

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH-1**

**IA.No.407 of 2023  
IN  
CP (IB) NO. 329/7/HDB/2020**

*Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with rule  
11 of the National Company Law Tribunal Rules, 2016.*

**IN THE MATTER OF**

**Mr. A. Rajendra,**

(Shareholder And Suspended Managing Director of Corporate Debtor),

Plot No.148,Ravi Colony, Opp. RTC Colony,

Thirumalgherry, Secunderabad – 500015

Email: [arajendra@gmail.com](mailto:arajendra@gmail.com)

Mobile No. 9866190745

**... Applicant**

**AND**

1. G. Madhusudhan Rao  
Resolution Professional of  
Dharti Dredging and Infrastructure Limited  
Office at 1<sup>st</sup> floor, BSMaktha  
Begumpet, Hyderabad 500016 IN  
Rep. by its Interim Resolution Professional  
E-mail: [ddailirp@gmail.com](mailto:ddailirp@gmail.com).
2. State Bank of India  
Represented by Authorised Officer  
SAM Branch, Hyderabad.  
[team6samb.sec@sbi.co.in](mailto:team6samb.sec@sbi.co.in)
3. Federal Bank  
Represented by Authorised Officer  
LCRD, Hyderabad Division  
Khairatabad, Hyderabad.  
[hydlerd@federalbank.co.in](mailto:hydlerd@federalbank.co.in)

4. ICICI Bank Ltd  
Represented by Authorised Officer  
Nanakaramyuda,  
Serilingampally, Hyderabad  
[sarat.sitamraju@icicibank.com](mailto:sarat.sitamraju@icicibank.com)

**(Respondents 2 to 4 are formal parties as the plan was never put before them and the applicant is not seeking any relief against them)**

5. Yogayatan Ports Private Limited  
**(The respondent is impleaded as party as per the directions dated 31.03.2023 of this Tribunal in IA.no.14/2023 in IA.no.407/2023 in CP(IB).No.329/7/HDB/2020.**  
# 4, Vaswani mansions, 120 dinshae vaccha road,  
Mumbai-400020.  
e.mail: [ports@yogayatangroup.com](mailto:ports@yogayatangroup.com)

... Respondents

**Date of order: 20.07.2023**

**CORAM:-**

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)**

**AND**

**SHRI. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

**Appearance**

For Applicant : Mr. Raj Shekar Selvaji Rao, Counsel  
For the Respondents : Mr. Chandrasen Reddy, Sr. Counsel for Respondent No.5,  
Mr.V.V.S.N. Raju, Counsel for Respondents No.2 to 4 &  
Mr. G.P.Yash Vardhan, Counsel for Respondent No.1.

**[PER BENCH]**

**O R D E R**

1. This application is filed by the Applicant under Section 60(5) read with section 35(1) (n), of IBC, 2016 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 seeking direction to the respondent to place the Resolution Plan submitted by the Applicant before the CoC for its consideration along with other Resolution Plans and further to stay the voting results of the Resolution Plan which was put to vote pending disposal of the present application.
  
2. **Averments of Applicant in brief:**
  - 2.1 This Tribunal vide order dated 05.04.2022 ordered initiation of Corporate Insolvency Resolution Process against M/s. Dharti Dredging and Infrastructure Limited, and the respondent was initially appointed as Interim Resolution Professional and was later confirmed as Resolution Professional.
  
  - 2.2 Pursuant to issuance of public notification on 08.06.2022 in Form-G calling for Expression of Interest (hereinafter called 'EOI') from Prospective Resolution Applicants and when the same did not elicit any interest, again the respondent published Form-G on 11.08.2022 inviting

EOI from PRA's. It is averred that one PRA submitted EOI and later submitted Resolution Plan.

2.3 Since the Corporate Debtor is a recognised MSME, and not barred under Se.29A Code to submit Resolution Plan, the applicant advisedly submitted Resolution Plan on 13.01.2023 to the Respondent, however the same was rejected by the Resolution Profession stating that "*the Resolution Plan is completely in violation of the provisions of IBC, 2016*". The rejection doesn't specify the reason for rejection.

2.4 Aggrieved by the rejection of the resolution plan by the Resolution Professional, the matter was appealed before this Adjudicating Authority and after going through the rival contentions, had condoned the delay in submitting the Resolution Plan by the Applicant for reasons stated in the application therein and directed the 1<sup>st</sup> Respondent to re-examine the resolution plan submitted by the Applicant and secondly ordered that if the Resolution Professional finds that the plan meets the criterion laid down in RFRP and the statutory requirements of the Code and the relevant Regulations framed by IBBI, the 1<sup>st</sup> Respondent shall place the same before the members of the CoC, and the CoC shall proceed further as per the provisions of the Code.

2.5 The Resolution Professional complying with the directions of this Tribunal had reviewed the Resolution Plan submitted by the applicant and sought certain clarifications to which the applicant has clarified and provided all the documents sought by the 1<sup>st</sup> Respondent. Despite that the Resolution Professional had inexplicably rejected the resolution plan of the Applicant vide letter dated 24.02.2023 contrary to the mandate of Sec.30 of the Code. The grounds for rejection of the plan is that the same is not in compliance with provisions of Section 29A of the Code as the Applicant had not filed financial statements for a continuous period of three years and the disqualification under Sec. 29A(e) will not come into the picture if the applicant is disqualified as director by the competent authority under the Companies Act.

2.6 It is averred that the total plan repayment period is just 4 months. Hence, the projected financials and cash flow statements are not materially relevant. All the objections in the rejection letter were clarified beforehand. Despite giving clarification, the 1<sup>st</sup> Respondent had rejected the plan on untenable grounds.

2.7 It is stated that the plan is better off than the one provided by the SRA qua the financial component of the Resolution Plan and the implementation time.

2.8 Hon'ble NCLAT in C. Raja John Vs R. Raghavendran & Others had enunciated in para 34 “ *Further, this Tribunal, keeping in view of the object of the Code that the Maximization of the Value of the Assets of Corporate Debtor is to be kept in mind in achieving its object. To give an opportunity to regain the control of the Corporate Debtor, the Management, Promoters/Erstwhile Directors of the Corporate Debtor being an MSME, not necessary to compete with other Resolution Applicants.*”

2.9 It is averred that the rejection of the Resolution Plan by the Respondent is contrary to the idea of the legislature to include Sec.240A of the Code. Further the Respondent even without putting the plan before the CoC had rejected the plan which is contrary to the provisions of the Code.

**3. Counter filed on behalf of the Resolution Professional/Respondent No.1, inter-alia stating that:**

3.1 A counter is filed by Resolution Professional inter-alia contending that in the 5<sup>th</sup> CoC meeting on 25.07.2022, the COC was informed about non-receipt of any resolution plan by the Resolution professional and as per the decision of COC, Fresh Form “G” was reissued.

3.2 In the 6<sup>th</sup> CoC meeting, the Resolution Professional apprised the COC that he is in receipt of seven EOIs, out of which 04 are eligible. In the 8<sup>th</sup> COC Meeting held on 13.10.2022, the COC was informed by the Resolution

Professional that two resolution plans along with EMD of Rs. 5 crores each has been received by him.

3.3 The CoC was apprised by the Resolution Professional in the 10<sup>th</sup> meeting of COC held on 09.11.2022 that the PRA i.e. Consortium of Yogayatan Ports Limited submitted the revised Resolution Plan. Subsequently, in the 11<sup>th</sup> CoC meeting, the Resolution Professional informed the COC that e-voting for approval of the Resolution Plan will be held from 17.12.2022 to 25.12.2022. However, in the light of the Order passed by this Tribunal extending the CIRP of the Corporate Debtor by 60 days vide its Order dated 19.12.2022, the Resolution Professional in 12<sup>th</sup> meeting of the CoC, has informed the members of the CoC, that, E-Voting on the Resolution Plan will be kept open from 19.01.2023 to 10.02.2023.

3.4 The CoC has approved the Resolution Plan submitted by the Consortium of Yogayatan Ports Private Limited and Dr. Rajendra Raja Bali Singh with 100% voting on 23.02.2023 after detailed discussions on the observations of the Resolution Plan of the Applicant on 13<sup>th</sup> CoC meeting held on 22.02.2023.

3.5 The Resolution Professional has filed an Interim Application No. 385 of 2023 before this Tribunal on 27.02.2023 for approval of the Resolution

Plan and the present IA was filed on 28.02.2023 which is after the approval of the Resolution Plan by the CoC.

3.6 The object of the Code is that CIRP has to be completed in a time-bound manner for maximization of value of assets of the Corporate Debtor and the present IA, has been filed with an intention to defeat the object. It is that the Applicant has filed this application with an oblique and ulterior motive and intention to derail the process of the reviving the Corporate Debtor and prayed to dismiss the application with exemplary cost.

**4. Counter filed by Respondents No.2 to 4, inter-alia stating that:**

4.1 It is stated that in the present application cause-title the Respondents No.2 to 4 stated as formal parties in the instant Application and that no reliefs are sought against them. However, the CoC herewith is of the considered opinion that it is necessary for the CoC to put forth its stand before this Tribunal.

4.2 It is stated that the Suspended Director has taken the MSME certificate with *malafide* intentions, the claim status of MSME is in itself is false and hence the applicability of 240A of Code cannot be taken and 29A of the Code will apply strictly.

4.3 The Applicant was present for all the relevant meetings before the approval of the Resolution Plan. The Applicant has never in once instance mentioned or proposed for the submissions of the Resolution Plan. Only after realizing that the Resolution Plan of Respondent No.5 is put to vote and the same is going to be approved by requisite majority, the Applicant sought to submit his Resolution Plan with an intension to frustrate the entire CIR Process.

4.4 It is stated that *the Hon'ble Supreme Court* in the matter of *Vallai RCK Vs. Siva Industries and Holdings Limited* has held once again that the commercial wisdom of the Committee of Creditors ('CoC') is supreme. Therefore, the Applicant cannot question the validity of approval of the Resolution Plan and prayed to dismiss the Application.

**5. Counter filed by the Respondent No.5, inter-alia stating that:**

5.1 It is stated that the Resolution Professional/Respondent No.1 issued Letter of Intent dated 24.02.2023 in favour of the present Respondent which has been accepted by the present Respondent. The present Respondent furnished performance security to the tune of Rs.5,95,00,000/-.

5.2 It is stated that the Judgment passed by the **Hon'ble NCLAT** in the matter of *Steel Strips Wheels Limited. V. Shri Avil Manezes, Resolution Professional of AMW Auto component Limited and Others (Company*

*Appeal (AT) (Insolvency) No. 89 of 2021*), wherein the Hon'ble NCLAT placing reliance on the Judgment passed by the Hon'ble NCLAT placing reliance on the Judgment passed by the Hon'ble Apex Court in the matter of '*Ebix Singapore Pvt. Ltd., Vs. Committee of Creditors of Educomp Solutions Ltd. & Anr.,*' (2021) SCC OnLine SC 707, observed that any consideration of a belated plan would breach both the timelines as well as the finality of a Resolution Plan approved by the CoC on the earlier date.

5.3 It is stated that *the Hon'ble NCLAT* in its Judgment passed in the matter of '*Kalinga Allied Industries India Pvt. Ltd., Vs. Hindustan Coils Ltd., & Ors. (Comp. App. (AT) (Ins.) No. 518/2020*), has held that when the Application for approval of Resolution Plan is pending before the Adjudicating Authority at the time of Adjudicating Authority should not entertain an Application of a person who has not participated in CIRP.

5.4 It is stated that there is no merit in the prayers made by the Applicant in the context of the undisputed facts and circumstances as brought out above, and the application deserves to be dismissed.

**6. Rejoinder filed by the Applicant for the counter filed by Respondent No.1, inter-alia stating that:**

6.1 It is stated that the repeated contention of the Respondent is that the Applicant has fallen foul of Section 29A(e) since the Corporate Debtor had

not filed annual returns for more than three years. Further, when the issue was raised by the 1<sup>st</sup> Respondent, the Applicant had filed returns manually to ROC since the MCA portal is not working since the beginning of this year and is expected to only be normally functional from April, 2023.

6.2 It is stated that the 1<sup>st</sup> Respondent had mislead this Tribunal with his statement across the bar, that the approval of the Resolution Plan has been communicated to the Applicant vide email dated 24.02.2023. The only email received by the Applicant on 24.02.2023 is enclosing the record notes of 13<sup>th</sup> CoC meeting which has no mention of the approval of the Resolution Plan.

6.3 It is stated that the cancellation of the DIN is subject to the powers under Section 403, 459 and 460 of the Companies Act, 2013. That disqualification of the director couldn't be without notice under Rule 11 of the Companies (Appointment of Directors) Rules, 2014. The power to disqualify the director is vested with ROC and the same can be challenged before NCLAT or High Court. That being the case, the Respondent has stepped into the shoes of the ROC and adjudicated that the Applicant is disqualified to act as a director, which is wholly beyond his powers and duties.

- 6.4 It is stated that the 1<sup>st</sup> Respondent had reject the resolution plan of the Applicant disregarding the provisions of the Code and regulations made thereunder and refused to act as per the orders of this Tribunal. In the circumstances the applicant prayed to allow the reliefs sought by the Applicant.
- 7 Written Submissions filed by the Counsel for the Applicant on 31.05.2023 and 22.06.2023 by re-iterating the facts mentioned in the Application and rejoinder, apart from that the Applicant filed the Judgment passed by the **Hon'ble Supreme Court in M.K.Rajagopalan Vs. Dr. Periasamy Palani Gounder & Anr.**
- 8 Written submissions filed by the counsel for the Resolution Professional/ Respondent No.1 on 07.06.2023 by re-iterating the facts mentioned in the counter to this Application, apart from that the counsel for the Resolution Professional also filed the Judgments passed by the ***Hon'ble High Court of Calcutta in W.PA.No.8450 of 2021.***

**Point:**

**Whether the communication of the Resolution Professional dated 24/02/2023 to the Applicant, whereby the Resolution Professional has rejected the resolution plan of the applicant, warrants interference of this Adjudicating Authority? If so, whether the applicant is entitled for the direction as prayed?**

9. We have heard Mr. Raj Shekar Selvaji Rao, Ld. Advocate for the Applicant, Mr. G.P.Yash Vardhan, Ld. Advocate for the Resolution Professional, Mr. V.V.S.N. Raju, Ld. Advocate for the Respondent No.2 to 4 and the Learned Senior Counsel Mr. Chandrasen Reddy for the Respondent No.5. Perused the record, written submissions and the case law.

**Point.**

Whether the communication of the Resolution Professional dated 24/02/2023 to the Applicant, whereby the Resolution Professional has rejected the resolution plan of the applicant, warrants interference of this Adjudicating Authority? if so, whether the applicant is entitled for the direction as prayed?

10. Shri Raj Shekar Selvaji Rao, the Ld. Counsel for the petitioner submits that, the Respondent/resolution professional in total violation of the direction of this Tribunal in IA.No.177/2023 dated 10.02.2023 had rejected the resolution plan of the Applicant, thus failed to place the same before the COC even though the said plan was in conformity with the RFRP and the relevant conditions, with an ultimate objective of causing undue benefit to the 5<sup>th</sup> Respondent at the cost of public money. Ld. Counsel further contended that, the submission of the resolution professional during the hearing held on 09/03/23 that the approval of the Resolution Plan of the 5<sup>th</sup> Respondent has been communicated to Applicant is false, as the only email received from RP was the email date 24/02/23 which was 'forwarding the minutes of 13<sup>th</sup> COC' which minutes does not inform about the approval of the Resolution Plan of

the 5<sup>th</sup> Respondent. Ld. Counsel further contended that as per IBC, any Resolution Applicant is allowed to revise and re-submit the submitted Resolution Plan once, after receiving the comments of the RP and the COC. However, even though the Applicant has sufficiently answered all the queries and clarifications of the RP and re submitted the revised plan on 18/02/23, mentioning that in case if there is any other information needed, the Applicant is willing to incorporate and submit the Revised Resolution Plan the RP has not given the opportunity to the Applicant to submit the revised Resolution Plan after 18/02/23, and simply rejected the same on untenable and unsustainable grounds.

11. According to the Ld. Counsel, the corporate debtor obtained MSME registration on 29/02/20 well before the commencement of CIRP process which is 05/04/22 with an objective of qualifying itself in the Tenders as there is an exemption for Earnest Money Deposit, Performance Guarantees besides, post COVID concessions announced by Government of India etc. The applicant submitted more than 25 Tenders as MSME and one work was awarded based on the MSME Certification, as such the allegation that “*The MSME registration was done to get undue advantage under the code but not to do business or operations of the corporate debtor*” is incorrect and baseless.

12. Ld. Counsel submits that, the RP filed IA 516/2023 only on 14/03/23 for transaction avoidance charges and hence the applicant is not debarred to submit the plan. Ld. Counsel further submitted that, the Applicants Resolution plan offered is 45% more in value than the 5<sup>th</sup> Respondent's offer besides the time period requested by Applicant for repayment of the entire amount is only 4 months as against 5 years of the 5<sup>th</sup> Respondent (Yogayatan) just 6.5% of the time period. According to the Ld. Counsel, the Applicant had submitted a superior offer with an intention to maximize the value of recovery by the COC.
  
13. Ld. Counsel further submitted that the Resolution plan has a firm commitment letter from investor namely, SVR Group who have been investing in Companies since 2013 and till date have invested in more than 53 companies, with a maximum single investment being Rs. 260 Crore through their registered fund. The source of funds has also been submitted before the 13<sup>th</sup> COC to the RP and requested the banks to allow the Investor SVR Group Chairman to be present in the 13<sup>th</sup> COC meeting to clarify in case COC has any queries relating to funding. However, the RP and the COC did not allow the Investor to attend the meeting thereby clearly implying their pre-set intentions to approve the Resolution Plan of 5<sup>th</sup> respondent even though it is just half of the value proposed by the Applicant.

14. Ld. Counsel also pleaded that the Applicant is now willing to deposit an amount of Rs. 5 Crores within two weeks from the date of order before the Hon'ble Court into a *no-lien account* so that after receiving this amount, RP can put-up the Resolution Plan for COC approval.
15. Shri. Yashvardhan, Ld. Counsel for the 1<sup>st</sup> respondent on the contrary, while strongly refuting the submission, raised the following pleas,
- i. According to the Ld. Counsel the Applicant has failed to provide a proper source of funds as per the requirements of the RFRP and the CIRP Regulations. Strangely, the Applicant has stated that it is not required to explain the source of his funds because the Applicant's Resolution Plan proposes to pay the entire Resolution Plan Amount within four months. However, this increases the burden on the Applicant to demonstrate proper sources of funds to show that the Resolution Plan is feasible and viable.
  - ii. Ld. Counsel submitted that as per Regulation 38(3) of CIRP Regulations, 2016, the mandatory contents of a Resolution Plan are as follows:
    - (3). A Resolution Plan shall demonstrate that
      - (b) it is feasible and viable;
      - (c) it had provisions for its effective implementation:

(e) the resolution applicant has the capability to implement the resolution plan.

Further, as per Clause 4.8(e) of the RFRP-

In addition to the events set out in the above clauses, the following events/occurrences may cause the resolution plan to be considered "non-responsive", at the discretion of the resolution professional/CO: if (1) the resolution professional or the COC or not satisfied as to the funding ability of the Applicant.

Further, as per Clause 4.8(e) of the RFRP, the Applicant is required to disclose, including without limitation, that

(e) the applicant has the necessary financial resources available for implementation and supporting the resolution plan and for any further infusion/contribution for additional funds into the company as indicated in the resolution plan;

iii. Ld. Counsel further stated that Clause 4.96(j) of the RFRP says:

In addition to the events set out in the above clauses, the following events/occurrences may cause the Resolution Plan to be considered non-responsive', at the discretion of the Resolution Professional/CO: if (j) the Resolution Professional or the COC are not satisfied as to the funding ability of the Applicant;

- iv. Therefore, the Resolution Professional or Respondent No. I was entitled to declare the Resolution Plan of the Applicant as "non-responsive" if no proper source of funding was provided. Moreover, the Applicant was duty bound to make a full disclosure of "sources of funds" for the payments proposed under the Resolution Plan.
- v. Ld. Counsel also referred to Clause 4.8.3 of the RFRP and stated that the same further clarifies what source of funds would be considered appropriate:
- “It is clarified that the resolution applicant shall be required to submit a firm letter of commitment (or a signed sanction letter) ("letter of commitment") any scheduled commercial bank or a financial institution of repute for the amount is proposed to be paid by the resolution applicant towards the items provided in Part C of Annexure V and/or with a letter from such bank or financial institution confirming availability of sufficient funds in the bank account of the resolution applicant. The status of fund availability as evidenced by the letter of commitment/sanction letter/letter evidencing availability of sufficient funds in the bank account of the resolution applicant shall not be as of a date earlier than 15 days prior to the date of submission of the resolution plan.”

vi. Therefore according to the Ld. Counsel, it is clear from a bare reading of clause 4:8.3 that only a letter of commitment from a "scheduled commercial bank" or a "financial institution of repute" (such as an NBFC]would be considered as an appropriate source of funds. However, the Applicant has provided a letter from a Bengaluru based company called "SVR Group United." [NOT A RESOLUTION APPLICANT], which claims to provide the funds for the resolution plan submitted by the Applicant. However, SVR Group is a private limited company and not a "scheduled commercial bank or a financial institution of repute" as is required by Clause 4.8.3 of the RFRP. Additional documents submitted by SVR Group on 17.2.2023 from a Hong Kong based company called "Skyline Profits" and a Singapore based company called "Konnect Trade Network PTE Lid" are not only inadmissible because of the belated nature of their submission, they do not even mention the Applicant and nor do they evidence their desire to provide a letter of commitment for the resolution plan submitted by the Applicant SVR Group did not provide a corporate guarantee and a networth certificate either. Moreover, as per the confirmation letter issued by SVR Group, 5,00,00,000 (Rupees Five Crore Only) was to be deposited on or before 27.1.2023 on behalf of the Applicant. However, the same was not paid.

vii. Ld. Counsel further submitted that, the burden to justify the source of funds is only compounded by the fact that the CoC has no faith in the bona fides of the Applicant. In this regard Ld. Counsel stated that, the Applicant being the suspended director of the Corporate Debtor has filed an application for registration of the Corporate Debtor as an MSME just before the commencement of the Corporate Insolvency and Resolution Process (CIRP) to get the undue advantage under the Code...clearly the Applicant has taken the MSME certificate to take undue advantage of Section 240A (1) of the Code.

viii. Ld. Counsel also submitted that the applicant is also facing transaction avoidance charges in this matter for wrongfully siphoning of monies from the account of the corporate debtor in the guise of investments and loans, especially when the corporate debtor is not into the business of lending or finance, and therefore constitutes transactions which are appropriately dealt with under section 66 of the insolvency and bankruptcy code, 2016. The applicant has done all such transactions in a fraudulent and wrongful manner, which had the effect of defrauding the creditors of the corporate debtor. Respondent No. 1 has filed Interlocutory Application No. 22 of 2022 and 516 of 2023 before this Honourable Tribunal under Section 66 of the Code for seeking appropriate directions in this matter and the said matter is still sub-judice.

- ix. According to the Ld. Counsel the applicant was present for all the relevant meetings before the approval of the resolution plan [of Respondent No. 5]. The applicant has never in one instance mentioned or proposed for the submission of the resolution plan. Only after realising that the resolution plan of Respondent No. 5 is put to vote and the same is going to be approved by requisite majority, the applicant sought to submit his resolution plan with an intention to frustrate the entire CIR process. Ld. Counsel also submitted that, as is evident in the reply of Respondent No. 1. The applicant has failed to provide any proper source of funds in its resolution plan, which has not only resulted in a complete lack of faith in the resolution plan put forth by the applicant but is also a violation of regulation 38 of CIRP regulations and various provisions of the code and the applicant has evidently not complied with the requirements as mentioned in the RFRP. Even if otherwise, due to the non-mention of any proper source of funds through which the applicant proposes to fulfil his obligations under the plan, the members of the CoC have lost faith in the applicant and therefore, even if the applicants resolution plan is put to vote, the same will be summarily rejected by the members of the CoC. Therefore, tabling the applicant's resolution plan before the members of the CoC in a meeting would be a futile exercise and cause delay in the CIRP of the corporate debtor.

- x. Ld. Counsel submitted that the resolution plan submitted by Respondent No. 5 is approved by the COC by 100% majority as per its commercial wisdom and the application for approval of the said plan is pending before this Honourable Tribunal. Therefore, it is submitted that once the plan is approved by the COC, this Honourable Tribunal is required to ascertain whether the approved resolution plan meets the requirements under the Insolvency and Bankruptcy Code, 2016. The Honourable Supreme Court in the matter of Vallal RCK v. Shiva Industries and Holdings Limited has held once again that the commercial wisdom of the Committee of Creditors (CoC) is supreme. Therefore, the Applicant cannot question the validity of approval of the resolution plan.
- xi. Ld. Counsel further submitted that the resolution plan submitted by the Applicant on 13.1.2023 demands the release of all Personal Guarantees given by the Promoters and the Third Parties Clause 3.9 of the resolution plan of the Applicant states: Being the promoter of the corporate debtor, the resolution applicant specifically requests the financial creditor not to take any steps and remedies and recourse available to them in applicable law for the recovery of the and recovered amounts from such guarantors under their respective documents during the course of implementation of the resolution plan. All the personal guarantees given by the promoters and

the third parties shall be returned soon or after successful implementation of the resolution plan.

Ld. Counsel submitted that as per Clause 4.7 of the RFRP, a Resolution Plan has to be unconditional. Furthermore, as per Clause 4.9(d) of the RFRP, the resolution plan may be considered non-responsive at the discretion of the Resolution Professional/CoC if it is conditional in nature. Thus, on this account the plan submitted by the applicant, since it made the release of Personal Guarantees a precondition for the approval of the plan, was not eligible.

- xii. According to the Ld. Counsel a person who is disqualified to act a director under Section 164(2) of the Companies Act, 2013 is not eligible as per Section 29A(e) of the Code. Section 164(2)(a) states that a person shall not be eligible for appointment as a director of a company which has not filed financial statements or annual returns for any continuous period of three financial years. It is submitted that the Applicant, as Directors of the Corporate Debtor did not file returns for a consecutive period of 3- years, i.c. 2018-19, 1019-2020, 2020-2021 and hence are ineligible as per Section 29A(c). Further, as per Section 167(1) (a) of the Companies Act, 2016 states that, the office of the director shall become vacant in case he incurs

any disqualification specified under Section 164 of the Companies Act, 2013.

In this regard Ld. Counsel has placed reliance, in the ruling in Satya Narayan Banik & Ors. Versus Union of India & Ors, of Honourable High Court of Calcutta, wherein it was held in para 15 and 16 as below:

A failure to file balance sheet and the annual returns for three consecutive years amounts to deliberate and wilful negligence. The public at large dealing with such companies cannot be put to the uncertainty, whim and fancy of recalcitrant directors. After all the requirements and compliances mandated under the Companies Act, are not only for the benefit of the shareholders of a particular company but also for the public at large, which rely upon such compliances, in assessing the conduct of and in deciding their relations with such companies. This Court is also of the view that the provisions of the 2013 Act have an overriding effect on the Companies (Appointment and Qualifications of Director) rules of 2014. The said rules can, therefore, not have any manner of application or confer in right on the petitioners, insofar as their disqualification as directors

Ld. Counsel also placed reliance on the ruling of Honourable High Court of Karnataka in the case of Yashodhara Shroff Vs. Union of India, wherein it has held that:

Thus, when the ineligibility for being appointed as a director of the defaulting company or in all the companies is for a period of five years from the date of the default is by operation of law, there is no necessity to give a prior hearing or comply with the provisions of audi alteram partem before such consequences visit a director of such a company. The ineligibility is in the nature of suspension of a director for a period of five years. Therefore, in my view, the need to hear a director of a company before the ineligibility to be reappointed as a director of a company in default or to be appointed in any other company on account of default of a company in which he is a director, for a period of five years from the date of default of the company is rightly not envisaged under Section 164(2) of the Act. Even in the absence of a prior hearing the section is valid and not in violation of Article 14 of the Constitution.

- xiii. Therefore, according to the Ld. Counsel there are no grounds to defend the default committed by the Corporate Debtor as being the responsibility of the Applicant under Section 164(2)(a) of the Companies Act, 2013, and disqualification of the Directors follows automatically. The Applicant has failed to provide a single defensible ground to escape disqualification under Section 164(2)(a) of the Companies Act, 2013, especially since the Applicant was overlooking the management of the corporate debtor during the entire period of default.

16. Shri. VVSN Raju, Ld. Counsel for respondents 2 to 4 submits that the instant application as filed by the suspended director, i.e., Mr. A Rajendra, is ill-conceived and devoid of any merit and is liable to be dismissed. According to the Ld. Counsel, this Tribunal on 05.04.2022, was pleased to admit the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 by the State Bank of India, and order for initiation of CIRP of the Corporate Debtor. In the said order the Tribunal has appointed the Respondent No. 1 herewith as the Interim Resolution Professional (who was later confirmed as the Resolution Professional with the consent of the CoC in its meeting dated 04.05.2022.)
17. According to the Ld. Counsel, the Interim Resolution Professional has performed all his duties including the constitution of the CoC in abidance with the Code. The CoC through its meeting dated 04.05.2022, confirmed the appointment of the said Interim Resolution Professional as Resolution Professional. It is further submitted that the Resolution Professional invited Expression of Interest (“EoI”) vide publication dated 08.06.2022, to which there was no response. Subsequently, another publication was made dated 11.08.2022 requesting EoI to which 5<sup>th</sup> Respondent emerged as a Prospective Resolution Applicant. Subsequently, the 5<sup>th</sup> Respondent submitted a Resolution Plan within the timelines set in the Information Memorandum (IM) and Request for Resolution Plan (RFRP) issued. The

Resolution Plan, after certain revisions submitted by the 5<sup>th</sup> Respondent was approved by the CoC by 100% majority on 24.02.2023. Thereafter, the 1<sup>st</sup> Respondent filed an Application under Section 30(6) of the Insolvency & Bankruptcy Code, 2016 for approval of the said Resolution Plan.

18. According to the Ld. Counsel, the Applicant, being the suspended director of the Corporate Debtor has filed an Application for registration of the Corporate Debtor as an MSME just before the Commencement of the Corporate Insolvency and Resolution Process (CIRP) to get the undue advantage under the code. Clearly, the Applicant has taken the MSME certificate to take undue advantage of Section 240A (1) of the Code. It is further contended that since the Suspended Director has taken the MSME certificate with *mala fide* intentions, the claim status of MSME is in itself is false and hence the applicability of 240A cannot be taken and 29A will apply strictly. In this context it is submitted that the Corporate Debtor was only registered as an MSME on 15.03.2021, after having been declared as NPA and the filing of the case for insolvency on 25.08.2020 by its lenders. Therefore, the Registration of the Corporate Debtor as an MSME is in itself void ab initio, hence the question of submission of the Resolution Plan by the Suspended Director does not arise and should be strictly barred by Section 29A of the Code.

19. Ld. Counsel further submitted that the Applicant is also facing transaction avoidance charges in this matter for wrongfully siphoning off monies from the account of the Corporate Debtor in the guise of investments and loans. Respondent No.1 has also filed Interlocutory Application No. 22 of 2022 and 516 of 2023 before this Hon'ble Tribunal under Section 66 of the Code for seeking appropriate directions in this matter and the said matter is still *sub-judice*. Therefore, the Applicant is debarred to submit the plan as per Section 29A.
  
20. It is also submitted that the Applicant was present for all the relevant meetings before the approval of the Resolution Plan. The Applicant has never in once instance mentioned or proposed for the submissions of the Resolution Plan. Only after realizing that the Resolution Plan of Respondent No.5 is put to vote and the is approved by 100% majority, the Applicant sought to submit his Resolution Plan with an intension to frustrate the entire CIR Process.
  
21. It is also submitted that the Applicant has failed to provide any proper Source of Funds in its Resolution Plan, which has not only resulted in a complete lack of faith in the Resolution Plan put forth by the applicant but is also a violation of Regulation 38 of IBBI Regulations and various

provisions of the Code and the Applicant has evidently not complied with the requirements as mentioned in the RFRP.

22. Ld. Counsel further submitted that the Applicant is ineligible to submit the Resolution Plan owing to the operation of Section 29A of the Code. Even if otherwise, due to the non-mention of the any proper Source of Funds through which the Applicant proposes to fulfil his obligations under the Plan, the members of the CoC have lost faith in the Applicant and therefore, even if the Applicant's Resolution Plan is put to vote, the same will be summarily rejected by the members of the CoC. Therefore, tabling the Applicants' Resolution Plan before the members of the CoC in a meeting would be a futile exercise and cause delay in the CIRP of the Corporate Debtor.
  
23. Ld. Counsel once again reiterated that the Resolution Plan submitted by the Respondent No.5 is approved by the CoC by 100% majority as per its Commercial Wisdom and the Application for approval of the said plan is pending before this Hon'ble Tribunal. Therefore, it is submitted that once the plan is approved by the CoC, this Hon'ble Tribunal is required to ascertain whether the approved Resolution Plan meets the requirements under the Insolvency & Bankruptcy Code, 2016.

24. Ld. Counsel placed reliance on the ruling of Hon'ble Supreme Court in the matter of *Vallal RCK v. Siva Industries and Holdings Limited*. where in it was held that the *commercial wisdom of the Committee of Creditors ('CoC') is supreme*. Therefore, according to the Ld. Counsel, there is no merit in the prayers made by the Applicant, hence the same is liable to be dismissed.
25. Shri. Chandrasen Reddy, Ld. Sr. Counsel for the 5<sup>th</sup> respondent would contend that, as per clause 3.9 of the Resolution Plan submitted by the Applicant, it is conditional upon release of the personal guarantees given by the promoters and third parties. However, under Clause 4.7 of the RFRP, a Resolution Plan necessarily had to be unconditional. Under Clause 4.9(d) of the RFRP, a Resolution Plan that was conditional was liable to be labelled as 'non-responsive'. As the Resolution Plan submitted by the Applicant was "Conditional" on the release of personal guarantees, and therefore contrary to the terms of RFRP the same is liable to be rejected. Moreover, due to the condition of release of personal guarantees, the Applicant's Resolution of this Respondent as this Respondent in Resolution have sought no such conditional release of Personal Guarantees. In fact, the Lenders as also other Creditors have liberty to proceed against the Guarantors and seek recovery of the amount due to them. The provisions of IBC read with RFRP are not meant to defeat the

rights and remedies available to the Creditors against the Guarantors. Guarantor's liability in law is independent of that of the Principle Debtor and discharge of the Principle Debtors obligation does not discharge the obligation of the Guarantors.

Ld. Sr. Counsel further submitted that the Applicant has failed to provide proper source of funds in its Resolution Plan:

The Resolution Professional (Respondent No. 1) has rightly declared the Resolution Plan of the Applicant as "non-responsive" as the proper source of funding was not indicated by the Applicant. The Applicant was duty bound to make a full disclosure of the source of funds for the payments proposed under the Resolution Plan.

The use of a letter from "SVR Group" and the personal commitment given by Mr. Rajesh Jhunjunwala vide his email dated 22.02.2023 is also purposefully intended to confuse and mislead as Clause 4.8.3 of the RFRP makes it clear as to what source of funds that would be considered appropriate. As per Clause 4.8.3 of RFRP: "It is clarified that the Resolution Applicant shall be required to submit a firm Letter of Commitment (or a signed Sanctioned Letter) ("Letter of Commitment") from any scheduled commercial bank or a financial institution of repute for the amounts proposed to be paid by the Resolution Applicant towards the

items provided in Part C of Annexure V and/or with a letter from such bank or financial institution confirming availability of sufficient funds in the bank account of the Resolution Applicant. The status of funds availability as evidenced by the Letter of Commitment Sanction Letter / letter evidencing availability of sufficient funds in the bank account of the Resolution Applicant shall not be as of a date earlier than fifteen days prior to the date of submission of the Resolution Plan." Therefore, it is clear from a bare reading of clause 4.8.3 that only a letter of commitment from a "scheduled commercial bank" or a "financial institution of repute" would be considered as an appropriate source of funds. Given that the Applicant failed to provide such sources of funds in the present instance, the Respondent No. 1 was well within his rights to declare the Plan as "non-responsive". Further, reliance of the Applicant on the letter issued by Deutsche Bank also does not take the Applicant's case any further. The said letter has been issued by Deutsche Bank in favour of a totally unrelated third party namely Skyline (SG) Global Holding PTE. Ltd. and not in favour of the Applicant. The said letter does not imply and/or amount to compliance of the terms of RFRP.

According to the Ld. Sr. Counsel, Regulation 38 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 makes it apparent that every Resolution Plan submitted during CIRP must provide

for mechanism the implementation of the proposed Resolution Plan, and for the capability of the concerned Resolution Applicant to implement the Plan so submitted. Regulation 38 provides for the mandatory contents of a Resolution Plan itself, and inter-alia states, ... (3) A resolution plan shall demonstrate that ... (c) it has provisions for its effective implementation; (e) the resolution applicant has the capability to implement the resolution plan." In furtherance, it is submitted that as per Clause 4.9) of the RFRP the Resolution Professional or the CoC can consider the Resolution Plan as "non-responsive" if they are "not satisfied as to the funding ability of the Applicant". Further, clause 4.8(e) of the RFRP requires the Applicant to disclose, including without limitation, that "the Applicant has the necessary financial resources available for implementation and supporting the Resolution Plan and for any further infusion/contribution for additional funds into the Company as indicated in the Resolution Plan". Therefore, the Respondent No.1 was entitled to declare Resolution Plan of the Applicant as "non-responsive" as the proper source of funding was not indicated by the Applicant.

Ld. Sr. Counsel further submitted that the Applicant is not eligible to submit its Resolution Plan as per Section 29A(e) of the Code, as the Applicant is disqualified from acting as a Director under the Companies Act, 2013. The Applicant is disqualified to act as a Director as

per Section 164(2) of the Companies Act, 2013, as the Applicant did not file financial statements or financial years. The Company Master Data available on MCA Portal clearly indicates that the last financial statements and/or annual returns were filed on 31.03.2018. As the Applicant has failed to file financial statements or annual returns they are automatically disqualified under Section 164(2) of the Companies Act, 2013. Therefore, the Applicant is not eligible to submit its Resolution Plan as per Section 29A(e) of the Code. The exemption from ineligibility granted to MSME by Section 240A of the Code is not applicable to the cases covered under Section 29A(e) of the Code.. Therefore, the Applicant despite his malafide act of seeking registration of Corporate Debtor as an MSME, cannot claim exemption from ineligibility under Section 29A(e) of the Code. In view of the judgements cited herein above and the reliance placed upon them, this Respondent humbly submits that once the CoC has approved the Resolution Plan of this Respondent by 100% majority, this Hon'ble Tribunal ought to cede ground to the commercial wisdom of the CoC rather than assess the resolution plan on the basis of quantitative analysis and that the commercial wisdom of CoC ought to be given paramount status without any judicial intervention for ensuring completion of the CIRP within the timelines prescribed by the Code.

26. Having heard the Ld. Counsel at length, at the outset, we wish to refer to the *genesis* of this application, *namely*, our order in IA No177 of 2023 in CP (IB) No. 329/7/HDB/2020 dated 10/2/2023, which is as below.

*“However, upon careful consideration of the submissions of both sides, and taking into consideration the facts and circumstances of this case, we are of the opinion that the present application can be treated as one for condonation of delay in submitting the resolution plan, and therefore, considering the fact that the applicant is an MSME, the reasons for the delay in submitting the resolution plan, besides the case law, supra, we here by condone the delay in submitting the resolution plan to the respondent and pass the following directions;*

*(i). The Resolution Professional is hereby be directed to re-examine the resolution plan submitted by the applicant, in the light of the documents produced by both sides before this Tribunal, within **three days** from the date of this order, and communicate the same to the applicant.*

*(ii). In the event if the Resolution Professional finds that the plan meets the criterion laid down in RFRP and the legal requirements refereed supra, he shall place the same before the members of the CoC, and the CoC shall proceed further as per the provisions of the Code.*

*(iii). There shall be no stay on the ongoing voting on the resolution plan of M/s M/s Consortium of Yogayatan Ports Limited, however the outcome of the voting shall be kept in abeyance till the Respondent/Resolution Professional takes his decision on the resolution plan of the applicant in terms of the directions supra, of this Tribunal.*

*The Application is accordingly disposed of without costs.*

27. Subsequently the RP has sent the following communication dated 24/02/2023 to the Applicant regarding the resolution plan submitted by the applicant which is impugned in this Application.

- i. *“The Resolution Plan of the consortium of Mr. Akumalla Rajendra (Promoter) and Mr. Rajeshkumar Jhunjhunwala & SKH Impex Private Limited requesting for release of the all the Personal Guarantees given by the Promoters and the Third parties (as per the Point No 3.9 of the Resolution Plan of Applicant) which is OTS proposal and either the RP or COC members cannot dealt with CIRP process as no Valuation of PGs in*

*CIRP process and the applicant Plan cannot be comparable with other PRA and also Mr.Rajesh Junjhunwala and other Promoters Personal Guarantees may have high value and initiated for Personal Insolvency under IBC.*

- ii. In respect of the secured operating creditors i.e secured statutory claims admitted, the resolution plan is in violation to comply the Rainbow Judgment of Hon'ble Supreme Court, I&B Code and CIRP/ Regulations and mentioned that the Liquidation Value is mentioned as Nil which is not correct.*
- iii. The Notarised affidavit for Sec 29A of the Code in respect of the Mr.Rajesh Junjhunwala, EOI eligibility criteria documents such has Chartered Accountant's net worth Certificates, Chartered Accountant's Minimum availability of investible surplus funds certificate, 3 years Audited financials of RA etc., have not been provided with the Resolution plan submitted on 13th Jan 2023.*
- iv. Under the Clause 5 the Resolution Plan states that "Dissenting Financial Creditors shall be paid proportionately in priority to the Assenting Financial Creditors in every instalment of the Tranche wise payment of the Total Resolution Plan Amount" which is in violation of the Regulation 38(1)(a) of CIRP Regulations.*
- v. The Resolution applicant is not complied Sec 29A of IBC, 2016 as per the detailed observations provided by the legal counsel to you i.e applicant. These observations provided after consideration of the status of MSME of the Corporate Debtor. Further the applicant's Company has not been filed the financial statements and returns for continuous period of three financial years and as per the MCA data for which returns submitted is FY 2017-18.*
- vi. You have expressed in reply on 19th Feb 2023 that you are ready or agreed or agreeable to do all the required changes in order to comply their plan as per IBC, EOI and RFRP which clears that the submitted resolution plan and Sec 29A documents are not in compliance of required provisions of the EOI, IBC & RFRP.*
- vii. Projected Financials, Cash Flow statement, Proper Sources of Funds have not been provided with the Resolution Plan and the commitment letter of the SVR Group also failed in respect of the initial first deposit of Rs.5 Crores proposed for payment on or before 27th Jan 2023 in their letter*

*attached to the Resolution Plan and reply is not satisfactory. As per the Schedule - 1 of the applicant plan, Resolution Applicant shall have the flexibility to adjust the timelines specified in without incurring any penalty or liability and such modification or deviation from the steps and timelines shall not be considered as non-compliance/breach or modification of the Resolution Plan. Further as per Schedule-1 the Plan, the Resolution Applicant shall have a right to rearrange the sequence of events occurring on Trigger Dated post payment of upfront cash. These clauses gives to RA flexibility in payment terms and other events even post approval of the plan by AA rather than certainty.*

*viii. Other observations of Resolution Professional and Resolution Professional Legal Counsel submitted to you / applicant and to all COC members in email on 14th Feb 2023.*

*ix. In view of the above facts, Your Resolution Plan and the documents submitted for Sec 29A of the IBC, 2016 and other attachments on 13th Jan 2023 to RP, COC members and Hon'ble NCLT, Hyderabad are not in compliance with the criterion laid down in EOI and Statutory Requirements of the Code and relevant Regulations framed by IBBI, as per the resolution professional and resolution professionals legal counsel and the above facts placed before COC meeting held on 22nd Feb 2023 and they also noted the same.”*

28. Before we proceed to examine whether or not the above communication is sustainable on facts of this case as well as under law, we wish to refer to the some of the relevant clauses of RFRP, relating to the subject pleas, which are as follows:

**“Clause 4.7 of RFRP**

**4.7 Contents of the Resolution Plan**

*4.7.1 The Resolution Plan shall be unconditional and binding on the Resolution Applicant. The Resolution Applicant shall also mandatorily include the following in its Resolution Plan, as set out in Section 30 (2) of the IB Code read with Regulation 38 of the CIRP Regulations:*

*(a) source of payment of the Insolvency Resolution Process Cost in priority to the repayment of any other debts of the Company;*

*(b) source of repayment of the Operational Creditors in a manner that the amount received by the Operational Creditors is not less than the amount which would have been otherwise received by them in the event of liquidation of the Company, which shall in any event be made before the expiry of 30 days after the final approval of a Successful Applicant by the Adjudicating Authority;*

*(c) source of payment of liquidation value due to dissenting members of the COC and provide that such payment is made before any recoveries are made by the members of COC who voted in favour of the Successful Applicant;*

*(d) statement as to how it would deal with the interests of all stakeholders, including but not limited to break-up of amounts to be paid to secured Financial Creditors, unsecured Financial Creditors and Operational Creditors and other creditors, of the Company.”*

**Clause 4.9 – Other terms applicable to submission of the Resolution Plan**

*In addition to the events set out in the above clauses, the following events/ occurrences may cause the Resolution Plan to be considered ‘non-responsive’, at the discretion of the Resolution Professional/ COC:*

*(a) Any Resolution Plan that is incomplete, i.e., not accompanied by any of the applicable forms, authorizations and documents as specified in this RFP or failure to provide necessary or sufficient information within the stipulated time as required in this RFP or otherwise required by the Resolution Professional/COC;*

*(b) The Resolution Plan is not signed by the duly authorized Representative/ signatory of the Resolution Applicant and/ or is not stamped in the manner indicated in this RFP;*

*(c) There are material inconsistencies in the information or documents submitted by the Applicant;*

*(d) The Resolution Plan submitted by the Applicant is conditional in nature..;*

*(e) The Resolution Plan is not in accordance with the provisions of the IB Code or the CIRP Regulations and does not contain the mandatory provisions required to be incorporated therein under the IB Code;*

29. Now, we refer to the Regulations 36A of CIRP Regulations and 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process

for Corporate Persons) Regulations, 2016 which has been substituted in the Code w.e.f. 30.09.2021, which are as below;

***“Regulations 36A of CIRP Regulations.***

*[36A. Invitation for expression of interest*

*(1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the [Schedule-I] at the earliest, [not later than sixtieth day] from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.*

*(2) The resolution professional shall publish Form G-*

*(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;*

*(ii) on the website, if any, of the corporate debtor;*

*(iii) on the website, if any, designated by the Board for the purpose; and*

*(iv) in any other manner as may be decided by the committee.*

*(3) The Form G in the [Schedule-I] shall –*

*(a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and*

*(b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.*

*(4) The detailed invitation referred to in sub-regulation (3) shall-*

*(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25;*

*(b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants;*

*(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and*

*(d) not require payment of any fee or any non-refundable deposit for submission of expression of interest.*

*[(4A) Any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made:*

*Provided that such modification shall not be made more than once.*

*(5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest*

*within the time specified in the invitation under clause (b) of sub-regulation (3).*

*(6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.*

*(7) An expression of interest shall be unconditional and be accompanied by-*

*(a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25;*

*(b) relevant records in evidence of meeting the criteria under clause (a);*

*(c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;*

*(d) relevant information and records to enable an assessment of ineligibility under clause (c);*

*(e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;*

*(f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and*

*(g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.*

*(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-*

*(a) the provisions of clause (h) of sub-section (2) of section 25;*

*(b) the applicable provisions of section 29A, and*

*(c) other requirements, as specified in the invitation for expression of interest.*

*(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under subregulation (8).*

*(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.*

*(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) maybe made with supporting documents within five days from the date of issue of the provisional list.*

*(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.]*

### **Regulation 39 Approval of resolution plan**

*“39. Approval of resolution plan.*

*A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with*

*(a) an affidavit stating that it is eligible under section 29A to submit resolution plans;*

*(b) Omitted*

*(c) an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.*

*[(1A) The resolution professional may, if envisaged in the request for resolution plan-*

*(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or*

*(b) use a challenge mechanism to enable resolution applicants to improve their plans.*

*(1B) The committee shall not consider any resolution plan-*

*(a) received after the time as specified by the committee under regulation 36B; or*

*(b) received from a person who does not appear in the final list of prospective resolution applicants; or*

*(c) does not comply with the provisions of sub-section (2) of section 30 and sub-regulation (1).].*

*(2) [The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -*

*(a) preferential transactions under section 43;*

(b) undervalued transactions under section 45;  
(c) extortionate credit transactions under section 50; and  
(d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.]

[(3) The committee shall-

(a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;

(b) record its deliberations on the feasibility and viability of each resolution plan; and

(c) vote on all such resolution plans simultaneously.

(3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.

(3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:

*Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting:*

*Provided further that where none of the resolution plans receives requisite votes, the committee shall again*

*Illustration. - The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under:*

Voting outcome	% of votes in favour of		Status of approval
	Plan A	Plan B	
1	55	60	No plan is approved, as neither of the plans received requisite votes. The Committee shall vote again on Plan B, which received the higher votes, subject to the timelines under the Code
2	70	75	Plan B is approved, as it received higher votes, which is not less than requisite votes
3	75	75	The Committee shall approve either Plan A or Plan B as per the tie-breaker formula announced before voting.

*[(4) The resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in [Form H of the [Schedule-I] and the evidence of receipt of performance security required under sub-regulation (4A) of regulation 36B.]]*

*(5)The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.*

*[(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:*

*Provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;]*

*(6)A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained.*

*(7) No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.*

*(8) A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.*

*[(9)A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions.]”*

(1A) The resolution professional may, if envisaged in the request for resolution plan-

(a) *allow modification of the resolution plan received under sub-regulation (1), but not more than once;*

(b) use a challenge mechanism to enable resolution applicants to improve their plans.

30. We, usefully refer to Section 29A and Section 30 of I B Code, which are as below

**“Section 29A of IB Code.** A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person— (a) is an undischarged insolvent; (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949; (c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor: Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan; (d) has been convicted for any offence punishable with imprisonment for two years or more; (e) is disqualified to act as a director under the Companies Act, 2013; (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets; (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code; (h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code; (i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or (j) has a connected person not eligible under clauses (a) to (i).

Explanation.— For the purposes of this clause, the expression "connected person" means— (i) any person who is the promoter or in the management or control of the resolution applicant; or (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii): Provided that nothing in clause (iii) of this Explanation shall apply to— (A) a scheduled bank; or (B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or (C) an Alternate Investment Fund registered with the Securities and Exchange Board of India."

***Section 30 of IB Code : Submission of resolution plan.***

*(1) A resolution applicant may submit a resolution plan <sup>1</sup>[along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.*

*(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan--*

*(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the <sup>2</sup>[payment] of other debts of the corporate debtor;*

*[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than--*

*(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or*

*(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,*

*whichever is higher and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.*

*Explanation 1.--For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.*

*Explanation 2.-- For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor--*

*(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;*

*(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or*

*(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]*

*(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*

*(d) the implementation and supervision of the resolution plan;*

*(e) does not contravene any of the provisions of the law for the time being in force;*

*(f) conforms to such other requirements as may be specified by the Board.*

*[Explanation.-- For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law];*

*(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).*

*[(4) The committee of creditors may approve a resolution plan by a vote of not less than <sup>6</sup>[sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, <sup>7</sup>[the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including*

*the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:*

*Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017(Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:*

*Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:*

*Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]*

*[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.]*

*(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:*

*Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.*

*(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.*

31. Admittedly the applicant failed in submitting the resolution plan *within the time allowed* which resulted in rejection of the plan by the resolution professional, however pursuant to the order on this Tribunal in IA

791/2023, *supra*, the resolution professional has taken up the resolution plan of the Applicant and once again rejected the same, under the impugned communication. It is also an undeniable fact that even though the applicant was present at all the relevant meetings that took place before the approval of the Resolution Plan of the 5<sup>th</sup> respondent, the Applicant has never proposed for the submission of any Resolution Plan until coming to know that the Resolution Plan of the 5<sup>th</sup> Respondent was put to vote. Even in respect of submission of the revised plan according to the resolution professional only upon being informed by the resolution professional that the Resolution Plan of the 5<sup>th</sup> Respondent has been accepted, the applicant had submitted the impugned resolution plan which plea however is strongly denied by the applicant as false.

32. Be that as it may, in terms of Section 30 (3) of IB Code, the resolution professional shall present to the committee of creditors for its approval such resolution plan which confirm the conditions referred to in sub-section (2) of section 30 of IB Code, *supra*. Thus, an important duty has been cast on the resolution professional by the statute to ensure that the resolution plan that he is required to present to the committee of creditors for its approval, meets the conditions *referred* to in sub-section (2) of section 30 of IB Code.

33. It is to be stated that, neither the Code nor any regulation bars the resolution professional from holding discussions with the members of the CoC, before placing the resolution plan(s) of prospective resolution applicants, for voting by the COC. Admittedly, the resolution professional has issued notice to all the members of the CoC including the applicant herein, of the 13<sup>th</sup> meeting of the CoC dated 17.01.2023, in order to discuss *inter alia*, the response submitted by the applicant to the observations made by the resolution professional regarding the revised resolution plan submitted by the applicant. Annexures 18,19 to 22 clearly states so. Relying on the relevant clause in RFRP, the regulations referred *supra*, particularly, clause 3.9 of the resolution plan of the applicant, which is as below,

***“3.9 : Treatment of Existing Guarantees and existing third party security:***

*Being the promoter of the corporate debtor, the resolution applicant specifically requests the financial creditor not to take any steps and remedies and recourse available to them in Applicable Law for the recovery of the uncovered amounts from such guarantors under their respective documents during the course of implementation of the resolution plan. All the personal guarantees given by the promoters and the third parties shall be returned soon of after successful implementation of the resolution plan.”*

the resolution professional, under the impugned communication dated 24/02/2023, held that the resolution plan of the applicant was not *qualified* to be placed before the CoC, by particularly stating as below.

*“The Resolution Plan of the consortium of Mr. Akumalla Rajendra (Promoter) and Mr. Rajeshkumar Jhunjhunwala & SKH Inpex Private Limited requesting for release of the all the personal Guarantees given by the Promoters and the Third parties (As per the Point No.3.9 of the Resolution Plan of Applicant) which is OTS proposal and either the RP or COC members cannot dealt with CIRP process as no Valuation of PGs in CIRP process and the applicant Plan cannot be comparable with other PRA and also Mr. Rajesh Junjhunwala and other Promoters Personal Guarantees may have high value and initiated for Personal Insolvency under IBC.”*

A. It is trite law that, conditional Resolution Plan cannot be approved in the light of Section 31(1) of IB Code.

Reliance in this regard can be placed on the ruling in,

*Ramchandra Dalaram Choudhary RP of Anil Mega Food Park Pvt Ltd Vs M2K Developers Pvt. Ltd. (NCLT Ahmedabad) Appeal Number : IA/843(AHM)2021 AND IA/420(AHM)2022 in CP(IB) 287 of 2019, wherein it was held that:*

*“The proviso to section 31(1) does not permit us to approve such conditional Resolution Plan.”*

34. That apart, as per clause 4.7 of RFRP the resolution plan shall be unconditional and a conditional plan is liable to be rejected in terms of clause 4.9(d) of RFRP. Here pertinently, the resolution plan of the applicant apart from being conditional as stated supra, the assets referred in the plan does not belong to the applicant as the same are the assets of the promoters already given as personal guarantees, and the personal insolvency proceedings initiated by the lenders are pending against them besides some other assets belongs to third parties. Moreover, the

information memorandum does not indicate that these assets as the assets of the corporate debtor.

35. We therefore find force in the submission of the Ld. Counsel for the Resolution Professional that the resolution plan was not in conformity with the Clause 4.7 of RFRP, hence not eligible to be placed before the COC.
36. As regards MSME status, even assuming that the applicant is duly qualified to be an MSME, according to the resolution professional, protection under section 240A of the Code is only in respect of subsection ( c ) and (h) of section 29A of the Code, and nothing more. In this regard, it may be stated that any prospective resolution applicant can be allowed to submit resolution plan covering the assets under part II and not part III of IBC. In so far as the case on hand is concerned the value of the assets of Mr. Rajesh Junihunwala, those covered by his personal guarantee, and the value of the promotor's assets are not made known in Form G issued under part II of IBC. As already stated the personal insolvency proceedings initiated by the lenders against the above personal guarantors are pending. It is the firm submission of the resolution professional supported by the notice of the meeting dated 17.1.2023, that the resolution professional has called for the 13<sup>th</sup> meeting of the CoC on 23.02.2023 to discuss, *inter alia*, the response submitted by the applicant to the observations made by the resolution professional, including in respect of its eligibility in terms of

Section 29 A of IB Code, and basing on the legal opinion and the collective decision of the CoC members it was decided to reject the resolution plan of the applicant, as the same was conditional, not besides inconformity with the other relevant provisions of the code and the Regulations. Thus, the decision based collective besides basing on the relevant clauses in RFRP, we do not find any force in the submission of the Ld. Counsel for the applicant that, the impugned communication needs to be interfered with.

37. That apart, the legal position as regards interference of this Tribunal with the ‘collective decisions of the CoC; be it, prior or post voting of the resolution plan, as held in *Arun Kumar Jagatramka v. Jindal Steel and Power Limited and Another*, **“should be kept at its bare minimum and should not disturb the foundational principles of the IBC.....”**
38. *In Unicon Buildtech vs. Aishwarya Mohan Gahrana RP, Durha Vitrak Private Limited (vide Comp App (AT) (Ins) 517 of 2021) wherein at paragraphs 6 and 7 it is observed as under:*

*“The Appeal itself shows that the Appellant had been participating in the CIRP and had on earlier occasion also filed revised plan. The CoC in the Minutes considered e-mail claimed by the Appellant to have been sent on 22nd January, 2021 and having considered e-mail decided to proceeded to consider the Resolution Plan which had been submitted clause by clause. The CoC in its wisdom did not find it appropriate to give more time to the Appellant and discussed the Resolution Plan and rejected the same for*

*reasons recorded. These are commercial decisions and we cannot hear the Appellant claiming Company Appeal (AT) (CH) (Ins.) Nos.166 & 174 of 2021 18 that he was offering bigger amount and so the CoC should be directed to consider his plan.*

39. In the matter of “Arcelor Mittal India Pvt. Ltd. vs. Satish Kumar Gupta & Ors.” [Civil Appeal No. 9402-9405 etc. of 2018] (MANU/SC/1123/2018), Hon’ble Supreme Court in para 79 of the judgment has observed **that** **“there is no vested right or fundamental right in the Resolution Applicant to have its Resolution Plan approved.**
40. Therefore, having carefully examined the reasons that are given by the Resolution Professional for rejecting the resolution plan of the applicant, and in the light of our discussion and the case law, we are fully convinced that the grounds of rejection are tenable and sustainable under law. Moreover there is no vested right in favour of the Applicant to claim that its resolution plan be approved, as held in *Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta & Ors* Supra. Hence, we are of the considered view that the Applicants sans merit and deserves to be dismissed. Accordingly the same is hereby dismissed. However, without costs.

**Sd/-**  
**CHARAN SINGH**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**DR. N V RAMAKRISHNA BADARINATH**  
**MEMBER (JUDICIAL)**

*Sridher*