IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II

IA.No.1085 of 2023

IA.No.1466 of 2023

IA.No.1478 of 2021

In

C.P. (IB) 1171/MB/2018

Under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Read with under Section 31(1) of the Insolvency and Bankruptcy Code, 2016,

IA.No.1085/2023

Rajesh Business and Leisure Hotels Private Limited

Through its Resolution Professional

Mr. Rohit Mehra

A 3403, Oberoi Woods, Oberoi Garden City, Goregaon East, Mumbai -400063

….. Resolution Professional/Applicant

IA.No.1466/2023

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

Sankalp Recreation Private Limited

…… Applicant

Versus

Rohit Ramesh Mehra & Ors.

…… Respondents

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT – II

IA.No.1085 of 2023 IA.No.1466 of 2023
IA.No.1478 of 2021 In C.P. (IB) 1171/MB/2018

IA.No.1478/2023

Under Section 30, and Section 60(5) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 11 of NCLT Rules, 2016

Rajesh Patel & Ors.

…… Applicant

Versus

Resolution Professional of Rajesh Business and Leisure Hotels Private Limited & Ors.

…… Respondents

In the matter between:

ICICI Bank Limited

….. Financial Creditor

Versus

Rajesh Business and Leisure Hotels Private Limited

…… Corporate Debtor

Order Delivered on:- 10.07.2024

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Applicant/RP in IA.No.1085/2023	:	Ld. Sr. Adv. Ramji Srinivasan a/w Adv. Shweta Dubey, Adv. Ishita Srivastava, Adv. Ichchha Kalash, Adv. Namrata Saraogi, Adv. Kartik Pandey
For the Applicant in IA.No.1466/2023	:	Counsel, Mr. Nausher Kohli a/w Adv. Umang Mehta a/w Adv. Alisha Sharma
For the Respondents in IA.No.1466/2023	:	Ld. Sr. Adv. Ramji Srinivasan a/w Adv. Shweta Dubey, Adv. Ishita Srivastava, Adv. Ichchha Kalash, Adv. Namrata Saraogi, Adv. Kartik Pandey (Respondent No.1) Adv. Laveena Tejwani a/w Adv. Neha Bhosale (Respondent No.2) Sr. Adv. Gaurav Joshi a/w Adv. Dharam Jumani a/w Adv. Harsh Behany a/w Adv. Yash Chedda a/w Adv. Gaurav Gandhi (Respondent No. 3 & 4)
For the Applicant in IA.No.1478/2023	:	Counsel, Mr. Rohit Gupta i/b Adv. Indrajeet Hingane
For the Respondents in IA.No.1478/2023	:	Ld. Sr. Adv. Ramji Srinivasan a/w Adv. Shweta Dubey, Adv. Ishita Srivastava, Adv. Ichchha Kalash, Adv. Namrata Saraogi, Adv. Kartik Pandey (Respondent No.1) Sr. Adv. Gaurav Joshi a/w Adv. Dharam Jumani a/w Adv. Harsh Behany a/w Adv. Yash Chedda

a/w Adv. Gaurav Gandhi
(Respondent No. 2 & 3)

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. By way of this common order, we propose to dispose of the following three Interim Applications as the issues raised and reliefs sought are intertwined:

   (a) IA No.1085/2023 filed by Resolution Professional ('RP') of Rajesh Business and Leisure Hotels Private Limited ('the Corporate Debtor') under Section 30(6) and Section 31(1) of the Bankruptcy and Insolvency Code, 2016 ('the Code') read with Section 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations') for approval of the Resolution Plan submitted by Rare Asset Reconstruction Limited in Consortium with Check-Inn Hotels Pvt. Ltd ('the Successful Resolution Applicant' / 'SRA');

   (b) IA No.1466/2023 filed under Section 60(5) of the Code by Sankalp Recreation Private Limited ('Sankalp') an unsuccessful Resolution Applicant to oppose the approval of the Resolution Plan submitted by Successful Resolution Applicant on the grounds that there have been material irregularities in the conduct of Corporate Insolvency Resolution Process (CIRP); and

   (c) IA No. 1478/2023 filed by Rajesh Patel and five others who are promoters and ex-directors of the Corporate Debtor under

Section 30 and Section 60(5) of the Code read with Rule 11 of the National Company Law Tribunal Rules, 2016 *inter alia*, seeking directions from this Tribunal to declare that the Resolution Plan as well as process adopted for approval of plan is contrary to law.

2. Brief facts of the case

2.1 On a Company Petition filed under Section 7 of the Code by ICICI Bank Limited, the Financial Creditor, this Tribunal initiated Corporate Insolvency Resolution Process ('CIRP') against Rajesh Business and Leisure Hotels Private Limited ('Corporate Debtor') vide its order dated 20.04.2022 and Mr. Rohit Mehra was appointed as Interim Resolution Professional ('IRP')

2.2 Pursuant to the said order, a public announcement in Form-A was made by the IRP on 27.04.2022 which was published in the newspapers- Business Standard (English) and Navshakti (Marathi) in the location of the registered office of the Corporate Debtor. Claims were called from the creditors of the Corporate Debtor specifying 04.05.2022 as the last date for submission of the claims. Based on the claims received, the Committee of Creditors ('CoC') of the Corporate Debtor was constituted on 11.05.2022 comprising of three Financial Creditors (ICICI Bank, Union Bank of India, and Bank of Baroda). In the 1st meeting of the CoC held on 20.05.2022, the CoC passed a resolution to confirm IRP as the Resolution Professional ('RP').

2.3 The RP published an Invitation for Expression of Interest (IEOI) (Form-G) on 29.06.2022 in newspapers- Business Standard (English)

and Navshakti (Marathi). In terms of Form-G, the last date for submission of an Expression of Interest (EOI) was 19.07.2022 and the last date for the submission of Resolution Plan was 02.09.2022. At the request of some of the potential investors, a revised Form-G was published on 22.07.2022 under which the last date for submission of EOI was 02.08.2022 and the last date for submission of Resolution Plan was 16.09.2022.

2.4 In response to IEOI, 28 EOIs were received out of which all Prospective Resolution Applicants (PRAs) except one were found to be prima facie eligible. Accordingly, the final list of PRAs of 26 applicants was published by the RP on 27.08.2022.

2.5 While the last date stipulated for submission of the Resolution Plan as per Form-G was 16.09.2022, on the request of the PRAs and upon approval by the CoC, the last date for submission of the Resolution Plan was extended from time to time till 15.01.2023. The RP had received 6 Resolution Plans and the Resolution Applicants ('RAs") were allowed to give a brief presentation on their financial proposals and answer the queries from the members of the CoC. At the 12th meeting of the CoC held on 12.01.2023, the CoC approved the issuance of the challenge process document, and in the 13th meeting of the CoC held on 09.02.2023, the RP invited the RAs for the challenge process. The challenge process commenced and continued for 13 rounds, under which, the RP announced the end of the challenge process as only one RA was remaining in the process.

2.6 The CoC deliberated on the feasibility and viability reports in respect of Resolution Plans submitted by 3 RAs-(i) Rare Asset Reconstruction Limited in consortium with Check-Inn Hotels Private Limited, (ii) Consortium of Sankalp Recreation Private Limited and Globe Ecologistics Private Limited, and (iii) Shri Ram Multicom Private Limited. After detailed deliberations, the said three Resolution Plans were decided to be put to vote at the meeting held on 24.02.2023 (voting commenced on 01.03.2023 and ended on 10.03.2023). Pursuant to the same, the Resolution Plan submitted by Rare Asset Reconstruction Limited ('Rare ARC') in consortium with Check-Inn Hotels Private Limited ('Check-Inn') was approved by the CoC with 100% votes. ('Successful Resolution Applicant' or 'SRA). The RP issued a letter of intent to the SRA on 10.03.2023 which was duly accepted on 11.03.2023 and SRA furnished a performance security of Rs. 30 Crore by way of performance bank guarantee on 11.03.2023.

2.7 Against the above backdrop, the following Interim Applications were filed before this Tribunal.

(i) **IA.No.1085/2023** filed by RP seeking approval of the Resolution Plan submitted by Rare Asset Reconstruction Ltd in consortium with Check-Inn Hotel Private Limited, who was declared as the Successful Resolution Applicant.

(ii) **IA.No.1466/2023** filed by Sankalp Recreation Private Limited (unsuccessful Resolution Applicant) seeking the following reliefs:

a) This Tribunal may be pleased to hold and declare that there has been a material irregularity in the exercise of the powers by the resolution professional during the corporate insolvency resolution period.

b) This Tribunal may be pleased to hold and declare that the Rare ARC- Naman Developers Consortium is ineligible for the purpose of submitting resolution plan of Rajesh Business and Leisure Hotels Private Limited.

c) This Tribunal may be pleased to dismiss I.A. No. 1085 of 2023 filed by the Resolution Professional seeking approval of the Resolution Plan submitted by Rare ARC- Naman Developers Consortium for Rajesh Business and Leisure Hotels Private Limited.

d) This Tribunal may be pleased to direct the Resolution Professional to again conduct the process of invitation, scrutiny and voting for Resolution Plans strictly in accordance with law.

e) In the event prayer (b) mentioned hereinabove is allowed, this Tribunal may be pleased to direct the Resolution Professional to declare the Applicant as the Successful Bidder;

f) Pending the hearing and final disposal of the present Application, this Tribunal may be pleased to stay the hearing of I.A. No. 1085 of 2023 for the approval of the Resolution Plan submitted by Rare ARC- Naman Developers Consortium for Rajesh Business and Leisure Hotels Private Limited.

g) Pending the hearing and final disposal of the present Application, this Tribunal may be pleased to direct the Resolution Professional to supply a copy of I.A. No. 1085 of 2023 and minutes of CoC Meeting to the Applicant herein.

(iii) **IA.No.1478/2023** filed by Rajesh Patel and five others (Promoters, Shareholders, and Erstwhile Directors) seeking:

a) That this Tribunal be pleased to quash and set aside the CIRP process to the extent of approval of Resolution Plan and declare that the plan as well as process adopted for approval of plan is contrary to law;

b) That this Tribunal be pleased to direct the CoC to conduct the process afresh after replacing the Resolution Professional;

c) That this Hon'ble Tribunal be pleased to hold that Respondent No.2, should not be permitted to participate in future process till requisite approval in this regard is obtained by Respondent No.2 from the Reserve Bank of India;

d) That this Tribunal be pleased to restrain the CoC from including any person as prospective resolution applicant who is not part of the list of prospective resolution applicants;

e) That this Tribunal be pleased to declare that the fees fixed for Resolution Professional are illegal and contrary to law;

f) That this Tribunal be pleased to order fresh valuation of the assets of the Corporate Debtor:

g) That this Tribunal be pleased to direct the Resolution Professional, so appointed to conduct the process after keeping the Applicants herein informed and associated as per the provisions of the Code and Regulations;

h) Pending the hearing and final disposal of this Application, this Tribunal be pleased to direct the Resolution Professional to file affidavit disclosing the fact that they were aware of Respondent no.2's Net Owned Fund being less than Rs. 1000 Crore.

i) That any other order as it may deem fit to this Hon'ble Tribunal be passed;

3. Submissions of Resolution Professional (RP)

3.1 It is submitted that the Corporate Debtor has been constructing a Hotel on a land admeasuring 9442.12 sq. mtr located at LBS Marg, near Cine Vista Studio, Kanjur Margh West Mumbai. The Hotel has been completed only to the limited extent of RCC, structure, facade, flooring, etc and the Hotel is not operational at present.

3.2 In the CIRP process, the Resolution Plan as revised and submitted on 17.02.2023 by Rare Asset Reconstruction Ltd, a company registered with Reserve Bank of India (RBI) as a securitization company and reconstruction company (ARC) under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act') vide Certificate No.021/2016 dated September 29, 2016 in consortium with Strategic Investor – Check-Inn Hotels Private Limited (a subsidiary of Shree Naman Developers Private Limited) was put to vote at the CoC meeting held on 24.02.2023. At the same meeting, resolution(s) for the inclusion of Check-Inn Hotels Limited to form a consortium with Rare Asset Reconstruction Ltd and also the inclusion of Arteck Surfin Chemicals Ltd to form a consortium with Rockwood Hotels & Resorts Ltd for a resolution plan for the Corporate Debtor was also put to vote. All the aforesaid resolutions were passed with 100% voting which concluded on 10.03.2023.

3.3 Pursuant to the resolutions passed, the RP issued a Letter of Intent to Successful Resolution Applicant (Rare ARC in consortium with Check-Inn Hotels Ltd) on 10.03.2023 which was duly accepted on 11.03.2023 and submitted a performance security of Rs.30 crore by way of Performance Bank Guarantee on 11.03.2023.

3.4 It is submitted that the approved Resolution Plan provides for (i) 100% Insolvency Resolution Process Cost of Rs.12.14 crore, (ii) 74.21% of admitted claim of Secured Financial Creditors at Rs.461 crore; and (iii) 3.35% of admitted claim of Operational Creditors at Rs.6 crore. As per the Resolution Plan, the upfront payment to the Operational Creditors shall be first paid towards the dues of the provident fund, gratuity, and other employee benefits, if any, as per the settled law laid down by Hon'ble NCLAT in the matter of Jet Airways. Thereafter, the remaining amount shall be paid to other Operational Creditors including admitted claims and contingent claims, on a pro-rata basis as per the provisions of the Code read with the CIRP Regulations.

3.5 All payments are proposed to be made within 60 days of the date of approval of the Resolution Plan by the Tribunal. The CIRP cost, the payment to operational creditors, and payment to dissenting financial creditors shall be made prior to the payment to the assenting financial creditors.

3.6 The Resolution Plan proposes upfront payment to the assenting secured financial creditors within 60 days of the NCLT approval date out of the funds infused by the Strategic Investor/Check-Inn. The Strategic Investor/Check-Inn proposes for issuing/allotting/transferring 5% equity shares to Secured Financial Creditors who assent to the Resolution Plan only out of restructured equity capital of the Corporate Debtor in the ratio of their admitted claims.

3.7 The Resolution Plan provides for the constitution of an Implementation and Monitoring Committee comprising the RP, a

nominee from assenting Secured Financial Creditors, and one nominee from the Consortium to supervise the implementation of the Resolution Plan.

3.8 RP stated that the Resolution Applicant has submitted an Affidavit of eligibility under Section 29A of the Code and an independent consultant has provided a report on Section 29A eligibility.

3.9 RP stated that an application filed under Section 43 of the Code (avoidance application) filed on 11.10.2022 is pending adjudication and the Resolution Plan provides that the right to pursue the avoidance application shall remain with the CoC and any recoveries made by the Corporate Debtor on account of such application shall be passed on to the assenting financial creditors for distribution, as decided by CoC or as directed by the Tribunal, as the case may be.

3.10 The Resolution Applicant has sought certain reliefs and concessions as provided in the Resolution Plan.

3.11 RP has certified that the Resolution Plan is not in contravention to any of the provisions of law, for the time being in force, as specified under Section 30(2) (e) of the Code. The RP also confirmed compliance with the requirements of the Code in terms of Section 30(2)(a) to 20(2) (f) and CIRP Regulations 38(1), 38(1) (a), 38(2) (a), 38(2) (b), 38(c) & 38(3).

4. Submissions of Sankalp Recreation Private Limited, the unsuccessful Resolution Applicant.

4.1 Sankalp Recreation Private Limited ("Sankalp") is a company registered under the Companies Act, 2013 that submitted a Resolution Plan for the revival of the Corporate Debtor in consortium with Globe

Ecologistics Private Limited (hereinafter called 'Sankalp Consortium') which was rejected by the CoC. Sankalp filed the application to oppose approval of the Resolution Plan submitted by the consortium of Rare ARC and Check-Inn Hotels Private Limited because there have been material irregularities in the conduct of the CIRP.

4.2 Sankalp submits that the Invitation for Expression of Interest (IEOI) issued by the RP on 29.06.2022 stipulates in Clause 8.1 that a person can either submit an EOI individually or in a consortium but cannot do both at the same time or be part of two consortiums at the same time. Accordingly, Sankalp along with Globe Ecologistic Private Limited submitted its EOI, as a consortium.

4.3 Upon scrutiny of all the EOIs, the RP published the final list of Resolution Applicants on 27.08.2022. In the final list, Rare ARC is shown individually as an Applicant and not shown as a part of any consortium. Further, the name of Check-Inn Hotels Private Limited is not shown at all in the list of PRAs.

4.4 Sankalp in consortium with Globe Ecologistics Private Limited submitted its Resolution Plan in November 2022.

4.5 Upon submission of Resolution Plans, the details of the name and number of Resolution Applicants that submitted Resolution Plans were leaked into the public domain and reported in newspapers such as 'The Economic Times'. In its article dated 06.01.2023, the Economic Times

reported that 6 persons had submitted Resolution Plans and the name of Check-Inn Hotels Private Limited did not figure in the list.

4.6 Thereafter, by way of an email dated 18.01.2023, the RP informed Sankalp that the CoC had decided to carry out negotiations of the Resolution Plan through a challenge mechanism and also shared the rules for the challenge mechanism.

4.7 Sankalp emerged as the highest H1 bidder in the challenge with a bid having a net present value of Rs. 490 Crore. Accordingly, Sankalp Consortium submitted its revised Resolution Plan dated 17.02.2023 to the RP with a total plan value of Rs. 530 Crore out of which Rs. 30 Crore was to be paid upfront, Rs. 20 Crore to be paid after 60 days and Rs. 480 Crore after 1 year. Along with the Resolution Plan, Sankalp Consortium also submitted letters from HDFC Bank, State Bank of India and a letter from its Chartered Accountant confirming the availability of funds for the Resolution Plan. Once again, the details of the challenge conducted by the RP came in the public domain in an article published by the Economic Times on 21.02.2023. As per the article, only 3 Applicants remained in the race namely, (i) Sankalp Consortium (ii) Shri Ram Multicon, and (iii) Rare ARC.

4.8 Sankalp vide its letter dated 27.02.2023 addressed to RP improved its financial offer by offering to pay a sum of Rs. 490 Crore upfront.

4.9 Sankalp submits that there was no update from the RP for 2 weeks on the status of the Resolution Plan, despite repeated follow-ups. In response to the email dated 14.03.2023 issued by Sankalp, the RP

informed vide his email dated 15.03.2023 that the Resolution Plan submitted by Sankalp Consortium had been rejected. On 22.03.2023, the Economic Times reported that the consortium of Rare ARC and Check-Inn Hotels Private Ltd has become the Successful Resolution Applicant as their plan stood approved by the COC.

4.10 It is submitted that the final list of Prospective Resolution Applicants did not disclose any consortium between Rare ARC and Check-Inn Hotels nor Check-in was in the list of PRAs at any point of time nor Check-Inn ever submitted any Resolution Plan or participated in the challenge mechanism. Sankalp further submitted that it came to know from the newspaper report that the approved Resolution Plan offered only Rs. 460 Crore as against the offer of Sankalp Consortium to Rs. 490 Crore upfront.

5. Submissions of Ex-Promotes/Shareholders/Guarantors.

5.1 An application (IA No. 1478 of 2023) has been filed by Ex-directors of the Corporate Debtor in multiple capacities as ex-directors, shareholders, and financial creditors (hereinafter collectively referred to as 'Promoters' or 'Ex-Directors' or 'Stakeholders'). They are corporate entities as well as individuals who are the original promoters, directors, and shareholders of the Corporate Debtor. The Applicants are also financial creditors who have filed their claim of Rs. 672 Crore and the RP has admitted a claim of Rs. 654.40 Crore.

5.2 The Application has been filed to challenge the process adopted by the RP while conducting CIRP of the Corporate Debtor and also to challenge the decision of the CoC to approve the Resolution Plan submitted by the Rare ARC in consortium with Check-Inn Hotels Ltd and seeks dismissal of the IA filed by the RP for approval of the Resolution Plan.

5.3 The Promoters allege that there have been irregularities in the conduct of the CIRP process and the Application is made with whatever limited documents made available by the RP and based on their records. It is stated that the Promoter's admitted claims are to the extent of Rs. 654.40 Crore and any better realization by way of a better resolution plan in the CIRP would have benefited the Applicants as stakeholders and guarantors. It is also stated that some of the Promoters are also security providers by mortgaging their third-party assets and consequently, the Promoters are adversely affected if a Resolution Plan, which offers lesser in comparison to other Resolution Plans, is considered and approved.

5.4 The Promoters/Ex-directors also raised the following contentions:

(a) The RP has failed to take into consideration the interest of all stakeholders and the shareholders are not being paid any amount under the Resolution Plan.

(b) The Successful Resolution Applicants are not eligible to be the Resolution Applicant as per CIRP Regulations. Rare ARC being

an Asset Reconstruction Company registered in accordance with guidelines/directions of RBI, which have the force of a statute, will lead to multiple consequences including cancellation of registration on account of breach of such directives.

(c) The business of ARC is well defined and relates to the business of asset reconstruction which means the acquisition of any right or interest of any financial asset of any bank or financial institution for realization. ARCs are not allowed to carry out any business other than asset reconstruction for which they are incorporated and licensed.

(d) ARCs are not allowed to purchase hotels or run hospitality businesses. The business of the Corporate Debtor is the business of running a hospitality business and managing and constructing the hotel.

(e) ARCs, for the first time were permitted to participate in the process of resolution as a Resolution Applicant as per RBI Circular dated 11.10.2022 in case they have a minimum net owned funds of Rs. 1000 crores. Otherwise, an ARC is not allowed to carry on or participate in any process as a Resolution Applicant which is not a process of securitization or reconstruction.

(f) If the eligibility of Rare ARC itself is not in accordance with law, the question of Strategic Investor (Check-Inn) meeting the eligibility does not arise at all. As per the CIRP process, the CoC has fixed the criteria for participation in the process and the criteria

specifically provided that any person participating should have a minimum Rs. 600 Crore of net worth. The financials of Check-Inn clearly demonstrate that it was not eligible to independently give a Resolution Plan as per the eligibility criteria fixed by the CoC. The financial documents produced in support of the Resolution Plan are, in fact, financial documents of Shree Naman Developers Private Limited ('Naman'), one of the group entities of Check-Inn.

(g) A bare perusal of the Resolution Plan submitted by SRA demonstrates that Rare ARC has no role to play in the Resolution Plan and is intended only for acquiring the financial debt. This is nothing but a cartelization wherein a party, who is otherwise not participating in the process and has also not submitted a Resolution Plan at the appropriate stage, has been included and the bid/Resolution Plan given by Rare ARC has been used to overcome the delay in submission of the Resolution Plan by flouting in utter disregard of the CIRP Regulations.

(h) The contribution of money to be paid to the financial creditors, reconstitution of the board of directors of the Corporate Debtor, reconstitution of the share capital of the Corporate Debtor, etc. are proposed to be done by Check-Inn which clearly shows that Rare ARC is involved only for cartelisation.

(i) The only role supposed to be played by Rare ARC is to acquire the debt which cannot be done as some of the debts are in the nature of foreign currency loans which cannot be acquired by an ARC as

per the prevailing law. Thus, the Resolution Plan is contrary to law and in violation of FEMA. The RP has not followed the process laid down in the CIRP Regulations to verify the eligibility of the participants for submission of the Resolution Plan and a stranger cannot enter at the last stage as its name does not appear in the final list of Prospective Resolution Applicants. Check-Inn has been included as PRA on the basis of clause 15 (xi) of the RFRP though the said clause nowhere provides that such an inclusion can be made. Clause 15 of RFRP permits such inclusion only in a scenario where the Applicant is a consortium. Rare ARC was never a consortium and clause 15 was not applicable at all. However, CoC illegally allowed the inclusion of Check-Inn at the last minute.

(j) The provisions relating to the consortium are also not followed as no such agreement at the time of participating in the process was submitted nor any prior approval of CoC was taken. Besides, the lead member Rare ARC has no interest in the Resolution Plan, etc.

(k) The RFRP has been prepared not in accordance with the Regulations, and the CoC and the RP did not follow either the Regulations or the RFRP.

(l) The RP has deliberately not provided the documents to the promoters though they were invited to the meeting of CoC. The Resolution Plan approved by the CoC was also not shared with the Erstwhile Directors though the issue was raised with the RP.

While the Resolution Plan was discussed in the CoC meeting held on 24.02.2023 a copy was sent to the Ex-Directors only on 27.02.2023 i.e., 3 days after the meeting. The copy of the Resolution Plan submitted for approval of the Tribunal has also not been provided to the erstwhile directors.

6. Submissions of Committee of Creditors.

6.1 The CoC has submitted that it is comprised of three lender banks viz., ICICI Bank (53.37%), Union Bank of India (20.6%), and Bank of Baroda (26.02%).

6.2 It is stated that RP after conducting thorough due diligence placed various resolution plans, including the Resolution Plan submitted by the SRA for voting. As per the independent Consultant-Resurgentindia- Viability Report of Resolution Plans, the evaluation matrix score for the Successful Resolution Applicant is 89.30 whereas the evaluation matrix of Sankalp Consortium was only 64.06. Therefore, the resolution plans provided by SRA and Sankalp Consortium were found viable after considering all the parameters with respect to the experience of the management, liquidity, credit rating, and backing of the promoter group.

6.3 It is submitted that RP in the CoC meeting held on 24.02.2023 clarified that in accordance with clause 15(1) (xi) of the RFRP, the CoC can permit resolution applicants to come together and form a consortium.

6.4 It has been submitted that net worth of Sankalp Consortium was only Rs.211 crores and it had no supporting documents for its other source of revenue including revenue from investments and properties. Sankalp

Consortium failed to satisfy CoC as to its financial capacity and wherewithal to honour the deferred payments under the Resolution Plan. The letters from the State Bank of India and HDFC Bank submitted by Sankalp Consortium to demonstrate its capacity to honour the payments are a mere acknowledgement of the receipt of letters seeking term loans and not final sanctions from the respective banks.

6.5 It is also submitted that the Successful Resolution Applicant offered to pay the resolution amount within 60 days from the date of approval of the Tribunal and also offered to infuse Rs.250.86 crore as capex for the cost of construction and improvement of the hotel as well as for operations and working capital requirements. The net worth of the SRA (including the group companies) is approx. Rs.1350 crores. Further, the HDFC Bank vide its letter dated 15.02.2023 confirmed a sum of Rs.498 crores standing to the credit of SRA and State Bank of India vide its letter dated 15.02.2023 gave in-principle approval for the project and working capital financing to the tune of Rs.250 crore. The said factors were taken into consideration by the CoC.

6.6 After taking into consideration various factors including evaluation and assessment by a team of experts and thorough deliberation, the CoC approved the Resolution Plan submitted by SRA with 100% votes.

6.7 It is submitted that it is a settled position of law that the details as to how the insolvency is to be resolved or as to how the entity is to be revived or the debt is to be restructured will not be provided in the Code, but such decisions will come from the deliberations of the CoC. The commercial wisdom of the CoC is beyond the pale of challenge

before this Tribunal. Therefore, the challenge to the commercial wisdom of the CoC is without any substance.

6.8 CoC has sought the approval of the Resolution Plan submitted by the SRA and approved by the CoC.

7. *Submissions of Successful Resolution Applicant*

7.1 It is submitted that the scope of Rare ARC in the Resolution Plan is limited to the acquisition of debt and no equity in the Corporate Debtor is proposed to be acquired. In the Resolution Plan dated 25.11.2022, Rare ARC had specified that there is a strategic investor who would be acting as a consortium partner and on the said basis, the resolution plan submitted by Rare ARC was processed. Thus, it was clear from the very beginning that Rare ARC was acting in a consortium and was never acting alone.

7.2 Rare ARC is undertaking only the acquisition of debt under the Resolution Plan and, therefore, reliance on the RBI Circular dated 11.10.2022 is completely misplaced. Rare ARC is proposing to undertake activities that are specifically permitted under the SARFAESI Act and hence the requirement of having net owned funds of a minimum of Rs.1000 crore etc is not applicable.

7.3 The Code does not prohibit an asset reconstruction company from submitting a resolution plan. No permission of RBI is required for an ARC to act as a co-applicant in a resolution plan. It is also submitted that Section 238 of the Code will prevail over any of the provisions of the SARFAESI Act if it is inconsistent with any of the provisions of the Code.

7.4 Under clause 15(1) (xi) of RFRP, the CoC has the discretion to permit PRAs to come together and form a consortium. In the exercise of the power conferred, CoC at its meeting held on 24.02.2023 permitted Rare ARC and Check-Inn to form a consortium with 100% votes, as the same has resulted in maximization of value which is one of the directives of the Code. This clause does not contemplate prior approval of the CoC.

7.5 Check-Inn is a wholly-owned subsidiary of Naman. It is now well settled that a parent and wholly owned subsidiary are to be treated as a single economic entity and the presence of one is to be counted and considered as the presence of the other or both. As Naman was also part of the final list of PRAs, the inclusion of Check-Inn, the wholly-owned subsidiary of Naman is fully justified. Thus, there is no violation of any Regulations.

8. The respective Respondents filed their replies and the Parties filed their written submissions.

9. **Analysis**

We have heard the Counsel for the parties and perused the pleadings and written submissions carefully. Considering the cross challenges raised in the IAs, we feel it would be appropriate to deal with each contention separately instead of going by the IAs.

10. ***The challenge to Process followed for approving the Resolution Plan***

10.1 Primarily, in this case, the very process followed for approving the Resolution Plan has been assailed challenging the participation of

Check Inn as a resolution applicant whose name did not figure in the final list of Prospective Resolution Applicants nor did it participate in the challenge process.

10.2 The unsuccessful resolution applicant and ex-directors (Collectively "Objectors") have contended that there is a clear statutory embargo on the CoC from considering a resolution plan from a resolution applicant whose name does not appear in the final list of the Resolution Applicants. To buttress the above contention, the Objectors relied on Clause 8.1 of the Invitation for Expression of Interest (IEOI) dated 29.06.2022 and the final list of Resolution Applicants published by the RP on 27.08.2022.

The final list of Resolution Applicants published by the RP on 27.08.2022 contained the names of Rare ARC and Shree Naman Developers individually at item No.15 and 21 respectively. However, the name of Check-Inn, who is part of the Consortium declared as Successful Resolution Applicants, did not figure in the final list of Resolution Applicants. The Objectors have contended that Check-Inn was given a backdoor entry through Rare ARC which is completely in contravention of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 ('CIRP Regulations').

10.3 The Objectors also referred to an order issued by IBBI in the matter of Manish Kumar Gupta, Insolvency Resolution Professional (No. IBBI/DC/130/2022) wherein it was stated as under:

"91. In the present instance it is observed that the RP had allowed for consideration of proposal of the Laxmi Trading Company to submit resolution plan when the language of the Regulations is crystal clear that the CoC cannot consider plan from a party that is

not included in the final list of PRAs. Hence, there is a contravention of the regulations 36A, 36B and 39 of the CIRP Regulations read with clause 14 of the Code of Conduct."

10.4 Per Contra, RP, CoC and SRA have controverted the contention by placing reliance upon Clause 15(1) (xi) of RFRP and contended that reliance on the clauses of the IEOI is completely misplaced as the same has now been superseded by RFRP. It is submitted that Clause 15 (1) (xi) of the RFRP permits two or more PRAs to come together to form a consortium subject to the approval of the CoC, and the CoC has permitted Rare ARC and Check-Inn (wholly owned subsidiary of Shree Naman Developers) to form a consortium.

10.5 It is also stated by RP and SRA that Rare ARC and Shree Naman Developers Pvt Ltd (of whom Check Inn is a wholly owned subsidiary) were part of the final list of PRAs dated 27.08.2022 and Rare ARC had indicated in the Resolution Plan dated 25.11.2022, that it would bring in a strategic investor. At the request of RP and CoC, Rare ARC has introduced Check-Inn as its strategic investor. They further relied on clause 15(1) (xi) of RFRP to argue that the CoC has the discretion to permit PRAs to come together and form a consortium at any stage and accordingly the CoC in the 14th meeting convened on 24.02.2023 had permitted Rare ARC and Check-Inn to form a consortium with 100% votes. It has also been brought to our notice that in the 9th CoC meeting another PRA i.e., Rockwood Hotels and Resorts Pvt Ltd who had earlier submitted the Expression of Interest individually, was also permitted to submit a resolution plan in a consortium with Artek Surfin Chemicals Ltd though Artek was not part of the final list of PRAs. Pertinently, the CoC was of the view that as there was no timeline

specified in RFRP for accepting the change in the composition of the PRAs, the CoC can accord its approval at any time before putting the resolution plans for voting and accordingly, the approval for formation of consortium was accorded by the CoC to Rockwood and Arteck as well as to Rare ARC and Check-Inn in the 14th CoC meeting as per clause 15(1) of the RFRP.

10.6 It is submitted that during the 14th meeting of CoC, the Promoter (Priyal Patel) had sought clarification as to whether Check-Inn can join as a member of the consortium at the stage of submission of the resolution plan to which the RP had given clarification and the Promoter was satisfied with the RP's response as she did not raise any objection concerning the same.

10.7 It is also contended that the exercise of power in furtherance of clause 15(1) (xi) of RFRP forms part of the commercial wisdom of CoC.

10.8 It is further submitted that Check-Inn is a wholly owned subsidiary of Shree Naman Developers Pvt Ltd which was also part of the final list of PRAs. It is now well settled that a parent and wholly owned subsidiary are to be treated as a single economic entity and the presence of one is to be counted or considered as the presence of the other or both. Hence, it was argued that Check-Inn is not a stranger to the list of PRAs. Reliance in this regard is placed on the judgements of the Hon'ble Supreme Court in Consortium of Titagarh Firema Adler S.P.A- Titagarh Wagons Ltd. through authorised signatory Versus Nagpur Metro Rail Corporation Ltd (NMRCL) through its General Manager (Procurement) and Another reported in (2017) 7 Supreme Court Cases 486 (Para 35 & 38); and CRRC Corporation Limited

Versus Metro Link Express for Gandhinagar and Ahmedabad (Mega) Company Limited (2017) 8 Supreme Court Cases 282 (Para 35 to 37).

10.9 It is submitted that Regulation 36A of CIRP Regulations is not being defeated by 15(1) (xi) for the reason that Rare ARC being the lead member of the consortium was always a part of the PRA. Even otherwise, Shree Naman Developers Private Limited of whom Check inn is a wholly owned subsidiary was also part of the final list of PRAs. Clause 15(1) (xi) permits 2 (two) PRAs to come together and submit a resolution plan and therefore, there is no violation of any regulation.

10.10 For comprehension of the subject matter and appropriate dealing with the issue involved, before proceeding further, suitable it would be to take note of the relevant provisions of IEOI and RFRP:

IEOI

"3.3.4 EOI may be submitted by a "Consortium".

"Consortium" shall mean any person acting together with another person as a consortium/joint bidder or joint venture (whether incorporated or not) for submission of EOI and resolution plan of the Company.

8. CONSORTIUM

Where the EOI is being submitted by a Consortium, the EOI, along with all undertakings submitted pursuant to this EOI shall be signed by each member of the Consortium. Please further note that:

8.1 A Person cannot be part of more than 1 (one) consortium submitting the EOI for the Company. Further, a Person shall submit only 1 (one) EOI, either individually as a PRA or as a constituent of a Consortium;

8.2 The consortium shall submit the copy of duly notarized consortium agreement/MOU, if any, entered into between the consortium members, setting out the respective obligations of the consortium members.

8.3 Each member of the Consortium shall nominate and authorise a Lead member to represent and act on behalf of the members of the Consortium. Such Lead member shall be the single point of contact on behalf of the Consortium with the Resolution Professional and the CoC, their representative and advisors in connection with all matters pertaining to the Consortium;

8.4 All the members of the consortium shall be jointly and severally responsible for compliance with the terms of the invitation for submission of EOI and process thereafter.

8.5 Unless the CoC permits otherwise, if any 1 (one member of the Consortium is disqualified under Section 29A of the Code, then the entire Consortium; ie., all the members of such Consortium shall stand disqualified;

8.6 The EOI must list the members of the Consortium, the Lead Member and the proposed equity participation/ economic interest of each member;

8.7 Lead Member of the Consortium shall be identified at the time of submission of EOI and shall hold at least 26%

8.8 In case of EOI by a Consortium, the Consortium shall incorporate a Special Purpose Vehicle (in the form of a company) under the laws of India, once finally selected prior to entering into the definitive agreements. The consortium members should ensure that the shareholding of the special purpose vehicle is the same proportion as their shareholding in the consortium.

8.9 Each member of the Consortium shall hold at least 10% equity share capital of the SPV (ie, a company) promoted or to be promoted by the members of the Consortium.

8.10 No change of Lead member may be permitted post submission of EOI (except with approval of the COC).”

RFRP

Clause 15 of RFRP

15.1 In the event the Applicant is a Consortium, it will be required to comply with the following requirements:

(i) Consortium will submit the copy of Consortium Agreement entered into between the Consortium members, setting out the respective obligations of the Consortium members.

(ii) Each member of the Consortium shall authorize one among them as the Lead Partner to act on behalf of the members of the Consortium as set out in Format IX at Annexure II (Power of Attorney for Nomination of Lead Partner) of this RFRP); and if a Letter of Intent is issued to such Consortium, then such Letter of Intent shall be issued to the Lead Partner on behalf of the Consortium.

(iii) The Lead Partner will be the single point of contact on behalf of the Consortium with the Resolution Professional and the CoC, their representative and advisors in connection with all matters pertaining to the Consortium; and will receive instructions and submit the Resolution Plan on behalf of all the Consortium members including preparation and submission of all related documents/clarifications and to negotiate with the members of the CoC, for and on behalf of the Consortium, and to agree and finalize the terms and conditions of the Resolution Plan.

(iv) The Consortium will not be allowed to change its composition during the Resolution Plan Process and if such Consortium is selected as a Successful Resolution Applicant, then until the implementation of the Resolution Plan, unless expressly approved by the Committee of Creditors.

(v) The Lead Partner will not change its shareholding in the Consortium without prior approval of the Committee of Creditors and its shareholding in Consortium, including the final bidding entity, shall not at any time be below 26% (twenty six percent).

(vi) Members of the Consortium shall be bound by their obligation as mentioned in the Resolution Plan.

(vii) Each of the members of the Consortium and/or joint venture will have to be eligible in terms of the Code. If any 1 (One) member of the Consortium is disqualified under this RFRP, then the decision on the disqualification of the other members of the Consortium shall be at the discretion of the CoC.

(viii) Each of the members of the Consortium and/or any joint venture created pursuant to the terms of the approved Resolution Plan shall be jointly and severally liable and responsible for implementation of the Resolution Plan.

(ix) A Person will be allowed to submit one 1(One) Resolution Plan, either individually as a PRA, or as a constituent of a Consortium. A person who submits, or participates, directly or indirectly, in more than one Resolution Pan will cause all the Resolution Pans in which such Person has participated (directly or indirectly) to be disqualified at the CoC discretion.

(x) Each member of the Consortium shall be considered a Resolution Applicant within the meaning of the Code and each member of the Consortium shall be bound by the obligations undertaken in the Resolution Plan.

(xi) Notwithstanding the above, the Committee of Creditors may permit change in composition of the Consortium (which may or may not include a PRA who had submitted an EOI) or permit PRAs to come together and form a Consortium and/or combine their Resolution Plans for purpose of presenting a common Resolution Plan for the Company. Any such combination etc. shall be subject to the terms as may be decided by the Committee of Creditors.

10.11 It is observed that the above clauses, when read together, indicate a different approach for submission of EoI by parties individually and in consortium. Even if we assume that the CoC had reserved a discretion in RFRP to permit a change in the composition of the PRAs, the question that arises for consideration is whether it can be permitted or exercised after the submission of the resolution plan. To find an answer to this question, we may notice Regulations 36A and 39 of the CIRP Regulations:

36A. Invitation for expression of interest.

…..

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.

Regulation 39 of the CIRP Regulations:

39. Approval of resolution plan

(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with

…

(1B) The committee shall not consider any resolution plan-

(a) received after the time as specified by the committee under regulation 36B; or
(b) received from a person who does not appear in the final list of resolution applicants.

10.12 It is observed that Regulation 36A sets out the form, manner, and timelines for the Resolution Professional regarding the publication of Form G for the invitation of expression of interest, submission of expression of interest, conducting of due diligence including compliance of provisions of Section 29A of prospective resolution

applicants, issue of the provisional list of eligible prospective resolution applicants, providing opportunity to object inclusion or exclusion of prospective resolution applicants in the provisional list, and issue of final list of prospective resolution applicants. Further, Regulation 39 (1B) directs the Committee of Creditors not to consider any resolution plan received after the time set by the CoC or received from a person who does not appear in the final list of resolution applicants. Thus, it is abundantly clear that a detailed procedure is prescribed in the CIRP Regulations with the intent to provide equal opportunity to the public at large and follow a transparent process. Furthermore, no discretion is left to the CoC to consider a resolution plan after the specified time or consider resolution plans from persons who did not find a place in the final list of prospective resolution applicants. We also find force in the argument of Sankalp, on the basis of the decision of the Hon'ble Supreme Court in Cherukuri Mani vs. Chief Secretary, Government of Madhya Pradesh and others (2015) 13 SCC 722 that where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure. Even otherwise, a harmonious reading of various provisions relating to IEOI and RFRP clearly indicate that it had not been the intention of the legislature to permit anybody to subsequently change the composition of a consortium and that too, after the submission of the resolution plan.

10.13 The last minute entry of Check-Inn can be looked at from a different angle. One of the arguments advanced is that Rare ARC was part of the final list of PRAs, and Rare ARC in the Resolution Plan dated

25.11.2022 indicated that it would bring in a strategic investor. Accordingly, Rare ARC has introduced Check Inn as its strategic investor. Relying on clause 15(1) (xi) of RFRP it is further argued that CoC has the discretion to permit change in the composition of the Consortium which may or may not include a PRA who had submitted an EoI or permit PRAs to come together and form a consortium. However, it is pertinent to observe that the revised Resolution Plan as well as the proposal to induct Check-Inn as a consortium partner of Rare ARC were discussed in the same CoC meeting held on 24.02.2023 which got approved in the voting concluded on 10.03.2023. In other words, there was not even CoC approval for the induction of Check-Inn when the Resolution Plan of Rare ARC and Check-Inn as a consortium was put to vote. Hence, reliance on clause 15(1) (xi) of RFRP is also not justified.

10.14 Another argument advanced is that Rare ARC and Shree Naman Developers Pvt Ltd were admittedly part of the final list of PRAs dated 27.08.2022. Check Inn, being a wholly owned subsidiary of Naman, it is contended that a parent and wholly owned subsidiary are to be treated as a single economic entity and the presence of one is to be counted or considered as the presence of the other or both. Reliance in this regard is placed on the judgements of the Hon'ble Supreme Court in Consortium of Titagarh Firema Adler S.P.A- Titagarh Wagons Ltd. through authorised signatory Versus Nagpur Metro Rail Corporation Ltd (NMRCL) through its General Manager (Procurement) and Another reported in (2017) 7 Supreme Court Cases 486- (Paragraphs Nos. 35 & 38); and CRRC Corporation Limited Versus Metro Link

Express for Gandhinagar and Ahmedabad (Mega) Company Limited (2017) 8 Supreme Court Cases 282- (Para 35 to 37).

10.15 In the aforesaid cases, Titagarh Firema Adler S.P.A (supra); and CRRC Corporation (supra) the issue under consideration was whether the experience of subsidiary/group companies could be relied upon to meet the eligibility criteria as per the Tender Document which is a different proposition altogether. However, the question coming up for consideration in the present case is whether the PRAs appearing in the final list prepared by RP would automatically cover their wholly owned subsidiaries as PRAs. Therefore, in our considered view, the judgements relied upon by the Ld. Counsel are not applicable in the facts of the case. Further, unlike in a tendering process, there is a regulatory framework as CIRP Regulations under which all EoIs received within the time fixed by CoC are considered and after scrutiny, as regards the eligibility, application of Section 29A, publication of the provisional list of PRAs, consideration of objections with respect to inclusion/non-inclusion of applicants etc the final list of PRAs is to be prepared. Taking into account the fact that a stringent process, as per CIRP Regulations, is to be followed and every applicant has to undergo careful verification to be included in the final list of PRAs, in our comprehension, there is no justification for inclusion of wholly owned subsidiaries at the last minute merely because the holding company was in the list of PRAs.

10.16 On the basis of the above discussion, we are of the considered view that CoC could not have exercised any discretion, when RFRP expressly provided that a person, who does not appear in the final list of prospective resolution applicants, will not be eligible to submit a

resolution plan. The definite and mandatory nature of the Regulations cannot be allowed to be flouted or deviated from under the garb of commercial wisdom of COC or value maximization especially when it violates the cannons of transparency and fair-play.

11. ***Eligibility of Rare to be a Resolution Applicant.***

11.1 It is the contention of the Objectors that Rare ARC being an Asset Reconstruction Company (ARC) is not eligible to submit the resolution plan as its net owned funds are less than Rs.1000 crores. Accordingly, Rare ARC could not have undertaken any business activities other than what has been permitted under the SARFAESI Act. Furthermore, the Corporate Debtor was engaged in the business of running hotels and was part of the hospitality industry, an ARC could not have possibly submitted its resolution plan to run such business. It is, therefore, necessary to notice the legal framework governing Asset Reconstruction Companies:

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

"3. Registration of asset reconstruction companies. —

(1) No asset reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without— (a) obtaining a certificate of registration granted under this section; and [(b) having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify;

Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of asset reconstruction companies:

Provided further that an asset reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

(2) Every asset reconstruction company shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

(3) The Reserve Bank may, for the purpose of considering the application for registration of a asset reconstruction company to commence or carry on the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such asset reconstruction company, or otherwise, that the following conditions are fulfilled, namely:— (a) that the asset reconstruction company has not incurred losses in any of the three preceding financial years; (b) that such asset reconstruction company has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons; (c) that the directors of asset reconstruction company have adequate professional experience in matters related to finance, securitisation and reconstruction; (e) that any of its directors has not been convicted of any offence involving moral turpitude; (f) that a sponsor of an asset reconstruction company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons; (g) that asset reconstruction company has complied with or is in a position to comply with prudential norms specified by the Reserve Bank; [(h) that asset reconstruction company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.

(4) The Reserve Bank may, after being satisfied that the conditions specified in sub-section (3) are fulfilled, grant a certificate of

registration to the asset reconstruction company to commence or carry on business of securitisation or asset reconstruction, subject to such conditions which it may consider, fit to impose.

(5) The Reserve Bank may reject the application made under sub-section (2) if it is satisfied that the conditions specified in sub-section (3) are not fulfilled:

Provided that before rejecting the application, the applicant shall be given a reasonable opportunity of being heard.

(6) Every asset reconstruction company shall obtain prior approval of the Reserve Bank for any substantial change in its management including appointment of any director on the board of directors of the asset reconstruction company or managing director or chief executive officer thereof or change of location of its registered office or change in its name: Provided that the decision of the Reserve Bank, whether the change in management of a asset reconstruction company is a substantial change in its management or not, shall be final.

Explanation. —For the purposes of this section, the expression "substantial change in management" means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.

4. Cancellation of certificate of registration.

(1) The Reserve Bank may cancel a certificate of registration granted to a asset reconstruction company, if such company— (a) ceases to carry on the business of securitisation or asset reconstruction; or (b) ceases to receive or hold any investment from a qualified buyer; or (c) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or (d) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or (e) fails to— (i) comply with any direction issued by the Reserve Bank under the provisions of this Act; or (ii) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or (iii) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or (iv) obtain prior

approval of the Reserve Bank required under sub-section (6) of section 3:

Provided that before cancelling a certificate of registration on the ground that the asset reconstruction company has failed to comply with the provisions of clause (c) or has failed to fulfil any of the conditions referred to in clause (d) or sub-clause (iv) of clause (e), the Reserve Bank, unless it is of the opinion that the delay in cancelling the certificate of registration granted under sub-section (4) of section 3 shall be prejudicial to the public interest or the interests of the investors or the asset reconstruction company, shall give an opportunity to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfilment of such conditions.

(2) A asset reconstruction company aggrieved by the order of cancellation of certificate of registration may prefer an appeal, within a period of thirty days from the date on which such order of cancellation is communicated to it, to the Central Government: Provided that before rejecting an appeal such company shall be given a reasonable opportunity of being heard.

(3) An asset reconstruction company, which is holding investments of qualified buyers and whose application for grant of certificate of registration has been rejected or certificate of registration has been cancelled shall, notwithstanding such rejection or cancellation be deemed to be a asset reconstruction company until it repays the entire investments held by it (together with interest, if any) within such period as the Reserve Bank may direct.

10. Other functions of asset reconstruction company. —

(1) Any asset reconstruction company registered under section 3 may— (a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties; (b) act as a manager referred to in clause (c) of sub-section (4) of section 13 on such fee as may be mutually agreed upon between the parties; (c) act as receiver if appointed by any court or tribunal: Provided that no asset reconstruction company shall act as a manager if acting as such gives rise to any pecuniary liability.

(2) ***Save as otherwise provided in sub-section (1), no asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction****:*

Provided that a asset reconstruction company which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.

Explanation. —For the purposes of this section, "asset reconstruction company" or "asset reconstruction company]" does not include its subsidiary.

11.2 The Counsel for the Objectors vehemently contended that an ARC can carry on the business of securitisation or asset reconstruction as permitted under a Certificate of Registration granted by RBI and the said Certificate of Registration is liable to be cancelled in case of failure to comply with any of those conditions subject to which the Certificate of Registration has been granted to it or failure to comply with any direction issued by the Reserve Bank under the provisions of the SARFAESI Act. Further, as per Section 10, no ARC which has been granted a certificate of registration under sub-section (4) of Section 3, shall commence or carry on, without prior approval of RBI, any business other than that of securitisation or asset reconstruction. It is argued that the business of ARC is well defined under the law and these companies are not allowed to carry out any business other than those specified in the SARFAESI Act without prior approval of RBI.

11.3 The Counsel has also drawn our attention to the definition of asset reconstruction in Section 2(b) of the SARFAESI Act as per which asset

reconstruction means acquisition by any asset reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. Further, RBI vide its circular dated 11.10.2022 has provided as under:

"13. Allowing ARCs to act as Resolution Applicant under Insolvency and Bankruptcy Code, 2016 (IBC)

ARCs are currently not permitted to commence or carry on any business other than that of securitisation or asset reconstruction or the business referred to in Section 10(1) of the SARFAESI Act without prior approval of the Reserve Bank of India*. It has now been decided under the provision of Section 10(2) of the SARFAESI Act to permit ARCs to undertake those activities as a Resolution Applicant (RA) under IBC which are not specifically allowed under the SARFAESI Act. This permission shall be subject to the following conditions:*

(i) The ARC has a minimum NOF of ₹1,000 crore.

(ii) The ARC shall have a Board-approved policy regarding taking up the role of RA which may inter alia include the scope of activities, internal limit for sectoral exposures, etc.

(iii) A committee comprising of a majority of independent directors shall be constituted to take decisions on the proposals of submission of resolution plan under IBC.

(iv)The ARC shall explore the possibility of preparing a panel of sector-specific management firms/ individuals having expertise in running firms/ companies which may be considered for managing the firms/ companies, if needed.

(v) In respect of a specific corporate insolvency resolution process (CIRP), the ARCs shall not retain any significant influence or control over the corporate debtor after five years from the date of approval of the resolution plan by the Adjudicating Authority under IBC. In case of non-compliance with this condition, the ARCs shall not be allowed to submit any fresh resolution plans under IBC either as a resolution applicant or a resolution co-applicant.

(vi)The ARC shall make additional disclosures in the financial statements with respect to assets acquired under IBC in addition to the existing disclosure requirements. These would include the type and value of assets acquired under IBC, the sector-wise distribution based on business of the corporate debtor, etc.

(vii) The ARC shall disclose the implementation status of the resolution plans approved by the Adjudicating Authority on a quarterly basis in their financial statements.

11.4 Based on the foregoing circular, it has been contended that ARCs were not permitted to undertake activity as a Resolution Applicant under the Code but with effect from 11.10.2022, RBI has permitted ARCs subject to fulfilment of conditions mentioned in RBI Circular dated 11.10.2022. However, there is no contention that Rare ARC meets the conditions specified in the RBI Circular and hence there is no need to go into the details of the conditions specified.

11.5 Another contention raised is that the role of Rare ARC is limited to the acquisition of debt and Rare ARC is not acquiring any equity shares of the Corporate Debtor under the Resolution Plan. In the Resolution Plan dated 17.02.2023 submitted by Rare ARC, it is mentioned that its role would be limited to the acquisition of debt and there is a strategic investor who would be acting as a consortium partner. In this regard, it is noticed that the 'resolution applicant' as defined in the Code means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of subsection (2) of section 25 or pursuant to section 54K, as the case may be. It is also noticed that the final list of PRAs pursuant to which the Resolution Plan was submitted on 25.11.2022 mentions Rare ARC alone as the Resolution Applicant.

After submission of a Resolution Plan as above, it was not open for Rare ARC to contend that it is not the resolution applicant or its role was limited to the acquisition of debt under the Resolution Plan. Even otherwise, we are of the view that the definition of resolution applicant under the Code does not differentiate the co-applicants in the case of consortium. In view of the above, we do not see force in the argument that the role of Rare ARC is limited to the acquisition of debt under the Resolution Plan.

11.6 However, as regards the eligibility of Rare ARC, the RP and SRA have contended that as per Section 238, the provisions of the Code shall have overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force and hence the provisions of the SARFAESI Act will not have any effect on the Resolution Plan. In support of the above, the Ld. Counsel relied on a decision of Hon'ble NCLAT at Chennai in the matter of Company Appeal (AT) (CH) (Ins) No. 181 of 2022 between Puissant Towers India Pvt. Ltd vs. Neueon Towers Limited & Ors which read as under:

" 10. It is significant to mention that Section 238 of the Code, will prevail over any of the provisions of the SARFAESI Act, 2002, ***if it is inconsistent with any of the Provisions of the 'I&B Code, 2016'*** *and therefore the Adjudicating Authority ought not to have placed reliance on Section 10(2) of the SARFAESI Act, 2002. It is also pertinent to mention that the CoC has approved the Resolution Plan by the majority of 98.70% in its 27th meeting, held on 19/10/2020. The Hon'ble Supreme Court in a Catena of Judgments has held that commercial wisdom of the CoC is non-justifiable and in the instant case, we do not see any material irregularity, under Section 30(2) of the 'IBC Code, 2016'.*

11. Keeping in view, the clarification given by the Counsel for RBI that the 'prior permission' is not required, this 'Tribunal' is of the considered view that the Adjudicating Authority ought not to have rejected the Resolution Plan, more so, when the principal objective of the Code is that 'revival of the Corporate Debtor and Resolution'. Liquidation ought to be the last resort, keeping in view the scope and spirit of the Code."

[Emphasis Supplied]

11.7 The Counsel for the Objectors argued that there is no inconsistency between the SARFAESI Act and the Code, and in the cited case it was not held that Section 10(2) of the SARFAESI Act is inconsistent with the provisions of the Code but only mentioned that the provisions of the Code will prevail over any of the provisions of the SARFAESI Act in case it is inconsistent. Further, it was pointed out that the aforesaid decision is based on the clarification given by the Counsel for RBI that prior permission is not required, but in the present case, no such clarification has been sought from RBI.

11.8 It has also been brought to our notice that RBI in another case took a firm stand that an asset reconstruction company is not permitted to participate as a resolution applicant and in a few other cases, the implementation of the resolution plan proposed by ARC faced roadblocks in obtaining permission from RBI. In few other cases, the approved resolution plans could be implemented by ARC for want of permission from RBI. Thus, the doubts regarding the eligibility of ARCs to participate as resolution applicants persisted and the RP has also raised the same question vide his mail dated 14.12.2022 though no further steps were taken by the parties to seek clarification from RBI.

11.9 However, considering the ratio of law laid down by the Hon'ble NCLAT at Chennai in Puissant Towers India (supra), we hold that non-obtaining of permission from the RBI cannot be a ground for rejection of the Resolution Plan by Rare ARC.

12. Eligibility of ARC to acquire Foreign Currency Loans.

12.1 It is contended by the Objectors that an ARC is not permitted to acquire foreign currency loans in India and such acquisition would otherwise be contrary to the Foreign Exchange Management Act and the restrictions imposed therein. In this regard, reliance was placed on RBI (Transfer of Loans) Directions more particularly Clause 3(iii) and 4 as well as Clause 24. Since the debt involved in the present case includes foreign currency loans, Rare ARC cannot acquire the debt.

12.2 As against this, Ld. counsel for SRA has contended that the provisions of the Code shall override the provisions of the RBI Master Circular and cannot come in the way of Rare ARC acting as resolution applicant and /or being the assignee of foreign currency loans as part of a resolution plan. In support of the same, SRA relied on the decision of NCLT in Edelweiss Asset Reconstruction Company Ltd (Company Petition (IB) No.528 (PB) of 2019 wherein the Company Petition filed under Section 7 of the Code in respect of assignment of foreign currency loan from IDBI Bank was admitted. Similarly, in the case of International Asset Reconstruction Company Pvt. Ltd vs. M/s. Solitaire India Ltd (Company Petition (IB) No. 977 of 2018) the Company Petition under Section 7 of the Code in respect of the assignment of a foreign currency loan from ICICI Bank was also admitted. Even otherwise, the resolution plan will not become illegal on this count for the reason that the resolution plan provides for the assignment of debt to Rare ARC or extinguishment of debt by Check Inn. In the event the CoC opts for extinguishment of debt by Check Inn the question of approval of RBI does not arise.

12.2 It is observed that the Objector has not referred to any legal provision specifically restricting ARCs with regard to the acquisition of foreign

currency loans. No restriction or prohibition is found in SARFAESI Act, the governing statute of ARCs. The provisions of FEMA apply to every person acquiring a foreign currency debt. Hence, we do not see any necessity to dwell upon the applicability of different provisions of FEMA and the compliances thereunder for the purpose of considering the resolution plan.

13. Non-supply/delayed Supply of information and documents including the Resolution Plan to the erstwhile directors.

13.1 It is contended on behalf of the erstwhile directors that RP has kept the Promoters/suspended directors associated only to give invitations to the meeting but has deliberately not provided documents and other information and conducted the process most illegally. Further, the promoters/suspended directors filed their claim for Rs.600 crore at the initial stage of CIRP in April 2022 and the claim was admitted only in November 2022. Therefore, the initial process of CIRP was conducted without their claim being taken into consideration. The RP has also not provided the information sought in respect of different claims made by the banks and RFRP issued in the CIRP process. It is further averred that the copy of the resolution plan, discussed on 24.02.2023 and thereafter voted upon without another meeting, was furnished to the erstwhile directors only on 27.02.2023. It is submitted that the resolution plan, which was provided on 20.12.2022, was a plan of Rare ARC alone and the plan discussed on 24.02.2023 was a different one. The Promotes contended that there are good enough reasons for setting aside the entire process, particularly on non-furnishing of the resolution plan to them. In this regard, they have relied on the decision of Hon'ble

Supreme Court in Vijay Kumar Jain v. Standard Chartered Bank ((2019) 20 Supreme Court Cases 455.

12.2 Per Contra, the RP contended that the Promoters have tried to make as many frivolous and malafide allegations to scuttle the resolution process since its conclusion is not to their liking. The RP has further contended that delay in sharing of the resolution plans has no bearing on the merits of the resolution plan or for that matter, the valuation reports does not in any way adversely affect the commercial wisdom of the CoC in approving the plan when the financial creditors are being repaid 73% of their claim. RP in its reply admitted that the revised resolution plan was supplied to the Promotes only on 27.02.2023 ie., after the discussion in the meeting held on 24.02.2023 wherein it was decided to put the resolution plan to vote.

12.3 The Ld. Senior Counsel for the Promoters has drawn our attention to the decision of the Hon'ble Supreme Court in Vijay Kumar (supra) wherein it was observed that the members of the erstwhile members of the Board of Directors, who are often guarantors as well, are vitally interested in a resolution plan as such resolution plan affects and binds them. Such a plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well. Every participant is, therefore, vitally entitled to a notice of every meeting of the CoC and such notice of the meeting must contain an agenda of the meeting, together with copies of all documents relevant to matters to be discussed and the issues to be voted upon at the meeting vide Regulation 21 (3) (iii).

12.4 In the light of the law laid down in the above cited case, we are of the view that furnishing a copy of the resolution plan to the participants of the CoC including the erstwhile directors is not an empty formality for various reasons including pointing out deficiencies in the resolution plan. On the basis of the above decision, we hold that not furnishing a copy of the resolution plan before the meeting held on 24.02.2023 is an irregularity which also militates against the validity of the plan to an extent.

13. Higher Resolution Plan

13.1 It is a matter of record that two resolution plans were put for consideration by the CoC. The Resolution Plan submitted by Sankalp Consortium is for an aggregate amount of Rs.540,94,26,954/- payable within 300 days. The Resolution Plan submitted by Rare ARC/ SRA is for Rs.479,14,00,000 plus some equity shares redeemable at a later stage (equity redemption was by 2 years which was subsequently reduced to 60 days vide letter dated 28.02.2023). It is contended by Sankalp that it also informed in the 14th meeting of CoC held on 24.02.2023 that the full amount would be paid by 180 days from the NCLT approval date instead of 300 days mentioned in the Resolution Plan. It was further contended that though the plan value of the Sankalp Consortium is higher, the Net Present Value of the Rare Consortium is higher, but if the reduced period of 180 days is taken into consideration the plan value and the NPV value of Sankalp Consortium would have been higher.

13.2 The Promoters have argued that any extra amount realized from the assets of the Corporate Debtor would have benefited the Promoters as it would have reduced their liabilities as guarantors, and therefore, the

Promoters are entitled to raise the issue before this Tribunal. It is further contended that the argument of exercise of commercial wisdom cannot be applied in the present case as there is no record in the CoC meeting or otherwise which would indicate that the commercial wisdom was duly exercised. The Minutes of the Meeting do not disclose the reasons why the CoC found the plan with a lesser value as better and in the interest of all the stakeholders.

13.3 Per Contra, the RP and SRA contended that Sankalp Consortium has miserably failed to demonstrate its financial wherewithal and capacity to honour its commitments under the resolution plan. In support of its resolution plan, Sankalp Consortium had produced two letters- (i) a letter dated 24.02.2023 issued by HDFC Bank in favour of Sankalp, and (ii) a letter dated 02.03.2023 issued by State Bank of India in favour of Sankalp. The above letters were not sanction letters and by the letters, the Banks had only recorded that they were principally inclined to sanction the proposal of Sankalp subject to proper due diligence and approval from appropriate sanctioning authorities. Further, the Sankalp Consortium had produced a self-certified certificate titled 'Certificate Regarding Proof of Source of Fund' which mentioned an open plot of land in Ahmedabad worth Rs.70 crore. However, there is no mention of its location, area, and/or description of the said open plot of land in the certificate. Sankalp Consortium also mentioned stocks worth Rs.25 crores without giving any particulars of the said stocks. To support the above argument, it was contended that in the evaluation matrix presented by Resurgent India Limited, it was stated that the resolution plan submitted by Sankalp Consortium seemed to be unachievable. While Sankalp Consortium had proposed to raise

debt to finance the proposed payment to the creditors, the interest payment on the debt was not considered in the projections, and the projected revenue was found to be aggressive. On the contrary, SRA has produced a balance confirmation certificate dated 15.02.2023 issued by HDFC Bank in favour of Check Inn thereby confirming that a balance of Rs.498 crores is standing to the credit of Check Inn's account. SRA has also produced a letter dated 15.02.2023 issued by HDFC Bank in favour of the RP thereby giving in-principle approval for the project and working capital financing of around Rs.250 cores. By the said letter, HDFC Bank expressed its interest in considering the project and working capital financing to the tune of Rs.250 crore.

13.4 SRA also contended that Sankalp is wrongly claiming to be the highest bidder. After the resolution plans were put for voting, Sankalp Consortium by an undated letter (forwarded by email dated 27.02.2023) revised its plan and allegedly offered to pay Rs.490 crores in 90 days from the date of approval by the Tribunal. It is alleged that the said undated letter was an afterthought and it was not accompanied by any document to demonstrate its financial capacity. It is further contended that the email dated 27.02.2023 was given a go-by by Sankalp Consortium in lieu of its email dated 14.03.2023 whereby Sankalp Consortium had sought refund of the Bid Bond deposit of Rs.5 crore if Sankalp was found to be an unsuccessful resolution applicant. Subsequently, RP refunded the Bid Bond deposit of Rs.5 crore which was accepted by Sankalp. Accordingly, Sankalp has no skin in the game, no locus, and cannot challenge the process as an unsuccessful resolution applicant.

13.5 It is a settled position of law that the commercial wisdom of CoC is not justiciable and the same should not be interfered with. It can be seen from the records that the CoC has taken an informed decision whilst approving the resolution plan submitted by SRA. As regards the contention that the resolution plan of SRA is of a lesser value as compared to the resolution plan of Sankalp Consortium it was stated that under clause 10(4) (ii) of the resolution plan, Check Inn had proposed to exercise call option by purchasing 5% equity shares from the assenting financial creditor during two years from the date of issuance of the equity shares. In case such call option is exercised by Check Inn at the end of year 2 from the date of issuance of equity shares, the price shall be Rs.30 crore for such 5% equity shares of the Corporate Debtor. However, in case the call option is exercised on any day before the end day of 2 years from the date of issuance of equity shares, the purchase price shall be an amount equivalent to NPV on such day of exercising the call option using a discounting rate of 10% of the said purchase price of Rs.30 crore for 5% equity shares at the end of 2nd year. By a letter dated 28.02.2023, the SRA provided a confirmation cum clarification that Check Inn shall exercise the call option upfront by making a payment of Rs.30 cr within 60 days of the approval from this Tribunal.

13.6 It has been brought to our notice that Resurgent had provided the scores of the evaluation matrix criteria, as set out in the RFRP, and apprised the CoC on 24.02.2023 that as per the Quantitative Criteria and Qualitative Criteria, the SRA has obtained a score of 89.30, followed by SMPL with a score of 64.06 and then Sankalp Consortium with a score of 48.58. Subsequently, on the basis of the additional

documents furnished, the Resurgent revised the Evaluation Score wherein SRA had scored 89.30, followed by SMPL with a score of 64.06 and Sankalp Consortium with a score of 51.58.

13.7 It is observed that it is the commercial wisdom of the CoC that is to be given paramount importance. The same has been held in various judicial precedents such as K. Sashidhar vs. Indian Overseas Bank and Ors (2019) 12 SCC 150, wherein it was held by the Hon'ble Supreme Court that:

> "33……. the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I & B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

13.8 The Hon'ble Supreme Court has also held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and the feasibility of the proposed resolution plan. They act on the basis of a thorough examination of the proposed resolution plan and assessment made by their team of experts. Further, the subjective satisfaction of the financial creditors constituting CoC at the resolution plan and including their perceptions

about the general capability of the resolution applicant the projected plan into reality cannot be questioned.

13.9 Based on the above decision and other catena of decisions regarding commercial wisdom, we hold that there is no reason for reviewing or questioning the commercial decision taken by the CoC on the resolution plan. Hence, the contentions about higher value or suitability are not tenable.

14. Contention regarding valuation

14.1 The Promoters have contended that the valuation of the property is much lower than the actual value. According to the Promoters, the land value itself is Rs.128 crore and the building valuation is Rs.877 crore. However, it is observed from the records that IRP/RP appointed two Registered Valuers for valuation to determine the fair and liquidation value of the Corporate Debtor in accordance with Regulation 35 of the CIRP Regulations. It is stated that the Valuers submitted their reports mentioning the fair value and liquidation value after computing the same in accordance with valuation standards and physical verification of the available inventory and fixed assets of the Corporate Debtor.

14.2 Having thoughtfully considered the above contention, we are of the view that the Promoters have not pointed out any defect in the appointment of registered valuers or valuation methodology adopted by the Valuers but have only claimed that the property would fetch higher value without any basis. Therefore, we do not see any merit in the challenge to the valuations done in the CIRP process.

15. Maintainability of the IAs

15.1 It is contended that an unsuccessful resolution applicant, whose resolution plan was rejected, does not have the locus to challenge the resolution plan approved by CoC and that such applicant is neither a stakeholder nor a creditor of the Corporate Debtor. Further, the unsuccessful resolution applicant, on one hand, requested the return of the bid bond deposit and received the bid bond deposit and at the same time is now challenging the resolution plan on ulterior grounds. In support of the above contention, the RP referred to the decision of the Hon'ble Supreme Court in Arcelormittal India Private Limited v. Satishkumar Gupta and Ors (2019) 2 SCC 1 wherein it was held that a resolution applicant has no vested right that the resolution can be considered, no challenge can be preferred to the Adjudicating Authority at this stage. The RP has also referred to the following decisions of the Hon'ble NCLAT:

(a) M.K Rajagopalan Balaji Villa vs. S. Rajendran, RP Vasan Healthcare Pvt. Ltd and Ors (Company Appeal (AT) (CH) (INS) No. 58 of 2023)

" 31. Petitioner/Appellant, being an 'Unsuccessful Resolution Applicant has no 'Locus', to 'assail' a 'Resolution Plan' or it's 'implementation', coupled with a candid fact that he is not a 'Stakeholder', as per Section 31(1) of the I & B Code, 2016, in relation to the 'Corporate Debtor', this 'Tribunal' without any 'haziness', holds that the 'Petitioner/Appellant', is not an 'Aggrieved Person' coming within the ambit of Section 61(1) of the I & B Code, 2016, especially when he is not a 'Privy' to the 'Resolution Plan'.

(b) IMR Metallurgical Resources AG Versus Ferro Alloys Corporation Ltd and Others (Company Appeal (AT) (Insolvency) No.271 of 2020

"5.It is essential to mention that the Resolution Applicant has no vested right that his Resolution Plan must be considered. It is settled position of law as laid down by Hon'ble Supreme Court in MANU/SC/1123/2018: (2019) 2 SCC 1 in case of Arcelor Mittal India Pvt ltd vs. Satish Gupta held that the resolution applicant does not have any vested right that his Resolution Plan must be considered.
6. The commercial wisdom of the CoC is paramount, and it has the absolute prerogative to decide the viability and feasibility of the Resolution Plans presented before them and the same is not to be interfered even by the Adjudicating Authority.

15.2 It is further contended that the ex-promoters/shareholders have no locus to challenge the resolution plan and relied on the decision in the matter of Mr. Ramesh Kesavan vs. CA Justin Jose & Another (Company Appeal (AT) (CH) (INS) No.422 of 2023) where the Hon'ble NCLAT observed that the shareholders have no locus to challenge a resolution plan.

15.3 However, it is to be noticed that in the matter of Arcelormittal (Supra), the Hon'ble Supreme Court was considering whether any challenge can be made at various stages of the corporate insolvency resolution process and held that given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority **at this stage**. The facts of the present case are different for the reason that CIRP has come to the final stage of seeking approval of NCLT and the unsuccessful resolution applicant is alleging gross contravention of CIRP Regulations. Therefore, the decisions of Hon'ble NCLAT referred to by the RP are distinguishable. Furthermore, the same contentions have also been raised by the Ex-

promoters/directors of the Corporate Debtor, and in the case of Vijay Kumar Jain (supra), the interests of Promotes/guarantors to challenge the plan were recognized. Further, as per section 61 of the Code, contravention of the provisions of any law or material irregularity in exercise of the powers of the resolution professional are recognized grounds which can be raised by any person aggrieved, for challenging a resolution plan. In view of the above, the IAs are held to be maintainable.

16. Findings:

16.1 As a corollary to the above discussion, we hold that it is a trite position of law that the commercial wisdom of the CoC is beyond the pale of challenge before the Tribunal and with respect to the application for approval of the resolution plan, the jurisdiction of this Tribunal is limited to determine whether or not the resolution plan, as approved by requisite majority of CoC, complies with the requirements specified under Section 30(2) of the Code. This includes, inter alia, examining whether the resolution plan contravenes any of the provisions of the law for the time being in force and conforms to such other requirements as may be specified by IBBI. This is further evidenced by Section 61 of the Code which permits any person aggrieved by the order of the Tribunal to prefer an appeal to the NCLAT on the grounds, inter alia, that the approved resolution plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period.

16.2 We have discussed in detail in para.10 hereinabove, the legality of Check-Inn joining as a resolution applicant when its name did not

appear in the final list of Prospective Resolution Applicants. It is further reiterated that Regulation 36A prescribes each step in the process to be taken by the Resolution Professional to ensure adherence to timelines, provide an opportunity to all resolution applicants who submitted the expression of interest to raise objection to the inclusion or exclusion of a provisional resolution applicant in the provisional list, etc. The Resolution Professional is also required to conduct due diligence of prospective resolution applicants based on the material made available to satisfy that the prospective resolution applicant complies with the applicable provisions of Section 29A and other requirements specified in IEOI. The final list of prospective resolution applicants is to be prepared after following all the above processes. Further, Regulation 39 of CIRP Regulations specifies that the CoC shall not consider any resolution plan received from a person who does not appear in the final list of prospective resolution applicants or does not comply with the provisions of Section 30(2) of the Code. Thus, in CIRP Regulations there are certain boundaries prescribed both for RP and CoC which need to be strictly adhered to. In the present case, it is observed that the name of Check-Inn appeared for the first time in the revised resolution plan dated 17.02.2023 and due diligence on Check-Inn was conducted after the submission of the resolution plan just before putting the resolution plan for voting. Considering the intent, purpose and wording of Regulations 36A and 39, we are of the view that clauses of IEOI/RFRP can never go beyond the provisions of the Code/CIRP Regulations, nor CoC, in the exercise of its commercial wisdom can contravene any express provisions of CIRP Regulations.

16.3 It is also an admitted fact that a copy of the resolution plan which was discussed in the CoC meeting held on 24.02.2023 and thereafter put to vote without another meeting was furnished to erstwhile Directors only on 27.02.2023. The law remains trite that furnishing a copy of the resolution plan to the participants of the CoC including the erstwhile directors is not an empty formality for various reasons including for pointing out deficiencies in the resolution plan. A combined reading of the Code as well as the CIRP Regulations, as held in the decision of Vijay Kumar (supra), leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the Committee of Creditors must be given a copy of such plans as part of the 'documents' that have to be furnished along with the notice of such meetings. On the basis of the above, we hold that not furnishing a copy of the resolution plan before the meeting held on 24.02.2023 is also a material irregularity.

16.4 Based on the above discussions, we conclude that (a) the Resolution Plan submitted for approval of this Tribunal does not meet all the parameters laid down in sub-section (2) of Section 30 of the Code read with Regulations 36A and 39 of the CIRP Regulations on account of its contravention of provisions of the law and non-conformity to the requirements specified by IBBI, and (b) there has been material irregularity in non-furnishing the copy of the resolution plan to the erstwhile directors. Consequently, IA No. 1085/2023 seeking approval of the resolution plan is dismissed, while I.A. No. 1466/2023 and I.A No.1478/2023 objecting to the approval of the resolution plan are partly allowed to the extent indicated in the foregoing discussion.

Liberty is granted to RP/CoC to re-run the process strictly in accordance with the Code and CIRP Regulations and in that event, an extension of the CIRP period of 4 months shall be deemed to have been hereby granted for the purpose. The CoC, however, shall be at liberty to take a contrary call if it so desires in its wisdom.

Sd/-	**Sd/-**
ANIL RAJ CHELLAN	**KULDIP KUMAR KAREER**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**