



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court – II)  
KOLKATA**

**IA (IB) No. 187/KB/2023  
IA (IB) No. 1563/KB/2022  
IA (IB) No.1567/KB/2022  
IA (IB) No. 1381/KB/2022  
in  
CP (IB) No.204/KB/2021**

*In the matter of:*

**Suasth Health Care Foundation** [CIN: U85100WB2008NPL130971] having its registered office at Plot No. X-1, 2 & 3, Block - EP Sector - V, Salt Lake City Kolkata – 700 091.

*... Corporate Debtor*

**IA (IB) No. 1563/KB/2022**

*In the matter of:*

**Hari Vittal Mission** [CIN U74999WB2016NPL234196]

*...Applicant*

*Versus*

1. **Ravi Sethia**, Resolution Professional of Suasth Health Care Foundation.
2. **Nishkala Healthcare Private Limited** [CIN U74999MH2019PTC321858]
3. **Committee of Creditors** of Suasth Healthcare Foundation

*...Respondent*

**IA (IB) No.1567/KB/2022**

**Shankar Mukherjee**, a member of Suspended Board of Directors.

*...Applicant*

*Versus*

1. **Ravi Sethia**, Resolution Professional of Suasth Health Care Foundation.
2. **Yes Bank Limited** [CIN L65190MH2003PLC143249]
3. **Axis Bank Limited** [CIN L65110GJ1993PLC020769]
4. **Consortium of Nishkala Healthcare Private Limited & Ujin Pharma Chem**

*...Respondents*

**IA (IB) No. 187/KB/2023**

*In the matter of:*

**Param Commercial Private Limited** [CIN U74900WB2013PTC198102].

*...Applicant*

*Versus*

1. **Ravi Sethia**, Resolution Professional of Suasth Health Care Foundation.
2. **Yes Bank Limited** [CIN L65190MH2003PLC143249]
3. **Axis Bank Limited** [CIN L65110GJ1993PLC020769]

*...Respondents*

**I.A. (IB) No. 1381/KB/2022**

*Application under section 30(6) and section 31(1) of the  
Insolvency & Bankruptcy Code, 2016 read with regulation 39(4) of the Insolvency and  
Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)  
Regulations, 2016 for approval of Resolution Plan.*

***In the matter of:***

Ravi Sethia, Resolution Professional of  
**Suasth Health Care Foundation**

... Applicant

**Date of hearing in IA (IB) No. 187/KB/2023: 24 January, 2023**

**Date of hearing in IA (IB) No. 1563/KB/2023: 11 May, 2023**

**Date of hearing in IA (IB) No. 1567/KB/2023: 28 April, 2023**

**Date of hearing of IA (IB) No. 1381/KB/2022: 11 May 2023**

**Order pronounced on: 28 August 2023**

**Coram:**

***Smt. Bidisha Banerjee, Member (Judicial)***

***Shri Balraj Joshi, Member (Technical)***

***Appearances (via video conferencing/Physical hearing):***

For the Resolution Professional : Mr. Ramji Srinivasan, Sr. Adv.  
Mr. Deep Roy, Adv.  
Mr. Rahul Auddy, Adv.  
Mr. Aditya Gooptu, Adv.  
In IA 1563/2022 : Mr. Joy Saha, Sr.Adv.  
Mr. Shaunak Mitra, Adv.  
Ms.Madhuja Barman, Adv.  
In IA 1567/2022 : Mr. Supriyo Gole, Adv.  
Mr. Rajarshi Banerjee, Adv.

**COMMON ORDER**

***Per Bidisha Banerjee, Member (Judicial):***

1. This court convened *via* hybrid mode.
2. ***Brief Background***
  - 2.1 An Application under section 10 of the Insolvency and Bankruptcy Code, 2016 (***‘Code’***) was filed by Suasth Health Care Foundation (***‘Corporate Debtor’***).

Subsequently, *vide* order dated 31 August, 2021 Corporate Insolvency Resolution Process (**'CIRP'**) was initiated against the Corporate Debtor.

3. **IA (IB) No. 1563/KB/2022**

3.1 This is an application filed by Hari Vitthal Mission, the Financial Creditor of the Corporate Debtor (**'Applicant'**), against the Mr. Ravi Sethi Resolution Professional (**'RP'**) of the Corporate Debtor (**'Respondent No.01'**), Nishkala Healthcare Private Limited (**'Respondent No.02'**) and Committee of Creditors of Susath Healthcare Foundation, represented by Yes Bank (**'Respondent No.03'**) *inter-alia* seeking for the following reliefs;

- a. *Leave be given to the Applicant to intervene in I.A. No. 1381 of 2022 filed by the Resolution Professional for approval of the Resolution Plan submitted by the Respondent No.2/ Resolution Applicant and to object to the approval of Resolution Plan on the ground or grounds more particularly set forth in this instant application;*
- b. *An order and/or orders be passed quashing and/or setting aside the Resolution Plan filed by the Respondent No.2/Resolution Applicant and sent back the Resolution Plan to the Committee of Creditors of the Corporate Debtor for further consideration, if NIL payment is made to the Applicant in the said Resolution Plan;*
- c. *An order be passed directing the Resolution Professional to furnish a copy of the Resolution Plan and/or excerpt of the Resolution Plan which deals with the way the right of the Applicant has been dealt with in order to enable it to take further ground and/or grounds at a later stage, if required;*
- d. *An order be passed directing the Respondent No. 2 Resolution Applicant to consider the Applicant as a 'dissenting financial creditor' and make appropriate provisions for payment under the resolution plan;*

- e. *Ad-interim orders directing the Respondent No. 1 Resolution Professional to provide a copy of the resolution plan and/ or to provide a the relevant extract of the resolution plan providing the treatment of the admitted claim of the Applicant;*
- f. *Ad-interim orders restraining the Respondent No. 1 Resolution Professional to proceed with the hearing of I.A No. 1381 of 2022;*
- g. *Such further or other order or orders be passed and/or direction or directions be given as this Hon'ble Tribunal may deem fit and proper.*

**4. Submissions by the Applicant in IA (IB) No. 1563/KB/2022**

- 4.1 The Applicant is admittedly a 'Financial Creditor' of the Corporate Debtor, who had filed a claim of Rs.62,16,33,563/- with the Interim Resolution Professional ('IRP') of the Corporate Debtor. However, the claim of the Applicant was partially admitted by the Interim Resolution Professional (**now the RP**) [at page 25 of the Application].
- 4.2 The Applicant was initially allowed to participate in the meeting of the Committee of Creditors ('CoC') of the Corporate Debtor. However, the Applicant was, all of a sudden declared as a related party of the Corporate Debtor by the Resolution Professional and as such was excluded from the CoC meetings.
- 4.3 Being aggrieved with the decision of the Resolution Professional, the Applicant duly filed an application challenging the illegal and/or unlawful declaration of the Applicant as a related party of the Corporate Debtor before this Adjudicating Authority which was numbered as I.A. No. 390 of 2022. However, the said Application, being I.A. No. 390 of 2022 was dismissed by this Adjudicating Authority by an order dated 23 September, 2022.
- 4.4 Aggrieved by the order dated 23 September 2022 passed by this Adjudicating Authority, the Applicant preferred an appeal before the Hon'ble National

Company Law Appellate Tribunal (AT)(Insolvency) No. 1206 of 2002. The appeal is yet to be finally heard by the Hon'ble NCLAT.

4.5 During the pendency of the appeal while the right of the Applicant to figure in CoC is yet to be determined by the Hon'ble NCLAT, the Resolution Plan in respect of the Corporate Debtor as submitted by the Respondent No. 2; Resolution Plan so submitted by Respondent No. 2 has been approved by the Committee of Creditors and an application under Section 30(2) of the Insolvency and Bankruptcy Code, 2016 has been filed by the Resolution Professional which has been numbered as I.A. No 1381 of 2022.

4.6 Since the Resolution Plan has already been approved by the Committee of Creditors apropos which an application for approval of such Resolution Plan has already been filed before this Adjudicating Authority, the Resolution Plan no longer remains a confidential document and the same is now part of public records. As such, the Applicant duly requested the Resolution Professional by email dated 04 November, 2022 to furnish a copy of the Resolution Plan.

The case of the Applicant in requesting for a copy of the Resolution Plan of the Resolution Applicant is squarely covered by the judgment of the Hon'ble National Company Law Appellate Tribunal in Association of aggrieved workmen of *Jet Airways (India) Limited v. Jet Airways (India) Limited*<sup>1</sup>.

4.7 Thereafter, the Resolution Professional by an email dated 21 November 2022 stated that the resolution plan can be only provided to the applicant if the Applicant falls within the ambit of the above-mentioned judgment and only when there is an application filed by the Applicant challenging the resolution plan [Annexure-F].

4.8 The Resolution Professional should inform the Applicant what is the treatment of the admitted claim/debt of the Applicant provided under the resolution plan

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<sup>1</sup> 2022 SCCOnline NCLAT 222

and if no reply is received from the resolution professional, it will be assumed that the resolution applicant i.e., respondent no. 2 is not making any payment to the Applicant and the Applicant is being paid NIL under the resolution plan.

4.9 It is now settled principle of law, as held by the Hon'ble National Company Law Tribunal, Chennai Bench in *Dr. Periasamy Palani Gounder v. Radhakrishnan Dharmarajan*<sup>2</sup> that claim of a related party Financial Creditor cannot be discriminated from unrelated Financial Creditors. It is also a settled principle of law as has been settled by the Hon'ble Supreme Court of India in *Committee of Creditors of Essar Steel Ltd. v. Satish Kumar Gupta*<sup>3</sup> that a Financial Creditor cannot be paid 'NIL' under the Resolution Plan. The Resolution Plan will be contrary to law if it proposes to completely wipe out the admitted debt of the Applicant and proposes to pay 'NIL' to the Applicant.

4.10 Reference is made to the following decisions;

- (i) **Hammond Power Solutions Private Limited vs. Sanjit Kumar Nayak and Others [2020 SCC OnLine NCLAT 199]** – to contend that reasons have to be recorded why the applicnat is given 'Nil' under the Plan.
- (ii) **M/s SP Enterprises vs. M/s Electrosteel Steels Limited &Ors. [Civil Appeal No. 1133 of 2019]** – **that** the interests of all the stakeholders and the payments to the various classes of operational creditors who have been paid nil value, need to be 'reassessed' and 're-considered' by the Committee of Creditors (CoC).
- (iii) **Dr. Periasamy Palani Gounder v. Radhakrishnan Dharmarajan**<sup>4</sup> that even related party is to be paid.

<sup>2</sup> Company Appeals (AT) (CH)(Insolvency) No. 164, 176, 218 & 219 of 2021

<sup>3</sup> (2020) 8 Supreme Court Cases 531

<sup>4</sup> Company Appeals (AT) (CH)(Insolvency) No. 164, 176, 218 & 219 of 2021



(iv) **Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd. [2022 (1) SCC 401]** that the matter can be referred back to the CoC for appropriate consideration upon rectification of Plan.

4.11 The Applicant states and submits that the Resolution Plan submitted by the Respondent No. 2 presumably discriminates between the Applicant Financial Creditor and the other Financial Creditors. If the Applicant is paid "NIL" by the Resolution Applicant in the Resolution Plan, then the Resolution Plan is contrary to law and deserves to be set aside.

**5. *Reply by the Respondent No.01, i.e, Mr. Ravi Sethi Resolution Professional in IA (IB) No. 1563/KB/2022***

5.1 The Applicant had provided a refundable deposit to the Corporate Debtor in lieu of securing preferential allotment of beds in the hospital of the Corporate Debtor for persons recommended by the Applicant. In lieu of such refundable deposit, the Applicant has been categorized as an unsecured financial creditor.

5.2 In pursuance to the order dated September 23, 2022, by this Adjudicating Authority the Applicant has been adjudged as a related party to the Corporate Debtor.

5.3 The Resolution Plan does not differentiate about the payment being made to the Applicant on the ground that the Applicant is a related party to the Corporate Debtor. The Resolution Plan does not provide NIL payment to the Applicant because it is a related party. The line of argument provided by the Applicant is completely baseless and unfounded.

5.4 As per the Resolution Plan under Part II- Clause 2.3 (iii) [*Ref: Annexure C @ pg. no. 18 of the Supplementary Affidavit*] clearly stipulates that the Applicant has been classified as an unsecured financial creditor of the Corporate Debtor and therefore, no payment is proposed to be made to the Applicant under the Resolution Plan. Further, it is also important to note that pursuant to the

provisions of Part II- Clause 2.3 (iii) of the Resolution Plan, SREI Equipment Finance Limited (*'SEFL'*), despite being a related party to the Corporate Debtor is being paid certain amounts on the ground that it was a secured financial creditor having a residuary charge over the assets of the Corporate Debtor.

- 5.5 The law recognises sub-classification of financial creditors as secured and unsecured and differential payments to each sub-class of creditors. It is submitted that the extant law clearly allows that differential treatment can be provided to the different sub-classes of creditors. Secured and unsecured financial creditors are valid and recognised sub-classes under the class of financial creditors
- 5.6 The CoC, in its commercial wisdom, is free to classify the creditors as secured and unsecured and thereafter determine the amounts to be paid to each class and sub-class of creditors so long as it is in accordance with the provisions of the Code and the CIRP Regulations. It is therefore submitted that while agreeing on the manner of distribution of the resolution proceeds under a resolution plan, a separate treatment can be provided to different sub-classes of creditors, as may be agreed by the CoC (*'Essar Steel'*).
- 5.7 In pursuance to regulation 38 (IA) of the CIRP Regulations, the interest of all stakeholders is to be balanced and NIL payments will not adequately satisfy the requirement of regulation 38 (IA) of the CIRP Regulations, some minimum amount must be paid to operational creditors.<sup>5</sup> In relation to the said judgment, it is important to submit and highlight that no other judgment actually holds that provision of NIL payment to any stakeholder is against the applicable law.
- 5.8 There are several precedents which clearly hold that NIL payment can be provided to stakeholders. Contrary to the submissions of the Applicant, the Hon'ble NCLAT in the matter of *Dharmindra Constructions Pvt. Ltd. & Anr.*

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<sup>5</sup> Hammond Power Solutions Private Limited v. Sanjiv Kumar Nayak & Ors [2020 SCC NCLAT 199].

*v. Rajendra Kumar Jain Resolution Professional of Kudos Chemie Ltd. & Ors*<sup>6</sup>. has held in paragraph 7 as follows:

*“The aforesaid Para 30(ji) extracts Form H submitted by the Resolution Professional which clearly indicate that the Liquidation value of the Appellant is Nil. Even the Operational Creditors that is Government whose verified claim is Rs.295.18 Crores were paid Nil. We do not find any error in the order by which no amount was allocated to the Appellant. The requirement for the obligation for payment of amount to the Operational Creditor is under Section 30(2)(b). It is not shown that there is any breach of provisions of the Section 30(2)b.”*

- 5.9 In the instant case, other than workmen and employees, operational creditors relating to government dues and other operational creditors were both paid NIL. The Hon’ble NCLAT has specifically considered and dealt on this issue and clearly held that the same is not in violation of section 30 (2) (b) of the Code
- 5.10 In *Chandriah v. Sunil Kumar Agarwal*<sup>7</sup> the Hon’ble NCLAT specifically distinguished Hammond Power Solutions Private Limited (**Supra**), and held that even if NIL is allocated, it does not mean that all stakeholders’ interests have not been dealt with. The Hon’ble NCLAT in paragraphs 25 and 26 held that:

*“25. The law thus obliges the Resolution Plan to make statement as to how it has dealt with the interest of all the stakeholders. We in the present case are concerned with the claim of Appellant who was classified as other Creditors. The Resolution Plan envisages as noticed above that amount for other Creditors is Nil. Thus, the submissions that all stakeholders have not been dealt with in the plan cannot be accepted. CoC in his commercial decision has decided not to allocate any amount to the other creditors which cannot be questioned since Appellant has not been able to prove violation of any provision of code in the*

<sup>6</sup> [CA (AT) (Ins) No. 1477 of 2020]

<sup>7</sup> [CA (AT) (Ins) No. 22 of 2022]

Resolution Plan. We thus are of the view that the Resolution Plan which has been approved by the Adjudicating Authority on 274 May, 2020 does not require any interference. We may also refer to the Judgment of this Tribunal in *Hammond Power Solutions Pvr. Lid. v. Sanilt Kumar Nayak and Ors.* Where this Tribunal had set aside the Order of the Adjudicating Authority approving the Resolution Plan and remitting the matter back to the Adjudicating Authority to send back plan to CoC.

26. The above Judgment of this Tribunal is clearly distinguishable since present is a case where all stakeholders have been dealt with in the Plan. There is no requirement in statute that all stakeholders have to be necessarily made payment in the Resolution Plan.”

- 5.11 Hence, in light of the above, it is abundantly clear that the Resolution Plan having duly dealt with the interest of all stakeholders is fully compliant with the provisions of the Code and the CIRP Regulations. Secondly, in the instant case, the Resolution Plan has clearly dealt with the interests of all stakeholders and also provided valid reasons for proposing NIL payments to the Applicant, as a separate sub-class of financial creditors. Accordingly, the aforementioned contention of the Applicant is completely baseless and misconstrued.
- 5.12 The Applicant has mistakenly referred to section 53 of the Code in relation to the current issue. They have also alleged that the Respondent is looking to provide an explanation for the allocation based on section 53 of the Code. It is being made crystal clear that the Resolution Professional does not take support of section 53 of the Code for any of its arguments. In fact, the Resolution Professional reiterates and emphasizes that section 53 of the Code is only applicable in a liquidation scenario. In the current case, the Company is presently under resolution.
- 5.13 Paragraphs 77, 88, 128, 145 of the Essar Case [SCC version being: (2020) 9 Supreme Court Cases 53] clearly stipulate that:



- I. *Differentiation may be made between various sub-classes;*
- II. *The only requirement of referring to section 53 of the Code during resolution is to calculate the minimum amount which may be payable to operational creditors or dissenting financial creditors;*
- III. *The amount to be paid (if at all) to various stakeholders is completely at the discretion of the CoC;*
- IV. *The adjudicating authority does not have power to adjudicate over the commercial wisdom of the CoC.*

5.14 Accordingly, the minimum amounts payable to such classes of creditors, basis the calculation provided under the provisions of the Code, may be NIL. In such cases, the Resolution Applicant can stipulate that no payments would be made to such class of creditors if the same is in compliance with the provisions of the Code.

**6. *Reply by the Respondent No.02, i.e, Nishkala Healthcare Private Limited (Successful Resolution Applicant) in IA (IB) No. 1563/KB/2022***

6.1 There is no provision under the Code which mandates that payment needs to be made to all stakeholders. The only protected class under the Code for distribution of resolution the plan amounts are the dissenting financial creditors and the operational creditors which are required to be provided at least the liquidation value payable to them.

6.2 It is further submitted that unsecured financial creditor objecting to the resolution plan fall in neither of the category. Unsecured financial creditors are entitled to nil liquidation amounts. Therefore, such unsecured financial creditors cannot demand that they be paid over and above their entitlements. The resolution plan has not discriminated against the related parties,

- 6.3 Secured financial creditors and unsecured financial creditors do not belong to the same class of stakeholders.
- 6.4 Time and again, the Hon’ble Supreme Court has given the primacy to the CoC’s commercial wisdom and has observed that so long as statutory provisions are complied with, the Adjudicating Authority should not examine the commercial aspects of the resolution plan.
- 6.5 The Hon’ble Supreme Court has stated in *K. Sashidhar v. Indian Overseas Bank & Ors.*<sup>8</sup> that

*“35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan “as approved” by the requisite percent of voting share of Financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements.*

*Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be Specified by the board”*

*(Emphasis supplied)*

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<sup>8</sup> (2019) 12 SCC 150

**7. *Reply by the Respondent No.03, i.e, Committee of Creditors of Susath Healthcare Foundation, represented by Yes Bank in IA (IB) No. 1563/KB/2022***

- 7.1 It is the commercial wisdom of the CoC which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.
- 7.2 The Successful Resolution Plan is in compliance with the Code and the CIRP Regulations and it is the commercial wisdom of the CoC that should be accorded primacy. Treatment of Applicant as unsecured financial creditor is in compliance with the Code and the CIRP Regulations
- 7.3 The Resolution Plan does not distinguish between the financial creditors on the basis of whether they are related party or not, the Applicant has basis its incorrect understanding of the provisions of the Code.
- 7.4 The Applicant has stated that it should be considered as a dissenting financial creditor. It is submitted that even assuming, whilst denying that the Applicant herein was admitted as a member of the CoC and dissents to approval of Successful Resolution Plan, the Applicant would have a voting share of approximately 19% in the CoC. As per Section 30(4) of the Code, the requisite threshold for approval of the Resolution Plan is 66% of the voting share. Accordingly, in the present instance, even assuming that the Applicant was admitted as a member of the CoC, the Resolution Plan would still have been approved by a majority of approximately 81% of the CoC members. Plan would still not be in contravention of the Code and any allegation to the contrary is liable to set aside.

**8. IA (IB) No. 1567/KB/2022**

- 8.1 This is an application filed by Shankar Mukherjee, a member of Suspended Board of Directors (*'Applicant'*), against the Mr. Ravi Sethi Resolution

Professional (**'RP'**) of the Corporate Debtor (**'Respondent No.01'**), Yes Bank Limited (**'Respondent No.02'**), Axis Bank Limited (**'Respondent No.03'**) and Consortium of Nishkala Healthcare Private Limited & Ujin Pharma Chem (**'Respondent No.04'**) *inter-alia* seeking for the following reliefs;

- a. *An Order/Orders granting leave to the Applicant to intervene in I.A. No. 1381/KB/2022 filed by the Respondent No.1/R.P. for approval of the said Resolution Plan submitted by the Respondent No. 4/Resolution Applicant and to object to the approval of said Resolution Plan on the ground or grounds particularly set forth in this instant application;*
- b. *An order and/or orders quashing and/or setting aside the said Resolution Plan filed by the Respondent No. 4/Resolution Applicant and sending back the Resolution Plan to the CoC of the Corporate Debtor for further consideration;*
- c. *Ad-interim orders in terms of prayers (a) and (b) above;*
- d. *Such further or other order or orders be passed and/or direction or directions be given as this Hon'ble Tribunal may deem fit and proper;*

**9. Submissions by the Applicant in IA (IB) No. 1567/KB/2022**

- 9.1 The Applicant is a member of the suspended Board of Directors of the Corporate Debtor, aggrieved by the approval of a resolution plan in respect of the Corporate Debtor. The Respondent No. 4 (i.e., SRA) has illegally claimed to itself in clause 2.2 (c) (i) of Part II of the resolution plan 'sole discretion' to determine the manner of final distribution of the amount i.e., Rs.73,00,000/-
- 9.2 Such discretion is not available to the Respondent No. 4 (i.e., SRA) as the manner of distribution proposed under the said plan has to be fully disclosed therein so that the same is clearly visible and apparent to this Adjudicating Authority.

- 9.3 Similarly, the Respondent No. 4 (i.e., SRA) has illegally proposed to institute favourable treatment towards some operational creditors who are doctors and potentially discriminate among them as well as against other operational creditors by entering into “arrangements/agreement with the operational creditors, being the doctors”, for payments of purportedly “mutually agreed amounts.”
- 9.4 Respondent No.4 has proposed to “pay Rupees Twenty Seven Lakhs only (27,00,000) towards the Operational Debt (other than debt owed to Employees and Workmen), i.e. towards Admitted Other Operational Creditor Debt , Admitted Government and Statutory Authority Debt on a pro rata basis,” whereas the Respondent No.4 has proposed to pay “NIL” amount to unsecured related party financial creditor against its admitted claim of Rs.60,37,46,150/- (Rupees Sixty Crore Thirty Seven Lakh Forty Six Thousand One Hundred and Fifty only).
- 9.5 No reason has been accorded in the resolution plan for such undue preference towards these operational creditors over the unsecured financial creditor, neither any basis been provided for paying “NIL” amount to an unsecured financial creditor.
- 9.6 Therefore the resolution plan is liable to be set aside by this Adjudicating Authority as it does not effectively deal with the interests of all stakeholders of the Corporate Debtor, and as such does not comply with section 30(2)(e) and section 30(2)(f) of the Code.
- 9.7 Purported commercial wisdom of the CoC cannot be exercised contrary to law and settled principles of law. It is discriminatory to propose “NIL” payment under the resolution plan to the unsecured financial creditor while proposing a high payment to the admitted other operational creditors who rank lower on the waterfall mechanism under section 53(1).

- 9.8 There exists no intelligible differentia in the resolution plan for privileging the admitted other operational creditors over the unsecured financial creditor in such a manner contrary to the scheme of section 53(4) of the Code.
- 9.9 The Applicant is not disputing the necessity of paying these operational creditors in priority over the financial creditors insofar as the timings of the payments under the resolution plan are concerned for the purpose of compliance with Regulation 38(1) of the CIRP Regulations.
- 9.10 A harmonious reading of the object of the IBC to ‘balance the interests of all the stakeholders’, section 30(2), section 30(4), section 53 of the IBC and Regulation 38 of the CIRP regulations will necessarily preclude the Respondent Nos. 2 and 3 from arbitrarily exercising any purported commercial wisdom to approve the said resolution plan wherein the amount proposed to be distributed to the creditors clearly fails to balance the interests of the stakeholders.
- 9.11 Furthermore, a careful appreciation of the minutes of the 15 Meeting of the CoC will indicate deterioration in the value of the assets of the Corporate Dbetor during the currency of the CIRP. The explanation offered by the RP for the disparity in valuation figures is plainly untenable in light of facts and prima face findings emanating from an Order dated 06 December, 2017 passed by the Hon'ble High Court at Bombay. The RP had also failed to continue the business operations of the Corporate Dbetor during the CIRP.
- 9.12 Operations of the Corporate Dbetor had been suspended by the RP in August, 2022, and salaries have not been paid to a number of employees/workmen. The diminution in the value of the assets of the Corporate Dbetor makes it plain and evident that the Respondent No.1 (i.e., the RP) has failed to preserve the value of the assets of the Corporate Dbetor and violated his duty under section 25(1) of the Code

9.13 The impugned resolution plan violates section 30(4) and section 30(2) of the Code by failing to specify the manner of distribution in respect of a sub-class of the Operational Creditors. The SRA has not stated in the impugned plan the manner of distribution it has proposed for Operational Creditors who are Employees and Workmen of the Corporate Debtor.

**10. *Reply by the Respondent No.01, i.e, Mr. Ravi Sethi Resolution Professional in IA (IB) No. 1567/KB/2022***

10.1 The distribution of resolution amounts is in compliance with the provisions of the Code and the CIRP Regulations. The Applicant has repeatedly suggested that the Resolution Plan discriminates the Applicant only because it is a related party. In light of the aforementioned contention of the Applicant, it is humbly submitted that the Resolution Plan does not provide NIL payment to Hari Vittal Mission (*'HVM'*) because it is a related party.

10.2 HVM has been classified as an unsecured financial creditor of the Corporate Debtor and therefore, no payment is proposed to be made to HVM under the Resolution Plan.

10.3 The Resolution Plan, while dealing with the payment to be made to the stakeholders of the Corporate Debtor, does not discriminate against HVM by virtue of it being a related party of the Corporate Debtor. The Resolution Plan, in no uncertain terms, stipulates that the reason for proposing no payments to HVM is only because of it being an unsecured financial creditor of the Corporate Debtor.

10.4 The law recognises sub-classification of financial creditors as secured and unsecured and differential payments to each sub-class of creditors

10.5 Further, the provisions of the Code and the CIR Regulations envisage the creation of a sub-class of secured financial creditors and unsecured financial creditors. The Form H, which is required to be submitted in with the provisions

of regulation 39 (4) of the CIRP Regulations, clearly provides for a classification of financial creditors as secured financial creditors and unsecured financial creditors.

- 10.6 Accordingly, the CoC, in its commercial wisdom, is free to classify the creditors as secured and unsecured and thereafter determine the amounts to be paid to each class and sub-class of creditors so long as it is in accordance with the provisions of the Code and the CIRP Regulations.
- 10.7 The provisions of section 30 (2) of the Code, while referring to section 53 (1) of the Code only stipulates a manner of calculation of arriving at a minimum amount to be paid to the operational creditors or dissenting financial creditors, which shall not be less than the amounts payable to such creditors in the event the proceeds are distributed in accordance with the priority mentioned under section 53 (1) of the Code.
- 10.8 Accordingly, the minimum amounts payable to such classes of creditors, basis the calculation provided under the provisions of the Code, may be NIL. In such cases, the Resolution Applicant can stipulate that no payments would be made to such class of creditors if the same is in compliance with the provisions of the Code.
- 10.9 The Applicant has alleged that the amounts to be paid to operational creditors should be in compliance with section 30 (2) of the Code and the distribution of such amounts must be fair and equitable. In light of such allegation by the Applicant, it is humbly submitted that the Resolution Plan is fully compliant with the provisions of the Code.
- 10.10 It is abundantly clear that a resolution applicant, while submitting a resolution plan, can commercially determine and provide the relevant amounts to be paid to the relevant stakeholders of the corporate debtor after a review of the factual scenario. Accordingly, in the instant case, the Resolution Applicant is well

within its rights to allocate and provide for certain amounts to be paid to the doctors and essential vendors and employees of the Corporate Debtor, so long as the payments being made are in accordance with the provisions of section 30 (2) of the Code.

10.11 Further, the CoC, upon a review of the Resolution Plan and after due negotiations and discussions on the feasibility and viability of the Resolution Plan, the payment structure and the timelines, in its commercial wisdom has approved the Resolution Plan by a majority of 100% of the voting share of the CoC.

10.12 The payments envisaged under the Resolution Plan for payment of provident fund dues are in compliance with the provisions of applicable laws. The Resolution Professional has duly ensured maximisation of the value of the Corporate Debtor.

10.13 It is pertinent to note that the valuation of the Corporate Debtor was affected on account of the issue regarding the registration of the lease deed with City and Industrial Development Corporation (“CIDCO”). The Applicant, in the instant case, has wrongly alleged that the interim order of the Hon’ble Bombay High Court had resolved the dispute. The order of the Hon’ble HC has simply recorded that the matter is pending before the PUC of the CAG. [Ref: Annexure A-7 @ pg. no. 200 of the Application].

10.14 It is important to highlight that despite the suspension of works and the impending obstacles faced by the Resolution Professional, the revised Resolution plan submitted by the Resolution Applicant provided better and improved commercial terms to the stakeholders.

**11. *Reply by the Respondent No.03, i.e, Axis Bank Limited (on behalf of CoC) in IA (IB) No. 1567/KB/2022***

11.1 The Successful Resolution Plan has been approved by the 100% majority vote of the CoC through e-voting which concluded on October 6, 2022.

- 11.2 It is a settled law that if a resolution plan is compliant with the provisions of the Code and the CIRP Regulations, it is the commercial wisdom of the requisite majority of the CoC (i.e. 66% by voting share) to accept a resolution plan.
- 11.3 The allegations by the Applicant that the Successful Resolution Plan is not in compliance with the provisions of the Code are entirely baseless and unsubstantiated and devoid of merit. The Successful Resolution Plan is in compliance with the Code and the CIRP Regulations and therefore it is the commercial wisdom of the CoC that should be accorded primacy and the Captioned Application shall be dismissed.
- 11.4 The liquidation value of the Corporate Debtor is not sufficient to pay the secured creditors who rank prior to dues of Employees under the waterfall mechanism in Section 53 of the Code. Therefore, the liquidation value to Employees would have been NIL. However, in respect of the admitted employee debt of INR 1,46,00,00,000, the clause 2.2(c)(i) of the Successful Resolution Plan provides for payment of IN 73,00,000 i.e., 50% of the admitted employees debt, which is higher than the amount mandatorily required to be paid under Section 30(2)(b) read with Section 53 of the Code.
- 11.5 The Applicant has further made false and baseless statement that the Successful Resolution Plan does not provide any statement as to gratuity dues that are already payable by the Corporate Dbetor. It is submitted that the Clause 2.2(c)(ti)(e) of the Successful Resolution Plan stipulates that the Gratuity amounts payable to the employees who leave the employment of the Corporate Debtor post the approval date will be paid by the Corporate Debtor in accordance with the provisions of Applicable laws [*Clause 2.2(c)(iii)(e) of Part II on Pg. 22 of the Resolution Plan*].
- 11.6 The Applicant has made similar false and frivolous allegations in respect of provident fund dues. It is submitted that the Clause 2.216)(i)(d) of the Successful Resolution Plan provides that the payment towards outstanding contribution in

relation to provident funds has to be made in priority to the Financial Creditors  
*[Clause 2.2(c)(tt)(d) of Part I on Pg.22 of the Successful Resolution Plan].*

11.7 The Resolution Applicant in the Successful Resolution Plan has provided separate treatment to secured and unsecured financial creditor, which is not contrary to the Code or the CIRP Regulations.

**12. *Reply by the Respondent No.04, i.e, Nishkala Healthcare Private Limited (SRA) in IA (IB) No. 1567/KB/2022***

12.1 There is no requirement under the Code that all operational creditors be paid pro rata. As long as the provisions of the Code are met, the distribution in resolution plans is considered to be fair and equitable. It is also a settled principle that there is no requirement for proportionate distribution of claims of Operational creditors *[Essar Steel (Supra)]*.

12.2 Further, the distributions under the Resolution Plan are based on security interests as well as the post resolution plan role of such creditors. There is no requirement that each group of stakeholders must be given a particular amount under the resolution plans.

12.3 Under the Section 53 the waterfall mechanism can be used as a guiding factor for determining the entitlements. It is pertinent to mention that operational creditors find no mention in Section 53 primarily because Section 53 distribution is meant for distribution of liquidation proceeds and not the distribution under resolution plans.

12.4 It is also pertinent to mention that in the present case, unsecured financial creditors are entitled to nil liquidation amounts. Therefore, such unsecured financial creditors cannot demand that they are entitled.

12.5 The resolution plan under consideration complies with all relevant requirements under the law as required under Section 30(2) of the Code.

**13. I.A. (IB) No. 187/KB/2023**

13.1 The I.A. has been filed by Param Commercial Private Limited under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“Code”) against Mr. Ravi Sethia, the Resolution Professional of the Suasth Healthcare Foundation, Yes Bank Limited and Axis Bank Limited seeking the following reliefs:

- a. *An order directing the respondents to allow the applicant and its financial partner to conduct a site visit of the hospital to get a better perspective and provide an improved proposal to the respondents so that the Corporate Debtor can be pulled out of the CIRP;*
- b. *An order directing the respondents to allow the Applicant to submit a revised and improved proposal which can be considered by the Respondents.*
- c. *Ad-interim orders;*
- d. *Such further or other order or orders be passed and/or direction or directions be given as this Hon’ble Tribunal may deem fit and proper.*

**14. Submissions on behalf of the Applicant in I.A. (IB) No. 187/KB/2023**

14.1 Param Commercial Private Limited (“Param Commercial”) holds 48.99% of the shares in the Corporate Debtor. It is submitted that the Corporate Debtor is an MSME and hence, Param Commercial is eligible to submit a proposal under section 12A of the Code as well as submit a Resolution Plan with respect to the Corporate Debtor under section 240A of the Code.

14.2 The Resolution Plan submitted by Param Commercial on 05 July 2022 was rejected by the Committee of Creditors on 21 July 2022. Thereafter, Param Commercial submitted a proposal under section 12A of the Code for withdrawal of CIRP on 28 September 2022, the proposal for withdrawal of CIRP was rejected by the CoC.

14.3 It is submitted that aggrieved by response of the CoC, Param Commercial filed an Interlocutory Application registered as I.A. (IB) No. 1308/KB/2022 which is still pending adjudication. In the meantime, Param Commercial sent an email to the Resolution Professional on 28 December 2022, requesting for permission to

visit the the hospital along with the financial partner of Param Commercial. Since no reply was received by Param Commercial, it sent another email on 03 January 2023 requesting for a site visit to be provided to Param Commercial along with its financial partner.

14.4 The learned Counsel submitted that a proposal under section 12A of the Code can be given at any stage of the proceeding including the liquidation stage. He placed reliance on the judgment passed by the Hon'ble NCALT in *V. Navaneetha Krishnan v. Central Bank fo India, 2018 SCC OnLine NCLAT 904* and *Satyanarayan Malu v. SBM Paper Mills Ltd., 2018 SCC OnLine NCLT 32358*.

14.5 It is further submitted that Param Commercial is genuinely trying to resuscitate the Corporate Debtor and hence a site visit will be helpful in correcting the deficiencies which were existing in the earlier proposals submitted by it to the CoC.

14.6 The learned Counsel submitted that in view of the above circumstances, direction be given to the Resolution Professional to allow Param Commercial to visit the hospital along with its financial partner on a day and at a time convenient to the Resolution Professional and/or its representative so as to provide Param Commercial with an opportunity to improve its proposal in the interest of maximization keeping in mind the intent and object of the Code. For the proposition that every opportunity ought to be afforded to an MSME to revive the Corporate Debtor under the provisions of section 240-A of the Code, the learned Counsel placed reliance on the celebrated decision of the Hon'ble Supreme Court in *Swiss Ribbons Private Limited vs Union of India (2019) 4 SCC 17* [Pr. 111 to 115].

**15. Submissions on behalf of Respondent No.01 (i.e., the Resolution Professional) in I.A. (IB) No. 187/KB/2023**

15.1 The learned Senior Counsel submitted that the CIRP was initiated on 31 August 2021 and Form G was published on 03 January 2022, wherein the last date of submission of Expression of Interest (“EoI”) was 24 January 2022. The Final

List of Prospective Resolution Applicants was issued on 18 February 2022 and the Resolution Professional issued the Request for Resolution Plan (“RFRP”) on 26 March 2022. The last date for submission of Resolution Plans was 15 May 2022.

- 15.2 It is submitted that Param Commercial sent a letter expressing its interest to submit its Resolution Plan on 28 May 2022. On 17 June 2022, the Resolution Professional replied to Param Commercial stating the last day of submission of EoI and that the CIRP was to be completed in a time bound manner.
- 15.3 On 05 July 2022, Param Commercial submitted its Resolution Plan. The Resolution Professional sent a letter to Param Commercial stating that it is not an eligible Prospective Resolution Applicant. Thereafter, Param Commercial submitted Financial Proposal on 28 September 2022. The said proposal was considered in the 12<sup>th</sup> CoC meeting held on 06 October 2022 and was rejected by the CoC. Another Financial Proposal was submitted on 05 December 2022 which was rejected on 06 December 2022. The CoC, after deliberating and discussing the proposals, unanimously rejected both the financial proposals submitted by the Param Commercial. This decision of the CoC has been communicated to the Param Commercial.
- 15.4 It is submitted that it is important to note that section 12A of the Code provides a discretionary right to the adjudicating authority to permit the withdrawal of an application for initiation of CIRP if the application for withdrawal is approved by the committee of creditors with a voting share of 90%. The learned Senior Counsel placed reliance in the case of ***Hem Singh Bharana v. M/s Pawan Doot Estate Private Limited*** [CA (AT) (Ins) No. 1481 of 2022] wherein the Hon’ble NCLAT while referring to the order of the Hon’ble Supreme Court in the case of ***Vallal Rick v. M/s Siva Industries and Holdings Limited and Ors.*** [CA Nos. 1811-1812 of 2022] has clearly held that “*From the above judgment of the Hon’ble Supreme Court, we are unable to find any ratio that even if a Resolution Plan is approved by the CoC and the Application is pending consideration for approval, the Promoters are entitled to file Settlement Proposal.*”

- 15.5 Thereafter, Param Commercial sent emails on 28 December 2022 and 03 January 2023, to the Resolution Professional requesting permission to visit the Hospital with its financial partner.
- 15.6 The Respondent No. 1, *vide* its e-mail dated January 06, 2023 has duly replied to the Applicant. In the said e-mail, it was highlighted that as per the provisions of the Code read with the applicable regulations and the RFRP, a site visit was provided to eligible prospective resolution applicants for a particular period of time stipulated under the RFRP. In the instant case, the Applicant is not an eligible resolution applicant and the period for site visit, as stipulated under the RFRP, has also expired. It was also highlighted that the financial proposal submitted by the Applicant has been rejected twice by the CoC and the application for approval of the resolution plan is pending before the Adjudicating Authority
- 16. Submissions of the Committee of Creditors (i.e., Respondent No.02 & Respondent No.03) in I.A. (IB) No. 187/KB/2023**
- 16.1 The learned Counsel submitted that the dates and events have been mentioned by the learned Counsel appearing on behalf of the Resolution Professional. It is submitted that the CoC in its commercial wisdom has already considered and rejected the Original Proposal submitted under section 12A of the Code as well as the Revised Proposal submitted by Param Commercial.
- 16.2 It is submitted that the present I.A. has been filed by Param Commercial as a dilatory tactic devised to prejudice and cause delay in the CIRP of the Corporate Debtor and hence should be dismissed *prima facie*.
- 16.3 It is submitted that the Hon'ble Supreme Court in the case of ***Vallal RCKv. Siva Industries and Holdings Limited and Ors., AIR 2022 SC 2636*** has *inter alia* held that the Adjudicating Authority or the Hon'ble NCLAT cannot sit in an appeal over the commercial wisdom of CoC in accepting or rejecting a withdrawal proposal as per section 12A of the Code. The interference would be warranted only when the Adjudicating Authority finds the decision of the CoC

to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute.

- 16.4 It is submitted that a bare perusal of the reasons for rejection of the Original Proposal submitted under section 12A of the Code as well as the Revised Proposal as set out in emails dated 06 October, 2022 and 07 December 2022 respectively sent by YES Bank Limited to the Resolution Professional would undoubtedly prove that the decision of the CoC to reject each of the said proposals is based on sound commercial reasons and cannot be termed as capricious, arbitrary, irrational or de hors the provisions of the Code or the regulations thereunder.
- 16.5 The CoC has unanimously approved a resolution plan which proposes to pay the entire amount upfront upon approval of this Adjudicating Authority. The Resolution Professional has filed an I.A. for approval of the Resolution Plan before this Adjudicating Authority.
- 16.6 The learned Counsel has placed reliance on the judgment passed by the Hon'ble NCLAT in *Hem Singh Bharana supra.*, paragraphs 15,16 and 22).
- 16.7 In the present case, given that the CoC has approved a resolution plan, any further consideration/ negotiation of a settlement proposal for withdrawal of proceedings as per section 12A of the Code would not be plausible or viable in light of the NCLAT judgment stated above.

**17. *Rejoinder by the Applicant to the Reply of Respondent No. 1 in I.A. (IB) No. 187/KB/2023***

- 17.1 The learned Counsel submitted that the the Respondents have contended that a proposal made under Section 12A of The Code cannot be considered after approval of the Resolution Plan by the CoC and have relied on the decision of the Hon'ble NCLAT in *Hem Singh Bharana v. M/s Pawan Doot Estate Private Limited [CA (AT) (Ins) No. 1481 of 2022]*.
- 17.2 The learned Counsel submitted that reliance on such decision is wholly misplaced and inapplicable to the present fact situation in that the said decision was passed in a fact situation where the application for approval of the

Resolution Plan was heard and subsequently reserved for orders by the Leamed Adjudicating Authority, New Delhi. (Refer Pages 2 & 3 Pr. 2 (iv) of the decision) Admittedly, in the present case, arguments in support of approval of the Resolution Plan have not been concluded.

- 17.3 The said decision was passed in a fact situation where the prayer made in the application was for entertaining the proposal made by the promoters under section 12A of the Code by deferring consideration of the Resolution Plan by the Adjudicating Authority. This will be evident from the question framed by the Hon'ble NCLAT. The applicant reiterates that it is only interested in visiting the hospital and submit an acceptable proposal.
- 17.4 The case relied upon by the respondent has been pronounced/rendered by a two-member bench of the Hon'ble NCLAT whereas a three-member bench of the Hon'ble NCLAT *vide* a judgement dated 28.08.2019 in ***Shweta Vishwanath Shirke and Others v. Committee of Creditors and Another 2019 SCC OnLine NCLAT 1049*** had held that it is always open to an applicant to withdraw an admitted application on the basis of which any CIRP has been initiated.
- 17.5 The instant matter is at a stage where the Resolution Plan has not been approved by the Adjudicating Authority. The distribution of resolution amounts to Hari Vitthal Mission ('HVM') is contrary to the provisions of the Code and the CIRP Regulations;
- 17.6 The payments being made to the Operational Creditors are at the sole discretion of the Resolution Applicant, which is contrary to the provisions of section 30 (2) of the Code; The payments envisaged under the Resolution Plan for payment of provident fund dues are non-compliant with the provisions of applicable laws; The Resolution Professional has failed to maximise the value of the Corporate Debtor

### **ANALYSIS & FINDINGS**

#### **In I.A. (IB) No. 187/KB/2023**

18. We have heard the learned Counsel appearing on behalf of Param Commercial, the learned Senior Counsel appearing on behalf of the Resolution Professional and the learned Counsel appearing on behalf of the CoC and perused the records.
19. The present I.A. has been filed by Param Commercial so that it can be given an opportunity to visit the hospital in order to place a better proposal under section 12A of the Code, which would be agreeable to the CoC.
20. The timeline with respect to the CIRP has been given by the Resolution Professional. The last date for submission of EoI was 24 January 2022 and the last date for submission of Resolution Plan was 15 May 2022, whereas Param Commercial submitted its request to submit its Resolution Plan on 28 May 2022 and filed its Resolution Plan on 05 July 2022, despite the fact that the Resolution Professional had rejected its request to file such plan. The Resolution Plan filed by Param Commercial was rejected by the CoC.
21. Thereafter, Param Commercial filed two proposals under section 12 A of the Code, which were also rejected by the CoC.
22. At this stage, the CoC have approved the Resolution Plan on 06 October 2022 and the Resolution Professional has filed an I.A. for approval of the same.
23. Param Commercial being the shareholder of the Corporate Debtor was aware of the CIRP and the timelines that were followed according to the Code, yet it did not follow the said timelines. It wasn't cautious about the timeline and filed its Resolution Plan as well as the Proposals for withdrawal after the approval of the Resolution Plan by the CoC. The CoC has considered both the proposals and rejected the same. Going through email rejecting the proposals *vide* emails dated 06 October 2022 and 07 December 2022 (filed with the notes of submissions) it is seen that ample reasons have been given for rejecting the proposals under section 12A of the Code.
24. Be that as it may, this I.A. has been filed only to seek permission to visit the hospital in order to submit a better proposal. If the CoC were of the view that a better proposal could be given by Param Commercial, the same would have been submitted at the time of arguments or an opportunity would have been granted

to Param Commercial to submit a better revised proposal, but it was not. At this stage, where the Resolution Plan is before us for the approval, and the proposal for withdrawal under section 12A of the Code have been rejected twice by the CoC using its commercial wisdom, we are of the view the prayers in this I.A. cannot be allowed. Param Commercial cannot be given an opportunity time and again which will also stall the CIRP of the Corporate Debtor.

**IA (IB) No.1563/KB/2022**

25. Whether applicant Hari Vittal Mission has been rightly denied any share of Resolution Amount
26. It is a settled proposition that:

*Ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors.*

**[Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta (2020) 8 Supreme Court Cases 531].**

In course of arguments, Ld. Sr. Counsel Mr. Ramji Srinivasan appearing for the RP in the matter would draw our attention to **Paragraphs 77, 88, 128, 145 – 147** of the **Essar Steel decision [(2020) 8 SCC 531]** to contend that:

*“Equitable treatment of creditors is equitable treatment only within the same class”.*

Ld. Counsel would place the following Paragraphs from the decision to support his contention that the applicant a related party financial creditor has been rightly provided “NIL” in the plan. The extracts would be the following:

**XXX XXXXXX**

88. *The Appellate Tribunal has fallen into grave error. The observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster.*

**XXX XXXXXX**

128. *When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Ms. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Ms. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of*

operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.

**XXX XXXXXX**

145. Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct not in the context of priority of payment of creditors, but only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.

**XXX XXXXXX**

146. The other argument based upon serious conflict of interest between secured and unsecured financial creditors, as the majority may get together to ride roughshod over the minority, is an argument which flies in the face of the majority of financial creditors being given complete discretion over feasibility and viability of resolution plans, which includes the manner of distribution of debts that is contained in them, subject to following the provisions of the Code relating, inter alia, to dealing with the interests of all stakeholders including operational creditors. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors, as it sought to be suggested by Shri Sibal. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. It is important to note that the original threshold required by way of majority was 75%. It is during the working of the Code that this was found to be unrealistic

*and therefore reduced to 66% - see the amendments made to Section 28(3) and 30(4) of the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act of 2018. For all these reasons therefore, it is not possible to accept Shri Sibal's arguments”.*

*147. NCLAT Judgment which substitute its wisdom for the commercial wisdom of the Committee of Creditors. “XXXXXXXX XXX must therefore be set-aside”.*

Placing the above it was urged that this Tribunal cannot substitute its wisdom for the Committee of Creditors.

27. Ld. Sr. Counsel Mr. Joy Saha would strenuously urge that the analogy given in Para 72 of the Judgment militates against the arguments put forth by the Sr. Counsels for RP and SRA, the extract being herein under:

*“72. This is the reason why Regulation 38(1-A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value – which in most cases would amount to nil after secured creditors have been paid – would certainly not balance of interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern”.*

28. Law is fairly well-settled that this Adjudicating Authority cannot substitute its wisdom for the CoC. But at the same time, we may not lose sight of the content of **Para 88** which provides:

*“88. The Appellate Tribunal has fallen into grave error.*

**XXX XXXXXX**

*The observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. The amended Regulation 38 set out in para 77 again*

*does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster”.*

We would note that the reference is misplaced. The claim of the present application is not that it should be paid the same amount that stands allocated in favour of the OC, but that at least a minimum that could have been provided to a dissenting FC (given the fact that the applicant once in CoC was ousted on the ground of “related party” to CD and was thus not allowed to vote). Later the RP has considered it as an unsecured Financial Creditor, we would further note that 30(2)(b) envisages that the resolution plan should provide for “payment of debts of financial creditors, who do not vote in favour of the resolution plan” and as in Explanation I the distribution that “shall be fair & equitable to such creditors”.

In terms of the judgment in *Essar Steel (Supra)* a balance has to be struck of interest of all stakeholders, including related party financial creditor, or an unsecured financial creditor like the present applicant. There is nothing in the code that deprives them.

29. In a batch appeals starting with **Dr.Periasamy Palani Gounder CA (AT) CH Ins 164/2021** in the matter of **Dharani Finance Ltd. CA (AT) (CH) Ins. 176/2021**, the RP had challenged the resolution plan,

*“On the ground that the Resolution Plan is violative of the IBC and Article 14 of the Constitution”; “and there has been a material irregularity in the exercise of the powers by the RP, and the Appellant who is also an Operational Creditor has not been provided for”.*

It was held as under:

- (i) *The Resolution Plan discriminates against the Appellant by providing no payment to it on the ground that it is a Related Party, even though the debt is admitted. The IBC does not permit discriminatory plans to be approved.*



- (ii) The Insolvency and Bankruptcy Code (Amendment) Act, 2019, does not provide for 'related party to be classified separately for payments under the Resolution Plan.
- (iii) Para 131 of the Supreme Court's Judgment in Committee of Creditors of Essar Steel India Ltd. Satish Kumar Gupta (2020) 8 SCC 531 states explicitly that the Resolution Plan may consider different classes of creditors mentioned in Section 53 of the IBC. Accordingly, Section 53 does not treat related parties as separate creditors.
- (iv) The law has to permit a distinction to be explicitly created, and this distinction should be based on intelligible criteria. The discrimination should have a nexus with the object sought to be achieved. **In the present case, the IBC does not provide for a separate classification of Related Party for payments under the Resolution Plan.** Such classification must still meet the test of reasonable nexus with the object to be achieved.
- (v) The IBC treats related parties as a separate category for specified purposes, excluding them from CoC under Section 21 and disqualifying them from being Resolution Applicants under Section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose.
- (vi) Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification. In Phoenix ARC Private Limited w. Spade Financial Services Limited, 2013 SCC 475 the Hon'ble Supreme Court held that they are excluded from the CoC so that they do not impede and interfere with the Resolution Process. This rationale is achieved by excluding them from the CoC and submitting Resolution Plans. However, for payment under the Resolution Plan, there is no reason to treat them as a separate class.
- (vii) Although in the 7<sup>th</sup> and 8<sup>th</sup> CoC Meetings, a certain amount was set apart for Related Parties in the final plan approved although in the next meeting, no amount is paid to the Related Party, and no discussion in the CoC for the same is recorded.



**The NCLAT considered the arguments that,**

***A related party is prohibited from acting in any of the following capacities in a CIRP:***

<b><i>Particulars</i></b>	<b><i>Provisions</i></b>
<i>Cannot be part of Committee of Creditors</i>	<i>Sec. 21, IBC, 2016</i>
<i>Cannot be a Resolution Applicant</i>	<i>Sec. 29A, IBC, 2016</i>
<i>Cannot be an authorized representative</i>	<i>Reg. 4A, IBBI (Insolvency Resolution Process for Corporate Persons) Reg, 2016</i>
<i>Cannot be a liquidator</i>	<i>Reg. 3, IBBI (Liquidation Process) Reg. 2016</i>
<i>Cannot be a part of the governing board</i>	<i>Reg. 9, IBBI (Information Utilities) Reg, 2017</i>
<i>Cannot act as a professional</i>	<i>Reg. 7, IBBI (Insol. Professionals) Reg. 2016</i>
<i>In case there any only related parties as financial creditors, the CoC would be formed of the Operational Creditors</i>	<i>Reg. 16 IBBI (Insolvency Resolution Process for Corporate Persons) Reg. 2016</i>

*“That the underlying object is that the involvement of a related party in the CIRP in any capacity is seen as giving unfair benefit to the Corporate Debtor. In short, a related party is treated in the same class as the Corporate Debtor itself”.*

After due consideration various pronouncement of Apex Court and other Hon’ble Courts, the Hon’ble NCLAT held in the batch cases as follows:

*“183. Based on the discussion above, it is clear that IBC treats related parties as a separate category for specified purposes, excluding from the CoC under Section 21 and disqualifying them from being Resolution Applicants under Section 29A. However, the IBC does not treat Related Party as a separate class for any other purpose. Therefore, a rationale nexus must exist for any classification between the object sought to achieve the classification and sub-classification.”*



**It also observed that:**

*“177. The Tribunal is a creature of statute, and by interpretation, it cannot dilute the statutory compliances”.*

In the light of the above proposition, it would not be fair to suggest that only the left out operational creditors are eligible to agitate if their share is nil in the plan. The related party financial creditors who could have been in the CoC but have been deprived to vote, should not deserves NIL payment as a matter of course.

**30. In M/s SP Enterprises vs. M/s Electrosteel Steels Limited &Ors. [Civil Appeal No. 1133 of 2019] Hon’ble Apex Court ordered as under:**

*Having heard learned counsel for all the parties, and given our most recent judgment in the Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta &Ors. (Civil Appeal Nos. 8766-8767 of 2019) delivered on 15.11.2019, we send the matter back to the National Company Law Tribunal (hereinafter referred to as ‘NCLT’ for brevity) to decide this case in accordance with paragraphs 46 and 56 CIVIL APPAL NO. 1133 OF 2019 etc. of the said judgment so that the NCLT may then consider whether the matter should be sent back to the Committee of Creditors to balance the interests of all the stakeholders, and ask the Committee of Creditors to reconsider nil payment to all Operational Creditors as per the Resolution Plan submitted.*

*It will be open for the parties to argue before the NCLT that the amount that has been paid by the Resolution Applicant should not be enhanced and that the secured creditors should be asked to take a call on whether a further hair-cut needs to be ordered so that the Operational Creditors may also receive some proportion of debts owed to them.*

*We make it clear that all arguments will be open to all the parties to make before the NCLT which will be decided strictly in accordance with our latest judgment.*

*We make it clear that the implementation of the Resolution Plan is not stayed.*

*The civil appeals stand disposed of.*

Thus, it is explicit that in the extent this Tribunal finds that a balance is not struck of interest of all stakeholders the matter (here resolution plan) can be sent back to the CoC to take a call.

**31. In Hammond Power Solutions Private Limited vs. Sanjit Kumar Nayak and Others [2020 SCC OnLine NCLAT 199], Hon'ble NCLAT noted,**

*“13. It has been observed in Para – 80 and 81 of the Judgment as follows: -*

*“80. When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the minimum in the case of operational creditors being the higher of the two figures calculated under sub-clauses (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder.*

*15. If the above minutes are perused, it can be hardly said that there are any reasons given by the Committee to demonstrate that it has taken care of interest of all stakeholders. Para 46 – of the Judgment in the matter of “Essar Steel” requires to see “the reasons given by the Committee of Creditors while approving a resolution plan” from point of view stated in the paragraph. The reasons for giving NIL to Operational Creditors is not reflected from record. We have already reproduced portion from Part B – Financial Proposal with regard to what the approved Resolution Plan states regarding dues to the Operational Creditors. The proposal is based on the assessment that there is no liquidation value due to Operational Creditors. Although it is not stated but there is reason to doubt that the Resolution Applicants were aware of the liquidation value. There is no dispute that so many of the Operational Creditors have been left high and dry giving them nil amount which Hon’ble Supreme Court has observed that giving NIL to Operational Creditors “would certainly not balance the interest of all stakeholders or maximise the value of assets of the Corporate Debtor if it becomes impossible to continue running its business as a going concern.”*

(emphasis added)

32. What we infer from the foregoing discussions is that:
- (i) The IBC treats related parties as a separate category for specified purpose so that they are excluded from the CoC and are as such not able to impede and interfere with the resolution process. (Section 21) and are disqualified from being resolution Applicants [Section 29(A)].
  - (ii) However, there is nothing to show that Section 53 treats them as a different class and excludes them altogether from the ambit of its reach.
  - (iii) None of the provisions whether its Regulation 38(1-A) (supra) or the Section 30(2) of IBC specifically negates the claim of a related party financial creditor who is not allowed a place in the CoC and is hence not allowed to vote.

(iv) Admittedly, the RP has treated the applicant as an **unsecured financial creditor**, and in terms of the distribution of assets under Section 53, the financial debts of an unsecured creditor ranks at fourth place.

33. We are given to understand that the admitted claim of all the stakeholders is 628.30 crores. The amount proposed by SRA is 180 crores. While the commercial wisdom of CoC is paramount, we are of the opinion that a balance is required to be struck among all the stakeholders.
34. In the aforesaid backdrop, to ensure fairness qua all the stakeholders, we deem it appropriate to send the resolution plan back to the CoC to review the distribution so as to balance the interest of all stakeholders as required in section 30(2) – Explanation 1, and see that a provision can be made for payment to the applicant from the proceeds.
35. The CoC will be at liberty to consider any other proposal including that of resolution applicant in **IA 187/KB/2023** on the basis of its viability, feasibility and merits. **IA (IB) No. 1381/KB/2022** shall be put back on board for considering along with the revised distribution, if any.
36. Since **IA (IB) No.1567/KB/2022** has been preferred seeking intervention in I.A. (IB) No. 1381/KB/2022, in terms of the order passed in I.A. (IB) No. 1563/KB/2022 and I.A. (IB) No. 1381/KB/2022, we feel that no separate order is required to be passed in this application.
37. This order will accordingly govern all the three I.A.s.
38. With the aforesaid directions all the **IAs** accordingly stand **disposed of**.
39. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

The Order is pronounced on 28<sup>th</sup> of August, 2023

*GGRB (LRA)/SA (LRA)*