NATIONAL COMPANY LAW APPELLATE TRIBUNAL

AT CHENNAI

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) NO. 431/2022
(IA Nos. 1088, 1089, 1090/2022 & 322, 323/2023)
(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Impugned Order dated 04/11/2022 in IA/252/2021 in CP(IB) 305/BB/2019, passed by the 'Adjudicating Authority', (National Company Law Tribunal, Bengaluru Bench)

In the matter of :

Mr. Arun Kumar
R/at: No. 100, 4th Main,
Amarjyothi Layout,
RT Nagar,
Bangalore – 560032 …Appellant

Versus

1. Ms. Sripriya Kumar,
The Resolution Professional,
No. 224A (New 346/1),
Avvai Shanmugam Salai,
Gopalapuram,
Chennai – 600086 ….Respondent No. 1

2. Kotak Mahindra
No. 27 BKC, G-Block,
C-27, Bandra Kurla Complex,
Mumbai – 400051. …Respondent No. 2

3. Monitoring Commmittee
Project Arun Auroville
Represented by Ms. Sripriya Kumar,
Having Office at No. 224A (New 346/1),
Avvai Shanmugam Salai,
Gopalapuram,
Chennai – 600086. …Respondent No. 3

4. Consortium of Resolution Applicants,
(Mr. Kamal Pasha and Mr. Sayed Fahad)
Having Office at N.324, Golden Point,
1ST Floor, Off Queens Road,
Baghavan Mahaveer Hospital Road,
Vasanth Nagar,
Bengaluru 560 052. …Respondent No. 4

Present :
For Appellant : Mr. B.S.V. Prakash Kumar, Advocate

For Respondent : Mr. Ranjana Jain, Advocate, For R2
Mr. Srinandan K, Advocate, For R4
Mr. N.P. Vijaykumar, Advocate, For R1, R3

J U D G M E N T

(Physical Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Challenge in this Company Appeal (AT) (CH) (Ins) No. 431/2022 is to the Impugned Order dated 04/11/2022 passed in IA No. 252/2021 in C.P.(IB) 305/BB/2019, whereby and whereunder the 'Adjudicating Authority' has allowed the Application filed by the 'Resolution Professional' under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code'), seeking approval of the 'Resolution Plan' submitted by the Consortium of Mr. S.M. Kamal Pasha and Mr. Syed Fahad, (hereinafter referred to as the 'SRA'). While allowing the Application for approval of the Plan, the 'Adjudicating Authority' has dismissed the objections filed by the Appellant herein / 'Promotor of the Corporate Debtor' to the Application preferred by the Resolution Professional.

2. Succinctly put, the main issues raised by the Appellant / Promotor of the Corporate Debtor is that the 'Adjudicating Authority' had wrongly directed for project wise CIRP; that the CoC was improperly constituted and that the amount in the Resolution Plan entitled for Kotak Mahindra Bank Limited (hereinafter referred to as 'the Kotak Bank') is much more than the actual Claim admitted by the Resolution Professional (hereinafter referred to as 'the RP'). It is the further case of the Appellant that the amount claimed was Rs. 36,27,00,000/- whereas the amount provided for under the Plan was Rs. 46,00,00,000/-, which is inclusive of 'interest', which ought not to have been charged after the quantum of the Claim amount HAD already crystalized. The other issue raised by the Appellant is that the Resolution Plan value is less than the Liquidation value and also that the 'SRA Consortium' is ineligible under Section 29A of the Code as they have been disqualified on account of non-filing of the Financial Statements of their Companies.

ISSUE: PROJECT WISE CIRP & WRONG CONSTITUTION OF COC

3. At the outset, the first issue raised by the Learned Counsel for the Appellant is that the IRP had wrongly constituted the CoC to consist of only the Financial Creditors pertaining to the project 'Arun Auroville'. It is submitted that in response to the Public Notice dated 04/02/2020, the IRP received several claims in respect of other projects, 'Arun Kaustubh', also known as 'Arun Parkwood' and that the IRP was required to verify every claim against the Corporate Debtor as of the date of the Insolvency Commencement date i.e. 31/01/2020 and include

all the Creditors of the Corporate Debtor. The first Meeting was conducted on 02/03/2020 with only the Financial Creditors of 'Arun Auroville' based on the erroneous interpretation of the decision of the NCLAT in the matter of 'Flat Buyers Association WinterHills – 77, Gurgaon Vs. Umang Realtech Pvt. Ltd.' Reported in [(2020) SCC Online NCLAT 1199] and the Legal opinion dated 24/02/2020. Thereafter, relying upon the revised Legal opinion, dated 24/04/2020, in the 3rd Meeting of the CoC, the RP recommended for reconstitution of the CoC to consist of all Financial Creditors of both the projects. Aggrieved by the decision of the RP to reconstitute the CoC, Kotak Bank / Financial Creditor preferred IA Nos. 187 & 195/2020, seeking to set aside the decision of the RP in reconstituting the CoC and for restoration of the CoC as constituted in the 1st Meeting. The 'Adjudicating Authority', vide a Common Order, dated 29/06/2020 allowed the said IAs and set aside the RP's decision of reconstituting the CoC. It is submitted that the RP thereafter conducted the 5th Meeting on 11/08/2020, consisting of only the Financial Creditors of Arun Auroville Project. It is the case of the Appellant that Kotak Bank having majority voting share of 85 % in the CoC replace the RP and appointed a new Resolution Professional, who upon taking charge submitted a Report dated 10/10/2020 for constitution of a 2nd CoC for the CIRP of 'Arun Kaustubh', for which the Respondent Bank had no objection. IA 515/2020 was filed seeking approval of the Constitution of the 2nd CoC for 'Arun Kaustubh', but the same was withdrawn, as a result of which the Claims of Creditors other than those related

to ‘Arun Auroville’ were disregarded. Aggrieved by the sudden disbanding of the CoC for project Arun Parkwood, the Financial Creditors of that project filed two separate Applications, IA NO. 58/2021 & 59/2021, seeking to set aside the decision of the RP, but the same was rejected by the ‘Adjudicating Authority’, vide Orders dated, 19/03/2021, against which two separate Appeals were preferred and the same are pending.

4. The Learned Counsels appearing for the Respondent Bank and the RP submitted that the Application filed by the Financial Creditor of Project Arun Parkwood has never challenged the Constitution of CoC and that the Application was only for consideration of their Claim. Their Appeals are still pending. It is submitted that M/s Kenstrean Ventures LLP filed IA No. 459/2022 after the approval of the Resolution Plan and expiry of Moratorium seeking leave of the Adjudicating Authority to take steps to enforce their mortgage against project Arun Parkwood in terms of the Debenture Trust Deed and this leave was granted on 15/11/2020 and therefore, there was never any issue raised regarding constitution of CoC for Project Arun Auroville.

5. As regarding this issue of wrongful constitution of CoC, it is seen from the record that the Application under Section 7 of the Code was filed by the 2nd Respondent, Kotak Mahindra Bank and the Company was admitted into CIRP on 31/01/2020. Kotak Bank has charged on Project ‘Arun Auroville’ and sought for CIRP of Project ‘Arun Auroville’ and therefore, the IRP constituted the CoC for Project ‘Arun Auroville’ and the CIRP was limited to that project only.

Thereafter, the IRP sought to change the Constitution of CIRP from project wise CIRP by extending it to the entire Company on 02/05/2020, which was challenged vide IA 187 & 185/2020 by the Bank and the same was allowed by the 'Adjudicating Authority' confirming project wise CIRP. It is seen from the record that this was not challenged by way of an Appeal and hence has attained finality. The subject matter of the challenge in IA Nos. 58 & 59/2022 are not relevant to the facts of this case as they are with respect to keeping the Claims of M/s. Purvankara Limited and Kenstream Ventures in abeyance. There is no documentary evidence on record to establish that the Order of the 'Adjudicating Authority' in IA Nos. 187 & 195/2020 was challenged. Hence, project wise CIRP of Arun Auroville has attained finality. Additionally, there is no rebuttal by the Appellant to the argument of the Learned Counsel appearing for the Bank that the Appellant was a part of 16 CoC Meetings which were held subsequent to the Constitution of Project wise CoC, and has never questioned the same. The NCLAT, Principal Bench has in the matter of ***'Dharmesh S Jain Vs. SREI Equipment Finance Limited'*** in ***Company Appeal (AT) (Ins) No. 697/2022*** held that CIRP can be confined to one project in a Real Estate Company where the interest of homebuyers is also required to be fulfilled and liabilities of the Financial Creditors are to be met. This view has been reiterated by NCLAT, Delhi in the matte of ***'Supertech Limited VS. Union Bank of India and Anr.'*** in ***Company Appeal (Ins) No. 406/2022*** whereby the concept of project wise CIRP was reiterated. For all these reasons, this Tribunal is of the considered view that

there is no merit in the 1st issue raised by the Appellant that the Project wise CIRP was wrongly initiated or that the CoC was erroneously constituted, specifically keeping in view that the Order of project wise CIRP was never challenged.

6. Further, the CoC on 29/10/2020 approved the eligibility criteria for a Prospective Resolution Applicant to provide a Resolution Plan in respect of Project 'Arun Auroville' alone. Based on this eligibility criteria, public announcement was effected on 14/11/2020 clearly stipulating that the Resolution Plan was sought only for Project 'Arun Auroville'. Having participated and attended the CoC Meetings, the Appellant had never exercised his choice of raising this issue. Hence, we do not find any substance in this matter in question.

ISSUE: DISQUALIFICATION OF THE SRA CONSORTIUM UNDER SECTION 29A OF THE CODE

7. The 2nd issue raised by the Appellant is that the 4th Respondent / The Consortium of Resolution Applicants is disqualified under Section 29A of the Code and therefore, ineligible to submit a Resolution Plan. It is submitted by the Learned Counsel for the Appellant that the Minutes of the 10th CoC Meeting held on 07/12/2020 discloses a false statement reflecting that the SRA was disqualified for the period from 01/11/2015 to 31/10/2020 and that there is no record reflecting that they were requalified. The Common Writ Order dated 12/06/2019 of the Hon'ble High Court of Karnataka discloses their disqualification for the period 01/11/2016 to 31/10/2021. It is submitted that the Writ Order had segregated the Writ Petitions filed on behalf of the Struck Off Companies from the Writ Petitions

simpliciter asserting the disqualification falling under Section 164(2) (a) of the Companies Act, 2013. In the final Direction given by the Hon'ble High Court of Karnataka, the Writ Petitions filed on behalf of the struck off Companies were dismissed with a liberty to approach the NCLT under Section 252 of the Companies Act, 2013. It is the case of the Appellant that it is not clear as to whether the issue in the two Writ Petitions of the SRA were considered by the Hon'ble High Court because they were dismissed with a liberty to approach the NCLT. The Learned Counsel placed reliance on the Judgment of the Hon'ble Supreme Court in the matter of ***'M.K. Rajagopal Vs. Dr. Periasamy PalaniGounder'*** in ***Civil Appeal No. 1682-1683/2022***, wherein the Hon'ble Apex Court has taken into consideration the DIN status of the Appellant as 'active complaint' by rejecting the allegation that the Appellant was held to be disqualified under Section 164 (2) (b) of the Companies Act, 2013, because a Director cannot be considered as disqualified unless a specific Order has been passed by the RoC. Whereas in the present case, it is a case of the SRA that they were disqualified as Directors from 01/11/2016 to 31/10/2021 and therefore, the duty is cast upon them to file positive proof reflecting that they were qualified Directors as on the date of submission of the Resolution Plan.

8. The Learned Counsel appearing for the SRA submitted that pursuant to the Orders of the Hon'ble High Court of Karnataka, dated 12/06/2019, they were never said to be disqualified as per Section 164 of the Companies Act, 2013 and that their DIN was restored and was active as on the date of submission of the

Resolution Plan and hence they were not disqualified under Section 29A of the Code.

9. Admittedly, the Resolution Applicants, Mr. Kamal Pasha and Mr. Syed Fahad were Directors of other Companies which had defaulted in filing their Balance Sheets and Annual Returns for three years prior to 01/04/2014 and these Companies were struck off and the Resolution Applicants suffered disqualification, challenging which decision, the Resolution Applicants filed W.P. No. 43859 and 43860/2017 in which a Common Order was passed by the Hon'ble High Court of Karnataka on 12/06/2019, wherein it was held that the provisions of Section 164 (2) (a) of the Companies Act, 2013 is prospective in nature and would not be applicable to default committed prior to 01/04/2014. The Union of India filed a Writ Appeal in W.A. No. 2866/2019 as against the Order passed in W.P. No. 56393/2017 and has not sought to challenge the Order, passed in favour of the Resolution Applicants. The Hon'ble Court had directed the Registrar of Companies to restore the DIN of such Directors. We find force in the contention of the Learned Counsels for the Respondents that the Order in W.P. No. 43859 & 43860/2018 has attained finality and therefore, there is no disqualification since June 2019. It is also seen from the record that the RP has conducted due diligence through an independent Chartered Accountant, whose Report establishes that the DIN of the Resolution Applicant was restored and activated in terms of the Order of the Hon'ble High Court of Karnataka. In fact, the Hon'ble Supreme Court in the matter of ***'M.K. Rajagopal Vs. Dr. Periasamy***

PalaniGounder' (Supra) has clearly held that when the DIN status of Appellant was 'active', the Appellant could not have been treated as ineligible. A perusal of the Minutes of the Meeting of the CoC held on 21/07/2021 and a plain reading of Form H shows that the aspect of the DIN of the Resolution Applicant being active, is clearly noted. Therefore, this Tribunal is of the considered view that the 4th Respondent / The Consortium of Resolution Applicants cannot be stated to be disqualified under Section 29A of the Code.

ISSUE : IS CHARGING OF PENAL INTEREST BY KOTAK BANK AGAINST THE PROVISIONS OF SECTION 30 (2) OF THE CODE

10. The 3rd issue which was vehemently argued by the Learned Counsel for the Appellant is with respect to whether Kotak Bank was justified in charging penal interest and capitalizing on the same and deducting the amount from the value of the Resolution Plan. It is submitted that the Settlement Agreement is dated 22/05/2018 entered into between the Corporate Debtor, Promotors and Kotak Bank whereby the sanctioned amount was Rs. 20,00,00,000/- and the Promoters were required to pay Rs. 23.50,00,000/- which is inclusive of Principal, Interest and Penal Interest. The payment was to start on 31/12/2018 and in case of delay in payment and additional penal interest of 3 % p.m., compounded monthly interest would be charged by Kotak Bank on such delayed period. It is submitted that as per Clause 38 if the installments were not paid for three consecutive months, the Bank can proceed against the Corporate Debtor and its Promotors.

The Learned Counsel for the Appellant drew our attention to Clause 39 of the Agreement dated 22/05/2018 which stipulates as follows:

> *39. Consequences on occurrence of the Event of Default:*
>
> *On the occurrence of any event of default as mentioned herein, the Addresses shall be jointly and severally liable to pay the Entire Outstanding Amount plus further interest and penal interest at the rate of 3 % per month is also any other penal interest and other charges as per the terms of this present and KMBL shall be entitled to enforce the Securities for recovery of its dues under the all applicable law to KMBL including SARFAESI Act.*

11. It is also the case of the Appellant that Kotak Bank cannot use IBC as the recovery proceeding and if such high interest rates and penal interest was to be recovered, Kotak Bank could have initiated Suit Proceedings or Proceedings under the DRT or under the SARFAESI ACT, 2002 which are meant for recovery. The scope and objective of the IBC is revival and not recovery. It is submitted that CIRP was initiated on 31/01/2020, Kotak Bank submitted its Claim for Rs. 36,27,27,729/- and since the Appellant had already paid Rs. 2,00,00,000/- while the Petition was pending, the IRP had admitted the Claim for Rs. 34,27,27,729/-. But the SRA and the CoC had settled Kotak Bank's Claim for Rs. 46,00,00,000/- by showing the due and outstanding amount as Rs. 53,51,00,000/- as on 30/04/2021. The Learned Counsel for the Appellant strenuously contended that Kotak Bank cannot capitalize on the penal interest and deduct the same from the Resolution Plan. The Learned Counsel placed reliance

on the Judgment of the Hon'ble Apex Court in ***'Central Bank of India Vs. Ravindra and Ors.'*** reported in ***[(2002) 1 SCC 367]*** in which in Para 46, it is held as follows:-

> *"....True it is that once a suit is filed in the court, so far as Section 34 of the Civil Procedure Code is concerned, the relationship of parties ceases to be governed by contract between the parties and comes to be governed by section 34 of Civil Procedure Code is concerned."*

12. The Learned Counsel for the Appellant also placed reliance on the Judgment of the Apex Court rendered in the matter of ***'S.P. Chengalvaraya Naidu (Debt) by LRs Vs. Jagganath (Debt) by LRs & Ors.'*** reported in ***[(1994) 1 SCC 1]*** in paras 55 & 57 as follows:

> *"Though interest can be capitalized on the analogy that the interest failing due on the accrued date and remaining unpaid, partakes the character of the amount advanced on the date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalized. Further interest i.e., interest on interest, whether simple, compound or penal cannot be claimed on the amount of penal interest. Penal interest cannot be capitalized. It will be opposed to public policy."*
>
> *"We have dealt with the law governing the debtor and creditor relationship. We have not dealt with any provision or principle of taxation law where under deemed payment of interest consequent upon capitalization and actual payment whenever made may be treated as capital or revenue, which question shall have to be determined under the scheme of relevant statutory enactment."*

13. It is submitted that Section 21A of the Banking Regulations Act will not have any overriding effect upon Section 34 Procedure, save and except on

'Usurious Loans Act, 1918'. However, as to commercial transactions a proviso has been added under Section 34 providing discretion to exceed 6% interest rate, but it shall not exceed contractual rate of interest. It is contended that in this case as per Section 21A contractual rate is already computed in the admitted Claim. It is submitted that as per Sections 3& 5 of the Interest Act, 1978, the Act will apply only to situations where Section 34 of Civil Procedure Code, is not applicable. It is neither applicable to a situation where interest is payable as of right by virtue of an agreement not to a situation where payment of interest is barred by virtue of an Express Agreement. In the matter of ***'Irrigation Department, State of Orissa Vs. G.Roy' reported*** in ***[(1992) 1 SCC 508],*** the Hon'ble Supreme Court held that this Interest Act, 1978 is applicable to a situation where the Agreement does not provide for grant of such interest nor does it prohibit such grant when the Agreement is silent as to award of interest. It is the case of the Appellant that in the present case, interest and penal interest and their rates have been set out in the Settlement Agreement dated 22/05/2018 and the same has been acted upon and claimed interest and penal interest till the Claim was admitted by the IRP. The Learned Counsel for the Appellant submitted that this situation will not fall under the Interest Act, 1978. The Learned Counsel relied on the matter of ***'Kottayam District Co-Operative Bank Vs. Annie John'*** rendered by the Hon'ble High Court of Kerala and reported in ***[(2002) SCC Online KER 184]*** in support of his submission that penal interest cannot be included with the contractual rate of interest for awarding future interest from the date of the suit.

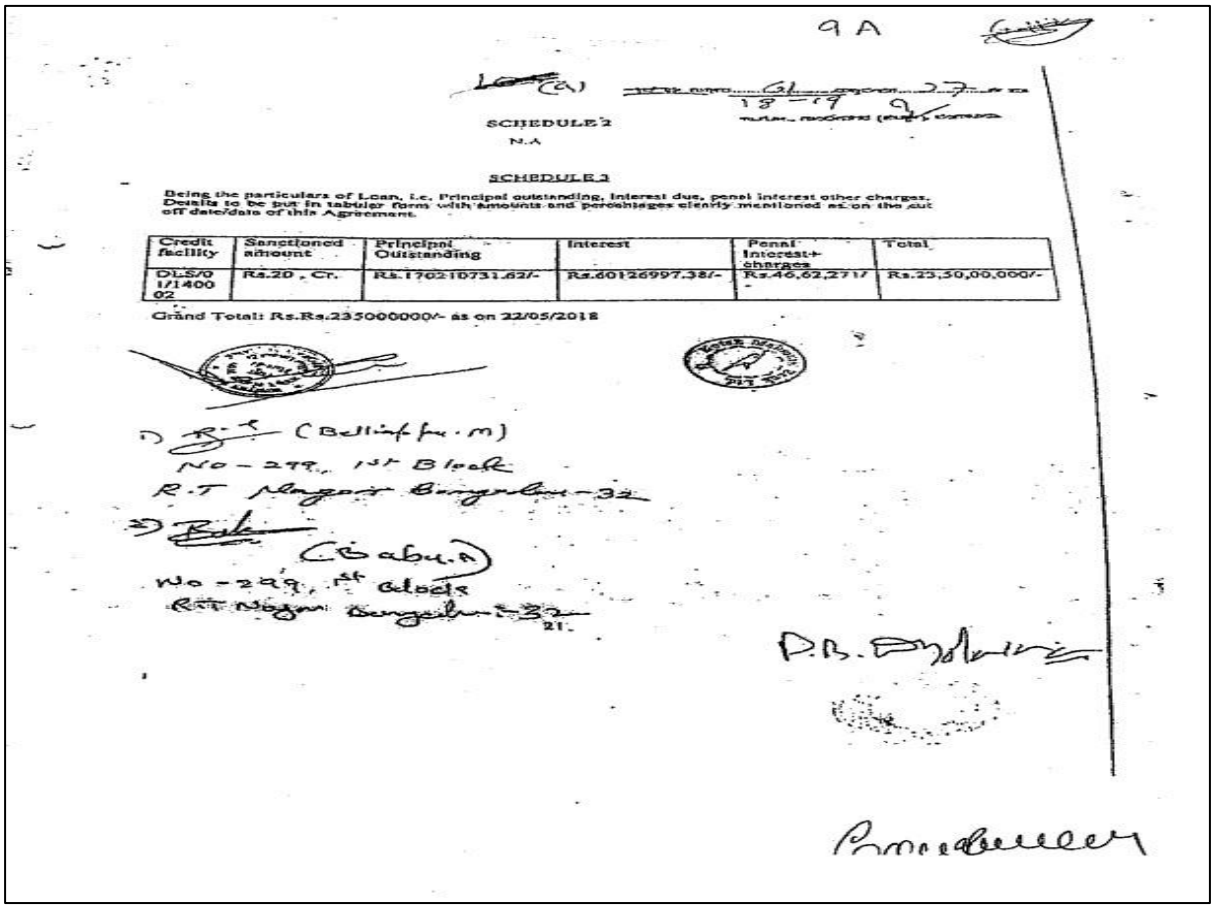
14. The Learned Counsel for the Appellant vehemently contended that after the RP admits the Claim, no further interest can be claimed. In the instant case, penal interest alone accrued to Rs. 13,65,00,000/- from 31/01/2020 to 30/04/2021 and the contractual rate of interest was Rs. 3,26,63,897/-. It is further submitted that Kotak Bank had recovered Rs. 9,30,00,000/- by initiating SARFAESI proceedings and invoking personal guarantee given by the Promotors. The Claim of Kotak Bank was settled for Rs. 43,00,00,000/- and is in excess of the admitted Claim. It is submitted that the recovery made from the guarantees and from the assets of the Corporate Debtor together shall not be more than the Claim admitted against the Principal Borrower. Kotak Bank had directly made a Settlement with SRA violating all laws and provisions of the Code. It is also the case of the Appellant that as per the BLRC Report, moratorium period is to be considered as 'calm period' without enhancing any claim, save and except to the extent envisaged under the Code. It is also submitted that the Hon'ble Supreme Court, in the matter of ***'Small Scale Industrial Manufactures Association Vs. Union of India & Ors.'*** reported in ***[(2021 8 SCC 511]*** held that there shall not be any charge of interest on interest / compound interest / penal interest in further period during the moratorium period notified by the RBI running form 01/03/2020 to 31/08/2020 effected by COVID 19 pandemic. The RP has not excluded the aforesaid period from calculation of interest on interest / compound interest / penal interest.

15. The Learned Counsel appearing for the RP submitted that Section 14 of the Moratorium does not put any kind of brake on the contractual interest liability. The Citations which the Appellant is relying upon relates to the role of Civil Courts and has not significance with the provisions of IBC, 2016. The reference to interest during pendency of Suit and post Decree are principles which are inapplicable as the RP is not a Civil Court but only collates Claims. It is further argued that the CIRP commencement date is the benchmark date for computation of amount due to Creditors. The Claim is determined as of the CIRP commencement date so that the RP can state the value of the amount due to the Creditors in the Information Memorandum and invite Expression of Interest from Prospective Resolution Applicants. It is contended by the Learned Counsels for the Respondents Nos. 1 & 3 that the Claim of the Creditors does not stop on the commencement of CIRP. The Learned Counsel appearing for the 2nd Respondent denied that the Bank was being paid an additional sum of Rs. 11,00,00,000/- over its admitted Claim of Rs. 34,00,00,000/-. The Learned Counsel drew our attention to Paras 14 & 14.1 of the Resolution Plan which states that the total amount due to the Bank as on 30/04/2021 is Rs. 53,51,00,000/-. Further, the Kotak Bank is the sole Creditor having charge over the entire project of 'Arun Auroville' and is accepting Rs. 46,00,00,000/- so that all the other stakeholders, namely homebuyers, workmen, and the Operational Creditors get 100 % of their admitted Claims. The Learned Counsel placed reliance on the Judgment of NCLAT dated 14/11/2018 in **'*Binani Industries Vs. Bank of Baroda and Anr.*'**

in ***Company Appeal (AT) (Ins) No. 32/2018,*** wherein the Financial Creditors were paid interest during the CIRP Period.

16. The moot question which arises for consideration in this issue of capitalization of penal interest by the Bank, raised by the Appellant, is to be examined within the Provisions of IBC, 2016. The Learned Counsel for the Appellant placed reliance on the Judgment of the Hon'ble Apex Court in the matter of in ***'Central Bank of India Vs. Ravindra and Ors.'*** reported in ***[(2002) 1 SCC 367]*** wherein it is held that subject to the terms of a Voluntary Contract or established practice or usage and subject to any legislative restriction, charging of interest at reasonable rates on lendings on periodical rests and capitalization thereof on remaining unpaid was held permissible under Section 34 of Civil Procedure Code, 1908 with certain note of caution. The Hon'ble Apex Court has discussed in detail the Section 34 of the Civil Procedure Code, 1908 and held that Section 34 confers the discretion on the Court to award or not to award interest or to award interest at such a rate as it deems fit dehors the contract between the Parties. The discretion has to be exercised fairly, judiciously and for reasons and not arbitrarily. It was also held that the relief of pendente lite and future interest can be refused. The subject matter in that case was with respect to whether the Hon'ble High Court was justified in upholding the Trial Court's Decree to the extent future interest was not allowed on the entire amount but pendente lite and future interest at 11% was allowed only on the Principal amount. *This ratio cannot be made applicable to the facts of this case as this Tribunal under the*

Provisions of IBC, 2016 does not have the jurisdiction or the discretion to either award any interest or reduce or increase any rate of interest which is the subject matter of a contract between the Financial Creditor and the Promotor of the Corporate Debtor. It is the case of the Appellant that in case of any delay in payment, 3% penal interest per month compounded monthly will be charged on the delayed period and if the installments are not paid for consecutive three months, the default would arise giving the right to the Bank against the Corporate Debtor. The percentage of interest charged is a matter of terms of the Settlement Agreement between Kotak Bank and the Promotors of the Corporate Debtor Company, to which they are bound. The Agreement dated 22/05/2018 signed by the Parties and the Bank is reproduced as hereunder:-



9A

SCHEDULE 2
N.A

SCHEDULE 3

Being the particulars of Loan, i.e. Principal outstanding, interest due, penal interest other charges. Details to be put in tabular form with amounts and particulars clearly mentioned as on the cut off date/date of this Agreement.

Credit facility	Sanctioned amount	Principal Outstanding	Interest	Penal Interest+ charges	Total
DLS/01/1400 02	Rs.20 . Cr.	Rs.170210731.62/-	Rs.60126997.38/-	Rs.46,62,271/	Rs.23,50,00,000/-

Grand Total: Rs.Rs.235000000/- as on 22/05/2018

1) R.T (Bullet fu.m)
No - 299, 1st Block
R.T Nagar Bangalore-32

2) Babu
(C Babu.A)
No - 299, 1st Block
R.T Nagar Bangalore-32

P.B.

17. From the aforenoted terms of the Agreement, it is noted that penal interest charges were added to the amount due and payable. Clauses 28 & 29 of the Settlement Agreement read as hereunder:-

> *28. The Addressees, have handed over post-dated cheque each to KMBL. In respect of the Settlement Amount and KMBL acknowledges receipt of the same in terms of Schedule – III attached herewith. Further, all the Addressees agree, confirm and undertake to maintain sufficient balance in their account for due clearance of aforesaid Cheques on respective dates as and when produced by KMBL for clearance on or after its due dates.*
>
> *29. It is agreed by and between the parties that the Securities shall stand as a continuing security till the full and final realization of Settlement Amount by KMBL and it will be enforceable by KMBL for all monies which may at any time become due and payable by the Addresses to KMBL under the Loan Documents executed between the Addressees and Assignor and Addressees and KMBL respectively to read with above said Assignment Agreement. <u>It is further agreed by and between the parties that the Securities shall also stand as a continuing security fo0r any additional financial facility granted by the KMBL to Addressees till its full and final realization by the KMBL as per the terms and conditions of such additional financial facility</u>.*
>
> *(Emphasis Supplied)*

18. This Tribunal is of the considered view that as far as penal interest is concerned, the Appellant is bound by the terms of the Settlement Agreement. The next question which arises for consideration is whether after the moratorium is imposed under Section 13 of the Code, the clock will stop ticking with respect to

the Claim amount and therefore, no further interest after the admission of the Claim by the RP is to be charged. At this juncture, we find it relevant to reproduce Section 14 of the Code, which deals with moratorium:

> *"14. Moratorium. –*
>
> *(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -*
>
> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b)transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
>
> *(d)the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor*
>
> *[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator*

or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

[(3) The provisions of sub-section (1) shall not apply to —

[(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process

period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

19. A simple and purposive reading of this Section 14 does not specify any 'interest waiver' during the period of moratorium. Therefore, this Tribunal is of the earnest view that the contention of the Learned Counsel for the Appellant that no interest could be charged subsequent to the admission of the Claim by the RP is untenable, specifically keeping in view the Agreement, the Provisions of Section 14 of the Code. As regarding the argument of the Appellant that the RP ought not to have added the interest of the Claim amount after admission of the Claim, we hold that the role of the RP under IBC, 2016 is only to collate the Claims and that he does not have any adjudicatory powers. The Claim of the Creditors does not stop on initiation of CIRP. Only the actions of enforcement are suspended during the period of moratorium. We find force in the contention of the Learned Counsel for the RP that the Claim is determined as of the CIRP commencement date so that the RP can state the value of the amount due to the Creditors in the Information Memorandum and invite Expression of Interest from Prospective Resolution Applicants.

20. Section 238 of the Code is categorical that the Code will apply, notwithstanding anything inconsistent therewith contained in any other law of the

time being inforce. Section 14(1)(a) of the Code states, inter alia, that on the 'insolvency commencement date' the 'Adjudicating Authority' shall by order continuation of pending suits or proceedings against the Corporate Debtor including execution of any Judgment, decree or order in any Court of Lw, Tribunal, arbitration panel or other authority." That the Code will prevail over all other statutes inconsistent therewith has been explained in the decision, dated 31st August 2017 of the Supreme Court in the matter of '**Ínnoventive Industries Ltd. Vs. ICICI Bank'** in ***Civil Appeal No. 8337-8338/2017.***

21. Section 238 of the Code reads as hereunder:-

> *"The Provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

22. Section 63 of the Code refers to jurisdiction of the Civil Court, vis a vis the IBC, 2016. Section 63 reads as hereunder:-

> *"63. Civil court not to have jurisdiction.—No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code."*

23. The right which vested with the Kotak Bank / The Financial Creditor by virtue of the Loan Agreement / Settlement Agreement cannot be interfered by the Code. It is mainly for this reason that the non obstante clause, in the widest terms

possible is contained in Section 238 of the Code, so that any vested right of either the Corporate Debtor or the Creditor, under any other law for the time being in force, cannot come in the way of the Code. The whole scheme and objective of the Code is to bring the defaulter Companies back on their feet, but at the same time cannot fiddle with the terms of the Contract as far as interest / penal interest or any other terms of the Agreement or Contract is concerned. To reiterate, it is not in the domain of the IBC, 2016, even to decide any contractual interest liability. Section 14 does not impose any restriction on charging of any interest till the amount is paid. It is the commercial wisdom of the CoC with respect to the quantum of amounts to be paid to the Creditors within the Provisions of the Code.

24. It is also seen from the record that the Appellant had not filed any Suit to redeem the mortgage and the Bank / Financial Creditor has taken steps to recover the balance amount due from the Appellant after the approval of the Resolution Plan. It is significant to note that 'this recovery of the balance amount' was never challenged by the Appellant herein. We find force in the submission of the Learned Counsel for the RP that there is also a Discharge Deed dated 11/01/2023 executed by the Appellant. There is no provision in the Code that enables the Corporate Debtor or a Guarantor to seek remission in the interest claims from the Financial Creditors solely on the basis that there is a Resolution Plan. This Tribunal keeping view the provisions of the Code, the terms of the Agreement, the commercial wisdom of the CoC, is of the considered view that interest

continues to accumulate as per law until the amount is repaid and we do not see any illegality in the act of the CoC in collecting the amount of penal interest by Kotak Bank. In this case, the amount due as on 30/04/2021 is Rs. 53,51,00,000/- and under the plan the Bank was paid Rs. 46,00,00,000/- and the homebuyers' interest was also protected as they have also been provided 100**%** of their Claims.

25. The Hon'ble Supreme Court in a catena of Judgments has laid down that the 'Commercial wisdom of the CoC' is non-justiciable. This Tribunal finds it relevant to place reliance on the Judgment in the matter of ***'Kalparaj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.'*** reported in ***2021 (10 SCC 401)***, wherein the Hon'ble Apex Court has held that unless there is any violation of Section 30 (2) of the Code, the Commercial wisdom of the CoC is not be interfered with. The relevant Paras in the matter of ***'Kalparaj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.'*** (Supra) are detailed as hereunder:

> ***"164.*** *It will be further relevant to refer to the following observations of this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] : (SCC pp. 186-87, para 57)*
>
> > *57. ... 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."

165. *It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.*

166. *The position is clarified by the following observations in para 59 of the judgment in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , which reads thus : (SCC p. 187)*

"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."

167. *This Court in Essar Steel India Ltd. Committee of Creditors [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] after reproducing certain paragraphs in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] observed thus : (Essar Steel India case [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , SCC p. 589, para 67)*

"67. … Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the adjudicating authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] ."

168. *It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.*

169. *In Maharashtra Seamless Ltd. [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , NCLT had approved [V. Venkatachalam v. Indian Bank, 2019 SCC OnLine NCLT 713] the plan of the appellant therein with regard to CIRP of United Seamless*

Tubulaar (P) Ltd. In appeal, Nclat directed [Padmanabhan Venkatesh v. V. Venkatachalam, 2019 SCC OnLine NCLAT 285] , that the appellant therein should increase upfront payment to Rs 597.54 crore to the "financial creditors", "operational creditors" and other creditors by paying an additional amount of Rs 120.54 crores. Nclat further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs 120.54 crores in addition to Rs 477 crores and deposit the said amount in escrow account within 30 days, the order of approval of the "resolution plan" was to be treated to be set aside. While allowing the appeal and setting aside the directions of Nclat, this Court observed thus : (Maharashtra Seamless case [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , SCC p. 487, para 30)

> *"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 : (2021) 2 SCC (Civ) 443] , 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."

170. *This Court observed, that 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. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.*

171. *It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.*

(Emphasis Supplied)

In the facts of the instant case, for all the aforenoted reasons, we do not see any violation of the Provisions of Section 30(2) of the Code.

26. It is submitted by the Learned Counsel appearing for the SRA that out of an amount of Rs. 53,00,00,000/- an amount of Rs. 37,02,00,000/- has already been paid to the Creditors and the Plan has already been implemented. This

Tribunal is conscious of the fact that speed is the essence of the IBC, 2016 and we do not wish to set the clock back.

ISSUE : BEING AN MSME, THE APPELLANT OUGHT TO HAVE BEEN GIVEN SUFFICIENT OPPORTUNITY AND DUE PREFERENCE WITH RESPECT TO 'THE PLAN'

27. Now, we address to the issue raised by the Appellant that despite being an MSME, the Plan submitted by the Promotor was not accepted. It is an admitted fact that the Appellant did not provide the net worth statement and never deposited the Earnest Money Deposit ("EMD") Amount and did not meet the eligibility criteria. It is seen from the record that pursuant to the approval of the prospective Resolution Applicant criteria by the members of the CoC in the 8th CoC Meeting held on 29/10/2021, the RP proceeded to issue an Expression of Interest in Form G on 04/11/2020. The CoC in the 14th CoC Meeting held on 17/03/2021 directed the RP to issue another EOI to better the Resolution Plan value and to maximise the interests of the CIRP Process, the RP proceeded to re-issue an Expression of Interest in Form G on 20/03/2021. The Final List of Eligible Prospective Resolution Applicants was prepared on 07/04/2021 by RP for the 2nd Expression of Interest issued on 20/03/2021. Eligible Prospective Resolution Applicants were finalized on 07/04/2021 and the invitation to submit Resolution Plan was sent on 09/04/2021 for the 1st Expression of Interest issued on 04/11/2020. The Prospective Resolution Applicant was intimated of the revisions and updations made to the previously issued RFRP. The last date of

submission of Resolution Plan was 18/04/2021 for the 2nd Expression of Interest issued on 20/03/2021 and the Resolution Applicant submitted the Resolution Plan on 01/04/2021 and the Plan was approved on 21/07/2021.

28. At this juncture, a comprehensive list of the dates and the Meetings when the Appellant was present is being reproduced for better understanding of the case and also for examining the issue whether the Appellant was not given an opportunity to submit a Plan.

Meeting reference	*Meeting Date*	*Issue*	*Presence of suspended director*	*Minutes given to suspended directors on*
1	*02 Mar 2020*	*Constitution of CoC only for one project- Arun Aurovilla and legal advise for the same. No objections were raised in relation to the same.*	***Mr. Anand Bhat, Authorised representative of suspended Director***	*03 March 2020*
2.	*17 Mar 2020*	*Mr. Arun Kumar (Corporate Debtor) requested to RP via email on 10th March 2020 to allow sale of certain flats/Villaments in the Auroville Project.*	***Mr. Anand Bhat, Authorised representative of suspended Director***	*18 March 2020*

3	*30 Apr 2020*	*Revised legal opinion to consider the CD as a whole instead of CIRP only for Arun Aurovilla*	***Not Present***	*02 May 2020*
4	*29 Jun 2020*	*Presence of Creditors of the other project and no specific discussions on the matter relating to project wise CoC*	***Mr. Arun Kumar – promoter director***	*01 July 2020*
5	*10 Aug 2020*	*Replacement of RP was discussed and approved*	***Mr. Arun Kumar***	*10 August 2020*
6	*22 Sept 2020*	*Representative of suspended director enquired about project wise CoC and no significant objections were raised*	***Mr. Arun Kumar and Mr. Anand Bhat***	*23 Sep 2020*
7	*17 Oct 2020*	*Status report filed by the RP to Hon'ble NCLT indicating only the creditors of Arun Aurovilla was presented and no objections were raised. RP placed on record that an*	***Mr. Arun Kumar***	*20 Oct 2020*

		application will be filed for second CoC for Parkwoods and discussions on EOI and Form G to be placed for Arun Aurovilla		
8	*29 Oct 2020*	*Discussions on mode of operation if two CoC's were to be constituted and continued and need to file application before Hon'ble NCLT for necessary directions*	***Mr. Arun Kumar***	*03 Nov 2020*
9	*28 Nov 2020*	*Application filed before Hon'ble NCLT for permitting the constitution and continuance of the second CoC for Parkwoods was placed and noted*	***Mr. Arun Kumar***	*30 Nov 2020*
10	*07 Dec 2020*	*EOI's received were discussed and approval of RFRP, IM to be issued to PRA*	***Mr. Kabilan V – AGM Accounts representing the Suspended Director***	*9 Dec 2020*
11	*06 Jan 2021*	*Revision in constitution of CoC on*	***Mr. Kabilan V – AGM Accounts***	*9 January 2021*

		account of claim by one Registered Home Buyer approved by the CoC and communication of withdrawal of application filed for second CoC for Arun Parkwoods	***representing the Suspended Director***	
12	*03 Feb 2021*	*Place on record receipt of Resolution Plan for Arun Aurovilla only from one applicant.*	***Not Present***	*6 February 2021*
13	*22 Feb 2021*	*Resolution Plan placed for consideration and SRA was present for clarifications – one consortium of M/s Syed Kamal Pasha and Syed Fahad.* *Application filed by M/s Kenstream and M/s Puravankara for Project parkwoods was placed before the CoC.*	***Not Present***	*25 February 2021*
14	*17 Mar 2021*	*CoC rejected the Resolution*	***Mr. Arun Kumar***	*18 March 2021*

		Plan and directed the RP to place another EOI so that the plan could be improved.		
15	*09 Apr 2021*	*Application filed by M/s Kenstream and M/s Puravankara for Project parkwoods was not allowed by Hon'ble NCLT and the same placed before the CoC along with the order to following the orders in IA 187 and 195 of 2020.* *Reissuance of EOI for Project Arun Aurovilla was placed along with Resolution Plan from only one consortium of M/s Syed Kamal Pasha and Syed Fahad for Rs. 41.23 Crores which was not accepted by the CD and CoC ordered*	***Mr. Arun KumarM12 April***	*12 April 2021*

		liquidation to be considered.		
16	*20 Apr 2021*	*CoC directs Liquidation as the plan was not found to be viable.*	***Mr. Arun Kumar***	*28 April 2021*
17	*10 May 2021*	*CoC proceeds to consider the Revised Resolution Plan with clear indication in all places that the same is for Project Arun Aurovilla only*	***Mr. Arun Kumar***	*15 May 2021*
18	*08 July 2021*	*Formal rescinding of Resolution to liquidate the Corporate Debtor and final resolution plan as discussed directed to be placed before the CoC in the next meeting.*	***Mr. Arun Kumar***	*10 July 2021*
19	*20 and 21 July 2021*	*Final Resolution Plan is placed for discussion.* *Objection received from the promoter on July 20, 2021 relating to disqualification*	***Mr. Kabilan V AGM Accounts representing the Suspended Director present on July 20,2021***	*23 July 2021*

		of the SRA, plan value being less that liquidation vale and to return the documents pertaining to Project Parkwoods. *The objections pertaining to Aurovilla were discussed and noted.* *The Resolution Plan was approved unanimously for a value of Rs. 53.42 Crores.*		
20	*04 July 2022*	*Discussions on the physical status of the project site including flooding and delay in approval process of resolution plan filed before Hon'ble NCLT.*	***Mr. Kabilan V – AGM Accounts representing the Suspended Director.***	*Jul 6, 2022*

29. It is pertinent to mention that the Promotor had attended all the CoC Meetings since inception and was very much present on the aforenoted dates and despite issuance of Notice to attend the Meeting on 21/07/2021, the Appellant /

Promotor was not present. It is also significant to mention that the Appellant's representative was present in the Meeting dated 20/07/2021.

30. It is an admitted fact that the Appellant could not provide the net worth statement or deposit the EMD amount. The Learned Counsel for the Appellant submitted that the amount spent by the Promotor during the CIRP was requested to be taken as EMD amount, but was refused by the CoC. Needless to add, the rejection was never challenged by the Appellant herein. As can be seen from the aforenoted table and the dates given in Para 27, it is clear that though two 'Form -Gs' were issued, *the Appellant never participated in the 2nd EOI and did not submit a Resolution Plan.* The Fourth Respondent after improving the Resolution Plan made a request for consideration and the CoC in its 17th Meeting held on 10/05/2021 took steps to consider the revised Resolution Plan. Even at this stage, the Appellant did not challenge the revised consideration of the Resolution Plan of the 4th Respondent.

31. One of the issues raised by the Appellant is that the Resolution Plan value is less than the Liquidation value and that this is in violation of the Provisions of Section 30(2) of the Code. The 'Adjudicating Authority' observed that the Liquidation value is merely to assist the CoC in deciding of the Resolution Plan and its commercial viability. We find substance in the argument of the Learned Counsels for the Respondents that the Liquidation value is Rs. 77,00,00,000/- which is based on the assumption that the project is fully completed in all aspects. The Plan value is Rs. 53,42,00,000/- and it is submitted by the SRA that they

would need to invest an additional Rs. 15,00,00,000/- over and above the sum of Rs. 54,00,00,000/-. Additionally, another Rs. 35,00,00,000/- would be required to make the Project viable and also to correct the deviations in the construction of the project as four pent houses were constructed without approval. It is seen from the table that all the dues of the Corporate Debtor company are settled to 100 % and the CoC in its commercial wisdom has unanimously approved the Resolution Plan. We do not see any force in the contention of the Appellant that the Resolution Plan is for a low amount less than the liquidation value and ought not to have been approved.

32. It is pertinent to mention that the Appellant addressed a letter dated 30/01/2021, requesting to submit a revival plan in partnership with the investors. The same is detailed as hereunder:-

30th January 2021 ***WITHOUT PREJUDICE***

To

The Members of Committee of Creditors
Arun Aurovilla Project (under CIRP)
Of Arun Shelters Private Limited
Bangalore

Through

The Resolution Professional
Arun Aurovilla Project (under CIRP)
Of Arun Shelters Private Limited
Bangalore

Dear Sirs/Madam,

Sub: EOI process and stakeholders interest – our request
Ref: 1. EOI Process initiated by public announcement dated 04/11/2020
2. NCLT order C.P (IB) No. 305/BB/2019 dated 31/01/2020

I refer to the ongoing CIRP proceedings of the Arun Aurovilla project of Arun Shelters P Ltd.

During the ongoing EOI process, I understand that there only two prospective resolution applicants and out of which only one resolution application is received by the RP/CoC from one resolution applicant before the due date for submission of resolution plan.

As you may appreciate, with only one resolution applicant, it would be extremely difficult to ensure value maximisation for all the stakeholders. As you are aware, objective of the IBC is not debt recovery for financial creditors but it is a law for reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets, to promote entrepreneurship, availability of credit and balance the interests of all stakeholder. Therefore, interest of all the stakeholders is very important and it has to be protected.

I as a promoter of the company has significantly invested in the company by way of debt as well as equity over a period of time which is evident from the financials of the company and it is utmost important for the CoC and the RP to protect my interest also in the resolution process.

Since there is only one resolution applicant, I am of the view that a good value discovery may not be possible which will be in the interest of the company and all its stakeholders. I also note that the valuation of the project Aurovilla is very high as per the valuation reports obtained by me and in my humble submission, one resolution applicant may not be in a position to provide better value. Further, I have a concern that there may be a possibility of CoC selling/transferring a very valuable asset at a throwaway price, in which case, I will have a very strong objection to the entire CIRP/EOI process.

Now, in view of improvement in economic situation, there are many prospective investors who have approached me and evinced keen interest in investing in the Company as well as in the Aurovilla project, parkwood project as well as the Arun Patios project of the company and willing to partner with me offering a good value proposition. This can resolve the insolvency situation of the Aurovilla project and address the liquidity issues of other projects.

Therefore, I am confident that with new investors, there is ample scope of good value maximisation for all the stakeholders.

In light of the above, I request CoC and RP to: allow me to submit a revival plan in partnership with investors.

Alternatively, I would request the CoC and RP to go for another of EOI, inviting more resolution applicants for better value discovery and value maximisation.

Therefore, I humbly request CoC and RP to kindly consider our request and take positive steps in the direction of resolution rather than liquidation or selloff of the project at a cheap price. This request is being made without prejudice to any/all other rights that are available to me under the extant provisions of IBC/other laws.

Thanking you.

Sincerely,
Sd/-
Arun Kumar M

33. Subsequent to this letter dated 30/01/2021, the Appellant still remained silent and did not take any steps and the CoC approved the Resolution Plan seven months thereafter, on 21/07/2021. The Appellant on 26/07/2021, addressed a letter offering a settlement of Rs. 36,11,00,000/- which was rejected by the Bank / Single Financial Creditor, vide Letter dated 29/01/2021. Having not challenged the decision of the CoC in not qualifying him as a Prospective Resolution Applicant, the Promotor cannot now at the belated stage after the approval of the Plan by the Adjudicating Authority states that he is interested in offering a viable solution. It is borne from the record that there is no 12A Application, filed by the Appellant herein, seeking any kind of settlement. The Promotor being an MSME is given an opportunity under the Provisions of the Code to present a Plan. At the

same time, the Code does not contemplate *any kind of preference to be given to an MSME Promotor by the CoC while accepting a Resolution Plan*. The CoC in its commercial wisdom examines the criteria for maximisation of value of assets and protecting the interest of all stakeholders. Therefore, the contention of the Appellant that being an MSME Promotor he ought to have been given a preference is unsustainable, more so when the Appellant did not furnish any Resolution Plan but now at a belated stage, *after* the approval by the 'Adjudicating Authority', is offering an amount in settlement. Any kind of settlement is between the Parties and no settlement can be directed by way of an Order under the Provisions of IBC, 2016, specifically keeping in view the ratio of the Hon'ble Apex Court in the matter of ***'E. S. Krishnamurthy & Ors. Vs. Bharath Hi-tech Builders Private Limited'*** reported in ***[(2022) 3 Supreme Court Cases 161].***

34. For all the aforegoing reasons, this Company Appeal (AT) (CH) (Ins) No. 431/2022 is 'dismissed'. No Costs. Connected Pending Interlocutory Applications, are 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

08/08/2023
SPR/TM