

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Comp. App. (AT) (Ins) No. 545 of 2023 & I.A. No. 1768 of 2023**

**(Arising out of the Order dated 16.02.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court- III in IA No. 47 of 2021 in Company Petition being C.P.(IB) – 3753(MB)/2018)**

**IN THE MATTER OF:**

**Mr. Manish Jaju**

Resolution Professional of CAN Enterprises Pvt Ltd  
having his address at D 502, Neelkanth Business  
Park, Vidyavihar, Mumbai – 400086  
(Resolution Professional of Original  
Corporate Debtor)

**...Appellant**

**Versus**

**1. Malharshanti Enterprises**

Through its sole Proprietor Mr. Sunil Pande  
Having office at 59A/12, nigari Niwara Parishad  
Gen. A. K. Vaidya Mag (Film City), Road,  
Goregaon (West), Mumbai – 400 053  
(Original Applicant /Operational Creditor)

**...Respondent No. 1**

**2. Mr. Naresh Sevantilal Shah,**

Having address at Flat No. 103, Thosar House,  
Hanuman X Road No. 1, Near Shiv Leela Hotel  
Vile Parle (E), Mumbai – 400 057  
(Suspended Director)

**...Respondent No. 2**

**3. Charu Naresh Shah**

Having address at Flat No. 103, Thosar House,  
Hanuman X Road No. 1, Near Shiv Leela Hotel  
Vile Parle (E), Mumbai – 400 057  
(Suspended Director)

**...Respondent No. 3**

**Present**

**For Appellant:**

Mr. Gauhar Mirza, Bhumika Kapoor, Adv.

**For Respondents :** Mr. Anshuj Dhingra, Kartik Sethi, Shubhamngda  
Singh, Muskan Bagga, Adv. for R1

**With**

**Comp. App. (AT) (Ins) No. 598 of 2023 & I.A. No. 1992 of 2023**

**(Arising out of the Order dated 16.02.2023 passed by the National Company  
Law Tribunal, Mumbai Bench, Court- III in IA No. 47 of 2021 in Company  
Petition being C.P.(IB) – 3753(MB)/2018)**

**IN THE MATTER OF:**

**Paton Constructions Pvt Ltd,**

a Company incorporated under the provisions of the  
Companies Act, 1956,  
having its registered office at A1, 1st Floor,  
Sagar Complex Co-Operative Housing Society Ltd,  
M.G. Road, Vile Parle (E), Mumbai – 400 057

**...Appellant**

**Versus**

**1. M/s Malharshanti Enterprises,**

Through its Sole Proprietor Mr. Sunil Pande,  
having his office at 59A/12, Nagari Niwara  
Parishad, Gen. A.K. Vaidya Marg (Film City)  
Road, Goregaon (W), Mumbai – 400 053.

**...Respondent No. 1**

**2. CAN Enterprises Pvt Ltd,**

a company incorporated under the provisions of  
the Companies Act, 1956,  
having its registered address at Flat No. 103,  
Thosar House, Hanuman X Road No. 1,  
Near Shiv Leela Hotel,  
Vile Parle (E), Mumbai – 400 057.

**...Respondent No. 2**

**3. Naresh Sevantilal Shah,**

s/o Sevantilal Shah, aged: 57 yrs, residing at Flat  
No. 103, Thosar House, Hanuman X Road No. 1,  
Near Shiv Leela Hotel, Vile Parle (E),  
Mumbai – 400 057.

**...Respondent No. 3**

**4. Charu Naresh Shah,**

w/o Naresh Shah, aged: 56 yrs, residing at Flat No. 103, Thosar House, Hanuman X Road No. 1, Near Shiv Leela Hotel, Vile Parle (E), Mumbai – 400 057.

**...Respondent No. 4**

**5. Jitendrakumar Rambaran Yadav,**

erstwhile Interim Resolution Professional, having his address at 11, Singh House, 2nd Floor, 23 Ambalal Doshi Marg, Besides BSE Building, Fort, Mumbai – 400 001.

**...Respondent No. 5**

**6. Manish Jaju,**

Resolution Professional of CAN Enterprises Pvt Ltd, having his address at D-502, Neelkanth Business Park, Vidyavihar (W), Mumbai – 400 086

**...Respondent No. 6**

**Present**

**For Appellant:** Mr. Akshay Goel, Harsh Jadon, Adv.

**For Respondents :** Mr. Anshuj Dhingra, Kartik Sethi, Shubhamngda Singh, Muskan Bagga, Adv. for R1

**With**

**Comp. App. (AT) (Ins) No. 600 of 2023 & I.A. No. 1996, 1997, 1999 of 2023**

**(Arising out of the Order dated 16.02.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court- III in IA No. 47 of 2021 in Company Petition being C.P.(IB) – 3753(MB)/2018)**

**IN THE MATTER OF:**

**1. Mr. Naresh Sevantilal Shah,**

Having address at Flat No. 103, Thosar House, Hanuman X Road No. 1, Near Shiv Leela Hotel Vile Parle (E), Mumbai – 400 057

(Suspended Director)

**...Appellant No. 1**

**2. Charu Naresh Shah,**

w/o Naresh Shah, aged: 56 yrs, residing at Flat  
No. 103, Thosar House, Hanuman X Road No. 1,  
Near Shiv Leela Hotel,  
Vile Parle (E), Mumbai – 400 057.

**...Appellant No. 2**

**Versus**

**1. Malharshanti Enterprises**

Through its sole Proprietor Mr. Sunil Pande  
Having office at 59A/12, nigari Niwara Parishad  
Gen. A. K. Vaidya Mag (Film City), Road,  
Goregaon (West), Mumbai – 400 053  
(Original Applicant /Operational Creditor)

**...Respondent No. 1**

**2. CAN Enterprises Pvt Ltd,**

a company incorporated under the provisions of  
the Companies Act, 1956,  
having its registered address at Flat No. 103,  
Thosar House, Hanuman X Road No. 1,  
Near Shiv Leela Hotel,  
Vile Parle (E), Mumbai – 400 057.

**...Respondent No. 2**

**3. Jitendrakumar Rambaran Yadav,**

erstwhile Interim Resolution Professional,  
having his address at 11, Singh House, 2nd Floor,  
23 Ambalal Doshi Marg, Besides BSE Building,  
Fort, Mumbai – 400 001.

**...Respondent No. 3**

**4. Manish Jaju,**

Resolution Professional of CAN Enterprises Pvt  
Ltd, having his address at D-502, Neelkanth  
Business Park, Vidyavihar (W),  
Mumbai – 400 086

**...Respondent No. 4**

**5. Paton Constructions Pvt Ltd,**

a Company incorporated under the provisions of  
the Companies Act, 1956,

having its registered office at A1, 1st Floor,  
Sagar Complex Co-Operative Housing Society  
Ltd, M.G. Road, Vile Parle (E),  
Mumbai – 400 057

**...Respondent No. 5**

**Present**

- For Appellant:** Ms. Anjali Sharma, Ms. Kanishka Sharma,  
Advocates.  
Mr. Neeraj Malhota, Sr. Advocate, Mr. Ashutosh  
Gupta, Mr. Gaurav Rana, Mr. Nimesh, Mr. Ajitesh  
Kumar, Advocates
- For Respondents :** Mr. Akshay Goel, Harsh Jadon, Adv. for R5  
Mr. Anshuj Dhingra, Kartik Sethi, Shubhamngda  
Singh, Muskan Bagga, Adv. For R1

**J U D G E M E N T**

**(17.09.2024)**

**NARESH SALECHA, MEMBER (TECHNICAL)**

1. These three Appeals have been filed against the common Impugned Order dated 16.02.2023 passed by the National Company Law Tribunal, Mumbai Bench, Court-III (in short ‘**Adjudicating Authority**’) in IA No. 47 of 2021 in Company Petition being C.P. (IB) – 3753(MB)/2018, which was filed by Malharshanti Enterprises Limited (‘**Operational Creditor**’) against the CAN Enterprises Pvt. Ltd. (‘**Corporate Debtor**’).
2. In Company Appeal (AT) (Ins.) No. 545 of 2023, Mr. Manish Jaju, Resolution Professional of the Corporate Debtor is the Appellant. The Respondents in this appeal are Malharshanti Enterprises Limited is the Corporate

Debtor (Respondent No. 1), Naresh Sevantilal Shah (Respondent No. 2) and Charu Naresh Shah (Respondent No. 3) who are Suspended Directors of the Corporate Debtor.

The Company Appeal bearing Company Appeal (AT) (Ins.) No. 545 of 2023 has been filed by the Mr. Manish Jaju who has challenged the Impugned Order and has sought the following reliefs before this Appellate Tribunal contained in Para 21 of this appeal :-

*“a. That this Hon’ble Tribunal be pleased to set aside the order dated 16<sup>th</sup> February, 2023 passed in IA No. 47 of 2021 in CP No. 3753 of 2020.*

*b. For Costs;*

*c. For such further and other reliefs, as this Hon’ble Tribunal may deem fit and proper in the nature and circumstances of the case.” SIC...*

The Resolution Professional has challenged the Impugned Order on the merits.

**3.** The Company Appeal bearing Company Appeal (AT) (Ins.) No. 598 of 2023 has been filed by Paton Construction Pvt. Ltd. the Unsecured Financial Creditor of the Corporate Debtor against the Malharshanti Enterprises Limited who is the Operational Creditor of the Corporate Debtor and who originally filed an application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in

short ‘Code’) which was admitted by the Adjudication Authority vide order dated 27.01.2020.

The Appellant stated that the based on loan agreement entered between the Paton Construction Pvt. Ltd. and the Corporate Debtor on 20.08.2019, the Appellant gave Rs. 1 Lakh as loan and has filed claimed for Rs. 1,05,877/- but the Impugned Order in Para 20 has been held against the Applicant i.e., Paton Construction Pvt. Ltd., which reads as under :-

*“It is appropriate to mention here that the RP herein filed an application bearing I.A. No. 375/2021 which is also pending before this Bench for withdrawal of the CIRP order under Section 12(A) of the Code on the ground of purported settlement entered into by the Corporate Debtor with the sole COC Member, M/s Paton Construction Pvt. Ltd. who is an unsecured Financial Creditor from whom the Corporate Debtor alleged to have borrowed an amount of Rs. 1,58,077/- recently before passing CIRP order which is an ingenious idea of Respondent Nos. 2 and 3 to bring out the Corporate Debtor from the clutches of CIRP order which attained finality from a back-door entry.”*

*(Emphasis Supplied)*

**4.** The Applicant has also sought the following reliefs :-

*“a. That this Hon’ble Tribunal be pleased to set aside the order dated 16<sup>th</sup> February, 2023 passed by the Adjudicating*

*Authority, National Company Law Tribunal, Mumbai Bench, in IA No. 47 of 2021 in CP (IB)/ 3753 (MB)/2018.*

*b. For Costs;*

*c. For such further and other reliefs, as this Hon'ble Tribunal may deem fit and proper in the nature and circumstances of the case."*

5. The third Company Appeal bearing Company Appeal (AT) (Ins.) No. 600 of 2023 has been filed by Naresh Sevantilal Shah and Charu Naresh Shah who are Suspended Directors of the Corporate Debtor against the Malharshanti Enterprises Limited who is the (**Operational Creditor**) as Respondent No. 1, CAN Enterprises Pvt. Ltd. (**Corporate Debtor**) as Respondent No. 2, Mr. Jitendrakumar Rambaran Yadav, Erstwhile Interim Resolution Professional of the Corporate Debtor as Respondent No. 3, Mr. Manish Jaju who is the Resolution Professional of the Corporate Debtor as Respondent No. 4 and Paton Construction Pvt. Ltd., the Financial Creditor as Respondent No. 5.

The Applicants in this appeal have sought following reliefs:-

*"a. That this Hon'ble Tribunal be pleased to set aside the order dated 16<sup>th</sup> February, 2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, in IA No. 47 of 2021 in CP (IB)/ 3753 (MB)/2018.*

*b. For Costs;*

*c. For such further and other reliefs, as this Hon'ble Tribunal may deem fit and proper in the nature and circumstances of the case."*

6. At this stage, from above three appeals we note that the reliefs sought in all these three appeals i.e., by Resolution Professional, Suspended Directors of the Corporate Debtor as well as the Unsecured Financial Creditor are exactly same.

7. Thus, it would be necessary for us to take into account the background of the case under which the original Corporate Insolvency Resolution Process (**'CIRP'**) was initiated by the National Company Law Tribunal, Mumbai Bench, Court-IV in Company Petition being C.P. (IB) 3753(MB)/C-IV/2018 on 27.01.2020 under Section 9 of the Code, on application filed by Malharshanti Enterprises Limited (**'Operational Creditor'**) against the Corporate Debtor. The Operational Creditor issued demand notice dated 02.12.2017 under Section 8 of the Code which was replied by the Corporate Debtor on 13.12.2017 denying the operational debts as well as raising issues regarding pre-existing disputes.

8. We also note that after going in detail, the Adjudicating Authority admitted the application of Malharshanti Enterprises Limited (**'Operational Creditor'**) appointing Mr. Jitendrakumar Rambaran Yadav as Interim Resolution Professional.

9. The order dated 27.01.2020 passed by National Company Law Tribunal, Mumbai Bench, Court-IV in Company Petition being C.P. (IB) 3753(MB)/C-IV/2018 was challenged by Naresh Sevantilal Shah who is the Suspended Directors of the Corporate Debtor before this Appellate Tribunal in Company Appeal (AT ) (Ins.) No. 415 of 2020 which was dismissed by this Appellate

Tribunal vide judgment dated 19.01.2021 upholding the National Company Law Tribunal, Mumbai Bench, Court-IV order dated 27.01.2020. The same was challenged by Naresh Sevantilal Shah before the Hon'ble Supreme Court of India vide Civil Appeal No. 822 of 2021 which was dismissed as withdrawn by the the Hon'ble Supreme Court of India vide order dated 10.03.2021 and the following order was passed :-

*“Mr. Salman Khurshid, learned senior counsel for the appellant requests permission to withdraw this appeal to pursue other remedies.*

*Permission is granted.*

*The Civil Appeal is, accordingly, dismissed as withdrawn with aforesaid liberty.”*

*(Emphasis Supplied)*

**10.** Thus, we note that the case has been contested against the admission of Section 9 application against the Corporate Debtor by Suspended Director at all level including, this Appellate Tribunal as well as the Hon'ble Supreme Court of India and at all places, the judgement came in favour of the Operational Creditor.

**11.** In this background, we will look into now challenged Impugned Order dated 16.02.2023. The present Resolution Professional Mr. Manish Jaju rejected the claims of Operational Creditor in totality and also admitted the claims of one Unsecured Financial Creditor i.e., Paton Construction Pvt. Ltd. for Rs. 1,05,877/- and changed the Constitution of Committee of Creditor ('CoC'). It is observed

that after initiation of CIRP, public announcement dated 22.02.2020 was issued by Erstwhile IRP and Operational Creditor filed its claim along with proof on 06.03.2020 and the same was admitted.

**12.** From the Impugned Order, we note that Mr. Manish Jaju was appointed as Resolution Professional by an order dated 09.06.2020 passed by Principal Bench of NCLT in Interlocutory Application No. 1007 of 2020 replacing Erstwhile IRP Mr. Jitendrakumar Rambaran Yadav.

Malharshanti Enterprises Limited (Operational Creditor) on 02.07.2020 filed an Interlocutory Application bearing I.A. No. 1241 of 2020 before the Adjudicating Authority, inter-alia, challenging the composition of Paton Construction Pvt. Ltd. as Single Member of CoC.

**13.** Mr. Manish Jaju, Resolution Professional, through an e-mail dated 05.07.2020 to M/s Malharshanti Enterprises Limited (Operational Creditor), called upon to submit additional documents in support of claims which were already admitted by the Erstwhile IRP and Malharshanti Enterprises Limited, (Operational Creditor) replied to the Resolution Professional Mr. Manish Jaju on 13.07.2020 in response to his e-mail dated 05.07.2020 but the Resolution Professional again issued a letter and an e-mail dated 04.09.2020 to Malharshanti Enterprises Limited (Operational Creditor) again calling upon the Malharshanti Enterprises Limited (Operational Creditor) to submit additional documents and finally the Resolution Professional Mr. Manish Jaju addressed an e-mail dated

02.12.2020 to Malharshanti Enterprises Limited (Operational Creditor) that the subject “claim document” “claim submitted by you is not accepted by Resolution Professional”, and the Resolution Professional rejected the claims of the Operational Creditor Malharshanti Enterprises Limited (Operational Creditor) despite clear adjudication by the Adjudicating Authority, upheld by this Appellate Tribunal and the Hon’ble Supreme Court in favour of the Operational Creditor.

**14.** We note that the Adjudicating Authority has examined all contentions and documents of various parties i.e, Malharshanti Enterprises Limited (Operational Creditor), the Corporate Debtor, the Suspended Directors of the Corporate Debtor, the Resolution Professional and sole Financial Creditors, while passing the Impugned Order dated 16.02.2023.

**15.** We note that the issue of the pre-existing disputes raised by the Appellant in the present appeal bearing Company Appeal (AT) (Ins.) No. 545 of 2023 had already been examined by this Appellate tribunal in its detailed judgement dated 19.01.2021, as contained in para 29 & 31 to 37 which reads as under :-

*“29. We have heard the arguments of the Learned Counsel for the parties and perused the records. The question that arises for consideration is as follows:*

*a) Whether there was a pre-existing dispute between the parties and weather the pre-existence of dispute shall be seen from the date of the first demand notice dated 2<sup>nd</sup> December 2017 or the second demand notice dated 23<sup>rd</sup> August, 2018?*

b) Whether the Adjudicating Authority rightly allow the petition of the Operational Creditor under section 9 of I&B Code?

30. In the case of Mobilox Innovations Pvt. Ltd. vs Kirusa Software (P) Ltd. reported at (2017) 1 SCC OnLine SC 353 the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under section 9 of I&B Code which is reproduced below:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). **What is important is that the existence of the dispute and/or the suit or arbitration proceeding must**

**be preexisting – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be……”**

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

37. Whether there is an “operational debt” as defined exceeding Rs.1 lakh?

ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And

iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

From the above decision it is clear that the existence of the dispute must be pre-existing i.e., it must exist before the receipt of the demand notice or invoice. Section 9 of the IBC makes it very clear for the Adjudicating Authority to admit

*the application “if no notice of dispute is received by the Operational Creditor and there is no record of the dispute in the information utility.” In the absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid ‘Operational Debt’. Consequently, the application cannot be rejected under section 9 and is required to be admitted.*

*31. It is apparent from the records that the Corporate Debtor had not raised any objection pertaining to the work performed by the Operational Creditor prior to the first demand notice dated 2<sup>nd</sup> December, 2017. It was on 13<sup>th</sup> December, 2017 when the Corporate Debtor responded for the first time in its reply to the notice issued by the Operational Creditor under Section 8(1) of I&B Code. We have noted that a large number of email communications has been made by the Operational Creditor and not even a single response was made by the Corporate Debtor raising such disputes.*

*32. The Contention of the Appellant that the relevant date for determining whether there was a pre-existing dispute was the date of second demand notice, i.e. 23<sup>rd</sup> August, 2018 and not the first demand notice dated 2<sup>nd</sup> December, 2017 as the first petition was dismissed by the Adjudicating Authority as the Petitioner Counsel had asked for withdrawal of the first petition due to incorrect claims made under first application,*

*with a liberty to proceed against the Corporate Debtor with a correct claim as envisaged under I&B Code.*

*The above Contention raised by the Appellant cannot be sustained. The Adjudicating Authority has rightly relied upon the ratio laid down by this Tribunal in the case of Dinesh Gupta vs. Hajura Singh Bhim Singh & another, Company Appeal (AT) (Insolvency) No. 99 of 2018 wherein it was held that:*

*“6. On hearing the parties, as we find that there was no dispute in existence prior to the 1<sup>st</sup> demand notice issued under Section 8(1) of the I&B Code and the Corporate Debtor disputed the claim about quality only after issuance of 1<sup>st</sup> demand notice, therefore, after withdrawal of 1<sup>st</sup> application under Section 9 on technical grounds and issuance of fresh demand notice, the application under Section 9 filed by Respondent was maintainable.”*

*33. The Appellant argued that the Adjudicating Authority misplaced its reliance on the above Judgment as in that case the first petition was dismissed on technical ground. However, in the present case, the first petition was not dismissed on technical ground but because Operational Creditor had made an incorrect claim.*

*This argument of the Appellant is turned down as firstly the above Judgment was mainly pointing out that there should be no dispute in existence prior to the 1<sup>st</sup> demand notice issued under Section 8(1) of the I&B Code. The Appellant has*

wrongly emphasized on the word 'technical ground' and not the ratio that was laid down under the judgment. Secondly, it is the Adjudicating Authority who shall observe whether the ground on which the first application was dismissed was a technical ground or not.

34. It is apparent from the records placed before this tribunal that Corporate Debtor have sent a legal notice on 13<sup>th</sup> March, 2018 setting out several preexisting disputes as to quality of work and delay in completion of work and also raised a counter claim against the Operational Creditor. The Corporate Debtor also sent a notice invoking arbitration on 10<sup>th</sup> April, 2018. These issues were raised after the issuance of the first demand notice. Thus there were no disputes existing prior to the issuance of first demand notice.

35. The arbitration notice was sent after the issuance of the first demand notice but prior to the issuance of second demand notice when the Operational Creditor was busy in removing the defects in its first petition. This exhibits that the intention of the Appellant behind this was to misuse the provisions under the Code and to intentionally delaying the process of law. There were no objections raised in relation to quality of work prior to the issuance of first demand notice and the work done by the Operational Creditor was in fact certified by the architect appointed by the Corporate Debtor. Moreover, the Municipal Corporation in September, 2016 issued Occupation Certificate to the Appellant. If there were any discrepancies, the appellant could not have obtained

*Occupation Certificate from municipality. This also shows that all the defects pointed out by the architect have been timely rectified within the appropriate time, so that the Municipal Corporation found it appropriate to issue the Occupation Certificate.*

*36. In the light of the above observations and the records placed before us. We are of the view that there was no dispute existing prior to the first demand notice and only disputes raised prior to the first demand notice are relevant to determine its pre-existence and disputes raised thereafter are totally irrelevant for the same. Also the arbitration was invoked after the first demand notice. Thus the Adjudicating Authority have rightly concluded that there was no dispute existing prior to the demand notice issued under section 8 of I&B Code.*

*37. Therefore, we are of the considered opinion that there is no reason for interference with the impugned order passed by the Adjudicating Authority. Hence Appeal is dismissed. No order as to costs.*

*(Emphasis Supplied)*

**16.** The Impugned Order passed by the Adjudicating Authority vide its earlier order dated 30.08.2021 had ordered for forensic audit of the books of account of the Corporate Debtor of 5 financial years preceding the date of CIRP and appointed Mr. Amarjit Chopra, past President of the Institute of Chartered

Accountants of India and the relevant audit observations of the forensic audit have been captured in the Impugned Order.

17. We would also like to take into consideration the relevant paragraphs of the Impugned Order dated 16.02.2023 which are self explanatory and contained in Para 16 to 24.

*“16. This Bench further notes that the Resolution Professional has come to a conclusion that no amount is due and payable to the Operational Creditor in the books of accounts of the Corporate Debtor on the date of commencement of CIRP i.e. 27.01.2020 and they are barred by limitation which is not legally correct. The relevant date for computing the period of limitation if any for the claim of the Operational Creditor is the date of filing the petition and not the date of ordering CIRP. **The RP can at best apply the above test of limitation for the other creditors who have directly submitted their claims after initiation of CIRP without adjudication by any legal forum and not the claims of the present Operational Creditor in this case since its claim has been already adjudicated through judicial process that attained finality. If this kind of action of the RP is upheld, it would amount to not only setting aside the order of the Adjudicating Authority but also the Appellate Authority thereby giving new dimension to CIRP process.***

*17. Therefore, it is very clear that the resolution professional has forgot that all the contentions of Corporate Debtor with*

regard to additional works, pre-existence of disputes, limitation etc. have been rejected by the adjudicating authority and also by the Hon'ble NCLAT with their concurrent findings and the CIRP order attained finality. It is appropriate to mention here that the Corporate Debtor as a respondent in the main company petition if failed to take any plea which he might and ought to have taken, he is barred from raising that plea once again in subsequent proceedings as it is barred by the doctrine of "constructive res judicata". The doctrine of "constructive res judicata applies to every subsequent proceedings except in cases in which the earlier matter was decided ex-parte.

18. The Respondent Nos. 2 and 3 who are the members of the suspended board have no locus once again to raise any plea with regard to the merits of the claim of the Operational Creditor in view of finality of the admission order and they are not at all necessary parties to this application.

19. This Bench further observes that the Resolution Professional has miserably failed to understand that the above CIRP order was passed by the adjudicating authority after prima-facie satisfying about the existence of 'debt' and 'default' of more than Rs. 1,00,000/- as on the date of filing the Company Petition and he shall not reject such claim of the Operational Creditor in toto by ignoring the concurrent findings of the adjudicating authority and the appellate authority.

20. It is appropriate to mention here that the RP herein filed an application bearing I.A. No. 375/2021 which is also pending before this Bench for withdrawal of the CIRP order under Section 12(A) of the Code on the ground of purported settlement entered into by the Corporate Debtor with the sole COC Member, M/s Paton Construction Pvt. Ltd. who is an unsecured Financial Creditor from whom the Corporate Debtor alleged to have borrowed an amount of Rs. 1,58,077/- recently before passing CIRP order which is an ingenious idea of Respondent Nos. 2 and 3 to bring out the Corporate Debtor from the clutches of CIRP order which attained finality from a back-door entry.

21. This bench further observes that the Resolution Professional miserably failed to understand that he can legally admit the claim of the Operational Creditor without insisting any books of accounts from the Operational Creditor in view of finality of the CIRP admission order and voluntary withdrawal of SLP before Hon'ble Supreme Court by Corporate Debtor.

22. For the aforesaid reasons viewing from any angle, this bench is of the considered opinion that the action of RP in rejecting the claim of the Operational Creditor in toto is illegal, arbitrary and does not stand to the test of legal scrutiny. This bench further observes that the RP has certainly exceeded his power by assuming super power in

**this case and did not perform his duties diligently and the conduct of RP also needs to be thoroughly investigated.**

*23. With the above observations, the action of the RP in rejecting the claim of Operational Creditor is set aside with a direction to him to admit the claim of Operational Creditor and complete the CIRP process as expeditiously as possible.*

*24. Accordingly, the above I.A. is disposed of.*

*(Emphasis Supplied)*

**18.** Now we shall deal with these three appeals before us in following discussions and go through the arguments of the parties. Since, all these three appeals are inter connected and inter dependent and arising out of the same common Impugned Order dated 16.02.2023, we shall dispose all three appeals in conjoint manner by this common order.

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**19.** The Appellant submitted that on taking charge from the Erstwhile IRP Mr. Jitendrakumar Rambaran Yadav, the Appellant noted that there are three claims i.e., of Malharshanti Enterprises Limited amounting to Rs. 1,95,01,079/-; another claim filed by Naresh Shah, Suspended Director of the Corporate Debtor for Rs. 1,77,24,370/- and claim of Paton Construction Pvt. Ltd. amounting to Rs. 1,05,877/- as unsecured Financial Creditor.

20. It would be worthwhile to note the table made by the Appellant in the present appeal in Para 5 which reads as under :-

S. No	Name of Creditor	Amount Claimed	Amount Admitted	Type of Creditor	Remarks
1.	Paton Construction Private Limited	105,877	105,877	Financial Creditor	Sole CoC Member
2.	Naresh S Shah	1,77,24,370	1,77,24,370	Related Party Financial Creditor	Suspended Director & promoter
3.	Malharshanti Enterprises	1,95,01,079	Nil	Operational Creditor	Original Petitioner
<b>Total Claims</b>		<b>3,73,31,326</b>	<b>1,78,30,247</b>		
<b>Total assets of corporate</b>			<b>9,59,24,285.73</b>		

<b>debtor as per Audited Balance sheet as on 31.03.2020</b>	
<b>Solvency Ratios based on assets as per audited balance sheet and claims collated during the CIRP</b>	
<b>Debt to asset ratio</b>	0.18 : 1.00
<b>Liquid fund available in the Bank account of corporate debtor as on 09.08.2021</b>	1,52,10,158.39

21. From above, we note that total claims against the Corporate Debtor were Rs. 3,73,31,326/- and the Appellant admitted of Rs. 1,78,30,247/- and the claims of the original Operational Creditor (on whose application was initiated CIRP

against the Corporate Debtor vide order dated 21.01.2020 for Rs. 1,95,01,079/-) was entirely rejected, whereas a fresh unsecured financial debt claim, which were received after initiation of the CIRP, from Paton Construction Pvt. Ltd., was admitted in full and was also declared as “Sole CoC Member” and the claim by the Suspended Director of the Corporate Debtor of Rs. 1,77,24,370/- was also admitted in full.

**22.** It is the case of the Appellant that after examining the books of the Corporate Debtor it came to his notice that no dues were outstanding and payable to the Malharshanti Enterprises Limited (Operational Creditor). The Appellant further submitted that he requested for documentations from the Malharshanti Enterprises Limited to substantiate its claims but received reply raising frivolous issues “including unauthorised constitution of CoC” etc.

**23.** The Appellant further submitted that he received an e-mail dated 31.08.2020 from Arpit Shah and Co., Chartered Accountant, the Statutory Auditors of the Corporate Debtor who allegedly stated that no debt is due and payable to the Operational Creditor.

We observe that the need for seeking such unilateral clarification from Chartered Accountant has not been explained by the Appellant.

**24.** The Appellant alleged that the Mr. Jitendrakumar Rambaran Yadav, the Erstwhile IRP admitted the claims of Malharshanti Enterprises Limited without verifying the same from the books of the Corporate Debtor, thus castigating role

of Erstwhile IRP Mr. Jitendrakumar Rambaran Yadav in order to justify his stand which has been held as completely illegal by the Adjudicating Authority.

**25.** The Appellant also alleged that Malharshanti Enterprises Limited (Operational Creditor), deliberately and consciously declined to provide any documents at all to the Appellant despite several reminders and therefore, the Appellant was constrained to reject the claims of Malharshanti Enterprises Limited for Rs. 1,95,01,079/- as non verifiable and non substantiated claims. The Appellant defended his action which according to him was done according to provisions and regulations provided under the Code.

**26.** We note that an I.A. No. 47 of 2021 was filed by Malharshanti Enterprises Limited against the rejection of claims and IA 1241 of 2020 challenging the claims of Financial Creditor before the Adjudicating Authority. Similarly, the Suspended Director also filed IA 1609 of 2020 seeking rejection of claims of Malharshanti Enterprises Limited (Operational Creditor) before the Adjudicating Authority.

**27.** The Appellant submitted that vide Order dated 30.08.2021, the Adjudicating Authority gave direction to Malharshanti Enterprises Limited to submit the documents and also directed the Appellant to collate the same. The Appellant also brought out that the Adjudicating Authority had further given the direction for forensic audit of the Corporate Debtor by Mr. Amarjit Chopra, past President of the Institute of Chartered Accountants of India.

The Appellant stated that pursuant to the Adjudicating Authority's order dated 30.08.2021, the Appellant received claims from the Malharshanti Enterprises Limited vide mail dated 03.09.2021 but the Appellant still came to conclusion that the documents were not enough to establish the claims of the Malharshanti Enterprises Limited and therefore the Appellant rejected the claims of the Operational Creditor vide e-mail dated 10.09.2021.

**28.** Concluding his remarks, the Appellant submitted that the Impugned Order need to be rejected.

**29.** Per contra, the Respondent No. 1 denied all the allegations of the Appellant labelling these as mischievous and misleading.

**30.** The Respondent No. 1 submitted that the Adjudicating Authority correctly admitted his claims and ordered for CIRP against the Corporate Debtor vide order dated 27.01.2020 which was challenged by Suspended Director of the Corporate Debtor and this Appellate Tribunal vide order dated 19.01.2021 dismissed the appeal upholding the correctness of the CIRP vide order dated 27.01.2020 and rejecting all the issues raised by the Suspended Director. The Respondent No. 1 submitted that the suspended Board of Directors preferred a SLP against this Appellate Tribunal Order dated 19.01.2021 before the Hon'ble Supreme Court of India and the said SLP was withdrawn and therefore, under these circumstances, the CIRP Order dated 27.01.2020 admitting section 9 petition as well as this Appellate Tribunal's order dated 19.01.2021 attained finality.

**31.** The Respondent No. 1 submitted that in March, 2020, when the agenda for first CoC meeting was circulated, it came to the knowledge of Respondent No. 1 that one Unsecured Financial Creditor i.e. Paton Construction Pvt. Ltd. was sought to be inducted as a sole CoC Member on the basis of a paltry sum of Rs. 1 lakh which was lent to the Corporate Debtor only on 6th September 2019 i.e. on a day just after the conclusion of oral arguments of Section 9 application filed by the Respondent No. 1. The same was strongly objected by the Respondent No. 1.

**32.** The Respondent No. 1 also stated on 3rd September 2019, the Corporate Debtor had transferred an amount of approximately Rs. 72 lakhs to its Director Mr. Naresh Sevantilal Shah (as per the ledger account of Corporate Debtor) as repayment of alleged loan taken from its director by the Corporate Debtor, but on the other hand the Corporate Debtor is claiming to have taken loan of paltry sum of Rs. 1 Lakh in similar time frame. The Respondent No. 1 stated that this is simple fraud being played in the CIRP proceeding by the Corporate Debtor, Resolution Professional and Unsecured Financial Creditor.

**33.** The Respondent No. 1 elaborated that in the first CoC meeting conducted on 18.03.2020, the Interim Resolution Professional admitted the claims of the Respondent No. 1 (Operational Creditor). The IRP recorded that claims of the Operational Creditor have been verified on the basis of supporting documents.

**34.** The Respondent No. 1 stated that Paton Constructions Private Limited, Unsecured Financial Creditor for Rs. 1,05,877/- was wrongly made the Sole CoC Member who misused its power and immediately replaced the Interim Resolution Professional without assigning any reasons and Mr. Manish Jaju was appointed as Resolution Professional. The Respondent No. 1 alleged that the minutes for first CoC meeting have not been finalized.

**35.** The Respondent No. 1 further submitted that thereafter, the second CoC meeting was conducted on 04.07.2020 wherein the Financial Creditor sought to pass a resolution seeking withdrawal of CIRP against the Corporate Debtor on the ground that the Corporate Debtor is a solvent entity.

**36.** The Respondent No. 1 alleged that conduct of the Resolution Professional and the Financial Creditor as well as that of the suspended Director clearly establish malafide intentions and therefore the Respondent no. 1 filed an IA bearing no. 1241/2020 before the Adjudicating Authority challenging the constitution of sole member CoC. The Respondent No. 1 alleged that in retaliation and even before the 3rd CoC meeting could be conducted, the Resolution Professional vide Email dated 02.12.2020 rejected the legitimate claims of the Respondent No. 1 so that the alleged Unsecured Financial Creditor as sole CoC member could pass a resolution to withdraw the CIRP against the Corporate Debtor and indeed this exactly happened.

**37.** The Respondent No. 1 submitted that in the third CoC meeting dated 07.12.2020, the Financial Creditor, sole CoC member contended that he does not wish to continue with the CIRP and wants to continue its business with the corporate debtor and therefore, the Resolution Professional filed an application for closure of CIRP through IA 375/2021 under section 12A of the Code.

**38.** The Respondent No. 1 stated that consequent upon rejection of his claim, the Respondent No. 1 moved an Application bearing no. 47/2021 before the Adjudicating Authority against the rejection of his claim by the Resolution Professional vide its Email dt. 02.12.2020 and the Adjudicating Authority after recording the detailed observations allowed the said application vide the Impugned Order dated 16.02.2023 thereby directing the Resolution Professional to admit the claims of the Operational Creditor. The Respondent No. 1 highlighted collusion amongst the Resolution Professional, the sole CoC member and suspended Board of Directors of the Corporate Debtor to derail CIRP and deny the claims of the Respondent No. 1.

**39.** The Respondent No. 1 assailed the Resolution Professional for rejecting his claims and who also concluded certain amount as recoverable by the Corporate Debtor from the Respondent No.1, thus, transgressing the power and duties of the Resolution Professional under the Code and assuming himself to be in role of judicial forum to adjudicate upon claims and the counter-claims contrary to the laid down law. The Respondent No. 1 emphasised that this

approach of resolution professional itself demonstrate gross misconduct being committed by the Resolution Professional and that is why in the Impugned Order dated 16.02.2023, the Adjudicating Authority was constrained to observe strongly about the non-transparent conduct of the Resolution Professional with direction to be thoroughly investigated. The Respondent No. 1 elaborated the instances wherein the resolution professional just accepted the submissions and documents of the Corporate Debtor 'as it is' including 'no dues certificate' created by the chartered accountant of the corporate debtor without verification, allowed the deductions as directed by the corporate debtor and disallowed the claims of the operational creditor.

**40.** The Respondent No. 1 stated that the Erstwhile IRP had correctly admitted the claims of the Respondent No. 1, but the appellant rejected the claims of the operational creditor while allowing counter-claims of the Corporate Debtor and further submitted that there was no requirement for the Corporate Debtor to seek a miniscule loan of Rs 1 lakh from the alleged financial creditor Paton Construction Pvt. Ltd. which was solely to oust the operational creditor.

**41.** The Respondent No. 1 stated that the Appellant has no locus in the present appeal as he cannot be treated as an aggrieved person. The Respondent No. 1 emphasised that role of Resolution Professional is of neutral qua the claim of any creditor and therefore there cannot be any interest in the matter let alone any personal interest since he is only a creature of the Code with specific role and

obligations. The Respondent No. 1 cited judgement of the Hon'ble Supreme Court of India in the matter of *Regen Powertech (P) Ltd. v. Giriraj Enterprises & Anr. [(2023) ibclaw.in 111 SC.]* in support of this argument.

**42.** The Respondent No. 1 concluded his remarks stating that there was no error in the Impugned Order and the appeal is without any merit and deserves to be set aside with exemplary cost.

### **Findings**

**43.** We note that the role of the Resolution Professional, the Appellant herein, has been defined in the Code, inter-alia, regarding collation of claims as against the adjudicator's role given to the liquidator qua the claims filed in the liquidation proceedings, whereas, in the present case the Appellant has gone ahead in deciding the claims and also decided to offset the claims by raising a counter claims against the Operational Creditor on his own.

**44.** We have also noted that the prayers made in the present appeal (all specific prayers noted earlier), nowhere the prayer has been made regarding expunging of adverse remarks contained in the Impugned Order against the Appellant, however, when the case was getting concluded, the Appellant submitted that he will be satisfied if only adverse remarks are expunged and submitted that the Appellant has made passing remarks in "facts in issues" in Para 8(a) for the same.

**45.** The Appellant has defended his action in rejecting the claims of the Operational Creditor on the basis that he did not get sufficient documentation. However, we observe that the claims of the Operational Creditor were properly adjudicated and admitted at the stage of initiating CIRP proceedings against the Corporate Debtor on the basis of which Section 9 application filed by the Operational Creditor vide order dated 27.01.2020.

**46.** We have already taken into consideration that Suspended Director of the Corporate Debtor had challenged the CIRP order dated 27.01.2020 before this Appellate Tribunal and the same was dismissed on merit after going through full facts and law vide this Appellate Tribunal's earlier order dated 19.01.2021. The observation of this Appellate Tribunal order has been recorded in detail by us in earlier discussions. It is worth noting that the same was challenged before the Hon'ble Supreme Court of India by Suspended Director of the Corporate Debtor which was dismissed as withdrawn. Thus, the CIRP order dated 27.01.2020 has attained the finality.

**47.** We have already noted that the Appellant has challenged the present appeal on the merits against the Impugned Order dated 16.02.2024. On a pointed query by this Appellate Tribunal, the Appellant stated that the appeal has been filed in his personal capacity. We wonder what is the locus and personal interest of the Resolution Professional in this regard.

**48.** In this connection, we note that the Hon'ble Supreme Court of India in the matter of *Regen Powertech (P) Ltd. (Supra)* has given ratio decidendi that Resolution Professional has to be neutral party and not expected to take a stand, which is contrary in present appeal where the Appellant filed appeal on merits of the Impugned Order and that too in his personal capacity as Resolution Professional of Corporate Debtor. This is contrary to ruling of the Hon'ble Supreme Court of India. The relevant para of the said judgment reads as under :-

*“We are of the opinion that in view of the facts and circumstances, the Resolution Professional should not have filed the present appeals. The Resolution Professional should have maintained a neutral stand. It is for the aggrieved parties, including the Committee of Creditors of Regen Powertech Private Limited (RPPL) and Regen Infrastructure and Services Private Limited (RISPL), to take appropriate proceedings or file an appeal before this Court.*

*Recording the aforesaid, the present appeals preferred by the Resolution Professional are dismissed as not entertained.”*

*(Emphasis Supplied)*

**49.** In this detailed background, we wonder as on what basis the Resolution Professional dismissed the claims of the Operational Creditor altogether which has gone through the entire round of litigation from the Adjudicating Authority to this Appellate Tribunal to the Hon'ble Supreme Court of India. Prima-facie this is much beyond his role and scope. If such approach of Resolution

Professional is to be accepted then the whole process of CIRP proceedings can get demolished.

**50.** It is further interesting to note that one Unsecured Financial Creditor, namely, Paton Construction Private Limited who is supposed to have given a loan of paltry sum of Rs. 1 Lakh knowing well that CIRP is being initiated against the Corporate Debtor, then original IRP is removed and the present Appellant is appointed as Resolution Professional, who in turn rejected the claims of Operational Creditor and accepted the claims of the Unsecured Financial Creditor and claims of promoter. This made the way for making Unsecured Financial Creditor of Rs. 1,05,877/- as a Sole Member of the CoC and ousting the Malharshanti Enterprises Limited the Operational Creditor out of CoC having claim of Rs. 1,94, 62, 148/-.

**51.** We also note that the forensic audit conducted by i.e., Mr. Amarjit Chopra, past President of the Institute of Chartered Accountants of India, gave clear report regarding admitted claims of the Operational Creditor along with other observation which have been discussed in details in the Impugned Order.

**52.** We observe that the Adjudicating Authority has castigated the role by the Appellant and recorded in details how the Resolution Professional has exceeded his role. The relevant para about the non-transparent conduct of the Resolution Professional has already been recorded by us in our earlier discussion.

**53.** As regards contentions of the Appellant that there were pre-existing disputes between Malharshanti Enterprises Limited (Operational Creditor) and the Corporate Debtor, we note that this issue was rejected both by the Adjudicating Authority and by this Appellate Tribunal in earlier order (already noted above). We are amazed to note tenacity of the Resolution Professional to assume role of the Adjudicating Authority and even role of the Appellate Tribunal and overrule the judicial orders which attained finality after the Hon'ble Supreme Court of India dismissed the appeal of Suspended Director/ Corporate Debtor as withdrawn.

**54.** This Act of Resolution Professional is deplorable in strongest term and need to be denounced in full force at our command. Such blatant illegal action will defeat the noble cause of the Code.

**55.** We find the allegations of the Appellant that Malharshanti Enterprises Limited (Operational Creditor) "since the very inception of the transaction has perpetrated a systemic fraud upon the Corporate Debtor" without any substantial basis.

**56.** In this background, shorn of unnecessary details, since the claims have been adjudicated at all stages and had been admitted in full by the Erstwhile IRP after verification of all documents, we do not need to go into these aspects again which has attained finality at all judicial fora including the Hon'ble Supreme Court of India.

**57.** The entire sequences of events leaves much less to be desired as it become quite clear that there seems to be conjoint action on part of the Resolution Professional along with the Suspended Director of the Corporate Debtor and Unsecured Financial Creditor i.e., Paton Constructions Pvt. Ltd. to derail the process of CIRP and to deny the admitted claim of the Operational Creditor. This is evident from fact that the Resolution Professional filed CP (IB) 3753/MB/C-IV/2018, as per direction of single Member of CoC for closure of CIRP under Section 12 A of the Code.

The aforementioned circumstances point out the high handedness and the malafide intentions of the Appellant conjointly with suspended Directors of Corporate Debtor and the Unsecured Financial Creditor.

**58.** We note that although the Adjudicating Authority in Impugned Order dated 16.02.2023 in Para 22 has recorded that “the conduct of the Resolution Professional also need to be thoroughly investigated”. However, the Adjudicating Authority did not give directions for the further course of action for the same or direction to the IBBI. Hence, this Appellate Tribunal is required to take this to logical conclusion as we are upholding the Impugned Order in toto. In this background, we direct the IBBI to look into the role of the Appellant in accordance with the law regarding conduct/ misconduct of the Appellant as the Resolution Professional and take further necessary action as deemed fit and warranted on the facts of the case and as per law.

**59.** Looking to frivolous appeal, we further impose cost of Rs. 10 Lakhs on the Appellant to be paid in Prime Minister's National Relief Fund within four weeks of pronouncement of this order. The compliance for the same will be reported to the Adjudicating Authority by the Appellant.

**Comp. App. (AT) (Ins) No. 598 of 2023**

**60.** This appeal has been filed by Paton Constructions Pvt. Ltd. who is Unsecured Financial Creditor of the Corporate Debtor who lent Rs. 1 Lakh to the Corporate Debtor just before the CIRP against the Corporate Debtor got initiated. It is claim of the Appellant that he did not know about the on going proceedings by the Respondent against the Corporate Debtor and only on publication of public announcement by the IRP inviting claims from the Creditors on 28.01.2020, the Appellant came to know about these developments and filed the claim of Rs. 1,05,877/- before the IRP/ RP.

**61.** The Appellant is aggrieved by the Impugned Order specially as contained in Para 20 which is against the Appellant. The Appellant submitted that being sole member of CoC, he has 100% voting rights. The Appellant submitted that the Resolution was passed with 100 % voting rights to replace the Erstwhile IRP with the present Respondent No. 6. During the CoC meeting held on 18.03.2020, the Suspended Director of the Corporate Debtor desired to continue the business

of the Corporate Debtor as going concern and he agreed for filing Section 12A application to close CIRP of the Corporate Debtor.

**62.** The Appellant stated that the Respondent No. 1 filed an I.A. No. 1241 of 2020 in C.P.(IB) – 3753(MB)/2018 seeking an order setting aside the loan transaction dated 06.09.2019 for Rs. 1 Lakh between the Appellant and the Corporate Debtor and during hearing, the Adjudicating Authority ordered the appointment of forensic auditor of the Corporate Debtor. The Appellant submitted that though I.A. No. 1241 of 2020 was listed, however, the Adjudicating Authority disposed the IA No. 47 of 2021 by way of Impugned Order dated 16.02.2023 by placing reliance of forensic audit report and gave relief beyond sought in the pleadings concluding that the transaction between the Appellant and the Corporate Debtor is “ingenious idea of the members of the Suspended Director of the Corporate Debtor.”

**63.** The Appellant submitted that he is Financial Creditor, who meets the criteria of Rs. 1 Lakh and therefore was within his right to be sole CoC Member with 100% voting rights. The Appellant defended the action taken by the CoC and assailed the Impugned Order which has gone beyond jurisdiction of the Adjudicating Authority in treating the Financial Creditor unjustly and unfairly.

**64.** Concluding his remarks the Appellant requested to set aside the Impugned Order.

**65.** Per contra, the Respondent No. 1 Malharshanti Enterprises Limited denied of the allegations of the Appellant labelling these as mischievous and misleading. The Respondent No. 1 emphasised that the Appellant has been inducted in the CoC only to frustrate the CIRP and to deny the claims of the Respondent No. 1 herein.

**66.** The Respondent No. 1 also refuted the claims of the Appellant that his claims of financial debt have been nullified in the Impugned Order. The Respondent No. 1 elaborated that in the Impugned Order, the Respondent No. 6 has been directed to accept the claim of the Respondent No. 1 and only mentioned regarding ingenious way of the financial debt but has not nullified the financial debt of the Appellant.

**67.** The Respondent No. 1 explained that the only reason that Appellant is here before this Appellate Tribunal is that observation of the Adjudicating Authority in para 20 of the impugned order and that too on the basis of the conclusions drawn by the forensic auditor in its audit report which provoked the Appellant to such an extent that it chose to file an Appeal against the order which only directed the Resolution Professional to accept the claims of the Respondent No. 1. The Respondent No. 1 submitted that there is no ground available to the Appellant to challenge the impugned order.

**68.** The Respondent No. 1 stated that the Corporate Debtor had entered into a transaction in the form of an Inter-Corporate Loan Deposit (ICD)/unsecured

Loan from M/s. Paton Construction Private Limited for a meagre sum of Rs. One lakh on 06.09.2019. Interestingly this loan amount was credited to the account of the Corporate Debtor the very next day of completion of oral arguments before NCLT, Mumbai on 05.09.2019 only to stop the Respondent No. 1 from being sole member of the Committee of Creditors in its capacity of being only Creditor and by the this act, the Corporate Debtor through its purported sole Unsecured Financial Creditor with a debt of mere Rs. 1 lakh to control the CIRP Process with ultimate aim to reject the claims of the Operational Creditor and file Section 12 A application for close of CIRP.

**69.** The Respondent No. 1 stated that Appellant M/s. Paton Construction Private Limited is merely a façade of the Corporate Debtor, who has been brought into the scheme of things merely to oust the Respondent No. 1 from being and comprising the sole member of CoC of the Corporate Debtor.

The Respondent No. 1 stated that the Suspended Director of the Corporate Debtor in its Appeal no. 415/2020 before this Appellate Tribunal against the CIRP Order, stated that it has an asset base of Rs. 7,09,41,985/- as reserves and surplus; therefore in such circumstances it is surprising that Corporate Debtor hurriedly availed a meagre loan of Rs. 1 Lakh from Appellant immediately on the next day of conclusion of oral arguments before the NCLT to defraud the Operational Creditor.

**70.** The Respondent No. 1 submitted that vide email dated 14.03.2020, the erstwhile IRP issued agenda of first CoC meeting and vide the said email, the identity of the Appellant was recognized for the first time against which the Respondent no. 1 vide email dated 17.03.2020 objected the Appellant's claim as the sole CoC member. On 18.03.2020, the first CoC meeting was conducted wherein the erstwhile IRP admitted the claims of the Respondent no. 1 and also the Respondent no. 1 was apprised of the fact that Appellant had lent a sum of Rs 1 lakh to the Corporate Debtor on 06.09.2019. The erstwhile IRP also recorded in the meeting that the claim of the Respondent No. 1 was verified and admitted on the basis of the supporting documents provided by the Respondent No. 1. The Respondent No. 1 alleged that since the Appellant became the sole member of CoC, therefore without any reason, in the very same meeting on 18.03.2020, the CoC passed the resolution for change of IRP and Mr Manish Jaju, the Respondent No. 6 herein was appointed as Resolution professional.

**71.** The Respondent No. 1 assailed that change of IRP was sought to be done in a haphazard manner when suddenly on 08.06.2020, the Respondent No. 1 receives an email addressed by the appellant wherein the IRP was apprised that the application for change in the Resolution Professional under Section 22 of the Code has been listed for emergency hearing on the very next date i.e. 09.06.2020 before the Principal Bench of the National Company Law Tribunal at New Delhi. The Respondent No. 1 submitted that he was shocked and surprised to have

received the said e-mail dated 08.06.2020 on such short notice and was rather awaiting finalization of minutes of the 1<sup>st</sup> CoC for inclusion of relevant objections raised by the Respondent No. 1 against the Appellant. The Respondent No. 1 stated that the Principal bench of NCLT then passed order dated 09.06.2020 replacing the erstwhile IRP with current resolution professional. Thereafter the second CoC meeting was conducted on 04.07.2020 wherein the Appellant sought to pass a resolution seeking withdrawal of CIRP against the Corporate Debtor on the ground that the Corporate Debtor is a solvent entity.

**72.** The Respondent No. 1 submitted that the alleged loan taken from the Appellant by the Corporate Debtor of merely Rs. 1 Lakh was to aimed at the Appellant to become Sole Financial Creditor which has already been challenged by the Respondent No. 1 vide an application bearing IA No. 1241 of 2020 challenging the constitution of CoC i.e., Appellant as Sole Member of the CoC which is pending before the Adjudicating Authority.

**73.** The Respondent No. 1 reiterated that the Adjudicating Authority in the Impugned Order as not nullified the alleged loans of the Appellant otherwise even the CoC would have been reconstituted but has only the Resolution Professional has been directed to admit the claims of the Appellant.

**74.** The Respondent No. 1 further submitted that he never misused the jurisdiction under Section 16(5) of the Code and no prejudiced would be caused to the Appellant by the observation under Para 20 of the Impugned Order

particularly when IA 1421/ 2020 is still pending for adjudication before the Adjudicating Authority. The Respondent No. 1 defended Para 20 which according to him have mere observation on the basis of inconsistency drawn by the forensic auditor in its report and also clearly in the facts of the case.

**75.** Concluding his arguments the Respondent No. 1 requested that the Appeal should be dismissed with exemplary cost.

### **Findings**

**76.** We note from the sequence of events that the Appellant has lent Rs. 1 Lakh when CIRP of the Corporate Debtor was almost imminent. We note that by giving a loan of Rs. 1 Lakh, the Appellant became Unsecured Financial Creditor and on inviting of claims from the Creditors by Erstwhile IRP, the Appellant filed claims for Rs. 1,05,877/- which barely meets the threshold of minimum Rs. 1 Lakh prevalent at that time.

**77.** We put a direct query to the Appellant regarding nature of his business and whether he has been involved in giving such loans to other parties and particularly how many such loans were given to the Corporate Debtor prior to this loan. The Appellant submitted that he is in a construction business and working as Real Estate Developer and not in financial business but in given circumstances he decided to give Rs. 1 Lakh loan to the Corporate Debtor which was legal for

him to do so. The Appellant did not give any details of loans given to other entities or the Corporate Debtor prior to this transaction.

**78.** We observe that such construction companies are normally always short of funds and keep raising the funds from the banks/ NBFC's and are not in business to give such loans. We wonder as to why the Corporate Debtor, whose net worth is stated to be more Rs. 7 Crores, still took loan of Rs. 1 Lakhs knowing very well that CIRP against the Corporate Debtor is likely to happen. We could not find any satisfactory response from the Appellant as well as the Ex-Promoters on this account.

**79.** Prima facie we cannot find any fault in the finding of the Adjudicating Authority contained in Impugned Order including as contained in para 20 against which the Appellant has filed this. The Impugned Order merely recorded that an application filed under Section 12 A on the ground of purported settlement entered between the CoC and the sole Appellant herein who is Unsecured Financial Creditor who took a loan just before passing CIRP order is indigenous idea of Corporate Debtor and the Promoters of Corporate Debtor to bring out the Corporate Debtor from the clutches of CIRP which attained the finality through back door entry.

**80.** We note that the forensic audit of books of accounts of the Corporate Debtor was ordered by the Adjudicatory authority and the forensic auditor made observations in relation to the purported loan transaction which took place

between the Appellant and the Corporate Debtor. The Appellant vide an agreement dated 20.08.2019 had to disburse a loan of Rs 50 lakh to the Corporate Debtor of which only Rs 1 lakh was given to the appellant on 06.09.2019 i.e., the very next day when the oral arguments were concluded before the adjudicating authority. The order admitting CIRP against the Corporate Debtor was passed on 27.01.2020. This was for the first and the last time that the Appellant paid money to the Corporate Debtor. We note from the submissions that after September, 2019 till date, no further loan amount was disbursed to the Corporate Debtor. We do not find anything which prevented the Appellant to disburse further amount under the agreement and it is only after the claims of the operational creditor got rejected the Appellant expressed its intention to continue the business relations with the Corporate Debtor. Incidentally it has been brought to our notice by the Respondent No. 1 that the alleged loan agreement was backdated and unstamped documents.

**81.** It is interesting to note that value of the said transaction is of Rs. 1 Lakh vis-à-vis the stand of solvency of the Corporate Debtor, having reserves of more than Rs. 7 Crores and failure on the part of the corporate debtor to pay back Rs 1 lakh to Appellant when the said amount was never disputed. These circumstances lead us to belief that the Appellant was brought into CIRP so that the committee of creditor could comprise of only Unsecured financial creditor and the CIRP could be stage- managed as per desires. In this context, we reiterate that the

forensic auditor in its report had observed that loan agreement was prepared on stamp paper dated May 2019 of Rs 100 for purpose of affidavit only and not for the purpose of obtaining loan and stamp paper was even prior to the Board resolution. It has been brought to our notice that as per Maharashtra stamp Act, stamp duty of 0.2% of the amount agreed in the contract gets attracted if amount exceeds 10 lakhs which in the present case was Rs 50 lakhs, which obviously was not paid.

**82.** We take into consideration that the demand notice under section 8 of the Code was sent to the Corporate Debtor on 02.12.2017 by the Operational Creditor whereas the said loan agreement was entered on 20.08.2019 i.e. This sequence reveals the conduct and intentions of concerned parties.

**83.** After going through all the facts of the case and submissions made by the parties as well as also going through the contentions of Resolution Professional in appeal bearing Company Appeal (AT) (Ins.) No. 545 of 2023 (which we have discussed at length in our earlier decisions we do not find any error in the Impugned Order and the Appeal devoid of any merits is dismissed.

**Comp. App. (AT) (Ins) No. 600 of 2023**

**84.** This appeal has been filed by Naresh Sevantilal Shah who is Suspended Director of the Corporate Debtor who submitted that the Corporate Debtor is involved in the business of Real Estate Development and even on 31.03.2019, the

Corporate Debtor had Rs. 7,09,41,98/- in reserve and surplus and thus is a solvent company and should be allowed to continue as a going concern.

**85.** The Appellant submitted that the claims submitted by the Operational Creditor are fraudulent claims. The Appellant stated that all claims of the Respondent No. 1 has already been paid by the Corporate Debtor to the extent payable.

**86.** The Appellant also submitted that there have been pre-existing disputes on every issues which has not been factored into by the Adjudicating Authority while passing the Impugned Order.

**87.** The Appellant also defended the action of the Resolution Professional for setting up counter claims against the Respondent No. 1 since the Resolution Professional was managing the affair of the Corporate Debtor and it was of Resolution Professional duty to ensure that interest of the Corporate Debtor is protected and in this background the Resolution Professional rightly raised the counter claims against the Respondent No. 1.

**88.** The Appellant submitted that it can be nobody's case that the Respondent No. 1 is entitled only for payment and not liable for making the payment to the Corporate Debtor and if this is allowed this will be abuse of the process of law.

**89.** The Appellant gave the details of the work order, the Corporate Debtor gave to the Respondent No. 1 with specific task and activities which should have been completed within specific time period and the same was inclusive of all

costs. The Appellant submitted that in the work order, it was clear that time was essence of the work and the work was to be completed by March, 2015 which the Respondent No. 1 miserably failed to complete. Thereafter, the Corporate Debtor and the Respondent No. 1 entered into the MoU dated 25.09.2015 where it was agreed that the Respondent No. 1 would complete the work on or before 10.10.2015 and would be entitled only for payment of Rs. 5 Lakhs for completing the work.

**90.** According to the Appellant, it is admitted fact that the Respondent No. 1 could not complete the work even withing the extended time.

**91.** The Appellant submitted that based on the MoU signed by both the parties, on 25.09.2015 the Respondent No 1 was entitled to receive only Rs. 5 Lakh in full and final settlement from the Corporate Debtor and assailed the conduct of the Respondent No. 1 who created false and record and fabricated documents in order to demand further amount from the Corporate Debtor.

**92.** The Appellant reiterated that there were pre-existing disputes and MoU was signed on 25.09.2015, thus the demand notice under Section 8 was illegal and the same was replied accordingly.

**93.** The Appellant also gave the background of the appeal made before this Appellate Tribunal which was dismissed by this Appellate Tribunal on 19.01.2021 and which was challenged before the Hon'ble Supreme Court of India which was finally dismissed as withdrawn. The Appellant submitted that appeal

was withdrawn after getting liberty for other legal remedies and based on this liberty granted by the Hon'ble Supreme Court of India , the present appeal has been filed by the Appellant.

**94.** The Appellant submitted that the Corporate Debtor was in need of money and as such the Corporate Debtor took a loan of Rs. 1 Lakh from Paton Constructions Pvt. Ltd./ Respondent No. 5.

**95.** The Appellant submitted that although he is promoter of the Corporate Debtor but he is also Unsecured Financial Creditor who lent the huge money to the Corporate Debtor and therefore he has filed the claims of Rs. 1,77,24,370/-.

**96.** The Appellant submitted that the claim of the Respondent No. 1 for Rs. 1,95,01,079/-, were wrongly admitted by Erstwhile IRP which was later corrected by the current Resolution Professional/ Respondent No. 6 based on the proper documentation and after taking into account the counter claims in favour of the Corporate Debtor.

**97.** The Appellant defended change of IRP to the present RP as it was decided by the Sole Financial Creditor in the interest of Corporate Debtor and no malafide intention can be attributed although no detailed reasons were recorded in the minutes of CoC for this change.

**98.** The Appellant also pointed out that since Section 9 application was initiated by the Respondent No. 1 with malafide intention and the Corporate Debtor is the solvent company, in the CoC meeting it was decided that the

Corporate Debtor should be allowed to continue as a going concern and as application under Section 12A should be filed before the Adjudicating Authority for closure of CIRP as such there is nothing wrong in withdrawing CIRP proceedings in accordance with laid down law.

**99.** The Appellant submitted that even for arguments sake even the entire claims received by IRP were to be taken into account of Rs. 3,73,31,326/-, the reserve and surplus of the Corporate Debtor was almost double hence it was correct decision on part of the CoC to file an application for closure of CIRP, so to allow the Corporate Debtor to continue as going concern in spirit of the Code. The Appellant castigated the conduct of the Respondent No. 1 who is unnecessary dragging the Corporate Debtor into insolvency and litigation.

**100.** The Appellant also defended the action of Respondent No. 6 for rejection of claims filed by the Respondent No. 1 since the Respondent No. 1 has not given the required documentations specifying claims of the Respondent No. 1 despite several opportunities given to him by the Respondent No. 6.

**101.** The Appellant assailed the conduct of the Respondent No. 1 who has been playing fraud on the Corporate Debtor based on fabricated documents in order to justify his false claims. The Appellant further submitted that the Respondent No. 1 fabricated document based on which certain payment was made by the Corporate Debtor to the Operational Creditor and referred to cube testing reports which are used to determine crushing strength of the concrete tubes utilised by

the Corporate Debtor in the present project and even cube test reports were found to be fabricated.

**102.** The Appellant also assailed the Impugned Order which has ignored the several vital facts including that the debt was not due and there was no default. The Appellant also raised the issue regarding limitation which was not considered properly by the Adjudicating Authority. The Appellant submitted that mere judicial order regarding admission of Section 9 application does not tantamount to admission of claims which has to go due process of law and to be followed by the Resolution Professional in terms of the stipulated requirements.

**103.** The Appellant also assailed the finding of forensic auditor and relied upon by the Adjudicating Authority as contained in the Impugned Order.

**104.** The Appellant submitted that there are FIRs pending before the police and authorities filed vide FIR No. 99/2023 and 949/2023 and till finalisation of these FIRs the claims of the Respondent No. 1 cannot be crystalized.

**105.** Concluding his arguments, the Appellant submitted that this appeal should be allowed and the Impugned Order should be set aside.

**106.** Per contra, the Respondent No. 1 denied all the averments made by the Appellant and accused the Appellant for misusing the process of law only to derail the CIRP process and to frustrate the legal claims of the Respondent No. 1.

**107.** The Respondent No. 1 submitted that there has been absolutely non-responsive attitude of the Corporate Debtor and further so called pre-existing

disputes were raised for the first time by the Corporate Debtor after the Respondent No. 1 issued notice under Section 8 of the Code, which is not permissible in terms of the Code, as well as based on catena of judgments of the Hon'ble Supreme Court of India on this issue.

**108.** The Respondent No. 1 submitted that the claims of the Respondent No. 1 were rightly adjudicated by the Adjudicating which was challenged before this Appellate Tribunal raising issues including pre-existing issues and limitation and the same were rejected by this Appellate Tribunal after going into all details and dismissed the appeal of the Appellant vide this Appellate Tribunal order dated 19.01.2021. The Respondent No. 1 further submitted that the Appellant even challenged this Appellate Tribunal's order dated 19.01.2021 before the Hon'ble Supreme Court of India which was also dismissed as withdrawn since the Appellant knew that there was no chance of winning the appeal there.

**109.** The Respondent No. 1 submitted that there is hardly any ground for the Appellant to file this appeal since all issues and claims have been adjudicated at highest level and thus by doctrine of res-judicata the appeal is deserves to be dismissed with cost.

**110.** The Respondent No. 1 also denied the averments made by the Appellant that the Respondent No. 1 has been indulging into fabrication and forging documents and also denied the fact that the Appellant allegedly got the RTI information from relevant authorities regarding cube testing report and stated that

they are manipulated and fabricated by the Appellant since validity of such information kept by the relevant authority is for 5 years.

**111.** The Respondent No. 1 submitted that based on these cube test report which was accepted by the Corporate Debtor and the Corporate Debtor got the payments from other agencies hence plea of fabricated cube testing report is only after thought at this stage to somehow mislead this Appellate Tribunal raising such frivolous issues regarding alleged fabrication and forgery.

**112.** The Respondent No. 1 reiterated the ploy of the Appellant in connivance that the Paton Constructions Pvt. Ltd. alleged Unsecured Financial Creditor for mere amount of Rs. 1,05,877/- and in connivance that the Resolution Professional Manish Jaju is deny the admitted claims of the Respondent No. 1 and to take out the Corporate Debtor from the clutches of CIRP.

**113.** Concluding his remarks the Respondent No. 1 requested this Appellate Tribunal to dismiss this Appeal with exemplary cost so that such incidence are not repeated in future.

### **Findings**

**114.** After going through arguments of all parties we note that the issues raised by the Appellant has already been dealt by the Adjudicating Authority and subsequently by this Appellate Tribunal vide order dated 09.01.2023. We also

note that the Appellant challenged the same before the Hon'ble Supreme Court of India which was also dismissed as withdrawn.

**115.** We wonder if the judicial adjudication of the claims and issues raised by the Appellant are decided at all floors of law i.e., NCLT, NCLAT, and Hon'ble Supreme Court of India, how Appellant can raise the same issues again and again.

**116.** We also note that once the claims of the Operational Creditor have been crystalized and admitted by the Adjudicating Authority while admitting Section 9 application of Respondent No. 1 and initiating CIRP against the Corporate Debtor. We also find that IRP was duly appointed by the Adjudicating Authority who collated the claims and admitted the claims of the Respondent No. 1 basis on the documentation submitted by the Respondent No. 1. We find surprising as how the claims of the Operational Creditor have been rejected later by the Resolution Professional.

**117.** We are not inclined to go into so called issues of RTI information and FIR raised by the Appellant as this is summary trial and claims and issue have already been crystalized and decided upon by all judicial authorities.

**118.** In find the Appeal bearing Comp. App. (AT) (Ins.) No. 600 of 2023 fails and stand dismissed. Interlocutory Applications, if any, are closed.

## **Summary of Findings**

**119.** We are constrained to observe that CIRP was initiated way back on 27.01.2020 and almost after 4.5 years, the case is being dragged and CIRP has not been concluded. This does not auger well.

**120.** In fine all three appeals Comp. App. (AT) (Ins.) No. 545 of 2023, Comp. App. (AT) (Ins.) No. 598 of 2023 & Comp. App. (AT) (Ins.) No. 600 of 2023 fail and stand dismissed. In Comp. App. (AT) (Ins.) No. 545 of 2023, we have already given suitable directions including imposition of cost of Rs. 10 Lakhs being frivolous appeal and further directions to IBBI to investigate the conduct of Resolution Professional.

**121.** The Registry is directed to send a copy of this order to the Chairman IBBI for necessary action and also send a copy to the Adjudicating Authority.

**[Justice Rakesh Kumar Jain]  
Member (Judicial)**

**[Mr. Naresh Salecha]  
Member (Technical)**

**[Mr. Indevvar Pandey]  
Member (Technical)**

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