NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD SPECIAL BENCH
(Virtual Hearing)
PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 02.11.2023 AT 10:25 A.M.

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB)/420/7/HDB/2018	Main Case	7 of IBC	Axis Bank Ltd Vs Lanco Amarkantak Power Ltd
	IA(IBC)/961/2023 in IA(IBC)/632/2021	60(5) of IBC	Edelweiss Asset Reconstruction Company Ltd & Others Vs Saurabh Kumar Tikmani
	IA(IBC)/270/2022		
	IA(IBC)/477/2021		
	IA(IBC)/632/2021		

ORDER

IA(IBC)/270/2022, IA(IBC)/477/2021 & IA(IBC)/632/2021:

Ms. Mahima Sareen, Mr.V.V.S.N.Raju & Mr.Abhilash Chaudhary, Ld. Counsels for the Applicant present. Mr. Abhishek Swaroop, Mr.Anupm Prakash, Mr. Palash Agarwal, Mr.Vasu Manchada & Mr. Anmol, Ld. Counsels for the majority lenders of the CoC present. Ms. Rubaina Khatoon & Ms. Anjali, Ld. Counsels for the RP present. Common order pronounced. The reference is answered by concurring with the opinion of the judicial member, vide separate orders.

IA(IBC)/961/2023 in IA(IBC)/632/2021: Both the counsel present. This application is filed by the Applicant, Edelweiss Asset Reconstruction Company Ltd (acting in its capacity as the trustee of EARC Trust SC244) seeking to take on record the additional documents, which are i) the common loan agreement dated 29.09.2010 entered into between the CD and Infrastructure Development Finance Company Limited (IDFC) in its capacity as senior lender and lender's agent (Loan Agreement) and ii) a diagrammatic representation of security of financial debt admitted by the RP in the CIRP of the CD.

But this case comes before me only on a reference for third opinion, which has to be based only on the material on which the split judgment was based. Otherwise it would amount to the reference bench going beyond it's scope. Hence this Application is dismissed. Accordingly, IA(IBC)/961/2023 is dismissed as disposed of.

SD/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu (PS)

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD SPECIAL BENCH

IA (IBC)/477/2021, IA (IBC)/632/2021 & IA (IBC/270/2022
IN
CP (IB)/420/7/HDB/2018

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016

In the matter of
M/s. **LANCO AMARKANTAK POWER LIMITED**
And

In the matter of

IA(IBC)/477/2021 IN CP (IB)/420/7/HDB/2018

BETWEEN:

1. Edelweiss Asset Reconstruction Co.Ltd
(Acting in its capacity as the trustee of EARC Trust SC244),
Having its office at Edelweiss House, 1st Floor, Off CST Road,
Kalina, Mumbai-400098

2. Canara Bank
(Including merged Syndicate Bank)
Office at 2nd Floor, T Subba Rami Reddy Complex,
1-7-1, S.P.Road, Secunderabad, Telangana-500003.

3. UCO Bank
Office at Flagship Corporate Branch (2268),
6-3-1108, Ground Floor, Navabharat Chambers,
Raj Bhavan Road, Somajiguda, Hyderabad -500082

... **Applicants**

AND

1. Mr.Saurabh Kumar Tikmani,
RP of Lanco Amarkantak Power Limited,
Office at KPMG Restructuring Services LLP,
1st Floor, Lodha Excelus, Apollo Mills Compound,
N.M. Joshi Marg, Mahalaxmi,
Mumbai City, Maharashtra-400 011.

2. Power Finance Corporation,
having its Office at 1,
Barakhamba Lane,
Connaught Place, New Delhi- 110 001.

3. Rural Electrification Corporation,
having its Office at Core-4, SCOPE Complex,
7, Lodhi Road, CGO Complex, Pragati Vihar,
New Delhi – 110 003.

4. IDBI Bank,
Having its office at IDBI Tower,
WTC Complex, Cuffe Parade,
Colaba, Mumbai, MH-400005

5. Indian Overseas Bank,
having its Office at 763,
Anna Salai, Chennai, Tamilnadu – 600 002.

6. Axis Bank,
having its Office at 'Trisul' 3rd Floor,
Opp: Samartheshwar Temple,
Law Garden, Ellisbridge,
Ahmedabad, Gujarat -380 006.

7. Union Bank of India (Erstwhile Andhra Bank),
having its Office at Union Bank Bhavan, 239,
Vidhan Bhavan Marg, Nariman Point,
Mumbai – 400 021, Maharashtra, India.

8. Punjab National Bank (And United Bank of India),
having its Office at Plot No.4, Sector-10,
Dwarka, New Delhi – 110 075.

9. Life Insurance Corporation of India
Having its Office at 4th Floor,
West Wing, Yogakshema, Jeevan Bhima Marg,
Nariman Point, Mumbai, Maharashtra – 400 021.

10. Bank Of India,
having its Office at Star House, C – 5,
"G" Block, Bandra Kurla Complex,
Bandra (East), Maumbai, Maharashtra – 400 051.

11. Indian Bank (And Allahabad Bank),
having its Office at No.66, Rajaji Salai,
Chennai, Tamil Nadu – 600 001.

12. Small Industries Development Bank of India,
having its Office at SIDBI Tower 15,
Ashok Marg, Lucknow, G.P.O.
Uttar Pradesh – 226 001.

... **Respondents**

AND

In the matter of IA(IBC)/632/2021 IN CP (IB)/420/7/HDB/2018

BETWEEN:

1. Edelweiss Asset Reconstruction Co.Ltd
(Acting in its capacity as the trustee of EARC Trust SC244),
Having its office at Edelweiss House, 1st Floor, Off CST Road,
Kalina, Mumbai-400098

2. Canara Bank
(Including merged Syndicate Bank)
Office at 2nd Floor, T Subba Rami Reddy Complex,
1-7-1, S.P.Road, Secunderabad, Telangana-500003.

3. UCO Bank
Office at Flagship Corporate Branch (2268),
6-3-1108, Ground Floor, Navabharat Chambers,
Raj Bhavan Road, Somajiguda, Hyderabad -500082

... **Applicants**

AND

1. Mr.Saurabh Kumar Tikmani,
Resolution Professional of Lanco Amarkantak Power Limited, having its Office at KPMG Restructuring Services LLP, 1st Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalaxmi, Mumbai City, Maharashtra-400 011.

2. Power Finance Corporation,
having its Office at 1,
Barakhamba Lane,
Connaught Place, New Delhi- 110 001.

3. Rural Electrification Corporation,
having its Office at Core-4, SCOPE Complex,
7, Lodhi Road, CGO Complex, Pragati Vihar,
New Delhi – 110 003.

4. Indian Overseas Bank,
having its Office at 763,
Anna Salai, Chennai, Tamilnadu – 600 002.

5. Axis Bank,
having its Office at 'Trisul' 3rd Floor,
Opp: Samartheshwar Temple,
Law Garden, Ellisbridge,
Ahmedabad, Gujarat -380 006.

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having its Office at Union Bank Bhavan, 239,
Vidhan Bhavan Marg, Nariman Point,
Mumbai – 400 021, Maharashtra, India.

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having its Office at Plot No.4, Sector-10,
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Having its Office at 4th Floor,
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Having its office at IDBI Tower,
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Colaba, Mumbai, MH-400005

11. Indian Bank (And Allahabad Bank),
having its Office at No.66, Rajaji Salai,
Chennai, Tamil Nadu – 600 001.

12. Small Industries Development Bank of India,
having its Office at SIDBI Tower 15,
Ashok Marg, Lucknow, G.P.O.
Uttar Pradesh – 226 001.

... **Respondents**

AND

In the matter of **IA (IBC)/270/2022 IN CP (IB)/420/7/HDB/2018**

BETWEEN:

Edelweiss Asset Reconstruction Co.Ltd
(Acting in its capacity as the trustee of EARC Trust SC244),
Having its office at Edelweiss House, 1st Floor, Off CST Road,
Kalina, Mumbai-400098

... **Applicant**

AND

1. Mr.Saurabh Kumar Tikmani,
Resolution Professional of Lanco Amarkantak Power Limited, having its Office at KPMG Restructuring Services LLP, 1st Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalaxmi, Mumbai City, Maharashtra-400 011.

2. Power Finance Corporation,
having its Office at 1,
Barakhamba Lane,
Connaught Place, New Delhi- 110 001.

3. Rural Electrification Corporation,
having its Office at Core-4, SCOPE Complex,
7, Lodhi Road, CGO Complex, Pragati Vihar,
New Delhi – 110 003.

4. Indian Overseas Bank,
having its Office at 763,
Anna Salai, Chennai, Tamilnadu – 600 002.

5. Axis Bank,
having its Office at 'Trisul' 3rd Floor,
Opp: Samartheshwar Temple,
Law Garden, Ellisbridge,
Ahmedabad, Gujarat -380 006.

6. Union Bank of India (Erstwhile Andhra Bank),
having its Office at Union Bank Bhavan, 239,
Vidhan Bhavan Marg, Nariman Point,
Mumbai – 400 021, Maharashtra, India.

7. Punjab National Bank (And United Bank of India),
having its Office at Plot No.4, Sector-10,
Dwarka, New Delhi – 110 075.

8. Life Insurance Corporation of India
Having its Office at 4th Floor,
West Wing, Yogakshema, Jeevan Bhima Marg,
Nariman Point, Mumbai, Maharashtra – 400 021.

9. Bank Of India,
having its Office at Star House, C – 5,
"G" Block, Bandra Kurla Complex,
Bandra (East), Maumbai, Maharashtra – 400 051.

10. Small Industries Development Bank of India,
having its Office at SIDBI Tower 15,
Ashok Marg, Lucknow, G.P.O.
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11. Indian Bank (And Allahabad Bank),
having its Office at No.66, Rajaji Salai,
Chennai, Tamil Nadu – 600 001.

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13. Canara Bank (Including Merged Syndicate Bank),
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1-7-1, S.P. Road, Secunderabad – 500003

14. UCO Bank,
having its office at Flagship Corporate Branch (2268),
6-3-1108, Ground Floor, Navabharat Chambers,
Raj Bhavan Road, Somajiguda, Hyderabad-500082

... **Respondents**

Order dated: 02.11.2023

***Coram*:**

Justice Telaprolu Rajani, Member (Judicial).

Parties/Counsels present:

For the Applicants	:	Mr. S. Ravi, Sr. Counsels along With Mr. VVS N Raju, Ms. Mahima Sareen, Mr. Abhilash Chaudhary, Mr.Satyajit Bose, Ms.Misha, Advocates.
For the RP	:	Mr. S. Niranjan Reddy, Sr.Counsel along with Mr. Ramakant Rai, Mr.Mohit Rohatgi, Mr.Aayush Mitruka, Mr. Ravin Kapur, Ms.Lisa Mishra, Ms. Rubaina Khatoon & Mr.Shivam Sharan, Advocates
For the majority lenders of CoC:		Mr.Avinash Desai, Sr. Counsel along with Mr. Abhishek Swaroop, Mr.Anupam Prakash, Mr. Palash Agarwal & Mr. Vasu Manchanda, Advocates

COMMON ORDER PASSED IN IA (IBC)/477/2021, IA(IBC)/632/2021 & IA(IBC/270/2022 IN CP(IB)/420/7/HDB/2018

Per: Justice Telaprolu Rajani, Member (Judicial)

1. This case comes before me on a reference due to the split opinion of the Judicial and Technical Members of NCLT Hyderabad Bench-1, on the following point:

2. Whether the decision of majority members of the CoC to include clause 23 in RFRP deciding to accept the evaluation matrix, dated 17.07.2022 is liable to be set aside on the plea that the same did not take into consideration the charge ranking, inter se priority of the secured creditors and value of their security interest of the applicants.

3. This bench heard the arguments of Mr. S. Ravi, Sr. Counsel along with Ms. Mahima Sareen, Mr.V.V.S.N.Raju, Mr. Satyajit Bose & Mr.Abhilash Chaudhary, Ld. Counsels for the applicants and Mr.S.Niranjan, Sr. Counsel along with Mr. Aayush Mitruka, Ms.Lisa Mishra, Mr. Ramakant Rai, Mr. Mohit Rohatgi, Mr. Ravin Kapur & Mr. Shivam Sharan, Ld. Counsels for the RP and Mr.Avinash Desai, Sr.Counsel along with Mr. Abhishek Swaroop, Mr. Anupam Prakash, Mr. Palash Agarwal & Mr. Vasu Manchanda, Ld. Counsels for R2 to R9 majority lenders of CoC and perused the written submissions of all the counsels.

4. Before going into merits of the case, it would be profitable to adjudicate on the preliminary issue that was raised by the Respondents, which is with regard to the scope of this bench, hereinafter referred to as "reference bench", in deciding all the issues on which there was a difference of opinion between the two members, apart from the point framed by the referral bench. The counsels for the Respondents contend that the jurisdiction of

the reference bench is limited only to adjudicate on the point of reference framed by the referral bench, while the counsel for the applicant contends that the jurisdiction of this reference bench extends to resolving all the issues on which the members had differed. Hence, the following point is framed, for preliminary consideration.

Point No.1: Whether the reference bench has jurisdiction to adjudicate on all the points of difference expressed by the members of the referral bench.

a) The counsel for the Applicant relies on the judgment of the NCLAT in the ***Committee of Administrators Pendente Lite of the Estate of Late Priyamvada Devi Birla & Anr. vs. INSILCO Agents Limited & Ors., in CA(AT)No.67/2022***, 2022 SCC OnLine NCLAT 3455 (INSILCO), in support of his contention. His contention is that the jurisdiction of the reference bench encompasses all the issues arising out of the split judgment and is not restricted to the question framed in the split judgment. He draws the attention of this bench to the relevant findings of the above cited judgment which are as follows:

> "In the instant case on hand before this Tribunal, the point of difference stated/formulated by the Hon'ble Members of the National Company Law

Tribunal dated 11.02.2022, in CP Nos.112, 113 & 114/KB of 2021 is a mere statement upon a `Ministerial Act' and it is neither a `preliminary order' nor `an interlocutory order' and does not partake the character and status of `an Order', as per Section 421 (1) of Companies Act, 2013. Further, the `point of difference' formulated by the `Hon'ble Members of the `Tribunal' on 11.02.2022 does not finally and conclusively determine the `Right of Parties', in quite earnest, as opined by this `Tribunal'. No wonder, it is the primordial duty of the `Hon'ble Third Member'/ `Third Judge' to whom the matter is referred, to consider `all points involved' revolving around the controversies, not confined to the point formulated by the `Hon'ble Members of the Tribunal' dated 11.02.2022, prior to the deliverance of his opinion'/`decision', of course with utmost `care', `caution', `circumspection', and with a view to prevent an `aberration of justice' and to secure the `ends of justice'."

b) Contrary to the said argument, the counsels for the Respondents appearing on behalf of the RP and the Committee of Creditors (CoC) contend that the

reliance placed by the Applicants on the above mentioned judgment is misplaced and that the applicant has placed selective reliance on the said judgment and has not brought forth the settled position of law with respect to the point of difference. By placing reliance on the judgment of Supreme Court in ***Babu & Ors., vs. State of UP AIR 1965 SC 1467***, it is further contended that it has been categorically held in the said judgment that the Hon'ble Third Member is completely free in resolving the differences/controversies between the parties concerned as deemed fit. "However, the same is subject to the point of difference, 'not being stated by the original bench/referral bench'". It is contended that since, in these applications point of difference is duly formulated by the referral bench, the jurisdiction of the reference bench is confined to it and the reference bench cannot transgress beyond the said jurisdiction as the same would tantamount to violating the provision of section 419 (5) of the Companies Act, 2013. Section 419 (5) of the companies act is extracted hereunder for ready reference:

> *"(5) If the Members of a Bench differ in opinion on any point or points, it shall be*

decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it."

c) It is true that the above section specifies that the point or points of difference shall be stated by the members of the referral bench. But the judgment relied upon by the counsel for the Applicant is clear on the scope of the jurisdiction of the reference bench with regard to the points of difference between the members of the referral bench. It is categorically held by the NCLAT that the judge to whom the matter is referred can consider all points involved, revolving around the controversies and not confined to the point formulated by the Hon'ble Members of the referral bench. The judgment relied upon by the Respondents, which is that of the Supreme Court in ***Babu & Others vs. State of***

UP also lays down the same principle and the spirit of the judgment can be understood from the language used in the said judgment, that the third member is completely free in resolving the differences/controversies between the parties concerned as it deems fit. Moreover, the NCLAT has relied on the said judgment and held that the judgment in *Babu's case* has held as such. At this juncture, it can be noted that the interpretation of a judgment by the appellate Tribunal is also binding on the lower tribunals. Hence this bench has to go by the interpretation of the NCLAT made with regard to the judgment in *Babu's case*.

d) The other judgments relied upon by the Respondents are not on the point, whether the reference bench can frame new points for determination with regard to the aspects on which there is a difference of opinion between the members of the referral bench, apart from the difference of opinion on the point framed by the referral bench. The first judgment is rendered by the High Court of Allahabad ***1952 SCC OnLine Allahabad 206 between the Jan Mohammed, Nainital vs. The Commissioner of Income Tax***. The facts of the said case are absolutely different from the facts of this

case. In the said case, the third member has framed a point and gave a finding on an aspect which was not at all heard by the referral bench therein. In that circumstance, it was held by the High Court of Allahabad that since on the said aspect there is only the opinion of the third member and the two other members of the Tribunal had no opportunity of going into that question and if the point had been raised before them they might not have taken the same view as a third member, has remitted the case to the Tribunal for decision in accordance with law.

e) The second judgment is rendered by the High Court of Bombay reported in ***2009 SCC OnLine Bombay 670 between Suzlon Infrastructure Ltd. vs. Union of India and Ors***. The facts of the case are that the Petitioners therein filed an application for passing a supplementary order and for formulating revised questions. The third member has framed consequential questions and when the third member was apprised of the application filed for passing supplementary order, he held that he had no jurisdiction to hear such an application and that he will dispose of the difference of opinion without going into the correctness or otherwise of the said application. The contention therein of the petitioners was that there

have been findings on some of the submissions and in-respect of some others, both the members have not recorded their findings, though they are germane for the purpose of deciding the controversy in the appeal. The consequence was that what has been referred to the learned third member are only the points on which the members have deferred. The third member considered that his jurisdiction was only to decide the said points. The question therein was whether during pendency of the application before the third member, is it open to an aggrieved party to apply for rectification. Holding that the application shall be heard by the Tribunal, the High Court of Bombay directed the third member not to proceed to answer the points raised, till such time. Hence, this judgment does not have any bearing on the issue raised before this Bench.

f) The other judgment is rendered by the High Court of Madras reported in ***2008 SCC OnLine Madras 1041 between Dynavision Ltd. vs. Income Tax Appellate Tribunal & Ors.***, The facts of the said case are that the members of ITAT passed a split verdict and disagreed on the questions to be referred to the third member for adjudication. The judicial member identified a single question whereas the technical member proposed two

questions. Then the matter went before the president, who reformulated the reference, framing four questions, some of which were beyond what was argued before the ITAT. In such circumstance, the order passed by the third member on such reformulated questions, which were held as not correct, was set aside and the matter was remitted to the ITAT for fresh adjudication on the difference of opinion in accordance with law. Hence, the above three judgments, as already observed, are not on the point raised before this Tribunal.

g) Though in the written arguments, Respondents 2 to 9 have mentioned that in *Babu's* judgment it was held that the same is subject to the point of difference not being stated by the original bench/referral bench, the attention of this bench is not drawn to the said part of the judgment.

h) The anomaly that would arise if all the points of difference are not resolved by the reference bench is very well pointed out by the counsel for the Applicant, by arguing that if the contentions raised by the Respondents were to be accepted, it would lead to an anomalous situation where the issues on which Ld. Judicial Member and the Ld. Technical Member have

rendered divergent findings but which do not expressly form part of the reference question framed in the split judgment would continue to remain unresolved and undecided, rendering the entire exercise completely nugatory and redundant, which surely would not have been the intent behind the split judgment. The said argument is quite convincing. If the reference bench does not assume the jurisdiction to resolve all the points of difference between the members of the referral bench, those aspects which are not resolved by the referral bench would be left unresolved. As contended by the counsels for the respondents, deciding the points of difference would not amount to the reference bench assuming appellate jurisdiction. Appeal would only lie against the concurrent opinions of the members but not on the points of difference. The opinion of this bench on the split points would only give finality to the judgment.

i) During arguments the counsels for the respondents contended that the applicants have made an application to the NCLT Principal Bench seeking constitution of Bench on all points and that, that itself would show that the applicants are also on the understanding that the reference tribunal has jurisdiction to decide only

the points framed by the reference Bench. But I opine that the filing of the application or what the parties understand to be the procedure and law, is not the criteria on which this issue has to be resolved. It is on the basis of the law that the jurisdiction needs to be assumed. Hence, viewed from any angle and any point of view, it convinces this bench that it has jurisdiction to resolve all the points of difference expressed by the members in the split judgment. This point is accordingly answered.

5. Apart from the point of difference by the referral bench, the Applicant seeks this bench to adjudicate on the aspect of liquidation value, on which also the Hon'ble Members of the referral bench differed. In accordance with the conclusion reached under the preliminary point the two points that now have to be determined are (i) the point framed by the referral bench,

   (i) whether the decision of majority members of the CoC to include clause 23 in RFRP deciding to accept the evaluation matrix, dated 17.07.2022 is liable to be set aside on the plea that the same did not take into consideration the charge ranking, inter se priority of the secured creditors and value of their security interest of the applicants.

   The second point would be,

(ii) whether the liquidation value has to be assessed as on the date of order.

Point No.I: Without burdening this judgment with repetition on the facts, it would suffice to remember that the applicant is a financial creditor, being the lender of Phase-I and some of the members of the CoC have second charge on the assets of Phase-I of the CD.

a) The contention of the applicant is that the Distribution Mechanism is not compliant with the I &B Code, which provides for the minimum guaranteed amount for a potential dissenting financial creditor and it ignores the inter se priority of the secured creditors and value of their security interest, more particularly, section 30 and 53 of the IBC. The plea is to set aside the decision of the majority of the lenders in favour of the distribution mechanism, which violates the above provisions. The three interlocutory applications were decided by a common order of the referral bench. In IA(IBC)/270/2022, the main prayer is to set aside clause XXIII of the RFRP dated 17.02.2022. It can be seen that the CoC has initially voted for the hybrid model and Hybrid Evaluation Matrix which entailed separate and distinct evaluation matrixes, comprising unique qualitative and quantitative parameters which

were prepared for each of the aforementioned phases of the CD. Later, as already observed, the CoC has decided to vote in favour of the distribution according to the admitted claims in respect of all the three phases of the CD.

b) The contention that the Resolution Professional (RP) does not have powers to mention in the RFRP, the manner of distribution of proceeds amongst the creditors and that section 25 (2) (h) of the IBC, does not stipulate the same and that the RP has travelled beyond his scope, is emphasised by stating that where a certain thing is prescribed to be done in a certain way it must be done in the same way and there shall be a no deviation, as held in Taylor v. Taylor.

c) However, the Judicial Member of the referral bench, by considering that the RP shall have right to prescribe the criteria as may be laid down by him with the approval of the CoC, having regard to the complexity and scale of operations of the business of the CD and that the language of Section 25 (2) (h) of the IBC is clear in that regard, upheld the act of the RP. In order to resolve the said aspect a look at Section 25(2) (h) of the IBC would be beneficial.

"25 (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board ."

Hence, according to the above provision, the RP has every right to mention the criteria, in the circumstances mentioned in the above provision.

The main contention, as already observed, is that the applicants have to be given priority against their security interest, since they have bargained for lending against the security interest of Phase-I of the CD. It can be noted that it is only phase-I which is viable and is making profits.

6. In the written submissions, the Applicants, by mentioning the contention of the Respondents that determination of a distribution mechanism for the proceeds of the resolution plan falls within the commercial wisdom of the CoC and as such cannot be challenged by a dissenting financial creditor and that the applicants are seeking a phase wise CIR Process of LAPL, submit that the applicants case is not that a phase wise CIR Process of the CD should be conducted. It is argued that reference to different phases of LAPL by the Applicants have been made before this Bench to merely bring out the differential security structure of each phase of LAPL and resulting differential legal rights attached thereto among the members of the CoC, which has been deliberately misconstrued by the Respondents. The Applicant's primary grievance arises from the distribution mechanism, which according to it, is non complaint and completely ignores the differential rights, inter se priorities and the value of security interests of the secured financial creditors and deprives minimum guaranteed entitlement of a dissenting financial creditor under Section 30 (2) read with section 53 of the Code. But during the course of the arguments, the contention has been that Phase-I assets have to be treated separately as the applicant has been a lender only to Phase-I. There seems to be a contradictory stand taken by the applicants in that regard. However, in order to make the point clear, it can be seen whether the phase wise CIR Process can be taken up.

Firstly, the definition of the 'Corporate Debtor' can be looked at. Section 3 (8) IBC defines "corporate debtor" as meaning a corporate person who owes a debt to any person. Corporate Person as defined under Section 3(7) means a company as defined in clause (20) of section 2 of the Companies Act, 2013, etc., and Company as defined in clause (20) of section 2 of the Companies Act, 2013 means a company incorporated under the Companies Act 2013 or under any previous company law. Hence, it is clear that the Corporate Debtor as an entity has to be looked at while ordering for CIRP and different units of the CD cannot be taken for deciding the claims of the creditors, since the incorporation is for the CD as one entity and not for each phase. In the above background, it is highly doubtful that the voting by the CoC for the hybrid model earlier, would stand the test of legal scrutiny, as, though it is within the domain of the CoC to decide the method of distribution, it should be in compliance with the provisions of the IBC.

7. There was a proposal by the RP to place both versions of RFRP for vote, but the same was rejected by the Applicant and the applicant directed the RP to put only one version of RFRP which is version-2. Hence, the same was put for vote and there was approval of the same by majority vote of 85.62%. Clause XXIII in RFRP2, which is sought to be set aside is also there in the earlier RFRP in favour of which the applicant also voted. Hence,

this bench does not find any deviation from the principle laid down in ***Taylor vs. Taylor* (1875)**, either by the COC or the RP, as the laying down of the criteria in the RFRP is in accordance with Section 25(2) (h) which has to be read along with Regulation 36 (B) of the CIRP Regulations on which the Applicant relies.

8. There is no quarrel on the aspect that it is within the scope of the CoC to vote for the distribution mechanism, but the contention is that it should be in compliance of Section 30(4). The amendment to Section 30(4) came into effect from 16.08.2019 which has given a discretion to the CoC to take into account the order of priority amongst the creditors, as laid down in sub-section 1 of section 53, including the priority and value of the security interest of the secured creditor. The word 'may' used in the provision is urged to be treated as mandatory, by contending that the word 'may' shall not always be construed as a word giving discretion. But there is nothing in the above provision which compels this bench to treat the word 'may' as 'shall'. This amendment might have been consequent to the judgment of the NCLAT in ***Standard Chartered Bank vs. Satish Kumar Gupta, RP of Essar Steel Limited 2019 SCC OnLine NCLAT 388,*** wherein the NCLAT directed distribution of resolution plan proceeds equally among secured and unsecured financial creditors. But I do not see any anomaly in the action of the CoC,

in deciding to distribute the assets according to the admitted claims. The judgment of the NCLAT cited above has given equality between the secured and unsecured financial creditors, which was clarified by the Supreme Court in the ***Committee of Creditors for Essar Steel (India) Ltd. vs. Satish Kumar Gupta 2020 8 SCC 531,*** wherein the equal treatment of secured and unsecured creditors was overruled. But as regards the inter se priority between the secured creditors is concerned, it does not laydown any special criteria. The mischief that was aimed to be done away with by the amendment is only equal treatment of secured and unsecured creditors, which anyhow is not proposed by the COC in this case. Such distribution is what is considered as not equitable.

9. The Supreme Court in Essar Steel has observed that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such committee must reflect the fact that it has taken into account maximizing the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interests of all stakeholders, including operational creditors. The limited judicial review available is to see that the CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of

all stakeholders, including Operational Creditors, has been taken care of. It is only when the above parameters are found to have been not kept, the Adjudicating Authority, may send the resolution plan back to the CoC.

10. At paragraph 145 of the judgment, it was held that full freedom and discretion has been given to the CoC to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself. Hence, from the above it is clear that what has been given to the CoC under Section 30(4) is a discretion and not a direction or mandate. The whole argument of the counsel for the Applicant is that the word "may" used in Section 30(4) has to be construed as "shall" and that the CoC does not have any discretion. The above part of the judgment, makes it clear that it is only a discretionary power that is given to the CoC, which in this case was exercised in favour of distributing the assets according to the admitted claims, which cannot be said to be contrary to Section 30(2) or Section 30(4).

11. Considering the contention of the Counsel that the resolution plan must itself provide the distribution inter se between secured financial creditors, it was held by the Supreme Court in Essar Steel that it is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable

towards debts based upon a classification of various types of creditors, which in this case is found to have been done. The contention of the counsel therein that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolution insolvency is found to be correct and it was upheld that Section 30(2) (b) of the Code refers to Section 53 not in the context of priority of the payment of creditors, but only to provide for a minimum payment to the Operational Creditors. It further held that this does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Hence, when it is made clear by the Supreme Court in Essar Steel which is a judgment rendered by three judges that the word "may" used in section 30(4) gives discretion to the CoC and not a direction, fault cannot be found with the CoC in this case for deciding to distribute the assets in accordance with the admitted claims.

12. The Supreme Court in *India Resurgence Case*, 2021 SCC OnLine SC 409, as also referred to the judgment in Essar Steel and as extracted the findings of the Essar Steel which are as under:

> "Section 30(4) of I &B Codes provides that the Committee of Creditors may approve a resolution plan by a vote which shall not be less than 66% of voting share of Financial Creditors. Such approval is to be done after considering the

feasibility and viability of the Resolution Plan, the manner of distribution proposed therein having regard to the order of priority amongst the creditors in terms of the waterfall mechanism laid down in Section 53 of the I&B Code, including the priority and value of security interest of Secured Creditor, besides other requirements specified by IBBI. On a plain reading of this provision it is manifestly clear that the considerations regarding feasibility and viability of the Resolution Plan, distribution proposed with reference to the order of priority amongst creditors as per statutory distribution mechanism, including priority and value of security interest of Secured Creditor are matters which fall within the exclusive domain of Committee of Creditors for consideration."

13. The Supreme Court in the above case, has also dealt with the amendment introduced in Section 30(4) and observed as follows:

"As regards amendment introduced in Section 30(4), be it seen that the amendment that it, introduced vide Section 6 (b) of Amending Act of 2019 vests discretion in the Committee of Creditors to take into account the value of security interest of a Secured Creditor in approving of a Resolution Plan. It's a guideline and not imperative in terms, which may be taken into account by the Committee

of Creditors in arriving at a decision as regards approval or rejection of a Resolution Plan, such decision being essentially a business decision based on commercial wisdom of the Committee of Creditors. In this regard the observations of Apex Court in '*Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others*' (Supra) are held to be significant.

14. The relevant para from the judgment of Essar Steel was extracted by the Apex Court in the above-mentioned judgment which is as follows:

> "The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report, 2015. Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of are solution plan. For all these reasons,

therefore, it is difficult to hold that any of these provisions is constitutionally infirm."

15. The Supreme Court in India Resurgence Case, further went on to observe as follows:

> "It is abundantly clear that the considerations, including priority in scheme of distribution and the value of security are matters falling within the realm of Committee of Creditors. Such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the Committee of Creditors, cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of I&B Code. While it is true that prior to amendment of Section 30(4) the Committee of Creditors was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the Committee of Creditors while exercising their commercial wisdom in taking the business decision to approve or reject the Resolution Plan. Such consideration is only aimed at arming the Committee of Creditors with more teeth so as to take an informed decision in regard to viability and feasibility of a Resolution Plan,

fairness of distribution amongst similarly situated creditors being the bottom-line. However, such business decision, taken in exercise of commercial wisdom of Committee of creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given a fair and equitable treatment."

16. In the said case, the argument of the counsel was also similar as that of the counsels for the applicants herein, which is that the CoC could not have approved the resolution plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended Section 30(4) of the IBC, requiring the Committee of Creditors to take into account the order of priority amongst creditors as laid down in Section 53(1) of the Code, including the priority and value of the security interest of a secured creditor. In that case, according to the submissions made by the counsel, the primary reason for the dissent to the resolution plan was that, as against total admitted claim, the resolution applicant had offered the appellant a meagre amount without even considering the valuation of the security held by the appellant, which admittedly had more valuation. The reference of the counsel to the judgment in *Essar Steel* was also taken note of and it was finally held that the said contention was bereft of substance and does not merit admission. It was

categorically summarised that as regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority and Section 30(2) read with Section 61(3) for the Appellate Authority.

17. It was further held that it needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal. It was further held that the repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance. What the dissenting financial creditor is entitled to is specified in the later part of sub-section (2)(b) of Section 30 of the Code and the same was observed as having been explained by the Supreme Court in *Essar Steel case.* The observations as such are as under:

> "When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors."

18. It was held that the arguments of the counsel that section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. It was further held that what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

19. It was further held that it has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.

20. There need not be any further discussion on the aspect as the above two judgments make it more than clear the position of dissenting financial creditors after the amendment of section 30(4) of IBC. There is absolutely no conflict of opinion expressed by the Supreme Court in the above two judgments. The judgment subsequent to Essar Steels, which is rendered by three judges, has interpreted and extracted the findings of the Supreme Court in Essar Steels, leaving no scope for this Tribunal to make any further interpretation.

21. In view of the fact that the constitutionality of the provisions of IBC were also upheld in Essar Steel, the contention of the counsel for the Applicant that the rights given to the applicant under the constitution are jeopardised cannot be appreciated.

22. Reference by the applicants to article 300 A of the constitution is hence redundant. The I&B Code provides a scheme of distribution by considering a larger interest of all the creditors by

maintaining equity and equality between different classes of creditors. Hence, it cannot be held to be unconstitutional. Section 48 of the Transfer of Property Act, 1882, which was referred to by the Applicants is subservient to the provisions of the Insolvency and Bankruptcy Code, which is self- contained. Reliance was placed by the Applicant's Counsel on the judgment of the Supreme Court in ***Vistra ITCL (India) Limited vs. Dinkar Venkatasubramanian 2023 SCC OnLine SC570.*** In the said case an option was given to the Successful Resolution Applicant, to treat the appellant therein as secured creditor in terms of Section 52 read with 53 of the Code, who will be entitled to retain the security interest in the pledged shares, and in terms thereof, would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the Code read with Rule 21-A of the Liquidation Process Regulations. The second option given was to treat the secured creditor under Section 52 & 53 of I & B Code. But we cannot read this judgment in isolation. It does not refer to the judgment of the Supreme Court in ***Essar Steels.*** Being a binding precedent, ***Essar Steels*** has to be kept in mind to contextualise the findings of any Supreme Court judgment which is subsequent to ***Essar Steels*** and which is not rendered by a larger bench. If we have to harmonise the findings in ***Essar Steels and Vistra ITCL,*** even if the secured creditor is given an option to realise from the security interest it would be only subject to his

rights as are upheld by the Supreme Court in *Essar Steels* and later by *India Resurgence Case.*

23. The contention of the applicants is that a dissenting financial creditor must be paid at least an amount which he would have received in accordance with section 53(1) of IBC. I do not see, any deviation of the distribution mechanism from section 53. Whether there is discretion to the CoC to distribute the assets according to section 53(1) or not has been dealt with in the ***India Resurgence Case.*** The contention of the appellant therein was also the same as that of the applicants herein. The Supreme Court has clarified that the financial proposal in the resolution plan forms the core of the business decision of the Committee of Creditors and once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction.

24. Hence, my concurrence is with the opinion of the judicial member, that in the scheme of the IBC, 2016 every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal. The argument of the applicant that since the revenue from Phase-I of the CD is exclusively charged to Phase-I lenders by way of cash crunch retention account, the pre-insolvency rights of the applicant need

to be taken care of by giving preference to the security interest by not treating the CD as a whole for the purpose of CIRP, does not stand to merit.

25. **<u>Point No.II</u>: Whether the liquidation value of LAPL must be recomputed to account for updated cash and receivables.**

26. As regards the liquidation value, the contention of the applicants is that the liquidation value must be recomputed to account for updated cash and receivables. It is contended that the liquidation value computed by the RP as on 05.09.2019 is outdated and does not account for the accretion, in cash assets of the CD. But however, the applicants also draw the attention of this bench to Regulation 2 (1) (k) of CIRP Regulations, which states that the liquidation value shall be calculated as on the Insolvency commencement date. The applicant relies on the judgment of the Supreme Court in ***CIT Bangalore vs. BC Srinivasa Reddy (1981) 2 SCC 46***0, in support of his contention that the contextual interpretation has to be made to Regulation 2 (1) (k). It is true that Section 2 starts with the words "in these Regulations, unless the context otherwise requires". But the liquidation value defined under clause (k) of Section 2 is unambiguous and does not leave any scope for being interpreted otherwise, in any context. The liquidation value itself is an estimated realisable value of the assets of the CD, in case the CD were to be liquidated on the insolvency commencement date. The

reliance placed by the Counsel for the Applicant on the judgment of NCLT Mumbai Bench in the case of *Mr.Vipin Agarwal vs. Mr.Sunil Kumar Agarwal, the Resolution Professional of Vistar Metal Industries Pvt Ltd* cannot be appreciated as the finding of the said Tribunal does not contain any explanation as to how the statutory provisions with regard to the liquidation value can be ignored. It only takes into consideration several factors like the instances of theft in the premises and the shutting down of business operations, in ordering for afresh determination of the liquidation value.

27. Equities cannot play a role in an adjudication, when the statute is clear on an aspect. Going behind the letter of law is permitted only when the law is shrouded by ambiguity. The theme of IBC is large, that it addresses the concepts of equitable and equal in terms of all the creditors, with reference to the classes. Apparent inequity should succumb to the intention of the Code. In a struggle between a head and heart, an adjudicating authority should not and cannot blind itself to the statutory provisions and the law on the given subject. It cannot be a judgment like the one *Justice Marshall* suggested to the Governor of Jamaica that if reasons are mentioned in any judgment, it would be a wrong judgment though the conclusion may be Right. It also has to be remembered that reason is the heart beat of the judgment. Hence, this court does not find any scope to order for fresh determination

of liquidation value. However, it satisfies the heart also, as it can be noted that no prejudice would occur to the applicant in view of the clarification given by the respondents that the amount valued in the Trust and Retention Account (TRA) is a common pool of assets of the CD and that the same would be distributed among all the lenders, as decided by the CoC and in this case, the CoC has come to a resolution to distribute the same on the basis of the admitted claims of the lenders. Hence, there is no prejudice that is caused to the applicants.

28. The reference is accordingly answered, concurring with the opinion of the judicial member.

Sd/- Dated 02.11.2023

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu (PS)