

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT) (INS) NO.839/2022**

(Arising out of the judgement/order dated 29.06.2022 passed by the Adjudicating Authority, NCLT, Kolkata Bench in IA(IB) No.277/KB/2021 in CP(IB) No.438/KB/2018)

In the matter of:

1. Jaydip Ghosh,
Director of suspended Board of Directors
Of Castal Extrusion Private Ltd,
s/o Biswanath Ghosh,
R/o 5B, Sukeas Row,
Beadon Street,
Kolkata 700006.
 2. Mahesh Kumar Khaitan,
Director of suspended Board of Directors
Of Castal Extrusion Pvt Ltd,
s/o Late Satyanarain Khaitan,
R/o GC-92, Sector-3,
Salt Lake City,
Kolkata 700106
 3. Uttam Kumar Samanta,
Director of suspended Board of Directors of
Castal Extrusion Pvt Ltd,
s/o Govinda Prasad Samanta,
R/o 39C, Kankurgachi Road,
Premises No.32 to 39/C, Phoolbagan,
Kolkata 700054
- Appellants

Versus

1. Niraj Agarwal,
RP of Castal Extrusion Pvt LTd,
M/s H.K. Agrawal & Co,
125, Netaji Subhas Road,
5th Floor, Room No.52,
Kolkata 700001

 2. Square Four Housing & Infrastructure
Development Pvt Ltd
238A, AJC Bose Road,
2nd Floor,
Suit-2B.
Kolkata 700020

 3. Vijaya Bank,
(now Bank of Baroda)
Sole Member of Committee of Creditors,
Having its registered office at
41/2, MG Road,
Bangalore 560001
- Respondents

For Appellant: Mr Prakhar Tandon, Mr Shambo Nandy, Advocates.
For Respondent: Mr Niraj Agarwal, R1/Ex RP, Mr Kumarjit Banerjee, Advocate for R1.
Mr. P. Nagesh, Sr. Advocate, Ms Neha Tandon, Mr Akshay Sharma, Advocates for R2.
Mr Shivam Saini and Mr Arun Agarwal, Ms Greeshma Beebireddy, Advocates for R3.

With

COMPANY APPEAL (AT) (INS) NO.861/2022

(Arising out of the judgement/order dated 29.06.2022 passed by the Adjudicating Authority, NCLT, Kolkata Bench in IA(IB) No.277/KB/2021 in CP(IB) No.438/KB/2018)

In the matter of:

1. T-RMC Private Ltd,
35A, Dr. Sarat Banerjee Road,
Kolkata 700029

Appellant

Versus

1. Niraj Agarwal,
RP of Castal Extrusion Pvt LTd,
M/s H.K. Agrawal & Co,
125, Netaji Subhas Road,
5th Floor, Room No.52,
Kolkata 700001
2. Square Four Housing & Infrastructure
Development Pvt Ltd
238A, AJC Bose Road,
2nd Floor,
Suit-2B.
Kolkata 700020
3. Vijaya Bank,
(now Bank of Baroda)
Sole Member of Committee of Creditors,
Having its registered office at
41/2, MG Road,
Bangalore 560001

Respondents

For Appellant: Mr Rudreshwar Singh, Mr. Sandeep Mittal, Mr Ayan Chakraborty, Mr Shamboo Nandy, Mr. Siddharth Nayak, Advocates.

For Respondent: Mr Niraj Agarwal, R1/Ex RP, Mr Kumarjit Banerjee, Advocate for R1.

Mr. P. Nagesh, Sr. Advocate, Ms Neha Tandon, Mr Akshay Sharma, Advocates for R2.

Mr Shivam Saini and Mr Arun Agarwal, Ms Greeshma Beebireddy, Advocates for R3.

JUDGEMENT
(24th July, 2023)

JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)

Both the aforesaid appeals arise out of the same order dated 29.06.2022 passed by the Adjudicating Authority, National Company Law Tribunal (hereinafter referred to as 'Adjudicating Authority') passed in IA(IB) No.277/KB/2021 in CP(IB) No.438/KB/2018. Both the appeals were heard together and on 22.05.2023 judgement was reserved.

2. By the impugned order the learned Adjudicating Authority was pleased to approve the Resolution Plan submitted on behalf of Respondent No.2/Square Four Housing and Infrastructure Development Pvt Ltd, submitted by RP/R1.

3. The three appellants in Company Appeal (AT)(Ins) No.839/2022 are suspended directors of Board of Directors of the Corporate Debtor i.e. Castal Extrusion Pvt Ltd whereas appellant in Company Appeal (AT)(Ins) No.861/2022 had claimed to be tenant of the major portion of the land of the Corporate Debtor and the appellant in this appeal whose resolution plan was not approved has also assailed the approval of the Plan by the impugned order.

4. In Company Appeal (AT)(Ins) No.839/2022 the appellants have prayed for following reliefs:-

- a) Quash and set aside the impugned judgement dated 29th June, 2022 passed by the Learned Adjudicating Authority, Kolkata Bench in IA (IB) No.277/KB/2021 in CP (IB) No.438/KB/2018; and
- b) Call for the records of CP (IB) No.438/KB/2018; and
- c) Pass any other order which this Hon'ble Appellate Tribunal deems fit in the facts and circumstances of the instant case.

5. Whereas in Company Appeal (AT)(Ins) No.861/2022 the appellant have prayed for following reliefs:-

- a) Impugned order/judgement dated 29th June, 2022 passed by the Learned National Company Law Tribunal, Kolkata Bench in IA(IB) No.277/KB/2021 in CP(IB) No.438/KB/2018, be set aside.
- b) Stay of operation of the impugned order/judgement dated 29th June, 2022 passed by the Learned National Company Law Tribunal, Kolkata Bench in IA(IB) No.277/KB/2021 in CP (IB) No.438/KB/2018, till the disposal of the instant appeal.

c) An order of injunction be passed restraining the respondents either by himself and/or his men or agents or assigns or otherwise howsoever from taking any step or further steps or giving any effect or further effect to the impugned order/judgement dated 29th June, 2022.

d) Ad-interim orders in terms of the prayers above.

e) Pass such order or further orders which this Hon'ble Appellate Tribunal deems fit in the facts and circumstances of the instant case.

6. Before proceeding it would be necessary to delineate certain facts which are necessary for adjudication in the present appeal which has emerged from materials available on record. It is evident that long back on 06.05.2013, the Castal Extrusion Pvt Ltd (CEPL/CD) provided corporate guarantee to the Vijaya Bank (now Bank of Baroda) for the loan availed by one Tania Construction Pvt Ltd (TCL). The Corporate Debtor also furnished the industrial free hold land admeasuring 2.209 acres situated at Mouze-Gopalpur, P.S. Rajarhat, Distt. 24 Parganas (North) as security towards the loan availed by TCL. Since the loan account was irregular, on 10.03.2014 the account of the borrower was declared as NPA by the Vijaya Bank and Notice under Section

13(2) of SARFEASI Act, 2002 was issued by the Bank for enforcement of security interest on the subject land. In the meanwhile on 12.07.2014, one Mr. Harshvardhan Tantia, who was holding 6.22% shares in the Corporate Debtor on 12.07.2014 gave his consent for being appointed as Director of the appellant in Company Appeal (AT)(Ins) No.861/2022 and subsequently on 17.7.2014 the appellant was incorporated under the Companies Act, 2013 and Mr. Harshvardhan Tantia became the Director with 50% shareholding. Immediately thereafter, on 27.7.2014, the Corporate Debtor entered into an unstamped and unregistered lease rent agreement (Annexure A-2) with the appellant and lease hold right over 1.90 acres of subject land was created in favour of the appellant for a period of five years on monthly rental of Rs.55000/- Thereafter on 01.08.2014, Notice under Section 13(4) of the SARFEASI Act, 2002 was issued by the Vijaya Bank for enforcement of security interest over the subject land. Mr. Harshvardhan Tantia, who on the date of execution of the unregistered lease agreement dated 27.07.2014 was holding 6.22% shares in the Corporate Debtor, on 14.03.2016 resigned from the directorship of the Corporate Debtor. It is further evident that on 26.02.2018 Vijaya Bank invoked the bank guarantee

against the Corporate Debtor and asked the Corporate Debtor to pay an amount of Rs.57.34 crores alongwith interest. Even thereafter on 26.07.2019 the Corporate Debtor entered into an unstamped and unregistered rent agreement (Annexure A-1) with the appellant whereas lease hold right over 1.90 acres of the subject land was created in favour of the appellant for further period of five years. We may deal with in detail in respect of aforesaid two lease agreement subsequently.

7. Since the financial debt was not cleared by the Corporate Debtor, the financial creditor i.e. Vijaya Bank (now Bank of Baroda) was constrained to file an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 which, finally on 19.03.2020, was admitted and Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor and Respondent No.1, Mr Niraj Agarwal, was appointed as Interim Resolution Professional. After the initiation of CIRP on 20.03.2020 IRP made the public announcement inviting claims from the creditors of the Corporate Debtor. In the first meeting of Committee of Creditors (CoC) which was held on 18.08.2020 the IRP was confirmed as Resolution Professional (RP) and then on 06.10.2020 RP issued Form G for the invitation of Expression of

Interest (EOI) from the prospective Resolution Applicants. Thereafter on 08.10.2020 RP issued a notice terminating the lease created in favour of the Appellant and asked the appellant to vacate the subject land/premises, upon expiry of 15 days from date of receipt of this notice. The said notice was purported to be notice issued under Section 106 of the Transfer of Property Act.

8. After issuance of Form G, RP received 7 EOIs. The appellant also filed EOI whereupon RP shared information of memorandum and other information with them. Since notice was issued by the RP to the appellant for vacating the premises the appellant subsequently approached the Civil Court (Jr. Division) North 24 Parganas against the eviction notice dated 08.10.2020 and on 27.11.2020 the Learned Civil Judge, Jr Division restrained the RP from disturbing the peaceful possession of the appellant.

9. The RP on 15.12.2020 received proposal from 4 PRAs which are as follows:-

- i) Mangalkari Manufacturing & Marketing LLP.
- ii) Square Four Housing & Infrastructure Development Pvt Ltd (Respondent No.2).
- iii) T-RMC Pvt Ltd (appellant)
- iv) Vakunthpati Constructions Pvt Ltd.

10. In the 4th CoC Meeting on 16.12.2020 sealed cover of four Resolution Plans were opened. RP also informed the CoC that the liquidation value of the CD is Rs.8.93 crores and the fair value is Rs.11.76 crores. In the meanwhile on 23.12.2020 Transactional Auditor submitted its report to the RP stating that the rent arrangement between the appellant and Corporate Debtor was under valued transaction. As per audit report the fair rent of the subject land is Rs.4.85 lakhs per month whereas the Corporate Debtor gave the subject land to the appellant for Rs.55000/- per month.

11. Finally on 12.02.2021 e-voting on the Resolution Plan was concluded and plan submitted by R2 was approved with 100% voting share and resolution plan submitted by the appellant was rejected by the CoC. Thereafter on 15.02.2021 RP issued letter of intent to Respondent No.2 and same was accepted. Subsequently RP filed an application i.e. Application No.IA(IB) No.277/2021 under Section 30(6) of the IB Code seeking approval of the resolution plan. Finally by the impugned order dated . 29.06.2022 the Adjudicating Authority allowed the IA(IB) No. 277/2021 and approved the plan submitted by Respondent No.2 as approved by the CoC. The Adjudicating Authority also allowed IA No.107/2021

filed by the RP for directing the appellant herein to vacate the land within a period of 30 days and also make payment to the Corporate Debtor at the rate of Rs.2 lakhs per month.

12. Aggrieved with the order dated 29.06.2022 to the extent of approval of plan the present Company Appeal (AT)(Ins) No.861/2022 has been preferred by the appellant. Whereas against the approval of the resolution plan and allowing IA No.277/2021 three directors of the suspended Board of Directors have preferred the appeal i.e. Company Appeal (AT) (Ins) no.839/2022.

13. Though both the appeals were taken together, we had firstly taken Company Appeal (AT)(Ins) No.861/2022 in which Mr. Rudreshwar Singh, learned counsel had appeared on behalf of the appellant. At the time of argument Mr. Singh submitted that on 27.07.2014 some portion of the land of the Corporate Debtor was taken on rent by the appellant in view of a lease agreement which was created for five years and expiring on 26.07.2019. Before expiry of the lease agreement again on 26.07.2019 another lease agreement was entered in between the parties and it was leased out for further period of five years which was to be terminated on 25.07.2024. However, in the meanwhile in the month of March,

2018 Vijaya Bank (now Bank of Baroda) filed an application under Section 7 of the IB Code and on 18.03.2020 it was admitted and CIRP was initiated. Mr. Singh further submits that on 08.10.2020 eviction notice was issued by the RP which was replied by the appellant on 12.10.2020.

14. Mr. Singh submits that by 15.12.2020 four resolution plans were submitted to the RP and on 23.12.2020 CoC in its 5th Meeting granted all the four proposed persons further time to re-consider and submit revised plans. On 31.12.2020 revised plans were submitted. Thereafter on 31.12.2020 CoC granted further time for submission of the resolution plans. After receipt of fresh resolution plans on 18.01.2021 and 27.01.2021, CoC discussed all the four resolution plans and finally on 05.02.2021 resolution plans were put for voting in which plan of Respondent No.2 was declared as successful.

15. While assailing the impugned order, Mr. Rudreshwar Singh, learned counsel for the appellant has drawn our attention to running page 84 of the impugned order at para 9.2.3 and submitted that the plan which has been approved had completely changed the nature of the business. He submits that approved plan reflects that on the approval of the resolution plan the

Resolution Applicant shall apply to the concerned Department for conversion of the nature of factory land from industrial land to residential/commercial land for Real Estate Project. He submits that in view of Section 5(26) of the IB Code the said resolution plan on this score alone appears to contrary to the statutory provisions and as such the learned Adjudicating Authority has committed error in approving the said plan. In course of arguments he has also drawn our attention to running page 91 of the impugned order and referred to Sl.No.6 para 10.2. It is better to reproduce para 10.2 as follows which is from running page 91 to 94:-

6	10.2	<u>Title in respect of immovable property held by the Corporate Debtor</u> 10.2.2 Based on the information received from the Information Memorandum and during due diligence, it is revealed that one T-RMC Pvt. Ltd. having its registered office at 35A, Dr. Sarat Banerjee Road, 2nd Floor, Kolkata-700029, has been carrying on its business activities of ready-mix concrete in a substantial portion of the Land/Premises of the Corporate Debtor as an occupier. It has also been transpired that there are several number of workers are engaged in the business activities of the said T-RMC Pvt. Ltd. In this regard, the RA proposes for passing an order by the Hon'ble NCLT, Kolkata Bench directing eviction of the said T-RMC from the aforesaid Land/Premises of the Corporate Debtor along with its establishment/machineries/staffs/employees	The RP has argued that the impugned transaction vide 2014 Agreement was covered within the purview of Section 46 (1) (ii) of IBC. It has been brought on record by the RP that at the relevant time of execution of the 2014 Agreement, the CD and T-RMC were related parties within the meaning of Section 5 (24) (d)
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	<i>/raw materials and all other things whatsoever.</i> <i>It is clarified that the RA shall not be in any manner liable to take any responsibility and/or liability in respect of the said T-RMC including its suppliers/contractors/vendors/employees/workers/staffs or any other entities whatsoever and the amount of Rs. 10.70 crore as offered by the RA shall remain unchanged.</i> <i>For the purpose of smooth and uninterrupted take over, possess and occupy the assets and properties of the Corporate Debtor by the RA, necessary order is to be passed by the Hon'ble NCLT directing the concerned District Administration, Police Authorities, Local Authorities and all other Statutory Authorities to provide full co-operation and assistance as may be required and sought for by the RA. The Hon'ble NCLT shall also pass an order directing the said T-RMC to remove its establishment completely from the aforesaid property immediately upon passing the order and communication of the same to them.</i> <i>10.2.3 Based on the information available to the Resolution Applicant following assumption has been made relating to ownership, title and status of the immovable properties:</i> <i>i.all documents of title, deeds, and writings in respect of all immovable properties of the Corporate Debtor, are complete title documents constituting all immoveable properties held in the name of Corporate Debtor, wherever situated</i> <i>ii.the properties together with the buildings and other structures is owned by the company and that no other charge exists on such properties other than in favour of the Financial Creditors who are part of the Committee of Creditor ("CoC") and that all the properties are in exclusive possession as on the Effective date.</i>	<i>of IBC. This is since Harshvardhan Tania, one of the promoters of both the CD and T-RMC, was a director of T-RMC and held more than 2% shares in the CD at the time of the execution of the purported 2014 Agreement. In this regard, the RP has drawn our attention to the following relating to Shareholding pattern:</i> <i>• Shareholding of T-RMC in FY 2014-15 at page 43 of the Application: Harshvardhan Tania held 50% shares of and in T-RMC at the relevant date.</i> <i>• Shareholding of CD in FY 2014-15 at page 107, Application: Harshvardhan Tania personally held 6.22% shares of and in the CD at the relevant date at the time of execution of</i>
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	iii. save and except the occupation of T-RMC in a portion of the said Property of the Corporate Debtor as stated herein above, that there are no encumbrances, encroachment or existing lease, sub-lease or rent, on the property owned or leased to the Corporate Debtor, except to the Secured Financial Creditors forming part of the Committee of Creditor ("CoC") as disclosed above and in the information memorandum. If, as on the Effective date any encumbrances, encroachment or existing lease, sub-lease or rent, on the property owned or leased to the Corporate Debtor is found, the same shall be deemed to be vacated w.e.f. approval of the Resolution Plan and all such contract in this respect, would be deemed to be cancelled. The Resolution Applicant accordingly expects the vacant & peaceful of the property subsequent to the approval of the Resolution Plan.	the 2014 Agreement. • Details of appointment and resignation of Harshvardha n Tantia from T-RMC (Form No. DIR-11) at pages 105-106: Harshvardha n Tantia was the director of T-RMC since 17.07.2014 14.03.2016. The said tenancy arrangement was subsisting, and being acted upon, as at 18.03.2018, i.e. two years preceding the date of insolvency commencement. Accordingly, the arrangement pursuant to the 2014 Agreement was continuing within 2 years preceding the Insolvency Commencement Date, 18.03.2020, and as such, falls within the purview of Sections 46 (1) (ii) of IBC.
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			<i>The RP has also submitted a valuation report, which shows that the fair monthly rent should have been Rs.4.85 lakh instead of Rs. 55,000/- and as such there was a shortfall of Rs.4.30 lakh per month.</i> <i>Upon perusing the documents filed by the RP and considering submissions by the parties, it is ordered that the T-RMC Private Limited and any other entity, if there be any, is directed to remove its establishment along with employees, staffs, officers, workmen engaged by them including all its machineries from the subject land/premises of CEPL within 15 days from the date of approval of the Resolution Plan and handover vacant peaceful possession of the land/premises to Resolution Applicant.</i>
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			<i>It is further directed that the Resolution Applicant shall not be in any manner liable to take any responsibility and/or liability in respect of the said T-RMC including its suppliers/ contractors/ vendors/ employees/ workers / staffs or any other entities whatsoever.</i> <i>It is further directed that in the event the said T-RMC fails and/or neglects to remove its entire set-up along with all officers, employees, staffs and workmen engaged by them including all its machineries from the subject land/premises of CEPL as stated above within the stipulated period, the concerned District Administration, Police Authorities, Local Authorities and all other Statutory</i>
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			<i>Authorities to provide full co-operation and assistance as may be required and sought for by the Resolution Applicant.</i> <i>Though the Valuation Report shows that the fair rent for the subject land/premises of the Corporate Debtor should be Rs.4.85 lakh but for the ends of justice, it is ordered that the said T-RMC shall make a further payment to the Corporate Debtor at the rate of Rs.2,00,000/- per month to be calculated from the date of creation of such tenancy in its favour till the date of handing over peaceful vacant possession of the land to Resolution the Applicant within the period stipulated above. In the event of failure to make such payment within the stipulated period, the Corporate Debtor and/or</i>
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		<i>the Resolution Applicant shall be at liberty to claim and realise mesne profit from T-RMC at such rate as may be reasonably decided by the Corporate Debtor and/or the Resolution Applicant. The Corporate Debtor and/or the Resolution Applicant shall be at liberty to take appropriate step against T-RMC for their eviction and realisation of the said dues in the event their failure to comply this order.</i> <i>The said I.A. (IB) 107//KB/2021 and I.A. (IB) 1302//KB/2020 IN C.P (IB) No. 438/KB/2018 is thus disposed of with the directions as above.</i>
	<i>10.2.4 Any dues, liabilities, charge, interest, penalty or cost on the Corporate Debtor relating to any period prior to the insolvency commencement date is deemed to waived/written-off with respect to the immovable property. Such dues for the period prior to the insolvency commencement date shall form part of the Operational Creditor (other than workmen/ employees) and if claim has been filed by the concerned authorities then the same to be paid on pro-rata basis from the total payment envisaged under the</i>	<i>Granted. All dues, liabilities, charge, interest, penalty or cost on the Corporate Debtor relating to any period prior to the commencement</i>

		<i>resolution plan for Operational Creditors (Other than workmen/ employees). Accordingly, if no such dues are claimed upto the Effective Date by the concerned authority then the Resolution Applicant cannot be held liable for any dues outstanding prior to the insolvency commencement date and no payment will be made by Resolution Applicant in that respect in addition to the amount as envisaged under the plan.</i> <i>10.2.5 Upon approval of the Resolution Plan, the Department shall cause to convert the nature of the land from industrial purpose to residential/commercial purpose upon an Application made by the Resolution Applicant in that respect. The said conversion of land is an integral part for the success of the Resolution Plan.</i>	<i>date of insolvency are to be waived/written-off with by the concerned authorities relating to the immovable property.</i> <i>Allowed. The concerned Authority is directed to grant conversion of the nature of land in terms of the application for conversion to be made by the Resolution Applicant.</i>
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16. In sum and substance it has been argued by Mr. Singh that the learned Adjudicating Authority in view of complete change of the nature of business of the Corporate Debtor as incorporated in the resolution plan has committed serious error in approving the same. He has also submitted that right from the very beginning the RP had not taken any step for revival of the Corporate Debtor. To substantiate his submission he has placed reliance on para 86 of a judgement of Hon'ble Supreme Court reported in (2019) 2 SCC

1 **Arcelormittal India Pvt Ltd Vs Satish Kumar Gupta & Ors**

which is reproduced hereinbelow:-

“83. Given the fact that both the NCLT and NCLAT are to decide matters arising under the Code as soon as possible, we cannot shut our eyes to the fact that a large volume of litigation has now to be handled by both the aforesaid Tribunals. What happens in a case where the NCLT or the NCLAT decide a matter arising out of Section 31 of the Code beyond the time limit of 180 days or the extended time limit of 270 days? Actus curiae neminem gravabit - the act of the Court shall harm no man - is a maxim firmly rooted in our jurisprudence (see Jang Singh V. Brijlal & Ors. S.C.R. at page 149, and A.R. Antulay V. R.S. Nayak & Ors. S.C.R. at page 71). It is also true that the time taken by a Tribunal should not set at naught the time limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.³ A reasonable and balanced construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.”

17. Learned counsel for the appellant has placed reliance on an unreported judgement of this Appellate Tribunal in Company Appeal (AT) (Ins) No.141 of 2018, **Industrial Services Vs. Burn Standard Company Ltd & Anr.** He submits that the resolution plan approved by the Adjudicating Authority reflects that the main

business of the Corporate Debtor was to be closed and it was decided to retrench all the workmen/employees which is not in consonance with the law particularly as held in **Industrial Services case (Supra)**. He has placed reliance on para 27, 28 and 29 of the aforesaid judgment which are reproduced hereinbelow:-

“27. In “Y. Shivram Prasad Vs. S. Dhanapal & Ors. — Company Appeal (AT) (Insolvency) No. 224 of 2018 etc.” this Appellate Tribunal by its judgment dated 27th February, 2019 while referring the decision of the Hon’ble Supreme Court including the provisions of the ‘I&B Code’ held that the ‘Resolution Professional’ and the ‘Liquidator’ are to ensure that the company remains a going concern. Steps should be taken for resolution at different stages including the liquidation stage to keep the Company a going concern in the interest of the employees. On failure, at the last stage the death of the ‘Corporate Debtor’ be made by liquidation.

28. The Hon’ble Supreme Court in “Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors” (Supra) specifically held that the closure of the Company is against the Preamble of the Code, which reads as follows:

21. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the

corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through 40 its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

29. In view of the aforesaid fact, as the 'Resolution Plan' is against the object of the Code and the application under Section 10 was filed with intent of closure of the 'Corporate Debtor' for a purpose other than for the resolution of insolvency, or liquidation, we hold that the part of the 'Resolution Plan' which relates to closure of the 'Corporate Debtor'/'Corporate Applicant' being against the scope and intent of the 'I&B Code' is in violation of Section 30(2)(e) of the 'I&B Code'."

18. Mr Rudreshwar Singh has also referred to paras 37 and 38 of judgement reported in (2022) 4 SCC 617 **K.N. Rajakumar Vs Nagarajan & Others** which is reproduced hereinbelow:-

"37. It could thus be seen that one of the principal objects of the IBC is providing for revival of the Corporate Debtor and to make it a going

concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort.

38. From the order of NCLT dated 4.6.2021, it could be seen that the Corporate Debtor has already settled the issue with the erstwhile financial creditors, who have resolved to withdraw the CIRP proceedings and by virtue of withdrawal of CIRP proceedings, the Corporate Debtor now is a going concern.”

19. Mr Singh has also placed reliance on paras 20.1 and 21 of judgement reported in (2020) 15 SCC 1 ***Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt Ltd and another*** which is reproduced hereinbelow:-

“20.1. As noticed from Preamble, the Code came to be enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and even of partnership firms and individuals in a time bound manner; the objectives, inter alia, being for maximisation of value of assets of such persons and balance of interest of all the stakeholders.”

21. The expositions abovementioned make it clear that the Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons and other entrepreneurs in a time bound manner so as to ensure maximisation of value of assets of such persons and to balance the interest of all the stakeholders. As regards corporate debtor, the primary focus of the Code is to ensure its revival and continuation by protecting it from its own management and, as far as feasible, to save it from liquidation. As tersely put by this Court in Swiss Ribbons (supra), the

Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.”

20. Mr Singh, learned counsel for the appellant further submits that it is true that law settled on the point that commercial wisdom of the CoC may not be interfered with but at the same time if in the garb of commercial wisdom a decision is taken by the CoC which is per se contrary to the statutory provision then the same can be looked into and interfered with in an appeal. In support of his submission he has placed reliance on 2022 SCC Online NCLAT 289 **63 Moons Technologies Ltd Vs Administrator of Dewan Housing Finance Corporation Ltd and others.**

21. Mr. Kumarjit Banerjee, learned counsel has appeared on behalf of Respondent No.1/RP and opposed the appeal. He submits that the appeal is fit to be rejected primarily on the ground that the appellant appears to have connived with the Corporate Debtor in frustrating the CIRP. He submits that even after account of the Corporate Debtor was declared NPA the appellant entered into an unlawful lease agreement with the Corporate Debtor and major portion of the land Corporate Debtor was occupied on the strength of such untenable lease agreement for several years. He

submits that since the appellant has not approached this Tribunal with clean hands, the appellant is not entitled to get any relief.

22. Mr. Banerjee, learned counsel for the Respondent has also referred to page 4 of the minutes of 6th CoC Meeting dated 02.01.2021 to show that condition of the corporate debtor was in such a dilapidated state that Insurance company had even refused to insure factory premises and plant and machinery of the Corporate Debtor. Page 4 of the minutes of the 6 CoC Meeting deals with insurance which is required to be reproduced:-

“Insurance:

The Chairperson informed the Committee that he had sought quotations from three Insurance Companies viz Cholamandalam MS General Insurance, Tata AIG and National Insurance Co Ltd for insuring the factory premises and the plant and machinery of the CD at Narayanpur. The representatives of the insurance companies had visited the factory site of the CD for survey. However, subsequently, they have verbally refused to underwrite the insurance of the factory premises and the plant and machinery therein citing that the operations of the factory is closed for many months now. Consequently, the CD’s assets at the Narayanpur factory location remain un-insured despite the best efforts of the RP and the CoC Member.”

23. Mr. Banerjee, learned counsel for the Respondent further submits that change of nature of business of the Corporate Debtor may not be termed as being against the provision of law. He submits that the provisions in the Code as well as Rules empowers for transfer of property/land of a Corporate Debtor. He further submits that material on record suggest that the factory which was being run by the appellant was not in running condition and equipments were much older. He further submits that in view of situation prevailing nothing was surviving for revival of the business of the Corporate Debtor. The factory was completely in dilapidated condition having old technology. Moreover, the factory was not in running condition. He also submits that the factory was established long back and area within which presently the said factory was situated had come into Municipal area which is residential one. He also submits that licence of the factory was not renewed for several years and more so factory was uninsured for several years. In such situation it was impossible to initiate for revival of the said business of the Corporate Debtor and as such in accordance with law established the approved plan was submitted and every care has been taken in the said plan. In support of his submission regarding change of the business Mr.

Banerjee, learned counsel has placed reliance on a judgement of this Tribunal reported in (2021) 130 taxmann.com 147(NCLAT) in ***Next Orbit Ventures Fund Vs Print House (India) Pvt Ltd.*** He has referred to paras 3(50), 37 and 38 of the said judgement which are reproduced hereinbelow:-

"3.50. We are of the view that there is nothing the Code that inhibits a Resolution Applicant from pursuing a line of business that is different to the erstwhile business of the 'Corporate Debtor'. If this proposition is accepted, then it would mean that there can never be a situation where the successful Resolution Applicant can revive a 'Corporate Debtor' by pursuing a different line of business. We can easily conceive a situation where the business of the 'Corporate Debtor' is overtaken by technology - examples that come to mind are the pager business, fax business, telex business etc., which were consigned to the dustbin of history when technology overran them. Besides, the Code only contemplates that to the extent possible, the 'Corporate Debtor' shall be continued to be run as a going concern. That, by no means, is enough to bind the Resolution Applicant to the erstwhile business of the 'Corporate Debtor', especially when there is obsolescence of the business pursued by the 'Corporate Debtor'."

"37. In today's scenario, in the Printing Industry, change is the biggest determiner. The amount and pace of change is unprecedented. Together, 'Printing' and 'Online' are greater than the sum of their parts. We are seeing a continuing movement towards automation and robotics, opening up a lot of new ideas and challenges. The Printing Industry is feeling the force of the digital age where new areas of innovation are being entered

into for protecting the business and making products relevant in today's digital age. It is oft repeated that 'Companies rarely die from moving too fast, and they frequently die from moving too slowly'. Merely because the 'Resolution Plan' does not stick to the core printing business, in its truest sense, it cannot be said that the approved 'Resolution Plan' lacks the right vision and proposition specially in the light of the converging market forces and refocused business models. Further, it has been agreed by the 'Resolution Applicant' that the new management will upgrade the skills of the workmen and employees for this business cycle. In 'Arcelor Mittal Company Appeal (AT) (Insolvency) No. 417 of 2020 with Company Appeal (AT) (Insolvency) No. 744 of 2020 India Private Limited' (Supra) it has been observed by the Hon'ble Apex Court that 'if there is a 'Resolution Applicant' who can continue to run the 'Corporate Debtor' as a going concern every effort must be made to try and see if this is possible'. 'Going concern' does not mean that the nature of the business cannot be changed with an objective to 'add value' or 'create synergy'. If it is viewed in this perspective, it would be interpreting the word 'going concern' in a very narrow compass which is not the scope and objective of the Code.

38. The Hon'ble Supreme Court has observed that paramount importance is to be given to the decision of CoC, which is taken on the basis of commercial wisdom which cannot be interfered with excepting under the limited scope as provided under Sections 30 & 31 of the I&B Code. At the cost of repetition 'IBC' provides for restructuring of the 'Corporate Debtor' change in technology, change in portfolio of goods and services produced or rendered by the 'Corporate Debtor' as long as the scope and objective of the Code is not hampered and therefore we are of the considered view that if the Resolution Plan contemplates a change in the nature of business to another line when the existing business is obsolete or non-viable, it cannot be construed that the Resolution Plan is not 'feasible or viable'. It can be seen from the aforementioned [Sections 30\(2\) & 31](#) and Regulations 37, 38 and 39 that there is nothing in the Code which prevents a 'Resolution Applicant' from changing the present line of business to adding value or creating 'Synergy' to the existing assets and converting an obsolete line of business to a more 'viable and feasible' option. Keeping in view the ratio laid down by the Company Appeal (AT) (Insolvency) No. 417 of 2020 with Company Appeal (AT) (Insolvency) No. 744 of 2020 Hon'ble Supreme Court in the recent Judgement 'Kalpraj Dharamshi & Anr.' (Supra), and the fact that there is no 'material irregularity in the exercise of powers' by the Resolution Professional; and the approved 'Resolution Plan' is not in contravention of any law for the time being in force, we are of the view that there is no illegality or infirmity in the Impugned Order of the Learned Adjudicating Authority."

24. On the aforesaid ground, it was submitted by Mr. Banerjee, learned counsel that there is nothing in appeal warranting interference with the impugned order and it is fit to be rejected.

25. Learned counsel for the Respondent has also referred to Information Memorandum which is Annexure A to the reply filed on behalf of Respondent No.1. He has referred to running page 34-37 i.e. Notes 4, 8 and 11 which is reproduced hereinbelow:-

“4. Tangible assets of Rs.20,36,496/- comprises of land property, plant and equipment.

<i>Land</i>	<i>Rs.11,37,701/-</i>
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<i>Plant and Machinery</i>	<i>Rs.6,49,132/-</i>
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<i>Factory Shed and Building</i>	<i>Rs.2,32,070/-</i>
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<i>Others</i>	<i>Rs. 17,593/-</i>
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8. Municipal Taxes and Khazana liability w.r.t. factory premises remains unpaid for more than 15 years. The same has not been provided for in the books of accounts.

11. Factory premises including the plant and machinery has not been insured for the last few years and continues to remain uninsured as on date. Steps have been taken to get the insurance done.”

26. On the aforesaid facts also it was argued by Mr. Banerjee, learned counsel, that in such a situation there was no reason for taking steps for revival of the same business.

27. Mr. Banerjee, learned counsel has also drawn our attention to paras 2b, c, d, f, h, I, m, n and o of reply filed on behalf of R1 which are reproduced hereinbelow:

*“b. It is stated that the Corporate Debtor was at all relevant times prior to insolvency commencement date engaged in the business of aluminium extrusion and selling of aluminium profiles to customers in market. Corporate Debtor at present is not a going concern and that it ceased to carry on any business operation on account of obsolescence of its plant and machinery rendering its products uncompetitive and carriage of business economically unviable and unfeasible. It is pertinent to note that the Information Memorandum (hereinafter "IM") issued by the RP in course of the CIRP of the Corporate Debtor clearly mentions that the plant and machinery of the Corporate Debtor is extremely old. It specifically mentions that the 600 MT capacity hydraulic press machine, the principal component of the plant and machinery, is 40 years old and is in urgent need of repairing in order to start functioning. Furthermore, it would be evident from the perusal of the said IM that the factory premises and plant and machinery had not been insured for past several years leading up to insolvency commencement date and continued to remained uninsured as on the date of preparation of the IM. In this connection, a relevant extracts from the IM issued by the RP, the Respondent No. 1 herein, on 19th September, 2020 is annexed hereto and marked as **Annexure "A"**.*

*c. In fact, it would also be evident from the perusal of the IM that the last payment in respect of the Municipal Taxes and Khazna liability of the Corporate Debtor was made for the period of 2005- 06 to 2007-08, and it remains unpaid for entire period of 15 years thereafter. The said liability has not even been provided for in the books of accounts of the Corporate Debtor. In this connection, copy of the receipt for last payment of Khazna by the Corporate Debtor is annexed hereto and marked as **Annexure "B"**.*

d. Furthermore, as per the information and documents in possession and custody of the answering respondent herein, there is no factory license necessary for running the factory of the Corporate Debtor, and the

extrusion unit was running without the requisite license and approval(s) for the past several years. No copy of the last license was available to the RP.

*f. On account of the obsolescence of the Corporate Debtor's plant and machinery, and the corresponding cost of overhauling the existing plant and machinery and economic and financial viability of the same, the Committee of Creditors (hereinafter the "CoC") in their commercial wisdom deemed it appropriate to approve the proposal to shut down the existing business line of the Corporate Debtor with an intent of reviving the business of the Corporate Debtor contained in the approved resolution plan submitted by the Respondent No. 2 herein by 100% voting share. It is submitted that shutting down an existing business line of Corporate Debtor does not tantamount to dissolution and/or corporate death of the Corporate Debtor. In fact Regulation 37 of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 (hereinafter "CIRP Regulations") itself envisages that an existing line of business and/or bucket(s) of goods and services provided by the Corporate Debtor can be altered. As such, it would be evident from the perusal of the provisions of the CIRP Regulations that alteration of the existing business line of the Corporate Debtor, and the corresponding shutting down of existing undertaking of the Corporate Debtor, is permissible in law and in fact is one of the envisaged modalities for revival of the Corporate Debtor. The present state and condition of the plant and machinery of the Corporate Debtor located at the subject premises exposed to the elements would be evident from the representative photographs taken at the site, copies whereof are annexed hereto and marked as **Annexure "D"**.*

h. It is also pertinent to note that the fact that reviving the undertaking of the Corporate Debtor as a going concern was unfeasible and unviable would also be evident from the fact out of the 3 resolution plans submitted in course of the CIRP of the Corporate Debtor, 2 plans proposed to alter the business line of the Corporate Debtor by shutting down the extrusion undertaking whereas the third plan proposed to first conduct a Techno Economic Viability ("TEV") study to ascertain if revival of the extant undertaking was at all viable.

i. Furthermore, the question pertaining to alteration of the business line of the Corporate Debtor is no longer res integra and this Hon'ble Tribunal has already unequivocally held that alteration of business line of the Corporate Debtor and the corresponding shut down of an existing undertaking, to be permissible under the provisions of the Code and/or regulations framed thereunder.

m. The purported tenant is the beneficiary of a fraudulent transaction perpetrated at the behest of the promoters of the Corporate Debtor in favour of the said T-RMC, which at the relevant time was a related party of the Corporate Debtor and it has been held by the Hon'ble Adjudicating

Authority that the entire transaction was carried into effect with the sole mala fide intent of keeping the subject asset out of the reach of the creditors of the Corporate Debtor in so far as the said transaction was given effect to post issuance of 13 (2) notice on 10 March, 2014 and 4 days prior to issuance of 13(4) notice on 02 August, 2021. It is stated that the purported tenancy has been held to be a fraudulent transaction under section 49 of IBC and the said finding has not been challenged in the present appeal and such the Appellants have no locus whatsoever to aver, allege and/or impugn the subject resolution plan on account of the fact that there is a purported tenant at the subject premises,

*n. It is further pertinent to note that the aforementioned purported tenancy divesting the substantially whole of the sole immovable asset of the Corporate Debtor to a related party was given effect to without any requisite resolution passed by the Board of Directors of the Corporate Debtor or the shareholders in a general meeting of the company. The absence of requisite resolution(s) for encumbering/ divesting substantially whole of the immovable asset of the Corporate Debtor further buttress the ex facie illegal nature of the purported transaction. In this connection copies of minutes of meeting of Board of Directors of the Corporate Debtor and the minutes of General Meeting are annexed hereto and collectively marked as **Annexure "E"**.*

o. It is stated that the subject Resolution Plan does not envisage eviction in its terms and the eviction of the purported tenant is being claimed pursuant to the order of the Adjudicating Authority holding the entire transaction to be fraudulent and/or undervalued transaction. In this connection, it is pertinent to note that the said purported tenancy was created:

(v) by an unregistered and unstamped document;

(vi) with a then related party;

(vii) post receipt of notice under Section 13 (2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (hereinafter the "SARFAESI Act") and 4 days prior to issuance of the notice under Section 13 (4) of the SARFAESI Act upon incorporation of T-RMC on 26 July 2014:

(viii) divesting 1.90 out of 2.21 acres of the sole immovable asset of the Corporate Debtor, and accordingly essentially alienating the whole of the undertaking of the Corporate Debtor,"

28. Mr. Banerjee, learned counsel has also drawn our attention to running page 245-299 of Volume II of Memo of Appeal which is

copy of resolution plan submitted by the appellant/tenant. He has specifically drawn our attention to running page 258 relating to employees of the Corporate Debtor. It reflects that it has been incorporated that *“Retention of employees-Post acquisition of CD by RA all the existing workman and staff shall be released/laid off/terminate with outstanding dues of gratuity and PF, as stated in the resolution plan. The amount dues to be existing employees and workman shall be paid by the new management. Further RA may re-appoint or appoint some of the employees and workman on the basis the requirement on new terms and conditions.”* In the plan submitted by the appellant page 263 reflects that there is ‘Nil’ against workman dues. He has also drawn our attention to running page 259 which is part of the resolution plan submitted by appellant T-RMC Pvt Ltd to show that plant operation of the Corporate Debtor was shut down for long period and further the appellants’ plan was not specific on the point of revival. The proposal for take over as incorporated in the plan of the appellant was referred by the learned counsel for the appellant which is reproduced hereinbelow:-

“Proposal for the takeover

*On payment of the Upfront Payment under the Proposed Resolution Plan, RA will do the Techno Economic Viability (TEV) of the Plant and estimate the cost of refurbishment and Maintenance of the Plant and other critical Machinery in the Factory as the entire Plant of the CD has been in Shut Down mode for many months. Basis the TEV study, RA will be decided whether to restart the Plant or **put the land to alternate** use or both. The said action will be the basis on which the pipeline of the orders for execution can be build up or some alternate plan can be put in place. The Inventory requirements for execution of the Sale Orders may be also from the existing network or Suppliers of the CD/Resolution Applicant.”*

29. Mr Banerjee, learned counsel submits that on the one hand the appellant is assailing the approved plan on the ground of change of the business whereas the plan submitted by the appellant also reflects that in view of fact that the plant operation was shut down since long the appellant was also of the view to put the land to alternate use.

30. Mr. P. Nagesh, learned senior counsel appearing on behalf of Respondent No.2, whose resolution plan has been approved, submitted that the appeal has been filed maliciously only with a view to drag the issue. He also highlighted that the account of the Corporate Debtor was declared as NPA on 10.03.2014 and only thereafter on 17.07.2014 the appellant was incorporated under the Companies Act, 2013 and immediately thereafter on 27.07.2014 the Corporate Debtor entered into unregistered lease agreement with the appellant. Though CIRP was initiated on 18.03.2020, application under Section 7 of the IBC was filed on 03.04.2018, Still thereafter 2nd unregistered lease agreement was executed between the appellant and Corporate Debtor wherein for further five years lease agreement was executed, that too without authorisation by the Board of Directors of the Corporate Debtor. He submits that after initiation of CIRP notice for termination of the tenancy was also issued by the RP to the appellant with a request to vacate the premises/land by its notice dated 08.10.2020. However, still one way or the other the appellant is enjoying benefits as tenant over the major portion of the land of the Corporate Debtor.

31. In reply to the plea taken on behalf of the appellant that change of the business was not permissible, Mr. Nagesh has firstly referred to Section 5(26) of the IBC and also relied on Regulation 37 of IBBI (Insolvency Resolution Process for Corporate Person) Regulation 2016. He has also referred to resolution plan submitted by Respondent No.2 which starts from running Page 340 of Volume II of the Memo of Appeal. He has drawn our attention to business plan incorporated in the resolution plan of the Respondent No.2 which is at running page 358 to 360 and reproduced herebelow:

“4 BUSINESS PLAN

Estimated reasons for the present position of the Company

M/s Castal Corporation Private Limited (CCPL) purchased 2.209 acres of land situated and lying at Narayanpur, P.O.-R. Gopalpur, Dist. 24 Parganas (North), West Bengal by two registered deeds of conveyance dated 19.05.1964. CCPL thereafter constructed sheds, buildings, etc, over the said plot of land from time to time and started non-ferrous metal factory therein. CCPL was amalgamated with G. Das & Company Private Limited w.e.f. 01.07.1985. On 08.09.1988, G. Das & Company Private Limited became a public company.

On 31.10.1988, G. Das & Company Limited entered into an agreement to sell the factory along with land, plant & machinery etc. to the Corporate Debtor - Castal Extrusion Private Limited at a total price of Rs. 25 lakhs and the date of sale was 01.02,1989, The property comprised of freehold land measuring 6.7 Bighas or says about 8,840 Sq. Meters with a pucca boundary wall all around, all covered spaces Including shads, structures, apartment and quarters, garages and other open land boundary. After acquiring of the factory, CEPL developed the factory site and the commercial production started from 20.03.1990.

CEPL is part of the Tantia Group. Tantia Constructions Limited (TCL) was the flagship company of the Tantia Group. TCL had taken loan from

Vijaya Bank (now Bank of Baroda) and in relation to that loan. M/s Castal Extrusion Private Limited (CEPL) provided Corporate Guarantee on 08.05.2013. Bank Invoked the Corporate Guarantee and sent a notice of demand dated 26.02.2018 asking CEPL to pay the entire outstanding amount of Rs. 57.34 crores+ interest. CEPL did not pay the amount as demanded.

In March 2018, Bank filed an application u/s 7 of IBC, 2016 with Hon'ble NCLT - Kolkata Bench against CEPL. Hon'ble NCLT-Kolkata Bench admitted the application u/s 7 of the Insolvency & Bankruptcy Code, 2016 on 18.03.2020 and appointed Mr. Niraj Agrawal as the Interim Resolution Professional. Public announcement was made in 2 newspapers on 20.03.2020 asking creditors of CEPL to submit their claims with IRP. Mr. Niraj Agrawal was confirmed as the Resolution Professional in the 1st meeting of the Committee of Creditors.

In the Interim TCL was also under CIRP and Resolution Plan was approved by Hon'ble NCLT in February 2020. As per the latest update, the successful Resolution Applicant is yet to fulfil its commitment as per the approved Resolution Plan.

Resolution applicant through various measures detailed under the section "Various aspect of the Plan" proposes to revive the Corporate Debtor and to take over the management of the company. Operation of the Company is currently disturbed, mainly due to old machinery requiring maintenance/ renovation, labour problems, piled up dues of workmen/labour/statutory dues/pf/esi, capital expenditure required availability of the quality management to manage the affairs of the Factory and Invocation of Corporate Guarantee. The Resolution Applicant intends to address these concerns and revive the Corporate Debtor.

Following are the brief action plan for building the capability required (technical, financial, manpower, turnaround expert etc) to revive CD:

TURNAROUND STRATEGY

The Resolution Applicant proposes to change the business of CEP Land convert it into a real estate company as a revival plan of the company.

As a part of the turnaround strategy, Resolution Applicant shall undertake the Following exercise,being:

- a) Creation of SPV- Formation of a Special Purpose Vehicle (SPV) wherein SFHIDPL will own 100% of the SPV. However, the Resolution Applicant reserves the right to induct other shareholders in the SPV. The Resolution Applicant will infuse funds into CEPL to the tune of Rs. 6.50 Lakhs, SPV will be used to hold the shares of CEPL;*

- b) Conversion of Nature of Factory Land -The Resolution Applicant proposes to convert the nature/use of the Factory Land from Industrial purpose to Residential/Commercial purpose. The Resolution Applicant has studied that the nearby areas of the Factory have been developed into a residential area with many residential properties being developed in the recent past, hence, it will be very difficult to restart or carry out any other new industrial activity in this area. The Resolution Applicant accordingly proposes to convert the industrial land into residential/commercial land.*
- c) Termination & Settlement of Labour & Staff - The workforce of CEPL as on Insolvency Commencement Date comprised of 38 labours and 5 employees, none of whom have the required skill set for working in a real estate company. Accordingly, the Resolution Applicant does not intend to retain the workforce of the company. The Resolution Applicant thus proposes for the retrenchment/termination of the workforce and any amount payable under such circumstances including on account of Gratuity would be dealt with as envisaged in the Resolution Plan.*
- d) Development of the Residential/Commercial Project - The Resolution Applicant also proposes as part of this Resolution Plan to develop a residential/commercial project on the Factory Land post its conversion into a residential/commercial land. The Resolution Applicant expects to generate employment during the course of the construction of the residential/commercial project. The residential/commercial project will also help in extracting value out of the land owned by the CD and thus helping in the revival of the CD. The total outlay for the said residential project is expected to be around Rs. 67 Crores (Rupees Sixty-Seven Crores) with a total construction area of around 2,90,000 sqft. The said usage of the property as proposed by the Resolution Applicant would generate employment for more than 500 workers/employees in the locality against the termination/retrenchment that is proposed for around 40 employees/workers. In addition to the generation of employment this huge capital investment would generate huge economical value in the local area.”*

32. He submits, by way of referring to aforesaid facts, that resolution plan submitted by the Respondent No.2 was viable and this was the reason that learned Adjudicating Authority on examining the resolution plan which was approved by the CoC has

finally approved the same. He submits that in normal course after approval of the plan by the Adjudicating Authority which has been approved as per the commercial wisdom of the CoC the said plan is not required to be interfered with.

33. Mr. Nagesh, learned senior counsel has also drawn our attention to Page 245 of Volume II of the Memo of Appeal i.e. part of the resolution plan submitted by the appellant that statutory licences as well as association licences had expired and not renewed. Mr. Nagesh has also placed reliance on ***Next Orbit Ventures Fund (Supra)*** and submits that in view of situation which was prevailing it was difficult to take any steps for proceeding with the same business of the corporate debtor and it was viable to change the nature of business and as such a reasonable approach was adopted in the resolution plan of the Respondent No.2 which on commercial wisdom of the CoC was considered for its approval and finally the same has been approved by the learned Adjudicating Authority.

34. Mr Arun Agarwal, learned counsel has appeared on behalf of Respondent No.3/CoC. Besides adopting arguments advanced by Mr. P. Nagesh, learned senior counsel for Respondent No.2 as well

as Mr. Banerjee, learned counsel for Respondent No.1 he tried to persuade the Court that lease agreement itself was fictitious and it was created only with a view to put the financial creditor to loss by illegal means. He submits that the perusal of the lease agreement itself makes it clear as to what was the object for creating such a document. By way of referring to lease agreement dated 27.07.2014 which is at running page 119 to 122 he submits that one of the Directors of Corporate Debtor namely Jaydeep Ghosh had executed the agreement as landlord on behalf of the Corporate Debtor and on behalf of M/s T-RMC Pvt Ltd (tenant), it was signed by Mr. Harshvardhan Tantia. This lease agreement was only notarised but not registered whereas the lease agreement was for a period of five years and land measuring 1.90 acres out of 2.209 acres of Corporate Debtor was leased out, that too for a monthly rent of Rs.55000/-. He has also drawn out attention to para 9 of the lease agreement dated 27.07.2014 at running page 121. It would be necessary to reproduce it as follows:-

*“9. Subject to fulfilment of the terms and conditions of these presents, the **TENANT will have the option to extend the tenure of this Agreement for a further period of 5 years** on the expiry of this agreement on the same terms and*

conditions given herein on giving the Landlord a notice to the same effect at least three months before the expiry of this tenure.”

35. As per the agreement lease was valid upto 26.07.2019. Thereafter again on 26.07.2019 another lease agreement was executed on behalf of the Corporate Debtor in which one of the signatory of Corporate Debtor was Mr. Jaydeep Ghosh and in this agreement also lease was for a period of five years commencing from the date of agreement i.e. 26.07.2019. In this agreement also Mr. Agarwal, learned counsel for R3 submits that same condition was imposed in Clause 8 of the Agreement which is at running page 126 and is reproduced hereinbelow:-

*“8. Subject to fulfilment of the terms and conditions of these presents, the **TENANT will have the option to extend the tenure of this Agreement for a further period of 5 years** on the expiry of this agreement on the same terms and conditions given herein on giving the Landlord a notice to the same effect at least three months before the expiry of this tenure.”*

36. Mr. Agarwal has highlighted that in both the aforesaid lease agreement monthly rent is same i.e. Rs.55000/- which was the rent on the commencement of the agreement in the year 2014 and at the time of second agreement which was entered into on 26.07.2019 i.e. after five years the same rent was permitted i.e. Rs.55000/- and a condition which is alien to the lease agreement, the tenant was given option to extend the tenure of the agreement for further five years. On aforesaid ground it was submitted that both lease agreements appear to be forged documents which were created without written permission of the Bank i.e. financial creditor where a charge was created in favour of the Bank. On aforesaid plea it was argued that the present appeal is required to be rejected outrightly. Moreover in the Transaction Audit Report rent of the land was determined at Rs.4.85 lakhs per month against Rs.55000/- per month.

37. Mr. Rudereshwar Singh also argued in rejoinder and reiterated that the Corporate Debtor was running the industry of aluminium production and as such there was no reason for alteration of the business.

38. In Company Appeal (AT)(Ins) No.839/2022 three suspended directors of the Board of Directors of the Corporate Debtor are three appellants. One of the appellant namely Mr. Jaydeep Ghosh is the signatory of the lease rent agreement dated 27.07.2014 and 26.07.2019.

39. Mr Prakhar Tandon, learned counsel has appeared on behalf of the appellant in the present appeal CA(AT)(Ins) No.839/2022. He assailed the resolution plan on several grounds including the ground that the approved resolution plan was conditional and vague. He emphasised that resolution plan has not discussed about the revival of the Corporate Debtor and decided for closure of the business of the Corporate Debtor. However, on being asked as to whether the appellants had also submitted any resolution plan, the learned counsel for the appellant accepted that no plan was submitted on behalf of the appellant.

40. Mr. P Nagesh, learned senior counsel appearing on behalf of Respondent No.2 raised preliminary objection on the point of maintainability of the appeal filed by the directors of the suspended Board of Directors of the Corporate Director. He submits that after initiation of the CIRP the Board of Directors was

put under suspension and the IRP and RP was taking all steps regarding the Corporate Debtor. He submits that on earlier occasions the appellants, particularly at the time of filing the resolution plan, had never raised any objection. It was the consensus decision of the CoC to accept the plan submitted by Respondent No.2 and thereafter said Plan was finally approved by the Learned Adjudicating Authority. He submits that it is settled that suspended Board of Directors have got no locus to assail approval of the resolution plan which has been approved by commercial wisdom of the CoC and thereafter finally approved by the Adjudicating Authority. On this very issue he has placed reliance on a judgement of Hon'ble Supreme Court reported in **Innoventive Industries Ltd Vs ICICI Bank reported in (2018) 1 SCC 407** and he has specifically referred to para 11 of the judgement which is quoted hereinbelow:-

“11. Having heard learned counsel for both the parties, we find substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause title stating that the erstwhile directors do not represent the company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the

company has been taken away and as they are otherwise affected as shareholders of the company. According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone.”

41. Learned counsel for all the Respondents have raised objection on the locus of the directors of suspended Board of Directors of the Corporate Debtor who are appellants in the one of the present appeals. Besides raising preliminary issue they have further argued that the detailed submission has been made regarding viable plan submitted by Respondent No.2 and no error in the impugned order particularly by replying submission of counsels in Company Appeal (AT)(Ins) No.861/2022.

42. Mr. Nagesh, learned senior counsel on the question of law in both the appeals has taken the same stand. He submits that it is settled that Resolution Applicant has no vested right regarding his resolution plan. It is upto the commercial wisdom of the CoC to consider the plan which may not be interfered with. On this very issue he has placed reliance on para 79 of judgement reported in

(2019) 2 SCC Page 1 **Arcelormittal India Pvt Ltd Vs Satish Kumar Gupta and others** which is quoted hereinbelow:-

“79. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the adjudicating authority at this stage. A writ petition under Article 226 filed before a High Court would also not be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plan, if no other resolution plan has passed muster.”

43. To corroborate his aforesaid submission he has further placed reliance on para 5 of a judgement of this Appellate Tribunal passed in Company Appeal (AT)(Ins) No. 272/2020 **IMR Metallurgical Resources AG Vs Ferro Alloys Corporation Lt & Anrs** which is reproduced hereinbelow:

“5. It is essential to mention that the Resolution applicant has no vested right that his Resolution Plan must be considered. It is settled position of law as laid down by Hon’ble Supreme

Court in (2019) 2 SCC 1 in case of Arcelor Mittal India Pvt Ltd Vs Satish Kumar Gupta that the resolution applicant does not have any vested right that his Resolution Plan must be considered.”

44. He has referred to para 2 of judgement of this Tribunal reported in 2020 SCC Online NCLAT 1106 **Hindustan Oil Exploration Co Vs Erstwhile Committee of Creditors JEKPL Pvt Ltd & Ors.** Which is reported hereinbelow:

“2. After hearing Mr. Abhijeet Sinha, Advocate for the Appellant, we are of the considered opinion that the Appellant has no locus to question the implementation of the approved Resolution Plan of the Successful Resolution Applicant. Admittedly, appeal preferred against approval of the Resolution Plan of the Successful Resolution Applicant stands dismissed by this Appellate Tribunal. Direction given in terms of the impugned order on the application filed under Section 60(5) of the ‘I&B Code’ to the Successful Resolution Applicant follows as a necessary corollary to the dismissal of appeal filed against approval of Resolution Plan of the Successful Resolution Applicant to implement the approved Resolution Plan on or before the extended date of 30th September, 2020. Once the Appellant is out of the fray, it has neither locus to call in question any action of any of the stakeholders qua implementation of the approved Resolution Plan nor can it claim any prejudice on the pretext that any of

the actions post approval of the Resolution Plan of Successful Resolution Applicant in regard to its implementation has affected its prospects of being a Successful Resolution Applicant. If the terms of the approved Resolution Plan of Successful Resolution Applicant have been varied or time extended to facilitate its implementation and the creditors have not claimed any prejudice on that count and the Committee of Creditors comprising of the creditors as stakeholders has not objected to same rather been privy to it on account of hardship due to prevailing circumstances, the Appellant cannot be permitted to cry foul. It is not a case of alleged material irregularity in the Corporate Insolvency Resolution Process which is in final stages with the approved Resolution Plan being under implementation. Outbreak of COVID-19 pandemic has slowed down the economic activity and operations have been adversely impacted. Viewed in that context some necessary changes in the agreed terms and extension of time for implementation would not be uncalled for. Be that as it may, the Appellant has no locus to maintain that the change in terms of the approved Resolution Plan in regard to extension of time for induction of upfront amount as also implementation of the Resolution Plan has jeopardized its legal rights qua consideration of its Resolution Plan which has been rejected.”

45. Similarly learned counsel for the Respondents have referred to para 31 of a judgement of this Appellate Tribunal passed in an unreported IA No.215/2023 in Company Appeal (AT)(CH)(Ins) No.58 of 2023 which is reproduced hereinbelow:-

“31. On a careful consideration of the respective contentions advanced on either side, this Tribunal, keeping in mind of a vital fact that the Petitioner/Appellant being an Unsuccessful Resolution Applicant, has no locus to assail a Resolution Plan or its implementation, coupled with a candid fact that he is not a Stakeholder, as per Section 31(1) of the I&B Code, 2016, in relation to the Corporate Debtor, this Tribunal, without any haziness, holds that the Petitioner/Appellant, is not aggrieved person, coming within the ambit of Section 61(1) of the I&B code, 2016, especially, when he is not a Privy, to the Resolution Plan. Viewed in that perspective the Leave, sought for in IA No.214/2023 in Comp. app (AT)(CH)(Ins) No.58 of 2023, sans merits.

Result

In fine, IA No.215/2023 in comp app (AT)(CH)(Ins) No.58/2023 is dismissed. No costs.”

46. On the point that the approval of the plan firstly by CoC is considered as commercial wisdom which is not required to be interfered with and also regarding change of nature of business of Corporate Debtor, Mr Nagesh has placed reliance on para 28, 37

and 38 of judgement reported in 2021 SCC Online NCLAT 122

Next Orbit Ventures Fund Vs Print House (India) Pvt Ltd.

47. On aforesaid ground it has been pleaded that both the appeals are required to be dismissed.

48. Besides hearing learned counsel for the parties we have perused the material available on record. Before proceeding we may reiterate that one who does not come to a Court with clean hands, may not get any relief. In the present case, primarily we are satisfied that conduct of the appellants in both the appeals is not transparent. We have also noticed that more than Rs.57 crores with interest was outstanding. The principal borrowers' account was declared NPA on 10.03.2017. Charge in respect of entire land of the Corporate Debtor was created in favour of financial creditor i.e. Vijaya Bank. Even thereafter one of the directors of the appellant namely Mr. Harshvardhan Tantia of Company Appeal (AT)(Ins) No.861/2022 who was also having 6.22% shares holding in the Corporate Debtor company entered into lease agreement on 27.07.2014 with CD in respect of major portion of the land of the Corporate Debtor. The lease agreement was signed by Mr. Jaydeep Ghosh on behalf of the Corporate Debtor and Mr. Harshvardhan

Tantia signed as one of the directors of T-RMC Pvt Ltd who is appellant in Company Appeal (AT)(Ins) No.861/2022. The lease agreement dated 27.07.2014 was for a period of five years which was to end on 26.7.2019. It is mandatory that if a tenancy is created on the basis of an agreement/lease agreement for one year or more then the said deed is required to be registered. However, it is not disputed that in the present case the lease agreement which was for five years was only notarised, not registered. Further it has been pleaded and not disputed by the appellant that Mr. Jaydeep Ghosh one of the directors who signed on behalf of the Corporate Debtor was never authorised by the resolution passed by the Corporate Debtor. Mr. Harshvardhan Tantia who put signature on the agreement, on behalf of tenant, i.e. T-RMC Pvt Ltd on the date of execution was also having about 6.22% shareholding in the company i.e. Corporate Debtor. It is also not in dispute that a charge had been created on the whole land of the corporate debtor in favour of the financial creditor/Bank. Once charge in respect of the said land was created in favour of the Bank it was mandatorily required on the part of the Corporate Debtor to get first permission/consent of the Bank for executing lease rent agreement that too for five years. One of the condition in lease

agreement i.e. 26.07.214 is at Clause 9 which gives a right on the tenant in respect of lease to extend the period of lease agreement for further five years. Same condition was included while executing second lease rent agreement which was executed on 26.07.2019 for further period of five years. Such conditions are alien to a lease agreement which reflects ill intention of both the parties. The outstanding loan was more than Rs.57 crores excluding interest. If in such a situation such type of lease agreement is created and major portion of the land is given to the possession of a related party i.e. by the present Corporate Debtor to Appellant T-RMC Pvt Ltd in Company Appeal (AT)(Ins) No.861/2022, certainly it suggests that with a view to obtain undue and illegal gain and to deprive the bank such act was done on basis of conspiracy hatched between the parties.

49. We have noticed that law is settled on the point that the suspended Board of Directors have got no locus to file an appeal against the approval of the plan by CoC and finally approved by the Adjudicating Authority and as such Company Appeal (AT)(Ins) No.839/2022 is liable to be rejected on this sole ground besides the facts relating to fraudulent lease rent agreement which we have noticed hereinabove. So far as plea taken on behalf of the

appellant in Company appeal (AT)(Ins) No.861/2022 that change of business of the Corporate Debtor was not permissible, we are of the view that it is necessary to examine Regulation 37 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 which is reproduced hereinbelow:

“37. Resolution plan-*A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following-*

(a) Transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) Sale of all or part of the assets whether subject to any security interest or not;

(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;

(c) The substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

- (ca) cancellation or delisting of any shares of the corporate debtor, if applicable.*
- (d) Satisfaction or modification of any security interest;*
- (e) Curing or waiving of any breach of the terms of any debt due from the corporate debtor;*
- (f) Reduction in the amount payable to the creditors;*
- (g) Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;*
- (h) Amendment of the constitutional document of the corporate debtor;*
- (i) Issuance of securities of the corporate debtor, for cash, property, securities, or in portfolio of goods or services produced or rendered by the corporate debtor.*
- (j) Change in portfolio of goods or services produced or rendered by the corporate debtor.*
- (k) Change in technology used by the corporate debtor; and*
- (l) Obtaining necessary approvals from the Central and State Governments and other authorities.*

50. Section 5(26) of the IBC is also necessary to be reproduced as follows:

“5(26) “resolution plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.

(Explanation:For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.)

51. The aforesaid provision particularly Section 5(26) of the IBC permits a resolution plan that entails restructuring. Similarly Regulation 37(ba) also permits restructuring, whereas Regulations 37(a) and (b) even permit for transfer of all or part of the assets and also sale of all or part of the assets of the CD. Only requirement is to see whether situation permits to do the same in the interest of the concerned creditors. In the present case it has been noticed that CD was not doing any business. Licence for running the factory had lapsed and not renewed for several years. There was no insurance of the factory premises since several years and even Insurance Company has refused to insure such factory/plant. It has also been noticed that for several years municipal tax were not paid by the CD. Even during CIRP the factory was non-

operational. The factory which was dealing with aluminium and its plant was very old one. It is also a fact that factory premises was in the municipal area. It was pleaded that by lapse of time the factory area was surrounded by residential area.

52. After examining all the aforesaid facts we are of the opinion that it was commercial wisdom of the CoC to accept the plan which has been noticed by way of change of the business of the CD. It has already been held that an unsuccessful resolution plan applicant has got no vested right and also settled that acceptance of plan is commercial wisdom of the CoC. Accordingly, there is no reason to entertain both the appeals particularly in view of the fact that the plan has finally been approved by Adjudicating Authority. In normal course after approval of the Resolution plan by the Adjudicating Authority there is very narrow scope for the Appellate Tribunal to interfere in the matter and as also considering the fact that the appellants in both the appeals have not approached this Tribunal with clean hands as well as the fact that on exercising commercial wisdom the CoC approved the plan and same was endorsed by the Adjudicating Authority, there is no reason to interfere with the impugned order. Accordingly, both the appeals are dismissed.

53. Before parting with the judgement considering the fact that so called two lease agreements dated 27.07.2014 and 26.7.2019 have been brought on record in the present proceeding which appear to be prepared for unlawful gain and with a view to take undue pecuniary advantage and depriving the interest of the Financial Creditor/Bank by illegal means, we feel this issue should not be left untouched. We are of the opinion that creation of aforesaid two doubtful and suspicious lease agreements which have been used in the court proceeding to defeat the objective of IBC, requires enquiry. As such we propose to request Delhi Police Commissioner to get the issue relating to aforesaid two lease rent agreements, its effect and also conspiracy, if any, enquired into and if materials are collected showing commission of cognisable offence, then in that event a regular FIR may be lodged and case may be investigated to its logical end. It is upto the Delhi Police Commissioner to entrust enquiry/investigation either to Economic Offences Wing or any other appropriate investigation wing of Delhi Police for taking the inquiry/investigation to its logical end.

54. Let a copy of this order be sent to the Delhi Police Commissioner for its compliance.

55. The Ld. Registrar of this Tribunal is directed to provide all assistance/material/authenticated copies of the appeals and other documents if asked by the investigating team.

56. With abovementioned directions, both the appeals are dismissed.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

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