National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 619 of 2021
&
I.A. No. 1818 of 2021

(Arising out of Order dated 03rd August, 2021 passed by National Company Law Tribunal, New Delhi, Court-III in I.A.-3146/2021 U/s-11 in IB-1600/(ND)/2018).

IN THE MATTER OF:

Indiabulls Housing Finance Limited
Office at: M-62 & 63, First Floor,
Connaught Place, New Delhi – 110001

And its Corporate Office at:

Indiabulls House
Plot No. 448-451
Udyog Vihar, Phase – V
Gurugram 122016 **...Appellant**

Versus

1. Sandeep Chandna
Interim Resolution Professional of Ambience Private Limited
A-23, Ground Floor
South City 2
Gurugram, Haryana. **...Respondent No. 1**

2. Vistra ITCL (India) Limited
Office at: IL&FS Financial Centre,
Plot No. C22, G Block, Bandra Kurla Complex,
Bandra East, Mumbai – 400051. **...Respondent No. 2**

3. Ambience Private Limited
Office at: L-4, Green Park Extension,
New Delhi – 110016. **...Respondent No. 3**

For Appellant: Ms. Avni Sharma, Ms. Anjali Anchayil,

	Mr. Rudreshwar Singh, Mr. Jaiyesh Bakhshi, Ms. Sonali Jaitley Bakhshi, Mr. Ravi Tyagi, Mr. Kabir Chhilwar, Mr. Mayank Kumar, Ms. Manmilan Sindhu, Ms. Ria Chandra, Mrs. Radhika Malik, Ms. Mayuri Shukla, Mr. Gaurav Yashwardhan and Mr. Manish Sharma, Advocates.
For Respondent No.1:	**Dr. U.K. Chaudhary, Sr. Advocate along with Mr. Nikhil Kumar Verma, Mr. Mansumyer Singh and Mr. Rahul Sharma, Advocates.**
For Respondent No. 2:	**Mr. Vijay Nair, Mr. Manoranjan Sharma, Ms. Sakshi Kapoor, Advocates.**
For IRP:	**Mr. Sandeep Chandna, Advocate.**

With

CONTEMPT CASE (AT) No. 20 of 2021
In
COMPANY APPEAL (AT) (INSOLVENCY) No. 619 of 2021

IN THE MATTER OF:

Indiabulls Housing Finance Limited
Office at: M-62 & 63, First Floor,
Connaught Place, New Delhi – 110001

And its Corporate Office at:

Indiabulls House
Plot No. 448-451
Udyog Vihar, Phase – V
Gurugram 122016 **...Appellant**

Versus

1. Sandeep Chandna
Interim Resolution Professional of Ambience Private Limited
A-23, Ground Floor
South City 2 **...Respondent No. 1**
Gurugram, Haryana. **/Contemnor**

For Appellant:	**Ms. Avni Sharma, Ms. Anjali Anchayil, Mr. Rudreshwar Singh, Mr. Jaiyesh Bakhshi, Ms. Sonali Jaitley Bakhshi, Mr. Ravi Tyagi, Mr. Kabir**

	Chhilwar, Mr. Mayank Kumar, Ms. Manmilan Sindhu, Ms. Ria Chandra, Mrs. Radhika Malik, Ms. Mayuri Shukla, Mr. Gaurav Yashwardhan and Mr. Manish Sharma, Advocates.
For Respondent No.1:	**Dr. U.K. Chaudhary, Sr. Advocate along with Mr. Nikhil Kumar Verma, Mr. Mansumyer Singh and Mr. Rahul Sharma, Advocates for R-1.**
For IRP:	**Mr. Sandeep Chandna, Advocate for IRP.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this *Company Appeal (AT) (Insolvency) No. 619 of 2021* is to the Impugned Order dated 03.08.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Court–III) in I.A. 3146/2021 U/s 11 in IB–1600/(ND)/2018, whereby and whereunder the Learned Adjudicating Authority has excluded 87 days from the calculation of 180 days exercising its powers under Rule 11 of the NCLT Rules, 2016, on an Application preferred by the IRP. By the Impugned Order, the Learned Adjudicating Authority has observed as follows:

> *"This is an Application filed under Rule 11 of the NCLT Rules, 2016 read with Regulation 40 (c) of the IBBI (CIRP) Regulations, 2016 for seeking exclusion of 87 days from the calculation of 180 days as provided by Section 12 of Insolvency & Bankruptcy Code, 2016.*
> *The Counsel for the Insolvency Resolution Professional, in the Application has prayed for excluding 87 days from 18.1.2021 to 23.2.2021 and from 19.4.2021 to 07.6.2021 from the calculation of 180 days given in Section 12 of IB Code for completion of the CIRP period.*
>
> *Having heard the submissions and perused the contents of the Application and also that the COVID-19 has impacted every Sector and the exclusion*

> *sought is primarily due to the reason of COVID-19, this Tribunal allows this Application."*

2. Succinctly put, the facts in brief are that on 21.12.2020, Section 7 Petition filed by the second Respondent namely *'Vistra ITCL (India) Ltd.'* against *'Ambience Private Limited'* was admitted and CIRP commenced on 23.12.2020. A Public Announcement was made in terms of the Regulations of IBBI, 2016. On 07.01.2021, Mr. Raj Singh Gehlot, the Director of the 'Corporate Debtor', filed an Appeal against the Admission Order vide *Company Appeal (AT) (Insolvency) No. 06 of 2021.* The IRP constituted a CoC after verification of claims. This Tribunal vide Order dated 18.01.2021 restrained the CoC from proceeding further till the next date of hearing i.e., 06.04.2021. On 13.02.2021, the Appellant preferred an Appeal namely ***Civil Appeal No. 717 of 2021 'Indiabulls Housing Finance Limited' Vs. 'Raj Singh Gehlot & Ors.'*** before the Hon'ble Supreme Court of India challenging the Order of this Tribunal. The Hon'ble Supreme Court passed an Interim Order dated 23.02.2021 *inter alia,* staying the oppression of the NCLAT Order. The said Order is reproduced as hereunder:

> *"1. Permission to file the appeal is granted.*
>
> *2. The appeal arises from an order of the National Company Law Appellate Tribunal dated 18 January 2021. Mr Shyam Divan, learned senior counsel appearing on behalf of the appellant has highlighted the following facets of the case:*
>
> > *(i) On 21 December 2020, the National Company Law Tribunal admitted the application filed against the Corporate Debtor and initiated the Corporate Insolvency Resolution Process;*

(ii) Following the admission of the application, the IRP was appointed;

(iii) The Committee of Creditors was constituted some time prior to 15 January 2021, which is evident from the e-mail (Annexure A-2) dated 15 January 2021 by the IRP convening the first meeting of the Committee of Creditors on 20 January 2021;

(iv) After the admission of the application, a Memorandum of Settlement was arrived at on 14 January 2021 between the first respondent and second respondent; and

(v) The agenda to the notice (page 62 of the paper book) would indicate that the claim of the appellant to the extent as acknowledged has been quantified at Rs 840 crores (representing 44% of the dues), while the claim which is due to the second respondent is quantified at Rs 297 crores (representing 15.4% of the dues).

2. Mr Shyam Divan has submitted that having due regard to the provisions of Section 12A of the Insolvency and Bankruptcy Code 2016, once the application has been admitted under Sections 7, 9 or 10, as the case may be, withdrawal of the application can be made by the applicant with the approval of a 90% voting share of the Committee of Creditors, in such manner as may be prescribed. Regulation 30A provides for the manner in which the withdrawal can take place. Section 12A was enforced with effect from 6 June 2018. Regulation 30A has been enforced with effect from 25 July 2019.

3. Apart from the above provisions, reliance has also been placed on Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, under which the adjudicating authority may permit withdrawal of an application on a request made by the applicant ***<u>before its admission.</u>*** *Consequently, it has been urged that the private settlement which was entered into between the first* *and second respondents is contrary to the express provisions of the IBC and may even amount to a preferential transaction within the prohibition contained in Section 43.*

4. In view of the above submissions, issue notice, returnable in three weeks.

5. Till the next date of listing, the following ad-interim order is issued:

(i) The impugned judgment and order of the NCLAT dated 18 January 2021 in Company Appeal (AT) (Insolvency) No 6 of 2021 shall remain stayed; and

(ii) In terms of the application for additional interim reliefs, there shall be a direction restraining the first and second respondents from taking any steps under the Memorandum of Settlement dated 14 January 2021.

6. List the Civil Appeal on 17 March 2021."

3. **<u>Submissions of the Learned Counsel appearing on behalf of the Appellants:</u>**

- Learned Counsel strenuously contended that the IRP convened a Meeting of the CoC on 07.07.2021 to discuss the issue of filing of an Application for exclusion/extension of timelines for the CIRP and put the item to vote. The resolution was not passed as only 19.81% Voting Shares of the CoC voted in favour of the resolution. Subsequently, the IRP going completely against the express mandate of the CoC filed the Exclusion Application seeking exclusion of a period of 87 days from

180 days period, without intimating the same to the Members of the CoC.

- Section 12(1) of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the **'Code'**) provides that the CIRP must be completed within 180 days. Section 12(2) of the Code provides that the IRP/RP shall file an Application to extend the period of the CIRP beyond 180 days only after instructed to do so by a resolution passed by the CoC by a vote of 66% of the Voting Shares. The wording *'if'* in Section 12(2) denotes a condition precedent i.e., the CoCs approval. This has to be read as including any request for exclusion of any period from the 180 days time period for completion of the CIRP. The Learned Counsel relies on the decision of the Hon'ble Supreme Court in ***'Arcelormittal India Private Limited' Vs. 'Satish Kumar Gupta & Ors.' (2019) 2 SCC 1*** para 73 to 75 in support of his case.
- It is clear from Regulation 340 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (hereinafter referred to as the **'Regulations'**) that it is the CoC which has to instruct the IRP to file an Application for extension of time period for the CIRP and the IRP shall do so upon receiving the CoC's instructions.
- The commercial wisdom of the CoC is non-justiciable and judicial intervention is not permitted as per the ratio laid down by the Hon'ble Supreme Court in ***'K Sashidhar' Vs. 'Indian Overseas Bank' (2019)***

12 SCC 150. The IRP is the facilitator of the CIRP and cannot go against the instructions of the CoC as observed by the Hon'ble Supreme Court in ***'Swiss Ribbons (P) Ltd.' Vs. 'Union of India' (2019) 4 SCC 17,*** para 91.

- The definition sought to be drawn by the IRP between 'extension' and 'exclusion' is without any basis. In both the cases, the time period for the IRP increases and therefore the CoC's approval is required.
- The contention of the IRP that the CoC's approval is not required for seeking exclusion of time is only an afterthought which is evident from the fact that IRP has sought the COC's approval for both exclusion and extension of time in the Meeting dated 07.07.2021. Even after the filing of the Appeal by email dated 21.08.2021, the IRP sought to obtain CoC's approval for the extension of time. The IRP cannot be permitted to approbate and reprobate.
- Exclusion of time is permitted only in certain circumstances which are not directed in the present case. Regulation 40C of the Regulations cannot be construed as a blanket period for exclusion of period of the lockdown due to COVID-19. The language of Regulation 40C makes it subject to the provisions of the Code including Section 12(2) which provides that all decisions must be backed by 66% voting share of the CoC. The IRP cannot mechanically invoke the said provisions as the Exclusion Application is bereft of any pleading as to which activity could not be performed due to the lockdown.

- The IRP suppressed the decision of the CoC not to file any Application seeking extension/exclusion of time. The CoC includes other Members also who have decided not to invite 'Expression of Interest' for the third Respondent. Only 3.74% of the Voting Shares of the CoC voted in favour of the resolution to invite 'Expression of Interests', whereas 58.09% voted against the same. Hence, it is prayed that the Impugned Order be set aside.

4. **Submissions of the Learned Counsel appearing on behalf of first Respondent/IRP:**

- The IRP Mr. Sandeep Chandna submitted that an email was sent to the CoC seeking the advice of CoC on drafting and filing of Application for extension of timelines for the CIRP, as the period had concluded. But the Appellant abruptly disapproved the filing of the Application for extension of the CIRP and exclusion of time and suggested to file an Application for the Liquidation of 'Corporate Debtor' without examining the viability of business of the 'Corporate Debtor' knowing that the project of the 'Corporate Debtor' was nearing completion and there was no perceptible reason to Liquidate the 'Corporate Debtor' which clearly establishes that the main intention of the Appellant was to push the 'Corporate Debtor' into Liquidation.
- Merely because the word 'exclusion' along with the word 'extension' was used, it does not give the right to the CoC Members to decide the fate of filing the Application for exclusion of the time period of CIRP

and does not take away the right of the IRP/RP for filing an Application before the Adjudicating Authority to meet the ends of justice and keep the 'Corporate Debtor' alive and as a 'going concern'. In support of his contention, reliance is placed on decision of this Tribunal in ***'Sudip Bhattacharya, Resolution Professional of Reliance Naval and Engineering Ltd.', Company Appeal (AT) (Insolvency) No. 858 of 2020,*** in which this Tribunal has excluded the period of lockdown with effect from 25th March 2020 till 31st August 2020 while computing the period of CIRP.

- The IRP could not work properly due to the lockdown imposed by the Govt. of Delhi and Govt. of Haryana from 19.04.20201 to 07.06.2021 and the IRP herein and his whole family tested positive and recovered only in end of May, 2021.
- Though the Appellant Counsel raised an objection during the hearing, the Adjudicating Authority took a view on the basis of the grounds mentioned, seeking exclusion and decided to allow the Application to keep the 'Corporate Debtor' as the 'going concern'. Regulation 40C of the CIRP Regulations in spirit also applies to the period of lockdown. This issue is squarely covered by the Judgement of this Tribunal in ***'Quinn Logistics Private Limited' Vs. 'Mack Soft Tech Private Limited' in Company Appeal (AT) (Insolvency) No. 185 of 2018.***
- It is also held in ***'Bhim Sain Goyal' Vs. 'The American Swan Lifestyle Co. Pvt. Ltd (Under CIRP)' Company Appeal (AT)***

(Insolvency) No. 1067 of 2020, that if an occasion arises for seeking extension of time based on cogent reason, the RP shall have opportunity to seek the same from the Adjudicating Authority.

- The RP regularly visited the properties of the 'Corporate Debtor', where the construction work was being carried out in full swing in Noida and put in sincere efforts to get the flats delivered to the Flat Buyers. The result is that 40 flats have been readied for being delivered to the Flat Buyers.
- In this case, the Respondent filed an Application for exclusion of 87 days for reasons beyond his control and submits that Application for exclusion of time does not require the prior approval of the CoC, that the Adjudicating Authority has Inherent Powers under Rule 11 of the NCLT Rules, 2016, to give such Orders to meet the ends of justice.
- It is further contended that the Appellant never wanted this IRP to continue and sent emails asking the IRP to liquidate the 'Corporate Debtor' and put various roadblocks in the functioning of the CoC by not letting discussions on important matters during the CoC Meetings.
- The Learned Counsel also placed reliance on the following Meetings of the CoC held on 18.03.2021, 07.04.2021 and 07.07.2021, in support of his case that there were several dissent votes on important resolutions put before them for voting in the CoC Meetings and that

there was continuous non-cooperation from the Appellant who was not allowing the IRP to work within the timelines provided:

S. No.	Resolution	% of Dissent	% of Assent	Result
1.	*Filing of application before the Hon'ble NCLT exclusion/extension of timelines.*	*42.029 (No. of Voters – 08)*	*19.815 (No. of Voters – 08)*	*Not Approved*
2.	*Discussion on the matter of Invitation of Expression of Interest.*	*58.748 (No. of Voters – 03)*	*3.7866 (No. of Voters – 03)*	*Not Approved*
3.	*To discuss and ratify the expenses/fees to Valuers to enable them to continue work on valuation exercise in the CIRP.*	*47.886 (No. of Voters – 04)*	*14.648 (No. of Voters – 05)*	*Not approved*

Assessment:

5. The brief point which falls for consideration in this Appeal is whether the approval of the CoC under Section 12(2) of the Code is mandatory for seeking '*exclusion of time'* even if it is sought on grounds of lockdown/time lost during the period of any 'Stay'/Status Quo /or for any other reason. It is the case of the Appellant that be it exclusion or extension, Section 12(2) i.e., approval of 66% of Voting Shares of the Members of the CoC is mandatory and that the act of the IRP in going ahead with the filing of the Application before the Adjudicating Authority seeking exclusion of the period of 87 days, even if it is on the ground of lockdown, is against the provisions of the Code.

6. In the Minutes of the 3rd CoC Meeting held on 07.07.2021 one of the matters to be discussed and listed in the Agenda was *'filing of Application/s*

before the NCLT for exclusion/extension of timelines'. The relevant Agenda item is reproduced as here under:

> ***<u>"1. Filing of application/s before the Hon'ble NCLT for exclusion/extension of timelines.</u>***
>
> *The IRP informed the CoC that the extra-ordinary situation created by the rampant spread of covid- 19 in the second wave and the effect it had on the country as a whole, and the CIRP in this matter particularly, wherein the IRP, the CD and its officials were physically infected and affected and thereafter the non-issuance of a go-ahead by the CoC for filing extension/exclusion application before the Hon'ble NCLT well within time have made it imperative that the CoC gives its approval now without any delay to the filing of relevant application/s before the Hon'ble NCLT.*
>
> *The CoC members requested the matter to be put to vote. Accordingly, the following resolution is proposed for approval by CoC:*
>
> > *"RESOLVED THAT the IRP/RP be and is hereby authorised to make suitable application/s as considered necessary for extension/exclusion of timeline/s under the provisions of The Insolvency and Bankruptcy Code, 2016."*

7. Learned Counsel for the Appellant drew our attention to the voting on this Agenda item (Annexure-4), the percentage of assent was 20.03% and percentage of dissent was 42.4% of the voting of the CoC Members. It is the main case of the Appellant that since the CoC has rejected the item seeking exclusion of time, the IRP could not have gone ahead and filed the Application before the Adjudicating Authority seeking exclusion of time. For better understanding of the case Section 12(1) and Section 12(2) of the Code are reproduced as hereunder:

> ***12. Time-limit for completion of insolvency resolution process.–****(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.*
>
> *(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of [sixty-six] per cent. of the voting shares.*
>
> *(Emphasis Supplied)*

8. It is the case of the Respondent that Section 12(2) provides for 'extension' which requires a 66% of Voting Share since it has to be read with Section 12(1) of the Code and there is no mandatory provision for 'exclusion' of the period spent in lockdown and the period lost during any 'stay' granted. Regulation 40C of Regulations is detailed as hereunder:

> *"40C. Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process"*

9. It is seen from the aforesaid Regulation that subject to the provisions of the Code, for the period of lockdown (imposed by the Central Government in the wake of COVID-19 outbreak), can be excluded for the purpose of timeline for any activity that could not be completed during such lockdown.

10. The period of 180 days of the 'Corporate Debtor'/R-3 expired on 09.06.2021. For better understanding of the case, the calculation of 87 days is detailed as hereunder:

S. No.	***Date***	***Event***	***Period***
1.	*21.12.2020*	*CIRP commenced*	*-*
2.	*18.01.2021*	*Interim stay of this Tribunal in an Appeal filed by Mr. Raj Singh Gehlot.*	*-*
3.	*23.02.2021*	*The Hon'ble Apex Court vacated the stay filed by the Appellant herein.*	*37days (18.01.2021-23.02.2021)*
4.	*19.04.2021 to 07.06.2021*	*Lockdown on account of Covid Pandemic; the IRP could not proceed due to partial lockdown; the IRP must having got COVID-19.*	*50days*
		Total	*87days*

11. At this juncture, we place reliance on the Judgement of this Tribunal in ***'Quinn Logistics Private Limited' Vs. 'Mack Soft Tech Private Limited' in Company Appeal (AT) (Insolvency) No. 185 of 2018,*** wherein this Tribunal had excluded the intervening period following the unforeseen pandemic:

> *"10. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-*
>
> > *(i) If the corporate insolvency resolution process is stayed by 'a court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.*
> >
> > *(ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.*

> *(iii) The period between the date of order of admission/ moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.*
>
> *(iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.*
>
> *(v) If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.*
>
> *(vi) Any other circumstances which justifies exclusion of certain period."*

12. A perusal of the Impugned Order dated 03.08.2021, shows that the Adjudicating Authority had heard both the Counsels and exercised its discretion under Rule 11 of the NCLT Rules, 2016, and allowed the 'exclusion of 87 days. This Tribunal in its Order dated 19.08.2021 directed for maintaining Status Quo as it exists today *qua* the Impugned Order. It is the case of the IRP that it was interpreted that the Status Quo shall be maintained as it exists at the time of passing the Order on 19.08.2021. Therefore, as on 19.08.2021, 87 days had already been excluded from the CIRP period of 180 days by the Adjudicating Authority vide Impugned Order. This Tribunal in ***'Bhim Sain Goyal' Vs. 'The American Swan Lifestyle***

Co. Pvt. Ltd (Under CIRP)' Company Appeal (AT) (Insolvency) No. 1067 of 2020, held as follows:

> *"We set aside the impugned order and while allowing the prayer direct exclusion of time w.e.f 20th March, 2020 to 2nd September, 2020 in reckoning of the ordinary Corporate Insolvency Resolution Process period viz. 180 days.* ***Beyond that, if an occasion arises for seeking extension of time based on cogent reasons, the Resolution Professional shall be at liberty to seek the same from the Adjudicating Authority.*** *The appeal is accordingly allowed with direction to the Appellant – Interim Resolution Professional to carry forward the Corporate Insolvency Resolution Process with expedition."*

13. Paragraph 73 and 75 of ***'Arcelormittal India Private Limited' (Supra)*** relied upon by the Appellant is detailed as hereunder:

> ***"73.*** *The time-limit for completion of the insolvency resolution process is laid down in Section 12. A period of 180 days from the date of admission of the application is given by Section 12(1). This is extendable by a maximum period of 90 days only if the Committee of Creditors, by a vote of 66%, votes to extend the said period, and only if the adjudicating authority is satisfied that such process cannot be completed within 180 days. The authority may then, by order, extend the duration of such process by a maximum period of 90 days [see Sections 12(2) and 12(3)]. What is also of importance is the proviso to section 12(3) which states that any extension of the period under Section 12 cannot be granted more than once. This has to be read with the third proviso to Section 30(4), which states that the maximum period of 30 days mentioned in the second proviso is allowable as the only exception to the extension of the aforesaid period not being granted more than once.*
>
> ***74.*** *What is important to note is that a consequence is provided, in the event that the said period ends either*

> *without receipt of a resolution plan or after rejection of a resolution plan under Section 31. This consequence is provided by Section 33, which makes it clear that when either of these two contingencies occurs, the corporate debtor is required to be liquidated in the manner laid down in Chapter III. Section 12, construed in the light of the object sought to be achieved by the Code, and in the light of the consequence provided by Section 33, therefore, makes it clear that the periods previously mentioned are mandatory and cannot be extended.*
>
> ***75.** In fact, even the literal language of Section 12(1) makes it clear that the provision must read as being mandatory. The expression "shall be completed" is used. Further, sub-section (3) makes it clear that the duration of 180 days may be extended further "but not exceeding 90 days", making it clear that a maximum of 270 days is laid down statutorily. Also, the proviso to Section 12 makes it clear that the extension "shall not be granted more than once"."*

14. The aforenoted ratio is with respect to 'extension of the timelines' keeping in view the strict timelines to be adhered to under the Code and is dated 04.10.2018 prior to the Pandemic, whereas Regulation 40C was inserted by Notification No. IBBI/2020–21/GM/Regulation 059 dated 20.04.2020, w.r.e.f. 29.03.2020.

15. Simply put, the dictionary meaning of **'extension'** is the act of lengthening, stretching out or enlarging the scope of something, the 'additional' period of time given to one to meet one end; and dictionary meaning of **'exclusion'** is an instance of leaving something or someone out, barring, keeping out, eliminate, rule out, facing out etc. The 'extension of 87 days' would necessarily mean 180+87 days and 'exclusion of 87 days' would essentially mean 180-87 days and therefore we are of the view that there is a

clear distinction between the words 'extension' and 'exclusion' and the Adjudicating Authority has rightly relied on Regulation 40C of the Regulations to keep the Company a 'going concern'. We are also conscious of the fact that the Appellant itself constituted approximately 42% Voting Share and it was dissented by 42% of the CoC Members; that substantial period of 37 days was spent on account of the 'Status Quo'; that the Application is filed under Rule 11 of the NCLT Rules, 2016, whereunder the Adjudicating Authority used its discretionary powers.

16. The contention of the Learned Counsel for the Appellant that the IRP had concealed voting of the Members of the CoC before the Adjudicating Authority is untenable as the Adjudicating Authority has heard both the sides and there is no denial regarding the argument of the IRP that the Counsel for the Appellant had appraised the Adjudicating Authority about the voting results on the resolution. Taking into consideration that Section 12(2) speaks about 'extension of the time'; Regulation 40C of the Regulations speaks about 'exclusion of time'; the fact that the Adjudicating Authority had exercised its Discretionary Powers under Rule 11 of the NCLT Rules, 2016, that the period sought for excluding the time period lost is based on the reasons mentioned in the table in para 10; the fact that had this period not been excluded, the Company would have gone into Liquidation, which stage of 'Corporate Death' should be the last resort as envisaged by the Hon'ble Supreme Court in a catena of Judgements; that keeping in view the scope, spirit and objective of the Code and reading Section 12 together with

Regulation 40C and also the unforeseen pandemic in mind, the Adjudicating Authority has rightly **'excluded'** the period of 87 days from the CIRP period.

17. For all the aforenoted reasons, this Appeal fails and is dismissed accordingly. No Order as to costs.

<u>I.A. No. 1818 of 2021:</u>

18. I.A. 1818 of 2021 has been preferred by the Appellant seeking a direction to remove the first Respondent as the IRP and forward the name of Mr. Munish Kumar Sharma to IBBI for its confirmation as the IRP; or in the alternative directed the IBBI to nominate the IRP/RP for R-3 Company. It is also seen from the record that I.A. 1132 of 2020 was also filed in CP (IB) 1600/ND/2018 before the Adjudicating Authority, when the matter was pending adjudication and listed for final arguments, seeking change of the proposed IRP. It was prayed that the Application be allowed and Mr. Jayant Prakash be substituted as the proposed IRP in place of Mr. Sandeep Chandna. We note that vide Order dated 25.10.2019, this Tribunal has set aside the Order of Admission of the Adjudicating Authority on the ground that it was passed by one single Member and remanded the matter back to the Adjudicating Authority to be heard afresh on merits relating to Admission of Application. As regarding the fee of Resolution Professional, it was directed that the Adjudicating Authority will decide the same in accordance with law and in case Section 7 Application is admitted, it will be decided by the Committee of Creditors as per the provisions of the Code. It is seen from the record that the present IRP/first Respondent continued to

perform his functions under Section 16(5) of the Code. It is not in dispute that in the 1st CoC Meeting held on 18.03.2021, 6 out of the 9 Members of the CoC present at the Meeting voted in favour of the first Respondent to appoint him as RP of the 'Corporate Debtor'. In the 2nd CoC Meeting held on 07.04.2021, 7 out of the 9 Members of the CoC voted in favour of the first Respondent to appoint him as the Resolution Professional of the Corporate Debtor. But it is seen that the first Respondent was neither appointed as the RP nor was he replaced. Hence, he has been continuing as the RP as per the provisions of Section 16(5) of the Code. The resolution for appointment of the IRP as the RP was not approved and the other resolutions for the appointment of another Insolvency Professional, nominated by the Applicant, RP was also put to vote, but was not approved as it could not receive the requisite majority of 66%. Sections 22 and 27 of the Code lay down pre-requisites for replacing the IRP. We find it relevant to reproduce the said Sections:

> *"22. **Appointment of Resolution Professional-** (1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.*
>
> *(2) **<u>The committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.</u>***

(3) Where the committee of creditors resolves under sub-section (2)-

(a) to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.

(4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional."

..

*"27. **Replacement of resolution professional by committee of creditors**-(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.*

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional,

> *subject to a written consent from the proposed resolution professional in the specified form.]*
>
> *(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.*
>
> *(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.*
>
> *(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section."*

19. Keeping in view the facts and circumstances of the case and the provisions of the Code, we are of the considered view that appointment of an IRP is clearly provided under Section 22 and the replacement of IRP under Section 27 and therefore, we dispose of this Application with a direction to the CoC to proceed in accordance with law. We hold that there is no provision under the Code which empowers one of the Members of the CoC to approach this Tribunal seeking replacement of the IRP or RP when the same is rejected by a majority of Members of the CoC.

Contempt Case (AT) No. 20 of 2021

20. Now we address ourselves to the *Contempt Case No. 20 of 2021,* it is the case of the Applicant/Indiabulls Housing Finance Ltd that the IRP conducted the Meeting of the CoC in blatant contravention of the Order of this Tribunal which has directed for maintenance of Status Quo, *qua* the

Impugned Order; the Meeting of the CoC was initially scheduled on 19.08.2021 and then rescheduled to 20.08.2021 and further rescheduled to 23.08.2021; the Contemnor/IRP was aware of the listing of the Appeal on 19.08.2021; the Contemnor circulated the Supplementary Agenda for the Meeting of the CoC; the Applicant intimated the Contemnor on 22.08.2021 that this Tribunal has ordered the Status Quo should be maintained; that the Contemnor proceeded to hold the Meeting of the CoC on 23.08.2021 to discuss and approve the Extension Application to be made to the Hon'ble NCLT and therefore the Contemnor has acted in utter disregard violating the Status Quo Order of this Tribunal and hence is liable for contempt.

21. It is also contended that the Applicant's Counsel was not allowed to attend the Meeting and despite having voted against the exclusion of the time period, the IRP went ahead and filed the Application which is in contempt of the Order of this Tribunal directing Status Quo.

22. It is the case of the Contemnor/IRP that it was always the intention of the Applicant to replace him with one Mr. Munish Kumar Sharma as RP, was rejected by the Members of the CoC in the 2nd Meeting held on 07.04.2021. The appointment of Mr. Munish Kumar Sharma as RP was not approved by the CoC as the requisite percentage of the Voting Share is 66% as per Section 27(2) of the Code. Therefore, it was always the intention of the Applicant not to cooperate with the IRP.

23. Further, it is submitted that the Order of 19.08.2021 passed by this Tribunal directing the 'Status Quo', was uploaded on 23.08.2021 in the

evening and the Meeting was convened in the morning of 23.08.2021 and within the time period extended by the Adjudicating Authority vide Impugned Order dated 03.08.2021. The Respondent drew our attention to the Order of the Hon'ble Supreme Court in *'Indiabulls Housing Finance Limited' Vs. 'Raj Singh Gehlot & Ors.' in Civil Appeal No. 717 of 2021,* whereby, the Order of 18.01.2021 in *Company Appeal (AT) (Insolvency) No. 06 of 2021* passed by this Tribunal was confirmed.

24. On perusal of the Minutes of the Meeting dated 23.08.2021, we observe that it was convened at 11:30 AM. The material on record also establishes that the notice for the Meeting of the CoC was admittedly given on 13.08.2021 but was later postponed due to repeated requests by various creditors, including the Applicant and was finally convened on 23.08.2021. Additionally, we also observe that the Order of this Tribunal dated 03.08.2021 states, *'in the meanwhile, Status Quo as exists today qua the Impugned Order shall be maintained'.* It was interpreted by the IRP that as on 19.08.2021, 87 days has already been excluded from the CIRP period of 180 days. We also note that considering the Order passed by this Tribunal no items on the agenda were 'put to vote' in the CoC Meeting held on 23.08.2021. Therefore, keeping in view all the aforenoted reasons, and that *Company Appeal (AT) (Insolvency) No. 619 of 2021* has been dismissed, we are of the considered opinion that there is no conscious and wilful disobedience of the Order of this Tribunal by the IRP. Additionally, we also

take into consideration all the reasons noted in dismissing the *Company Appeal (AT) (Insolvency) No. 619 of 2021.*

25. Thus, this *Contempt Case No. 20 of 2021* fails and is dismissed accordingly.

26. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
18th January, 2022

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