NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH
Company Appeal (AT) (CH) (Ins.) No. 340 of 2022
&
I.A. Nos. 767 and 768 of 2022

[Arising out of Order dated 05.09.2022 passed by the Adjudicating Authority/National Company Law Tribunal, Hyderabad Bench-II in I.A. 283 of 2022 and IA 655 of 2022 in CP (IB) 372/7/HDB/2018]

IN THE MATTER OF:

Earthin Projects Limited
Registered office at
H-No. 1-1867 (B) Velamapalem Chitoor
Andhra Pradesh 517640
Email: earthinprojectslimited@gmail.com **...Appellant**

Versus

1. Mr. Anup Kumar Singh
Resolution Professional of Indu Projects Limited
Stellar Insolvency Professional LLP,
Suite IB, 1st floor, 22/28A, Manohar Pukar Road,
Near Deshopriya Park, Kolkata-700029.
West Bengal
Email: ip.induprojects@gmail.com **...Respondent No.1**

2. Indu Projects Limited
1009, Indu Fortune Fields, 13th Phase,
KPHB Colony, Hyderabad-500072,
Telangana,
Represented by its Resolution Professional, Mr. Anup Kumar Singh **...Respondent No.2**

Present:

For Appellant	:	**Mr. P. H. Arvindh Pandian, Sr. Advocate For Resolution Applicant** **For Mr. Avinash Amarnath, Advocate** **For Resolution Applicant**
For Respondents	:	**Mr. S. Ravi, Sr. Advocate for Resolution Professional & Corporate Debtor/ Respondent Nos. 1 & 2 respectively** **For Mr. Anup Singh, Resolution Professional** **For Mr. VVSN Raju, Advocate** **For Resolution Professional** **Mr. P.S. Raman, Sr. Advocate/ Intervener.**

J U D G M E N T
(Virtual Mode)
(25.11.2022)

NARESH SALECHA, MEMBER (TECHNICAL)

The present `Appeal' is filed against the 'Impugned Order' dated 05.09.2022 passed in IA 283 of 2022 and IA 655 of 2022 in CP (IB) 372/7/HDB/2018, by the 'Adjudicating Authority' (`National Company Law Tribunal', Hyderabad Bench-II), whereby, the 'Adjudicating Authority', dismissed the Petition filed under the Insolvency & Bankruptcy Code, 2016 (in short '**I & B Code', 2016**).

Brief Facts:

2. M/s Earthin Projects Ltd. is the 'Appellant' in present `Appeal', before this 'Appellate Tribunal' is the 'Successful Resolution Applicant'.

Mr. Anup Kumar Singh is a `Resolution Professional' of `Indu Projects Ltd.', is the 1st Respondent herein.

`Indu Projects Ltd.', is the 'Corporate Debtor' under 'Corporate Insolvency Resolution Process', is the 2nd Respondent herein.

3. On an application filed by the Bank of India as Financial Creditor of the Corporate Debtor (Indu Projects Ltd.), the 'Adjudicating Authority' admitted 'Corporate Insolvency Resolution Process' on 25.02.2019 and Mr. Gopi Krishna Byadigera was appointed as 'Interim Resolution Professional' on 05.03.2019. However, on the recommendation of the 'Committee of Creditors', Mr. Anup Kumar Singh was appointed as 'Resolution Professional' by the 'Adjudicating Authority', on 04.06.2019.

4. The 1st Respondent invited 'Expression of Interest' in Form-G on 16.07.2019 inviting prospective 'Resolution Applicants' to submit 'Expression of Interest' and seven prospective 'Resolution Applicant' participated, however only two prospective 'Resolution Applicants' submitted the 'Resolution Plan'. The 'Committee of Creditors' rejected and recommended for liquidation of the 'Corporate Debtor'. During pendency of liquidation application, the 'Appellant' desired to submit his 'Resolution Plan'. After getting fresh approval of the 'Adjudicating Authority', the 1st Respondent again published fresh Form- G on 25.07.2020 and receipt two applications by prospective 'Resolution Applicants'. The 'Committee of Creditors' with 97.33% of voting shares approved 'Resolution Plan' of the 'Appellant' and accordingly 1st Respondent filed I.A 861 of 2020 as 'Plan Approval Application' which was approved by the 'Adjudicating Authority' vide order dated 01.10.2021. It has however been brought out by the 'Appellant' that order was uploaded only on 25.10.2021. As per approved 'Resolution Plan', Rs. 4531.44 crores were claimed by the 'Creditors' and out of which claim for Rs. 4138.5 crores were admitted and finally amount of Rs. 501 crores was proposed to be settled with the 'Creditors' as per approved 'Resolution Plan' and in addition Rs. 40 crores was to be infused as working capital thus, total amount of Rs. 541 crores was approved as amount of settlement. This 'Appellate Tribunal' also note from the 'Resolution Plan' approval dated 01.10.2021 that the fair value of the 'Corporate Debtor' was of Rs. 394.12 crores and the liquidation value was of Rs. 220.90 crores.

5. This 'Appellate Tribunal' further notes from the approved Resolution plan the definition of *'Effective Date* – *The date of approval of the Resolution Plan by the Adjudicating Authority'*.

Further, as per approved 'Resolution Plan' Clause 4 A

> *"the total term of the 'Resolution Plan' for implementation shall be within 90 days from the effective date"*.

6. In terms of Clause 7 of the approved 'Resolution Plan', following additional term was specified whereby there was specific provision for interest payment on delayed payment and forfeiture of payment made in case default beyond 60 days.

> *"The RA confirms that in case the RA fails to pay the balance instalments as mentioned in the Resolution Plan, and there is default beyond 60 days from schedule date, all the payments made till that date shall be liable for forfeiture. The RA confirms that in case the RA fails to pay the balance instalments as mentioned in the Resolution Plan, and there is subsisting default beyond 7 days from schedule date, such default amount shall be liable for simple interest @ 8% per annum"*.

7. In terms of the approved 'Resolution Plan' a monitoring committee was formed on 28.10.2021 consisting of three representative one each from 'Resolution Professional', 'Financial Creditor' and 'Successful Resolution Applicant' (the 'Appellant' herein).

8. The 'Appellant' has brought out that he was under honest belief that effective date being 25.10.2021 i.e. date when approved 'Resolution Plan' was uploaded (in contrast to the provisions made in the 'Resolution Plan' which defines effective date as date of order of approved by the 'Adjudicating Authority' which was 01.10.2021). Be that as it may, the 'Appellant' failed to make payment of Rs. 501 crores within 90 days of the effective date. The 'Appellant' has brought out that this was due to post COVID-19 uncertainly, delayed disbursement of fund by global investors etc. The 'Appellant' approached the 'Adjudicating Authority' by way of I.A. 733 of 2021 in I.A. 861 of 2020 under Rule 11 r/w Rule 154 of NCLT Rules, 2016, wherein four reliefs were sought including rectifications of few errors and directing the effective date to be 25.10.2021 instead of 01.10.2021. However the 'Adjudicating Authority' allowed two rectifications and did not give any further relief including effective date to be 25.10.2021 instead of 01.10.2021.

9. Similarly, the 'Appellant' also filed I.A. No. 77 of 2022 in I.A. 861 of 2021, whereby, few reliefs were sought including extension of 60 days for implementation of 'Resolution Plan', however, the 'Adjudicating Authority' after detailed examination in their order dated 01.02.2022 did not give any relief, including any extension of the time.

10. Aggrieved by the 'impugned order' passed by the 'Adjudicating Authority' the 'Appellant' approached this 'Appellate Tribunal' by CA (AT) (CH) (Insolvency) No. 86 of 2022 in I.A No. 183 & 184 of 2022 and this 'Appellate Tribunal' vide order dated 13.04.2022 gave following orders:-

"Heard both the sides.

It is represented by Mr. Y. Suryanarayana, Learned Counsel for the Appellant that the 'Appellant' had deposited a sum of Rs.50 Crores in the 'Designated Account', which fact is not disputed by the other side.

The 'Successful Resolution Applicant' although had addressed vide letter dated 12.04.2022 to the Resolution Professional, Monitoring Committee, Committee of Creditors in the matter of 'Indu Projects Ltd.' seeking 'six months' time to remit the 'residual balance amount' together with 'overdue interest' @ 8% per annum, <u>this 'Tribunal' is granting 'three months' time from today, to pay the 'residual balance amount' in the 'Designated Account'</u> along with 'overdue interest' @ 8% per annum from 23.01.2022.

It is abundantly made clear by this 'Tribunal' that the implementation of the 'Resolution Plan' can go on and the 'Monitoring Committee' is permitted to perform the act of 'partial disbursement' of 'Plan Amount'.

Further, the 'Resolution Applicant' shall ensure the continuation of 'All Projects' by keeping the "Bank Guarantee Alive" and by making payment for the encashed 'Bank Guarantee'.

In view of the above observations and directions, the impugned order in IA No.77 of 2022 in IA No.861 of 2020 in CP(IB)-372/7/HDB/2018 passed on 01.03.2022 at Paragraph No.8, wherein the amount paid as 'Earnest Money Deposit' by the 'Applicant' shall have to be forfeited and proceedings under Section 74 (3) of the I&B Code, 2016 have to be initiated as per Law shall not hold good.

In so far as the observations made by the 'Adjudicating Authority', ("National Company Law Tribunal", Hyderabad Bench) in the impugned order in IA No.77 of 2022 in IA No.861 of 2020 in CP(IB)-372/7/HDB/2018 are to the fact that "we are very upset with the manner in which the 'Monitoring Committee' has given a very very long rope to the Applicant in making the payment. We get a doubt on the fairness of the 'Monitoring Committee' with regard to implementation of the Resolution Plan" to that extent is expunged by this Tribunal in furtherance of 'substantial cause of justice'.

Accordingly, the instant Company Appeal (AT)(CH)(Ins) No.86/2022 stands disposed of. No costs. The pending connected I.A. Nos.183 & 184/2022 are closed."

[emphasis supplied]

11. This 'Appellate Tribunal' note that in the meantime one 'Operational Creditor' M/s Vishal Nirmiti Pvt. Ltd. approached Hon'ble Supreme Court of India vide Civil Appeal No. 3660 of 2022 under Section 62 of I & B Code, 2016 against this 'Appellate Tribunal' Judgment and order dated 13.04.2022. Following relevant portion of the Judgment of the Hon'ble Supreme Court of India is being reproduce for clarity and continuity:-

"Heard learned counsel for the parties.

Pursuant to an order dated 25.02.2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad) Corporate Insolvency Resolution Process (CIRP) was commenced against the Corporate Debtor, Indu Projects Limited. The Respondent No. 1, hereinafter referred to as the

Resolution Applicant, had submitted a Resolution Plan in respect of the Corporate Debtor, in terms whereof the Respondent No. 1 was required to deposit Rs. 501 Crores in a designated escrow account, on or before 23.01.2022.

On 21.01.2022, the Respondent No. 1 filed an application before the Adjudicating Authority seeking extension of time by 60 days to make the deposit.

By an order dated 02.02.2022, the Adjudicating Authority granted two weeks' time to the Respondent No. 1 to make the payment. Against the aforesaid order, the Respondent No. 1 appealed to the NCLAT under Section 61 of the IBC. The impugned order has been passed in the said appeal.

The Appellant, who as stated above, is an Operational Creditor contends that the impugned order is prejudicial to the right of the Appellant to receive the amounts payable to the Appellant under the approved Resolution Plan, within the timelines thereunder.

Three months' time granted to the Resolution Applicant (Respondent No. 1) to pay the residual balance amount in the designated account along with overdue interest, has expired. No payment has been made. The appeal has, thus, become infructuous and is dismissed.

The NCLT may proceed further with the matter, in accordance with law."

[emphasis supplied]

12. The 1st Respondent approached the 'Adjudicating Authority' vide I.A. 283 of 2022 in CP (IB) No. 372/7/HDB/ 2018 wherein five prayers were made including dismissal of I.A. 77 of 2022 filed by the 'Appellant', allowing

1st Respondent to invoke EMD bank guarantee and extension of 'Corporate Insolvency Resolution Process' allowing fresh bids for the 'Resolution Plan' to be invited and debarring the 'Appellant' from participation further. The 'Adjudicating Authority' vide their order dated 05.09.2022 allowed this I.A No. 283 of 2022 and directed the 1st Respondent to complete the 'Corporate Insolvency Resolution Process' a fresh within 60 days from the date of order dated 05.09.2022 and also made clear that no further extension would be given. The relevant portion of the judgment of the 'Adjudicating Authority' dated 05.09.2022 is also been quoted as under :-

> *"<u>This IA is filed by the Resolution Professional seeking extension of 60 days time to conduct the CIRP afresh in the light of the failure of the successful bidder in</u> honouring the commitments made in the Resolution Plan.*
>
> *<u>The IA is allowed</u> and the Resolution Professional is directed to complete the Corporate Insolvency Resolution Process afresh, within 60 days from today and no further extensions, whatsoever, will be granted in the matter. Accordingly, <u>prayer in Item No. C in IA(IBC)/283/2022 is allowed. Prayers in Item Nos. A, B are not pursued by the Resolution Professional.</u>*
>
> *In view of passing of the order in this IA and taking into consideration the earlier orders of this Bench on 01.03.2022 rejecting granting of extension of time to the Successful Resolution Applicant f(SRA) and also <u>the NCLAT orders dt.13.04.2022 passed in an appeal preferred against the order of rejection of extension of time by this tribunal, by virtue of which a time of three more months to make payment, was given,</u> <u>**IA(IBC)/654/2022**</u> <u>has become infructuous</u>. The remedy, if any, as regards to extension of time, is before the*

NCLAT, as the time extended by NCLAT has already expired and the jurisdiction of this Adjudicating Authority gets ceased, once the issue is taken within the purview of the Appellate Authority. It can be noted that the reason for not extending the time as sought for by the SRA is due to his not fulfilling the commitment undertaken by him. Except seeking extension, no further grounds were put forth by the SRA in the earlier application. By virtue of the expiry of the period extended by the NCLAT, the SRA loses his right of seeking for extension on any ground.

*As regards **IA(IBC)/655/2022**, which was filed by Successful Resolution Applicant seeking impleadment in the liquidation application, we notice that no such IA was filed by the Resolution Professional for initiation of liquidation proceedings of the Corporate Debtor. As such, we don't find any reason to keep it pending. We, therefore, observe that filing of this IA is misplaced and is accordingly, dismissed."*

[emphasis supplied]

13. Aggrieved by the 'impugned order' in I.A. 283 of 2022, the 'Appellant' has preferred the present `Appeal', before this 'Appellate Tribunal' .

Appellant's Submission

14. The Learned Counsel for the 'Appellant' gave overall view of the appeal and the circumstances which led to the present appeal. On coming to know that the 'Corporate Debtor' has been recommended for liquidation the Appellant approached 1st Respondent expressing his intent to give his resolution plan on 04.05.2020. After getting approval from the 'Adjudicating Authority' on an application made by 1st

Respondent in his fresh Form- G published on 25.07.2020. The 'Appellant' submitted his Resolution Plan of Rs. 501 crores along with additional working capital of Rs. 40 crores. The 'Adjudicating Authority' vide their order dated 01.10.2021 approved the 'Resolution Plan' however the order of the 'Adjudicating Authority' was uploaded only on 25.10.2021. The Learned Counsel for the Appellant further submitted that he was under belief that this will be the effective date for calculating 90 days within which payments have to settled as indicated in the Resolution Plan.

15. The Learned Counsel for the Appellant emphasised that due to post COVID-19 circumstances including uncertain economic environment, procedural delays and delayed disbursement of fund by global investors the 'Appellant' could not meet the time line for settling claims as given in the 'Resolution Plan' and accordingly the 'Appellant' approached the 'Adjudicating Authority' by way of I.A. No. 77 of 2022 (Extension Application) for seeking extension of timelines, however the 'Adjudicating Authority' dismissed the extension application ignoring the prevailing circumstances and genuine ground for seeking extension.

16. The Learned Counsel for the Appellant pointed out that despite his best intension to resolve the matter and bring back the 'Corporate Debtor' from liquidation stage, the 1st Respondent approached the 'Adjudicating Authority' vide I.A 283 of 2022 with several prayer, inter-alia, invoking EMD bank guarantee of the 'Appellant' and initiating fresh 'Corporate Insolvency Resolution Process'.

17. The Learned Counsel for the Appellant mentioned that aggrieved by this he approached this 'Appellate Tribunal' in CA (AT)(CH) (Ins.) No. 86 of 2022. The Learned Counsel for the Appellant highlighted that this 'Appellate Tribunal' appreciating the genuine grievances of the 'Appellant' and valid circumstances allowed extension of time as well as embargo on encashment of EMD bank guarantee. The Appellate Tribunal granted three months period from the date of order i.e. from 13.04.2022 instead of six month period requested by the Appellant for making residual balance payment in the designated bank account along with over due interest @ 8% per annum from 23.01.2022.

18. The Learned Counsel for the Appellant pointed out that the 'Resolution Plan' clearly provides for provision for delayed payment and stipulate Appellant's liability to pay interest @ 8% per annum. The Learned Counsel for the Appellant assailed the 'impugned order' which ignored this vital point.

19. The Learned Counsel for the Appellant submitted that the ex-promoters of the 'Corporate debtor' committed frauds and gave wrong information to the 1st Respondent and the 'Committee of Creditors' and as a result of which incorrect "Information Memorandum" was prepared. The Learned Counsel for the Appellant stated that the 'Resolution Plan' was prepared, submitted and finally approved by the 'Adjudicating Authority' which was prepared by the 'Appellant' on the basis of incorrect "Information Memorandum". The Learned Counsel for the Appellant further stated that in order to set the things right and to take expromoter to logical task, the 'Appellant' filed I.A. No. 654 of 2022 in C.P (IB) 372 of 2018 (Direction Application) under Section 60(5) of the I & B Code, 2016 r/w Rule 11 of NCLT Rules, 2016, whereby he prayed for immediate interim relief including forensic audit and restraining ex-promoters from disposing off and transferring moveable and immovable assets during pendency of the applications.

20. The Learned Counsel for the Appellant stated that an impleadment application vide I.A. 655 of 2022 was also filed regarding granting of any relief in I.A. No. 283 of 2022 filed by the 'Respondent' without hearing the 'Appellant'. The Learned Counsel for the Appellant emphasised that these applications were necessary in order to implement the 'Resolution Plan'. The Learned Counsel for the Appellant, however assailed the 'impugned order' dated 05.09.2022 which was issued in complete violation of principal of natural justice and "Audi Alteram Partem". The Learned Counsel for the Appellant also assailed the 'Adjudicating Authority' failed to give proper speaking order.

21. The Learned Counsel for the Appellant stated that they had already made part payment of around Rs. 60 crores under the 'Resolution Plan' and if the 'impugned order' is not set aside, the investment made by the 'Appellant' will go down the drain. The Learned Counsel for the Appellant also stated that the very purpose of the I & B Code, 2016 is to bring back the 'Corporate Debtor' from the brink of the Insolvency and put it back as a going concern. The Learned Counsel for the Appellant also mentioned that since then they have tied up the funds with foreign entities and are ready to settle the 'Resolution Plans'. The Learned Counsel for the Appellant further stated that the 'Resolution Plan' itself had foreseen the circumstances of delay and provided for delayed payment @ 8% which they are willing to pay.

22. The Learned Counsel for the Appellant stated that the 'Adjudicating Authority' failed to exercise inherent powers granted to it under Section 60(5) of the I & B Code, 2016 to meet ends of justice.

23. The Learned Counsel for the Appellant concluding his pleadings requested this 'Appellate Tribunal' to set aside the 'impugned order' dated 05.09.2022 passed by the 'Adjudicating Authority' in I.A 283 of 2022 and I.A 655 of 2022 along with restraining 1st Respondent to initiate the 'Corporate Insolvency Resolution Process' de-novo.

<u>Respondent's Submission:</u>

24. The Learned Counsel for the Respondent gave the background of the case and assailed the appeal. The Learned Counsel for the Respondent stated that the present appeal is only derail the entire process and in turn will result in eroding the economic value of the 'Corporate Debtor'.

25. The Learned Counsel for the Respondent stated that all support was given to the 'Appellant' in order to implement the 'Resolution Plan' successfully and smoothly. However, right from the beginning the attitude of the 'Appellant' was seems to be only buying time and postponing the settlement of the claims. The Learned Counsel for the

Respondent further pointed out that the 'Adjudicating Authority' as well as this 'Appellate Tribunal' extended the time line beyond 90 days, however the 'Appellant' could not still make substantial payments. The Learned Counsel for the Respondent emphasised that out of Rs. 501 crores claim settlement amount along with additional working capital infusion, admittedly, the 'Appellant' has brought in only 10% of such money till date despite the 'Resolution Plan' was approved way back on 01.10.2021. The Learned Counsel for the Respondent further clarified that according to the approved 'Resolution Plan' the 'Appellant' was supposed to make all payments within 90 days and further maximum 60 days were provided in the 'Resolution Plan' @ 8% interest rate per annum for delayed payments and the terms of plan it was crystal clear that beyond 60 days of grace period, all payment made by the Appellant will be liable to be forfeited.

26. The Learned Counsel for the Respondent stated that the 'Appellant' has brought several I.A's before the 'Adjudicating Authority' just to delay the whole process and the 'impugned order' was given correctly by the Adjudicating Authority' after taking all due facts, provisions of the I & B Code, 2016 and this 'Appellate Tribunal' order dated 13.04.2022 into consideration.

27. The Learned Counsel for the Respondent assailed the conduct of the 'Appellant' and the content of the appeal. The Learned Counsel for the Respondent brought to the notice of this 'Appellate Tribunal' that I.A No. 654 of 2022 filed by the 'Appellant' for seeking urgent and immediate relief against ex-promoters/ directors of the 'Corporate Debtor' including request of forensic audit did not have any substance on merit and was initiated only to delay the whole proceedings and making the payments as per 'Resolution Plans'. The Learned Counsel for the Respondent also assailed the contention of the 'Appellant' that he was not given an opportunity of being heard and his rights of natural justice were breached were simply misconstrued as the 'Adjudicating Authority' considered all the relevant factors into consideration before disposing I.A. No. 654 & 655 of 2022. The Learned Counsel for the Respondent also mentioned that the 'Resolution Plan ' was supposed to be prepared with due diligence and the 'Appellant' cannot be allowed to raise boggy issues to circumvent the settlement payments.

28. The Learned Counsel for the Respondent also denied averments made by the 'Appellant' that he was not given hearing in I.A. No. 655 of 2022 ('Impleadment Applications'). The Learned Counsel for the Respondent further stated that in I.A. No. 655 of 2022 became infructuous since 'Resolution Applicant' failed to fulfil his commitments within the time period granted by the 'Adjudicating Authority' as well as extended time period granted by this 'Appellate Tribunal'. The Learned Counsel for the Respondent also brought to the notice of this 'Appellate Tribunal' that the Hon'ble Supreme Court of India on a separate application filed by one 'Operational Creditor' challenging order of this 'Appellate Tribunal' in Company Appeal (AT) (CH) (Ins.) No. 86 of 2022 dated 13.04.2022 whereby the Hon'ble Supreme Court of India noted that three months' time was granted to the 'Resolution Applicant' to pay the residual amount along with interest had expired without making any payment and thus, the appeal became infructuous and dismissed. The Learned Counsel for the Respondent emphasised that the 'Appellant' has exhausted all his legal remedies and the present appeal is therefore is liable to be dismissed.

29. The Learned Counsel for the Respondent stated that the 'Appellant' approached the 'Adjudicating Authority' vide I.A. No. 77 of 2022 ('Extension Application') for seeking extension of timelines which was rightly dismissed by the 'Adjudicating Authority', since the 'Resolution Plan' was approved on 01.10.2021 and the 'Appellant' was supposed to make all payment within 90 days however that was a complete failure on part of the 'Appellant' to arrange fund and sought only long rope to delay the process.

30. The Learned Counsel for the Respondent further emphasised that the 'Appellant' was given all the cooperation to implement the 'Resolution Plan' successfully, however the 'Appellant' was not in a position to implement the same and accordingly the 1st Respondent had to approach the 'Adjudicating Authority' vide I.A. No. 283 of 2022 with prayer to dismiss I.A. no. 77 of 2022 along with permission of the Adjudicating Authority to invoke EMD bank guarantee furnished by the Appellant and to initiate fresh 'Corporate Insolvency Resolution Process' and the 'Adjudicating Authority' vide their order dated 05.09.2022 allowed the I.A. No. 283 of 2022 allowing initiation of fresh CIRP within 60 days as per 'Prayer- C' and 'Prayer- A & B' was not considered as not being pursued by the 1st Respondent.

31. The Learned Counsel for the Respondent submitted that the Hon'ble Supreme Court of India in the matter of ***K. Shashidhar vs. Indian Overseas Bank and Others (2019) 12 SCC 150; Committee of Creditors, Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (2020) 8 SCC 531; Maharashtra Seamless Limited vs. Padmanabhan Venkatesh and Others (2020) 11 SCC 467*** gave very clear verdict that commercial wisdom of CoC is supreme and neither the 'Adjudicating Authority' not the 'Appellate Authority' can trespass the commercial wisdom of the 'Committee of Creditors'.

32. The Learned Counsel for the Respondent mentioned that the pursuant to the 'Adjudicating Authority' order dated 05.09.2022, the 1st Respondent has already issued fresh 'Form G' inviting 'Expression of Interest' from perspective Resolution Applicants on 19.09.2022 in order to revive the 'Corporate Debtor' and any intervention at this stage will only frustrate the whole process and reduce the economic value of the 'Corporate Debtor'.

33. The Learned Counsel for the Respondent concluded his arguments with the strong plea to dismiss the Appeal.

Findings

34. Heard the Learned Counsel for the Appellant and the Respondents and also perused record made available to us. Several issues have been raised in the Appeal which are required to be deliberated upon before coming to final conclusion.

(I) Whether the 'Adjudicating Authority' has got the sufficient power to extend the time lines for making payments as per approved 'Resolution Plan' and if so, whether in the present case this power was exercised or otherwise by the 'Adjudicating Authority' correctly ?

(II) Whether the 'Adjudicating Authority' violated the principals of natural justice in the present case ?

(III) Whether the 'Adjudicating Authority' could have ordered for fresh 'Corporate Insolvency Resolution Process' when the 'Successful Resolution Applicant' has claimed to be in position to implement the 'Resolution Plan', albeit, beyond the schedule as stipulated in the 'Resolution Plan' ?

(IV) Whether, the 'Appellant' exhausted legal remedies in view of failure to comply extended time lines permitted vide order dated 13.04.2022 as well as after dismissal of appeal filed by one 'Operational Creditor' before the Hon'ble Supreme Court of India challenging this Appellate Tribunal's order ?

35. **Issue No.** (I) **Whether the 'Adjudicating Authority' has got the sufficient power to extend the time lines for making payments as per approved 'Resolution Plan' and if so, whether in the present case this power was exercised or otherwise by the 'Adjudicating Authority' correctly?**

- Before dwelling into these aspects in details, it will be desirable to look into the specific provision of the I & B Code, 2016 which deals with the submission of the 'Resolution Plan' as well as approval of the 'Resolution Plan'.

> ***"30. Submission of resolution plan***.—(1) A resolution applicant may submit a resolution plan [along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.
>
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—*
>
> *(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [payment] of other debts of the corporate debtor;*
>
> *(b) provides for the [payment] of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;*
>
> *(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*
>
> *(d) the implementation and supervision of the resolution plan;*
>
> *(e) does not contravene any of the provisions of the law for the time being in force; (f) conforms to such other requirements as may be specified by the Board. [**Explanation**.—For the purposes of clause (e), if any*

approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law];

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

[(4) The committee of creditors may approve a resolution plan by a vote of not less than 5 [sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

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

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

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

[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.]

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered: Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

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

***"31. Approval of resolution plan**.—(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan:*

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

[(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.]"

- The objective of I & B Code, 2016 is for maximisation of value of assets of the Corporate Debtor and not maximisation of value of any one stake holder. Thus, the very first objective is the 'Resolution' followed by the objective of the 'Maximisation of value of assets of the 'Corporate

Debtor' and finally 'promoting entrepreneurship, availability of credit and balancing of interest'.

- It is also universal accepted fact that there is a time value of money which is very significant in effective revival of the 'Corporate Debtor'.
- In catena of the judgments passed by the Hon'ble Supreme Court of India including case cited by the 'Respondent' quoted in preceding paragraphs it has been decided that the commercial wisdom of the Committee of Creditors is supreme and judicial interventions by the Adjudicating Authority and/ or the Appellate Authority should be minimum.
- This 'Appellate Tribunal' further notes from the approved 'Resolution Plan' the definition of *'Effective Date* – *The date of approval of the Resolution Plan by the Adjudicating Authority'*.

Further, as per approved 'Resolution Plan' Clause 4 A 'the total term of the 'Resolution Plan' for implementation shall be within 90 days from the effective date'. This Appellate Tribunal notes that order of the 'Adjudicating Authority' approving the resolution plan was dated 01.10.2022 and therefore, legally speaking 01.10.2022 should be constitute as effective date for calculating 90 days. The 'Appellant' has made a case that since the order of the 'Adjudicating Authority' was uploaded only on 25.10.2022 hence effective should be treated as 25.10.2022 and 90 days should be calculated from this date. The argument of the 'Appellant' cannot be accepted in view of the specific definition given of the effective date in the 'Resolution Plan' itself.

- In terms of Clause 7 of the approved 'Resolution Plan', following additional term was specified whereby there was specific provision for interest payment on delayed payment and forfeiture of payment made in case default beyond 60 days.

  > *"The RA confirms that in case the RA fails to pay the balance instalments as mentioned in the Resolution Plan, and there is default beyond 60 days from schedule date, all the payments made till that date shall be liable for forfeiture. The RA confirms that in case the RA fails to pay the balance instalments as mentioned in the Resolution Plan, and there is subsisting default beyond 7 days from schedule date, such default amount shall be liable for simple interest @ 8% per annum".*

- Taking 01.10.2021 as effective dated 90 days period and additional 60 days with interest of 8 % per annum would be over quite sometime back.
- Admittedly, the 'Appellant' till date, even after substantial period is over has paid around Rs. 60 crores as against required to be Rs. 501 crores as per 'Resolution Plan' in addition to Rs. 40 crores as working capital (total Rs. 541 crores). Thus, broadly 90% of Resolution Plan settlement amount is yet to be brought in by the 'Appellant'.
- It is noted that this 'Appellate Tribunal' has granted additional three months period vide its earlier order dated 13.04.2022 which has also been noted by the Hon'ble Supreme Court of India while disposing the

appeal against this 'Appellate Tribunal's order as discussed earlier in preceding paragraphs.

- The 'Adjudicating Authority' while disposing I.A. No. 283 of 2022 filed by 1st Respondent as taken note of this 'Appellate Tribunal' and recorded that despite this extended time line, the 'Appellant' could not make the payment.
- This 'Appellate Tribunal' consciously notes that powers of the 'Adjudicating Authority' has been clearly defined in Section 31 of the I & B Code, 2016 (discussed earlier) and there is no specific provision authorising the 'Adjudicating Authority' to consider such extensions of time lines. This 'Appellate Tribunal' again observes that the objective of I & B Code, 2016 is 'Resolution' as well as 'Maximisation the value of the assets of the Corporate Debtor' and take care of interest of all stake holders and not limited to one stake holder or one set of stake holders.
    - In view of the provisions as stipulated in the I & B Code, 2016
    - Specific provisions of time lines of 90 days from the effective dates and subsequent additional 60 days as the outer limit provided in Resolution Plan.
    - Specific proviso in Resolution Plan that after 90 + 60 days if settlement payment is not made money already been paid is liable to be forfeited.
    - Failure to comply even extended time lines of three months given by this Appellate Tribunal.

This 'Appellate Tribunal' do not find any error in the 'impugned order' on this aspect. While observing this, this 'Appellate Tribunal' has also factored into the ratio provided by the Hon'ble Supreme Court of India that commercial wisdom of 'Committee of Creditor' is supreme and there is limited scope for judicial intervention by the 'Adjudicating Authority' or the 'Appellate Tribunal'. Hence, this 'Appellate Tribunal' upholds the decision of the 'Adjudicating Authority' on this issue.

<u>Issue No.</u> (II) **<u>Whether the 'Adjudicating Authority' violated the principals of natural justice in the present case ?</u>**

- It has been alleged by the 'Appellant' that the 'Adjudicating Authority' has not considered his 'Impleadment Application' bearing I.A. No. 655 of 2022 as well as 'Direction Application' bearing I.A. No. 654 of 2022 in suitable manner and the 'Appellant' was not given chance to represent the case. The 'Appellant' also contended that the 'Adjudicating Authority' ought to have decided 'Impleadment Application' being necessary an important party in I.A No. 283 of 2022 and the 'Adjudicating Authority' erred in disposing I.A. No. 283 of 2022 without disposing First Appellant's Interlocutory Application. It is a case of the 'Appellant' that the 'Adjudicating Authority' erred in summarily dismissing the direction and 'Impleadment Application' without appreciating the merit for non-speaking 'impugned order'.

- This ‘Appellate Tribunal’ has already noted and brought in preceding paragraphs averments made by the ‘Respondent’ on above contentions of the ‘Appellant’.
- It has been observed from the order of the ‘Adjudicating Authority’ while disposing I. A 283 of 2022 vide order dated 05.092022 that the ‘Adjudicating Authority’ has factored into I.A. No. 654 of 2022 and has recorded that this has become infructuous due to non – payment by the ‘Appellant’ and failure to comply with the orders dated 13.04.2022 passed by this ‘Appellate Tribunal’. The ‘Adjudicating Authority’ has also taken a view that once the extended time lines of stipulated by this ‘Appellate Tribunal’ is over the ‘Adjudicating Authority’ do not have any further power to extend the time lines.
- As regard, I.A No. 655 of 2022 the ‘Adjudicating Authority” has mentioned that no such I.A’s was filed by the Resolution Professionals for <u>initiation of liquidation proceedings</u> of the Corporate Debtor as such ‘Adjudicating Authority’ did not find any reason to keep order pending and dismissed I.A. No. 655 of 2022 and pronounced the judgment in I.A No. 283 of 2022 on 05.09.2022.
- In I.A. No. 283 of 2022 the 1st Respondent had asked for dismissing I.A. No. 77 of 2022 of the ‘Appellant’ as well as allowing 1st Respondent to invoke EMD bank guarantee of the ‘Appellant’ and in addition to allow initiation of the ‘Corporate Insolvency Resolution Process’ to invite fresh bids.

- This Appellate Tribunal note that prayer made in I.A. No. 655 of 2022 by the Appellant in (a), (b) & (c) reads as under:

    a) *Allow the Applicant, being the Successful Resolution Applicant of the Corporate Debtor, <u>to be impleaded as a party</u> and to make submissions <u>in the Liquidation Application</u>.*

    b) *Allow <u>the Applicant to access a copy of the Liquidation Application</u> and file <u>a Reply to the Liquidation Application</u>, or file a separate Application seeking directions if required;*

    c) *Pass such other and further orders as may be deemed fit by this Hon'ble Court.*

- Therefore, the 'Adjudicating Authority' seems to be right in observing that there was no application for initiation of liquidation and the application of Appellant in I.A. No. 655 of 2022 is incorrect and accordingly was dismissed by the 'Adjudicating Authority'.

- Taking into account the averments made by the both the parties and the reasons accorded by the 'Adjudicating Authority' while disposing relevant I.A. No. 654 & 655 of 2022, this Appellate Tribunal do not find any reason to intervene the 'impugned order' on this account.

<u>**Issue No.**</u> (III) <u>**Whether the 'Adjudicating Authority' could have ordered for fresh Corporate Insolvency Resolution Process when the 'Successful Resolution Applicant' has claimed to be in position to implement the 'Resolution Plan', albeit beyond the schedule as stipulated in the 'Resolution Plan'?**</u>

- This 'Appellate Tribunal' has already noted that in accordance with the approved 'Resolution Plan' the 'Appellant' was required to settle all payments within 90 days and further within 60 days. This 'Appellate Tribunal' has also factored into the fact that despite this 'Appellate Tribunal' extension of three months to make all payments, the 'Appellant' failed to satisfy the terms of the Resolution Plans. The 'Appellant' while submitting the 'Resolution Plan' was supposed to know all the circumstances including economic uncertainties, if any, and requirement for generation of funds. It can not be the case of the 'Appellant' to invoke such pleas subsequent to approval of 'Resolution Plan'. This 'Appellate Tribunal' also note that despite substantial period of the approval of the 'Resolution Plan', the 'Appellant' is yet to settle around 90% of its liabilities towards the 'Resolution Plan'.
- It is a fact that the timely resolution is very important in case the value of the 'Corporate Debtor' is required to be preserved and in order to ensure maximisation of value of assets of the 'Corporate Debtor'. This 'Appellate Tribunal' has also noted that pursuant to the 'Adjudicating Authority' order for fresh 'Corporate Insolvency Resolution Process', the 1st Respondent has already issued fresh 'Form-G' on 19.09.2022 inviting fresh "Expression of Interest" from prospective Resolution Applicants and any interference at this stage will hamper the entire process and perhaps may lead to liquidation which is practically death knell of the 'Corporate Debtor'. In view of all above, this 'Appellate Tribunal' do not find any error in the 'impugned order' on this account.

<u>Issue No.</u> (IV) **<u>Whether, the 'Appellant' exhausted legal remedies in view of failure to comply extended time lines permitted vide order dated 13.04.2022 as well as after dismissal of appeal filed by one 'Operational Creditor' before the Hon'ble Supreme Court of India challenging this Appellate Tribunal's order ?</u>**

- This 'Appellate Tribunal' has already discussed that in its earlier order dated 13.04.2022 three additional months period was given to the 'Appellant' to settle all the payments as per approved the 'Resolution Plan'. Subsequently, in different appeal filed by one 'Operational Creditor' before the Hon'ble Supreme Court of India challenging this 'Appellate Tribunal's' order vide Civil appeal No. 3660 of 2022, the Hon'ble Supreme Court of India dismissed the same vide order dated 29.08.2022. Accordingly, three month periods extended by this 'Appellate Tribunal' was also over and no payment was made. Hence, prima-facie, it looks that the 'Appellant' had taken all the legal remedies available to it including various Interlocutory Applications filed before the 'Adjudicating Authority', appeal made to this 'Appellate Tribunal' and upholding this 'Appellate Tribunal' order by the Hon'ble Supreme Court of India filed by one of the 'Operational Creditor' (and not the Appellant). As such, no further scope is available to this 'Appellate Tribunal' to invoke any of the provisions available under I & B Code, 2016, to give any further relief to the 'Appellant', at this juncture.

36. Therefore, this 'Appellate Tribunal', is of the considered opinion that there is no error, in the 'impugned order' dated 05.09.2022, passed by the 'Adjudicating Authority'. `Appeal', `devoid of any merit(s)', is dismissed. No costs. The connected pending `Interlocutory Applications', if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran