NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.167 of 2024

(Arising out of Order dated 09.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Special Bench (Court-II) in I.A. No.195/ND/2018 & IA No.4845/2023 in Company Petition No.(IB)-101/(PB)/2017)

IN THE MATTER OF:

M/s. EBIX Singapore Pte. Limited
through its Authorized Signatory
having its office at 143, Cecil Street, No. 22
-01, GB Building, Singapore – 069 542 ... Appellant

Vs

1. Mr. Mahendra Singh Khandelwal
Resolution Profession of M/s. Educomp
Solutions Limited
having his office at the Palm Springs Plaza,
Office No. 1501-8, 15th Floor, Sector-54
Golf Course Road, Gugaon – 122001.

2. The Committee of Creditors of
Educomp Solutions Limited through
State Bank of India,
Having its office at - State Bank of India,
Stressed Assets Management, Branch II,
11th Floor, Jawahar Vyapar Bhawan,
STC Building, Janpath, 1 Tolstoy Marg,
New Delhi – 110001. ... Respondents

Present:

For Appellant: **Mr. Ramji Srinivasan, Sr. Advocate with Ms. Namrata Saraogi and Mr. Kartik Pandey, Advocates.**

For Respondent: **Mr. Raghav Mittal, Ms. Aishwarya, Mr. Abhishek Sharma and Ms. Kritya Sinha, Advocates for RP.**

Ms. Misha and Ms. Gayathri, Advocates for CoC.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Successful Resolution Applicant ("**SRA**"), whose Plan has been approved by Adjudicating Authority by the impugned order

dated 09.10.2023 has been filed challenging the said order passed in IA No.195/ND/2018 & IA No.4845 of 2023 in Company Petition No. (IB)-101/(PB)/2017.

2. We need to notice the facts and events giving rise to this Appeal, which are:

(i) The Corporate Debtor – Educomp Solutions Limited filed an Application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**"), to initiate Corporate Insolvency Resolution Process ("**CIRP**"), on which an order was passed by the Adjudicating Authority on 30.05.2017, initiating the CIRP.

(ii) The Committee of Creditors ("**CoC**") was constituted. The Respondent - Mahendra Singh Khandelwal was approved as Resolution Professional ("**RP**"). The Information Memorandum was issued by the RP. The Appellant has submitted its Resolution Plan dated 27.01.2018. The CoC approved the Resolution Plan of the Appellant and declared the Appellant as SRA. An Application for approval of Resolution Plan was filed.

(iii) During the pendency of approval of the Resolution Plan, the Appellant filed an Application for seeking withdrawal of the Resolution Plan. The Adjudicating Authority, rejected the Application. Application filed by the Appellant in CA

No.1816(PB)/2019 for withdrawal of the Resolution Plan was allowed by the Adjudicating Authority vide order dated 02.01.2019.

(iv) The Company Appeal (AT) (Insolvency) No.203 of 2020 was filed by the CoC challenging the order of the Adjudicating Authority dated 02.01.2019, which Appeal was ultimately allowed by this Appellate Tribunal by its order dated 29.07.2020. A Civil Appeal No. 3224 of 2020 was filed by the Appellant before the Hon'ble Supreme Court challenging the order dated 29.07.2020 passed by this Appellate Tribunal, by which order, the order passed by the Adjudicating Authority, was set aside. The Civil Appeal No.3224 of 2020 filed by the Appellant was heard and decided and the Hon'ble Supreme Court by judgment dated 13.09.2021 dismissed the Appeal. The Hon'ble Supreme Court while dismissing the Appeal filed by the Appellant noted and considered all the pleas raised by the Appellant, as to why the Resolution Plan be allowed to be withdrawn.

(v) After the order of the Hon'ble Supreme Court dated 13.09.2021, the Adjudicating Authority proceeded to consider the Application filed by the RP for approval of Resolution Plan being IA No.195/ND/2018 and Application filed by the Appellant being IA no.4845 of 2023. The orders were reserved

on 29.08.2023 in IA no.195 of 2018. The arguments in IA no.4845 of 2023 were also concluded on 19.09.2023. In the IA, which was filed by the Appellant, the pleas canvased in the written submissions were repeated. The Appellant opposed the Application filed by the RP for approval of the Resolution Plan. Various pleas and grounds were raised before the Adjudicating Authority by the Appellant, as to why the Application for approval of Resolution Plan needs to be rejected. The Adjudicating Authority after hearing both the parties elaborately, has passed the impugned order dated 09.10.2023, allowing the IA No.195 of 2018 filed by the RP and approving the Resolution Plan submitted by the Appellant.

(vi) The Appellant aggrieved by the said order has come up in this Appeal.

3. We have heard Shri Ramji Srinivasan, learned Senior Counsel appearing for the Appellant; Shri Raghav Mittal, learned Counsel appearing for RP and Ms. Misha and Ms. Gayathri, learned Counsel appearing for CoC.

4. Shri Ramji Srinivasan, learned Senior Counsel for the Appellant submits that the Adjudicating Authority as per Section 31, and Section 30, sub-section (2) (d) as well as Regulation 38(3) of the IBBI (CIRP) Regulations, is obliged to consider as to whether a Resolution Plan is capable of being implemented or not. The aspect of implementation of the

Plan has not been looked into by the Adjudicating Authority, which is a clear breach of statutory obligation imposed on the Adjudicating Authority. It is further submitted that failure to keep Corporate Debtor as a going concern is another reason due to which Resolution Plan has become unimplementable. The RP has grossly failed to manage the Corporate Debtor as a going concern, so much so, that the revenues of Rs.1774.77 million being generated by the Corporate Debtor in the Financial year 2016-17 were left to trivial amount of Rs.9.66 million in Financial Year 2020-21. The Resolution Plan, which was submitted by the Resolution Applicant on account of financials of the Corporate Debtor at the time of submission of the Resolution Plan, have been drastically diminished in last five years. The Plan has become unimplementable and ought not to have been approved by the Adjudicating Authority. It is submitted that objections raised by the Appellant to the unimplementability of the Plan, were brushed aside by the Adjudicating Authority. The Hon'ble Supreme Court in its ***Ebix Singapore*** judgment has also clearly laid down the importance of time line, specifically the delay in approval of Resolution Plan. In the present case, the judgment by the Hon'ble Supreme Court was delivered on 30.09.2021 and Plan could be approved by the Adjudicating Authority on 09.10.2023, causing further delay of more than two years, which itself was sufficient ground to refuse the approval of the Plan.

5. Learned Counsel appearing for the RP as well as CoC have refuted the submissions of learned Senior Counsel for the Appellant. It is submitted that all submissions, which are now sought to be advanced by the

Appellant in support of the Appeal, were also raised before the Hon'ble Supreme Court in earlier round of litigation and in the ***Ebix Singapore*** judgment, the Hon'ble Supreme Court has considered all submissions and rejected the submissions advanced on behalf of the Appellant. The Hon'ble Supreme Court in ***Ebix Singapore*** judgment has categorically held that SRA has no right to withdraw from the Resolution Plan, nor the Adjudicating Authority has any jurisdiction to allow such Application. It is submitted that the issue of financial status of the Corporate Debtor was advanced before the Hon'ble Supreme Court, which was rejected. The Hon'ble Supreme Court in its judgment held that it was the Resolution Applicant, who was to conduct its due diligence and the SRA was fully conscious about the financial affairs of the Corporate Debtor from the beginning, cannot make an excuse for not approval of the Plan. Insofar as argument on the basis of delay caused in approval the Resolution Plan, it is the SRA, who has caused the delay at every stage of CIRP. As noted above, thrice the Application as filed by the SRA for withdrawal of the Resolution Plan and it was on the third Application, that Adjudicating Authority allowed the Application and permitted the Applicant to withdraw from the Plan, which led to litigation and filing of Appeal before the NCLAT, which was allowed and matter was taken by the SRA in the Hon'ble Supreme Court, in which process more than two years period was elapsed. Further, subsequent to order of the Hon'ble Supreme Court, the Application for approval of Resolution Plan was revived by the Adjudicating Authority on 02.12.2021 and thereafter, SRA has filed several Applications

before the Adjudicating Authority, praying for different reliefs. Two of the Appeals were also filed in this Tribunal by the SRA and due to the aforesaid proceedings, the Plan approval was delayed. The Appellant cannot take advantage of its own wrong and put it on Adjudicating Authority, when it is the SRA who has caused the delay. Several attempts have been made by the SRA to withdraw from the Plan, which were disapproved. The objections to the approval of Resolution Plan, before the Adjudicating Authority is another attempt by the Appellant to delay the approval of the Resolution Plan.

6. We have considered the submissions of learned Counsel for the parties and have perused the record.

7. Before we proceed to enter into respective submissions of learned Counsel for the parties, it is relevant to notice the judgment of the Hon'ble Supreme Court in ***Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Ltd. & Anr. – (2022) 2 SCC 401*** decided on 13.09.2021. An Appeal before the Hon'ble Supreme Court was filed by the Appellant – SRA, challenging the order of this Appellate Tribunal, by which, order passed by the Adjudicating Authority allowing the third Withdrawal Application filed by the Appellant was set aside. Elaborate submissions were made by the Appellant before the Hon'ble Supreme Court. The submissions made by the Appellant were noticed under the heading "*D. Submissions of Counsel in the Ebix Appeal*". It is useful to notice only few of the submissions, which were advanced by the Appellant and noticed by the

Hon'ble Supreme Court in its ***Ebix Singapore*** judgment. The submission that delay in CIRP has prejudiced the commercial considerations underlying the Resolution Plan was advanced, which was noted in paragraph 82 (ii) (g), which is as follows:

> "**82(ii)(g)**. Ebix had sent a notice dated 2-7-2018 to the E-CoC/E-RP stating that the severe delays in the CIRP have prejudiced the commercial considerations underlying the resolution plan and, in any case, the resolution plan was valid only for six months. It urged the E-CoC/E-RP to expedite the process for obtaining the adjudicating authority's approval. Thereafter, Ebix filed the first withdrawal application for seeking information relating to the financial position and other commercial aspects of Educomp. After the dismissal of the first withdrawal application, the appellant filed the second and third withdrawal applications for withdrawal of its resolution plan."

8. The submission that it was essential to the Ebix's bid for the business of Educomp was crucial for keeping the business as a going concern was also noticed in paragraph 82(iii) (a) to (e), which are as follows:

> "**82(iii)(a)** The Resolution Plan was based on certain considerations that were fundamental to the Ebix's bid for the business of Educomp, and were crucial for keeping the business of Educomp as a going concern. These were the government contracts and IP driven solutions in the education and health industries. However, due to the inordinate delay in the completion of the CIRP, many of the government contracts may have ended. Further, various technology driven solutions and intellectual property owned and operated by Educomp, which Ebix had sought to acquire, were no longer valid;

(b) The E-CoC passed a resolution with 77.85 per cent votes to conduct a special audit into the affairs of Educomp, which shows that evidence is available to conclude that the affairs of the company were mismanaged, which materially affect the economic considerations underlying the Resolution Plan;

(c) The affairs of Educomp are also being investigated by the SFIO and CBI, which provides further evidence that the affairs of Educomp were severally mismanaged and are susceptible to criminal investigations;

(d) There has been a lapse of over three years resulting in an erosion of vital business prospects of Educomp; and

(e) The implementation and viability of a Resolution Plan is to be assessed at the time of consideration of such plan by the competent Court/Tribunal, and not at the time of submission of the Plan. The subsequent events that have transpired after the submission of the Resolution Plan are relevant for evaluating the commercial viability and the capability to implement the plan. In the present case, the substratum forming the basis of the resolution plan has been eroded by the occurrence of the abovementioned events. Thus, the successful Resolution Applicant has the right to withdraw the Resolution Plan in such circumstances;"

9. The Hon'ble Supreme Court after considering all statutory provisions of the IBC, considered the issue under heading (J), "*Withdrawal of the Resolution Plan by a Successful Resolution Applicant*" and held as follows:

"**144** The analysis of the statutory framework governing the CIRP and periodic reports of the Insolvency Law Committee indicates that it is a creditor-driven process. The aim of the process, in preferential order, is to: *first*, enable resolution of the debt by maintaining the corporate debtor as a going concern, in order to preserve the business and employment of the personnel; *second*, maximize the

value of the assets of the corporate debtor and enable a higher pay-back to its creditors than under liquidation; and *third*, enable a smoother and faster transition to liquidation in the event that a time bound CIRP fails, in a bid to avert further deterioration of value.

145 Since the aim of the statute is to preserve the interests of the corporate debtor and the CoC, it was recognized that settlements between the corporate debtor and the CoC may be in the best interests of all stakeholders since insolvency is averted. Two decisions of two judge Benches of this Court, in **Lokhandwala Kataria Construction (P) Ltd v. Nisus Finance and Investment Managers LLP and Uttara Foods and Feeds (P) Ltd v. Mona Pharmachem**, (prior to the insertion of Section 12A which enabled withdrawal of the CIRP on account of settlement between the parties), had refused to effectuate this remedy by exercising inherent powers of the Adjudicating Authority under Rule 11 of the NCLT Rules 2016 or the power of parties to make applications to the Adjudicating Authority under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. In **Uttara Foods** (supra) this Court had granted a one-time relief under Article 142 of the Constitution since all the parties were present before it and had presented it with signed consent terms. This course of action, in refraining from the exercise of inherent powers to effect procedures and remedies that were not specifically envisaged by the statute, was explicitly affirmed by the Insolvency Law Committee Report dated March 2018 which proceeded to suggest amendments to the IBC and recommended a ninety per cent voting threshold by the CoC for withdrawals of a CIRP and a specific amendment to Rule 8 of the then existing CIRP Rules to enable parties to file such applications. This report led to the insertion of Section 12A which vested the CoC with the power to withdraw the CIRP or vote on such withdrawal, if sought by the Corporate Debtor. This provision was introduced with retrospective effect on 6 June 2018. Significantly, no such exit routes have been contemplated for the Resolution Applicant. It is relevant to note that

the newly inserted and then unamended Regulation 30A (w.e.f. 4 July 2018) of the CIRP Regulations stipulated that withdrawal under Section 12A can be allowed through submitting an application to the IRP or RP (as the case maybe) before the invitation for EOI is issued to the public. The CoC was to consider the application within seven days of its constitution and an approval for such application required approval of the ninety per cent of the voting share of the CoC. However, on 14 December 2018, a two judge Bench of this Court, held in **Brilliant Alloys (P) Ltd v. S Rajagopal** that Regulation 30A is directory, and not mandatory in nature since Section 12A of the IBC does not stipulate a deadline by which a withdrawal from the CIRP can be made. Thus, in exceptional cases withdrawals from the CIRP under Section 12A of IBC could be permitted even after the invitation of EOI has been issued. Regulation 30A of the CIRP Regulations was then amended by the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations 2019, w.e.f. 25 July 2019 to reiterate the decision of this Court. The newly amended provision allows for withdrawals even after the invitation for expression of interest has been issued, provided that the applicant states the reasons justifying such withdrawal. Similarly, on 25 January 2019, a two judge Bench of this Court in **Swiss Ribbons** (supra) interpreted the true import of Section 12A and clarified that if the CoC is not yet constituted, a party can approach the Adjudicating Authority, which may in exercise of its inherent powers under Rule 11 of the NCLT Rules 2016, allow or reject an application for withdrawal or settlement. On 25 July 2019, the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 amended Regulation 30A in terms of this decision in interpreting Section 12A and now specifically provides the procedure under the IBC that relates to affecting a withdrawal under Section 12A before the constitution of the CoC. The applicant submits an application for withdrawal through the IRP, directly before the Adjudicating Authority, since the CoC is not yet constituted to consider such an application. To ensure that the

process for withdrawal is timely and efficient, the present Regulation 30A provides that the IRP shall submit an application for withdrawal of the CIRP prior to the constitution of the CoC to the Adjudicating Authority on behalf of the applicant within three days of the receipt. Alternatively, if the application for withdrawal is made after the constitution of the CoC, such application will be considered by the CoC within seven days of its receipt. If the CoC approves such an application with ninety per cent voting share, it is to be submitted to the Adjudicating Authority within three days of approval. Further, the application for withdrawal has to be accompanied by a bank guarantee towards estimated expenses relating to costs of the IRP (in case of a withdrawal prior to constitution of the CoC) or insolvency resolution process costs (where withdrawal is after constitution of the CoC). It is clear that withdrawal of the CIRP is allowed only if it upholds the interests of the CoC, is time-bound, and takes into consideration how the expenses relating to the insolvency process up to withdrawal shall be borne. Thus, even the exit under Section 12A of the CoC, which is not available to the Resolution Applicant, is regulated by procedural provisions indicating that the legislature has applied its mind to the timelines and costs involved in the CIRP. Pertinently, the regulations do not provide for any costs that are payable to the prospective Resolution Applicants or a successful Resolution Applicant, who must have incurred a significant expense in participating in the process. This Court, in **Maharashtra Seamless** (supra) had denied relief to a Resolution Applicant who had sought to invoke Section 12A to resile from its Resolution Plan. The nature of the statute indicates the clarity of its purpose – primacy of the interests of the creditors who are seeking to cut their losses through a CIRP. Traditional models and understandings of equity or fairness that seek reliefs which are misaligned with the goals of the statute and upset the economic coordination envisaged between the parties, cannot be read into the statute through judicial interpretation. While parties have the freedom to negotiate certain commercial terms of the Resolution Plan to gain wide support, their

ability to negotiate is circumscribed by the governing statute. A court cannot interpret the negotiated arrangements that are represented in the Resolution Plan in a manner that hampers the objectives of the IBC which is a speedy, predictable and timely resolution. The Resolution Applicant is deemed to be aware of the IBC and its mechanisms before it steps into the fray and consents to be bound by its underlying objectives. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. It cannot demand vesting of certain powers and rights which have been conspicuously omitted by the legislature under the statute, in furtherance of the policy objectives of the IBC. A court may not be able to lay down such detailed guidance on how a mechanism for withdrawal, if any, may be provided to a successful Resolution Applicant without disturbing the statutory timelines and adequately evaluating the interests of creditors and other stakeholders, which is ultimately a matter of legislative policy. In **Essar Steel** (supra), a three judge Bench of this Court, affirmed a two judge Bench decision in **K Sashidhar** (supra), prohibiting the Adjudicating Authority from second-guessing the commercial wisdom of the parties or directing unilateral modification to the Resolution Plans. These are binding precedents. Absent a clear legislative provision, this court will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC to re-negotiate a submitted Resolution Plan or agree to its withdrawal, at the behest of the Resolution Applicant. The Adjudicating Authority can only direct the CoC to re-consider certain elements of the Resolution Plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of approval or rejection, as the case may be, under Section 31. In **Government of Andhra Pradesh v. P Laxmi Devi**, while determining the constitutionality of a statute, this Court observed that it should be wary of transgressing into the domain of the legislature, especially

in matters relating to economic and regulatory legislation. This Court observed:

> "80. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. **It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions."**
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> **(emphasis supplied)**"

10. In paragraph 146, 147 and 148, the Hon'ble Supreme Court categorically held that withdrawal of Resolution Plan by Successful Resolution Applicant under IBC is not permissible. It was observed that the absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of the IBC's proscriptioin of any attempts at withdrawal at its behest. Paragraph 146 and 147 are as follows:

> "**146** Judicial restraint must not only be exercised while adjudicating upon the constitutionality of the statute relating to economic policy but also in matters of interpretation of economic statutes, where the interpretative maneuvers of the Court have an effect of transgressing into the law-making power of the legislature and disturbing the delicate balance of separation of powers between the legislature and the judiciary. Judicial restraint must be exercised in such cases as a matter of prudence, since the court neither has the necessary expertise nor the power to hold consultations with stakeholders or experts to decide the direction of economic policy. A court may be inept in laying down a detailed procedure for exercise of the power of withdrawal or modification by

a successful Resolution Applicant without impacting the other procedural steps and the timelines under the IBC which are sacrosanct. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. In this case, if Resolution Applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a Resolution Plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective Resolution Applicants who are seeking to participate in the process and the successful Resolution Applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry of litigation which would cause the delay that the IBC seeks to disavow.

147 The IBC is silent on whether a successful Resolution Applicant can withdraw its Resolution Plan. However, the statutory framework laid down under the IBC and the CIRP Regulations provide a step-by-step procedure which is to be followed from the initiation of CIRP to the approval by the Adjudicating Authority. Regulation 40A describes a model-timeline for the CIRP that accounts for every eventuality that may arise between the commencement of the CIRP and approval of the Resolution Plan by the Adjudicating Authority, including the different stages for pressing a withdrawal of the CIRP under Section 12A. Even a modification to the RFRP is envisaged by the CIRP Rules and is subject to a timeline. The absence of any exit routes being stipulated under the statute for a successful Resolution Applicant is indicative of the IBC's proscription of any attempts at withdrawal at its behest. The rule of casus omissus is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction. Justice GP Singh in his authoritative treatise,

Principles of Statutory Interpretation, defines the rule of casus omissus as:

> "**It is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction**. But there is no presumption that a casus omissus exists and language permitting the court should avoid creating a casus omissus where there is none."
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> **(emphasis supplied)**

The treatise further discusses that a departure from this rule is only allowed in cases where words have been accidently omitted or the omission has an effect of making any part of the statute meaningless. Further, only such words can be supplied to the statute which would have certainly been inserted by the Parliament, had the omission come to its notice. The relevant paragraph is extracted below:

> "As already noticed it is not allowable to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words". A departure from the rule of literal construction may be legitimate so as to avoid any part of the statute becoming meaningless. Words may also be read to give effect to the intention of the Legislature which is apparent from the Act read as a whole. Application of the mischief rule or purposive construction may also enable reading of words by implication when there is no doubt about the purpose which the Parliament intended to achieve. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these or similar words would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

In the wake of the COVID-19 pandemic, several Resolution Plans remained pending before Adjudicating Authorities due to the lockdown and significant barriers to securing a hearing. An Ordinance was swiftly promulgated on 5 June 2020 which imposed a temporary suspension of initiation of CIRP under Sections 7, 9

> and 10 of the IBC for defaults arising for six months from 25 March 2020 (extendable by one year). This was followed by an amendment through the IBC (Second Amendment) Act 2020 on 23 September 2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations 2020, which inserted Regulation 40C on 20 April 2020, with effect from 29 March 2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. Recently, the IBC (Amendment) Ordinance 2021 was promulgated with effect from 04 April 2021 providing certain directions to preserve businesses of MSMEs and a fast-track insolvency process. There has been a clamor on behalf of successful Resolution Applicants who no longer wish to abide by the terms of their submitted Resolution Plans that are pending approval under Section 31, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or renegotiations has been provided, in the last eighteen months. In the absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by a successful Resolution Applicant, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible. Such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door."

11. In paragraph 153, the Hon'ble Supreme Court held that the binding nature of a Resolution Plan on a Resolution Applicant, who is a proponent of the Plan, which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. In paragraph 153, following was laid down:

> "**153** Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan

whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/ withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC."

12. It was held by the Hon'ble Supreme Court that the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant. In paragraph 157, 158 and 160, following was held:

"**157** Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.

158 Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60 (5)(c). In a decision of a three judge Bench of this Court in **Gujarat Urja** (supra), it was held that, "the NCLT's residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do". Further, the court observed that "this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC". The effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtors.

160 Permitting the Adjudicating Authority to exercise its residuary powers under Section 60(5) to allow for further modifications or withdrawals at the behest of the successful Resolution Applicant,

would be in the teeth of the decision of this Court in **Essar Steel** (supra) which held that "[s]ection 60(5)(c) cannot be used to whittle down Section 31(1) of the IBC, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority".

13. We may also notice the conclusions recorded by the Hon'ble Supreme Court in ***Ebix Singapore***, which is under the heading (L) "*Conclusion*". In paragraphs 201 to 205, following have been held:

> "**201** This Court is cognizant that the extraordinary circumstance of the COVID19 pandemic would have had a significant impact on the businesses of Corporate Debtors and upon successful Resolution Applicants whose Plans may not have been sanctioned by the Adjudicating Authority in time, for myriad reasons. But the legislative intent of the statute cannot be overridden by the Court to render outcomes that can have grave economic implications which will impact the viability of the IBC.
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> **202** The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or

a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC.

203 If the legislature in its wisdom, were to recognize the concept of withdrawals or modifications to a Resolution Plan after it has been submitted to the Adjudicating Authority, it must specifically provide for a tether under the IBC and/or the Regulations. This tether must be coupled with directions on narrowly defined grounds on which such actions are permissible and procedural directions, which may include the timelines in which they can be proposed, voting requirements and threshold for approval by the CoC (as the case may be). They must also contemplate at which stage the Corporate Debtor may be sent into liquidation by the Adjudicating Authority or otherwise, in the event of a failed negotiation for modification and/or withdrawal. These are matters for legislative policy.

204 In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating

Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations. In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court in **Gujarat Urja** (supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2.

205 It would also be sobering for us to recognize that whilst this Court has declared the position in law to not enable a withdrawal or modification to a successful Resolution Applicant after its submission to the Adjudicating Authority, long delays in approving the Resolution Plan by the Adjudicating Authority affect the subsequent implementation of the plan. These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation. The thirty-second report of the Ministry of Corporate Affairs' Standing Committee on Finance (2020-2021) on the 'Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions'127 represented a despondent state of affairs with regard to pendency of applications before the Adjudicating Authority. It noted

15. The age-wise pending cases in NCLT under IBC as on 31 May, 2021 are as under:

IBC Sec	0-90 days	91-120 days	121-180 days	180+ days	Total
Sec 7	155	147	306	2,177	2,785
Sec 9	279	401	1091	4,202	5,973
Sec 10	85	17	51	455	608
Others	111	60	121	193	485
Total	630	625	1,569	7,027	9,851
Percentage	6.39%	6.34%	15.92%	71.33%	

In its observations, the Report noted that a delay in the resolution process with more than seventy-one per cent cases pending for more than 180 days is in deviation of the original objective and timeline for CIRP that was envisaged by the IBC. The delays were attributable to: (i) the NCLT taking considerable time in admitting CIRPs; (ii) late and unsolicited bids by Resolution Applicants after the original bidder becomes public upon passage of the deadline for submission of the Plan; and (iii) multiplicity of litigation and the appellate process to the NCLAT and the Supreme Court. Such inordinate delays cause commercial uncertainty, degradation in the value of the Corporate Debtor and makes the insolvency process inefficient and expensive. We urge the NCLT and NCLAT to be sensitive to the effect of such delays on the insolvency resolution process and be cognizant that adjournments hamper the efficacy of the judicial process. The NCLT and the NCLAT should endeavor, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith. Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC. We cannot let the present insolvency regime meet the same fate."

14. The learned Counsel for the Appellant has relied on Section 31, sub-section (1) proviso, which is as follows:

"31. Approval of resolution plan. -

> ***(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, 1 [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.*
>
> *Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."*

15. Section 30, sub-section (2), sub-clause (d) is also relied, which required that RP shall examine each Resolution Plan received by him to confirm the implementation and supervisions of the Resolution Plan. When we look into both the aforesaid provisions, i.e., Section 30, sub-section (2) (d) and Section 31(1) proviso, what is significant is that Resolution Professional has to look into and examine that Resolution Plan provides for implementation and supervision of the Plan. The requirement of the law is that the Plan contains provision for effective implementation. It is not the case before us that Plan does not contain effective provision for implementation. The Adjudicating Authority in the impugned order specifically noticed the provisions of the Resolution Plan, which provides

for implementation. It is not the case before us that there are no provisions in Resolution Plan for effective implementation. The submission of the Appellant that in view of lapse of more than five years and the deterioration of the financial status of the Corporate Debtor, the Plan is no more implementable, cannot be accepted as a ground to withdraw from the Resolution Plan. It is further relevant to notice that before the Hon'ble Supreme Court in ***Ebix Singapore***, the SRA has raised similar contentions, including that position has changed manifestly in relation to the financial conduct of **Educomp**. The said argument was noted and was rejected in paragraph 181 of the judgment, which is as follows:

> "**181** Ebix has also tried to argue that its position has changed manifestly because of new allegations which have come up in relation to the financial conduct of Educomp. However, in this regard, it is pertinent to note Clause 1.3.2 of the RFRP which directs prospective Resolution Applicants to conduct their own due diligence. In so far as is relevant, it reads:
>
> > "1.3.2 The Resolution Applicant(s) shall be provided access to the electronic as well as physical data room ("Data Room") established and maintained by the Company acting through the Resolution Professional and coordinated by PwC in order to conduct a due diligence of the business and operations of the Company
>
> Similarly, Clause 1.13.6 also requires prospective Resolution Applicants to conduct independent investigations:
>
> > "1.13.6 This RFRP does not purport to contain all the information required by the Resolution Applicant. The Resolution Applicant should conduct independent investigations and analysis and should check the accuracy, reliability and completeness of the information in this RFRP and obtain independent advice from appropriate sources, prior to making an assessment of the Company."

> Ebix was responsible for conducting their own due diligence of Educomp and could not use that as a reason to revise/modify their approved Resolution Plan. In any event, Section 32A of the IBC grants immunity to the Corporate Debtor for offences committed prior to the commencement of CRIP and it cannot be prosecuted for such offences from the date the Resolution Plan has been approved by the Adjudicating Authority under Section 31, if the Resolution Plan results in a change of management or control of the Corporate Debtor subject to certain conditions.

16. With regard to the revenue of Corporate Debtor, the Adjudicating Authority has noted the details in paragraph 35 of the judgment, which is as follows:

> "**35.** Though in the wake of the Judgement of Hon'ble Supreme Court (ibid), there is no scope left to Ebix/SRA to question its own Plan, still we may refer to the contents of para 18 of the IA-4845/2023 filed by the SRA. In the said para the SRA/Ebix itself has taken stand that for the financial year 2020-21, the revenue of CD from operation was INR 13.8 million. It is also the stand taken by the SRA/Ebix in para 16 of the application that the Resolution Professional had published unaudited financial statements of the Corporate Debtor for the financial year 2020-21 in newspaper. As per the stand taken by the SRA/Applicant itself, in para 15 of the application that on search qua the portal of Ministry of Corporate Affairs and the Stock Exchanges the SRA could see that the Financial Statement of F.Y. 2020-21, approved at the AGM of the CD on 25.08.2023. The SRA has enclosed a copy of the audited financial statement qua the financial debtor for F.Y. 2020-21 as Annexure A-6 to IA4845/2023 (ibid). As can be seen from the financial statement, the CD had total income of INR 14.73 million as on 31.03.2021. Besides, Mr. Neeraj Malhotra, Ld. Sr. Counsel for the RP submitted that for the Assessment Year 2021-22 the revenue of the CD could rise to 40 million and the revenue for the year 2021-

22 in fact reflects the impact of the pandemic Covid-19. The Clause 3 of the Financial Performance canvassed in the audited financial statement for the

> **"3. OPERATING RESULTS AND BUSINESS:**
>
> **On Standalone basis Company's** total income stands at Rs. 14.73 million as on March 31, 2021 as compared to Rs. 106.58 million as on March 31, 2020, a decline of 86.18%. The loss before taxes is Rs. 505.98 million as on March 31, 2021 as against loss before taxes of Rs. 1513.68 million as on March 31, 2020. On Consolidated basis Company's total income stands at Rs. 14.73 million as on March 31, 2021 as compared to Rs. 108.20 million as on March 31, 2020, registering a decline of 86.38 %. The loss before tax and exceptional items stands at Rs. 511.87 million as on March 31, 2021 as against loss of Rs. 1438.03 million as on March 31, 2020.
>
> **MANAGEMENT DISCUSSION AND ANALYSIS REPORT**
>
> Management's Discussion and Analysis Report for the year under review detailing economic scenario and outlook, as stipulated under Schedule V of the SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015 ("SEBI LODR Regulations") is presented in a separate section and forms integral part of this Report."

17. The Hon'ble Supreme Court in paragraph 181 of the judgment as noted above has also held that the Appellant was entitled to conduct its own due diligence.

18. Now, coming to the submission of the Appellant that Corporate Debtor is not a going concern, which furnishes a ground to the Appellant to oppose the approval of the Resolution Plan. It is reflected from the record that an affidavit was filed on 22.09.2023 before the Adjudicating Authority by RP stating that CD is a going concern. The RP, who has been running

the Corporate Debtor after initiation of CIRP, has stated in the affidavit that the CD is a going concern. The Adjudicating Authority in paragraph 35 has noted the financials of the Corporate Debtor for the year 2020-21 and 2021-22. A bare perusal of the financials extracted in paragraph 35, indicate that the Corporate Debtor was carrying on business and according to the own case of the Appellant the finances for the year 2015-16 to 2020-21, there is revenue generation and in the Financial Year 2020-21 revenue of Rs.13.8 million was generated. The Adjudicating Authority in paragraph 35, as extracted above has noticed that revenue for the year 2021-22 reflects the impact of the pandemic Covid-19 and it was further noticed that revenue of the CD could rise to Rs.40 million in the year 2021-22. We, thus, do not find any substance in the submission of the Appellant that Corporate Debtor was not a going concern.

19. The last submission of learned Counsel for the Appellant relying on the observation in judgment of the Hon'ble Supreme Court in ***Ebix Singapore*** in paragraph 205 that delays in approving the Resolution Plan by the Adjudicating Authority affect the subsequent implementation of the Plan. Suffice it to say that the most part of the delay in the approval of the Plan lies in the hands of the Appellant. The learned Counsel for the Respondents pointed out that three Applications have been filed by the Appellant, after the order of the Hon'ble Supreme Court, i.e., IA No.397 of 2022 seeking financial information regarding the Corporate Debtor, which was dismissed on 08.03.2022. IA No. 1611 of 2022 filed by the Appellant seeking direction to be issued to the RP for protection of the assets of the

Corporate Debtor's wholly owned subsidiary, which was dismissed by the Adjudicating Authority on 11.04.2022. Then the Appellant filed Company Appeal (AT) (Insolvency) No.507 of 2022, which was dismissed on 06.05.2022. Another Appeal being Company Appeal (AT) (Insolvency) No.550 of 2022 filed by the Appellant, dismissed on 19.05.2022. Again an IA No.4845 of 2023 was filed by the Appellant on 13.09.2023, objecting to its own approved Resolution Plan on grounds of financial status of the Corporate Debtor and failure of the RP to protect the Corporate Debtor as a going concern. There can be no quarrel to the proposition laid down by the Hon'ble Supreme Court that delay in approval of Resolution Plan affect the implementation of the Resolution Plan, but in the present case, the Appellant himself by filing different Applications and Appeals delayed the decision of the Adjudicating Authority as noted above and series of litigation ensued after filing of several withdrawal applications by the Appellant. In paragraph 179 of the judgment of the Hon'ble Supreme Court in ***Ebix Singapore*** as stated above, the Hon'ble Supreme Court held that "*Parties cannot indirectly impose a condition on a judicial authority to accept or reject its Plan within a specified time period*". We, thus, are of the view that Resolution Plan could not have been rejected on the ground that delay was caused in approving of Resolution Plan.

20. Insofar as, feasibility and viability of the Resolution Plan is concerned, the feasibility and viability of a Resolution Plan is in the domain of commercial wisdom of CoC. The Plan having been found feasible and

viable and approved by the CoC, the Appellant cannot ask the Adjudicating Authority to enter into feasibility and viability of the Plan.

21. We, thus are satisfied that no valid grounds are raised by the Appellant, before the Adjudicating Authority to reject the Application filed by the RP for approval of the Resolution Plan in IA No. 195 of 2018. No error has been committed by the Adjudicating Authority in allowing IA No.195 of 2018 and approving the Resolution Plan. There is no merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

23rd February, 2024

Ashwani