of the Venus judgment

petition seeking a declaration that the proceeding against it was void and non-est.[5]

9.21 Before the Court, the arguments that were advanced on behalf of the petitioner were not restricted to the preferential transaction only under Section 43 of the code but extended to any transactions that was "preferential, undervalued, fraudulent or extortionate."[6] The expression "avoidance applications" used during the course of submissions was used in a general sense to cover applications impugning suspect transactions of all kinds and not merely the ones that are preferential in nature.[7] Even on behalf of the respondents, the submissions were not restricted to preferential transactions alone but covered other kinds of suspect transactions as well.[8] The court observed that the situation was similar in respect of other kinds of suspect transactions, viz. undervalued, fraudulent or extortionate as well.[9]

9.22 The Hon'ble High Court, in its analysis of the submissions made before it, dealt with the preferential transactions, undervalued transactions, transactions defrauding creditors and extortionate credit transactions and observed that the purpose of avoidance of such transactions was to ensure that the insolvency/liquidation process was fair to creditors.[10]

[5] paragraphs 64&65 of the Venus judgement
[6] paragraph 16 of the Venus judgement
[7] Paragraphs 21 &24 of the Venus judgement
[8] Paragraphs 34&36 of the Venus judgement
[9] paragraph 56 of the Venus judgement
[10] paragraph 52 of the Venus judgement

9.23 The Hon'ble High Court framed the questions before it. One of the questions framed was "**who would get the benefit of an adjudication of the avoidance application after the approval of the Resolution Plan**?."[11]

9.24 In light of the above facts and the question framed by the Hon'ble High Court that it was held that an avoidance application is not meant for the benefit of the Corporate Debtor in its new avatar after the approval of the resolution plan and that the plan would have to take into consideration such amount. It further held that the resolution plan would have to take into consideration such amounts and the benefits which can be given to the Corporate Debtor for the benefit of the CoC.[12]

9.25 The Hon'ble court further observed that the avoidance applications were neither for the benefit of the resolution applicant nor the company after the resolution was complete but for the benefit of the Corporate Debtor and its COC.

9.26 The respondents have relied on the sentence "*this is however subject to any clause in the resolution plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the resolution plan. In the present case, no such clause has been shown to exist*"[13] to contend that if a resolution plan provides to the contrary, the resolution applicant can take the benefit of the recoveries. The appellant argued that the said discussion is not

[11] paragraph 59 of the Venus judgement
[12] paragraph 73 of the Venus judgement
[13] paragraph 77 of the Venus judgement

in the context of the question(iii) framed by the court but in the context of the question(i), which deals with the issue as to whether a resolution professional can continue to act beyond the approval of the resolution plan. The Venus judgement does not lay down any proposition that if a resolution plan provides that the resolution applicant can take the benefit of the recoveries from avoidance transactions, the same is permissible, let alone legal.

9.27 We are fully convinced with the argument advanced by the Appellants Counsel that the ratio of the 'Venus Recruiters' case applies to the facts of this case. Further, the ratio laid down by the Hon'ble Delhi High Court is that of the constitutional court directly answering the issues before the NCLT was binding on the AA/ NCLT.

Whether CoC gives up the proceeds of avoidance transactions to the Resolution Applicant in exchange for a higher upfront amount or not.

9.28 We have to analyse from the facts whether CoC gives up the proceeds of avoidance transactions to the Resolution Applicant in exchange for a higher upfront amount or not.

9.29 In the instant case, the Administrator under his statutory duties, in March 2020, issued a Request for Resolution Plan ("RFRP") under Regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the "CIRP Regulations"). It has provided in the RFRP that any transaction is avoided/set aside in terms of Sections 43, 45, 47, 49, 50 or 66 of the Code, and any amount is received

by Respondent No.1 or the Resolution Applicant or the Corporate Debtor; such sums shall be for the benefit of the CoC. The relevant clause in the RFRP in this regard was as follows:

> *"**In the event, any transaction is avoided/set aside by the Adjudicating Authority** in terms of Sections 43, 45, 47, 49, 50 or 66 of the IBC, **and any amount is received** by the Administrator or the Resolution Applicant/ Corporate Debtor (as the case may be) in accordance with such decision of the Adjudicating Authority**, such sums shall be for the benefit of the creditors and shall be a pass-through amount to the creditors**."*

9.30 Thus, originally, it was envisaged by Respondent Nos.1 and 3 that any recoveries from transactions avoided/set aside under Sections 43 to 51 and 66 of the Code would enure to the benefit of DHFL's creditors and that the prospective applicants will not receive any benefits therefrom.

9.31 **Four entities viz. Respondent No. 2 herein, India Opportunities Investments Singapore Pte. Ltd. ("Oak tree"), Adani Properties Private Limited ("Adani") and M/s SC Lowy Primary Investments Limited ("SC Lowy") expressed interest in submitting Resolution Plans.**

9.32 After that, realising that the substantial value of DHFL was locked up in the avoidance applications filed by Respondent No. 1 as above and further realising that there was sufficient evidence in the form of news report of 'Cobrapost.com', forensic audit report of M/s KPMG, Report of Transaction Auditor M/s Grant Thornton and the fact that SFIO was investigating the

DHFL scam, **these Resolution Applicants raised issues with respect to the stipulation in the RFRP providing that the recoveries from transactions set aside/ avoided under Sections 43 to 51 and 66 would be for the benefit of DHFL's creditors.**

9.33 **Considering the objections of the Resolution Applicants, it was agreed that the RFRP might be suitably modified to incorporate language which was in the mutual interest of Respondent No.3** (which includes the Applicant as well) and the Resolution Applicants.

9.34 Some of the Relevant / Key observations/directions of the meeting of 7th CoC held on September 10 2020, as recorded in the minutes of the meeting**,** are mentioned below:

> The existing RFRP provides that in the eventuality transaction is avoided/set aside by the Adjudicating Authority in terms of the provisions of the Code, any amount received by the Administrator or the Resolution Applicant/Corporate Debtor (as the case may be) in accordance with such decisions of the Adjudicating Authority shall be for the benefit of the creditors and shall be a pass-through amount to the creditors.
>
> However, the PRA's have stated that given the significant part of the asset pool located under group B and C of options 2nd might fall under the filing of avoidance transactions being done by the Administrator, clarity is required on ascribing value to the same. The Administrator, after deliberations with both the legal counsels and

process adviser and based on inputs provided by them, stated that the following options could be evaluated by the COC or any other options as they may deem fit since it is COC's prerogative to fix terms of the RFRP, to resolve the issue raised by the PRA's.

- *The PRAs may be asked to ascribe value to all the transactions that are being filed u/s 66 as best as they can and once the Resolution Plans are received, the CoC thereafter negotiates basis the values ascribed by the PRAs, what part of the potential future recovery from such transactions may be shared with PRAs to increase the upfront value of they ascribe to the loan assets :**CoC has discretion to negotiate, or***

- *The PRAs may be asked to ascribe value to all the loan assets including those which relate to transactions that are being filed u/s 66 on the basis that all potential future recovery from such transactions may be retained only by the PRAs and on this basis, to increase the upfront value they ascribe to the loan assets.*

- *At this juncture, the administrator and the COC counsel sought views from the members of the COC in this regard. **The representative from Catalyst Trusteeship Limited[14] expressed concern as to why this issue could not be envisaged raised at the time of drafting of the RFRP**. The administrator respondent that the quantum of the complexities and value of the transactions were not known at the time of drafting RFRP and hence the situation could not be foreseen by the*

[14] CTL

stretch of imagination at that time. Further, these facts were unearthed by the avoidance audit, which is subsequent. The representative from SBI concurred with the views of administrator and informed that this could not have been envisaged in the initial period.

- *After due deliberation amongst the several CoC members**, it was agreed that the RFRP may be suitably modified to incorporate the language which is in mutual interest of the CoC members and the Resolution Applicant,** which would incorporate that the **PRAs may ascribe a value to the transaction to all the transaction that are being filed u/s 66** and propose the manner of dealing with any recoveries therefrom. **The Administrator directed both the legal counsel alongwith the process advisors to make the appropriate changes in the RFRP to ensure that the rights of the CoC members are adequately protected.** The CoC counsel and the Administrator Counsel took note of the same. The CoC members did not raise any other point and it appeared that they concurred with the suggestions of both the legal counsels."*

9.35 The Appellant has filed a copy of the Piramal Resolution Plan-options 2nd Group A, dated 16 October 2020 (page 299 of the appeal paper book). Clause 2.13.2 about 'OPTION A' is quoted below for ready reference;

"*2.13.2 Given that these transactions primarily pertain to group B and group C, which are to be carved out of the company pursuant to section 9.1.3 of part A (financial proposal), the resolution applicant attributes NIL value to the transactions.* ***Accordingly, any amount received by the company as a***

result of such orders shall be distributed to the financial creditors pro rata to the extent of the financial debt for financial creditors. *Provided that, the COC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst financial creditors as laid down in section 53 (1) of the IBC and such decision of the COC shall be accepted by the resolution applicant, such to there being no change in the total resolution amount."*

9.36 ***Further, in the Piramal resolution plan-options 2nd group A dated 9 November 2020 (Page 300 of Appeal paperbook)***

"*2.14.2 Given that these transactions primarily pertain to group B and group C, which are to be carved out of the company pursuant to section 9.1.3 of part A (financial proposal), the resolution applicant attributes NIL value to the transactions.* ***Accordingly, any amount received by the company as a result of such orders shall be distributed to the financial creditors pro rata to the extent of the financial debt for financial creditors***. *Provided that, the COC may in its discretion adopt different manner or distribution (which may take into account the order of priority amongst financial creditors as laid down in section 53 (1) of the IBC and such decision of the COC shall be accepted by the resolution applicant, subject to there being no change in the total resolution amount.*

2.14.5 The resolution applicant ascribes nil value in respect of any transactions that may be provided/set aside by the NCLT in terms of section 66 of the IBC. Accordingly, any amount received by the company as a result of such orders shall be distributed, net of taxes, to the financial creditors pro-rata to the extent of the

financial debt for financial creditors. Provided that, the COC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst financial creditors as laid down in section 53 (1) of the IBC and such action of the COC shall be accepted by the resolution applicant, subject to there being no change in the total resolution amount.

9.37 ***Further, in the Piramal resolution plan-options 2nd group A dated 17 November 2020 (Page 300 of Appeal Paper book)***

"*2.14.2 Given that these transactions primarily pertain to group B and group C, which are to be carved out of the company pursuant to section 9.1.3 of part A (financial proposal), the resolution applicant attributes NIL value to the transactions.* ***Accordingly, any amount received by the company as a result of such orders shall be distributed to the financial creditors pro rata to the extent the financial debt for financial creditors****. Provided that, the COC may in its discretion adopt a different manner or distribution (which may take into account the order of priority amongst financial creditors as laid down in section 53 (1) of the IBC and such decision of the COC shall be accepted by the resolution applicant, subject to there being no change in the total resolution amount.*

2.14.5 The resolution applicant ascribes nil value in respect of any transactions that may be provided/set aside by the NCLT in terms of section 66 of the IBC. Accordingly, any amount received by the company as a result of such orders shall be distributed, net of taxes, to the financial creditors pro-rata to the extent the financial debt for financial creditors. Provided that, the COC may in its discretion adopted different manner of distribution (which may take into account the order of priority amongst financial

creditors as laid down in section 53 (1) of the IBC and such action of the COC shall be accepted by the resolution applicant, subject to there being no change in the total resolution amount.

9.38 **Piramal Resolution Plan-option 1st dated 14 December 2020 (page 302 of Appeal Paper book)**

2.14 Treatment of preferential transactions, undervalued transactions, extortionate transactions and fraudulent trading.

2.14.2 with respect to the avoidance transactions, the resolution applicant intends to pursue the application filed by the administrator before the NCLT in respect of these avoidance transactions (of identity litigation). The resolution applicant intends to take all necessary steps on the best efforts basis in order to ensure maximum recovery from the avoidance litigation. ***Any positive recovery as a result of the reversal of such transactions provided or set aside by the NCLT would accrue to the benefit of the resolution applicant.*** *All the court is and expenses incurred or to be incurred towards such avoidance litigation prior to the implementation date shall be on account of the COC for this purpose; the COC can, with the prior written consent of the resolution applicant, set up a separate corpus for this purpose. All the costs and expenses incurred are to be incurred towards such avoidance litigation post the implementation date shall be undertaken by the resolution applicant. The resolution applicant ascribes a value of INR 1 in respect of avoidance transactions pertaining to section 66 of the IBC.*

2.14.3 any claim from any counterplay of the aforesaid transactions (in future) arising due to reversal of any such transactions shall stand extinguished.

9.39 **Piramal Resolution Plan options 2nd group A dated 14 December 2020 quoted at page 303 is reproduced below for ready reference;**

2.14.2 Given that these transactions primarily pertain to group B and group C after, which are to be carved out of the company pursuant to section 9.1.2 of part a (financial proposal), the resolution applicant attributes nil value to these transactions. Accordingly, any amount received by the company as a result of such orders shall be distributed, net of taxes, to the financial creditors pro-rata to the extent of the financial debt for financial creditors. Provided that, the COC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst financial creditors as laid down in section 53 (1) of the IBC and such decision or of the COC shall be accepted by the resolution applicant, subject to there being no change in the total resolution amount.

9.40 Considering the above, Respondent No.1 amended the abovementioned clause of the RFRP. The amended RFRP provided that the benefit of avoiding/setting aside any transaction in terms of Sections 43, 45, 47, 49, 50 (and not Section 66 of the Code) shall enure to the benefit of DHFL's creditors. In contrast, if any transaction is avoided/set aside in terms of Section 66 of the Code, the Resolution Applicant shall ascribe a value under the Resolution Plan to any recoveries that are likely to be made in respect of such transactions and shall propose the manner of continuing and dealing with any legal action initiated and the proposed manner of treatment of any

proceeds arising therefrom. The relevant clauses of the RFRP in this regard are as follows:

> *"(w) in the event any transaction is avoided/set aside by the Adjudicating Authority in terms of Section 43, 45, 47, 49, 50 of the IBC, and any amount is received by the Administrator or the Resolution Applicant/Corporate Debtor (as the case may be)* ***in accordance with such decision of the Adjudicating Authority such sums shall be for the benefit of the CoC and shall be pass-through amount to the creditors****, subject to sub-clause (x) below:*
>
> *...*
>
> *(x)* ***In respect of any transaction is avoided / set aside by the Adjudicating Authority in terms of Section 66 of the IBC, the Resolution Applicant shall ascribe a value under the Resolution Plan to any recoveries that are likely to be made in respect of such transactions and shall propose the manner of continuing and dealing with any legal action initiated and the proposed manner of treatment of any proceeds arising therefrom which the CoC may evaluate as per its discretion."***

9.41 In the 10th CoC meeting held on November 6, 2020, and after the receipt of the letter dated November 30, 2020, addressed by the Appellant/Applicant, in the 17th meeting of the CoC held on 18th and 19th December 2020, **Respondent No. 1 pointed out to each of the Resolution Applicants that the stipulation in the Resolution Plans submitted by them seeking to take benefit of the recoveries from avoidance applications was not in line with the RFRP as well as the judgement of the Delhi High Court in the case of Venus Recruiters Private Limited v. Union of India and Ors.,**

wherein it was inter alia held that the benefit of an avoidance application is not meant for the Company or the Resolution Applicant but for the benefit of the creditors of the Corporate Debtor. Respondent No. 1 requested the Resolution Applicants to align the condition in their respective proposed plans with the requirement under the RFRP.

9.42 **Resolution Plan of Respondent No. 2 (SRA) dated 22nd December 2020 (Option I) –**

> "2.13.2. *The Resolution Applicant intends to pursue, on a best efforts basis, the application(s) filed by the Administrator before the NCLT in respect of these Avoidance Transactions.* ***Any positive monetary recovery received by the Company as a result of orders passed in relation to the Avoidance Transactions shall be distributed, net of costs and expenses (including taxes), to the Financial Creditors pro-rata to the extent the Financial Debt for Financial Creditors****, provided that* ***the CoC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst Financial Creditors as laid down in Section 53(1) of the IBC****) and* ***such decision of the CoC shall be accepted by the Resolution Applicant, subject to their being no change in the Total Resolution Amount.***
>
> 2.13.3. *The Resolution Applicant ascribes value of INR 1 in respect of any transactions that may be avoided set aside by the NCLT in terms of Section 66 of the IBC****. Accordingly, any positive recovery as a result of the reversal of transactions avoided or set aside by the NCLT in terms of Section 66 of the IBC would accrue to the sole benefit of***

the Resolution Applicant. *All the costs and expenses incurred or to be incurred towards litigation pertaining to Section 66 of the IBC shall be to the account of the Resolution Applicant."*

9.43 Based on the minutes of the 17th Meeting of COC dated 18 December 2020, it is clear that during this meeting, it was informed by the Administrator that the treatment of avoidance recovery as mentioned in the plan is not in compliance with the terms of RFRP. Further attention was drawn towards the judgement of the same. Excerpts of the minutes (Page 320 of Appeal Paper book) is given below for ready reference;

"7(vii) ***the COC legal counsel highlighted the treatment of avoidance recoveries is mentioned in the plan and is stated that the same is not in accordance with the terms of RFRD. Further, attention was also drawn to the recent High Court judgement on the same. The Adani representative agreed to the revisit and revert on the same."***

9.44 It was the COC Suo moto decided to bargain with the resolution applicant's further and increase the resolution amount in view of parting with recoveries under Section 66 of the Code is also incorrect as it was the resolution applicant's that requested the administrator/ COC that the RFRP should be suitably amended to provide how the recovery from avoidance transaction should be dealt with. This is evident from the COC meeting minutes dated 10 September 2020.

9.45 Except for a bald assertion by learned senior counsel for the Respondent that the Successful Resolution Applicant enhanced resolution amount to factor in the avoidance transactions, there is nothing on record to suggest that this was done. The correlation between when the resolution plan amount was increased to ₹ 37,500 crores and how many avoidance applications existed is also relevant.

9.46 It is the case of the Appellant/Applicant that even after the modification by the prospective Resolution Applicants of the treatment envisaged under their respective Resolution Plans to the recoveries as a result of the avoidance applications filed by Respondent No. 1, the modified treatment is not in accordance with the provisions of the Code and/or the RFRP.

9.47 The appellant contends that by email dated 24th December 2020, the Applicant invited the attention of Respondent No. 1 to a legal opinion on the issue of entitlement of recoveries from avoidance applications.

Appellants contention about Valuation reports, obtained by Respondent No. 1

9.48 Respondent No. 1 appointed two valuers viz. M/s RBSA Valuation Advisors LLP and M/s Kapil Maheshwari to determine the fair value and the liquidation value of DHFL in accordance with the CIRP Regulations. Rather than ascribing some reasonable and realistic value to the assets/money that may be recovered by pursuing the avoidance applications referred to above, these valuers ascribed Nil value to these avoidance applications and did not

consider filing these avoidance applications. As a result, the fair value and the liquidation value of DHFL were suppressed. Instead of calling for fresh valuations after taking into consideration the correct value locked up in the avoidance applications, Respondent No. 1 persisted with these valuations to the detriment of DHFL's creditors.

9.49 Appellant further submits that by letter dated 11 January 2021 addressed to Respondent No. 1, it had raised objections in this regard. However, Respondent No. 1 has not replied to this letter to date. Therefore, the Applicant once again addressed a letter dated 14th January 2021 to Respondent No.1, raising objections regarding the proposed distribution mechanism and requested Respondent No. 1 to adhere to the principles of fair and equitable distribution of proceeds among various stakeholders of DHFL. However, Respondent No.1 has not paid any heed to the Applicant's request.

Appellants objection about voting on the resolution plans

9.50 Appellant alleges that despite the unlawful stipulation in the Resolution Plans regarding the treatment of recoveries from avoidance applications and instead of directing the Resolution Applicants to modify the Resolution Plans in this regard, Respondent No. 1 put the Resolution Plans to vote of the CoC. The voting window was open from 29th December 2020 to 14th January 2021. Instead of the resolution seeking a vote regarding the Resolution Plan only, Respondent No. 1 sought votes on the deviations to the RFRP being waived by the same resolution.

9.51 Appellant further submits that though it had challenged the action of Respondent No. 1 of putting to vote the Resolution Plans which provided for the treatment of recoveries from avoidance applications not in accordance with the law, in the IA No. 2352 of 2020 filed before NCLT , during the course of the hearing of this Interlocutory Application, the Applicant was informed by the Tribunal that the Applicant might vote on the Resolution Plans and such vote will be without prejudice to the rights and contentions of the Applicant inter alia that the stipulation in the Resolution Plans that the benefit of the recoveries/ contributions made or the benefit of any orders passed in the avoidance applications under Sections 43 to 51 or under Section 66 of the Code will enure to the benefit of the resolution applicant, is bad in law. The NCLT passed oral directions permitting the Applicant to vote on the Resolution Plans without prejudice to its rights and contentions. Accordingly, the Applicant has, without prejudice to its contentions as regards the illegalities in the Corporate Insolvency Resolution Process of DHFL, voted in the resolution process. In any event, the mere fact that the Applicant has voted in a particular manner in the resolution process is no ground to condone illegalities in DHFL's Corporate Insolvency Resolution Process.

9.52 The learned senior counsel for respondent vehemently argued that NCD holders as a class approved Resolution Plan, the appellant as an individual NCD holder could not maintain any challenge to the Resolution Plan as there is estoppel under law.

9.53 Respondent placed reliance on the observations of the Hon'ble Supreme Court in case of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd, reported in 2021 SCC OnLine SC 253, wherein it is observed that;

> ***"131.*** *The word "payment", as defined in Black's Law Dictionary was also analysed by NCLT and it was stated that the obligation has to be seen and in the instant case, the obligation was repayment of money lent along with interest. It was observed, that the dissenting financial creditors were to be paid in cash not just by virtue of Section 53 of the Code but also by virtue of the terms and conditions of the agreement between JIL and the dissenting financial creditor, in the following words:—*
>
> > *"92.…Therefore this argument will not be ticking to say that payment in kind to the promise is discharge of obligation. If the promisee has agreed to give up the payment obligation, he is free to do so.* ***In this case, for the dissenting financial creditor has not agreed to the approval of the resolution plan, they shall be paid in cash, not only by virtue of the mandate under Section 53 of the Code but also by virtue of terms and conditions of the agreement between the Corporate Debtor and the dissenting financial creditor."***
>
> ***387.*** *The relevant aspect for the present point for determination is that apart from such dissenting financial creditors, a few of the associations of homebuyers and some of the individual homebuyers carry their own grievances against the resolution plan and seek to submit that their interests have not been safeguarded and they are being denied of their legal*

rights. These dissatisfied associations and individual homebuyers seek to contend that the resolution plan is lacking in various requisite arrangements; is violative of the CIRP Regulations; and is also violative of the provisions of RERA and therefore, it could not have been approved. One block of such objectors is rather differently dissatisfied for the reason that according to them, the housing projects which have been completed or are nearing completion ought to be kept out of the purview of this plan of resolution. In counter, it is contended on behalf of the resolution applicant that these dissatisfied homebuyers or associations have no right to maintain any objection as if being the dissenting financial creditors because the homebuyers have voted as a class in favour of the resolution plan and are bound as a class with 'drag along' provisions in the Code. The objections have been refuted on merits too. These rival submissions have led to the formulation of four different questions in this point for determination.

388. *The associations and the individual homebuyers who are dissatisfied with the resolution plan and the process of its approval have made various overlapping and repeat submissions; we may summarise the substance thereof, while avoiding prolixity, as far as possible.*

389. *It is contended on behalf of the association of homebuyers, who has filed the appeal (in T.C. No. 243 of 2020) and has also filed an intervention application in the appeal filed by other associations, that the homebuyers have the locus standi to file an appeal even though they belong to a class of creditors represented through an authorised representative, who voted in favour of the resolution plan of NBCC. This association of dissatisfied homebuyers submits that sub-*

section (3A) of Section 25A of the Code is only intended to iron out the logistical issues and technical difficulties which arise due to the large number of creditors; and the mere fact that more than 51% of the homebuyers voted in favour of the resolution plan cannot take away the statutory right of appeal."

423. Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated in Section 25A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3A) to Section 25A, which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR shall cast his vote on behalf of all the financial creditors he represents 'in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote'. 425. *In the face of clear language of sub-section (3A) of Section 25A of the Code, read with the law declared by this Court in Pioneer Urban (supra), the suggestion on behalf of the dissatisfied homebuyers that the said provision was only intended to iron out the logistical issues and technical difficulties is required to be rejected altogether. The said provision, as held by this Court, is to iron out the creases that might have been felt in the proper working of Section 25A; and it is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but,*

when coming to the vote in the Committee of Creditors, their vote would be that of a class.

426. *Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorised representative on the entire class of the financial creditor/s he represents.*

427. *To put it in more clear terms qua the homebuyers, the operation of sub-section (3A) of Section 25A of the Code is that their authorised representative is required to vote on the resolution plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the*

particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.

429. *A rather overambitious attempt has been made by the homebuyers who have filed separate appeal (T.C. No. 242 of 2020) to refer to the percentage of voting share of homebuyers and it has been suggested that out of the total voting share of homebuyers i.e., 57.66%, the assenting voting share was only 34.10%, whereas 22.51% abstained and 1.05% dissented. It is submitted that roughly, for every 3 homebuyers who voted for NBCC, 2 had dissented/abstained. Even assuming the percentage as stated by these appellants to be correct, we are at a loss to find any logic in the submissions so made. A re-look at sub-section (3A) of Section 25A would make it clear that '50%' for the purpose of the said provision is of those homebuyers who cast their vote. On the percentage figures as given before us****, out of the total voting share of homebuyers at 57.66%, the persons carrying 22.51% voting share simply abstained and of the persons casting their votes, ayes were having the voting share of 34.10% whereas nays were having the voting share of 1.05%. Obviously, 50% would be counted only of the persons who chose to vote where, much higher than 50% of the homebuyers who cast their vote, stood for approval of the resolution plan of NBCC. Such a voting cannot be set at naught for the purported dissatisfaction of a miniscule minority, which was about 3.69% in terms of the number of persons voting; and about 1.05% in terms of the voting share. They have to sail along with the overwhelming*

majority. That is the purport and effect of 'drag along' or 'sail along' provisions in the scheme of the Code.

430. *For what has been discussed hereinabove, the suggestions that there was no cent percent approval of the resolution plan, or that there was no consensus amongst homebuyers, or that the plan of Suraksha Realty was considered better, are required to be rejected. It is not the case that the AR of homebuyers has not voted in accordance with the decision taken by a vote of more than 50% of the voting share of homebuyers who did cast their vote. In the given set of facts, we have no hesitation in thoroughly disapproving the unnecessary imputations made by one set of homebuyers against the AR that he made any incorrect statement before the CoC. That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers****, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal.*** *All such objections and appeals are required to be rejected on this ground alone.*

431. *The suggestion about the so-called statutory right of appeal has only been noted to be rejected.* ***The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the***

plan by a constituent of the class that had voted in favour of approval.

435. *To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.*

436. *Once we have held that these dissatisfied homebuyers and associations are not entitled to put up any challenge to the resolution plan contrary to the decision of the requisite majority of their class, all their objections are required to be rejected outright.* ***Yet, in the interest of justice, we have examined these objections to find if there be any aspect worth consideration within the periphery of Section 30(2) of the Code. We find none****."*

9.54 Based on the above judgment of the Hon'ble Supreme Court, the Learned Senior Advocate for Respondent argued that in the instant case, the appellant's NCD holders as a class had approved the Resolution Plan; therefore, the appellant as an individual NCD Holder cannot maintain any challenge to the Resolution Plan as there is estoppel under law.

9.55 In response to the above argument, learned Senior Counsel for Appellant argues that the said contention of Respondent Nos. 1 & 2 is entirely misconceived. In addition to the fact that the Appellant has voted to owe to the express liberty granted by this Hon'ble Tribunal, without prejudice to Appellant's rights & contentions, the plea of estoppel is not available to the

Respondents in the present facts on the following legal grounds which are without prejudice, and in the alternative, to each other:

i. A Resolution Plan, which is otherwise illegal or contains terms contrary to law, cannot be countenanced based merely on the strength of the majority that votes for such a plan. Hence, the manner in which a member of the CoC votes cannot cure illegality in a Resolution Plan.

ii. As a result, no person, howsoever minimal his voting share is in the CoC and irrespective of how he has voted, can be estopped from challenging illegality or unlawful terms in a Resolution Plan;

iii. This Hon'ble Tribunal is under a legal & statutory duty to enquire whether a resolution plan suffers from any illegality or otherwise contains unlawful terms. The said duty is not eclipsed by the manner of voting by a particular creditor or a class of creditors. In fact, even in the absence of any person pointing out any illegality in a resolution plan, this Hon'ble Tribunal is expected to exercise its powers to enquire whether the requirements of Section 30(2) of the Code have been met to perform the said duty.

iv. The plea of the Respondents, if accepted, would amount to disregarding the well-settled and universally applicable legal principle that there cannot be any estoppels against the law.

9.56 It is argued on behalf of the Appellant that A Resolution Plan, which is otherwise illegal or contains terms contrary to law, cannot be countenanced based merely on the strength of the majority that votes for such a plan.

9.57 It also finds support from the observations of the Hon'ble Supreme Court in para 436 of the Jaypee Kensington (supra) judgement as mentioned below;

> ***"436.*** *Once we have held that these dissatisfied homebuyers and associations are not entitled to put up any challenge to the resolution plan contrary to the decision of the requisite majority of their class, all their objections are required to be rejected outright.* ***Yet, in the interest of justice, we have examined these objections to find if there be any aspect worth consideration within the periphery of Section 30(2) of the Code. We find none."***

9.58 Hon'ble Supreme Court, while considering the case of dissatisfied homebuyers and associations, had observed that the challenge to the resolution plan contrary to the decision of the requisite majority of their class is required to be rejected outright. However, Hon'ble Supreme Court further goes on to observe that in the interest of justice, they have examined the objections to find if there be any worth aspect consideration within the periphery of Section 30 (2) of the Code.

9.59 A mandatory statutory duty has been cast upon the Adjudicating Authority, in terms of Section 31 read with Section 30(2) of the Code, to ensure that a resolution plan placed before it for approval is compliant with the

provisions of law. Despite the limited scope of enquiry in an application for approval of a Resolution Plan, the jurisdiction of the Adjudicating Authority to go into the aspects of illegality in Resolution Plans and the Resolution Plans being compliant with the provisions of law has been well recognized & accepted by Hon'ble Supreme Court of India in several judgements.

9.60 The learned Counsel for the respondent adverted to the observations of the Hon'ble Supreme Court in paras 30 of the judgement in the case of *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*, (2020) 11 SCC 467, wherein it is observed that:

> ***"30.*** *The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable.* ***Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8***

SCC 531] , the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. *The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront."*

9.61 The learned Senior Counsel for Respondent submits that treatment of proceeds arising out of Avoidance Application is not a matter of law. Section 66 of the Code or any other provision of the code creates any impediment on the rights of the resolution applicant to avail the proceeds, if any, from the avoidance applications. The law is flexible on whether the creditors or the resolution applicant should enjoy the benefits of the avoidance applications subject to the provisions of the resolution plan. As such, the COC, in its commercial assessment of the assets of the erstwhile Corporate Debtor, decided to give up the recoveries (if any) from the avoidance applications under Section 66 of the code to the SRA in exchange for a higher front resolution amount. It is settled law that the treatment of recoveries arising out of avoidance application is a matter of commercial wisdom of the COC.

9.62 The respondent places reliance on this Appellate Tribunal's judgment in the case of JSW Steel Ltd. v. Mahender Kumar Khandelwal ..., reported in 2020 SCC OnLine NCLAT 431 decided on 17th Feb 2020.

In the above case, it has been observed that;

"145. *Therefore, Para 128(i) of the impugned order ought not to have modified the specific inter se understanding between the 'Committee of Creditors' and the Appellant on sharing of such proceeds, which has been recorded in Para 13 of the Addendum Letter and forms a part of the 'Resolution Plan'. Further, since this is a matter which relates to a commercial understanding between the 'Committee of Creditors' and the Resolution Applicant as recorded in the 'Resolution Plan', in light of "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta—2019 SCC OnLine SC 1478", such commercial understanding be given effect to, without any modification.*

146. *In light of the above, we set aside the condition stipulated in second part of para 128(i) of the impugned order, regarding monies recovered from tainted and other such transactions, as being contrary to the agreed position in terms of para 13 of the Addendum Letter, which forms a part of the 'Resolution Plan'."*

9.63 The Learned Senior Counsel for the Respondents further submits that this Appellate Tribunal ought to adopt a hands-off approach and should not undertake a judicial review of the COC is commercial wisdom exercised while dealing with the treatment of proceeds (if any) arising out of applications filed under Section 66 of the Code.

9.64 Respondent further places reliance on the following judgements of Hon'ble Supreme Court with specific paras as mentioned below;

a) K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150: (2019) 4 SCC (Civ) 222. In this case, Hon'ble Supreme Court has held that;

"52. *As aforesaid, upon receipt of a "rejected" resolution plan, the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code.* ***The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory.*** *In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code****. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through***

voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. *The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their*

*commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code**. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality.** The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code."*

(emphasis supplied)

b) Ebix Singapore (P) Ltd. v. Committee of Creditors, reported in 2021 SCC OnLine SC 707 wherein it is held that;

***"145.** The absence of any specific provision in the IBC or the regulations referring to a CoC-approved Resolution Plan as a contract and the lack of clarity in the BLRC report regarding the nature of such a Resolution Plan, constrains us from arriving at the conclusion that **CoC-approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts, save and except for the specific prohibitions and deeming fictions under the IBC. Regulation 39(3) of CIRP regulations,** as it stood before the IBBI (CIRP) (Fourth Amendment) Regulations 2020 and applicable to the three appellants before us, enabled a framework where a draft Resolution Plan would involve several rounds of negotiations and revisions between the Resolution Applicant and the CoC, before it is approved by the latter and*

submitted to the Adjudicating Authority. However, this statutorily-enabled room for commercial negotiation is not enough to over-power the other elements of regulation that detract from the view that CoC-approved Resolution Plans are contracts. ***CoC-approved Resolution Plans, before the approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act.*** *The voting by the CoC also occurs only after the RP has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein. The amended Regulation 39(3) further regulates the conduct of the CoC on voting on Resolution Plans and has introduced the requirement of simultaneous voting. The IBBI's Discussion Paper issued on 27 August 2021 has invited comments on regulating the process on revisions that can be made to resolution plans submitted to the CoC. These developments bolster the conclusion that the mechanism prior to submission of a CoC-approved resolution plan is subject to continuous procedural scrutiny by the IBC and cannot be considered as a simple contractual negotiation between two parties. Section J below details how a common law remedies of withdrawal or modification on account of frustration or force majeure are not applicable to CoC-approved Resolution Plans owing to the nature of the IBC. Similarly, the whole host of remedies such as liquidated and unliquidated damages, restitution, novation and frustration, unless specifically provided by the IBC, are not available to a successful Resolution Applicant whose Plan has been approved by the CoC and is awaiting the approval of the Adjudicating Authority.*

The Insolvency Law Committee Report of February 2020 has recommended the CIRP process to mandate Resolution Plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP. These reports are periodically commissioned by the parliament to review the functioning of the Code and suggest amendments. However, if the intention was to view a CoC-approved Resolution Plan as a contract, the principles of unjust enrichment would have been sufficient to address the issue and an amendment may not be considered necessary. A Resolution Applicant, as a third party partaking in the insolvency regime, seeks to acquire the business of the Corporate Debtor without the entirety of its debts, statutory liabilities and avoiding certain transactions with third parties. These benefits are a function of the coercive mechanisms of the IBC which enable a third party to acquire the assets of a Corporate Debtor without its liabilities, for a negotiated amount of the debt that is owed by the Corporate Debtor. Typically, resolution amounts envisage payment of a fraction of debt that is owed to the creditors and the business is acquired as a going concern with its employees. The Resolution Plan is drafted in a way that it is implementable in the future and brings about a quietus to the CIRP. Enabling Resolution Applicants to seek remedies that are not specified by the IBC, by seeking recourse to the Contract Act would be antithetical to the IBC's insolvency regime. The elements of contractual interpretation can be relied upon to construe the language of the terms of the Resolution Plan, in the event of a dispute, but not to re-fashion and distort the mechanism of the IBC altogether. This Court in Laxmi Pat Surana v. Union Bank of India has held that the IBC is a self-contained Code. Thus, importing principles of any other law or a statute like the

Contract Act into the IBC regime would introduce unnecessary complexity into the working of the IBC and may lead to protracted litigation on considerations that are alien to the IBC. To give an example, the CoC can forfeit the PBG furnished by the successful Resolution Applicant under certain circumstances in terms of the RFRP and Resolution Plan including, inter alia, on the ground that the Resolution Applicant has failed to implement the resolution or has contributed to its failure. Regulation 36B (4A) of CIRP regulations provides for the furnishing of such performance security once the plan is approved by creditors. The Regulations do not provide that the performance security has to be a reasonable estimate of loss as is expected of penalty clauses under contract law, rather the explanation provides that the performance security should be 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". Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process. The parties may resort to invoking principles of frustration or force majeure to evade implementation of the Resolution Plan leading to unnecessary litigation. This Court in Amtek Auto (supra), had curbed a similar attempt by a successful Resolution Applicant who had relied on a force majeure clause in its Resolution Plan to seek a direction compelling the CoC to negotiate a modification to its Resolution Plan. ***The Court held that there was no scope for negotiations between the parties once the Resolution***

Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority. *Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, de hors the over-riding principles of the IBC."*

(emphasis supplied)

9.65 Hon'ble Supreme Court in case of Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel and Others ..., reported in 2021 SCC OnLine SC 569 in paragraphs 29-51, while dealing with the issue of the scope of interference by the Adjudicating Authority and the powers of the NCLT and NCLAT regarding approval of the Resolution Plan referred earlier Supreme Court judgements pronounced so for and summarised the law in this regard.

9.66 In the case of Pratap Technocrats (P) Ltd (supra), Hon'ble Supreme Court has held that;

29. *The function of the Adjudicating Authority under Section 31 is to determine whether the resolution plan "**as approved by the CoC**" under Section 30(4) "meets the requirements" under Section 30(2). If the Adjudicating Authority is satisfied that the resolution plan, as approved, meets the requirements under sub-Section (2) of Section 30, "**it shall by order approve the resolution plan**" which shall then be binding on the*

Corporate Debtor and all stakeholders, including those specifically spelt out:

> *"31.(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan."*

30. The jurisdiction which has been conferred upon the Adjudicating Authority in regard to the approval of a resolution plan is statutorily structured by sub-Section (1) of Section 31. The jurisdiction is limited to determining whether the requirements which are specified in sub-Section (2) of Section 30 have been fulfilled. This is a jurisdiction which is statutorily-defined, recognised and conferred, and hence cannot be equated with a jurisdiction in equity, that operates independently of the provisions of the statute. The Adjudicating Authority as a body owing its existence to the statute, must abide by the nature and extent of its jurisdiction as defined in the statute itself.

31. The jurisdiction of the Appellate Authority under Section 61(3), while considering an appeal against an order approving a resolution plan under Section 31, is similarly structured on specified grounds. Section 61(3) provides:

> ***"61.....(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—***
>
> > ***(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;***
> >
> > ***(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;***
> >
> > ***(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;***
> >
> > ***(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or***
> >
> > ***(v) the resolution plan does not comply with any other criteria specified by the Board."***

36. *The nature of the jurisdiction which is exercised by the Adjudicating Authority, while approving a resolution plan under*

Section 31, has been interpreted in the judgment of a two-Judge Bench in K Sashidhar v. India Overseas Bank ("K Sashidhar"). The decision emphasizes that the Adjudicating Authority is circumscribed by Section 31 to scrutinizing the resolution plan "as approved" by the CoC under Section 30(4). Moreover, even within the scope of that enquiry, the grounds on which the Adjudicating Authority can reject the plan is with reference to the matters specified in sub-Section (2) of Section 30. ***Similarly, the Court notes that the jurisdiction of the Appellate Authority to entertain an appeal against an approved resolution plan is defined by sub-Section (3) of Section 61. Now, it is in this context, that the consistent principle of law which has been laid down is that neither the Adjudicating Authority nor the Appellate Authority can enter into the commercial wisdom underlying the approval granted by the CoC to the resolution plan. The commercial wisdom of the CoC in its collegial capacity is, hence, not justiciable.***

37. *In K Sashidhar (supra), Justice A M Khanwilkar, speaking for the two-Judge Bench, held:*

> *"57. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)", which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of*

statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.

58. ***Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed***

upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.

59. ***In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors****……"*

(emphasis supplied)

38. <u>The Court, also held (in paragraph 62) that the legislative history of the IBC indicated that "there is a contra indication that the commercial or business decisions of financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority".</u>

39. *The above principles have been re-emphasised and taken further by a three-Judge Bench in Essar Steel India Limited (supra). The Court, speaking through Justice R F Narminan, held:*

"73. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. ***Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.*** *The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the*

Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

***40. The precedents laid down by this Court are in tandem with recommendations made in the UNCITRAL's Legislative Guide on Insolvency Law, which states that it is desirable that a court does not interfere with the commercial wisdom of the decisions taken by the creditors. The relevant extract is reproduced below**:*

"63. The more complex the decisions the court is asked to make in terms of approval or confirmation, the more relevant knowledge and expertise is required of the judges and the greater the potential for judges to interfere in what are essentially commercial decisions of creditors to approve or reject a plan. In particular, it is highly desirable that the law not require or permit the court to review the economic and commercial basis of the decision of creditors (including issues of fairness that do not relate to the approval procedure, but rather to the substance of what has been agreed) nor that it be asked to review particular aspects of the plan in terms of their economic feasibility, unless the circumstances in which this power can be exercised are narrowly defined or the court has the competence and experience to exercise the necessary level of commercial and economic judgment."

44. <u>The observations in paragraph 73 of the decision in Essar Steel India Limited (supra) clarify that once the Adjudicating Authority is satisfied that the CoC has applied its mind to the statutory requirements spelt out</u>

in sub-Section (2) of Section 30, it must then pass the resolution plan. The decision also emphasises that equitable treatment of creditors is "equitable treatment" only within the same class*. In this context, the judgment contains an elaborate foundation on the basis of which it has held that financial creditors belong to a class distinct from operational creditors. This distinction was emphasised in the earlier decision in Swiss Ribbons (supra), where a two-Judge Bench of the Court, speaking through Justice R F Nariman, observed:*

> *"51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."*

45. *In Essar Steel India Limited (supra), this Court held that "the UNCITRAL Legislative Guide…makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors". The Court finally also observed that the 'fair and equitable' norm does not mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, it noted:*

"88. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."

46. *The Court also noted that:*

"89…by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors."

47. ***These decisions have laid down that the jurisdiction of the Adjudicating Authority and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is***

there a residual equity based jurisdiction in the Adjudicating Authority or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment.*:*

> *"Since an insolvency regime cannot fully protect the interests of all parties, some of the key policy choices to be made when designing an insolvency law relate to defining the broad goals of the law (rescuing businesses in financial difficulty, protecting employment, protecting the interests of creditors, encouraging the development of an entrepreneurial class) and achieving the desired balance between the specific objectives identified above. Insolvency laws achieve that balance by reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals. As such, an insolvency law can have widespread effects in the broader economy."*

50. Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.

G Conclusion

51. *In the present case, the resolution plan has been duly approved by a requisite majority of the CoC in conformity with*

Section 30(4). Whether or not some of the financial creditors were required to be excluded from the CoC is of no consequence, once the plan is approved by a 100 per cent voting share of the CoC. ***The jurisdiction of the Adjudicating Authority was confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC. As such, once the requirements of the statute have been duly fulfilled, the decisions of the Adjudicating Authority and the Appellate Authority are in conformity with law."***

(emphasis supplied)

9.67 Further, in case of Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657 Hon'ble Supreme Court has observed that;

93.*..... "After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable."*

9.68 Hon'ble Supreme Court in case of India Resurgence ARC Private Limited v. M/s. Amit Metaliks Limited, 2021 SCC OnLine SC 409 has observed that;

> ***"12. As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority***. *In the case of Jaypee Kensington (supra), this Court, after taking note of the previous decisions in Essar Steel (supra) as also in K. Sashidhar v. Indian Overseas Bank : (2019) 12 SCC 150 and Maharashtra Seamless Limited v. Padmanabhan Venkatesh : (2020) 11 SCC 467, summarised the principles as follows:—*
>
> > *"77. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval.*
> >
> > *77.1.* ***Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or***

otherwise of the commercial wisdom exercised by the CoC. *The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for : (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.*

77.2. ***The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority; or the resolution plan does not comply with any other criteria specified by the Board.***

77.3. The material propositions laid down in Essar Steel (supra) on the extent of judicial review are that the

Adjudicating Authority would see if CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. And, if the Adjudicating Authority would find on a given set of facts that the requisite parameters have not been kept in view, it may send the resolution plan back to the Committee of Creditors for re-submission after satisfying the parameters. Then, as observed in Maharashtra Seamless Ltd. (supra), there is no scope for the Adjudicating Authority or the Appellate Authority to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors."

13. *It needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal."*

9.69 Further, in case of Ngaitlang Dhar v. Panna Pragati Infrastructure Pvt. Ltd., 2021 SCC OnLine SC 1276 Hon'ble Supreme Court has observed that;

> ***"17.*** *Shri Abhijeet Sinha, learned counsel appearing on behalf of the respondent No. 1-PPIPL would submit that there is a distinction between the decision of the CoC and the procedure adopted by the RP and the CoC to arrive at that decision****. He submitted that though a final decision of the CoC cannot be a matter of challenge on the ground that the 'commercial wisdom' of the CoC should not be interfered with, yet if there is a material irregularity in the procedure adopted by the RP, an appeal under Section 61(3) of the IBC would be tenable.*** *He submitted that the RP acted with undue haste in the present matter. Learned counsel submitted that in the proceedings of the meeting of the CoC, held on 11-12th February, 2020, the Director of PPIPL, had sought one or two days' time to submit its revised offer. He submitted that, however, the said time was not granted. He further submitted that the revised offer was submitted within two days and it was the duty of the RP to present its revised offer before the CoC. Having not done that and having hastily approved the plan of Ngaitlang Dhar, the NCLAT has rightly interfered with the decision of the CoC. In this respect, he relies on the judgment of this Court in the case of Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Limited.*
>
> ***31. It is trite law that 'commercial wisdom' of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the***

NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC. It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's 'commercial wisdom' is non-justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of the IBC. *This position of law has been consistently reiterated in a catena of judgments of this Court, including:*

(i) K. Sashidhar v. Indian Overseas Bank

(ii) Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta,

(iii) Maharashtra Seamless Limited v. Padmanabhan Venkatesh,

(iv) Kalpraj Dharamshi v. Kotak Investment Advisors Limited.

(v) Ghanashyam Mishra and Sons Private Limited Through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited Through the Director

32. No doubt that, under Section 61(3)(ii) of the IBC, an appeal would be tenable if there has been material irregularity in exercise of the powers by the RP during the corporate insolvency resolution period. However, as discussed hereinabove, we do not find any material irregularity.

33. *We may gainfully refer to the following observations of this Court in the case of Keshardeo Chamria v. Radha Kissen*

Chamria while considering the scope of the words 'material irregularity', as are found in Section 115 of the Civil Procedure Code, 1908:

> *"Reference may also be made to the observations of Bose, J. in his order of reference in Narayan Sonaji v. Sheshrao Vithoba [AIR 1948 Nag 258]* ***wherein it was said that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."***

34. In the present case, leave apart, there being any 'material irregularity', there has been no 'irregularity' at all in the process adopted by the RP as well as the CoC. On the contrary, if the CoC would have permitted the PPIPL to participate in the process, despite it assuring the other three prospective Resolution Applicants in its meeting held on 11-12th February, 2020, that the absentee prospective Resolution Applicant (PPIPL) would be excluded from participation, it could have been said to be an irregularity in the procedure followed*.*

35. *Insofar as the contention of the learned counsel, Shri Abhijeet Sinha, that the NCLT had already extended the CIRP period by 90 days vide order dated 26th February, 2020 and therefore, there was no necessity to hastily approve the Resolution Plan of Ngaitlang Dhar on 12th February, 2020, is concerned, we find the same to be without substance. It will be*

relevant to mention that the period of 180 days was to expire on 24th February, 2020, and therefore, in the meeting dated 12th February, 2020 itself, the CoC after resolving to declare Ngaitlang Dhar as H-1 bidder had resolved to authorise the RP to seek an extension of CIRP period before the NCLT.

36. *It will be relevant to refer to paragraph 2 of the order dated 26th February, 2020 passed by the NCLT, which reads thus:*

> *"2. It is the submission of the RP that the CoC in its 5th meeting held on 11.02.2020 concluded on 12.02.2020 declared one Mr. N. Dhar as highest bidder and the said decision of the CoC is under consideration for approval with the higher authority of the CoC and, therefore, prayed for further extension of CIRP period to 90 days with effect from 25.02.2020"*

37. *It could thus be seen that the contention in that regard is also without substance. It is further to be noted that, as has been consistently held by this Court in catena of judgments, referred to hereinabove, the dominant purpose of the IBC is revival of the Corporate Debtor and making it an on-going concern. In the present case, the said purpose is already achieved, inasmuch as all the dues of the financial creditors, i.e., the Allahabad Bank and the Corporation bank, have already been paid, and the Corporate Debtor, in respect of which CIRP was initiated, is now an on-going concern.*

9.70 Based on the different judgements of the Hon'ble Supreme Court, it is undisputed that NCLT/NCLT has to adopt a hands-off approach and should not undertake a judicial review of the COC's commercial wisdom exercised.

However, the question arises as to what can be considered commercial wisdom. Commercial wisdom is not defined anywhere. What would be treated under commercial wisdom can be inferred from the powers given to COC under the code. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the Corporate Debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. Suppose the Adjudicating Authority finds that the aforesaid parameters have not been kept in view on a given set of facts. In that case, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.

9.71 In case of Ngaitlang Dhar v. Panna Pragati Infrastructure Pvt. Ltd., 2021 SCC OnLine SC 1276 Hon'ble Supreme Court has observed that under Section 61(3)(ii) of the IBC, an appeal would be tenable if there has been a material irregularity in exercise of the powers by the RP during the corporate insolvency resolution period. It is trite law that 'commercial wisdom' of the CoC has been given paramount status without any judicial intervention for ensuring completion of the processes within the timelines prescribed by the IBC. It has been consistently held that **it is not open to the Adjudicating Authority (the NCLT) or the Appellate Authority (the NCLAT) to take into**

consideration any other factor other than the one specified in Section 30(2) or Section 61(3) of the IBC.

9.72 In the case of Pratap Technocrats, Hon'ble Supreme Court has observed that **the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's 'commercial wisdom' is non-justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) of the IBC**. This position of law has been consistently reiterated in a catena of judgments of Hon'ble Supreme Court, including; K. Sashidhar v. Indian Overseas Bank; Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta; Maharashtra Seamless Limited v. Padmanabhan Venkatesh Kalpraj Dharamshi v. Kotak Investment Advisors Limited.

9.73 Hon'ble Supreme Court, in the case of Ebix Singapore (supra), has observed that **the procedure designed for the insolvency process is critical for allocating economic coordination between the parties who partake in, or are bound by the process.** This procedure produces substantive rights and obligations. **For instance, the composition of the CoC, the method and percentage of its voting, the timelines for CIRP, the obligation on the RP to file specific forms after every stage of the process and the obligation to explain to the Adjudicating Authority reasons for any deviations from the timeline while submitting a Resolution Plan, and other such procedural requirements create a**

mechanism which tightly structures the conduct of all participants in the insolvency process. This process invariably impacts the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework. An analysis of the statute and regulations framework provides insight into the dynamic and comprehensive nature of the statute. Upholding the procedural design and sanctity of the process is critical to its functioning. **The interpretative task of the Adjudicating Authority, Appellate Authority, must be cognizant of, and allied with that objective.** Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 must be closely scrutinised for broader compliance with the insolvency framework and its underlying objective.

9.74 In the instant case, respondents claim that Section 66 of the insolvency and Bankruptcy Code 2016 does not impede the resolution applicant's rights to avail the proceeds from the avoidance applications. Indeed, this Code does not have any provision restricting the resolution applicant to avail the benefits of avoidance proceedings initiated under Section 66. However, if there is no restriction, it can't be presumed that the code authorises the resolution applicant for the same.

9.75 The Appellants relying on the judgement of Hon'ble Delhi High Court in the case of Venus Recruiters (supra), contends that the avoidance applications are meant to give benefit to the creditors of the Corporate Debtor

and not for the Corporate Debtor in its new avatar after the approval of the Resolution Plan.

9.76 The question of whether the stipulation of future recoveries from Section 66 avoidance applications being retained by the Successful Resolution Applicant's amounts to illegality or whether the same is within the commercial domain of COC as claimed by the respondent is to be addressed. Whether the same can be treated under the rights of commercial wisdom of the COC is also vital for the decision of these Appeals.

9.77 For the correct legal position about recoveries from avoidance transactions to the benefit of the company's creditors, the inference may be drawn from the following authoritative external aids, based on which the Indian law has developed.

9.78 The Appellant further placed reliance on the 'UNCITRAL' United Nations Commission on International Trade Law, Legislative Guide or Insolvency Law and the Report of Bankruptcy Law Reforms Committee November 2015, and Insolvency Law Committee Reports, 2020.

9.79 The relevant part of the said **UNCITRAL LEGISTATIVE GUIDE** is given below for ready reference;

> ***"F. Avoidance proceedings***
>
> *1. Introduction*
>
> *148. Insolvency proceedings (both Liquidation and reorganisation) may commence long after a debtor first becomes aware that such an outcome cannot be avoided. In that*

*intervening period, there may be significant opportunities for the debtor to attempt to hid assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others**. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position. The result of such activities, in terms of the eventual insolvency proceedings, generally disadvantages ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest**.*

***152. Avoidance provisions can be important to an insolvency law not only because the policy upon which they are based is sound, but also because they may result in recovery of assets or their value for the benefit of creditors generally and because provisions of this nature help to create a code of fair commercial conduct that is part of appropriate standards for the governance of commercial entities**. It should be noted that, in the cross-border context, jurisdictions with insolvency laws that not provide for avoidance of certain types of transaction, may encounter difficulties with recognition of proceedings and cooperation with courts and insolvency officials of jurisdictions where those transactions are subject to avoidance."*

9.80 **Principles of International Insolvency**, By Philip R Wood

"CHAPTER 17
AVOIDANCE OF PREFERENCES
Introduction
Policies of the avoidance of preferences

17-001 *All developed bankruptcy laws provide for the recapture of assets transferred by the debtor in the twilight suspect period prior to the commencement of formal insolvency proceedings.*

The fundamental and universal requirements qualifying a transaction as preferential are that the transaction:

- *prejudices other creditors of the debtor,*
- *occurs while the debtor is actually insolvent or renders him insolvent, and*

- *occurs in a suspect period prior to the formal opening of insolvency proceedings.*

  The first item is always required. The other two are usually required but there are exceptions.

  The objectives are as follows:

- ***Fraud*** *The main and original object is to prevent the debtor from fraudulently concealing or transferring his assets beyond the reach of his creditors when he knows that his own insolvency is looming. This is the true fraudulent conveyance or transfer and often carries an element of dishonesty."*

17-006 **<u>Who invokes the Avoidance</u>**

"In most jurisdictions the avoidance procedure is invoked by the insolvency administrator for the benefit of all creditors. *This is so in those jurisdictions which split management powers in rescue proceedings between management and creditor representative or court. The US is unusual in vesting the avoidance power in the debtor in possession. See BC 1978 s 1107.*

***This must appear particularly galling to the creditor concerned**. To provide this result, in the Japanese debtor in possession rescue proceedings, the civil rehabilitation, the court appoints a supervisor to exercise the power.*

A widespread exception is the power of a single creditor to initiate avoidance action for his own benefit under the Pauline action- the original intentionally fraudulent preference. This is probably because the Pauline action preceded the advent of formal bankruptcy legislation by several.

Prejudice to creditors generally

The basic requirement of all preferences is that other creditors of the debtor or prejudiced. This usually means that the assets of the debtor available to pay his debts are reduced or depleted.

Sometimes the case law reveals a further form of prejudice, namely, that, although the assets remain the same in normal times, one liquid asset is exchanged for cash which can be more easily dissipated,eg a sale of the factory or a mortgage over a factory for cash or a sale of an entire business."

9.81 **Avoidance and Recapture**

Recapture

***"17-132 The basic principle of the recapture is to put the parties in the position they would have been in if the transaction had not occurred and tends to follow the broadly traditional pattern of avoidance procedures in other contexts.eg the restoration of a party induced into a contract by misrepresentation or in the case of a contract collapsing by frustration or force majeure**. In view of the complexity of the circumstances, some jurisdictions, including England and the US give the count broad discretions*

as to manner of recovery (though, in the case of England, the statute sets out a range of specific options without prejudice to the generality of the discretion—see IA 1986 s 241), while others, like Norway, attempt some specific rules: see the Debt Recovery Act 1984, ss 5-11, 5-12.

Broadly one may expect that the recapture will involve the repayment of cash payments, the return of gifts or other property or cash in lieu (especially if it would be overburdensome to require the re-transfer of goods, securities or other property already abroad or readily available elsewhere in the market or where the transfer was at an undervalue but not wholly a gift), or the release of preferential security. In the United States, BC 1978 s 550 allows either recovery in specie or money's worth in damages, at the court's option. The questions of accounting for income or interest and improvements, and the time of valuation (time of transfer or time of recovery action--the transferee may have sold for less) must be dealt with. There are usually time limits on the recovery actions ranging from one year (Austria) upwards."

"UNCITRAL-World Bank Group
Judicial Capacity-Building Initiative on International Best Practices in Insolvency Law

Questions & Answers

Consequences of avoidance

"*Can the outcome of an avoidable transaction be given to the Successful Resolution Applicant?"*

Ans ; See recommendations 93 and 98 of the UNCITRAL Legislative Guide on Insolvency Law and their accompanying commentary that, in particular, state that the most common approach is to treat the assets or value recovered through avoidance as part of the estate on the basis that the principal justification of avoidance proceedings is to return value or assets to the estate for the benefit of all creditors, rather than to provide a benefit to individual creditors. Other approaches may however be found in domestic insolvency laws.

The World Bank ICR Principles do not address this issue specifically."

9.82 **The Report of the Bankruptcy Law Reforms Committee, dated November 2015;**

Rationale and Design

"5.5.7 Treating recoveries from vulnerable transactions

The Committee discussed the possibility of identifying and recovering from vulnerable transactions. These are tractions that fall within the category of wrongful or fraudulent trading by the entity, or unauthorised use of capital by the entity, or unauthorised use of capital by the management ***There are two concepts that are recognised in other jurisdictions under this category of transactions: of fraudulent transfers, and fraudulently preferring a certain creditor or class of creditors. If such transactions are established, then they will be reversed. Assets that were fraudulently transferred will be included as part of the assets in Liquidation***

The Committee recommends that all transactions up to a certain period of time prior to the Application of the IRP (referred to as the "look-back period") should be scrutinised for any evidence of such transactions by the relevant Insolvency Professional. The relevant period will be specified in regulations. At any time within the resolution period (or during the Liquidation period if the entity is liquidated) the relevant Insolvency Professional is responsible for verifying that reported transactions are valid and central to the running of the business. There should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the "look back period" should be specified in regulations to be longer.

The Code will give the Liquidator the power to file cases for recovery. ***Some jurisdictions set such recoveries aside for payment to the secured creditors. Given the extent of equity financing in India, all recoveries from such transactions will become the property of the trust, and will be distributed as described within the waterfall of liabilities."***

9.83 **Report of the Insolvency Law Committee dated February, 2020**

CHAPTER 3: RECOMMENDATIONS REGARDING ACTIONS AGAINST AVOIDABLE TRANSACTIONS AND IMPROPER TRADING IN THE CORPORATE INSOLVENCY RESOLUTION AND LIQUIDATION PROCESSES;

1.4 The Committee first analysed the purpose of avoiding transactions and penalising improper trading actions. It was highlighted that though they may often be linked to preservation of commercial morality, they are primarily aimed at swelling the asset pool available for distribution to creditors.

The underlying policy of such proceedings is to prevent unjust enrichment of one party at the expense of other creditors.

1.5 Therefore, these actions are taken to serve the Interests of the person receiving the recoveries. Due to this, many jurisdictions such as US and UK do not impose any obligation on the regulatory or other State bodies to undertake avoidance actions. State authorities in such jurisdictions utilise powers in relation to civil and criminal offences to carry on investigations of any wrongdoings by the Corporate Debtor instead. Based on this, the Committee agreed that it may not be appropriate for the IBBI to undertake investigation of avoidable transactions and improper trading under the Code. The Committee concluded that only the insolvency professional would be in a position to investigate these during a CIRP or liquidation process, and thus the present provisions of the Code need not be amended in this regard. Therefore, the Committee agreed that the status quo be maintained and the primary responsibility for investigation of these transactions should be on the insolvency professional. However, IBBI may continue to exercise its powers under Section 236 to file criminal complaints to prevent misconduct.

2. Filing of Applications to Avoid Transactions, ETC.

2.4. The Committee also considered if the successful Resolution Applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the Resolution Applicant being entitled to a return that was not factored in at the time of submitting their bid. Therefore, the Committee decided that the Resolution Applicant should not be permitted to file applications against improper trading or applications to avoid transactions.

3. DISTRIBUTION OF RECOVERIES

3.1 The Committee also reviewed the provisions related to orders that the Adjudicating Authority may pass after the existence of an avoidable transaction or improper trading has been proven. These orders include various actions that may help restore status quo prior to the occurrence of such transaction or trading. ***Therefore, provision under the Code allow the Adjudicating Authority to restore the position prior to such transaction or trading by inter alia vesting the recoveries with the Corporate Debtor****. It was brought to the Committee that when the Adjudicating Authority passes an order to vest recoveries with the Corporate Debtor, it is not clear whether these recoveries are enjoyed by the successful Resolution Applicant or distributed amongst creditors.*

3.2. ***The Committee discussed that the Resolution Applicant has usually not factored in these recoveries in her proposed Resolution Plan. Further, the key aim of avoiding certain transactions is to avoid unjust enrichment of some parties in insolvency at the cost of all creditors*** *(see paragraph 1.4 above)*. ***Thus, in most cases it may be better suited to distribute recoveries amongst the creditors of the Corporate Debtor. While the Committee agreed on this principle, it noted that factual factors such as - the kind of transaction being avoided, party funding the action, assignment of claims (if any), creditors affected by the transaction or trading, etc. - may need to be taken into account when arriving at a decision regarding distribution of recoveries. Thus, it was recommended that instead of providing anything***

prescriptive in this regard, the decision on treatment of recoveries may be left the Adjudicating Authority.

3.3 ***Accordingly, the Adjudicating Authority should decide whether the recoveries that vest with the Corporate Debtor should be applied for the benefit of the creditors of the Corporate Debtor, the successful Resolution Applicant or other stakeholders****. In arriving at this decision, the Adjudicating Authority may take note of the facts and circumstances of the case, along with the above listed factors.* ***Additionally, the Committee agreed that if the recoveries are to be vested with the creditors, they may usually be distributed per the order of priorities provided in Section 53(1) of the Code****, unless an alternate manner of distribution is deemed appropriate by the Adjudicating Authority.*

9.84 The learned Senior Counsel for the respondent contends that Appellant has placed selective reliance upon the recommendations of the ILC report to suit their interests. Contrary to the submissions of the appellant's, the law is indeed flexible on the question of the distribution of proceeds from avoidance applications. The ILC report itself refuses to provide any straitjacket formula for distribution of proceeds from the avoidance transactions but merely observes that the recoveries should usually go to the creditors of the corporate debtor. The Resolution Applicant has factored in the recoveries in its resolution plan proceeds arising from the avoidance applications filed under Section 66 of the Code. Accordingly, the Resolution Plan ascribed a value of INR 1 to such recoveries. Moreover, COC itself consciously decided to let the

SRA take the benefits of the proceeds (if any) arising out of avoidance application in exchange for accepting a higher upfront amount. Considering the above eventualities, the NCLT deemed it fit to approve the resolution plan along with its provisions relating to avoidance transactions.

9.85 Respondent further submits that the appellant reliance on the IBBI Handbook and the UNCITRAL guide is also misplaced. The appellants have only resorted to vague submissions without pointing out any reference in the said reports that would establish that the benefits of the avoidance applications are to accrue to the sole benefit of the creditors of the Corporate Debtor. Moreover, none of the reports addressed a scenario when the COC has consciously taken the commercial decision to give up the proceeds of the avoidance transactions in favour of the resolution applicant for a higher total resolution amount.

9.86 It is important to mention that Hon'ble Supreme Court, in case of Ebix Singapore (P) Ltd (supra) (para 145) has observed that **"the insolvency law committee report of February 2020 has recommended the CIRP process to mandate resolution plans to provide for the apportionment of the profit or loss accrued by the Corporate Debtor during the CIRP. These reports are periodically commissioned by the Parliament to review the functioning of the code and suggest amendments".**

9.87 Chapter 3 of the Insolvency Law Committee Report February 2020 deals with the recommendations regarding actions against avoidance transactions and improper trading in the corporate insolvency resolution and liquidation

process. It is specifically provided that the purpose of providing transactions and penalising improper trading actions are primarily aimed at swelling the asset pool available for distribution to creditors. The underlying policy of such proceedings is to prevent unjust enrichment of one party at the expense of other creditors. The provision under the code allows the adjudicating authority to restore the position prior to such transaction or trading by inter-area investing the recoveries with the Corporate Debtor.

9.88 The key aim of avoiding certain transactions is to avoid unjust enrichment of some parties in insolvency at the cost of all creditors. **Thus, factual factors such as the kind of transaction being avoided, party funding the action, assignment of claims, creditors affected by transaction or trading may need to be considered when deciding on the distribution of recoveries**. **Thus, it was recommended that instead of providing anything prescriptive in this regard, the decision on the treatment of recoveries might be left to the adjudicating authority. Accordingly, the adjudicating authority should decide whether the recoveries that vest with the Corporate Debtor should be applied for the benefit of the creditors of the Corporate Debtor, the Successful Resolution Applicant or other stakeholders**. **In arriving at this decision, the adjudicating authority may take note of the facts and circumstances of the case and other listed factors.** Additionally, the committee agreed that if the recoveries are to be vested with the creditors, they must usually be distributed per the order of priorities provided in Section 53 (1) of the code

unless an alternate manner of distribution is deemed appropriate by the Adjudicating Authority.

9.89 Per contra, in this case, the Adjudicating Authority, while rejecting the IA of the Appellant in this regard made an observation that *"the COC by exercising its commercial wisdom have accepted, approved the resolution plan including the monies to be recovered if any from the fraudulent transactions. Therefore, we as adjudicating authority reluctant to substitute our wisdom at this stage as against their commercial wisdom of the COC. Further by following the judicial precedent is discipline and various judgements of the Hon'ble Supreme Court,* ***we restrain ourselves from interfering with the commercial decision of the COC."***

9.90 The guiding principle for deciding avoidance application is also provided under the insolvency law committee report. But the Adjudicating Authority has approved the resolution plan without going into the merits of the application filed by the appellant.

9.91 Adjudicating authority has further failed to consider the judgement of Hon'ble Delhi High Court, which happens to be the jurisdictional High Court, and its judgement was an authoritative and binding pronouncement. Hon'ble Delhi High Court in case of Venus Recruiters in clear terms held that "**outcome of avoidance applications were meant to give benefit to the creditors of the Corporate Debtor, not for the Corporate Debtor in its new avatar."**

9.92 Therefore, it is apparent that the Adjudicating Authority/NCLT has not taken any decision as was required in view of recommendations of the Insolvency Law Committee and rejected the appellant's application simply on the basis of COC's commercial wisdom. However, Adjudicating Authority failed to pass a reasoned order despite that the appellant had filed a detailed written submission and raised every issue.

9.93 Hon'ble Supreme Court in the case of Asst Commissioner commercial tax department (supra) has clearly held that recording of reasons is an essential feature of the dispensation of justice. The requirement of recording reasons is applicable with greater rigour to judicial proceedings. Non-recording of reasons causes prejudice to the affected party and hampers the proper administration of justice. In furtherance of principles of natural justice, the authorities should give reasons for arriving at a conclusion showing the proper application of mind. A litigant has a legitimate expectation of knowing the reasons for rejection of its claim. The recording of reasons would also be for the benefit of the higher or the Appellate Court.

9.94 **UNCITRAL; Model 6; Avoidance Transactions, Offences And Penalties**[15]

220. <u>UNDERSTANDING THE IBC KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS</u>

2. Avoidance Transactions

The UNCITRAL Legislative Guide on Insolvency Law defined avoidance provisions as "provisions of the

[15] https//www.unicitral.org/pdf/English/texts/insolven/05-80722_Ebook.pdf/

insolvency law that permit transactions *for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.*

Avoidance provisions are one of the key tools in insolvency law to match maximise assets of the CD and to prevent opportunistic and value destroying actions in does by the CD or even certain creditors prior to the ICD. It is aimed at preservation of the CD's assets pool for the collective benefit of all the stakeholders. While the conditions of avoidance may vary depending on the type of action undertaken, in general, the transactions that can be avoided or ones where, prior to the initiation of the CIRP, there has been an asset valuation by the CD, or an unfair advantage unjust enrichment given to any creditor (s).

The principle behind avoiding these transactions is to protect the general body of creditor (as a whole), to prevent unfair advantages being given to certain creditors at the expense of others, and also to maximise the general pool of assets available to the creditors in the insolvency resolution and liquidation process.

9.95 It is important to mention that Sections 66 and 67 of the Insolvency and Bankruptcy Code 2016 deal with wrongful trading. Sub-section 2 of Section 66 provides that where the adjudicating authority has passed an order either under Sub-section 1 or 2 of Section 66 of the Code, **in relation to a person who is a creditor of the Corporate Debtor, the Adjudicating**

Authority may by order direct that the whole or any part of the debt owed by the Corporate Debtor to that person and any interest thereon shall be ranked in order of priority of payment under Section 53 after all other debts owed by the Corporate Debtor.

9.96 Section 66 and 67 of the I&B Code,2016 is given below for ready reference;

> ***66. Fraudulent trading or wrongful trading***.—
>
> *(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the Corporate Debtor has been carried on with intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose, the Adjudicating Authority may on the Application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the Corporate Debtor as it may deem fit.*
>
> *(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the Corporate Debtor, as the case may be, shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit, if—*
>
> *(a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such Corporate Debtor; and*

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the Corporate Debtor.[(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per Section 10-A.]

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

***67. Proceedings under Section 66**.—*

(1) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of Section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order, and in particular, the Adjudicating Authority may—

(a) provide for the liability of any person under the order to be a charge on any debt or obligation due from the Corporate Debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the Corporate Debtor held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and

(b) from time to time, make such further directions as may be necessary for enforcing any charge imposed under this section.

Explanation.—For the purposes of this section, "assignee" includes a person to whom or in whose favour, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

(2) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of Section 66, as the case may be, ***in relation to a person who is a creditor of the Corporate Debtor,*** *it may, by an order,* ***direct that the whole or any part of any debt owed by the*** *Corporate Debtor* ***to that person and any interest thereon shall rank in the order of priority of payment under Section 53*** *after all other debts owed by the Corporate Debtor.*

9.97 The phrase "in relation to a person who is a creditor of the Corporate Debtor" and the other expression "shall rank in the order of priority of payment under Section 53" used in Sub-section 2 of Section 67 of the Insolvency and Bankruptcy Code indicate that recoveries from avoidance transaction should be distributed among the creditors in order of priority given under Section 53 of the Code. Therefore, it cannot be the discretion of the Committee of Creditors to negotiate the terms against the statutory provision of the Code. However, language erred in Section 67 indicates that

recoveries made under Section 66 could go only to the creditors of the Corporate Debtor.

9.98 The learned Senior Counsel for the respondent also referred to the judgement "In re YAGERPHONE, LIMITED" (000137 of 1933) page 392 Chancery Division (1935), reported in The Weekly Law Report, Chancery Division, 1935.

Facts are taken from Judgement.

In this case, During the winding-up proceeding, the sum is recovered from the creditor by the liquidator. The question arose ***whether the property of debenture holder is distributable among general creditors-under the companies act, 1929*** *(19 and 20Geo.5,c.23), section 265.*
The joint liquidators in the voluntary winding up of a company recovered a sum of money alleged to have been paid to a creditor by the company by way of fraudulent preference.

A debenture holder took out a summons in the liquidation for an order that the money recovered from the creditor should be paid to the receiver of the property charged by the debenture;
Held ***that the money did not become part of the company's General assets but was a sum of money received by the liquidator's and impressed in their hands with the trust for those creditors among whom the company's assets were distributable.***
Ex parte Cooper (1875) L.R. to Ch.510 and Willmott v London Celluloid Co. (1886) 34 Ch. D. 147 distinguished.

"In January 17, 1933, the creditor to whom the money was paid and from whom the money was recovered was a creditor of

Yegarphone, Ltd. When Yegarphone, Ltd , paid to the creditor 240 l.IIS.2d.,that sum, in my judgement, ceased to be the property of Yegarphone, Ltd. the payment to the creditor could not have been attacked or impeached, unless within 3 months from the date of payment the liquidation of Yegarphone, Ltd, had taken, and, in my judgement, at the date when the security contained in the debenture crystallised, the sum of240 l.IIS.2d was not the property of Yegarphone, Ltd, not the property in respect of which it could, I think, be said that Yegarphone, Ltd, had even a contingent interest.

The right to recover a sum of money from a creditor has been preferred is conferred for the purpose of benefiting the general body of creditors, *and I think Mr Montgomery White was right* ***when he said that the sum of money, when recovered by the liquidators by virtue of section 265 of the Companies Act, 1929, and section 44 of the Bankruptcy Act, 1914, did not become part of the general assets of Yegarphone, Ltd., but was a sum of money received by the liquidators impressed in their hands with the trust for those creditors amongst whom they had to distribute the assets of the company.***

The application fails and must be dismissed."

9.99 Apart from the judgement of the Delhi High Court in the case of Venus Recruiters (supra), the bankruptcy laws of the countries like the US also advocate creditors benefit, either directly or indirectly. For example, while dealing with Section 550 of the US bankruptcy code stating such recoveries from avoidable transactions to pay for the "benefit of the estate", the court of

appeals in In re Centennial Industries, Inc. vs NCR Corporation[16] has observed this phrase to articulate the creditors as beneficiary and the act that they must be "meaningfully and measurably benefited"[17]. The court further permitted the debtor to pursue avoidance actions concerning improper transfers even post completion of the resolution, stating that any such recovery will be additional security for the plan's fulfilment and increase the likelihood of the creditors receiving their future payments.

9.100 FROM TIME TO TIME, the US courts have observed that any recovery from avoidance actions must be equitably distributed to the debtor's creditors, according to the dictates of the code.[18]

9.101 The UK courts have also reiterated a similar view-"a sum recovered from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors not for the benefit of the company or the holder of the floating charge. This is because it does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the company's assets.

9.102 Such positive affirmation by the foreign courts evinces that the creditor of the Corporate Debtor are sole beneficiaries, and some direct benefit must ensure, in their favour. Accordingly, the proceeds may be distributed

[16] 12 B. R.12. 99 (1981)
[17] In re Greenberg, 266 B.R.. 45, 51 (Bankr.E.D.N.Y..2001); In re Vogel Van Storge, Inc.,210 B.R..27, 33-34(N.D.N.Y. 1997)
[18] In Re Yegerphone Ltd.[1935] Ch 392 England and Wales.

amongst them in accordance with the waterfall mechanism provided under Section 53 (1) of the I & B Code, 2016, unless an alternate one is found by the Adjudicating Authority to be appropriate.

9.103 Any decision taken by the committee of creditors which strikes at the very heart of the Code cannot simply be upheld under the garb of commercial wisdom. In other words, the COC's decision to approve the resolution plan submitted by Respondent No. 2, which contains unlawful stipulations concerning intelligible bifurcations of recoveries under two similarly placed sets, is unsustained in the eyes of the law. Accordingly, it is illegal, and the plan containing such an illegal stipulation is not sustainable.

9.104 It is pertinent to mention that the judgement of the Hon'ble Delhi High Court in the case of Venus Recruiters (supra) holding that "the avoidance applications are meant to give benefit to the creditors of the Corporate Debtor, and they are not for the Corporate Debtor in its new avatar after the approval of the resolution plan or for the benefit of the Resolution Applicant after the resolution was complete." Therefore, it is fully applicable to the instant matter. Given the law laid down by the constitution bench of Hon'ble Supreme Court in the case of State of Orissa v. Bhagaban Sarangi, (1995) 1 SCC 399, this Appellate Tribunal is bound by the decision rendered by the jurisdictional Delhi High Court.

9.105 In the case 'State of Orissa' (supra) mentioned above, Hon'ble Supreme Court has held that:

> ***"1.*** *In our opinion, it is not correct for the Tribunal to have stated that they are not prepared to accept the judgment of the Orissa High Court in Kunja Behari Rath v. State of Orissa [O.J.C. No. 668 of 1969] . We make it clear that the Tribunal in this case is nonetheless a Tribunal and it is bound by the decision of the High Court of the State. It is incorrect to side-track or bypass the decision of the High Court."*
>
> *(emphasis supplied)*

9.106 We are not convinced with the respondent's argument that Venus recruiters only provide that property or sum recovered under avoidance applications should form part of the Resolution Plan and that the Resolution Plan considers such amounts and benefits. It does not deal with how these assets are to be dealt with, which is provided only in the Resolution Plan.

9.107 In the case of Venus Recruiters, Hon'ble Delhi High Court has further held that certainty and timelines being the hallmark of the Code coupled with the legislative intent in Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) regulations, 2016 implies that the prescribed timelines therein have a specific purpose. Therefore, an indefinite continuation of avoidance applications is bound to affect the creditors grievously.

9.108 It is also important to mention that the depositors of the DHFL are the rightful beneficiaries, if not owners, of the monies that have been siphoned off by the promoter directors of the Corporate Debtor. Unfortunately, such activities generally disadvantage creditors, especially small investors.

9.109 Regulation 37A of the IBBI (Liquidation Process) Regulations, 2016 (the "Liquidation Process Regulations"), which empowers a Liquidator to assign or transfer a not readily realizable asset during the liquidation of a Corporate Debtor. The conspicuous absence of a similar provision in the CIRP Regulations, which permits assignment or transfer of recoveries from avoidance transactions to a resolution applicant, supports the case of the Appellant that such recoveries cannot be transferred to a resolution applicant in the CIRP process, which is qualitatively different and distinct from the liquidation process.

9.110 Both Respondent Nos. 1 & 2 have contended that on the ground of estoppel, the Appellant is prevented from challenging Respondent No. 2's resolution plan because the Appellant itself & the class to which it belongs have voted in favour of the plan. Respondent Nos. 1 & 2 have relied on the judgement of Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors. (Civil Appeal No. 3395 of 2020 dated 24th March 2021) (the "Jaypee Kensington Judgement") in this regard. The said contention of Respondent Nos. 1 & 2 is entirely misconceived. In addition to the fact that the Appellant has voted to owe to the express liberty granted by this Hon'ble Tribunal, without prejudice to Appellant's rights & contentions, the plea of estoppel is not available to the Respondents in the present facts on the following legal grounds which are without prejudice, and in the alternative, to each other:

i. A Resolution Plan, which is otherwise illegal or contains terms contrary to law, cannot be countenanced based merely on the strength of the majority that votes for such a plan. Hence, the manner in which a member of the CoC votes cannot cure illegality in a Resolution Plan.

ii. As a result, no person, howsoever minimal his voting share is in the CoC and irrespective of how he has voted, can be estopped from challenging illegality or unlawful terms in a Resolution Plan;

9.111 This Tribunal is under a legal & statutory duty to enquire whether a Resolution Plan suffers from any illegality or otherwise contains unlawful terms. The said duty is not eclipsed by the manner of voting by a particular creditor or a class of creditors. Even in the absence of any person pointing out any illegality in a resolution plan, this Hon'ble Tribunal is expected to exercise its powers to enquire whether the requirements of Section 30(2) of the Code have been met to perform the said duty. The plea of the Respondents, if accepted, would amount to disregarding the well-settled and universally applicable legal principle that there cannot be any estoppels against the law.

9.112 The Appellant relies on the following judgments in support of this proposition:

a) In the case of S. B. Noronah v. Prem Kumari Khanna (1980) I SCC 52 Hon'ble Supreme Court has held that:

> ***"19.*** *The doctrine of estoppel cannot be invoked to render valid a proceeding which the legislature has, on*

grounds of public policy, subjected to mandatory conditions which are shown to be absent:

> *"Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition. [Halsbury's Laws of England , Fourth Edn., Vol 16, para 1515]."*

b) M/s Elson Machines Private Limited v. Collector of Central Excise 1989 Supp (1) SCC 671. In this case, Hon'ble Supreme Court has held that;

> **"*10.*** *The next submission on behalf of the appellant is that the classification lists had been approved earlier and the excise authority was estopped from taking a different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a provision of law and, therefore, this contention must be rejected."*

c) M. Aamira Fathima & Ors. v. Annamalai University & Ors. (2018) 9 SCC 171. In this case, Hon'ble Supreme Court has held that;

> ***"21. The other submission that the students were estopped from raising a challenge must also fail. If a particular modality is prescribed by the legislature, any action in defiance or ignorance of***

such modality cannot be protected or preserved on the plea of estoppel."

d) *Hon'ble Supreme Court in case of A.C Jose v. Sivan Pillai and Ors. (1984) 2 SCC 656 has held that;*

"38. *Lastly, it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or through his agent. This argument is wholly untenable because* ***when we are considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorised by law he cannot be estopped from challenging the same."***

9.113 The appellants, aggrieved persons on account of illegalities perpetrated in the approved Resolution Plan, have preferred these appeals, requiring adjudication on an important question of law. Accordingly, these appeals have duly urged the requisite ground for Section 61 (3) of the Code.

9.114 Providing the benefit of the outcome of avoidance applications to the Resolution Applicant results in unjust enrichment of Respondent No. 2/RA at the expense of all the creditors of the Corporate Debtor. Moreover, the same is vitiated by illegalities and material irregularities, and the same could not have been cured on the pretext of the commercial wisdom of COC.

9.115 The reliance of the Respondents on the Jaypee Kensington Judgement is also entirely misplaced since, in the said judgement, Hon'ble Supreme Court held that once a class of creditors votes in favour of a Resolution Plan, the individual creditors of that class cannot challenge the commercial aspects of the Resolution Plan or its commercial wisdom. A meaningful reading of the said judgement shows that in the said case, certain financial creditors belonging to the class of homebuyers were challenging the commercial aspects the commercial wisdom in accepting the plan and not any illegality therein, which is clear from the following paragraphs of the judgement:

a) Para 10.1/ pg. 14: Wish Town Home Buyers Welfare Society sought "implementation of the projects but carried reservations on some of the terms of the resolution plan" and also suggested that the plan of another resolution applicant Suraksha Realty was for better than that of NBCC".

b) Para 10.2/ pg. 15: Jaypee Aman Owners Welfare Association was "aggrieved of the projected dates of completion and proportional increase in delay, as provided in the Resolution Plan" and sought penalty on account of delay.

c) Para 10.4/ pg. 16: Jaypee Orchard Resident Welfare Society sought implementation of the projects but had its reservations on the terms of the Resolution Plan where the requisite compensation in

relation to the delayed implementation of the project had not been provided in terms of RERA".

d) Para 10.6/ pg. 17: One Mr. Ashok Chandra "sought directions to determine adequate and fair compensation to be paid to homebuyers due to unreasonable delay in completion."

e) Para 158/ pg. 275: A perusal of this paragraph shows that individual homebuyers and their associations "carried their own grievances against the Resolution Plan" and contended that the Resolution Plan was lacking in various requisite arrangements".

f) Para 159.4.5/ pg. 286, Para 159.6/ pg. 287: The Supreme Court has set out the commercial nature of the challenges of the appellants in the said paragraphs.

9.116 Further, in the case of ***Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 Hon'ble Supreme Court has observed that:**

> ***"147.*** *Taking into consideration the fact, that KIAL had objected to participation of any other applicant submitting plan after the due date as per the last Form 'G' and also reiterated its objection, we are of the considered view, that it cannot be held, that having participated by submitting the revised plans, KIAL is estopped from challenging the process on the ground of acquiescence and waiver. Merely because, the revised plans are not submitted with the words "without prejudice", in our*

view, would not make any difference. As already discussed hereinabove, KIAL had no other option than to submit its revised plans in view of Clause 11.2 of the Process Memorandum. Inasmuch as, had it not responded, it had to run the risk of being out of fray. As already discussed hereinabove, the conduct of the party is relevant for considering, whether it can be held, that a case is made out of waiver or acquiescence.

148. *None of the appellants have been in a position to establish, that KIAL had given up/ surrendered its rights to take recourse to the legal remedies. In any case, the appellants had also not been in a position to establish, that on account of any such waiver or acquiescence any of the appellants had altered their position to their detriment."*

9.117 In fact, the argument based on estoppel, acquiescence and the waiver was rejected by the Hon'ble Supreme Court in the above-mentioned case. In this case, the Hon'ble Supreme Court observed that if the party had no choice but to act in a particular manner in order to avoid the risk of being out of the fray, it cannot on the basis of that action be estopped from challenging the process unless it can be shown that he has surrendered his rights to take recourse to legal remedies.

9.118 To answer the "ambush" argument of learned Senior Counsel for the respondent, the appellant has drawn our attention towards a chart showing the detailed instances under which it was forced to withdraw its earlier application IA 2352 of 2021.

Date	Particulars	Page Nos.
18 December 2020	RP Congress to all resolution applicant's that they need to align Resolution Plans with the Delhi High Court judgement.	Page 320 of Appeal No. 454 of 2021

1.	24.12.2020 to 25.12.2020	18th CoC meeting held wherein it was decided that the Resolution Plans would be put to the vote of the CoC.
2.	21.121.2020 to	At the appropriate time when the above decision to put the resolution plans to the vote was taken, this Hon'ble Tribunal, NCLT, was not available for judicial work (except Vacation Bench) due to Christmas vacation.
3.	28.12.2020	On the next working day (i.e. after the decision regarding putting the resolution plans to vote being taken in 18th CoC meeting), the Applicant filed IA No.2352 of 2020 challenging the decision of Respondent No.1 to put to the vote of CoC resolution plans which sought to appropriate for the benefit of the Resolution Applicants recoveries/ contributions from avoidance applications.
4.	30.12.2020	Respondent No. 1 opened the voting window on 30.12.2020 from 9.00 pm till 14.01.2021.

		Since the vacation bench of NCLT was not presiding on 30.12.2020, the Applicant could not move IA 2352 of 2020 on that day.
5.	31.12.2020	IA No. 2352 of 2020 was listed before the Vacation Bench of this Hon'ble NCLT. Respondent No. 1 contended that the said IA was premature and not maintainable and prayed for dismissal at the time of the hearing. The Hon'ble Tribunal was pleased to adjourn the hearing of the said IA to 13.01.2021 and directed Respondent No. 1 to file a reply to the IA. In the order dated 31.12.2020, this Hon'ble Tribunal observed that the IA would be heard "on a priority basis".
6.	31.12.2020 to 13.01.2021	Since the Applicant had filed IA No. 2352 of 2021, which was pending adjudication and to be listed before the closure of the voting window, the Applicant did not vote on the Resolution Plans till this time.
7.	13.01.2021	On this date, due to the heavy burden of judicial work, IA No.2352 of 2020 was listed last on the board (Sr. No. 21) of this Hon'ble Tribunal. Therefore, the IA could not be taken up for hearing due to a lack of time. Accordingly, the Counsel for the Applicant mentioned the IA to request this Hon'ble Tribunal to hear the said IA on an early date

		convenient to this Hon'ble Tribunal. Since the next day (which was also the date on which the voting window was to close) was a restricted holiday for this Hon'ble Tribunal, the matter could not be listed on 14th January 2021 but on 15th January 2021. Since the voting was to conclude on 14th January 2021 and the matter was listed on 15 January 2021, the Applicant sought leave of this Hon'ble Tribunal to vote on the resolution plans without prejudice to its rights and contentions. This request was made in the presence of the Senior Counsel for Respondent Nos. 1 & 3. Respondent No. 2 was not a party to the I.A. This Hon'ble Tribunal was pleased to grant liberty to the Applicant to vote on the resolution plans without prejudice to its rights and contentions.
8.	14.01.2021	Pursuant to the liberty granted by this Hon'ble Tribunal, the Applicant voted on the resolution plans. The voting window closed.
9.	15.01.2021	The IA was listed and called out for hearing. However, due to the technical issues in connectivity, the hearing could not conclude, and the IA was adjourned to 21st January 2021.

10.	16.01.2021	The voting on the resolution plans was announced, and Respondent No. 2 was declared as a successful resolution applicant.
11.	21.01.2021	Since the voting had ended and Respondent No. 2 was declared a successful resolution applicant, the Applicant sought leave of this Hon'ble Tribunal to withdraw the IA No. 2352 of 2020 and file a comprehensive application to agitate all issues at the Section 31 stage. The Hon'ble Tribunal granted the said liberty, and all issues were kept open.

9.119 The appellant submits that he did what we could as a litigant to assert rights in the circumstances. And, it is wrong to suggest that IA 2352 of 2020 was filed to set up a 2nd ambush. Thus, the respondent's narration of dates and events by learned senior counsel is factually incorrect.

9.120 In addition to the above, before the NCLT, Respondent No. 2 relied on the judgement of this Hon'ble Tribunal in the cases of Indian Renewable Energy Department Agency Ltd. v. Bhuvesh Maheshwari & Ors, and S.S. Natural Resources Pw. Ltd. v. Ramsarup Industries Ltd. These judgments also have no application to the present case and have been distinguishable.

9.121 The argument based on estoppel on the ground of acquiescence and waiver was rejected by the Hon'ble Supreme Court in the Kalpraj Judgement. (Para 132 to 135).

9.122 While the proposition that the commercial wisdom of the Committee of Creditors is supreme is not disputed in so far as the commercial aspects of the Resolution Plan are concerned, the said principle is not applicable to the present facts where the issue of illegality has been raised. The CoC cannot countenance incorporating any term in the resolution plan which is contrary to the law or which otherwise makes the resolution plan illegal.

9.123 Since none of the judgments above on 'commercial wisdom' lay down the principle that even issues which touch upon the legality or illegality of a Resolution Plan or its terms are to be left to the commercial wisdom of the committee of creditors and the Adjudicating Authority cannot interfere in such cases – despite the clear statutory mandate under Section 30(2) of the Code, these judgments are not applicable in the present facts.

9.124 The Respondents have also contended that it is a common practice in insolvency cases to ascribe INR 1 value when there is uncertainty regarding the same. The Respondents have relied on the judgement in the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors (2020) 8 SCC 531 (the "Essar Steel Judgement") (Para 73)

9.125 A careful reading of the Essar Steel Judgement, the Supreme Court upheld the assignment of the notional value of INR 1 by the Resolution Professional to claims of Operational Creditors in respect of which there were pending disputes with various authorities. The case had nothing to do with avoidance applications and ascribing of' value to recoveries. Therefore, the

assignment of the notional value of INR 1 to the claims of operational creditors in the Essar Steel Judgement case was in an entirely different factual background which is inapplicable to the facts of the present case.

9.126 It is pertinent to mention that company appeal (AT) (insolvency) 546 of 2021 is filed by the Air Force Group Insurance Society, Company Appeal AT/INS/759 and 760 is filed by U P State Power Sector Employees Trust, CA /AT/INS 760 of 2021 is filed by Uttar Pradesh State Power Corporation Contributory Provident Fund Trust on being aggrieved by the resolution plan. Many other Fixed Deposit Holders and Public Deposit Holders had filed their appeal against the same resolution plan. None of them is satisfied with the amount awarded under the resolution plan. Provident fund holders and Employees Provident fund trust had invested in fixed deposits of the financial service provider, i.e. corporate debtor DHFL. However, this Tribunal is not a court of equity, and every stakeholder abides by the terms of the approved resolution plan.

9.127 In the circumstances, it is of utmost importance to see that there should not be any unjust enrichment at the cost of lakhs of creditors of the company whose money has been defrauded by the corporate debtor's promoters. It is also important to mention that Government Agencies like CBI, a Special Fraud Investigation officer of the Ministry of Corporate Affairs and other agencies are also investigating the fraudulent transfers of money from the corporate debtor account to the shell companies rerouting them from there. In such a scenario, chances of recovery are very high. If any such

recovery is made from these avoidance transactions, the benefit should go to the creditors of the company as per the prevailing practice in other countries.

9.128 It is also important to mention that outcome of the avoidance transaction is given in the notional value of ₹ one. In such a scenario, it should not have much impact on the resolution plan. However, since we have concluded that the outcome of the avoidance transaction cannot be given to the successful resolution applicant and it must go to the company's creditors, it is essential to send back the resolution plan for reconsideration by the committee of creditors.

Conclusion

10. The only judgment that squarely covers the facts of the present case is the Venus Judgement of the Delhi High Court. Therefore, the contention that the Venus Judgement is not applicable or is distinguishable is incorrect and an afterthought. At the relevant time, it was not the case of any of the Respondents that the said judgement is not applicable. The same is clear from the following:

i) In the 17th CoC meeting held on 18th/19th December 2020, it was pointed out to the resolution applicants, including Respondent No. 2, that the treatment of recoveries from avoidance transactions was not in compliance with the terms of the September RFRP and the Venus Judgement was also pointed out to them. (Page No. 315-322 of the Appeal- Vol II)

ii) When the Venus Judgement was pointed out as above by the legal counsel, it was not the case of any of the Respondents that the said judgement does not apply to the case.

iii) Not only was no objection raised as regards applicability of the Venus Judgement, in fact, after 18th/19th December 2020, Respondent No. 2 modified its resolution plan to provide those recoveries from avoidance transactions under Sections 43 to 51 of the Code to benefit DHFL's creditors.

iv) However, **the issue about the applicability of the Venus judgement in the facts of the case was an adjudicatory issue that required adjudication. The law does not permit COC to exercise judicial function. There is a vast difference between the exercise of Commercial Wisdom during CIRP and the exercise of adjudicatory powers by the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016. Law is well settled that Adjudicating Authority cannot interfere with the commercial wisdom of the COC provided approved by the required majority. Similarly, in the instant case, COC was not authorised to decide the applicability of Venus judgement on the facts of the case.**

11. Admittedly in the instant case, the Administrator under statutory duties under Regulation 36B of the CIRP Regulations requested for Resolution Plan (RFRP). It was provided in the RFRP that any transaction is avoided or

set aside in terms of Sections 43, 45, 47, 49, 50 or 66 of the Code, and any amount is received by the 1st Respondent, Resolution Applicant or the Corporate Debtor; such sums shall be for the benefit of the CoC. In response to the said RFRP, four entities expressed interest in submitting the Resolution Plans.

12. However, when the Resolution Applicant's raised the issue with respect to the stipulation of an RFRP providing that the recoveries from transactions debtor aside/avoided would be for the benefit of the DHFL creditors, RFRP was amended.

13. Based on the above issue raised by Resolution Applicant's, the Administrator, after deliberations with both the legal counsels and process adviser and based on their inputs, decided that the COC could evaluate options as they deem fit. Although the administrator stated that it is CoC's prerogative to fix the term of RFRP to resolve the issues raised by PRA's, CoC has the discretion to negotiate.

14. It is pertinent to mention the powers of COC where commercial wisdom can be exercised is provided under Sections 28, 30(4) of the Code. It is also provided that no action under Section 28 (1) of the Code shall be approved by CoC unless approved by a vote of 66% of the voting share. Section 28 (4) further provides that where the Resolution Professional takes any action under subsection 1, without seeking the approval of the Committee of Creditors in the manner as required in the section, such action shall be void.

15. The Insolvency and Bankruptcy Code is a self-contained code. In the exercise of its power under Section 30 (4), the CoC is authorised to approve a Resolution Plan with a vote share of 66%. Under Section 30 (2) of the Adjudicating Authority is given powers about approval of Resolution Plan. Section 30 (2) (e) of the Code imposes a duty on the Adjudicating Authority to ensure that the Resolution Plan presented for approval does not contravene any of the provisions of law for the time being in force.

16. Therefore, before approving the Resolution Plan, the Adjudicating Authority was obligated to test the Resolution Plan in terms of Section 30 (2) of the Code. In the instant case, the Administrator referred the matter to COC to decide on the applicability of the Venus judgement of Delhi High Court in providing the outcome of avoidance transactions to the Successful Resolution Applicant. **Adjudicatory power could not have been delegated to the CoC**. The Adjudicating Authority has not taken any decision about the applicability of the Venus judgement on the issue of providing the outcome of avoidance transaction to the resolution applicant. The Adjudicating Authority has stated that "**as far as the claims of avoidance transactions, COC has consciously decided that the money realised through these avoidance transactions would accrue to the members of the CoC. At the same time, they have also consciously decided after a lot of deliberations negotiations that money realised if any under Section 66 of the IBC, i.e. fraud and fraudulent transactions, CoC has ascribed the value of ₹ one and if any positive money recovery the same would go to the Resolution Applicant**

of the Corporate Debtor." Therefore, it cannot be considered the findings of the Adjudicating Authority. The COC was not empowered to exercise such Adjudicatory power and decide. Insolvency Law Committee Report, 2020, specifically provides that the key aim of providing certain transactions is to avoid unjust enrichment of some parties in the insolvency at the cost of all creditors. The underlying policy of such a proceeding is to prevent unjust enrichment of one party at the expense of other creditors. Thus, factual factors such as the kind of transactions being provided, party funding the action, assignment of claims, and creditors affected by transaction or trading may be considered when deciding on the distribution of recoveries. **Thus it was recommended that instead of providing anything prescriptive in this regard, the decision o*n the treatment of recoveries might be left to the adjudicating authority.***

17. Accordingly, the Adjudicating Authority should have decided whether the recoveries vested with the corporate debtor should be applied for the benefit of creditors of the corporate debtor, the successful resolution applicant or other stakeholders. In arriving at this decision, the Adjudicating Authority may take note of the facts and circumstances of the case and other listed factors.

18. The Respondents have also argued that the possibility of recovering monies from avoidance transactions is very low. However, the amount of the actual recovery that may be made in the future is entirely irrelevant. Since Respondent No. 2 has ascribed a value of INR 1 to the avoidance transactions,

Respondent No. 2 has not factored in the avoidance transactions in the Resolution Plan amount. Moreover, there is no material on record to suggest that the avoidance transactions have been factored in Respondent No. 2's Resolution Plan. Therefore, the oral contention of the Respondents that the avoidance transactions have been factored in the Resolution Plan amount is unsupported and not borne out from the material on record.

19. Therefore, the present appeals ought to be allowed. The term in the Resolution Plan that permits the Successful Resolution Applicant to appropriate recoveries, if any, from avoidance applications filed under Section 66 of the Code ought to be set aside. The Resolution Plan be sent back to the CoC for reconsideration on this aspect.

20. Company Appeals No. 454, 455 & 750 of 2021 are decided accordingly. No order as to costs.

[Justice M. Venugopal]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI
27TH January, 2022

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