

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

IA No. 1110/MB/C-I/2021

In
C.P (IB) No. 1385/MB/C-I/2017

Under section 60(5) of Insolvency and Bankruptcy Code, 2016.

Filed by
**Reliance Projects & Property Management Services
Limited**

(formerly known as Reliance Digital Platform & Project
Services Limited)

Reg. Office: 101, Saffron, Near Centre Point,
Panchwati 5 Rasta, Ambawadi, Ahmedabad, Gujrat –
380006.

Corporate Office: 5th Floor, Makers Chamber – IV,
222, Nariman Point, Mumbai – 400021.

...Applicant

Versus

**1. Committee of Creditors of Reliance Infratel
Limited**

Through State Bank of India, Stressed Assets
Resolution Group, 21st Floor, E-wing, Maker
Tower, Cuffe Parade, Mumbai, MH – 400005.

2. Mr. Anish Nanavaty

Erstwhile Resolution Professional of Reliance
Infratel Limited

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA NO. 1110/MB/C-I/2021

In

C.P. (IB) No. 1385/MB/C-I/2017

One International Centre, Tower 3, 27th Floor,
Senapati Bapat Marg, Elphinstone Road (West),
Mumbai, MH-400013.

3. State Bank of India

Stressed Assets Resolution Group, 21st Floor, E-
wing, Maker Tower, Cuffe Parade, Mumbai, MH –
400005.

4. Union Bank of India

239, Ground Floor, Vidhan Bhavan Marg, Nariman
Point, Mumbai, MH – 400021.

5. Indian Overseas Bank

Stressed Assets Management Department, Central
Office: P. B. No. 3765, 763 Anna Salai, Chennai –
600002.

...Respondents

In the matter of

Ericsson India Private Limited

...Petitioner

Versus

Reliance Infratel Limited

... Corporate Debtor

Order Pronounced on: 16.03.2022

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Sh. Kapal Kumar Vohra

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA NO. 1110/MB/C-I/2021

In

C.P. (IB) No. 1385/MB/C-I/2017

Appearances:

For the Applicant : Sr. Adv. Vikram Nankani.

For the Respondent-1 : Sr. Adv. Gopal Jain.

For the Respondent-2 : Adv. Anoop Rawat.

For the Respondent-3 : Sr. Adv. Gaurav Joshi.

ORDER

Per: Justice P. N. Deshmukh, Member (Judicial)

1. Reliance Projects & Property Management Services Limited (“**RPPMSL**” or “**Applicant**”) (as the successful resolution applicant in the corporate insolvency resolution process of Reliance Infratel Ltd. (“**RITL**” or the “**Corporate Debtor**”) has filed the captioned application (being IA 1110 of 2021 in CP (IB) 1385/2017) (“**Interlocutory Application**”) before this Adjudicating Authority *inter alia* seeking the following prayers:

- (a) to direct the Respondents to provide to the Applicant, copies of the entire forensic audit report on the basis of which the banks have declared the account of Reliance Infratel Ltd. (including Reliance Communications Limited and Reliance Telecom Limited) as “fraud” under Master Directions on Frauds dated July 1, 2016, and the copies of the communication to the Reserve Bank of India declaring the account as ‘fraud’;

- (b) to direct the Respondents to provide to the Applicant copies of any or all complaints (together with annexures) filed by the Respondents with the Central Bureau of Investigation, Enforcement Directorate or any other investigating or regulatory agencies in respect of such declaration of fraud and any notices received from such investigating agencies or regulatory authority;
- (c) to direct the Respondents Nos. 3 to 5 to provide any and all information relating to declaration of fraud for Reliance Infratel Ltd. (and Reliance Communications Limited and Reliance Telecom Limited) accounts.

Submissions made by Applicant:

- 2. The Applicant submits that **(a)** the Applicant is not reneging out of implementation of the Resolution Plan and seeking the information and documents which it is rightfully entitled to; **(b)** There is no delay in implementation of the Resolution Plan which can be attributed to the Applicant; **(c)** At the outset, it is submitted that the applicant is committed and is taking steps to implement the R Plan, page 8, para 2 of the Application.
- 3. It is submitted that the entire statutory scheme under IBC (including Section 29) and the Regulations thereunder (including Regulation

36(2)(h) & (l) of the CIRP Regulations) is premised on ensuring complete transparency with the Resolution Applicant who agrees to take over the Corporate Debtor, and requires that the declaration of fraud, the Forensic Report and the complaints made to investigative agencies are material information in respect of the Corporate Debtor which ought to have been provided to the Applicant, before the approval of the Resolution Plan by the Ld. Adjudicating Authority on 03.12.2020.

(Interlocutory Application @ pg. 8-9)

4. For the purpose of this Application, Applicant relied on Section 29 of the IBC which provides as follows:

“29. Preparation of information memorandum. - (1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

*(2) The resolution professional shall **provide to the resolution applicant access to all relevant information** in physical and electronic form, provided such resolution applicant undertakes-*

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have

access to; and

*(c) not to share relevant information with third parties unless clauses (a) and
(b) of this sub-section are complied with.*

*Explanation. –For the purposes of this section, **“relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified”.***

And also relied on Regulation 36(2)(h) & (l) of the CIRP Regulations which provides as follows:

“36. Information memorandum.

...

(2) The information memorandum shall contain the following details of the corporate debtor-

...

*(h) **details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;**”*

*(l) **other information,** which the resolution professional deems relevant to the committee.*

(emphasis supplied)

5. It is submitted that as per regulation 36(2)(h) read with regulation 36(2)(h)(1) of the CIRP Regulations, it was incumbent upon the Respondents, more particularly the Respondent Nos.3 to 5 to disclose about the commissioning and obtaining of the said Forensic Report in relation to the accounts of RITL, RCOM and RTL by the lenders being an ongoing investigation and relevant information. It is further submitted that it was incumbent upon Respondent No.2 to provide the Applicant with the information in relation to the ongoing forensic audit of the Corporate Debtor. Admittedly, the Forensic Audit had been conducted during the CIRP of Corporate Debtor, and the audit and the resulting report being relevant information as envisaged under the IBC ought to have been provided to the Resolution Applicant and prior to approval of the Resolution Plan by this Hon'ble Tribunal. In any event, nothing in law prevents the Respondents from furnishing the said Forensic Audit Report to the Applicant subsequently.
6. It is further submitted that access to Forensic Report is also crucial to ascertain the allegation of fraud and to ensure that the entitlement to and the immunity provided under Section 32A of the IBC is available to the Applicant.

7. According to Applicant, Forensic Report on the basis of which the banks determined reported RITL account as fraud, and the complaints made by the banks to the investigative agencies, depending on the findings therein, are material to and critically impact the corporate insolvency resolution process, and the stage of the CIRP becomes irrelevant on account of the fact that this relates to an issue of fraud by the Corporate Debtor, keeping in mind the judgments of the Hon'ble Supreme Court in *Express Newspapers (P) Ltd. v. Union of India*, (1986) 1 SCC 133 at **Paragraph 119 & DDA v. Skipper Construction, (2007) 15 SCC 601 at **Paragraph 1**, which has reiterated the well accepted principle of law that frauds vitiates everything.**
8. It is also submitted that right to seek relevant information is enshrined in the IBC and not providing such vital information will lead to gross miscarriage of justice as the Resolution Applicant will be forced to infuse money into the Corporate Debtor without knowing the complete information in relation to the affairs of Corporate Debtor. Such a situation is clearly against the principles of natural justice.
9. It is submitted that in May 2021 Respondent No.3 was agreeable to share the excerpts of the Forensic Report with the Applicant, to the extent it relates to the Corporate Debtor and subject applicant entering in non-

disclosure agreement. In fact Respondent No.3 reiterated this stand on 11th January 2022, during the course of the hearing of the above IA. However, Respondent No.3 is now seeking to renege on the above stand, without providing any reason. Respondent No.3 has not submitted before this Tribunal as to what prejudice would be caused to it, if the relevant excerpts of the Forensic Report are shared with the Applicant, under a confidentiality arrangement. Respondent No.3 cannot approbate and reprobate at the same time.

10. It is submitted that the present case is a unique resolution process under IBC, as in this case: (i) the Applicant had and continues to have contractual relationship with the Corporate Debtor since much before the commencement of CIRP and even during CIR; (ii) The contractual relationship is long term in nature and continues to this date; (iii) The continued engagement and knowledge of the business of the Corporate Debtor was the primary reason that the Applicant chose to become a resolution applicant and continued to engage with the COC/erstwhile Resolution Professional and the Monitoring Committee to ensure preservation of the assets of the Corporate Debtor and survival of the Corporate Debtor on a '*going concern*' basis, while at the same time offering the most viable resolution for the stakeholders of the Corporate

Debtor; (iv) This is also evident that the Resolution Plan was approved by 100% of the COC; (v) The Applicant's affiliates have also provided various advances amounting to approximately INR 1,000 crores. prior to and during the CIRP, with the view to ensure the continuity of operations of the Corporate Debtor and to maintain the '*going concern*' status of the Corporate Debtor; and (vi) The Applicant is therefore within its rights to review the contents of the Forensic Report and satisfy itself that the assets of Corporate debtor are adequately insulated and protected in terms of Sec. 32A of IBC. Hence, the Plan cannot be compared to a simpliciter process where a third-party new entrant submits a resolution plan for a corporate debtor.

11. The forensic audit report had declared the CD as fraud and applicant feels that Applicant needs to note the details in which he will have implication in the viability of the Asset of CD.
12. In light thereof, in all fairness the Applicant submitted and expressed its willingness to give an undertaking to maintain confidentiality qua the said Forensic Audit Report or part thereof once provided.
13. In light of the above and considering that the Applicant is ready to give an undertaking to maintain confidentiality qua the said Forensic Audit Report or part thereof provided to the Applicant, the Applicant prays that

Applicant is entitled for a copy of excerpts of Forensic Report pertaining to Corporate Debtor, and thus seeks directions to Respondent No. 3 to share the excerpts of the Audited Forensic Report pertaining to Corporate Debtor to Applicant; and to also direct Respondent No. 3 to allow the Applicant to review the report and seek clarifications if any from said Respondent.

14. During the course of hearing the Applicant stated that it is ready to implement all aspect of the Resolution Plan including bringing funds as per the timelines committed in the Resolution Plan and will not take any benefit of this litigation to delay payment schedule and other actions; it is also contended that applicant shall enter into Non Discloser Agreement with Respondent No 3 State Bank of India as desired by said Respondent and that he has no intention to derail the implementation of Resolution Plan.

Submissions made by CoC, Respondent-1

15. It is the case of said Respondent no. 1 that the Applicant is seeking disclosure of all information in connection with the forensic audit conducted by Respondent Nos.3-5 in accordance with the RBI Circular

dated July 1, 2016 (updated on July 3, 2017) titled as “Master Directions on Frauds – Classification and Reporting by commercial banks and select FI’s” (“RBI Master Directions”). The Application has been filed by the Applicant invoking Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“**Code**”). As a result, the Applicant is seeking appropriate orders from this Hon’ble Tribunal *inter alia* directing Respondent No.3 – State Bank of India to provide copies of the forensic audit report dated October 15, 2020 (“**Forensic Report**”) and all other ancillary documents in relation thereto, including but not limited to the resultant complaints filed with the investigative agencies along with the Report hereinafter referred to as “**Forensic Report Information**”.

16. According to Respondent No. 1 it is noteworthy that the Resolution Plan (“**Resolution Plan**”) submitted by the Applicant has been approved by 100% of the members of the Committee of Creditors of RITL on March 4, 2020. The primary and focal ground of the Applicant is that non-disclosure of the Forensic Report Information as sought would have an impact on implementation of its Resolution Plan, as approved by this Hon’ble Tribunal vide its Order dated December 3, 2021. The Applicant has refrained from implementing the Resolution Plan for over 13 months on the pretext of the present Application and the reliefs sought

thereunder. The Applicant has been taking contradictory stands in the Application wherein it states under para 2 @ pg. 8 that it is committed to implement the Resolution Plan. However, in para 27 @ pg. 18 the Applicant states that it will not pay the amounts committed under the Resolution Plan unless it is satisfied with the findings contained in the Forensic Report.

17. It is further submitted such action of the Applicant is in complete violation of the principles of Code which has been enacted for the purpose of effective and timely resolution of an entity under corporate insolvency resolution process and the said action is also against the settled position of law set out by the the Hon'ble Supreme Court of India in the case of *Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr.* (2021 SCC OnLine SC 707) wherein it was held that once a resolution plan has been approved by the Adjudicating Authority it is not open to any subsequent modifications/amendments and neither can such resolution plan be withdrawn.
18. In the circumstances, Respondent No.1 submits that the Applicant is not entitled to reliefs and prays that the captioned Application ought to be

dismissed along with a direction to the Applicant to proceed with implementation of the Resolution Plan at the earliest.

Submissions by Erstwhile Resolution Professional Respondent-2

19. Respondent No. 2 erstwhile RP has opposed the Application contending that he has limited role as RP with regard to Forensic Audit as that was being conducted at the behest of Respondent Nos.3 to 5 and forensic audit report is not available with Respondent No.2. All material information concerning the affairs of the Corporate Debtor as available and as required under the Insolvency code were made available on the virtual data room and in the information memorandum.
20. R-2 further submitted that the forensic audit report dated 15th October, 2020 issued by BDO India LLP, *(the auditors appointed by Respondent Nos. 3 to 5 to conduct the forensic audit exercise with respect to Corporate Debtor)* and other documents sought by the Applicant were/are not available with Respondent No. 2. Respondent No.2 learnt about the declaration of the account of Corporate Debtor as fraud on 26th December, 2020 from media reports and accordingly sent email dated 13th December, 2019 and 25th May, 2020 for sharing copy of the report, however, till date, the copy of the Forensic Audit Report has not been shared with Respondent No.2.

21. Thus, it is its case that the role of the RP was limited only to facilitating the transmission of the information between the Reliance Infratel Limited (“**RITL/Corporate Debtor**”) and the forensic auditor, at the specific request of the certain CoC members, said Respondent was not even aware of the specific purpose for which the information was sought and/ or the outcome of the audit exercise. As per Section 21(9) & (10) of the Insolvency and Bankruptcy Code, 2016 (“**Insolvency Code**”), the CoC has the right to require the RP and the RP has to make available any financial information in relation to the Corporate Debtor as requested by the CoC.
22. It is further submitted that Applicant was present in the CoC meeting wherein the issue of ongoing forensic audit exercise was discussed and thus, the assertion made by the applicant that he became aware of the fact of the forensic audit exercise by lenders of RITL subsequent to the passing of Resolution Plan approval order by the Adjudicating Authority appears to be erroneous, even the applicant’s presence and participation in the 16th CoC meeting held on 09.01.2020 wherein the issue of forensic audit report was discussed although it was not duty of RP to necessarily invite RA for meeting.

23. RP drew attention to Section 29 (2) of IBC wherein it is stated that the RP shall provide to RA access to all the relevant information in physical and electronic form, provided such RA undertakes – (a) to comply with the provision of law for the time being in-force relating to confidentiality and insider trading;---- (b) not to share relevant information with 3rd parties...
24. Respondent No. 2 lastly contended that availability of the information/ document is a relevant factor for any disclosure in the information memorandum this assertion made by the RP, the documents/ information pertaining to the Forensic Audit Report were/are not available. In fact, as the RP, Respondent No.2 was not even aware about the purpose of the forensic audit exercise. Thus, in terms of the provisions of the Insolvency Code, RP was not bound or required to disclose the Forensic Audit Report in the information memorandum.
25. The compliance of Section 29 of the Insolvency Code read with Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Reg**”) is premised on a fundamental understanding that the information / document is available with the RP. In the absence of availability of the information / document, it would be incongruous to

expect that an information / document not within the domain of the RP has to be included in the information memorandum.

26. Reliance on Regulation 36(2)(h) and (1) of the CIRP Reg is misconceived and is not applicable in the present case. Regulation 36(2)(h) and (1) of the CIRP Reg does not contemplate disclosure of the Forensic Audit Report carried out by bankers under RBI Circulars. Such document/ information would not fall within the ambit of *“an ongoing investigation or proceeding initiated by Government and statutory authorities”*.
27. In terms of the duties of the RP under Section 25(2)(j) of the Insolvency Code and 39(2) of the CIRP Reg, Respondent No.2 has filed avoidance applications pursuant to the transaction audit by auditors and has also informed the CoC about the same.

Submissions by Respondent-3 State Bank of India

28. Respondent No. 3 State Bank of India has filed reply contending that by virtue of present Interlocutory Application, the Applicant is seeking a disclosure of all information in connection with the forensic audit conducted by Respondent Nos.3-5 As a result, the Applicant is seeking appropriate orders from this Hon'ble Tribunal *inter alia* directing State Bank of India to provide copies of the forensic audit report dated October

15, 2020 and all other ancillary documents in relation thereto, including but not limited to the resultant complaints filed with the investigative agencies along with the “**Forensic Report Information**”.

29. The primary and focal ground of the Applicant is that non-disclosure of the Audited Forensic Report Information as sought would have an impact on implementation of its resolution plan (“**Resolution Plan**”), approved by this Hon’ble Tribunal. This appears to be the Applicant’s expressly pleaded case as evidenced from a perusal of paragraph 12 of the Application.
30. As per the Respondent No. 3, the case made out by the Applicant for seeking the Forensic Report Information can be summarized in following four grounds:
- (i) Neither the fact that the forensic audit was conducted nor the Forensic Report itself was disclosed to the Applicant;
 - (ii) The forensic audit being conducted during the subsistence of the CIRP of the Corporate Debtor, being “relevant information” as envisaged under the Code ought to have been provided to the Applicant;
 - (iii) The classification of the loan account of the Corporate Debtor as fraud is a significant event and a “*Material Adverse Change*” having

a bearing on the implementation of the Resolution Plan submitted by the Applicant; and

(iv) Given the allegation of fraud committed by the Corporate Debtor, it is incumbent that the Applicant be provided with the information sought, as fraud vitiates everything.

31. Apart from above submissions Respondent No. 3 has raised preliminary objections with reference to maintainability of this application contending that during the pendency of the same, the Hon'ble Apex Court of India in the judgement of *Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr. (2021 SCCOnLine SC 707)* held that once a resolution plan has been approved by the Adjudicating Authority it is not open to any subsequent modifications/amendments and neither can such resolution plan be withdrawn.

32. It is contended that as per the law laid down in the above referred case of *Ebix (supra)*, it is abundantly clear that it is not open for the Applicant to either seek any modification of the Resolution Plan or withdraw the Resolution Plan. With regard to above preliminary objection it is to be noted that the limited prayer in this application to provide him copies of entire Forensic Audit report and copies of all other complains along with

documents filed by Respondents with investigation agencies or regulatory agencies. In view of the same, we find no substance in the preliminary objections raised as aforesaid relied upon the law laid down in the case of *ebix supra* as in that case already stated in the aforesaid it is laid down that it is not open for applicant to seek modification of amendment of Resolution Plan or withdraw the same but has to make an endeavor of its implementation.

33. It is also the case of R-3 that inconsistent stands taken by the Applicant are rife. In the Application, at the outset itself the Applicant has averred that, “*is committed to and is taking steps to implement the Resolution Plan.*” However, in the ultimate paragraph of the Application i.e. paragraph 27, the Applicant, with an undertone of a warning, has conspicuously averred that, “*The Applicant cannot pay this amount unless it is satisfied that the findings in the forensic audit report and the contents of the complaints made to the investigative agencies do not in any manner impact its ability to put to use the assets of the Corporate Debtor for the purposes intended and revive the operations of the Corporate Debtor.*”. The juxtaposition in the aforesaid averments clearly proves the Applicant’s misdemeanour, as it does not intend to implement the Resolution Plan until and unless its arbitrary demands have been met. Thus, it is contended that on this ground alone, the

Application ought to be dismissed and the Applicant to be directed to forthwith implement the Resolution Plan.

34. Apart from the preliminary submissions it is also the case of the Respondent No. 3. That period of thirteen months has elapsed since the approval of the Resolution Plan however, till date there has been no intent from the Applicant to implement the Resolution Plan despite expressly averring in the Application that it intends to do so and that due to certain contractual obligations, the Corporate Debtor (under the control and supervision of the monitoring committee) is required to maintain identified towers for the benefit of the Applicant. As a result, the Corporate Debtor is being hit with a financial burden of approximately Rs 42 crores per month by virtue of honouring its contractual obligations. Given the lapse of time, it is becoming challenging for the Monitoring Committee to maintain the Corporate Debtor's status as a going concern.
35. On the other hand, the Applicant is not facing any prejudice. While the Applicant has not fulfilled its obligations of paying the amounts committed under the Resolution Plan i.e. INR 3,720 crores, within 30 days of December 3, 2020, its affiliate/ group company, namely Reliance Jio Infocomm Limited, continues to occupy and utilise around 30,000 of the identified towers, on terms, and in a manner, which is

commercially prejudicial to the interest of the Corporate Debtor and the financial creditors.

36. Secondly, the Applicant's apprehensions about the contents of the Forensic Report Information and the resultant consequences, is misplaced as the mechanism not only under the RBI Master Directions but also under the Code itself provide adequate safeguards for a successful resolution applicant who takes control over a particular corporate debtor. Under Section 32 A of the IBC Code.
37. Section 32A protects a successful resolution applicant of a corporate debtor, by providing that in a CIRP, which contemplates a change in ownership, then for any criminal offence committed prior to the commencement of CIRP, neither would the corporate debtor be prosecuted, nor would any action be taken against the property of such corporate debtor. This ensures that no past liability is foisted upon the successful resolution applicant, who steps into the shoes of the outgoing management of the corporate debtor.
38. It is submitted that the Forensic Report has been prepared under the provisions of the RBI Master Directions. The intent was clear i.e. for a framework whereby banks would be enabled to detect and report frauds and pave way for investigative agencies to commence investigations and

proceedings. The RBI Master Directions provide for penal provisions which would be attracted in the event any borrower is held guilty of fraud. However, a safeguard has also been provided in the event the existing promoters/management have been replaced and the borrower is completely delinked from the erstwhile promoters/management.

39. In light of the above, it is submitted that the concerns of the Applicant are devoid of any merit.
40. With reference to four grounds raised by the Applicant, Respondent No.3 has contended as follows:

(i) *Neither the fact that the forensic audit was conducted nor the Forensic Report itself was disclosed to the Applicant.*

- Recourse under the RBI Master Directions *de hors* the proceedings under the Code. The offences were committed prior to the commencement of the CIRP, for which actions has been taken under the RBI Master Directions i.e. complaints with the investigative agencies. However, these proceedings pursuant to the Forensic Report would not have any impact on the Applicant or its Resolution Plan approved by the Hon'ble NCLT, given the protection afforded to the Applicant (as stated in paragraphs 11-15

hereinabove).

- In any event, the scheme under the RBI Master Directions does not warrant sharing of any information, including but not limited to the Forensic Report, with any third parties, which includes the Applicant.

(ii) *The forensic audit being conducted during the subsistence of the CIRP of the Corporate Debtor, being relevant information as envisaged under the Code ought to have been provided to the Applicant;*

- What is to be appreciated is that the forensic audit was conducted for offences committed prior to commencement of CIRP and not the fact that it was conducted during the subsistence of the CIRP. All information that was required for the Applicant to assess the financial condition of the Corporate Debtor was provided by Respondent No.2 in the Information Memorandum (“IM”).
- The IM was prepared by Respondent No.2 in accordance with Section 29 of the Code. All “relevant information” as required under Section 29 of the Code was provided to the Applicant. The purpose of the IM is to assist a resolution applicant to make a well-rounded decision qua the value of

resolution plan proposed and also to support the resolution applicant's decision making.

- Section 29 of the Code read with Regulation 36 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”) does not warrant any obligation members of the CoC to disclose information such as the Forensic Report Information.
- Without prejudice to the above, in any event the IM was prepared prior to the date of issuance of Forensic Report i.e. October 15, 2020. Further, the Forensic Report was itself issued post approval of the Resolution Plan by the CoC on March 4, 2020.
- The duty is imposed on Respondent No.2 under the Code to provide all material and vital information to potential resolution applicants. Respondent No.3 not in a position to disseminate the Forensic Report Information to any third parties. Further, Under the extant provisions of the Code (along with the rules and regulations thereunder) concerning the preparation of the IM, no duty has been

imposed on CoC members (such as Respondent No.3) to provide information to potential resolution applicants.

(iii) *The classification of the loan account of the Corporate Debtor as fraud is a significant event and a “Material Adverse Change” having a bearing on the implementation of the Resolution Plan.*

➤ Without prejudice to the Preliminary Submissions, the Material Adverse Change clause in the Resolution Plan is meant to provide an exit for the Applicant in the event of unforeseeable circumstances that prevent it from fulfilling the terms of the Resolution Plan. Material Adverse Change can be resorted to in the event of impossibility of performance of the Resolution Plan. The aforesaid definition is essentially a force majeure clause. A force majeure clause can be resorted to in the event of impossibility of performance of a contract, beyond the control of the parties. The classification of the Corporate Debtor's account as a fraud account, in no manner renders the implementation of the Resolution Plan impossible.

(iv) *Given the allegation of fraud committed by the Corporate Debtor, it is incumbent that the Applicant be provided with the information sought,*

as fraud vitiates everything.

- Without prejudice to the Preliminary Submissions, classification of the Corporate Debtor's account as a fraud account is not a Material Adverse Change which would render implementation of the Resolution Plan impossible, thereby permitting the Applicant to terminate the Resolution Plan.
- The Applicant has positively averred that it does is committed to implementing the Resolution Plan. The processes under the RBI Master Directions are a separate regime applicable to banks, independent of the processes under the Code. There is no overlap in the process under the RBI Master Directions and the Code. There is no legal bar which prevents the processes to commence in parallel, and the two serve very different objectives.

41. In light of the above, it is respectfully submitted that this Hon'ble Tribunal must ensure that the Resolution Plan must be implemented at the earliest. Non-implementation is against the spirit, object and intent of the Code, which provides for a time bound process for resolution of stressed assets. Further, making the implementation subject to conditions

like the review of the Forensic Audit Report, is legally impermissible. The Applicant and its affiliates cannot be permitted to gain undue benefit at the cost and peril of other stakeholders.

42. In the circumstances, Respondent No.3 submits that the Applicant is not entitled to reliefs as prayed for. Therefore, Respondent No. 3 humbly prays that the captioned application ought to be dismissed *in limine* with exemplary costs. Without prejudice to the above, it is submitted that the Respondent No. 3 is willing to abide by the directions/orders passed by this Hon'ble Tribunal.

Findings:

43. At the outset we have considered law laid down in the case of Ebix (Supra) relied by respondents the relevant excerpts of ***Ebix (supra)*** are reproduced hereinbelow:

“175..... Section 31(1) ensures that the Resolution Plan becomes binding on all stakeholders after it is approved by the Adjudicating Authority. The language of Section 31(1) cannot be construed to mean that a Resolution Plan is indeterminate or open to withdrawal or modification until it is approved by the Adjudicating Authority or that it is not binding between the CoC and the successful Resolution Applicant.”

179. If the appellants' claim were to succeed, a clause enabling a Resolution

Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3) ... Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute However, conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable.....

182..... A conditionality which allows for further negotiations, modification or withdrawal, once the Resolution Plan is approved by the CoC would only derail the time-bound process envisaged under the IBC.

184. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan.....

185. Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60 (5)(c). In a decision of a three judge Bench of this Court in Gujarat Urja (supra), it was held that,

“the NCLT’s residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do”. Further, the court observed that “this Court must adopt an interpretation of the NCLT’s residuary jurisdiction which comports with the broader goals of the IBC”. The effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtors.

187. Permitting the Adjudicating Authority to exercise its residuary powers under Section 60(5) to allow for further modifications or withdrawals at the behest of the successful Resolution Applicant, would be in the teeth of the decision of this Court in Essar Steel (supra) which held that “[s]ection 60(5)(c) cannot be used to whittle down Section 31(1) of the IBC, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority.

(emphasis supplied)

44. On a perusal of the aforementioned paragraphs of ***Ebix (supra)***, it is abundantly clear that it is not open for the Applicant to either seek any

modification/amendment of the Resolution Plan or withdraw the Resolution Plan.

45. The said position is also reiterated by the Hon'ble Supreme Court in ***Karad Urban Co-op Bank Limited vs. Swapnil Bhingardevay & Ors. [(2020) 9 SCC 729]*** wherein the Court held as under:

“14. The principles laid down in the aforesaid decision make one thing very clear. If all the factors that need to be taken into account for determining whether or not the corporate debtor can be kept running as a going concern have been placed before the Committee of Creditors and the CoC has taken a conscious decision to approve the resolution plan, then the adjudicating authority will have to switch over to the hands off mode....”

46. We are conscious of the fact that the process under the RBI Master Directions and the implementation of the Resolution Plan under the Code are two entirely different streams, being independent and unrelated to each other. The Applicant cannot be permitted to delay implementation of the Resolution Plan under the pretext of the non-disclosure of the Forensic Audit Report under the RBI Master Directions. In the background of above facts judgement in Ebix (Supra) is distinguishable for following reasons:

- i. The Ebix Judgment dealt with issues pertaining to withdrawal/modification of the resolution plans by the resolution applicants, where the said resolution plans were approved by the committee of creditors however were pending approval by the Adjudicating Authority. However, in the present case, the Applicant is not seeking to either amend or modify its Resolution Plan and rather wants to implement the Resolution Plan, subject to perusal of the relevant excerpts of the Forensic Report, which the Respondents have continuously denied.
- ii. In Ebix Judgment the Supreme Court was dealing with a situation where implementation of a resolution plan is withdrawn at the behest of the successful resolution applicant basis certain media reports, which the court has held to be inherently unviable. The judgment however does not deal with the situation where the financial creditors/resolution professional deny sharing of the information available with them in the form of a Forensic Report that was mandated by lenders who are part of the CoC especially to a resolution applicant who has always maintained that it is keen on implementing the resolution plan.

47. Having considering the case of applicant, affidavit in reply of Respondent and submissions advance by the Learned Counsel for the parties to this application and the records it is noted that after the approval of Resolution Plan by this Adjudicating Authority on 03.12.2020, there had been discussions on sharing of the contents of Forensic Audit Report concerning the Corporate Debtor by Respondent No.3 Bank with Applicant in his capacity as Successful Resolution Applicant. In fact documents reveals that R-3 had sent email to applicant sometime in April-May 2021 indicating its willingness to share the information with the applicant with a view to have effective implementation of the Resolution Plan, Subject to applicant entering into “Non Discloser Agreement” with R-3 and also agreeing with applicant to share with relevant excerpts concerning of the Corporate Debtor.
48. It would not be out of place to mention here that after applicant become aware during the Monitoring Committee meeting held in January, 2021 and also on the basis of news reports *inter alia* classifying RITL, RCOM, RTL accounts as fraud. In accordance with guidelines issued by RBI had requested for the relevant details from the Respondents including the Forensic Audit Report and thereafter reiterated his request from time to time. The applicant in support of his case for providing him Audit

Report, complaints made to investigation agencies and / any other material had also relied upon the legal opinion dated 10.02.2021 of Justice B N Shrikrishna (Retd.) who having regards to Sec 29 of IBC and Regulation 36(2) (h) of CIRP Regulations observed that Forensic Audit Report and complaints filed with the investigating Agencies ought to be provided to the applicant. Legal opinion referred above is forming part of applications.

49. We have noted that R-1 CoC, nor R-2 the Erstwhile RP had not provided any legal basis for not providing copies of the document sought by applicant nor we find any legal embargo of relevant circulars if any or directions which prevents from providing such information to the Successful Resolution Applicant. We find that such vital and material information concerning to the Successful Applicant concerning the affairs of the Corporate Debtor would certainly help in implementing the Resolution Plan however, in the instance application such vital information is being withheld from the applicant though R-3 Bank after several follow ups by the applicant vide its email dated 17.04.2021 agreed to share the information sought by the applicant, subject to execution of Non Discloser Agreement to maintain confidentiality of the information to be provided to the applicant. It is also material note that applicant by

his response dated 19.04.2021 expressed his readiness and willingness to execute the “Non Discloser Agreement”. In response to same R-3 had even shared the draft of said agreement on 22.04.2021 to which the applicant suggested certain changes to ensure the entire information sought i.e. (i) complete forensic audit report; and (ii) all complaints made/ filed with the investigating agencies, regulatory authority (ies) are provided.

50. In response to Applicant’s email dated 28th April 2021, the Applicant is informed by R-3 vide its email dated 18th May 2021 that the Applicant can be permitted to peruse on a conditional basis, selective information from the Forensic Audit Report as determined by the Respondent Nos. 3 to 5. As such it is noted that by this communication R-3 Bank was not agreeable to share the Forensic Audit Report or copy of complaint filed with the Investigating Agencies but had agreed to allow applicant to perused the Forensic Audit reports observations pertaining to RITL and had also agreed for modification as suggested by the applicant in Non-Discloser Agreement.

51. It would not out of the place to mention here that the status report dated 01st April 2021 submitted by the erstwhile RP on behalf of the Monitoring Committee specifying the status implementation of the Resolution Plan

to some extent highlight the applicant's concern since he is not shared with the Audited Forensic Report and or complains made by the Bank to the Investigating Agencies. We have noted that the Forensic Audited Report on the basis of which financial institutions, Banks determines the accounts as fraud and as well as complains made by such financial institutions to the investigating agencies and findings therein are important for Successful Resolution Applicant for successful implementation of the Resolution Process. The stage of CIRP in fact becomes irrelevant on account of the fact that such information relates to a issue of fraud of the Corporate Debtor.

52. We also find that applicant is entitled to know the financial impact of the alleged fraud reported; as all the financial information of the Corporate Debtor provided to the applicant was admittedly on the basis of no fraud and subsequently the applicant in his capacity as Successful Resolution Applicant comes across any fraud or fraudulent entries from the financial of the Corporate Debtor that necessarily has impact on his implementation of Plan and keeping this view in mind we are of the opinion that the applicant is entitled for the records prayed for subject to he is entering into Non Discloser Agreement with R-3 bank and other concern financial institutions. The relief as sought also needs to be

allowed as the applicant though as a matter of right was not entitled to receive such records, in the case in hand the development has occurred after the applicant was declared Successful Resolution Applicant and was deprived of such information in spite of approaching erstwhile RP and Monitoring Committee.

Having considered the facts involved in the application and for the reason stated as above the application is liable to be allowed in the interest of justice as per order below:

- i. R-3 State Bank of India shall share excerpts of information with reference to the “Audited Forensic Report” with regard to the Corporate Debtor as agreed by said Respondent vide its e-mail dated 18.05.2021, subject to applicants entering in “Non-Disclosure Agreement” with the said Bank and other financial institutions if any, as such knowledge of facts will facilitate smooth implementation of Resolution Plan.
- ii. R-3 shall be at liberty to share all that information and excerpts thereof pertaining to the Corporate Debtor for which applicant is Successful Resolution Applicant.

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA NO. 1110/MB/C-I/2021

In

C.P. (IB) No. 1385/MB/C-I/2017

iii. Needless to state that by this order there shall be no change in terms of approved Resolution Plan including payment schedule etc. therein.

53. With the aforesaid observation the present **IA No. 1110 of 2021 In C.P (IB) No. 1385/MB/C-I/2017** stands disposed of as allowed in above terms.

Sd/-

KAPAL KUMAR VOHRA
MEMBER (TECHNICAL)
16.03.2022

Sd/-

JUSTICE P. N. DESHMUKH (RETD.)
MEMBER (JUDICIAL)

SAM