

**IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
CAMP AT CHENNAI**

Under Section 60(5) of the IBC, 2016

Miscellaneous Application No. 1750 of 2019 in CP 2054 (MB) of 2018

**Mr Rajiv Chakraborty,
Resolution Professional of
Uttam Galva Metalics Limited**

... Applicant

In the matter of

Mr. Rajiv Chakraborty

Versus

**1. State Bank of India on
Behalf of the Committee of
Creditors**

**... Respondent 1/
Committee of Creditors**

Versus

2. Uttam Galva Metalics Limited

**... Respondent 2/
Corporate Debtor**

Order delivered on: 06.05.2020

CORAM

B. S.V. PRAKASH KUMAR, ACTING PRESIDENT

For the Applicant : *Mr.Rajiv Chakraborty, Resolution Professional
Ms.Fatema Kachwalla and Mr.Gautam Ankhad,
Advocates and Mr.Ahsan Allana, Sr. Advocate
i/b J.Sagar Associates*

For the Resolution Applicant: Mr.Rohan Rajadhyaksha, Mr.Suharsh Sinha & Mr.Dhirajkumar Totala, Advocates

*For the Operational Creditor: Mr. Shyam Kapadia and Mr. Vividh Tandon Advocates
For Trilegal*

*For the Committee of Creditors: Ms.Misha, Ms.Shivani Sinha, Mr.Vaijayant Paliwal &
Ms.Mahima Sareen, Advocates
Shardul Amarchand Mangaldas & Co.*

&

Miscellaneous Application 1751 of 2019 in CP 1830 (MB) of 2018

Mr.Rajiv Chakraborty,
Resolution Professional of
Uttam Value Steel Limited **... Applicant**

In the matter of

Mr.Rajiv Chakraborty

Versus

**1. State Bank of India on
Behalf of the Committee of
Creditors**

**... Respondent 1/
Committee of Creditors**

Versus

2. Uttam Value Steel Limited

**... Respondent 2/
Corporate Debtor**

CORAM

B. S.V. PRAKASH KUMAR, ACTING PRESIDENT

For the Applicant : *Mr.Rajiv Chakraborty, Resolution Professional
Ms.Fatema Kachwalla and Mr.Gautam Ankhad,
Advocates and Mr.Ahsan Allana, Sr. Advocate
i/b J.Sagar Associates*

*For the Resolution Applicant: Mr.Rohan Rajadhyaksha, Mr.Suharsh Sinha &
Mr.Dhirajkumar Totala, Advocates*

*For the Operational Creditor: Mr.Zal Andhyarujina, Senior Counsel, Ms.Akanksha Agrawal,
Mr.Neerav B Merchant & Mr. Bharat B Merchant, Advocates
i/b Thakordas & Madgavkar.*

*For the Committee of Creditors: Ms.Misha, Ms.Shivani Sinha, Mr.Vaijayant Paliwal &
Ms.Mahima Sareen, Advocates
Shardul Amarchand Mangaldas & Co.*

ORDER

Per: B.S.V. PRAKASH KUMAR, ACTING PRESIDENT

Order pronounced on: 30.04.2020

There are two companies namely M/s. Uttam Galva Metalics Limited (CP/2054(MB)/2018) (herein after referred as “**Metallics**”) and M/s. Uttam Value Steel Limited (CP/1830(MB)/2017) (hereinafter referred as “**Value Steel**”) against which Corporate Insolvency and Resolution Process (CIRP) is independently initiated and thereafter for these two companies

functioning being inter linked to each other, NCLT – Mumbai Bench ordered to take up joint hearing on the Resolution Plans filed in the respective company petitions considering the fact that these two companies functioning is inter linked to each other.

2. In view of the same, the Resolution Plans filed against the respective companies by the Resolution Applicant namely Consortium of Carval Investors LLP, New York and Nithiya Capital Resources Advisors LLP, Middlesex, United Kingdom, (hereinafter called “**Carval**”) being approved by the respective CoC’s with requisite majority i.e. with 88.9% votes in the meetings of the CoC held on 21.04.2019, the Resolution Professional namely Mr. Rajiv Chakraborty (hereinafter called as “the RP”) filed the Resolution Plans approved by the respective CoCs before this Bench for approval u/s 31 of the Code.

3. It is also pertinent to mention here that, while these Resolution Plans pending for approval of this Adjudicating Authority, the unsuccessful Resolution Applicant “Consortium of Investment Opportunities IV Pte. Ltd., Singapore, Synergy Metals and Mining Fund LLP, Dubai and Art Special Finance (India) Limited, New Delhi (hereinafter called as “**SSG**”) filed two applications, and along with, one of the Operational Creditor’s namely M/s. Noble Resources International Pte Limited (hereinafter referred as “**Noble**”) also filed a Miscellaneous Application assailing the

action of the CoC in approving the resolution plan in Metallica, after due consideration, these applications were dismissed on merits.

4. In the backdrop of this factual history, the CoC moved urgent application during lock-down owing to COVID-19 crisis for hearing of applications pending for disposal u/s 31 of the Code citing the reason if MA/1750/2019 in CP/2054/2018 and MA/1751/2019 in CP/1830/2017 were not disposed of before 30.04.2020, the performance guarantee of ₹250Crore given by this Resolution Applicant would expire on 30.04.2020.

5. Against these applications seeking urgent hearing, Noble Counsel has raised an objection saying that since NCLT itself notified in a Notice dated 22.03.2020 stating that hearing on Resolution Plans would not be considered as urgent hearing, Applications pending for hearing u/s 31 of the Code should not be taken up for hearing.

6. As to this objection, I am of the view that when money that is likely to come to the public institutions such as Banks is stuck due to pending approval of the Resolution Plans owing to COVID-19 crisis, at the same time, when Banks are under obligation to keep supplying money to the citizens of the country stuck in lockdown, if the Banks, in this critical situation, are restrained from realizing its dues from the sources available, it could further cripple the business of banking.

7. When Circular was issued by the NCLT, this difficulty was not visualized, therefore the notification given stating that the approval of the resolution plans would not be contemplated as urgent hearing should not become hindrance to take up hearing on the applications already pending before this Bench since long. In view of the same, the unnumbered applications sought for urgent hearing are hereby allowed. For the counsel argued on MA/1750/2019 and MA/1751/2019, they are accordingly disposed of as follows:

MA/1750/2019 in CP/2084(MB)/2018:

8. As to Metallics, CIRP was commenced on 11.07.2018, thereafter the CIRP period was extended for another 90 days i.e. 07.01.2019 expiring on 07.04.2019 and another extension was given up to 07.05.2019. In the meanwhile, on the resolution applications received, the CoC shortlisted Carval Resolution Plan. Before it was put to approval of the CoC, the RP issued a Certificate stating that Carval plan is in compliance with Sec.30(2) of the Insolvency and Bankruptcy Code, 2016, over which, the CoC approved Carval plan with 88.9% votes in the meeting held on 21.04.2019, in furtherance of it, the RP, on 07.05.2019, filed this application u/s 30(6) r/w Sec.31 of the Code seeking approval by detailing the provisions for making payment to the stakeholders set out in the resolution plan and other terms of the plan, which are as follows:

SL No	Category of Stakeholder	Amount Claimed (₹)	Amount Admitted (₹)	Amount Provided under the Plan	Amount Provided to the Amount Claimed (%)
1	Other Secured Financial Creditors	3455.57	3455.50	921.92	26.58%
2	Other Unsecured Financial Creditors	178.58	178.58	47.74	26.58%
2	Operational Creditors	470.68	383.85	1.00	0.18%
	Government	158.16	158.16		
4	Unpaid Insolvency Process Resolution Cost	—	—	86.20	—
	Total	4263.00	4176.09	1056.86	

The summary of payments to be made by the Successful Resolution Applicant under the Resolution Plan is as under:

	Particulars	Amount Provided in the Resolution Plan (₹)
A	Upfront Settlement Amount	350.00
B	Equity infusion	60.00
C	Bank Guarantee	1.17
D	Total Upfront Fund Commitment (A+B+C)	411.17
E	Deferred Payment to Creditors (In lieu of which secured non-convertible debentures for an amount of ₹500Crore are issued to Financial Creditors on the	700.00

	terms and conditions as set out in Annexure 4 of the Resolution Plan)	
F	Definitive Settlement Amount	1,111.17
	<u>Contingent Payments available to Financial Creditors</u>	
G	Pass through from recovery from trade receivables	110.00
H	Pass through from mega incentive receivables	180.00
I	Pass through on Recovery from Advance & Investments	166.00
J	Total Contingent Payments available to Financial Creditors (G+H+I)	456.00
K	Equity participation offered to Financial Creditors	5% (Equity share capital of ₹3Crore)

9. This Consortium of these Resolution Applicants is global investment fund and seasoned credit investors in distressed securities both in India and Abroad. The Resolution Applicant issued a Certificate dated 21.04.2019 certifying the compliance of the Successful Resolution Applicant u/s 29A of the Code. The RP has also issued Compliance Report dated 21.04.2019 in relation to the resolution plan submitted by the Resolution Applicant.

10. It has also been further stated that this plan would be implemented through a Special Purpose Vehicle incorporated for this purpose.

Subsequent thereto, the Corporate Debtor will undertake capital reduction, whereby all the equity and the preference shares of the Corporate Debtor shall stand cancelled without any pay out. The face value of the equity shares shall be transferred to the capital reserve of the Corporate Debtor.

11. On the Closing Date (the later of the date when the Resolution Applicant acquires control of the Corporate Debtor or Uttam Value Steel Limited), the SPV (formed on the Closing Date) along with the incoming shareholders shall subscribe to ten lakh equity shares of the Corporate Debtor at a face value of ₹10 for an aggregate amount of ₹1 Crore.

12. On and from the Closing Date, all existing Directors of the Corporate Debtor shall be deemed to have resigned and vacated their office and the Board of Directors of the Corporate Debtor shall be reconstituted by the Successful Resolution Applicant.

13. It is submitted that since the Resolution Plan was approved prior to the amendment dated August 16, 2019 in Section 30(2)(b) of the Insolvency and Bankruptcy Code, 2016 (the “Code”) related to “financial creditors who do not vote in favor of the resolution plan” and such amendment being applicable to the Resolution Plan by virtue of Explanation 2(i) to Section 30(2)(b) of the Code, it is hereby confirmed that the payment being made to the financial creditors who have not voted in favor of the Resolution Plan which is more than the amount payable to such creditors

in accordance with sub-section(1) of section 53 in the event of a liquidation of the Corporate Debtor. Accordingly, it is also submitted that in compliance with the Code and regulations made there under, while implementing the Resolution Plan, such financial creditors shall be paid in priority to the financial creditors who have voted in favor of the Resolution Plan and this be recorded for compliance in the order being passed in Application for Approval.

14. After the Effective Date (the date on which the Adjudicating Authority passes order approving the Resolution Plan), the Resolution Professional shall cease to be involved in the management and affairs of the Corporate Debtor and during the period between the Effective Date and the Closing Date, monitoring committee shall be constituted which shall comprise of two representatives of financial creditors, two representatives of Successful Resolution Applicant and one external expert nominated by the Successful Resolution Applicant and one external expert nominated by the Successful Resolution Applicant and the financial creditors. The monitoring committee shall supervise the implementation of the Resolution Plan, which shall be dissolved after the Closing Date. The Successful Resolution Applicant intends to retain all employees and supplement with certain key managerial personnel.

15. The implementation of the Resolution Plan is subject to certain conditions as set out in Part D – Item 1 of the Resolution Plan. One of the

material conditions of the Resolution Plan is that the Resolution Plan submitted by the Successful Resolution Applicant for Value Steel to be approved by its committee of creditors and the control of Value Steel be transferred to the Successful Resolution Applicant. It is submitted that the said condition on inter-linkage with Value Steel has been approved by the committee of creditors of the Corporate Debtor.

16. The Successful Resolution Applicant in its Resolution Plan has sought certain reliefs and concessions from the Adjudicating Authority. The said reliefs and concessions are set out under **Annexure “A”** to this present written submission. It is submitted that the implementation of the Resolution Plan is not subject to the grant of the said reliefs and concessions by the Adjudicating Authority. Even if the reliefs and concessions as sought under Annexure A are not granted, the Successful Resolution Applicants will implement the Resolution Plan as per its terms.

17. On looking at the reliefs and concessions sought by the Applicant, this Bench has approved the concessions to the extent mentioned below:

(i) On permission for appointment of an Observer, this Bench hereby observes that the Applicant would appoint an Observer for its assessment but whereas the observations made by such Observer shall not repudiate either the value of the company or any of the assessments made in valuing this company.

(ii) With regard to approvals and permissions which are necessary for the operations of the company, the company shall obtain necessary approvals required under the law for the time being in force within a period of one year from the date of approval of the Resolution Plan u/s 31 of the Code.

(iii) No investigations shall be initiated against the actions or proceedings in relation to any non compliance of law in force prior to initiation of CIRP.

(iv) With regard to such non compliance, if the Resolution Applicant is required to take any further approvals; it shall be permitted to take such approvals within one year from the date of approval of this Resolution Plan.

(v) As to various Income Tax issues and other tax issues, the Corporate Debtor is entitled to seek exemptions over the actions or non compliances that occurred before initiation of CIRP, the Corporate Debtor or the Resolution Applicant cannot seek any exemption over any of the actions of this company indulged in after approval of the Resolution Plan.

(vi) The Corporate Debtor is entitled to get exemptions over the procedural requirements set out u/s 66 of the Companies Act, 2013 to the extent permitted under law. With regard to levy of Stamp Duty, it

is also not permitted unless any explicit provision exempts payment of Stamp Duty under Insolvency and Bankruptcy Code, 2016.

(vii) The Competition Commission of India shall permit the Resolution Applicants to make payment of CIRP costs and Liquidation Value due to the Operational Creditors within the prescribed period under the IBC and CIRP Regulations.

(viii) SEBI & Stock Exchanges shall be bound by the resolution plan to the extent that is not inconsistent with their Regulations and to the extent IBC prevails over SEBI Regulations.

(ix) With regard to terms of the utility and facility sharing agreements between the Corporate Debtor and Value Steel, and the approval letter dated 07.10.2014 released by the Central Railways, Railways shall not exercise any specific termination rights available to it or take any adverse actions under the utility and facility sharing agreements based on the prior inactions or actions of the company before initiation of CIRP process, in the event the resolution plan is terminated before initiation of CIRP, the consequential action against the Corporate Debtor shall be waived.

(x) Likewise, with regard to the operation of the private freight terminal at Wardha dated 02.02.2013, executed by the Central Railways Administration and the Corporate Debtor, the Central

Railways shall waive all objections/liabilities of the company arising out of the initiation of CIRP and shall not exercise any specific termination rights available under the agreement based on some prior inaction of the company before initiation of the CIRP.

(xi) With regard to Licence Agreement dated 29.08.2008 executed between Inox Air Products Limited (“Inox”) and the Corporate Debtor for the purpose of Inox allowing and permitting the Corporate Debtor to use on license basis the equipment comprised in a 200 TPD gas plant located within the manufacturing facility of the company at Wardha, since the said Inox is not a party before this Bench, this Adjudicating Authority cannot give any mandatory directions to Inox with regard to the contract between the Corporate Debtor and the Inox. But it is made clear that this Resolution Applicant/Corporate Debtor is not liable to pay any liability which is not admitted as claim against the Corporate Debtor.

(xii) It is obvious that the Corporate Debtor is not liable for non compliance, default and breach until before initiation of CIRP in relation to the contractual arrangements with the counter parties including the Government Authorities.

(xiii) As to the proceedings, investigations, enquiries initiated against the company before initiation of CIRP, they shall be unconditionally abated without any liability against the Corporate Debtor.

(xiv) Whatever approvals taken for the functioning of the Corporate Debtor before initiation of CIRP, they shall continue unless this company subsequently violates such approvals.

(xv) The relevant Government Authorities in relation to tax dues shall waive any tax or interest to the period before initiation of CIRP and shall not initiate any penal proceedings for non fulfilment of any obligations of the Corporate Debtor in relation to which benefit has already been received by the Corporate Debtor prior to initiation of CIRP.

(xvi) Since the Adjudicating Authority is not aware of the intricacies involved in respect to the Customs Duty and other Import Licences, it is hereby clarified if any payables left pending, the same is hereby waived, but as to the payments having over riding effect upon Insolvency and Bankruptcy Code, 2016, it is left open to the Resolution Applicant to proceed in accordance with law.

(xvii) With regard to recasting of Financial Statements for the period mentioned in the resolution plan, it is permitted to the extent that is not inconsistent with the law in force.

(xviii) The Corporate Debtor has right to use the trade mark “UTTAM” and any other trade mark or trade name which is used by the Corporate Debtor prior to the date of approval of the Resolution

Plan. In the event any liabilities in relation to the use of these trademarks pending before initiation of CIRP, they are hereby extinguished.

(xix) In relation to the titles of the land parcels, the Corporate Debtor is open to pursue its remedies as before.

(xx) With regard to carry forward of losses, the amendment brought to Sec.79 of the Income Tax, Act, 1961 is applicable to the Corporate Debtor.

(xxi) The Corporate Debtor shall continue to be eligible for the benefits under the Government of Maharashtra's Resolution No.PSI 2018/CR-117/IND-8 on Modalities for sanction and disbursement of Industrial Promotion Subsidy under GST regime to Mega/Ultra Mega Projects under PSI-1993, PSI-2001, PSI-2007 and PSI-2013.

(xxii) For the liability of taxes and penal charges payable to the various tax authorities being waived, the respective authorities may issue no objection certificates to the Corporate Debtor as contemplated u/s 281 of the Income Tax Act, 1961.

M.A.1751/2019 – Uttam Value Steel Limited:

18. It is another corporate debtor company which has been linked up to Metallica for hearing on application for approval of the Resolution Plan by this Adjudicating Authority.

19. In this company, CIRP was initiated on 26.06.2018, thereafter 90 days extension was given up to 03.04.2019, and CIRP was again extended on 22.04.2019 up to 07.05.2019. For the procedural aspect in approving this plan with requisite majority by the CoC was done as done in the case of Metallica, instead of repeating as to how Carval emerged as a Successful Resolution Applicant on approval of the Resolution Plan by the CoC on 21.04.2019; by holding that this plan was approved by the CoC as per procedure, I hereby straight away reflect the values and the provisions made by the Resolution Applicant, which are as follows:

SL No	Category of Stakeholder	Amount Claimed (₹)	Amount Admitted (₹)	Amount Provided under the Plan (₹)	Amount Provided to the Amount Claimed (₹) (%)
1	Other Secured Financial Creditors	2492.03	2479.49	636.64	25.67%
2	Operational Creditors (non-related parties)	585.8	534.61	1	0.19%
	Employees	0.46	-	-	-
3	Unpaid Insolvency Process Resolution Cost	-	-	137.36	-
	Total	3078.29	3014.1	775.00	

20. The summary of payments to be made by the Successful Resolution Applicant under the Resolution Plan is as under:

(Amount in Crores)

	Particulars	Amount Provided in the Resolution Plan (₹)
A	Upfront Settlement Amount	275.00
B	Equity infusion	40.00
C	Bank Guarantee	3.19
D	Total Upfront Fund Commitment (A+B+C)	318.19
E	Deferred Payment to Creditors (In lieu of which secured non-convertible debentures for an amount of ₹500Crores are issued to Financial Creditors on the terms and conditions as set out in Annexure 4 of the Resolution Plan)	500.00
F	Definitive Settlement Amount	818.19
	<u>Contingent Payments available to Financial Creditors</u>	
G	Pass through from recovery from trade receivables	88.00
H	Pass through from mega incentive receivables	90.00
I	Pass through on Recovery from Advance & Investments	82.00

J	Total Contingent Payments available to Financial Creditors (G+H+I)	260.00
K	Equity participation offered to Financial Creditors	5% (Equity share capital of ₹2Crore)

21. As in the case of Metallics, the Applicant issued a Certificate dated 21.04.2019 certifying the compliance u/s 29A of the Code, and the RP has also issued Compliance Report dated 21.04.2019 in relation to the resolution plan submitted by the Resolution Applicant. It has also been further stated that this plan would be implemented through a Special Purpose Vehicle incorporated for this purpose. Subsequent thereto, the Corporate Debtor will undertake capital reduction, whereby all the equity shareholders and the preference shares of the Corporate Debtor shall stand cancelled without any pay out. The face value of the equity shares shall be transferred to the capital reserve of the Corporate Debtor.

22. On the Closing Date (the later of the date when Resolution Applicant acquires control of the Corporate Debtor or Metallics), the SPV (formed on the Closing Date) along with the incoming shareholders shall subscribe to 10,00,000 equity shares of the Corporate Debtor at a face value of ₹10 for an aggregate amount of ₹1Crore.

23. On and from the Closing Date, all existing Directors of the Corporate Debtor shall be deemed to have resigned and vacated their office and the board of directors of the Corporate Debtor shall be reconstituted by the Successful Resolution Applicant.

24. It is submitted that since the Resolution Plan was approved prior to the amendment dated August 16, 2019 in Section 30(2)(b) of the Insolvency and Bankruptcy Code, 2016 (the “**Code**”) related to “financial creditors who do not vote in favor of the resolution plan” (and such amendment being applicable to the Resolution Plan by virtue of Explanation 2(i) to Section 30(2)(b) of the Code), it is hereby confirmed that the payment being made to the financial creditors who have not voted in favor of the Resolution Plan is more than the amount payable to such creditors in accordance with sub-section(1) of section 53 in the event of a liquidation of the Corporate Debtor. Accordingly, it is also submitted that in compliance with the Code and regulations made there under, while implementing the Resolution Plan, such financial creditors shall be paid in priority to the financial creditors who have voted in favor of the Resolution Plan.

25. After the Effective Date (as defined in the Resolution Plan, means the date on which the Adjudicating Authority passes order approving the Resolution Plan), the Resolution Professional shall cease to be involved in the management and affairs of the Corporate Debtor and during the period between the Effective Date and the Closing Date, a monitoring committee

shall be constituted which shall comprise of two representatives of financial creditors, two representatives of Successful Resolution Applicant and one external expert nominated by the Successful Resolution Applicant and one external expert nominated by the Successful Resolution Applicant and the financial creditors. The monitoring committee shall supervise the implementation of the Resolution Plan, which shall be dissolved after the Closing Date.

26. The Successful Resolution Applicant intends to retain all employees and supplement that with certain key managerial personnel.

27. The implementation of the Resolution Plan is subject to certain conditions as set out in Part D – Item 1 of the Resolution Plan. One of the material conditions of the Resolution Plan is that the Resolution Plan submitted by the Successful Resolution Applicant for Uttam Galva Metallics Limited to be approved by its committee of creditors and the control of Uttam Galva Metallics Limited be transferred to the Successful Resolution Applicant. It is submitted that the said condition on inter-linkage with Uttam Galva Metallics Limited has been approved by the committee of creditors of the Corporate Debtor.

28. The Successful Resolution Applicant in its Resolution Plan has sought certain reliefs and concessions from the Adjudicating Authority as sought in Metallics. It is submitted that the implementation of the Resolution Plan

is not subject to the grant of the said reliefs and concessions by the Adjudicating Authority. Even if the reliefs and concessions as sought are not granted, the Successful Resolution Applicants will implement the Resolution Plan as per its terms.

29. Since the concessions and exemptions sought in this Resolution Plan being almost identical to the concessions and exemptions sought in the Resolution Plan approved by the CoC of Metallica, I hereby hold that whatever concessions and exemptions allowed in Metallica are equally applicable in this case as well. By allowing the concessions to the extent mentioned above, it is hereby clarified that the Corporate Debtor is entitled to waivers and exemptions to the extent permitted under various enactment in the light of the Insolvency and Bankruptcy Code, 2016.

Jatia Group Objections:

30. One Mr. Vinodh Jatia of Jatia Group submits that the total admitted debt of Jatia Group in UVSL is ₹423Crore and the Jatia Group exposure is 82% of the total operational debt. As against this claim, , Jatia Group is now under this plan only getting ₹82,00,000, i.e. 0.19% of the total admitted debt of ₹423Crore payable to this group.

Now the principal objection of Jatia Group is as follows:

I. Violation of IBC as amended, Corporate Insolvency Resolution Process:

31. This group submits that Carval filed the Resolution Plans in the respective Corporate Debtor companies with a rider that it is the sole prerogative of the Resolution Applicant to withdraw its plan without any liability if both the plans of the Carval are not approved by the CoC.

32. Since it has been reiterated that whenever plan is conditional, such plan should not be approved because a conditional offer by an offeror to the offeree will not amount to an open offer acceptable in the form that has been made. To substantiate this ratio, Jatia Group relied upon **Keventer Projects Ltd. Anr. vs. Union of India and Ors** (2013 SCC Online Cal 1966) to say that conditional offer is no offer.

33. Defending this argument, the CoC counsel submits that the business of Metallica and Value Steel are being inter-linked, the Resolution Professional already filed an application for interlinking of hearing of these two Resolution Plans understanding the commercial sense placed by the Resolution Applicant, and this Bench has already allowed interlinking of the approval of the plans of these two companies, therefore the CoC counsel says, now that point is not open to this Applicant to argue.

34. On hearing the submissions and counter submissions, it is pertinent to mention that the argument of the conditional offer will become an issue when a person made conditional order assails the decision of an offeree in rejecting its conditional offer. Whenever any open offer or a conditional offer is made and if the same is accepted by the offeree, the defence of the conditional offer will not be available either to the offerer or to the offeree. In this case, looking at the interdependence of these two companies, any person having commercial sense will ask for approval of plans in both the companies, so that he could run business effectively. Since this proposal being already approved by the CoC, no other condition is left to be performed by the CoC, now these plans cannot therefore be construed as plans with some uncertainty owing to the condition mentioned above. When any condition is mentioned in the plan and that condition is required to be fulfilled by the stakeholders after approval of the plan by the CoC, and accomplishment of the provisions of the plan is contingent upon some future actions after approval, then there could be a situation of uncertainty in future in fulfilling of the provisions of the plans, but here in this situation, since interlinking already been approved the Carval Plans alone being approved, nothing has remained contingent, the Resolution Applicant is under unconditional obligation to fulfil the provisions of the Plans, therefore I have not found any merit in the objection raised by Jatia Group.

II. Approval of the Carval Resolution Plan by CoC is in breach of proviso to Section 31 (4) of the Code:

35. Jatia Group has raised another objection stating that for there being a proviso u/s 31 (4) of the Code to obtain approval from Competition Commission of India (CCI) u/s 5 of the Competition Act prior to the approval of the Resolution Plans by the CoC, since the Resolution Applicant has failed to place approval of the CCI before the CoC prior to the approval of the Resolution Plan for combination by the CoC, these plans, in principle, shall be rejected by the CoC for want of CCI approval by the time plans were placed before the CoC.

36. As to factual aspect is concerned, the Resolution Applicant applied for approval of CCI on 20.04.2019 pursuant to requirement set out in proviso to Section 31(4) of the Code, but fact of the matter is, these plans were approved by the CoC on 21.04.2019 despite the Resolution Applicant failed to place CCI approval as on the date CoC approved the Resolution Plans of the Carval. However, Carval obtained CCI approval on 04.06.2019 i.e. after the resolution plans were approved by the CoC.

37. As against this factual aspect, Jatia Group counsel submits that when a proviso is carved out to a section making CCI approval as condition precedent prior to the approval of the resolution plans for combination by

the CoC, the CoC shall not approve the plans with the infirmity of the non filing of the CCI approval along with the Resolution Plans.

38. To substantiate this argument, Jatia Group counsel has relied upon various citations namely *S. Sundaram Pillai vs. V. R. Pattabiraman* (1985 ; 1 SCC 591), (*A. Chowgule and Company Ltd vs. Goa Foundation and Ors – 2008 ; 12 SCC 646*), (*HMT House Building Cooperative Society vs. Syed Khader and Ors*), (*Bangalore City Cooperative Housing Society Ltd. vs. State of Karnataka & Ors*), (*Mackinnon Mackenzie Ltd vs. Mackinnon Employees Union*), (*Babu Varghese & Ors vs. Bar Council of Kerala & Ors. ; SCC pp. 432-33, paras 31-32*), (*Taylor vs. Taylor which was followed by Lord Roche in Nazir Ahmad vs. King Emperor who stated as under (Nazir Ahmad case, IA pp. 381-82)*), (*Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh and again in Deep Chand vs. State of Rajasthan*), (*State of U.P. vs. Singhara Singh and the rule laid down in Nazir Ahmad's case was again upheld*), (*Arun Kumar and Ors. vs. Union of India and Ors.*), (*Arcelormittal India Pvt. Ltd. vs. Abhijit Guhathakurta, Resolution Professional of EPC Constructions India Ltd. & Ors.*)

39. In all these citations, the ratio set out is when a particular procedure is set out in the statutory provision to be followed; it should be done in that particular manner and failure to do so shall result in nullity.

40. If an action is part of cluster of actions, and such action is only accompanying action to main action, it cannot be blindly said that failing to comply with that mandate will tantamount to nullity of all other actions without looking into the consequences of noncompliance of such accompanying action.

41. In this case, the Resolution Applicant shall obtain CCI approval prior to the approval of the plans by the CoC, it is no doubt correct in the event CCI has rejected the approval sought, then it is obvious that approval given to the resolution plan by the CoC could get obviated for want of CCI approval.

42. In this case, CCI indeed has given approval to the resolution plans proposed by the Resolution Applicant, in a case of this nature, the procedural infraction could be harmonised by saying that the plans were validated by the CCI approval.

43. It is not that a ratio decided in one case could be generalised to apply to each and every situation. If the situation and underlying facts are different, especially when such post facto approval is not in depravation of justice, the ratio afore decided cannot be super imposed over the facts not identical to the facts of those respective cases cited by the Counsel.

44. The fundamental difference in IBC is speed is the essence of the Code. Every milestone under IBC is underlined with a deadline. At the

same time, I don't vouchsafe that compliances and conditions set out in IBC could be flouted under the cover of meeting with timelines. In the present case, the CoC already took two extensions for approval of plans by the CoC; therefore in a situation like this, CoC cannot remain waiting until approval is obtained from CCI. If for any reason approval is not given by the CCI, it will not pass through the window provided u/s 31 of the Code. One more fact to take into cognizance is, this is a condition set out under section 31, not under section 30 of the Code. Therefore, in the cases of combination, the Adjudicating Authority is mandated to examine as to whether approval is obtained from CCI or not, if not approved, it will not be approved by the Adjudicating Authority. Moreover, in the proviso, it is not said that if approval of CCI is not obtained before CoC approved the plans; the plan approved by the CoC would amount to nullity. Above all, it is not that plans are without approval of CCI, the difference is - approvals are ex-post facto approvals, not ex-ante approvals. If this difference makes any difference to the rights of anybody, then these approvals shall be put to test as to whether post facto approval caused any grievance to any of the stakeholders. It is not the case that by virtue of this post facto approval, Jatia group rights are affected. In view of the same, I hereby distinguish the applicability of the ratio afore mentioned to the present case facts.

45. CCI approval in my belief is no way connected to the commercial CoC examines, since CCI is the Regulatory authority to avoid unhealthy competition in the market, CCI approval is mandatory to the approval of the plan, so that this infraction would not become hindrance if the plan is approved by CCI after CoC has approved. Here plans were approved by CCI.

46. As to stakeholders of the company are concerned, it cannot become grievance of them, because approval or non approval will not change the payment obligation mentioned in the plans.

47. In view of the same, I hereby hold that there is no merit in the argument placed by Jatia Group counsel.

III. Discrimination against Operational Creditor.

48. Another grievance of Jatia Group is, though the claim against the Corporate Debtor is ₹423Crore, now by virtue of these Resolution Plans, since they are getting only 0.19% of its claim, their realization from this plan is inequitable to the proportion coming to the share of the Financial Creditors.

49. As against this point, the CoC counsel submits that the point to be tested is, as to whether Jatia Group as an Operational Creditor is deprived of getting their share as set out u/s 53 of the Code or not.

50. In this case, the Operational Creditor does not get any share under the waterfall mechanism set out under section 53 of the Code, the Financial Creditors themselves getting not even half of the claim they are entitled to realize from this Corporate Debtor. Such being the situation, this Operational Creditor cannot have any grievance saying that they are inequitably treated.

51. In spite of it, a provision has been set out for making certain payment to the Operational Creditor which may be only 0.19% out of their claim, but that cannot become its grievance because this operational creditor is not entitled to get if distribution is made as per section 53 of the Code. Fair and equitable treatment of the Operational Creditor does not mean that they shall be provided a share beyond their entitlement as set out u/s 53 r/w Section 30(2) (b) of the Code.

52. It has been reiterated in various judgements of Honourable Supreme Court (*K. Sasidhar vs. Indian Overseas Bank (2019 SCC Online SC 257)*; *Swiss Ribbons Private Limited vs. Union of India (2019 SCC Online SC 17)*; *CoC of Essar Steel India Limited vs Satish Kumar Gupta (2019 SCC Online SC 1478)*) that the commercial decision with regard to approval of the plan is within the domain of the CoC, the Adjudicating Authority is not expected to transgress into the commercial wisdom of the CoC in approving the plans. The rule is set out to examine as to whether the plan placed u/s 31 is in accordance with Sec.30 (2) of the Code.

53. It is not the case of this Operational Creditor that provision is not made as set out in Sec.30(2) of the Code, it is also not the case of this group that plans are in contravention of any law that is in force.

54. If at all equitable treatment is set as a test to approve the Resolution Plan ignoring the provisions of the Code, it always differs from case to case and from person to person. It is only a perception. Perception is always dependent upon the mindset of the person dealing with it, which ultimately will become a threat to predictability and certainty. When the Code is clear as to how to go about, with all humility I hold that this test is beyond the scope of Sec.53 r/w Section 30 (2) of the Code, for this reason only the Honourable Supreme Court time and again reiterated that the Adjudicating Authority shall not enter into the aspects left to be decided by the CoC.

55. As to maximisation of the assets of the Corporate Debtor and keeping the company as a going concern, it is the point to be decided by the CoC. Unless it is pointed out that the CoC examination is vitiated by fraud, the Adjudicating Authority is not expected to interfere with the decision of the CoC.

56. In view of the same, I have not found any merit in the argument of Jatia Group saying it is inequitably treated.

IV. Deliberate suppression of vital facts.

57. The allegation of Jatia Group is, CoC misrepresented that Mr. Johannes Sittard is a director of Nithiya Capital Resources Advisors LLP (NITHIYA) an entity of the Consortium of the Resolution Applicant, despite the fact Mr. Johannes Sittard has resigned as a director from Nithiya with effect 01.04.2018.

58. To say that it is material suppression, this Applicant ought to have filed supportings reflecting the absence of Mr. Johannes Sittard will make huge difference in fulfilling the objects of the resolution. No such evidence is placed.

59. By looking at the suppression a fact or failure to place a fact, whenever any fact is not reflected or overstated, it has to be tested as to whether such act will amount to material suppression causing difference to the rights of the parties. If it makes difference, it amounts material suppression, if not, then non-mention of a fact cannot be construed as material suppression. In this case, the Counsel has not mentioned as to whether such non-mention has caused grievance either to this Jatia Group or to any of the stakeholders, therefore I have not found any merit in this allegation.

60. There is another Operational Creditor, namely Noble Resources International Pte Limited (Noble) raised objections to the approval of the

resolution plans, on the premise that the plans approved by the CoC are contrary to the scheme of the Code and the CoC has taken an undue advantage of its voting rights to undercut the payout to the Operational Creditors.

61. On looking at the narration of facts given by the Operational Creditor, Noble counsel submits that Personal Bank Guarantee given by the Resolution Applicant is not as per the format set out in the RFRP; therefore such PBG should not have been accepted. It appears the Resolution Application filed revised PBG so as to meet the requirements as mentioned in the format. It is not the case of the Noble counsel that PBG given by the Resolution Applicant is not proportionate to the value of the plan. At the end of the day, one has to see as to whether PBG equivalent to the requirement has been given or not, while approving plans, it is quite common, the Resolution Applicant offers something, when something offered is not in compliance of the requirement, CoC would ask for compliance, if the applicant fulfills the compliance, CoC would further proceed with the plan. In this case also, same thing happened. PBG is normally taken to bind the Resolution Applicant to fulfill the plan; it will not make any difference to quantum of payment and timings mentioned in the plans. Therefore, I have not found any merit in the objections raised by Nobel. When the Operational Creditor they will only get their share as set out in the Code. It cannot be seen whether Operational Creditors are

receiving money equivalent to the money Financial Creditors getting, because operational creditors as a class cannot equate themselves with the financial creditors and ask for more than what they are entitled u/s 53 r/w section 30(2) of the Code. .

62. With regard to other objections, such as some financial creditors arising discussions in the CoC meeting with regard to the approval of the resolution plans, it is to be seen as to whether the Financial Creditors who raised queries in the meetings have voted in favor of the plan or against the plan and whether the approval is with requisite majority or not. If the approval is given with requisite majority, the discussions taken place in the meeting cannot invalidate the plans duly approved by the CoC. For the sake of transparency and to ascertain information, the CoC members clear their doubts; it does not mean raising a question by a member of the CoC will amount to casting doubt over the plan validly approved by the CoC.

63. In view of the same, I have not found any merit in the objections raised by Noble, henceforth they are hereby rejected.

64. Accordingly, the Resolution Plan approved by the CoC of Metallics and the Resolution Plan approved by the CoC of Value Steels are hereby approved with the concessions and exemptions granted above.

(B.S.V. PRAKASH KUMAR)
ACTING PRESIDENT

rajesh