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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.12264-12266 OF 2024

SANJAY DAVE ...Appellant(s)

Vs.

ANDHRA BANK LTD. & ORS. ...Respondent(s)

J U D G M E N T

K.V. VISWANATHAN, J

1. The present appeals under Section 62 of the Insolvency and Bankruptcy Code, 2016 (for short, "the Code") call in question the correctness of the judgment dated 29th October, 2024 passed by the National Company Law Appellate Tribunal New Delhi (for short, "the NCLAT") in Company Appeal (AT)(INS) Nos. 1128, 1131 and 1134 of 2024.

SUMMARY OF THE FACTS

2. The Corporate Insolvency Resolution Process (CIRP) out of which the present appeals arise, concerns the Corporate-Debtor by the name M/s. Oracle Home Textiles Limited. The CIRP was admitted on 9th August, 2018 and the Resolution Professional (RP) came to be appointed. On 6th February, 2019 a Request For Resolution Plan (RFRP) was issued by the RP. With the permission of the National Company Law Tribunal (for short, "the NCLT"), the appellant submitted a Resolution Plan. The appellant was the Promotor/Director of M/s. Oracle Homes Textiles Limited. This entity had a certificate of MSME (Micro, Small, and Medium Enterprises). On 10th May, 2021 the appellant was informed that the Resolution Plan submitted by him had been approved by the Committee of Creditors (CoC) with the voting majority of 99.90%.

3. It must be pointed out at this stage that at the time when the appellant's plan was submitted and was under consideration, certain third parties had moved the

Adjudicating Authority as prospective resolution applicants (for short "PRA") seeking permission to file Resolution Plans for the Corporate-Debtor. Those applications were pending before the Adjudicating Authority.

4. It was at this stage that on 23rd May, 2021, a Letter of Intent (LoI) was issued by the RP to the appellant. The appellant characterised the LoI as a conditional LoI. Be that as it may, the RP refused to treat them as conditional. At this stage, the appellant filed IA No.1205 of 2021 seeking re-issuance of an unconditional LoI. The case of the appellant was that the LoI dated 23rd May, 2021 was conditional as it carried the following paragraph:

> "The above e-voting results, thereby approving the said final resolution plan (including the addendum) submitted by the member of the suspended Board are subject to the order reserved by Hon'ble NCLT (Mumbai Bench) in the hearing held on 21st Jan, 2021, the same has already been discussed in the CoC meetings along with you and the same is in your knowledge too."

5. In the meantime, pending the appellants Interlocutory Application, a second LoI came to be issued on 23rd June, 2021.

The reason for issuing the second LoI was that the appellant failed to submit the accepted copy of the LoI within the time stipulated. In this LoI too, it was stated that the LoI would be subject to the outcome of the pending applications filed by the prospective resolution applicants.

6. There was another clause to which also the appellant raised a grievance. The clause was to the following effect:

> "You hereby acknowledge and agree that all applications, cases etc. filed by the staff, employees, workers etc. to any authority, courts etc. is the risk of the successful resolution applicant and the successful resolution applicant is aware and ready to take such calculated risk and has configured the same in his resolution plan and hence the same (risk and cost) shall be borne by the successful resolution applicant only."

7. Since the acceptance was not forthcoming, on 23rd July, 2021 a third LoI was issued on the very same terms and a specific clause was incorporated that the unconditional performance guarantee was to be submitted within a period of seven days in terms of clause 1.10 of the Request For Resolution Plan (for short "RFRP").

8. Since here again the acceptance was not received, on 2nd August, 2021 the RP informed the appellant that the earnest money deposit of Rs.1,00,00,000/- (One Crore) was forfeited as per the terms and conditions of the RFRP on account of non-acceptance of the LoI dated 23rd June, 2021.

9. This resulted in the appellant's filing of IA No.2029 of 2021 before the Adjudicating Authority on 27th August, 2021 seeking restoration of Earnest Money Deposit (EMD) contending that the forfeiture was contrary to clause 1.9.4 of the RFRP.

10. The CIRP period came to an end on 21st February, 2023. Since there was no valid Resolution Plan under Section 33 of the Code, the CoC on 5th June, 2023 voted on the liquidation of the Corporate-Debtor. The same was approved with a voting percentage of 99.61%. After the CoC voted for liquidation, the RP filed IA No.3914 of 2023. seeking approval for liquidation based upon the decision of the CoC in its 33rd meeting.

11. Two Interlocutory Applications of the appellant being IA Nos. 1205 of 2021 and IA No.2029 of 2021 and the Interlocutory

Application of the RP, namely, IA No.3914 of 2023 were disposed of by three separate orders by the Adjudicating Authority on 30th April, 2024. While the two applications of the appellant were dismissed, the application of the RP came to be allowed. This resulted in three appeals being filed before the NCLAT by the appellant. By the impugned order of 29th October, 2024, all three Company Appeals have been dismissed. That is how the appellant is before us by way of the further appeals under Section 62 of the Code.

CONTENTIONS OF THE LEARNED COUNSEL

12. We heard Ms. Purti Gupta, learned counsel for the appellant. Mr. Gaurav Agrawal, learned senior counsel appearing for respondent No.1-the lead bank-the Union Bank and Ms. Anjali Sharma, learned counsel for respondent No.3-Liquidator.

13. Ms. Purti Gupta, learned Counsel, who very ably presented the case for the appellant, vehemently contended that all the LoIs were conditional and such conditional LoIs

were contrary to the Code as well as the plan submitted by the appellant. According to the learned counsel for the appellant, the stipulation in the LoI that the approval of the final Resolution Plan would be subject to the orders reserved by the NCLT in the applications filed by the PRAs makes the LoI a conditional one.

14. The further argument is that the stipulation about underwriting, any liability that may result in the litigation initiated, if any, by the staff, employees and workers would be the risk of the SRA, also makes the LoI conditional.

15. The third contention is that after having originally granted a period of forty-five days for submitting the performance guarantee in the LoI of 23rd May, 2021 reducing the same to seven days in the LoI of 23rd July, 2021 for submitting performance guarantee was contrary to the resolution of the CoC.

16. In response, the learned senior counsel Mr. Gaurav Agrawal for respondent No.1 and Ms. Anjali Sharma, learned

counsel for respondent No.3 drew attention to the findings of both the Adjudicating Authority and the Appellate Authority and reiterated the findings recorded thereon. They also drew the attention of this Court to the said findings.

17. The Adjudicating Authority had recorded in its order that the appellant was present in the 15th CoC meeting dated 24th January 2020 wherein the Resolution Plans received from M/s. Faze Three Limited and M/s Munish Kohli and Associates were discussed and deliberated. These two entities had filed MA Nos. 2005 and 1618 of 2019 which were the two applications pending before the NCLT. The NCLT held that the appellant was aware of the ongoing litigations with respect to submission of Resolution Plans by the PRA and that it was unjust on his part to insist that his plan, which itself was submitted pursuant to the order of the NCLT dated 18th February, 2020 be considered without subjecting it to the outcome of the decision of the Adjudicating Authority. The relevant findings of the adjudicating authority is reproduced below:

"19…. On perusal of records, such as the minutes of the 15th CoC Meeting held on 24.01.2020 annexed at Annexure 'A' to the Application, it is evident that the Applicant herein was present in the 15th CoC meeting wherein the resolution plans received from M/s. Faze Three Ltd and M/s. Munish Kohli & Associates were discussed and deliberated upon in the backdrop of M.A. No. 2005/2019 and M.A. No. 1618/2019 which were then pending for hearing before this Tribunal. The Applicant expressed his interest to submit a resolution plan vide Letter dated 11.02.2020 and he submitted his initial resolution plan only after passing of the Order dated 18.02.2020 by this Tribunal in MA No. 608/2020. ***Thus, it is evident from records that the Applicant was aware of the ongoing litigations with respect to submission of resolution plans by other resolution applicants and, therefore, it goes without saying that the Applicant herein cannot now insist on his plan being considered without subjecting it to the outcome of the decision of the Adjudicating Authority or any other court or tribunal under the laws of the land. Thus, the plea of the Applicant that the Applicant cannot be made subject to outcome of third-party applications where the Applicant is not even a party, is hereby rejected in toto as being irrational, absurd and untenable in law."***

18. The NCLAT has also concurred with the finding of the NCLT. The NCLAT has recorded that it cannot be held that the appellant was taken by surprise as the pendency of the application of the PRA was discussed in the presence of the appellant and that the CoC had raised the issue in several meetings, namely, in the meetings of 1st March, 2021, 10th

March, 2021, 29th April, 2021 and 21st May, 2021. The Appellate Authority found that the LoIs were issued based on the Resolution Plan of the Successful Resolution Applicant (SRA)/appellant along with the addendum and CoC decisions in which the SRA was also a participant. It was pursuant to the refusal of the appellant to comply with the third LOI of 23rd July, 2021 that the EMD also came to be forfeited in accordance with the relevant clause 1.9.4 of the RFRP on 2nd August, 2021. The relevant findings in the impugned order are extracted below:-

> *"20. The SRA never objected at any stage upto the 28th CoC meeting to making the resolution plan subject to the prospective orders to be passed by the Adjudicating Authority. Instead the SRA requested the CoC to issue him a LoI. However, after the LoI was circulated to the SRA for his perusal and acceptance on 24.05.2021 by email, it is at this stage that the SRA through his Advocate on 29.05.2021 raised preliminary objections to the LoI being conditional for being subjected to the prospective orders of the Adjudicating Authority. This shows that the SRA was well aware before seeking the LoI from the CoC that the Loi was to be subject to the outcome of hearing dated 21.01.2021.* ***Hence it becomes clear that it was an after-thought on the part of the SRA to raise the bogey of conditional LoI. If the SRA was so aggrieved, it could have sought impleadment in the matter before the Adjudicating Authority or taken up the matter with the RP/ CoC to seek early resolution of the matter. In any case, it is an admitted***

fact that both the IAs filed by the PRAs stood dismissed for non-prosecution before the Adjudicating Authority took up IA 1205 for hearing.

26. In the present case once CoC had approved the resolution plan, the SRA stood precluded from raising any observations to the conditions stated in the LoI as these were not alien to the resolution plan as submitted by the SRA which was approved by the CoC. Present was not a case of conditional and addendum LoI but a case where the SRA was vacillating in accepting the LoI and not wanting to put his skin in the game by baselessly alleging that the LoI was conditional. The Adjudicating Authority rightly refused to entertain the objections of the SRA to the conditions in the LoI since withdrawal or modification of resolution plan after approval by the CoC is not permissible in law."

ANALYSIS AND REASONING: -

19. We find that the stand of the appellant that the stipulated clauses objected to by the appellant made the LOI conditional is bereft of any merit. All that the stipulations mentioned was that the LoI would be subject to the final decision of a judicial body in a proceeding to which the CoC and RP were privy. Even if such a stipulation was not mentioned, ultimately it will be the order of the Adjudicating Authority, unless duly called in question and set aside before the higher body, which will

prevail. Hence, the stipulation about the LoI being subject to the outcome of the pending applications of PRA would not make the LoI conditional for the appellant to renege from the plan.

20. Moreover, a perusal of the minutes of meetings of the CoC make it evident that the appellant was very well made aware of the pending litigation and the other conditions which the LoIs have allegedly imposed on the appellant. The relevant extracts from the various minutes of meetings have been set out below:-

Minutes of 28th CoC Meeting Held on 21st May 2021

"*The details of the e-Voting result on the above said resolution plan(including addendum) is as follows:*

Agree	*Disagree*	*Abstain from Voting*	*Total*
99.90%	*0.10%*	*0%*	*100 %*

The RP further informed that the above results are subject to the order reserved by Hon'ble NCLT in the hearing held on 21st Jan, 2021. The RP has already sent the intimation on 10th May, 2021 to Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) and has asked him to provide a final signed hardcopy (3 sets) of the resolution plan including the addendum along with the word documents of the same after

making due corrections as discussed in the above mentioned meetings of the committee of creditors, and also to attach all the revised and relevant documents including the board resolution and letter from the financial sponsors to the resolution plan in support of the final resolution amount as soon as possible so that the same can be filed before Hon'ble NCLT at the earliest.

Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) stated that he has received the said communication on email but he is wanting the formal letter of Intent on letter head to proceed further. The COC asked the RP to issue the "Letter of Intent" on letterhead to Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant). Adv. A.K. Mishra (M/s MDP Partners -Advocates & Solicitors) Advocates for Resolution Professional suggested to issue the "Letter of Intent" on the letterhead giving reference of the email dt. 10th May, 2021 and also the discussion being held in the current COC meeting. The COC members agreed to the same."

Minutes of 29th COC Meeting Held on 11th June 2021

"The COC asked Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) if he has any other query or resistance to the LOI. Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) handed over the letter of his advocates to the COC. The COC asked Adv. U.C. Nayak (M/s M.V. Kini & Co. - Law Firm) - Advocates for Financial Creditors to read the whole letter for the benefit of all the participants. After going through the letter the COC again asked Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) if he has any specific

query or resistance to the LOI as there is nothing specifically mentioned in the letter of the advocate been submitted by him. Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) replied in negative."

21. Equally, the condition with regard to the underwriting, the risk of staff and workers in any pending litigation, cannot be said to be a conditional one on the facts of the present case. As the discussion in the minutes indicate, the appellant in the 27th CoC meeting agreed to the same. The appellant cannot be permitted to blow hot and cold. The relevant portion of the minutes are extracted below:

"The RP then asked Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) to elaborate on the following point

Quote from addendum (dt. 5th May, 2021) Page No. 6
7.11 The Resolution Applicant has been Informed by the Resolution Professional that an MA has been filed by the workers and employees in respect of their salaries and dues post commencement of CIRP but since the workers and employees have not reported for work and hence there is no question of any payment of remuneration post commencement of CIRP as the RP is clear on the concept of NO WORK NO PAY and hence the same is not considered as payable. If any amount is found due and payable by the Hon'ble Tribunal or the

Appellate Tribunal for the time the plant was functioning in CIRP period, then and in that event, the same will be dealt by Resolution Applicant accordingly.

Unquote:

Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) then read the above clause 7.11 from the addendum) Page 6. Adv. Rohan Agarwal (M/ s MDP Partners - Advocates & Solicitors) Advocates for Resolution Professional clearly stated that the same is subjudice and contingent till the order of Hon'ble NCLT' is pronounced. The Resolutional Professional clearly stated that he has been personally targeted and misrepresented by the Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant). Further the Resolution Professional stated that "NO WORK NO PAY" is a precedent set by Hon'ble Supreme Court and the same has been discussed at length in the past COC meetings also where Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) has duly participated."

"The Resolution Professional specifically asked Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) on what he meant by the words in the above clause 7 .11 "the same will be dealt by resolution applicant accordingly" and what is his proposal or intention. Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) that he is not clear on the same. ***Mr. Deena Dayal (Representative of M/s Union Bank of India including erstwhile Andhra Bank) stated that all such applications of the staff, employees, workers etc. is the risk of the resolution applicant and the resolution applicant is required to take such calculated risk and configure the same in his resolution plan and hence the same (risk and cost) shall be borne by the resolution applicant only. Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) agreed to the same."***

22. In such a background, we do not accept the contention that the stipulation was in the nature as to make the LoI a conditional one to enable the appellant to renege from the CoC approved plan.

23. The third contention that the period of forty-five days as mentioned in the CoC minutes of 27th meeting dated 6th May, 2021 which resulted in the issuance of the LOI of 23rd May, 2021 was reduced to seven days in the third LOI dated 23rd July, 2021 also does not carry the case of the appellant any further. Under the RFRP, the time stipulated for the issuance of performance guarantee was seven days. What the learned counsel for the appellant contends is that, at the meeting on 6th May, 2021, a decision was taken to extend the time to forty-five days for issuance of the performance guarantee. The relevant portions of the 27th CoC meeting is extracted below:-

> *"Mr. Sanjay Dave (Member of the suspended board & Resolution Applicant) requested the COC to grant 45 days time instead of 7 days as prescribed in the RFRP documents to provide the performance guarantee, this is due to the ongoing pandemic. Adv. Rohan Agarwal (M/s MDP Partners - Advocates & Solicitors) Advocates for Resolution Professional objected to*

this request. ***Mr. Deena Dayal (Representative of M/ s Union Bank of India including erstwhile Andhra Bank) stated that it is agreeable to the COC due to the ongoing pandemic and thereby relaxed the condition and granted the time of 45 days for submission of the performance guarantee against the prescribed time of 7 days, the participants agreed to the same****."*

24. To counter this, Mr. Gaurav Agrawal, learned senior counsel for respondent No.1 submitted that forty-five days which was granted in the 6th May, 2021 minutes was due to the COVID Pandemic. By the time the third LoI was issued on 23rd July, 2021, that period had long since expired. The appellant did not convey acceptance. As such, there was no question of granting a further forty-five days and rightly a period of seven days was prescribed. We are inclined to accept this submission.

25. In fact, our attention was drawn by Mr. Gaurav Agrawal, learned senior counsel to the Minutes of the Meeting of the CoC dated 23rd July, 2021 where by the appellant agreed to submit the performance bank guarantee in seven days as

prescribed in the RFRP document. The relevant parts of the minutes are extracted below:-

> "**Mr Sanjay Dave(Member of the suspended board & Successful Resolution Applicant) further stated that even though COC had allowed him 45 days time to submit the Performance Bank Guarantee, he has agreed to submit the same in seven days as prescribed in the RFRP document. Further he also drew the attention of the participants on the word "Personal" in the agenda items which needs to the read as "Performance", the participants noted the same."**

26. Therefore, in light of the discussions above, it is beyond cavil that the appellant had not just acquiesced but had agreed expressly to the so-called contingencies that would fall upon him as per the LoI.

27. Dealing with the meaning of "acquiescence", this Court in ***Chairman, State Bank of India and Another*** *v.* ***M.J. James***[1], held as under:

> "**39.** Before proceeding further, it is important to clarify distinction between "acquiescence" and "delay and laches". Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act

[1] (2022) 2 SCC 301

is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. **Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance. However, acquiescence will not apply if lapse of time is of no importance or consequence."**

(Emphasis supplied)

28. The appellant cannot be allowed to approbate and reprobate. In the celebrated case of ***Nagubai Ammal and Others*** v. ***B. Shama Rao and Others***[2], this Court held as under:

"9.15. The observations of Scrutton, L.J. on which the appellants rely are as follows: (Verschures Creameries, KB pp. 611-12)

"… A plaintiff is not permitted to "approbate and reprobate". The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: Ker v. Wauchope; Douglas-Menzies v. Umphelby. **The doctrine of election is not however confined to instruments. A person cannot say at**

[2] (1956) 1 SCC 698

one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

29. Further, in ***Rajasthan State Industrial Development & Investment Corporation and Another.*** v. ***Diamond & Gem Development Corporation Limited and Another***[3], it was held:

"I. Approbate and reprobate

15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience.

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

(Emphasis supplied)

[3] (2013) 5 SCC 470

30. In view of the abovementioned decisions of this Court, the appellant cannot be permitted to approbate and reprobate and the fora below have rightly dismissed the objections of the Appellant in this regard. Not only did the appellant not object to the terms, as evidenced from the minutes of the meetings, he had expressly agreed for the same. The device adopted by the appellant was an indirect attempt to renege from the plan. It was a clear subterfuge. Knowing fully well that one cannot withdraw directly from the plan approved by the CoC, an attempt was made in an indirect manner by harping on about certain stipulations as conditionalities to shift the blame on the CoC for the appellant's unwillingness to take the plan forward. This clever ploy has rightly been scotched by the fora below. If such artifices are allowed to succeed, the entire architecture of the IBC would crumble and the laudable objects sought to be achieved by the said Code would become a far cry.

31. In this light, it is also important to examine the binding nature of the resolution plan that is approved by the CoC. In ***Ebix Singapore Private Limited*** vs. ***Committee of Creditors of Educomp Solutions Limited and Another***[4], this Court held as under: -

> ***"166. The binding nature, as between the CoC and the successful resolution applicant, of the resolution plan submitted for approval by the adjudicating authority is further evidenced from the fact that the CoC issues an LoI to a successful resolution applicant stating that it has been selected as the successful resolution applicant and its plan would be submitted to the adjudicating authority for its approval. The successful resolution applicant is typically required to accept the LoI unconditionally and submit a PBG. Sequentially, the issuance of an LoI is followed by its unconditional acceptance by the successful resolution applicant. In Amtek Auto, this Court thwarted a similar attempt by a successful resolution applicant who had relied on certain open-ended clauses in its resolution plan to seek a direction compelling the CoC to negotiate a modification to its resolution plan.*** *The resolution plan had been approved by the adjudicating authority and the resolution applicant's IA was not entertained. The resolution applicant had then sought to challenge the approval of the resolution plan under Section 61(3) IBC by seeking the same relief. This Court rejected the claim and observed that : (SCC p. 475, para 30)*
>
> ***"30. … To assert that there was any scope for negotiations and discussions after the approval of the***

[4] (2022) 2 SCC 401

resolution plan by the CoC would be plainly contrary to the terms of IBC."

"167. *.. … The binding nature of a resolution plan on a resolution applicant, who is the proponent of the plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the resolution applicant. The negotiations between the resolution applicant and the CoC are brought to an end after the CoC's approval.* ***The only conditionality that remains is the approval of the adjudicating authority, which has a limited jurisdiction to confirm or deny the legal validity of the resolution plan in terms of Section 30(2) IBC. If the requirements of Section 30(2) are satisfied, the adjudicating authority shall confirm the plan approved by the CoC under Section 31(1) IBC."***

"172. … … *The adjudicating authority cannot compel a CoC to negotiate further with a successful resolution applicant. A rejection by the adjudicating authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the resolution plan because the resolution applicant is unwilling to execute it, based on terms of its own resolution plan."*

"221. *… …* ***Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the adjudicating authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days' outer limit of the CIRP under Section 12(3) IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the corporate debtor, its creditors, and the economy at large as the liquidation***

value depletes with the passage of time…."

"223. … … In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved resolution plans, at the behest of the successful resolution applicant, once the plan has been submitted to the adjudicating authority. A resolution applicant, after obtaining the financial information of the corporate debtor through the informational utilities and perusing the IM, is assumed to have analysed the risks in the business of the corporate debtor and submitted a considered proposal. A submitted resolution plan is binding and irrevocable as between the CoC and the successful resolution applicant in terms of the provisions of IBC and the CIRP Regulations. …"
(Emphasis supplied)

32. Therefore, it is clear that once the CoC, after applying its commercial wisdom, has approved the resolution plan, the SRA is prohibited from negotiating further and is expected to act in a time bound manner to implement the plan. In the present case, it is seen that the appellant was deliberately trying to delay the implementation of the plan citing the purported conditionality of the LoI. This defeats the purpose of the Code as the otherwise timebound and swift process is now being delayed at the behest of the appellant. In view of this, we find

no merit in the third contention of Ms. Purti Gupta, learned counsel for the appellant.

33. On the aspect of forfeiture of the EMD, the RFRP in clause 1.9.4 clearly stipulates that where there is failure to submit the performance guarantee within the stipulated time or in case of any non-compliance with the plan, there could be forfeiture of EMD. Clause 1.9.4 is extracted hereinbelow:-

> *"1.9.4 Forfeiture of Earnest Money Deposit of the Applicant*
> *The Designated Lender shall be entitled to forfeit Earnest Money Deposit where:*
> *……*
> ***b) the Successful Applicant fails to submit the Performance Guarantee within the stipulated time; or***
> ***e) in case of any other non-compliance with the Resolution Plan Process or the Resolution Plan submitted by the Applicant.***
> *……*
> *Provided, that the Designated Lender shall not be entitled to forfeit the Earnest Money Deposit of the Successful Applicant in accordance with this Clause 1.9.4, if any non-compliance with the requirements set out above arises due to (a) non-receipt of the Letter of Intent from the Committee of Creditors; or (b) the Successful Applicant not accepting additional terms stipulated by the Committee of Creditors in addition to the Resolution Plan, pursuant to discussions of the Committee of Creditors with the Successful Applicant."*

34. Hence, we find no illegality in the RP forfeiting the EMD of Rs.1,00,00,000/- (Rupees one crore). The minutes of the 31st CoC meeting held on 26th July make it clear as to the premise on which the EMD stood forfeited:-

> *"The representative of the Union Bank of India stated that we can go ahead with the RFRP terms & conditions of non acceptance of the LOI dt. 23rd June, 2021, the consequences and the said provisions can be invoked and proceeded further. The representatives of Union Bank further stated that sufficient opportunities has been given to Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant), in spite of making good these opportunities he has only misused the opportunities. Since Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) has not accepted the LOI, the consequences of non acceptance of LOI will follow.* ***Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) objected to the forfeiture on the EMD on the ground for the non-acceptance of LOI, the COC asked whether there is any reason to not to proceed further with the terms & conditions stipulated in the RFRP to which Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) could not give any satisfactory reply to the COC, hence in the event of noncompliance with the Conditions Subsequent the resolution plan submitted by Mr. Sanjay Dave (Member of the suspended board & Successful Resolution Applicant) was rejected by the COC."***
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> (Emphasis supplied)

35. The appellant, having become the SRA, failed to carry out the obligations resulting in not only time running out for invitation of fresh plans but also forced the CoC to resort to liquidation under Section 33 of the Code.

36. The final submission of the learned counsel for the appellant that the proposal for liquidation ought not to have been approved since it was contrary to Section 33 of the Code need not detain us any further. Rejecting the submission, the NCLAT held as under:-

> *"28. …Since the CoC is statutorily empowered to decide on the liquidation of the Corporate Debtor at any time before the confirmation of the resolution plan. This decision is a collegiate1 commercial wisdom of the CoC which is not subject to judicial review except for ensuring that the resolution plan meets the requirements of the IBC and related Regulations. The paramount supremacy of the commercial wisdom of CoC has been upheld in a catena of judgments by the Hon'ble Supreme Court. The Explanation to Section 33(2) of IBC makes it amply clear that the CoC is entitled to take a final call, to liquidate the Corporate Debtor prior to affirmation of the resolution plan by the CoC. This decision of the CoC is a business decision taken in the exercise of their commercial wisdom which is clearly not amenable to judicial review. There is no incidence of any statutory aberration having been committed by the RP or CoC in this regard."*

37. This Court in ***Manish Kumar*** v. ***Union of India***[5], has held as under:

> **"101. Section 33, which is in Chapter III in Part II, compels announcing the death knell of the corporate debtor. That is if, before the expiry of insolvency resolution process period or the maximum period permitted which is CIRP under Section 12, inter alia, a resolution plan is not received or though received is rejected by the adjudicating authority, then under Section 33, order is to be passed. The curtains are wrung down on the insolvency resolution process. The corporate debtor goes into liquidation. The adjudicating authority is bound to pass an order requiring corporate debtor to be liquidated as provided in Chapter III Part II.** ***Section 33(2) contemplates that before the confirmation of the resolution plan if the Committee of Creditors so approved by not less than 66% of the voting decide to liquidate the corporate debtor, the adjudicating authority is to pass the liquidation order."***
>
> (Emphasis supplied)

38. Section 33 of the Code is reproduced hereinbelow:-

> ***"Section 33: Initiation of liquidation.***
>
> ****33. (2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors [approved by not less than sixty-six per***

[5] (2021) 5 SCC 1

cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

[2][Explanation. – For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]"

39. A plain reading of clause 2 of Section 33 and specifically the explanation to the said clause 2, which came into force from 16.08.2019, makes it clear that where an SRA after lulling the CoC to believe that it will comply with the plan, reneges from the plan and where the CoC resolves to liquidate the company so as to realize the money and disburse the claims of the different claimants, no fault can be found with the process.

40. There is nothing in Section 33 of the Code which detracts from the said course of action. Hence, we are of the opinion that the Fora below rightly allowed the application of the RP viz-a-viz the liquidation process and rightly dismissed the applications of the appellant.

41. Another aspect that has to be brought out is that once the CoC has, in its commercial wisdom, come to the decision to reject the appellant's plan and liquidate the CD on account of the appellant's own default, there can be no case for interference. This Court in ***K. Sashidhar*** *v.* ***Indian Overseas Bank***[6], has held as under:-

> ***"52. ...*** *The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken.* ***Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines***

[6] (2019) 12 SCC 150

prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable."

(Emphasis supplied)

42. Therefore, in the light of the position of the law above, it is held that the fora below have rightly refused to interfere in the well-informed commercial decision of the CoC to reject the plan of the appellant and liquidate the CD, which was approved with a voting percentage of 99.61%.

43. For the reasons stated above, we find no merit in the appeals. The appeals are accordingly dismissed.

44. It is made clear that all interim orders will stand vacated with the dismissal of the appeals. The respondent No.3-

Liquidator is directed to proceed with the remaining part of the liquidation in accordance with the Code.

45. There will be no order as to costs.

.....J.
[**K. V. VISWANATHAN**]

.....J.
[**VIPUL M. PANCHOLI**]

NEW DELHI;
27th May, 2026