NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH: CHENNAI

Company Appeal (AT)(CH) (Insolvency) No. 172 of 2021

[Arising out of Impugned Order dated 28th May, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench, Bengaluru) in I.A. No.161 of 2020 in C.P. (IB) No. 51/BB/2018]

IN THE MATTER OF:

Alok Kailash Saksena
Resolution Professional for
Associate Décor Limited,
C/o Desai Saksena and Associates, CA
1st Floor, Laxmi Building,
Sir Pherozshah Mehta Road, Fort,
Mumbai – 400001 **...Appellant**

Versus

1. **Associate Décor Ltd**
Through its Resolution Professional
Mr. Alok Kailash Saksena
Registered office at:
Plot No.1, Phase IV, KIADB Industrial Area
Huralagera, Malur, Kolar
Karnataka – 563160 **...Respondent No.1**

2. **Punjab National Bank**
(Formerly Oriental Bank of Commerce
Through its Deputy General Manager
Corporate Banking Branch at:
Maker Tower, F-Wing
14th Floor, Cuffe Parade
Mumbai – 400005 **...Respondent No.2**

3. **Bank of Baroda**
Through is Deputy General Manager
Corporate Financial Services Branch at:
1st Floor, 3 Walchand Hirachand Marg
Ballard Pier, Mumbai – 400001 **...Respondent No.3**

4. **Union Bank of India**
(Formerly Corporation Bank)
Through its Deputy General Manager
Corporate Banking Branch at:
Bharath House, #104

Ground Floor, MS Marg
Mumbai – 400023 **...Respondent No.4**

5. Mohammed Enterprises (Tanzania) Ltd.
Through its CEO and President
Corporate Office at:
20th Floor, Golden Jubilee Towers
Ohio Street, P.O. Box 20660
Dar es Salaam, Tanzania

Head Office at:
Ground Floor, Textile House
Morogoro Road, PO Box 20660
Dar es Salaam, Tanzania **...Respondent No.5**

6. Svamitva Landmarks
Through its Partner
No. 110/2, 1st Floor
Krishnappa Layout, Lalbagh Road
Bengaluru – 560027 **...Respondent No.6**

7. Shankeshwar Landmarks, LLP
Through its Designated Partner
No. 110/2, 1st Floor,
Krishnappa Layout,
Lalbagh Road, Bengaluru – 560027 **...Respondent No.7**

8. Shankeshwar Landmarks
Through its Partner
No. 110/2, 1st Floor,
Krishnappa Layout,
Lalbagh Road, Bengaluru – 560027 **...Respondent No.8**

9. Assistant Commissioner of
Commercial Taxes
LGSTO-150, Bengaluru
3rd Floor, TTMC Building, Yeshwanthpura
Bengaluru – 560022 **...Respondent No.9**

10. State of Karnataka
By its Principal Secretary to Government
Department of Industries & Commerce
Vikasa Soudha, Bangalore – 560001

Rep. by the Additional Director
(Policy and Promotion
Directorate of Industries & Commerce
Bengaluru – 560001 **...Respondent No.10**

Present:

For Appellant	**:**	**Mr. Rajasekar Rao, Senior Advocate**
For Respondents	**:**	**Mr. P.H. Arvindh Pandian, Senior Advocate for R6 to R8**

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

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present 'Appeal' is filed against the common order dated 28.05.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench, Bengaluru) more particularly in I.A. No. 161/2020 in C.P. (IB) No.51/BB/2018, whereby the 'Adjudicating Authority' has disposed of the said Application without any independent consideration on its merits and solely on account of the fact that the entire matter remitted back to the 'CoC' to consider a belated resolution plan submitted by the Respondents No.6 to 8, herein.

Brief Facts:

Appellant's Submissions:

2. The Learned Senior Counsel for the Appellant submitted that the Appellant is aggrieved by the common order dated 28.05.2021 limited to I.A. No. 161 of 2020 in CP No. 51 of 2018.

3. It is submitted that the CIR Process was initiated against M/s Associate Décor Limited, the 'Corporate Debtor' vide order dated 26.10.2018 by the 'Adjudicating Authority' ('NCLT', Bengaluru Bench). In compliance of the I&B Code and Regulations, the RP initiated the process namely issuance of 'Form-G' inviting 'Expression of Interest' (in short 'EoI') etc. In response

thereto, the Respondents No. 6 to 8 herein formed as consortium submitted their 'EoI' on 06.09.2019 as consortium members and reconfirmed their interest vide e-mails dated 14.09.2019, 03.10.2019 and 12.10.2019. Accordingly, the consortium was a part of the provisional list of Resolution Applicants and the 'RP' provided the copies of Information Memorandum (in short 'IM'), evaluation matrix and 'Request For Resolution Plan' (in short 'RFRP') in accordance with Section 25(2)(h) of the I&B Code, 2016 on 09.10.2019 in order to enable the consortium to submit Resolution Plan for the 'Corporate Debtor'. Even 'Virtual Data Room' (in short 'VDR') access was provided to the consortium on 15.10.2019 along with 20 others 'Prospective Resolution Applicants' (in short 'PRAs'). The consortium was included in the final list of 'PRAs'. The consortium vide e-mail dated 05.11.2019 requested for a site visit on 11.09.2019 and also requested for the extension of a date for submission of the Resolution Plan. However, the consortium never asked for audited balance sheet and was proceeding on the basis of information available on the 'VDR' and the 'IM' as was disclosed to all 'PRAs'.

4. It is submitted that on 06.11.2019 the consortium sent an e-mail to the 'Resolution Professional' declining their participation in submission of Resolution Plan for the non-availability of audit financial statements of 'Corporate Debtor'. It is submitted that all relevant information i.e. required under Section 2 of the Code and Regulation 36 of CIRP Regulations including financial data that was available with the RP was made available to all the 'PRAs' for due diligence. None of the 'PRAs' backed out from the 'CIRP' citing reasons of non-availability of documents. It is to state that

there was no request from consortium seeking for the said documents at any point of time after given access to the documents. The non-availability of information/audited financial statements was merely an excuse for consortium to not being able to conduct its due diligence within time and not being able to submit Resolution Plan within time lines prescribed under the 'RFRP'.

5. It is submitted that the last date for submission of plans expired on 07.12.2019 and the 330 days period of 'CIRP' expired on 16.03.2020, however, the consortium did not bother to submit a Resolution Plan or even informed the Appellant 'RP' that they are in the process of submitting a Resolution Plan.

6. It is submitted that two Resolution Applicants including the 5th Respondent herein had submitted their Resolution Plan within the time lines prescribed for the same. The 'RP' negotiated with the 'PRAs' and both the 'PRAs' were revised and submitted from time-to-time basis. The 19th 'CoC' meeting held on 11.02.2020 and the plans submitted by the PRAs decided to place before the 'CoC'. The e-voting was conducting from 13.02.2020 to 06.03.2020 and the plan submitted by the 5th Respondent was approved by all the members of 'CoC' pursuant to the voting process. After approval of the plan by the 'CoC', the Appellant RP filed an application bearing I.A. No.161 of 2020 in CP No. 51 of 2018 under Sections 30 & 31 of the I&B Code before the 'Adjudicating Authority' for approval of 5th Respondent's plan.

7. Thereafter, Respondents No.6 to 8 filed an application being I.A. No. 225/2020 for urgent hearing of I.A. No. 227/2020 and sought a direction to place its Resolution Plan before the 'CoC' for its consideration. The 'RP' filed his counter to the said I.A. The matter was heard on 28.05.2021 and the 'Adjudicating Authority' passed the impugned order.

8. It is submitted that the ''Adjudicating Authority' erred in holding that I.A. No.161 of 2020 is deemed to be disposed without considering the said I.A. on merits. The 'Adjudicating Authority' ought to have considered on merits in the interest of 'Corporate Debtor' and keeping in view the essence of the code i.e. time bound resolution for maximation of value of the assets of the 'Corporate Debtor'. Instead, the application has been disposed of by passing a single line order. It is submitted that the 'Adjudicating Authority' erred in holding that the 'RP' did not conduct the 'CIRP' in accordance with the provisions of the Code and applicable Regulations. Further, the 'Adjudicating Authority' erred in extending time beyond 16.03.2020 and directing the 'RP' to place the Respondents No.6 to 8 plan and the claims of the 'GST Department' and 'Department of Industries and Commerce' before the 'CoC'. It is submitted that in the present case, the 'CIRP' period had already exceeded 500 days and the claims of the 'Department of Industries and Commerce' was not included and the said department has not filed any claim despite public announcement.

9. It is submitted that each and every application ought to be considered by the 'Adjudicating Authority' on its own merits.

10. In view of the reasons as stated above the Learned Senior Counsel prayed this Bench to allow the Appeal and set aside the impugned order passed in I.A. No. 161 of 2020 in C.P. No. 51 of 2018.

<u>5th Respondent's Submissions</u>:

11. The 5th Respondent filed its reply affidavit vide diary No. 369 dated 23.08.2021. The Learned Senior Counsel appeared for this Respondent submitted that this Respondent is the 'Successful Resolution Applicant' (in short 'SRA') in the 'CIRP' of Associate Décor Ltd. ('Corporate Debtor') whose Resolution Plan has been approved by the 'CoC' with 100% voting share of the 'Corporate Debtor'. Further, it is submitted that after approval of the plan, a 'Performance Bank Guarantee' (in short 'PBG') dated 19.03.2020 amounting to Rs.30,00,00,000/- was issued by this Respondent in favour of 'Bank of Baroda' which is one of the members of the 'CoC'.

12. It is submitted that the Appellant filed the I.A. No.161 of 2020 before the 'Adjudicating Authority' seeking approval from the authority, however, due to nationwide lockdown the said application was not taken up for hearing. In view of the pendency of the application and at the request of the member of the 'CoC' and the Appellant, this Respondent in good faith renewed the 'Performance Bank Guarantee' on 03.04.2021 for a period of 90 days.

13. It is submitted that the 'Adjudicating Authority' cannot interfere with the commercial wisdom of the 'CoC'. It is submitted that this Respondent's plan was deliberated by the member of the 'CoC' in detail in various meetings held between 07.12.2019 to 11.02.2020. Further this Respondent

revised its plan after taking the suggestions of the 'CoC'. It is submitted that the impugned order directing the 'CoC' to consider the Resolution Plan submitted by the Respondents No. 6 to 8 is in clear violation of settled law as it amounts to sitting in judgment over the commercial wisdom of the 'CoC'. Further, the 'CoC' cannot change / reverse its decision of approving a Resolution Plan after expiry of the 'CIRP' period as per Section 31 of the I&B Code, 2016. Admittedly, the plan of this Respondent has been approved by the 'CoC' and there is no risk of liquidation of the 'Corporate Debtor' meriting any consideration by the 'CoC'. The 'Adjudicating Authority' without assessing the compliance of this Respondent's Resolution Plan with Section 30(2) of the Code, proceeded to dispose of I.A. No.161 of 2020 on the alleged finding that the 'Resolution Professional' has acted contrary to the provisions of the Code.

14. In view of the reasons as stated above the Learned Senior Counsel submitted that this Respondent supports the relief sought by the Appellant in the present Appeal and prayed this bench to allow the Appeal.

<u>6 to 8 Respondent's Submissions</u>:

15. The Learned Senior Counsel appeared for these Respondents submitted that these Respondents filed I.A. No. 227 of 2020 before the 'Adjudicating Authority' and the present Appeal is against I.A. No. 161 of 2020 filed by the Appellant herein, which was pending before the 'Adjudicating Authority'. Since the issues raised pertains to the same 'Corporate Debtor', the matters were heard together passed the common order in both the IA's.

16. It is submitted that out of many 'PRAs' only two applicants survived and they only submitted the plan within the stipulated time. These Respondents were in a bonafide belief that the process was still ongoing, undertook all efforts to collate all information pertaining to the 'Corporate Debtor' from the website of the 'Ministry of Corporate Affairs'. In the process of collating information and submitting the plan, lockdown was imposed due to the outbreak of Pandemic Covid-19 and there was a delay in submitting the plan. These Respondents submitted its plan on 27.05.2020, the Appellant had not sent any reply to the same. However, a reminder was sent on 16.06.2020, the Appellant vide its reply dated 18.06.2020 rejected the plan without placing the same before the 'CoC' for its consideration. Aggrieved by the said order of the Appellant these Respondents filed I.A. No. 227 of 2020 before the 'Adjudicating Authority'.

17. It is submitted that the 'Adjudicating Authority' rightly observed that not only the Respondents but other participants withdrew from the process due to irregularities adopted by the Appellant. A perusal of the minutes of 14^{th} CoC meeting dated 28.11.2019 would also show that one 'PRA' viz. Rushil Décor Limited has specifically requested for audited financials without which they refused to put a plan for consideration. The Appellant being at the helm of affairs of 'Corporate Debtor' is expected to provide data available but also take necessary steps to provide relevant details of the 'Corporate Debtor' as and when requested for. The contention of the Appellant that non-availability of data was merely an excuse for these

Respondents for not being able to conduct its diligence or submit plan is ill founded and baseless.

18. It is submitted that the conduct of 'CIRP' by the Appellant was riddled with irregularities which despite sufficient time from the commencement of the insolvency was never rectified by the Appellant.

19. It is submitted that the submissions of plan by these Respondents is within the 'CIRP' period and thus rightly directed the 'CoC' to consider the same along with the 5th Respondent's plan. The 'CIRP' period could not have ended on 16.03.2020 as the order of the Hon'ble Apex Court prohibiting limitation period was operative from 14.03.2020. Further, this 'Tribunal' in the case of Quinn Logistics India Private Limited Vs. Macksoft Tech Private Limited in CA (AT) (Ins) No. 185 of 2018 has observed certain time period can be excluded for the purpose of counting total 'CIRP' period. The 'Adjudicating Authority' appropriately exercised its powers and thus excluded the time from 05.03.2020 i.e. the date on which I.A. No. 134 of 2020 was filed.

20. It is submitted that the Adjudicating Authority excluded the time within its power and the same is not violative of Section 12 of the Code. Further, the Hon'ble Apex Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory Vs. Satish Kumar Gupta & Ors. (2020) 8 SCC 531 held that the term "mandatorily" in Section 12 is struck down as being manifestly arbitrary under Article 14 of the Constitution of India and as being an unreasonable restriction on the

litigant's rights to carry on business under Article 19(1)(g) of the Constitution of India.

21. As stated (supra) the Hon'ble Supreme Court extended the period of limitation from 15.03.2020 to 02.10.2021 and further the 'Adjudicating Authority' directed the extension of 'CIRP' period of 12 weeks, the plan submitted by these Respondents is well within the time.

22. In view of the reasons as stated above, the Appeal is devoid of merits and dismissed the same.

<u>10th Respondent's Submissions</u>

23. The 10th Respondent filed reply vide Diary No. 820 dated 09.11.2021 wherein it is stated that the loan facility extended by this Respondent, the 'Corporate Debtor' had provided bank guarantee to the extent of Rs.20,80,44,296/-. Since the 'Corporate Debtor' failed to renew the bank guarantee dated 19.06.2014 which would expire on 18.06.2019, this Respondent visited the office of the 'Corporate Debtor' in February, 2020. It was given to understand that the 'CIRP' was initiated against the 'Corporate Debtor' and the Respondent addressed the several letters requesting the bank guarantee to be renewed. The bank guarantee for Rs. 2,75,00,000/- has expired on 18.06.2019 and the same was not renewed by the 'Corporate Debtor'. It is submitted the bank guarantee amounting to a sum of Rs.11.47 crores have been encashed by the Corporate Debtor till date and the liability of the 'Corporate Debtor' stands for remaining amount with interest and penal interest.

24. In view of the reasons as stated above the Learned Senior Counsel prayed this Bench to dismiss the Appeal.

Analysis / Appraisal:

25. Heard the Learned Senior Counsel for the respective parties, perused the pleadings, documents and relevant citations. After analysing the pleadings, the issue fell for consideration is whether the Appellant has made out any case warranting interference by this 'Tribunal' in the order passed by the 'Adjudicating Authority' (impugned order).

26. Before proceeding with the issue, the brief facts are as under which emanated filing of the present appeal.

27. Appellant being RP of the 'Corporate Debtor' filed an application being I.A. No. 161 of 2020 in CP No. 51 of 2018 under Section 30(6) of the I&B Code read Regulation 39(4) of 'IBBI' ('Insolvency Resolution Process for Corporate Persons') Regulations, 2016 before the 'Adjudicating Authority' ('National Company Law Tribunal', Bengaluru Bench) praying the 'Adjudicating Authority' therein to pass an order sanctioning the Resolution Plan submitted by the 'Successful Resolution Applicant' i.e. 5th Respondent herein. The aforesaid application was filed on 16.03.2020 and the 'Adjudicating Authority' vide its order dated 28.05.2021 disposed of the I.A. as under:

> *"V.*
> *1.*
> *(5) "I.A. No. 161 of 2020 is deemed to be disposed of and restored to the RP, for being re-considered by the CoC along with the resolution plan submitted by Swamitva Landmark,*

Shankeshwar Landmarks LLP and Shankeshwar Landmarks."

28. The 'Adjudicating Authority' in para 11(5) observed that the I.A. No. 227 & 225 of 2020 were filed by the Swamitva Landmark Group seeking directions to the RP to put up their Resolution Plan before the CoC for its consideration and not to approve the Resolution Plan submitted by the 5th Respondent in I.A. No. 161 of 2020.

29. The 'Adjudicating Authority' has not given any reasons in disposing of the I.A. No. 161 of 2020 except simply stated that the said I.A. deemed to be disposed of.

30. The Appellant rightly invoked the jurisdiction of the Adjudicating Authority in filing I.A. No. 161 of 2020 seeking approval of Resolution Plan of the 5th Respondent which was approved by the CoC on 11.02.2020. The 'CoC' in their commercial wisdom and by exercising the powers under sub-section (4) of Section 30 of the I&B Code approved the Resolution Plan with 100% voting share, though as per the provision 66% of the voting share of the CoC, meets the requirement for approval of Resolution Plan. After approval of the Resolution Plan by the 'CoC', the Resolution Professional shall submit the resolution plan to the Adjudicating Authority for its approval under sub-section (6) of Section 30 of the Code. When an application is filed before the 'Adjudicating Authority', the 'Adjudicating Authority' shall approve the Resolution Plan under sub-section (1) of Section 31 of the Code if it is satisfied that the plan as approved by the 'CoC' under sub-section (4) of Section 30 meets the requirements as referred to in sub-

section (2) of Section 30, it shall by order approve the Resolution Plan which shall be binding on the Corporate Debtor and its employees, members, creditors (including the Central Government, any State Government or any local authorities to whom a debt in respect of the payment of dues arising under any law for the time being enforce, such as authorities to whom statutory dues are owed), guarantors and other Stakeholders involved in the Resolution Plan. A proviso was inserted by Act 26 of 2018 w.e.f. 06.06.2018 that the 'Adjudicating Authority' shall, before passing an order for approval of Resolution Plan under this sub-section, satisfy that the Resolution Plan has provision for its effective implementation. As per sub-section (2) of Section 31 of the Code, where the 'Adjudicating Authority' is satisfied that the Resolution Plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the Resolution Plan.

31. From the above provision of law, the power vested in the Adjudicating Authority, that it shall approve the Resolution Plan if it is satisfied that the plan has been approved by the CoC and meets the requirements or reject the Resolution Plan under sub-section (2) of Section 31 of the Code. Other than this the 'Adjudicating Authority' simply cannot dispose of the application without considering the same on merits. The 'Adjudicating Authority' miserably failed in exercising the powers vested in it and passed a cryptic and unreasonable order, this Tribunal is of the view that the said order is illegal and without application of mind.

32. This 'Tribunal' intend to put on record that by the common order dated 28.05.2021 the 'Adjudicating Authority' disposed of several I.As, viz.

a) I.A. No. 85 of 2021 filed by State of Karnataka,
b) I.A. No. 227 of 2020 filed by the Consortium i.e. Swamitva Landmarks & 2 others,
c) I.A. No. 134 of 2020 filed by the Assistant Commissioner of Commercial Taxes,
d) I.A. No. 225 of 2020 filed by the Consortium i.e. Swamitva Landmarks & 2 others,
e) I.A. No. 248 of 2020 filed by the M/s Farooq Ali Khan, and
f) I.A. No. 161 of 2020 filed by the Appellant herein.

33. Aggrieved by the same, the parties filed the following Appeals before this 'Tribunal':

i) The CoC filed Company Appeal No. 159 of 2021, and

ii) Company Appeal (AT) (Ins) No. 160 of 2021 against the I.A. 227 of 2020 and I.A. No. 85 of 2021.

iii) The 'Successful Resolution Applicant' filed Company Appeal (AT) (Ins) No. 165 of 2021 against I.A. No. 227 of 2020,

iv) The Resolution Professional filed Company Appeal (AT) (Ins) No.170 of 2021,

v) The Resolution Professional / Appellant filed the present Company Appeal (AT) (Ins) being No. 172 of 2021

vi) Company Appeal (AT) (Ins) No. 173 of 2021 aggrieved against the orders in I.A. No. 85 of 2021 and I.A. No. 227 of 2021.

34. Thus, total 6 Appeals have been filed before this Tribunal and this Tribunal disposing of all the Appeals by passing separate judgements.

35. The reasons emanate from the impugned order dated 28.05.2021 that the 'Adjudicating Authority' did not consider I.A. No. 161 of 2020 on the

ground that the State of Karnataka filed I.A. No. 85 of 2021 and the Respondents Nos. 6 to 8 filed I.A. No. 227 of 2020 and the Assistant Commissioner of Commercial Taxes filed I.A. No. 134 of 2020. The 'Adjudicating Authority' in all these I.As directed the Appellant herein that the Appellant shall put up the claim in 'Form-C' of the State of Karnataka in I.A. No. 85 of 2021 before the 'CoC' for its consideration. Further the 'Adjudicating Authority' in I.A. No. 227 of 2020 filed by the Respondents No. 6 to 8 directed the Appellant herein that the plan submitted by these Respondents on 27.05.2020 shall be placed before the 'CoC' for consideration. This Tribunal is of the view that the applications filed by the Applicants therein are independent to each other and the 'Adjudicating Authority' ought to have considered the Applications independently by passing a reasoned order.

36. This Tribunal dealt the issues that arises for this Tribunal consideration in other appeals in detail. Therefore, the same is avoided repeating.

37. This 'Tribunal' also takes note of the fact that the 'Adjudicating Authority' in para 6 of the impugned order dated 28.05.2021 passed a direction to the Appellant who shall carry out the same within a period of 12 weeks from the receipt / uploading of the impugned order and stated that this period is considered appropriate considering the present Covid-19 pandemic situation and the ensuing lockdown in several states. Further, the 'Adjudicating Authority' granted liberty to the Appellant to bring an application before the Adjudicating Authority for any further exclusion of

time in the interest of completing the process and achieving the objects of the code.

38. This 'Tribunal' does not find any justification in passing the above impugned order when an application is pending for considering before the same 'Adjudicating Authority' for approval of resolution plan. When an application is filed before the 'Adjudicating Authority' seeking approval of Resolution Plan, meaning thereby the resolution process with respect to 'Corporate Debtor' is in advance stage by overcoming the engrossing process as enshrined under the I&B Code from the date of initiation of 'CIRP' against the Corporate Debtor till the approval of Resolution Plan. The resolution process in respect of Corporate Debtor is in the final stage, at such point of time directing the Appellant to consider a plan submitted by the Respondents No. 6 to 8 on 27.05.2020 and after completion of 'CIRP' period and the said Respondents are nowhere in the zone of consideration in entire CIRP process, amounting to reopening of the CIR process of the 'Corporate Debtor' and the said direction also frustrates the resolution process of the 'Corporate Debtor', which is a time bound.

39. Section 12 of the I&B Code prescribes time limit for completion of 'Insolvency Resolution Process'. Though proviso to sub-section (3) of Section 12 the word mandatorily incorporated, however, the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta reported in (2020) 8 SCC 531 at para 127 struck down the word mandatorily, holding that the said word being manifestly arbitrary under Article 14 of the Constitution of India. Further, the Hon'ble Supreme Court

held that in exceptional cases only the time can be extended, the general rule being that 330 days is the outer limit within which resolution of the Stressed Assets of the 'Corporate Debtor' must take place beyond which the 'Corporate Debtor' is to be driven into liquidation. Therefore, in all respects the outer limit of 330 days is paramount and in exceptional cases only the outer limit can be extended. In the present case, no such exceptional case has been made out except to afford an opportunity to the Respondents No.6 to 8 who initially backed out from the Resolution Process and stood outside the preview of the resolution process. On the other hand, these Respondents belatedly filed the Resolution Plan before the Appellant and the Appellant rightly rejected the said resolution plan. The 'Adjudicating Authority' also exceeded its jurisdiction in excluding the time of CIR process, without considering the application filed by the Appellant is in our view arbitrary and illegal.

40. It is apt to note that the once Resolution Plan is approved by the 'CoC' with requisite voting share i.e. 66%, in the present case, the 'CoC' voted with 100% voting share in approving the Resolution Plan and the same is binding and irrevocable as between the 'CoC' and the 'Successful Resolution Applicant' as held by the Hon'ble Supreme Court in Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Ltd. reported in (2021) SCC Online SC 707 at para 246 held as under:

> *"246. In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired*

course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor. Pertinently, this direction has been otherwise provided in Section 33(1)(b) of the IBC when an Adjudicating Authority rejects a Resolution Plan under Section 31. In this context, we hold that the existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved Resolution Plans, at the behest of the successful Resolution Applicant, once the plan has been submitted to the Adjudicating Authority. A Resolution Applicant, after obtaining the financial information of the Corporate Debtor through the informational utilities and perusing the IM, is assumed to have analyzed the risks in the business of the Corporate Debtor and submitted a considered proposal. <u>A submitted Resolution Plan is binding and irrevocable as between the CoC and the successful Resolution Applicant in terms of the provisions of the IBC and the CIRP Regulations.</u> In the case of Kundan Care, since both, the Resolution Applicant and the CoC, have requested for modification of the Resolution Plan because of the uncertainty over the PPA, cleared by the ruling of this Court in Gujarat Urja (supra), a one-time relief under Article 142 of the Constitution is provided with the conditions prescribed in Section K.2."

41. The 'Adjudicating Authority' is not authorised to pass any orders which would circumvent and attempt to frustrate the Resolution Plan pending before it for consideration under Section 31 of the Code. The bitter fact remains that the Respondents No. 6 to 8 are completely standing outside of the CIRP and initially expressed their 'EoI' in submitting its plan, however, backed out from participating in resolution application and now

after completion of the CIR period their application cannot be considered. In this regard, this Tribunal in Kalinga Allied Industries Pvt. Ltd. Vs. Hindustan Coils Ltd. (2021) SCC Online NCLAT 51 at para 15 held as under:

> *"15. In pursuant to the expression of interest issued by RP on 24.08.2018 the Appellant submitted a Resolution Plan. After several rounds of deliberation by the COC revised Resolution Plan was submitted by the Appellant on 19.12.2018. The same was approved on 28.12.2018 by the COC in the 13th meeting by requisite majority. <u>Thereafter, the RP filed an Application under Section 30 (6) of the I&B Code for approval of Resolution Plan in the month of January, 2019 and sometime in the month of February, 2020 the Respondent No. 1 filed an Application seeking direction for consideration of its Resolution Plan. Admittedly the Respondent No. 1 has not submitted any Resolution Plan pursuant to the expression of interest issued by the RP. Thus, the Respondent No. 1 is not part of CIRP.</u> The Respondent No. 1 has filed Application directly before the Adjudicating Authority. The Adjudicating Authority in the guise of maximization of the value of assets of the Corporate Debtor directed that the Respondent No. 1's Application and Resolution Plan be put up before the COC for consideration. <u>There is no provision in the code or regulation which provides that while exercising the power under Section 31 of the I&B Code the Adjudicating Authority can direct the COC to consider the Resolution Plan of such person who has not been part of CIRP. Otherwise also if such procedure is adopted then the CIRP will be frustrated.</u> Once the Resolution Plan has been opened and fundamentals and financials of the Plan and offer made therein were disclosed to all the participants including RP. Then anyone can enhance its offer before the Adjudicating Authority in the guise of maximization*

of realisation. Therefore, no further fresh bid or offer could have been accepted or considered as held by this Appellate Tribunal in the case of Kotak Investment Advisors Ltd. (Supra) (See Para 23)"

42. Further this 'Tribunal' in Shrawan Kumar Agarwal Consortium Vs. Rituraj Steel Pvt. Ltd. & Ors., reported in (2020) SCC Online NCLAT 380 para 16, had observed the following:

> *"16. Thus it is clear that the Adjudicating Authority is having limited power of judicial scrutiny under <u>Section 31, which has to remain within the four corners of Section 30(2) of the Code and the same cannot, in any circumstance, trespass upon the commercial wisdom of the CoC. The directions of the Adjudicating Authority for re-bidding, after the approval of Resolution Plan by the requisite majority, is not in consonance with the law laid down by</u> Hon'ble Supreme Court in K. Shashidhar (supra) case, as a Resolution Plan is neither a sale nor an auction but it all depends on the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority and <u>'that is made non-justiciable'</u>. Thus, the Appeal No 1490/2019 deserves to be allowed.*

<u>Conclusion</u>

43. Having analysed the facts, legal position and the precedents and viewed in that perspective, this 'Tribunal' unequivocally comes to a resultant conclusion that the 'impugned order', passed in I.A. No. 161 of 2020 in CP No. 51 of 2018 dated 28.05.2021 is per se 'illegal', 'without application of mind', the same is set aside, with the following directions to be complied

with by the 'Adjudicating Authority' (National Company Law Tribunal, Bengaluru Bench).

<u>Directions:</u>

(i) I.A. No. 161 of 2020 in CP No. 51 of 2018 is restored to its original position on the file of the 'Adjudicating Authority', ('National Company Law Tribunal', Bengaluru Bench).

(ii) The 'Adjudicating Authority' is hereby directed to consider the plan of the 'Successful Resolution Applicant' / '5th Respondent' herein, i.e. Mohammed Enterprises Ltd. (Tanzania Ltd.) (in short METL) whose plan has been approved by the 'CoC' with 100% voting share, within 4 weeks from the date of receipt of copy of this Judgment, in accordance with 'Law'.

(iii) The interim order granted by this 'Tribunal' dated 03.08.2021 is made absolute.

44. In fine, the Company Appeal (AT) (CH) (Ins.) No. 172 of 2021 is 'allowed'. No order as to costs. The connected pending 'Applications', if any, stand 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

19th September, 2022

pks