

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- COURT I
KOLKATA**

I.A. (IBC) 1362/KB/2022, IVN.P (IBC) 27/KB/2022,

I.A. (IBC) 272/KB/2023, I.A. (IBC) 524/KB/2023

in

CP (IB) 149/KB/2019

In the matter of:

Indian Bank

.....Financial Creditor

-versus-

City Mall Developers Pvt. Ltd.

.....Corporate Debtor

And

I.A. (IBC) 1362/KB/2022

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of

Indian Bank

..... Applicant

-versus-

Kannan Tiruvengadam [Resolution Professional of City mall Developers Pvt. Ltd.]

..... Respondent

IVN.P (IBC) 27/KB/2022

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of

GSR Tradefin Pvt. Ltd.

..... Applicant

-versus-

1. Indian bank

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2. Kannan Tiruvengadam, Resolution Professional of City mall Developers Pvt. Ltd.

..... Respondents

I.A. (IBC) 272/KB/2023

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of

Indian Bank

..... Applicant

-versus-

Kannan Tiruvengadam [Resolution Professional of City mall Developers Pvt. Ltd.]

..... Respondent

I.A. (IBC) 524/KB/2023

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

In the matter of

Indian Bank

..... Applicant

-versus-

1. Kannan Tiruvengadam [Resolution Professional of City mall Developers Pvt.

Ltd.]

2. GSR Tradepin Pvt. Ltd.

3. Gopal Sponge and power Pvt. Ltd.

..... Respondent

Date of Pronouncement of the order: 08.03.2024

Coram:

Rohit Kapoor, Member (Judicial)

Balraj Joshi, Member (Technical)

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Appearances (via video conferencing/physical):

| | |
|--------------------------------|---------------------------------------|
| Mr. Rishav Banerjee, Adv. |] For Indian bank |
| Mr. Santosh Kumar Ray, Adv. |] |
| Ms. Rituparna Sanyal ,Adv. |] |
| Ms. Swastika Sengupta, Adv. |] |
| | |
| Mr. Joy Saha, Sr. Adv. |] For the Resolution Professional |
| Mr. Mainak Bose, Adv. |] |
| Ms. A. Rao, Adv. |] |
| Ms. A. Basu, Adv. |] |
| | |
| Mr. Sanwal Tibrewal, Adv. |] For Suspended Management |
| | |
| Mr. Shaunak Mitra, Adv. |] For GSR Tradefin Pvt. Ltd. |
| | |
| Mr. Ratnanko Banerji, Sr. Adv. |] For Successful Resolution Applicant |
| Mr. Kalyan Bhaumik, Adv. |] |

COMMON ORDER

Balraj Joshi, Member (Technical):

1. This Court convened through hybrid mode.
2. **IA. (IBC) 1362/KB/2022** has been filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter may be referred to as "IBC" or "the Code") read with Rule 11 of the National Company Law Tribunal Rules, 2016 (hereinafter may be referred to as "NCLT Rules") challenging the wrongful admission of claims by the Resolution Professional (RP), pertaining to the Corporate Guarantee extended by the Corporate Debtor i.e *M/s. City Mall Developers Pvt. Ltd* in respect of credit facilities sanctioned to *M/s. City Mall Vikash Pvt. Ltd* without obtaining a NOC from the applicant Bank.

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3. In opposition to the said IA. (IBC) 1362/KB/2022, **IVN. P. (IBC) 27/KB/2022** has been filed by GSR TradeFin Pvt Ltd. ("GSR") being the Financial Creditor having 77.53% voting share in the Committee of Creditors (hereinafter referred to as "CoC") praying for leave to intervene in I.A. No. 1362/KB/2022 or being impleaded as a Respondent in I.A. No. 1362/KB/2022.
 4. Subsequently two more IAs namely **IA. (IBC) 272/KB/2023 and IA(IBC) 524/KB/2023** have been filed by Indian Bank. **IA. (IBC) 272/KB/2023** was filed seeking directions to set aside the resolution plan approved by the CoC since the said resolution plan is bad in law. **IA(IBC) 524/KB/2023** was filed seeking the reliefs including replacement of the RP, reconstitution of the CoC after removal of GSR there from and setting aside of the resolution plan received from Gopal Sponge and Power Pvt. Ltd.
 5. It has been stated in the pleadings of IA 524 (page 8) that Indian bank has filed an application under Section 60(5) of the Code challenging the wrongful admission of claims of the Respondent No.2 as well as an application challenging the approval of the Resolution Plan before this Adjudicating Authority being IA No 1362 of 2022 and IA No 272 of 2023 respectively and that the applicant would rely on the pleadings in these applications during the hearing.
 6. We find that the issues in the aforesaid applications are either identical or interconnected and as such, it is appropriate to deal with them together. Hence, this common order.
 7. **Brief Facts of the matter:**
 - 7.1 The Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") was initiated against the Corporate Debtor, City Mall Developers Private Limited (hereinafter referred to as "CD") vide Order dated 08.03.2022 passed by the Adjudicating Authority in Company Petition No. IB-149/KB/2019 . Mr. Sajjan Kumar Dokania was appointed as Interim Resolution Professional (IRP) vide the said Order and subsequently, the Respondent herein was appointed as the Resolution Professional (RP).
 - 7.2 A public announcement was made inviting claims from creditors of the CD in-Form A and subsequently claims were received from Indian Bank along with other

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creditors. Thereafter, the Committee of Creditors (hereinafter referred to as "CoC") was constituted and the share percentage of the Indian Bank as on 04.04.2022 was 32.97%.

7.3 Thereafter, the IRP kept updating the List of Creditors from time to time after receiving fresh claims from other creditors including that of one Omkara Assets Reconstruction Private Limited ("Omkara ARC").

7.4 Omkara's claim was based on the debt belonging to JM Financial ARC which was assigned to Omkara ARC on 17.03.2022 *i.e* post the CIRP commencement date. The claim from Omkara ARC was received by the IRP on 22.03.2022 and was initially rejected on the ground that the debt was not assigned to them as on 08.03.2022 (CIRP commencement date). Thereafter, a fresh claim was received by the IRP from JM Financial ARC on 31.03.2022 along with an intimation that the debt has been assigned to Omkara ARC. The same was accordingly admitted by the IRP.

7.5 Indian bank had been informed about the formation of CoC and its voting rights by the IRP vide email dated 05.04.2022. As on the 1st CoC Meeting held on 05.04.2022, the two financial creditors of the Corporate Debtor were Indian Bank (then having 32.97% voting shares) and Omkara ARC (then having 67.03% voting shares).

7.6 In the First CoC meeting, Omkara ARC had also proposed the name of the Respondent RP for appointment as RP, which was later on taken up for passing a resolution in the subsequent meetings and was thereafter approved by the Adjudicating Authority on 12.05.2022.

7.7 At the 2nd CoC Meeting held on 18.04.2022, the IRP placed the revised status of voting shares of the members of the CoC. As per the revised claims, the voting share of Indian Bank was revised to 22.47% and the voting share of Omkara ARC was revised to 77.53%. The revision of the claims was done due to the admission of the fresh claim of Omkara ARC.

7.8 Out of the said 77.53% voting share of Omkara ARC, 45.68% was held as a secured creditor and 31.85% voting share was held as an unsecured creditor. The voting share of 31.85% held by Omkara ARC was on account of a Corporate Guarantee

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executed by the Corporate Debtor in respect of credit facility extended by the Financial Creditor to M/s. City Mall Vikash Pvt Ltd.

7.9 For the sake of brevity, the voting shares of the CoC Members as on 1st CoC Meeting held on 05.04.2022 and 2nd CoC Meeting held on 18.04.2022 are as follows:

Constitution of Committee of Creditor (CoC) as on 04.04.2022 and 18.04.2022

| Name Of Financial Creditor | Voting %age as on 05.04.2022 | Voting %age on and after 18.04.2022 |
|----------------------------|------------------------------|-------------------------------------|
| Indian Bank | 32.97% | 22.47% |
| Omkara ARC/ GSR | 67.03% | 77.53% |
| TOTAL | 100% | 100% |

7.10 After the appointment of the Respondent RP vide order dated 12.05.2022, the 4th CoC Meeting was held on 01.06.2022.

7.11 Thereafter on 04.07.2022, Omkara ARC transferred their debt to GSR Tradefin Pvt. Ltd. (“GSR”). Accordingly, in the 5th CoC Meeting held on 04.07.2022, the RP apprised the CoC members of such transfer and allowed GSR to participate in the meeting and also allowed them to vote on the resolutions.

7.12 Subsequently, in the 8th CoC Meeting held on 13.10.2022, the resolution plan submitted by **Gopal Sponge & Power Private Limited (“Gopal Sponge”)** was discussed and at this juncture, Indian Bank raised a concern with regard to the ambiguity in the distinction of payment to secured and unsecured creditors.

7.13 In the 9th CoC Meeting held on 01.11.2022, it was decided that the resolution plan submitted by Gopal Sponge be put up for voting. The voting lines were opened from 03.11.2022 to 05.11.2022. Indian Bank requested to delay the voting and sought time for 15 days to vote. Accordingly, the voting time was extended up to 18.11.2022. Voting was concluded on 18.11.2022 and the resolution plan was passed by 77.53% and the Indian Bank abstained from voting. Accordingly, I.A

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(IBC) 1524/KB/2022 was filed with the Adjudicating Authority which is pending adjudication.

8. Submissions by the applicant i.e Indian Bank in I.A.1362/KB/2022, I.A. 272/KB/2023 and I.A.524/KB/2023:

8.1 It has been submitted by Indian Bank that the 31.85% voting share held by Omkara ARC which was later assigned to GSR on account of Corporate Guarantee given to debts of M/s. City Mall Vikash Pvt Ltd was an illegal and wrongful financial transaction. The said Corporate Guarantee was executed by the Corporate Debtor in utter derogation of the terms and conditions of the sanction letter issued by Indian Bank¹11.06.2007. No NOC and/or banks approval was obtained by the CD before extending such Corporate Guarantee to a third party. In light of such contravention, the alleged claim of the purported financial creditor should not have been admitted by the Respondent RP. In doing so, the RP has blatantly violated Regulation 12(3) of the IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”).

8.2 Further, the Respondent RP had illegally and wrongfully allowed the participation of Respondent No.2 viz. GSR in the 5th CoC meeting and also wrongfully allowed it to vote in the resolutions passed in the said 5th CoC meeting without collating and/or verifying and/or admitting the claim of Respondent No.2 to whom the debt had been allegedly assigned by Omkara ARC. The same is in contravention of Regulation 28 of the CIRP Regulations, 2016.

8.3 In the said 5th CoC Meeting it was stated by the Respondent No.1 RP that "one of the Financial Creditors named Omkara Asset Reconstruction Pvt Ltd have transferred their debt to GSR Tradefin Pvt. Ltd. on 4th July 2022 vide email dated 4th July 2022 at 14:04Hrs.....". The assignment deed was only received by the RP on 06.07.2022 at 7:11pm. It is, therefore, apparent that on 04.07.2022 when the 5th CoC Meeting was held, the Respondent RP did not have any such assignment deed as the same was provided on 06.07.2022. As such without

¹Annexure A-9 to I.A. 1362/KB/2022

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verification and admission of a claim, the RP cannot assign the voting share to a creditor.

8.4 Therefore, the constitution of the CoC itself violates the proviso to Section 21 (2) of the I & B Code 2016 read with 12(3) of the CIRP Regulations. and is a nullity in the eye of law and that this action alone vitiates the entire CIRP.

8.5 Furthermore, the Resolution Plan submitted by **Gopal Sponge** fails the test of being feasible and viable as the security interest of the applicant bank has not been taken into consideration at the time of preparation of the Resolution Plan and the same is not in accordance with the amendment made in Section 30(4) as effective from 16.08.2019. The CoC has failed to ensure that the manner of distribution of the funds takes into account the order of priority amongst creditors and shall also be the priority and value of the security interest of a creditor. Indian Bank having substantial security interest has not been distinguished from the unsecured financial creditor GSR, having partly unsecured claims. The Liquidation value has also not been stated and/or quantified in the revised Resolution Plan. In consequence of such disregard to the Code and its regulations, the Applicant Bank has abstained from voting in favour or against the Resolution Plan.

8.6 There is also material irregularity in the resolutions passed in the 5th CoC Meeting, specifically pertaining to Agenda 1 "approval of publication of Form G under Regulation 36A" as well as Agenda 2 "Approval of Eligibility criteria under Section 25(2)(h) for Expression of interest (EOI) under Regulation 36A" as there is blatant violation of Section 25(2)(h) of the Code, 2016 read with Regulation 12 and Regulation 28 of the CIRP Regulations, 2016 due to the fact that GSR could not have participated in the 5th CoC Meetings let alone vote on the resolutions and then further participate in all subsequent CoC Meetings and/or vote all subsequent resolutions after the 5th CoC Meetings. Sine EoI was approved in the 5th CoC, the entire process should be reset to EoI stage.

“It is evident from the above stated fact that there might have been some collusion by and between both the respondents herein Furthermore, the intentions of the respondent RP appear to mala fide.”

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On this assertion, it is sought to replace the RP and annul the entire process held so far more particularly the decisions taken in the 5th CoC and all subsequent CoC meetings.

8.7 As such the Indian Bank has sought the following reliefs by way of I.A.1362/KB/2022, I.A. 272/KB/2023 and I.A.524/KB/2023:

- a) The replacement of the Resolution professional;
- b) The reconstitution of CoC after removal of GSR from the CoC and accordingly revision of the voting share of the Indian Bank in the CoC;
- c) The declaration of the the Expression of Interest (EoI) as null and void and accordingly Setting aside of the resolution plan submitted by Gopal Sponge;
- d) Declaration of all resolutions passed on and after 5th CoC Meeting as *void ab initio*.

9. Submissions made by the Respondent RP in I.A.1362/KB/2022:

9.1 A claim² of Rs.1,65,03,98,110.37 was filed by JM Financial ARC with the RP on behalf of Omkara ARC, with regard to Corporate Guarantee executed by the Corporate Debtor on 29.03.2012 in respect of Credit facility extended to City Mall Vikas Pvt Ltd. The said claim was admitted on 18.04.2022, after verifying the notice of invocation of guarantee³ issued by IDBI Trusteeship Services Limited as the Facility Agent of the lender ICICI Bank Limited on May 19, 2016. ICICI Bank Ltd. had also initiated recovery proceedings against the CD before the Debts Recovery Tribunal at Jabalpur in March 2018.

9.2 The Applicant never raised any objection before the IRP regarding the revision of the voting shares done in the 2nd CoC Meeting, as is evident from the email of the said IRP dated 24th November 2022⁴. Till date nine CoC meetings have taken place wherein the applicant actively participated and also voted for the resolutions therein.

²Annexure K to the Reply Affidavit in I.A. 1362/KB/2022

³Annexure B to the Reply Affidavit in I.A. 1362/KB/2022

⁴Annexure C to the Reply Affidavit in I.A. 1362/KB/2022

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9.3 The Respondent took over the CIRP after the completion of the 3rd CoC Meeting and has been diligently continuing the CIRP process since 12.05.2022.

9.4 Regarding the allegation of Indian Bank that the corporate guarantee was executed by the Corporate Debtor without obtaining consent from Indian Bank, it is submitted that two loans had been sanctioned by the Indian bank to the Corporate Debtor. The first loan sanctioned under the letter of sanction dated 11.06.2007 stood discharged and satisfaction of charge⁵ was filed with the Registrar of Companies, West Bengal. The latter loan being the term loan for Rs. 50 Crore on 21.10.2011 was sanctioned to the Corporate Debtor herein against existing/future lease rentals. As per the said sanction letter⁶ dated 21.10.2011, the overdue amount in the account of M/s. City Mall Vikash Pvt. Ltd. had to be adjusted as a pre-disbursement condition before availing the fresh loan. No condition was imposed where the CD was required to obtain either NOC or prior approval of the applicant before execution of any security document in favour of any other bank/financial institution.

9.5 The sanction made on 21.10.2011 was reviewed and continued by a letter⁷ dated 28.09.2013 which also did not contain any clause requiring the CD to obtain either NOC or prior approval of the applicant before execution of any security document in favour of any other bank/financial institution. Further, during the 9th CoC Meeting, the suspended board of director of the Corporate Debtor clarified the position regarding the conditions of sanction of the loan in 2007 to the Applicant.

9.6 During the 9th CoC meeting, it was suggested that the Resolution plan be voted on by members of the CoC, which the applicant didn't oppose. The voting was scheduled from November 3 to November 5, 2022. The applicant asked for a 15-day extension to seek permission from their corporate office to vote. Despite granting the extension until November 18, 2022, as requested by the applicant, they abstained from voting. As a result, the voting concluded on November 18, 2022, and subsequently, the Resolution Professional filed an application for approval of the Resolution Plan. Indian bank, having participated in each CoC

⁵Annexure F to the Reply Affidavit in I.A. 1362/KB/2022

⁶Annexure G to the Reply Affidavit in I.A. 1362/KB/2022

⁷Annexure H to the Reply Affidavit in I.A. 1362/KB/2022

meeting and having exercised their voting on all matters regarding the CIR process of the CD, have waived/acquiesced their right to raise the issue about their voting share when the CIRP is almost nearing completion.

10. Submissions made by the Respondent RP in I.A.272/KB/2022:

- 10.1** During the course of interaction with representatives of **Gopal Sponge and Power Limited (SRA)** in the 8th CoC meeting, question regarding distinction of payment to secured and unsecured financial creditors was put forth to the SRA. It had then been clarified that there was no distinction between one or other Financial Creditor in terms of Section 5(7) and 5(8) of the Code. Reliance was placed on the judgement passed by the Hon'ble Supreme Court of India in *Committee of Creditors of Essar Steel India Limited through Authorized Signatory vs Satish Kumar Gupta & Ors*⁸ which had set the ground for distribution of amount in the Resolution Plan without any distinction between secured and unsecured creditor. The applicant being satisfied on the same as recorded in the eighth CoC meeting did not raise any further comment on the same. After the aforementioned discussion, Indian Bank requested the RP to go through various other judgements issued in this respect and appropriately take a considered decision and communicate to the PRA so that the resolution plan can be amended appropriately.
- 10.2** Thereafter the SRA revised the resolution plan which was communicated to the CoC members and even during the course of 9th CoC meeting, no such questions were raised by the Applicant. It is further submitted that IA/1B/ 1362/KB/2022 was filed before the 9th CoC meeting. The deliberation of the Resolution Plan took place and with participation of all CoC members, score in respect of Evaluation Matrix were decided. In the 9th CoC Meeting, the discussions held in 8th CoC meeting in respect of the manner of distribution proposed was again brought to the knowledge of the CoC members. None of the members including the applicant raised any objection to the same and proceeded with the meeting.
- 10.3** The instant application has been filed by the applicant challenging the feasibility and viability of the Resolution Plan, to which they were part of discussion and

⁸ (2020) 8 SCC 531

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never raised any objection which was not responded to them to their satisfaction. It is well settled that a creditor who has dissented or abstained in the voting cannot challenge a Plan and seek a higher payment on the basis of security interest held by it over Corporate Debtor.

- 10.4** The viability and feasibility of the Resolution Plan was discussed in details in the eighth and ninth CoC meeting as would appear from page 264 of the application filed by Indian Bank. The applicant participated in the deliberation and also gave score in course of assessment of Evaluation Matrix. The applicant as a CoC member had duly considered the qualitative and quantitative parameters of the plan and had participated in the scoring on the same as will appear from page 269 of the above mentioned application. The CoC members were put on notice that the plan would be put to vote since the last date for the CIRP was December 3, 2022. Despite the same, the applicant chose not to raise any objection at that relevant point of time.
- 10.5** The Plan submitted by the Respondent no. 3 was discussed in detail in the eighth CoC meeting. The issue regarding liquidation value in the Resolution Plan was never raised by the applicant. Further, there is no question of intimating the liquidation value to the prospective resolution applicant as the same may lead to misuse of such knowledge by a prospective resolution applicant who would quote a figure close to such value only.
- 10.6** The Respondent RP has relied on the following landmark judgments in support of his contentions:
- a) *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta: (2020) 8 SCC 531, paragraph 128;*
 - b) *India Resurgence ARC Private Limited vs Amit Metaliks Ltd. &Anr. reported in 2021 SCC Online SC 409, paragraph 21;*
 - c) *Jaypee Kensington Boulevard Apartments Welfare Association and others vs NBCC (India) Limited &Ors. Reported in (2022) 1 SCC 401, paragraph 14.*

11. Submissions made by the GSRTradefin Pvt. Ltd. in I.A.272/KB/2022 and IVN.P.(IBC) 27/KB/2022:

11.1 Omkara ARC was an assignee of the debts of JM Financial ARC. Omkara ARC has two admitted claims, one as a secured financial creditor and second as an unsecured financial creditor as detailed below:

- a) Unsecured Debt: Claim of Rs. 1,65,03,98,110.37 with regard to Corporate Guarantee executed by the CD (i.e guarantor) in favor of IDBI Trusteeship Services Limited (i.e facility agent for ICICI Bank) in respect of Credit facility extended to City Mall Vikash Pvt Ltd (i.e the borrower) by ICICI Bank (i.e the Creditor);
- b) Secured Debt: Claim of Rs. 2,36,70,56,194.14 with regard to Corporate Guarantee along with second ranking interest in the property of the Corporate Debtor executed by the CD (i.e guarantor) in favor of IDBI Trusteeship Services Limited (i.e facility agent for ICICI Bank) in respect of Credit facility extended to Krish (Raipur) Hotels Pvt Ltd. (i.e the borrower) by ICICI Bank (i.e the Creditor).

11.2 Till the date of the filing of the instant applications, Nine CoC meetings had taken place wherein Indian Bank never raised any objection regarding constituents of the COC and had actively participated in all the discussion that took place in course of the meetings and also the resolution. No query or objections was raised on the voted to same in any of the CoC meetings by the applicant till the decision was made to put the Resolution Plan on vote.

11.3 The Resolution plan was also discussed in details in the 8th CoC Meeting wherein all question including alleged ambiguous distribution to Financial Creditors were put to rest.

11.4 In the 9th CoC held on 1st November 2022, it came to the knowledge of GSR that Indian Bank has filed an application being IA No. 1362 /KB/2022 seeking reduction of vote share of GSR. However, GSR was not made a party to the said application *i.e* IA No. 1362/KB/ 2022 even though relief sought vitally affects it. The said application was heard on 15th November 2022, when the applicant appeared and opposed the same. It was proposed in the 9th CoC meeting that the

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voting for the approval of Resolution plan be put for vote by the other COC member which was never opposed by Indian Bank. It initially decided that the voting lines would be opened from November 3, 2022 to November 5, 2022. However, Indian Bank sought for extension of time for voting by fifteen days which was allowed by the RP.

11.5 Despite such extension of time, Indian Bank abstained from voting. The voting was concluded on November 18, 2022 and an application has been filed for approval of the Resolution Plan.

11.6 Indian Bank has failed to appreciate that as a dissenting creditor, the applicant will only receive an amount as assessed on basis of section 30(2)(b) read with section 53 of the Code. Needless to say that the said Section provides for payment to Secured creditors in priority to the unsecured.

11.7 It is to be noted that Indian Bank has not challenged the secured portion of the claim of GSR and has challenged that unsecured portion only. The contention of Indian Bank is that the admission of unsecured portion of the claims of GSR is bad in law as the same is de hors the alleged sanction of the Applicants dated 11.06.2007 hence it is intended that the shares of the applicant in respect of spoils of the Resolution Plan outlay will increase.

11.8 Indian Bank continues to participate in the CoC, actively voting on agendas as would be evident from 10th CoC meetings enclosed herewith and marked with Letter F. Indian Bank at one point is challenging the formation of CoC and at other hand participating in it without any objections.

11.9 Infact the suspended management raised objection⁹ to the admitted claims of Indian Bank which has till date not been addressed by the Indian Bank and/or the RP. The emails will amply establish that the claims of Indian Bank are inflated and contrary to their own admitted records.

12. Rejoinder filed on behalf of Indian Bank in I.A. 1362/KB/2022:

12.1 The notice for invocation of guarantee is dated 19.05.2016 and as such the claim is barred by limitation.

⁹ Annexure H to the Reply filed by GSR in I.A. 272/KB/2022

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- 12.2 It is further denied that the loan sanctioned vide letter of sanction dated 11.06.2007, stood discharged.
- 12.3 In the 8th CoC Meeting, the resolution plan submitted by the prospective resolution applicant being **Gopal Sponge and Power Pvt Ltd.** was discussed at length and it was at this juncture that Indian Bank raised a concern with regard to the ambiguity in the distinction of payment to secured and unsecured creditor. Further, Indian Bank was concerned with its voting percentage considering that the applicant bank was a secured creditor and GSR Tradefin Pvt Ltd's 31.85% voting percentage was unsecured. It was for the first time that after scrutinizing the documents and records etc. it had come to the notice of the applicant bank that the Corporate Guarantee extended by the CD towards loan facilities availed by City Mall Vikash Pvt Ltd in the year 2012 was wrongfully and/or unauthorizedly extended by the CD without obtaining any NOC from the applicant Bank.

13. Analysis and findings

- 13.1** Heard the Ld. Sr. Counsel on behalf of the Resolution Professional, the Ld. Sr. Counsel on behalf of the Successful Resolution Applicant, the Ld. Counsel on behalf of Indian Bank, the Ld. Counsel on behalf of GSR Tradefin Pvt. Ltd. and the Ld. Counsel on behalf of suspended management of the Corporate Debtor and perused the records.
- 13.2** It is noted that the Adjudicating Authority, vide order dated 10.02.2023, had directed the Deputy General Manager of Indian Bank to file a supplementary affidavit in order to bring on record the resolution passed in the 5th CoC Meeting. In compliance of the same, a supplementary affidavit notarized on 10.03.2023 has been filed and has been taken into account.
- 13.3** It is admitted by the bank in the pleadings as well as during the hearing that they had indeed participated in the process and had attended all the CoC meetings. However, on the issue of estoppel Ld. Counsel put forth the argument that '*there can not be estoppel against law*' which had been violated in the instant case. So in essence the purported injury is due to non-following of laid down process by the RP.

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- 13.4** It has been expressly stated that the RP has violated the regulations 12 & 28 of the IBBI Regulations (Corporate Insolvency resolution Process) 2016 have been and therefore the entire process of CIRP taken up so far , particularly after the 5th CoC needs to be set aside and declared a nullity. The reliefs sought include the re-constitution of the CoC after proper verification and collation of the claims of various creditors and voting percentage arrived at afresh. Further some apprehensions on the conduct of the RP have also been cast which also needs to be examined.
- 13.5** Before starting the analysis following facts are extracted:
- a. CIRP started on 8.03.2022- IRP appointed
 - b. IRP conducted the CIRP which included three meetings of CoC.
 - c. Following the appointment of the respondent as RP on 12.05.2022, the Fifth meeting of the CoC was held by the new incumbent.
- 13.6** It has been alleged that the admission of the claim of the other financial creditor namely Omkara ARC, has been erroneously done thereby reducing the voting percentage of Indian bank to 22.47 % as against 100% on 30.3.2022 i.e. the date when the first list of the creditors was issued by the IRP.
- 13.7** In the Fifth CoC meeting, the new RP has allowed the representative of the assignee financial creditor which is being objected to now by the applicant. However a look at the minutes of the 5th CoC shows the voting percentage of the Applicant bank to be same as had been arrived at by the IRP i.e. 22.47%.Therefore, this allegation cannot be raised against the present RP who have very categorically stated that he had started off from where the previous IRP had left. Thus, leaving aside the matter of questioning the RP on the issue of allowing the assignee namely GSR it cannot be said that RP has ‘manipulated’ this percentage. The principal allegation on the RP thus is that he allowed the representative of GSR to attend the 5th CoC meeting and subsequent meetings without complying with the said regulations 2016.
- 13.8** For putting things in perspective, these regulations of IBBI(Corporate Persons Insolvency Resolution) 2016 are reproduced herewith:

12.Submission of proof of claims.

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- 1) *Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.*
- 2) *A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.]*
- 3) *Where the creditor in sub-regulation (2) is a financial creditor under regulation 8, it shall be included in the committee from the date of admission of such claim:
Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.*

28. Transfer of debt due to creditors.

- 1) *In the event a creditor assigns or transfers the debt due to such creditor to any other person during the insolvency resolution process period, both parties shall provide the interim resolution professional or the resolution professional, as the case may be, the terms of such assignment or transfer and the identity of the assignee or transferee.*
- 2) *The resolution professional shall notify each participant and the Adjudicating Authority of any resultant change in the committee within two days of such change.*

13.9 Hereinafter, we have dealt with the allegations made by the Indian Bank in its applications individually:

A. On contravention of regulations 28 and 12 and section 25(2)(h):

- i. Upon perusal of Regulation 28 of the CIRP Regulations 2016, it is seen that while it has been provided that the transferor and the transferee of the debt are required to provide to the IRP/RP, the terms of such assignment or transfer and the identity of the assignee or transferee, no strict time-limit has been set for the disclosure of the terms of assignment/transfer. Further, in such a case, the IRP/RP is required to notify the CoC members regarding the transfer/assignment

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within two days from the change. In the instant matter, it is seen that the Transfer of the debt from Omkara ARC to GSR took place on 04.07.2022 at 14.04 Hrs. and the same was communicated to the RP on the same day. Further, the RP notified the CoC members regarding the same in the 5th CoC Meeting held on 04.07.2022 at 16.10 Hrs. The law is silent as to the time-limit of producing the documents in support of the transfer and accordingly, the RP in the same meeting, requested GSR to submit all the necessary documents for verifications. In doing so, the RP has followed the letter of law and cannot be said to have contravened Regulation 28. Further, since Indian Bank did not object to the RP's inclusion of GSR's name in the CoC in the 5th CoC Meeting and voted for resolutions in favour of further resolution of the Corporate Debtor, Indian Bank, at this point cannot come and object to the same.

- ii. The Ld. Counsel on behalf of the Indian Bank has claimed the constitution of the CoC to be a nullity and has relied on the decision the matter of *Jayanta Banerjee vs. Shashi Agarwal, Liquidator of INCAB Industries Ltd & Anr*¹⁰, wherein the Hon'ble NCLAT has stated that the IRP/RP has no discretionary power to constitute the committee of creditors without admission of a claim and that without verification and admission of a claim, the IRP cannot assign the voting share to a creditor, and without that, there cannot be a meeting of the committee of creditors. It was further held therein that as the IRP/RP has formed the committee of creditors without admitting the claims of the financial creditors, it violates Regulation 12(3) of the CIRP Regulations.
- iii. However, it is seen that in the instant matter, no fresh admission of claims was done by the RP in the 5th CoC Meeting and only an existing claim which had been previously verified by the IRP was transferred from one party to another. As such, since due process of law was followed while admitting the said claim, the constitution of the CoC cannot be held a nullity solely because the transfer of the claim was not verified before GSR was allowed to vote in the 5th CoC Meeting.

¹⁰ Company Appeal (AT) (Insolvency) No. 348 of 2020

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iv. In this regard, it is further noted that the RP had clearly mentioned in the 5th CoC Meeting that the inclusion of GSR's name in the CoC was only provisional and GSR was requested by the RP to submit all the relevant documents to the RP. If anything, it was an irregularity as opposed to an illegality, which was also subsequently cured when the terms of the transfer and other relevant documents were shared with the RP on 06.07.2022.

v. Regarding the difference between irregularity and illegality, we would like to rely of the decision in the matter of ***Solanki Parvatikumari Rameshbhai vs. State of Gujarat***¹¹, the Hon'ble High Court of Gujarat observed the following:

"5.3 A thing irregularly done is not regularly done. It is not in conformity of rule or principle. The concepts "illegal", "irregular" and "procedurally irregular", are often understood in terms of their degree which they bear to be not in conformity with rule of particular course of action. The illegality is a highest kind of breach of law which will taint and vitiate the action. One who commit "illegality" has to be denied the assertion of his right and he stands disentitled to relief in law. Irregularity, as noticed, is breach of procedure of rule or some orderly conduct but not of such nature which could be said to be in the nature of a debilitating defect. It is pardonable in law. The concept of procedural irregularity is indicative of lapse of minor nature in procedure which could not affect adversely rights of a party, nor would exceptionally reverse the obligation of the other side."

vi. Further, in another recent decision in the matter of ***State of Gujarat vs. Vijaybhai Sureshbhai Panchola***¹² the High Court of Gujarat has reiterated as follows:

" The law conceives difference between illegality and irregularity. In the context of requirement of 'staff profile', in the case of the present

¹¹ Special Civil Application No.22981 of 2017, decided on 27.12.2018

¹²R/LETTERS PATENT APPEAL NO. 860 of 2023, decided on 25.07.2023

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petitioner, this distinction be- comes relevant. Illegality is something which amounts to substantial failure in compliance of a requirement. Illegality is one where an essential requirement is not fulfilled. Illegality denotes breach of rule or requirement of such kind, which alters the position of a person in respect of any right such person may be seeking to enforce or any obligation a person has to discharge. Illegality is a contrary to complete defect in the proceedings. It is a situation contra the principles of law.

.....

5.3 In Law Lexicon by R. Ramanatha Aiyar, 1997 Edition, irregularity is defined as "a neglect of order or method; not according to regulations; the doing of an act at an unreasonable time, or in an improper manner; the technical term for every defect in practical proceedings or the mode of conducting an action or defence, as distinguished from defects in pleading. Irregularity is failure to observe that particular course of proceedings which, conformable with the practice of the court, ought to have been observed".

- vii. In light of the aforesaid judgments, it is clear to us that while an irregularity is curable, an illegality is not curable and alters the position of a person in respect of any right such person may be seeking to enforce or any obligation a person has to discharge. In the instant matter, it is seen that the law is silent regarding the time limit for submitting the documents relating to the transfer of debt before the RP. Further, the process of transfer of debt from Omkara ARC to GSR in no way affects the voting percentage of the Indian Bank. The position of Indian Bank with regards to its voting rights would also remain unaltered if the RP had allowed Omkara ARC instead of GSR to vote in the resolutions passed during the 5th CoC Meeting.
- viii. As such, there is no illegality in the process followed by the RP in conducting the CIRP, especially 5th CoC Meeting, but merely an irregularity which was subsequently cured on 06.07.2022 i.e before the 6th CoC Meeting. As such, the

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resolutions passed in the 5th CoC Meeting and the subsequent meetings cannot be held a nullity and are very much valid in the eyes of law.

- ix. In regards to the alleged violation of Regulation 12 of the CIRP Regulations, it is seen that the claim of Omkara ARC vide JM Financial ARC was admitted by the IRP upon verification of relevant documents. It is only after the said admission, the RP came into picture on 12.05.2022. As such, the RP could not have violated Regulation 12 with respect to the admission of the claim of Omkara ARC. In regard to the alleged violation of Regulation 12 during the 5th CoC Meeting wherein GSR being the transferee of the claim of Omkara ARC was allowed to vote, it is relevant to note that the claim in question was already admitted upon verification by the IRP on 31.03.2022 and only the transfer of the same to GSR was required to be verified by the RP in light of Regulation 28. As addressed above, Regulation 28 was not contravened by the RP during the 5th CoC Meeting and the documents relevant to the transfer were also submitted to the RP within a reasonable time. It is clear to us in the above scenario that Regulation 12 and 28 cannot be considered to have been violated in the due process of CIRP in this case. As a result, section 25(2)(h) of the Code has also not been violated.

B. Violation of Regulation 19:

- i. Regulation 19(1) and regulation 19(2) of CIRP Regulations, 2016 stipulates that a notice of meeting of the CoC should be given which should not be less than 24 hours. It has been alleged that in the instant case, there is also violation of Regulation 19(1) and regulation 21 of CIRP Regulations, 2016 since RP allowed GSR to participate in the 5th CoC Meeting without serving the mandatory 24 hours' notice as GSR informed the RP about purported Assignment only 2 hours before the meeting.
- ii. In this regard it becomes relevant to note that in the instant matter, Indian Bank not only failed to object to the said action of the RP in the meeting, but it also actively participated in the voting process of the resolutions passed in the said 5th CoC Meeting and all subsequent meetings till the 10th CoC Meeting. It is only during 8th CoC Meeting held on 13.10.2022, when the Resolution Plan of

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the SRA was discussed, the Indian Bank raised a concern regarding the ambiguity in the distinction of secured and unsecured creditors. The Indian Bank sought clarification with regards to the exact consideration to be paid to the secured and unsecured financial creditors. However, no other objection was raised by the Indian Bank in this regard even at the said stage.

- iii. In fact, Indian Bank has actively taken part in the voting process of the CoC Meetings even in the 10th CoC Meeting i.e after filing I.A.(IBC) 1362/KB/2022 and in doing so, Indian Bank has acquiesced to the actions of the RP and the manner in which the CoC Meetings were conducted.
- iv. It is relevant at this juncture to establish the difference between a mere “delay” in taking an action and “acquiescence” of an action. The Hon’ble Supreme Court of India, has explained the true import of “acquiescence” and its differences with “delay” and “laches” in the matter of *The Chairman, State Bank of India v.M.J. James*¹³, wherein the Apex Court has held as follows:

“30. Laches unlike limitation is flexible. However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity. On the other hand, acquiescence implies active assent and is based upon the rule of estoppel in pais. As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person. Given the aforesaid legal position, inactive acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation.”

¹³MANU/SC/1069/2021: (2022) 2 SCC 301

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Further, in the matter of *Prabhakar v. Joint Director Sericulture Department*¹⁴, the Apex Court has made the following observation:

“36. It is now a well-recognized principle of jurisprudence that a right not exercised for a long time is non-existent.” And

“If a party having a right stands by and sees another acting in manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong.”

- v. It is abundantly clear at this point that the Applicant has participated in all the CoC Meetings, and thereby subjected itself to the outcome of CIRP. The Applicant has not merely delayed in objecting to the alleged violations, rather, it has actively voted in favour of/against the resolutions without objections to the procedure being followed by the RP, and in the process allowed a right to be created in favour of the Successful Resolution Applicant(SRA). At this juncture, he cannot turn volte-face to challenge the methods followed by the IRP/RP in carrying out the due process of resolution as he acquiesced to the mode and manner of the conduct of CIRP by the RP.

Omkaara ARC/GSR being an unsecured creditor and not a secured Creditor:

- i. It has been asserted that no portion of the claim of Omkaara ARC/GSR could have been “secured” since both portions of the debt were arising out of a Corporate Guarantee and nothing more.
- ii. In this regard, it is relevant to mention that as per the claim submitted in Form C, the secured portion of the claim consists of the corporate guarantee along with second ranking interest in the property of the Corporate Debtor as executed by the Corporate Debtor in respect of Credit facility extended to Krish (Raipur) Hotels Pvt. Ltd. It is further noted that the inclusion of either portion of Omkaara’s claim had not been challenged by Indian Bank till filing of I.A.1362/KB/2022.

¹⁴MANU/SC/1041/2015: (2015) 15 SCC 1

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The applicant bank had acquiesced to such voting share being allotted to Omkara ARC by voting in favour of the resolutions passed during the various CoC Meetings and is therefore estopped from objecting to the same at this juncture, when the resolution plan has been approved by the CoC and in pending approval from the Adjudicating Authority.

C. On the claim being time-barred:

- i. It is seen that the corporate guarantee given by the Corporate Debtor herein in respect of the loan sanctioned to City Mall Vikas Pvt. Ltd. was invoked on 19 May 2016. As such, Indian Bank, in its rejoinder filed in respect of I.A. 1362/KB/2022, has claimed that the claim of Omkara ARC submitted by JM Financial ARC on 31.03.2022 in respect of the said debt due to it is barred by limitation. It is noted that the Limitation Act, 1963 does not specifically provide any limitation period of submission of claims by creditors before the IRP/RP and as such, the same needs to be considered in light of Article 137 of the Schedule attached to the Limitation Act 1963, which provides for a limitation period of three years in case of Any application for which no period of limitation is provided elsewhere in the Act.
- ii. In light of Article 137 therein, the limitation period would ordinarily end on 19 May 2019. However, upon perusal of the Financial Statements of the Corporate Debtor for F.Y. 2018-19 (page 145), which is annexed to the Supplementary Affidavit filed by the Corporate Debtor in C.P. (I.B.) 149/KB/2019, it is seen that the Corporate Debtor has acknowledged its guarantee provided to IDBI Trusteeship Services Limited in respect of the loan sanctioned to City Mall Vikas Pvt. Ltd. In light of the said acknowledgement, section 18 of the Limitation Act, 1963 will come into play and a fresh limitation period shall ensue from 31 March 2019 which will culminate on 31.03.2022. since the claim was filed by JM Financial ARC on 31 March 2022, the same is within limitation period.
- iii. As such, the claim filed by GSR does not fall within the category of time-barred debt and needs to be entertained.

D. Failure of Corporate Debtor in obtaining Indian Bank's assent before giving corporate guarantee:

- i. The applicant Indian Bank has alleged that the IRP/RP has committed an illegality by admitting the claim consisting of corporate guarantee given by the Corporate Debtor with regard to the loan sanctioned to City Mall Vikas Pvt. Ltd since the Corporate Debtor had failed to take NOC from the Indian Bank before giving such corporate guarantee and in doing so, has breached the terms of the sanction letter dated 11.06.2007.
- ii. The Respondent RP in this regard has explained that the loan sanctioned under the letter of sanction dated 11.06.2007 stood discharged and satisfaction of charge¹⁵ was filed with the Registrar of Companies, West Bengal. Further there was no condition imposed on the CD to obtain any NOC or prior approval of the applicant before execution of any security document in favour of any other bank/financial institution in the latter sanction letter dated 21.10.2011.
- iii. It is Ex facie clear that the illegality complained of herein is with regard to a contractual breach, if any, between the Corporate Debtor and Indian Bank and does not include the third-party Financial Creditor i.e. Omkara ARC/ GSR. Since there is no privity of contract between the said third party creditor and Indian Bank, the interests of the said third party cannot be questioned based on the said breach. Therefore, the alleged breach of contract would not prevent the IRP/RP from admitting the claim of Omkara ARC/ GSR.

E. Violation of Sections 30(4):

- i. Lastly, it has been contended that the Resolution Plan submitted by the Successful Resolution Applicant does not comply with sections 30(4), 30(2)(e) and 30(2)(f) along with Regulation 38(1)A and therefore ought not to be approved by the CoC. In support of this claim, Indian Bank has relied on the decision of the Hon'ble National Company Law Tribunal (NCLT) Ahmedabad in the matter of *Ravindra Kumar Goyal vs. Jatin Prakash Gupta & Ors*¹⁶

¹⁵Annexure F to the Reply Affidavit in I.A. 1362/KB/2022

¹⁶ IA 680 (AHM) 2021 & IA 183(AHM) 2022 in CP(IB) 295/7/NCLT/AHM/2019

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wherein the NCLT Ahmedabad has held that a resolution plan in breach of two provisions of law i.e sequence of priority in payment of the dues to the stakeholders as stated under Section 53 of IBC and which does not comply mandatory requirement under Regulation 38 and more particularly Regulation 38(1)A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, which states that "*A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor*", cannot be approved. It was further held therein that as the resolution plan does not effectively deal with the interests of all stakeholders of the company, the resolution plan does not comply with Sections 30(2)(e) and Section 30 (2) (f) of IBC, hence, cannot be approved.

- ii. Indian Bank has also relied on the decision of the Apex Court in the matter of ***M/s. Vistra ITCL (India) Ltd & ORS -VS- mr. Dinkar Venkatasubramanian &Anr***, wherein the Apex Court held:

"Vistra, who is treated it as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor under Section 52 and 53 of the Code."

- iii. It is relevant to refer to section 30(4) at this juncture, which is reproduced hereinafter:

"(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:"

- iv. It is to be noted here that the word 'may' in subsection 4 of section 30, is directory and not mandatory. As such, the CoC is not mandated to distribute the payments to the creditors based on the value of security held by them before the

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commencement of CIRP. In this regard, we rely upon the decision of the Hon'ble Supreme Court of India in the matter of **India Resurgence ARC Private Limited vs. Amit Metaliks Limited and Another**¹⁷, wherein the Apex Court has made the following observation:

“It needs hardly any elaboration that financial proposal in the Resolution Plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and take care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction’. Thus, it is noteworthy from the ruling above, that in the Scheme of the IB Code, 2016, every dissatisfaction like that of the Applicants herein, does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.”(para 11)

- v. Further, in the matter of *Canara Bank Vs. Sri. Nitin Vishwanath Panchal RP*¹⁸, the NCLT bench at Hyderabad has held that:

“A bare perusal of the language used by the Legislature in the amended Section 30(4), with respect to considering the security interest, shows that the word used being “may”, the same is directory and not mandatory. That apart, the said provisions is only an enabling provision and does not impose any mandate on the COC to distribute payments to creditors based on the value of security held by them. Section 30(4) of the IB Code only says that the COC may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53 of the IB Code, including priority and value of security interest of secured creditors, while approving the resolution plan, so much so, the argument that, as the COC failed to take into the account the pre-CIRP preferential financial bargains

¹⁷ (2021) ibclaw.in 87 SC

¹⁸ (2023) ibclaw.in 109 NCLT

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made by the Applicants with the Corporate Debtor, as such, the impugned decisions are liable to be set aside, is untenable.”

- vi. In ***Essar Steel India Ltd. Vs. Satish Kumar Gupta &Ors.***¹⁹, the Apex Court has further held:

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

- vii. As such, it is clear that the amount to be paid to different classes and sub-classes of creditors is subject to the commercial wisdom of the CoC, which in the instant case has approved the resolution plan by a majority of 77.53% votes. It has been held in a catena of judgements by various fora including Hon’ble Supreme court that the commercial wisdom of the CoC is not justiciable. The examination by the Adjudicating Authority shall then be limited only to see whether the precepts of Section 30(2) and 53 have been duly complied with or not. In this regard, we would like to refer to the decision of the Hon’ble NCLAT in the matter of ***Sita Chaudhary Vs. Haryana Telecom Ltd. and Ors.***²⁰Wherein the Appellate Authority has held as follows:

“26. Undisputedly, in the statutory framework of IBC, the grounds on which the decision of approval of the resolution plan by the CoC can be interfered with by the Adjudicating Authority has been set out in Section 31 read with Section 30 of IBC. In terms of Section 31 of IBC, the scope of enquiry by the Adjudicating Authority is confined to scrutinizing whether Section 30(4) has been complied with or not. In the present case, the CoC after considering the viability and feasibility of the resolution plan has approved the same with 100% vote share thereby fairly and squarely meeting the conditionalities

¹⁹(2019) ibclaw.in 07 SC

²⁰(2023) ibclaw.in 734 NCLAT

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laid down in Section 30(4) of the IBC. In the present case, the Resolution Professional after approval of the plan by the CoC filed an application before the Adjudicating Authority seeking approval of the Resolution Plan under Section 31 of the IBC. After detailed deliberations on feasibility and viability of Resolution Plan, the Adjudicating Authority has clearly recorded in the first impugned order that on examination of the resolution plan it has found that no provision of law appears to have been contravened and that there is compliance to Regulations 38 and 39 of CIRP Regulations, 2016.

.....

*28. We are of the considered view that the CoC has done due diligence and evaluated the matrix in approving the resolution plan of the SRA and the sole member of CoC having 100% voting share has already approved the plan in their commercial wisdom as contemplated under the law. The Appellant has failed to point out any material irregularity or contravention of any provision of law by the CoC in approving the plan. That being the case, the Adjudicating Authority with the limited powers of judicial review available to it, cannot substitute its views with the commercial wisdom of the CoC in rejecting the resolution plan unless it is found it to be contrary to the express provisions of law or there is sufficient basis which establishes material irregularity. There can be no fetters on the commercial wisdom of CoC and the supremacy of commercial wisdom of CoC has been reaffirmed time and again by the Hon'ble Supreme Court in a catena of judgements including *K. Sashidhar v. Indian Overseas Bank* (2019) 12 SCC 150 ; *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta* (2020) 8 SCC 531; *Maharashtra Seamless Limited v. Padmanabhan Venkatesh* (2020) 11 SCC 467; *Kalpraj Dharamshi v. Kotak Investment Advisors Limited*, (2021) 10 SCC 401 and *Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory v. Edelweiss**

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- COURT I

I.A. (IBC) 1362/KB/2022, IVN.P (IBC) 27/KB/2022,

I.A. (IBC) 272/KB/2023, I.A. (IBC) 524/KB/2023

In CP (IB) 149/KB/2019

Asset Reconstruction Company Limited through the Director (2021)

9 SCC 657.”

viii. In light of the said decision in *Sita Choudhary* (supra), this Adjudicating Authority has perused the Resolution Plan²¹ submitted before it in I.A.(I.B.C) 1524/KB/2022. Upon perusal of the same, it is seen that clauses 5.5 to 5.8 therein deal with the payments proposed to be made to all the stakeholders including Operational Creditors and Financial Creditors. As such, Regulation 38(1A) of the CIRP Regulations is deemed to have been complied with. It is further noted in this regard that neither section 30(4) nor Regulation 38 mandate a distinction to be made between the amounts to be paid to secured and unsecured creditors. As such, we find no violation of section 30(4) or Regulation 38 and accordingly, the appeal of Indian bank under section 61(3)(iii) is not tenable.

F. Prejudice caused to Indian bank:

- i. Indian Bank has also objected to the constitution of CoC whereby GSR was allowed to participate in the voting process in the 5th CoC Meeting before the documents relating to the assignment of debt to it were verified by the RP. It is clear to us at this point that the voting percentages of Omkara ARC and Indian Bank were last updated in the 2nd CoC Meeting on 18.04.2022 and have remained unchanged ever since. Even if GSR were not allowed to vote in the 5th CoC Meeting, the same would not have any impact on the voting share of Indian Bank, who would remain a minority stakeholder either way.
- ii. It is a fact that the CoC has already approved the resolution plan in question with the requisite votes and the time-period of the CIRP has also come to an end. Now to tag the entire constitution of CoC as a nullity at this point in time and re-start the entire process again, there has to be some tangible impact on the decision making which could be prejudicial to the interests of the Indian bank, however we do not see any material loss or injury caused to the applicant which would necessitate the setting aside of the entire process and reboot the CIRP. It is also not lost on us that that the contention of the applicant bank is more of an afterthought and more of a wish-list which is actually embellished with both

²¹Annexure I to the I.A.(IBC) 1524/KB/2022

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laches and acquiescence and the bank has willy-nilly directly contributed to the instant outcome of the process, which cannot be countenanced in law for awarding any reliefs as sought.

13.10 We are of the view that sufficient grounds have not been made out for us to interfere with the resolutions passed in the CoC Meetings, which are further protected by the trite law of the commercial wisdom of the CoC and therefore in light of the aforesaid findings, we hereby hold as follows:

a) **I.A.(IBC)1362/KB/2022, I.A.(IBC)272/KB/2023 and I.A.(IBC) 524/KB/2023** stand *rejected*;

b) **IVN.P (IBC) 27/KB/2022** stands *dismissed* as infructuous;

14. List the Company Petition on 03.04.2024 for further consideration.

15. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 8th day of March, 2024

SM(LRA)