NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 519 of 2020

[Arising out of Order dated 23rd January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Allahabad Bench, Allahabad in Company Application No.142/ALD/2019 in Company Petition (IB.) No. 422/ALD/2018]

IN THE MATTER OF:

Mr Rajnish Jain
The promoter, Stakeholder and Managing
Director of Suspended Board of Directors **Appellant**

Versus

1. **(Manoj Kumar Singh – I.R.P.)**
   Struck off as per Order dated 24.06.2020 **Respondent No.1**

2. **Anupam Tiwari**
   Resolution Professional for
   M/s Jain Mfg (India) Private Limited
   IP Registration No.:
   IBBI/IPA-003/IP-N00018/2017-18/10131 **Respondent No.2**

3. **BVN Traders**
   Registered Office at G-1, Siddharth Villa
   7/17, PB Road, Tilak Nagar
   Kanpur Nagar, Uttar Pradesh **Respondent No.3**

Present:

For Appellant : Mr Neelambar Jha, Advocate

For Respondent : Mr DN Awasthi, Advocate for RP.
Mr Abhishek Kumar Tripathi, Advocate for R-3.

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order dated 23rd January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Allahabad Bench, Allahabad in CA No.142/ALD/2019 in Company Petition (IB) No. 422/ALD/2018, whereby the Adjudicating Authority had rejected the Application filed by Appellant under Section 60(5) of the Insolvency and

Bankruptcy Code, 2016 (in short '**I&B Code'**) and declared 'BVN Traders', Respondent No.3, as a 'Financial Creditor' under Sec 5(7) of the Code and 'Debt' as 'Financial Debt' under Sec 5(8)(f) of the Code. The parties are represented by their original status in the Company Petition for the sake of convenience.

2. The brief facts of the case are as follows:

The Appellant filed Company Application No.142/2019, under sub-section (5) of Section 60 of the I&B Code, 2016 read with Rule 11 of NCLT Rules, 2016, in Company Petition No.422/ALD/2018, for a declaration that 'BVN Traders' is not a 'Financial Creditor' in connection with the loan extended to the corporate debtor '**Jain Mfg (India) Private Limited'.** The Resolution Professional Mr Anupam Tiwari filed its Reply (Annexure A5) to the Company Application No.142 of 2019 on 21st July 2019, with its opinion that the *M/s 'BVN Traders' is not a Financial Creditor*". After submission of reply by the Resolution Professional, the Adjudicating Authority passed an order dated 19th August 2019 (Annexure A6) stating that:

> *".....It is brought to our notice that earlier IRP recognised Claim of the BVN Traders as a Financial Creditor, but subsequently after the filing of application by the MD of suspended Board of Director of the Corporate Debtor, RP has sought advice from two professionals on the Claim, but that advice was not placed before the COC and the RP has changed his view without informing to the COC. Under such circumstances, let the RP explain why the matter has not been placed before the COC when he received such an advice and come directly to Adjudicating Authority seeking approval of COC."*
>
> *(verbatim copy)*

3. Purporting to act in view of Order of the Adjudicating Authority, the Resolution Professional called the Meeting of 'Committee of Creditors' the Corporate Debtor M/s Jain Mfg. (India) Private Limited. The 'Committee of Creditors' (in short 'CoC') in its fourth meeting held on 30th August 2019 passed the Resolution (Annexure A7-page 99) '*that M/s BVN Traders be treated as 'Financial Creditor'*.

4. After that, the Adjudicating Authority by its Order dated 23rd January 2020 (Annexure A1-Page 40) rejected the Company Application No. 142/ALD/2019. The relevant part of the Order of the Adjudicating Authority is as under:

> ***"Para 11.*** *In view of provisions and the fact stated, this adjudicating Authority is of the view that* ***as the COC has voted in majority in favour of BVN Traders as "financial creditor" and thus Suspended Management as well as Resolution Professional has no locus to challenge the commercial wisdom and decision of Committee of Creditors with regard to determination of Respondent as financial Creditor.***
>
> ***Para 12.*** *Therefore, this adjudicating Authority declares "BVN Traders" as "financial creditor" as per Sec 5(7) of IBC, 2016 and the loan amount given by BVN Traders to Corporate Debtor is declared as "financial debt" under Sec 5(7)(f) of the IBC, 2016.*
>
> ***Para 13.*** *Accordingly, CA No. 142/ALD/2019 is rejected and hereby dismissed."*
>
> *(verbatim copy with emphasis supplied)*

5. Surprisingly, the 'CoC' in its 7th meeting held on 14th February 2020 again discussed the proposed Resolution of RP, for not considering M/s BVN

Traders as a 'Financial Creditor'. The Committee of Creditors accepted the proposed Resolution (Annexure A8-Page 116 r/w Page 125) and passed with its majority *that* ***'M/s BVN Traders is not a 'Financial Creditor'.***

6. After that The 'Committee of Creditors' in its 8th meeting held on 18th February 2020 further passed a *Resolution* (Annexure A9-Page 142) ***'****to eliminate the name of M/s BVN Traders from the list of 'Committee of Creditors'****.***

7. Thereafter, the Appellant has challenged the impugned Order on the ground that the Adjudicating Authority has erred in facts and law in holding that 'M/s BVN Traders is a 'Financial Creditor', which is mainly based on decision of the Committee of Creditors, though it was not empowered to decide that 'BVN Traders is a Financial or Operational Creditor (Appeal ground 9(V)).

8. In response to the above the Respondent No 3, M/s BVN Traders, contends that Mr Dilip Kapoor, a partner of the firm, used to infuse funds to the Corporate Debtor M/s Jain Manufacturing (India) Private Limited for its working capital requirement which extended a loan of Rs.80,00,000/-lacs with interest @ 18% per annum, against the deposit of title deed. A petition was filed against the Corporate Debtor under Section 9 of the Code by one Operational Creditor-Vikas Tiwari which was admitted by order of the Adjudicating Authority dated 22nd February 2019. Mr Manoj Kumar Singh was appointed as 'Interim Resolution Professional' (in short 'IRP') who made a public announcement on 24th December 2019. In response to the public announcement Respondent, No.3 M/s BVN Traders submitted its Claim in 'Form-C' on 07th March 2019 as a 'Financial Creditor'.

9. The Respondent No 3 further contends that IRP Mr Manoj Kumar Singh admitted the Claim of Respondent No.3 as 'Financial Creditor' and included the Respondent No.3's name in the list of 'Committee of Creditors'. But the Appellant in connivance and collusion with RP and certain other 'Financial Creditor's hatched a conspiracy to oust 'BVN Traders', Respondent No.3, from 'CoC'. After that, at the instance of the Appellant, the 'BVN Traders' status was changed from 'Financial Creditor' to 'Operational Creditor'.

10. It is contended by the Respondent No 3 that the IRP had earlier recognised the Claim of the 'BVN Traders' as a 'Financial Creditor' and resolved that M/S BVN Traders is a 'Financial Creditor'. But ignoring the earlier action and even Order of the Adjudicating Authority, dated 23rd January 2020, the Resolution Professional conducted the seventh and eighth Meeting of 'Committee of Creditors' with the ulterior motive to oust 'M/s BVN Traders' from the 'Committee of Creditors'.

11. The Resolution Professional/Respondent No.2 had filed his Reply before the Adjudicating Authority stating that he has re-verified the Claim 'Form-C', submitted by M/s BVN Traders and found that M/s BVN Traders falls in the category 'Operational Creditor' instead of 'Financial Creditor'. The RP further submits that it had sought the opinion of two experts on the question of determination of M/s BVN Traders as 'Financial' or 'Operational' Creditor.

12. The Resolution Professional further submits that in compliance of IBBI Circular dated 01st March 2019 and Regulation 13 and 14 of CIRP Regulations, it is the duty of IRP/RP to maintain an updated list of claims

including its verification and determination. The determination of one Creditor as 'Operational' or 'Financial' is not dependent on the voting of 'Committee of Creditors'. Accordingly, he did not opt 'Committee of Creditors' to vote upon this issue.

13. The issues that arise for our Consideration are as under:

i) Whether the Committee of Creditors constituted under Section21 of the I&B Code, 2016, could determine that M/s BVN Traders' is a 'Financial' or 'Operational' Creditor?

ii) Whether the Resolution Professional could reclassify the status of a creditor from 'Financial' to 'Operational Creditor' based on the expert opinion despite that the Adjudicating Authority had taken a contrary view?

iii) Whether the Order of the Adjudicating Authority in upholding that ' BVN Traders' is a Financial Creditor based on the majority decision of Committee of Creditors is valid?

14. We have heard the arguments of the Learned Counsel for the parties and perused the records. Before starting a discussion, it is essential to go through the statutory provisions, which are as under:

Section 18. Duties of interim Resolution professional

18. Duties of interim Resolution Professional.—

(1) The interim Resolution professional shall perform the following duties, namely—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the Committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.— For the purposes of this 1[section], the term "assets" shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

(Emphasis supplied)

20. Management of operations of corporate debtor as going concern.—

(1) The interim Resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim Resolution professional shall have the authority—

(a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided ***that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:***

Provided that no prior consent of the Creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern.

Section 21. Committee of creditors

21. Committee of creditors.—

(1) The interim Resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The Committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a [financial creditor or the authorised representative of the financial Creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the Committee of creditors:

[Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [3][or completion of such transactions as may be prescribed], prior to the insolvency commencement date.]

(3) [Subject to sub-sections (6) and (6A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial Creditor shall be part of the Committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,—

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the Committee of creditors, with voting share proportionate to the extent of financial debts owed to such Creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such Creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility 4[* *] provide for a single trustee or agent to act for all financial creditors, each financial Creditor may—*

(a) authorise the trustee or agent to act on his behalf in the Committee of creditors to the extent of his voting share;

(b) represent himself in the Committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the Resolution professional) at his own cost to represent himself in the Committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

[(6-A) Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under Clause (a) or sub-section (6), the interim Resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim Resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first Meeting of the Committee of Creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under Clause (a) or Clause (b) or Clause (c) shall attend the meetings of the Committee of creditors, and vote on behalf of each financial Creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under Clause (b) of sub-section (6A) shall be as specified which shall form part of the insolvency resolution process costs.]

[(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).

(8) Save as otherwise provided in this Code, all decisions of the Committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the Committee of Creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.]

(9) The Committee of creditors shall have the right to require the Resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The Resolution professional shall make available any financial information so required by the Committee of creditors under sub-section (9) within a period of seven days of such requisition.

24. Meeting of Committee of creditors.—

(1) The members of the Committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the Committee of creditors shall be conducted by the Resolution professional.

(3) The Resolution professional shall give notice of each Meeting of the Committee of creditors to—

(a) members of 1[Committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of Section 21 and sub-section (5)];

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of Committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) [Subject to sub-sections (6), (6A) and (6B) of Section 21, any creditor] who is a member of the Committee of creditors may appoint an insolvency professional other than the Resolution professional to represent such Creditor in a meeting of the Committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such Creditor.

(6) Each Creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such Creditor.

(7) The Resolution professional shall determine the voting share to be assigned to each Creditor in the manner specified by the Board.

(8) The meetings of the Committee of creditors shall be conducted in such manner as may be specified.

27. Replacement of Resolution professional by Committee of creditors.—

(1) ***Where, at any time during the corporate insolvency resolution process, the Committee of creditors is of the opinion that a resolution professional appointed under Section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section****.*

[(2) ***The Committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, resolve to replace the Resolution professional appointed under Section 22 with another resolution professional, subject to a written consent from the proposed Resolution professional in the specified form.]***

(3) The Committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed Resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in Section 16.

(5) Where any disciplinary proceedings are pending against the proposed Resolution professional under sub-section (3), the Resolution professional appointed under Section 22 shall continue till the appointment of another resolution professional under this section.

28. Approval of Committee of creditors for certain actions.—

(1) ***Notwithstanding anything contained in any other law for the time being in force, the Resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the Committee of creditors namely***—

(a) raise any interim finance in excess of the amount as may be decided by the Committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying

back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the Committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) ***delegate its authority to any other person;***

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the Management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the Committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The Resolution professional shall convene a meeting of the Committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the Committee of creditors unless approved by a vote of [sixty-six] per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the Resolution professional without seeking the approval of the Committee of creditors in the manner as required in this section, such action shall be void.

(5) The Committee of creditors may report the actions of the Resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.

Section 30. Submission of resolution plan

30. Submission of resolution plan.— *(1) A resolution applicant may submit a resolution plan 2 [along with an affidavit stating that he is eligible under Section 29-A] to the Resolution professional prepared on the basis of the information memorandum.*

(2) ***The Resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—***

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the 3 [payment] of other debts of the corporate debtor;

[(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the Order of priority in sub-section (1) of Section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this Clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this Clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this Clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(c) provides for the Management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

[Explanation.—For the purposes of Clause (e), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]

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

[(4) ***The Committee of creditors may approve a resolution plan by a vote of not less than 5[sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, 8[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:***

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

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

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

[Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution

applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018).]

(5) The resolution applicant may attend the Meeting of the Committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the Meeting of the Committee of creditors unless such resolution applicant is also a financial creditor.

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

Section 31. Approval of resolution plan

31. Approval of resolution plan.—

(1) ***If the Adjudicating Authority is satisfied that the resolution plan as approved by the Committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by Order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, 3 [including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed,] guarantors and other stakeholders involved in the resolution plan:***

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this

sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

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

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

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

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

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

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

Issue No 1&2;

15. It appears that the Adjudicating Authority passed an order dated 19th August 2019 (Annexure A6) when it was noticed from the Reply to CA 142/2019 where the Resolution Professional took the changed stand. The relevant part of the order is as under;

> *"It is brought to our notice that earlier IRP recognised Claim of the BVN Traders as a Financial Creditor, but subsequently after the filing of application by the MD of Suspended Board of Director of the corporate debtor, RP has sought advice from two professionals on the Claim, but that advice was not placed before the COC and the RP has changed his view without informing to the COC. Under such circumstances, let the RP explain why the matter has not been placed before the COC when he received such as advice and come directly to Adjudicating Authority seeking approval of COC."*

16. With regard to the above order, the Resolution Professional submits that the IBBI vide their Circular no. Facilitation/002/2019 dated 1st March 2019, under the charter of responsibilities of IRP/RP and 'Committee of Creditors' in a CIRP, and under Section 25(2)(e) of the Code read with Regulation 13 & 14, it is the duties of Resolution Professional maintain an updated list of claims, including verification and determination. The voting of 'Committee of Creditors' regarding the determination of a Creditor as 'Financial' or 'Operational' is not applicable under law. Therefore, he did not opt 'Committee of Creditors' to vote upon the issue in the 3rd Meeting of 'Committee of Creditors'.

17. On perusal of the statutory provision of the Code, it appears that the Interim Resolution Professional constitutes a Committee of Creditors under

Section 18(1)(c) of the Code. Under Section 18(1)(b) the IRP is to receive and collate all the claims submitted by creditors to him, in response to the public announcement.

18. Section 28 of the Code provides the occasions when Resolution Professional requires for approval of the Committee of Creditors for specific actions. It provides that the Resolution Professional during CIRP shall not take specific actions as enumerated in sub-clauses (a) to (m) of sub-section (1) of Section 28 of the Code, **without prior approval of the Committee of Creditors** and for such approval, sub-section (2) of Section 28 mandates to convene a meeting of Committee of Creditors. Sub-section (3) of Section 28 mandates that unless Committee approves the actions enumerated in Clause (a) to (m) of sub-section (1) of Section 28 of the Code by voting share of 66% the action stated shall not be treated as approved.

19. Thus, it is evident that certain matters specifically provided in sub-section (1) of Section 28 requires prior approval of the Committee of Creditors with a minimum 66% vote share. The Code is complete in itself, and it specifies what the Committee of Creditors is empowered to decide. For example, Section 27 provides that if the Committee of Creditors thinks that Resolution Professional appointed under Section 22 is required to be replaced, it may at a meeting by a vote of 66% resolve to replace the Resolution Professional. Section 20 of the Code deals with the Management of operation of Corporate Debtor as a going concern by Resolution Professional.

20. It is pertinent to mention that Clauses (a) to (m) of sub-section (1) of Section 28 deals with the stages where the Resolution Professional has to obtain approval of the Committee of Creditors during Corporate Insolvency Resolution Process. The action of the Resolution Professional for referring the matter to the Committee of Creditors to determine whether the claim of 'M/s BVN Traders' falls in the category 'Operational Debt' or 'Financial Debt' is not covered under clauses (a) to (m) of sub-section (1) of Section 28 of the Code.

21. In the instant case, the chronology of events with date in a chart form depicting the actions taken by the IRP, RP, the Committee of Creditors and the Adjudicating Authority at different stages during CIRP are under:

22.02.2019	CP (IB) No.422/ALD/2018 filed by Operational Creditor Mr Vikas Tiwari was admitted in respect of Corporate Debtor Jain Manufacturing (India) Limited. (Order Annexure 2)	Under Regulation 6, CIRP Regulations Mr Manoj Kumar Singh was appointed as IRP.
24.02.2019	IRP (Respondent No.1) made the public announcement.	
07.03.2019	Respondent No.3 'M/s BVN Traders' filed its claim in Form 'C' as Financial Creditor. (Reply *Diary No.21421*-Annexure 1)	

	As per Regulation 13 of CIRP Regulations, IRP/RP within 7 days from the last date of filing the claims has to prepare a list of creditors containing the amounts claimed by the Creditor, claims admitted or rejected with or without security interest. **The IRP After verification admitted the part of the Claim of 'M/s BVN Traders' as Financial Debt. (See notice dated 10.03.2019 for 1st Meeting of CoC DT. 23.03.2019- Annexure A3-Page 51, 56, 85, 81, 86)**	
23.03.2019	First Meeting of Committee of Creditors was called by IRP Mr Manoj Kumar Singh. **The name of 'M/s BVN Traders' is shown at Sl. No.7 as Member of CoC** in Ex. B of Notice, Annexure A3. Ex. C, Page 86, treats BVN as having secured loan with Title Deeds as Security Ground Note	

	below stated that verification of Claim is an undergoing process, and Claim is provisionally admitted by IRP. In this CoC, deliberation took place about the Claim of the Financial Creditor/ Operational Creditor/ Employees/Workman received by the Resolution Professional and verification status thereof. The IRP submitted details of claims of the Financial Creditor/ Operational Creditor, Employees along with the report about the verification status with a list of admitted and rejected claims. It further stated that the claims received between 08th March 2019 to 16th March 2019 are under process.	
14.05.2019	The Adjudicating Authority appointed Respondent No.2 Mr Anupam Tiwari as Resolution Professional on the recommendation of the CoC.	

	Appellant Mr Rajnish Jain promoter, Stakeholder and Managing Director of the suspended Board of Director filed Company Application No.142/ALD/ 2019 under Section 60(5) of the Code to declare that 'M/s BVN Traders' is not a Financial Creditor**.**	**The RP claims to have obtained legal opinions from Advocate Mr D.N. Awasthi and Transitional Auditor Jain & Awasthi about the status of the Claim of 'M/s BVN Traders' as operational or Financial debt.** **It is claimed they had given the opinion that the debt of 'M/s BVN Traders' is not covered as Financial debt, and thus, it can not be treated as a Financial creditor.**
	The Adjudicating Authority heard the matter and fixed 23.07.2019 for submission of reply.	
		RP Mr Anupam Tiwari submitted its reply (Annexure A5-Page 89) before the Adjudicating Authority that 'M/s BVN Traders' is not a Financial Creditor. RP submitted that it has re-verified the claim Form 'C' and found that the 'M/s BVN Traders' falls in the category of Operational Creditor.

30.08.2019	**In the fourth CoC Resolution (Annexure A7 –page 99) was proposed to declare 'M/s BVN Traders' as an Operational Creditor but it was rejected.**	**Members with only 11.7% of vote share voted in favour of the Resolution to treat BVN as Operational Creditor.64.9% voted against the proposal & 23.3% abstained.** **Therefore, 'M/s BVN Traders' was treated as Financial Creditor. In this meeting 'M/s BVN Traders' as a Member of CoC, with a voting share of 22.06%, also participated in the voting.**
23.01.2020		**The Adjudicating Authority rejected Company Application No. 142/ALD/ 2019 and declared 'M/s BVN Traders' as Financial Creditor. (Annexure A1-Page 40)**
14.02.2020		**In 7th CoC's meeting, it was resolved that 'M/s BVN Traders' is not a Financial Creditor. (Annexure A8-Page 116)** **This Resolution was passed contrary to the Order of the Adjudicating Authority dated 23.01.2020 whereby 'M/s BVN Traders' was**

		declared as Financial Creditor.
	<u>Agenda Item No.12</u>: Regarding withdrawal of CIRP under Section 12A of the Code. (Voting percentage required 90%)	**This Resolution was not passed 30.9% voted in favour, and 69.1% voted against the proposal. (Page 126)**
	<u>Agenda Item No.13:</u> Some CoC Members wanted to review their decision based on a legal opinion that 'M/s BVN Traders' should not continue in the category of Financial Creditor and to remove its name from the CoC despite order of Adjudicating Authority.	**'M/s BVN Traders' was vehemently opposing and disapproving the Resolution. <u>On voting, Resolution was passed with a vote share of 69.1%.</u>** **'M/s BVN Traders' having 30.9% voted vehemently opposed the Resolution.**
18.02.2020	**Eight CoC Meeting took place wherein Agenda Item 5 sought Resolution to eliminate BVN Traders from CoC by not considering BVN Traders as Financial Creditor.** **<u>Agenda Item No.6</u> was for withdrawal of running CIRP under Section 12A of the Code.**	CoC adopted the Resolution Annexure A9-page 142 @ 144 to 147) with a vote share of 69.1%. 'M/s BVN Traders' having vote share of 30.9% voted against the Resolution. **Despite the objection of BVN Traders, the Resolution Professional proposed a resolution for elimination of name of 'M/s BVN Traders' from the CoC**

		and placed revised/ reconstituted Committee of Creditors, minus BVN Traders. **<u>'M/s BVN Traders' was not permitted to vote on this and Resolution was passed with 100% vote share.</u>**

22. Section 30 of the Code deals with the submission of Resolution Plan. Section 30(2) authorises the Resolution Professional to examine each Resolution Plan received by him. The scope of examination by the Resolution Professional regarding a Resolution Plan is specifically provided in Section 30(2) of the Code. Under sub-section (3) of Section 30, the Resolution Professional has to submit such Resolution Plan before the Committee of Creditors, which confirm the conditions referred to in sub-section (2) of Section 30. The most important duty of the Committee of Creditors is provided in sub-section (4) of Section 30 of the Code. **The powers exercised by the Committee of Creditors under sub-section (4) regarding approval of Resolution Plan with 66% vote share, solely depends on commercial wisdom of Committee of Creditors.** In view of the law laid by Hon'ble Supreme Court in case of K. Sashidhar Vs. Indian Overseas Bank [2019 (12) SCC 150], the commercial wisdom of Committee of Creditors for approval of Resolution Plan has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by I&B Code. It is further held that neither the Adjudicating Authority (NCLT) nor the Appellate Authority (NCLAT) has been

endowed with the jurisdiction to reverse such commercial wisdom of the Committee of Creditors.

23. Sub-clause (e) of Section 25 of the I&B Code, 2016 deals with the duties of the Resolution Professional, which mandates RP to maintain an **updated list of claims'**. The question that arises for our consideration is whether the Resolution Professional was under the obligations to maintain an updated list of claims, was entitled to overturn its earlier decision of declaring BVN Traders as 'Operational Creditor' instead of 'Financial Creditor'. For this, it is essential to understand the responsibilities and duties of Interim Resolution Professional/Resolution Professional as defined under Section 18 of the Code.

24. Section 18(1)(b) of the Code authorises IRP to receive and collate all the claims submitted by claimants, under the public announcement made under Section 13 and 15 of the Code. Section 18(1)(c) authorises IRP to constitute a 'Committee of Creditors'. Undisputedly, in this case, the IRP after collation of claims admitted the Claim of M/s BVN Traders as a 'Financial Creditor' and debt as a 'Financial Debt'. Up to this stage, M/s BVN Traders being a 'Financial Creditor' was a member of 'Committee of Creditors'.

25. The contention of RP is that after calling the report of two experts, he submitted an Application before the Adjudicating Authority for treating M/s BVN Traders as an 'Operational Creditor' instead of 'Financial Creditor'. The RP represents that he is authorised to **'maintain the updated list of claims'** as per Section 25(2)(e) of the Code.

The Resolution Professional in the name of "updating list of claims" sat down to review the claims on his own. For this, he called reports from 2 alleged experts.

26. The above contention of the Resolution Professional is not acceptable. The IRP after collation of Claims and formation of 'Committee of Creditors' was not entitled to suo-moto review or change the status of a creditor from Financial to Operational Creditor. Updating list and review are different acts. If Resolution Professional was aggrieved, he should have moved the Adjudicating Authority. The aggrieved person can challenge either constitution of 'Committee of Creditors' or for any grievance against rejection, incorrect acceptance or categorisation of creditors before the Adjudicating Authority. But the Resolution Professional cannot arbitrarily on its own overturn earlier decision, to change the status of a creditor from Financial Creditor to Operational Creditor.

27. Under the duties of RP 'to maintain an updated list of Claim, he cannot change the status of an existing creditor on his own. But to maintain an updated list of claims the IRP/RP is authorised to add to existing claims or admit or reject further claims received collating them and thus update the list of creditors accordingly.

28. In the case of Mahal Hotel Private Limited Vs. Asset Reconstruction Company (India) Limited and Others. In CA No (AT) (Insolvency) No.633 of 2018 and Company Appeal (AT) (Insolvency) No.718 of 2018 dated 18th November 2019 this Tribunal has held that:

"When there is a dispute as to whether Mahal Hotel Private Limited comes within the meaning of 'Financial Creditor' or not, ***we hold that after constitution of 'Committee of Creditors', without its permission the Resolution Professional was not competent to entertain more applications after three months to include one or other as a Financial Creditor.*** *Further once a decision was taken by the 'Committee of Creditors' to call for a meeting for removal of Resolution Professional, it was improper for Resolution Professional to include Mahal Hotel Private Limited as 'Financial Creditor' of the Member of the 'Committee of Creditors'.*

(emphasis in bold supplied)

In Company Appeal (AT) (Insolvency) No. 291 of 2018 M/s. Prasad Gempex Vs Star Agro Marine Exports Pvt. Ltd. & Ors this Appellate Tribunal by judgment dated 01st February 2019 held that;

"6. The connected Appeal has been preferred by 'SREI Infrastructure Finance Limited' (Financial Creditor) against the Order dated 23rd July, 2018. By the said Order, the application preferred by the appellant 'SREI Infrastructure Finance Limited' to set aside the decision of the 'Resolution Professional' dated 15th April, 2018 for refusing, re-calculating or reducing the Claim in respect of the 'corporate debtor' has not been entertained. Thus, the rejection/reduction of the Claim by 'Resolution Professional' by Order dated 15th April, 2018 reached a finality. The question arises for Consideration in both the appeals is whether the 'Resolution Professional' has jurisdiction to decide or reject the Claim of one or other 'Financial Creditor' or 'Operational Creditor'.

7. Similar issue fell for Consideration before this Appellate Tribunal in 'M/s. Dynepro Private Limited' vs Mr. V. Nagarajan – Company Appeal (AT) (Insolvency) No. 229 of 2018 etc.' The

Appellate Tribunal by its judgment dated 30th January, 2019 held that 'Resolution Professional has no jurisdiction to decide the claim of one or other creditor, including 'Financial Creditor', 'Operational Creditor', 'Secured Creditor' or 'unsecured Creditor'. Referring to sub-section (6) of Section 60 of the 'I&B Code', this Appellate Tribunal further observed that after completion of the period of moratorium, a suit or application can be filed against the 'Corporate Debtor'. Relevant portion of Section 60 is quoted below:-

> ***"60.** (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.*
>
> *xxx xxx xxx*
>
> *(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*
>
> *(a) any application or proceeding by or against the corporate debtor or corporate person;*
>
> *(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*
>
> *(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings*

of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this part, the period during which such moratorium is in place shall be excluded.

From sub-section (6) of Section 60 it is clear that after period of moratorium, a suit or application can be filed against the Corporate Debtor -16- Company Appeal (AT) (Insolvency) No. 229 of 2018 and 262 of 2018 for which an order of moratorium has been made under the Part II and in such case, the period during which such moratorium is in place shall be excluded for the purpose of counting the limitation.

8. The power of 'Resolution Professional' also fell for consideration before the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. & Anr. vs Union of India & Ors. – Writ Petition (Civil) No. 99 of 2018'****. In the said judgment dated 25th January 2019, the Hon'ble Supreme Court held that 'Resolution Professional' has no adjudicatory power. The 'Resolution Professional' has to vet and verify the claims made and ultimately determine the amount of each Claim. As opposed to this, the 'Liquidator' in the Liquidation proceedings under the I&B Code has to consolidate and verify the claims and either admit or reject such claims under Sections 38 to 40 of the Code."*

Thus Resolution Professional could not adjudicate. What he did was to call alleged reports of experts and changed stand before

Adjudicating Authority. When questioned by the Adjudicating Authority, he rushed to CoC, which did not agree to treat 'BVN Traders' as Operational Creditor. This led to the Impugned Order. Still not satisfied he put up to CoC in 7th and 8th Meeting to get decisions changed to treat 'BVN Traders' as not a Financial Creditor. This is high handedness, and unbecoming of Resolution Professional as the following paragraphs will show.

29. The Resolution Professional himself called the report of two experts and changed stand/defence before the Adjudicating Authority when Appellant filed Application.

30. The Resolution Professional has annexed the copy of the Minutes of the 7th 'Committee of Creditors', dated 14th February 2020, by which the Resolution Professional apprised the Members of 'Committee of Creditors' about a rejection of Company Application filed by Appellant Mr Rajnish Jain, Suspended Member of Board of Directors of Corporate Debtor. The 'Committee of Creditors' took note of the said development. The Resolution Professional has further annexed the copy of Minutes of 8th 'Committee of Creditors', held on 18th February 2020 which reflects that the Resolution Professional while presiding the Meeting as Chairman proposed the following Resolution before the 'Committee of Creditors' for Consideration.

> ***"Resolve that the <u>CoC be and is hereby not considering M/s BVN Traders as the Financial Creditors as per Section 5(7) of IBC, 2016</u> and <u>approved to elimination of M/s BVS Traders from</u>***

Committee of Creditors, in the light of Hon'ble NCLT, Allahabad, Order dated 23rd January, 2020 as well as with adoption of Reconstituted Committee of Creditors."

The above Resolution was passed with a majority of 69.1% of the vote share. It also appears that in this meeting discussion was also made for the withdrawal of running Corporate Insolvency Resolution Process under Section 12(A) read with Resolution 30(A) of I&B Code 2016, and following Resolution was passed;

"It was resolved unanimously that an application of withdrawal of running Corporate Insolvency Resolution Process shall make by the Applicant with approval of 90% voting share in such a manner as specified in Regulation 30 (A) of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulation, 2016 and shall be submitted to 'Resolution Professional."

The above Resolution was passed with 100% vote share, but 'BVN Traders', erstwhile Member of COC as a Financial Creditor could not participate and vote in this meeting because of elimination of its name from the COC. This very proposal of withdrawal U/S 12A was earlier rejected in the 7th CoC when BVN Traders was there. In 8th Meeting, BVN Traders was "eliminated" and object achieved. Then the Appellant filed the present Appeal.

31. It is apparent that every action of Resolution Professional, either about the change of status of 'BVN Traders' from financial to Operational Creditor or regarding the elimination of name of 'BVN Traders' from the 'Committee of

Creditors' was being done in collusion with erstwhile Member of suspended Board of Directors, Promoter and Managing Director Mr Rajnish Jain. It is pertinent to mention that, the Resolution Professional even in disregard of the orders of the Adjudicating Authority dated 23rd January 2020, subsequently proposed the Resolution before 'Committee of Creditors' for considering BVN Traders as Operational Creditor and further for the elimination of name of BVN Traders from 'Committee of Creditors'. It is also evident that when Appellant and Resolution Professional could not succeed in getting permission from the Adjudicating Authority to change the status of BVN Traders from Financial Creditor to Operation Creditor, Resolution Professional adopted the route of 'Committee of Creditors' for the elimination of name of BVN Traders from 'Committee of Creditors'. In the last, the Appellant and RP succeeded in getting Resolution passed with 100% of the voting share for withdrawal of Petition under Section 12(A) of I&B Code, in total disregard of the Orders of Adjudicating Authority dated 23rd January 2020, whereby the Adjudicating Authority had not permitted Resolution Professional to change the status of BVN Traders from Financial to Operational Creditor.

32. Thus it appears that the Resolution Professional obtained the expert opinion of an Advocate and CA for removing the name of 'BVN Traders' from 'Financial Creditor' to 'Operational Creditor'. After that, the Appellant moved an application before the Adjudicating Authority for seeking permission for the same. But when permission was not granted, and explanation was called from 'Resolution Professional' then he adopted the route of Committee of

Creditors. After that, the Resolution Professional moved a resolution before Committee of Creditors for the elimination of name of BVN Traders from the list of 'Financial Creditors' and when Resolution was passed, and BVN Traders was eliminated from the list of Committee of Creditors, the Resolution for withdrawal of Petition was proposed and passed with 100% vote share.

33. The impugned Order is challenged inter alia on the ground (Para 9 V) that finding of the Adjudicating Authority dated 23rd January 2020 regarding the declaration of BVN Traders as Financial Creditor is based on the decision of 'Committee of Creditors', which Committee was not empowered to determine of the issue.

34. The Adjudicating Authority has observed that:-

> ***"Para 11.*** *In view of provisions and the fact stated, this adjudicating Authority is of the view that as the COC has voted in majority in favour of BVN Traders as "financial creditor" and thus Suspended Management as well as Resolution Professional has no locus to challenge the commercial wisdom and decision of Committee of Creditors with regard to determination of Respondent as financial Creditor.*
>
> ***(emphasis supplied)***.

35. The above observation of the Adjudicating Authority in its Order dated 23rd January 2020 is incorrect because the 'Committee of Creditors' had no role in deciding the status of a creditor either as 'Financial' or 'Operational' Creditor and such a decision of 'Committee of Creditors' can never be treated as an exercise under its Commercial wisdom. It is a matter of applying the law of I&B Code, and if such factor is left to CoC, there would be a serious conflict

of interest, as the present matter itself shows. Whether a person or entity is "Financial Creditor" as defined in Section 5(7) or Operational Creditor as defined in Section 5(20) is a matter of applying the law to facts. It cannot be a matter of voting, and choice as discretion is not relevant. During the CIRP, the IRP collates the Claim, and after that, the 'Committee of Creditors' is formed under Section 18 of the Code. After the formation of the 'Committee of Creditors', only the aggrieved person can agitate the same and that too, only before the Adjudicating Authority.

36. However, we find that the Order of the Adjudicating Authority that 'BVN Trader is a Financial Creditor' is not totally based on the decision of the 'Committee of Creditors'. The Adjudicating Authority has determined the status of 'BVN Traders' as a Financial Creditor "in view of provisions and the fact situation". It would have been ideal and rather expected that Adjudicating Authority should have recorded reasons also, instead of taking a short cut by taking the support of Resolution of CoC. This was perhaps the reason CoC appears to have got emboldened that it can take such decisions in favour or against its own constituents.

37. It is essential to note that on the initiation of Appellant Mr Rajnish Rai the Resolution Professional and the Members of the 'Committee of Creditors', excluding Respondent No. 3 BVN Traders, made deliberate attempt to eliminate the name of BVN Traders from the Committee of Creditors. It also appears that the Claim of Respondent No. 3 BVN Trader was illegally rejected as 'Financial Creditor', so that they could pass the Resolution to withdraw the CIRP with the required percentage of voting share, i.e., 90%. Since Respondent

No. 3, which had 30.9% voting share in the CoC, the Resolution for withdrawal u/s 12A could not have materialised, therefore in their effort to defeat the valuable rights of the Respondent No. 3 BVN Traders, the RP ignored the Order of the Adjudicating Authority dated 23rd January 2020 and was successful in his deliberate attempt to change the status of BVN Traders from Financial Creditor to the Operational Creditor and then eliminate its name from the 'Committee of Creditors'.

38. It is also necessary to mention that core duty of IRP is to receive, collate and verify claims which cannot be further delegated to 'Committee of Creditors', who in turn cannot be allowed to do the same in purported exercise of Commercial Wisdom.

39. Recently, Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Ltd. V/s Satish Kumar Gupta Civil Appeal No. 8766 and 8767 of 2019 has specified the role of Resolution Professional in the revival of the 'Corporate Debtor'. Hon'ble Supreme Court has held that;

> *"Under CIRP Regulation 13,*
>
> *"The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it."*

40. Furthermore, the IBBI Circular No. I.P./003/2018 dated 3rd January 2018 provides *'that an Insolvency Resolution Professional shall not outsource any of his duties and responsibilities under the Code'.*

41. Thus, it appears that the Resolution Professional has failed to perform his obligation/duty to observe the Code, the Rules and Regulations as enumerated in the Code and CIRP Regulations while conducting CIRP for the reason of taking up such an Agenda of Meeting and leading to illegal Resolution of ousting the BVN Traders from the 'Committee of Creditors'.

42. Therefore we are of the considered opinion that the Committee of Creditors was not empowered to adjudicate the issue that has cropped up in the present case, i.e. M/s BVN Traders' is a 'Financial' or 'Operational' Creditor. Such adjudication is beyond the scope of consideration of the Committee of Creditors. Further, the Resolution Professional erred to reclassifying the status of a creditor from 'Financial' to 'Operational Creditor', based on the alleged expert opinion despite that the Adjudicating Authority took a contrary view.

Isuue No 3

43. In the instant case, the alleged loan amount of Rs. 80,00,000/- (Rupees Eighty Lakh Only) @ 18% per annum was advanced to the Appellants Company against the title deed of Plot No. Y of 7/190 (1) Swaroop Nagar, Kanpur, 208002, which was in the name of Appellants Company, and the said title deed is still in possession and custody of Respondent No. 3 BVN Traders. E-mail dated 02nd September 2018 sent by Appellant-Reply (Diary No.21421-Annexure—Sr. No.11@Page 92 of Appeal) to Dilip Kapoor of BVN Traders

requesting the return of Original Sale Deed papers of Swaroop Nagar land, claiming that, he had left them in the office of Dilip Kapoor.

44. The Appellant has not disputed the amount due. In the instant Appeal, the Appellant is seeking a declaration that 'BVN Traders' is not a 'Financial Creditors.' As per Section 5(7) of the Code, only such Creditor could be the 'Financial Creditor' of the 'Corporate Debtor' to whom a financial debt is owed by the 'Corporate Debtor', and as per Section 5(8) of the Code, the critical requirement of the financial debt is disbursal against the 'Consideration for the time value of money, which included the events and modes of disbursement and enumerated in sub-clauses.

In Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited Vs Axis Bank Limited etc. **2020 SCC OnLine SC 237 Hon'ble Supreme Court has held ;**

> "205. *Applying the aforementioned fundamental principles to the definition occurring in* Section *5(8) of the* Code*, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the* Code*, the basic elements are that it ought to be a disbursal against the consideration for* time *value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of* Section *5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g)* and *(h) of* Section *5(8);* and *it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the*

consideration for the time *value of money, in our view, remains an essential part even in respect of any of the* transactions*/dealings stated in sub-clauses (a) to (i) of* Section *5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the* time *value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the* transactions *stated in the said sub-clauses (a) to (i) of* Section *5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal,* and *that too against the consideration for* time *value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of* Section *5(8) of the* Code*. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the* time *value of money."*

45. In the present case, undisputedly Appellant's company has deposited its title deed of Plot No. Y of 7/130(1), Swaroop Nagar, Kanpur-208002 against the loan amount of Rs. 80,00,000/- (Rupees Eighty Lakh Only) @ 18% per annum. The record shows, the Appellant Company is a borrower, and the loan amount was directly disbursed to Appellant's Company for which the title deed was deposited with the Respondent No. 3. In the said transaction time value of money is unambiguously involved, and the Appellant Company's liability is regarding the debt owed by it.

46. In the present case, Respondent No. 3 disbursed the debt against the Consideration for the time value of money. It is reiterated that the Appellant Company had raised the said amount from the Respondent No.3 to meet its working Capital Requirement. Hence the Respondent No. 3 is a Financial Creditor within the meaning of 5(7) and 5(8) of the Code.

47. The Hon'ble Supreme Court, in the case of Pioneer Urban Land Infrastructure Vs. Union of India 2019 SCC Online Page 1055 has observed that; "The definition of 'Financial Debt' in Section 5(8) then goes on to state that a debt must be 'disbursed' against the Consideration for the time value of money. In the present context, it is clear that the expression 'disburse' would refer to the fund transfer made by the Respondent No.3 to the Corporate Debtor for the particular purpose of funding, i.e. working capital. The expression 'disburse' refers to money, which has been paid against consideration for the time value of money. In short, the disbursal must be money and must be against Consideration for the time value of money, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money for the working capital requirement or any other purpose of the company. Thus, it is clear that the Respondent No.3 disbursed money in the form of fund transfer made towards the purpose of working capital of funding.

48. The 'expression time value of money' has not been defined under the Code and hence one has to revert to the dictionary meaning of the phrase as generally understood. The time value of money concept states that cash

received today is more valuable than cash received at some point in the future.

49. NASDAQ Glossary of Financial Terms defines phrase *'TIME VALUE OF MONEY'* as The idea that a dollar today is worth more than a dollar in the future because the dollar received today can earn interest until the time the future dollar is received.

50. In Nikhil Mehta and Sons Vs. AMR Infrastructure Ltd. – Company Appeal (AT) (Insolvency) No. 07 of 2017, this Hon'ble Tribunal has dealt with the issue of interpretation of the phrase "time of value of money" as follows:

> *"The key feature of financial transaction as postulated by section 5(8) is its Consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned. "In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money".*

In the present context, the Appellant Company has assured the Respondent No.3 to repay the loan in One month for which an interest @ 18% per annum has also charged as Consideration for the time value of money.

51. The term financial debt has been defined in section 5(8) of Code "to mean a debt, along with interest, if any, which is disbursed against the consideration for the time value of money." An illustrative list of transactions that would fall under this definition has also been included. In Swiss Ribbons Ltd. Vs. Union of India, Writ Petition (Civil) No.99 of 2018, the Hon'ble Supreme Court laid down the distinction between "Financial Debt" and 'Operational Debt' in the following terms, "A perusal of the definition of 'Financial Creditor' and 'Financial Debt' makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the Consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) of the Code or otherwise, as Section 5(8) is an inclusive definition.

52. Thus given the above, it can be safely concluded that to qualify as a 'Financial Creditor' a basic element of disbursal to the Corporate Debtor, of amount against the Consideration of time value of money, needs to be found in the genesis of any debt being claimed as 'financial debt' before it could be treated so, under Section 5(8) of the IBC". Similarly, the transaction involved in the present case meets the root ingredients/basic element of 'financial debt' within the meaning of the Code in the following manner:

(i) Respondent No.3 disbursed the debt against the Consideration for the time value of money to the Appellant Company, which is evident from the Bank Account Statement and the ledger account of Respondent No.3, (See Annexure-1 to Reply of Respondent No.3 – Form C and its Annexures).

(ii) Undisputedly Appellant's Company has deposited its title deed of Plot No. Y of 7/190(1), Swaroop Nagar, Kanpur-208002 against the loan amounting to Rs.80,00,000/- (Rupees Eighty Lakh Only which can be substantiated from Whatsapp chat (Reply of Respondent No.3- Annexure 1 at Page 67, 75, 76 of Affidavit) between the parties, and can also be further substantiated with the fact that the Respondent No.3 stands still in possession of such valid deposit of title deed made by the Appellant and not even a single civil/criminal action being initiated by it to recover the same.

(iii) The said loan amount was directly disbursed to Appellant's Company against payment of interest @ 18% per annum, which can be substantiated with Whatsapp chat and Bank Account statement annexed with Claim Form. Thus the transaction in question fulfils the requirement of Consideration for the time value of money. Hence the said transaction falls within the ambit of "financial debt" as per the Section 5(8) of the Code.

(iv) Appellant has not denied the debt availed by it but only contended to the extent of it not being financial debt or a Financial Creditor.

53. Thus the Appellant Company is a borrower, and Reply of Respondent No.3 and its Form C submitted shows that loan amount was directly disbursed to Appellant's Company for its working capital requirement to smoothly run the business for which the aforementioned title deed was deposited with the Respondent No.3. In the said transaction time value of money is unambiguously involved. And the Appellant Company's liability is regarding the debt owed by it. Therefore we are of the considered opinion that

the Respondent No.3 BVN Traders is a Financial Creditor within the meaning of Section 5(7) of the Code, and the debt in question is a "financial debt" within the meaning of Section 5(8) of the Code.

(54.1) Reply (Diary No. 21421) shows that Dilip Kappor partner of Respondent No. 3 used to infuse funds/advance money in Corporate Debtor for Working Capital Requirements; that on 15.08.2018 Appellant had come to the office of Respondent No. 3 and requested for loan/advance Rs. 1 crore assuring repayment in one month. As per Respondent No. 3, Rs. 80 lakhs were advanced as a loan with interest at the rate of 18 percent per annum. This was not honoured and later Respondent No. 3, concluded that there was deceit and filed FIR on 21.10.18 (Which is before Section 9 Application was admitted. Respondent NO. 3 has filed Annexure 1, Form C, with Annexures which included Documents like its ledger; Copies of Title Deed; Screen Shots of Whatsapp messages, Bank Statements, and copy of e-mail dated 02.09.18 sent by Appellant, and other documents. The record shows IRP received such Claim and collated the same and Notice (Annexure A 3) (Page 51 of the Appeal) circulated on 16.03.2019 was issued for 1st meeting of CoC on 23.03.19 showing BVN Traders at Sr. No. 7 as Member of CoC (See Page 56) and Annexure B (Page 85) of the Notice showed BVN Traders at Sr. No. 7 as Creditor whose Estimated amount of claim "Admitted by IRP" was Rs. 80 Lakhs with voting Share of 30.6 % Exh. C to the Notice (Page 86 of Appeal) shows a list of Financial Creditors verified by IRP. The loan of BVN Traders was collated as a secured loan with Security Interest being the original Title Deeds of Corporate Debtor. Appellant has extracted these entries in Appeal

(Para 6, Ex D, Page 87) of the Notice at Sr. No. 4 also shows BVN Traders as operational Creditor to the extent of Rs. 1,23,75,548/-. Bank Statement filed with Form C shows amounts were being deposited by RTGS. IRP verified the Claim and collated the same treating Respondent No. 3- BVN Traders Financial Creditor to the extent of Rs. 80 Lakhs.

(54.2) When Appellant filed CA 142/2019, RP filed Reply Annexure 5 (Page 89) and took about-turn claiming that he "revisited the claim and found that the alleged financial creditor M/s. BVN Traders had failed to file any conveyance deed as per the requirement of Section 55 of the Transfer of Property Act, 1882". Section 55 of the TP Act related to "Rights and liabilities of buyer and seller". This is clearly beyond the point in issue. He sat down to review the Claim admitted by IRP without moving Adjudicating Authority under Section 60 (5) (c) of IBC.

54.3) When questioned by Adjudicating Authority, RP rushed to CoC in 4th Meeting dated 30.09.2019 when in Resolution (Annexure A7 Page 99) in Agenda Item 11 rejected Resolution that claims of BVN Traders be treated in the category of Operational Creditor, rather than Financial Creditor.

54.4) After Adjudicating Authority passed Interim Order, Resolution Professional in 7Th Meeting of CoC (Annexure A8 page 116 @ Page 127) took up Agenda 13 "Discussion/Approval for not considering M/s. BVN Traders as Financial Creditor…." It is surprising and interesting to note that Members recorded that "despite the Order passed by Hon'ble NCLT Allahabad the CoC is of the view that **they no longer wish to continue M/s BVN Traders in the category of the "Financial Creditor**" in the CoC and want to review their

decision in this regard." "No Longer wish"? This is strange. This is the danger due to which collating is not left to CoC. As mentioned, this was taken up, and resolutions were passed in the 7th Meeting and also 8th Meeting dated 18.2.2020 (Annexure A9) to resolve and oust BVN from CoC. Thus CoC sat in Appeal over Impugned Order and passed resolutions to the contrary, which cannot be said to be legal.

55. We hold and direct that all these decisions discussed above, of CoC in the 4th, 7th, and 8th Meetings of CoC to be beyond their jurisdiction and powers and duties. Commercial decision and wisdom mainly relate to evaluating Resolution Plan and duties as mostly seen in Section 28 of IBC.

56. For same reasons we direct that the Resolution taken in 8th CoC (Annexure A9), in Agenda Item 6, approving withdrawal under Section 12 A of IBC would also require to be ignored as it was taken after the illegal Resolution in Agenda Item 5 to eliminate BVN Traders and illegal reconstitution of CoC.

57. We uphold the Impugned Order for its declaration that BVN Traders is Financial Creditor for Reasons we have recorded.

58. Thus, we hold that the Order of the Adjudicating Authority rejecting CA No.142/2019 is correct and needs no interference. However, we set aside the reasoning relying on the decision of CoC for holding BVN Traders to be Financial Creditor. We find that the Committee of Creditors has no adjudicatory power to decide as such whether a creditor who files its Claim is a 'Financial' or 'Operational' Creditor.

59. Based on the above discussion, we clarify and hold that during CIRP, the IRP is authorised to collate the claims, and based on that he is empowered to constitute the Committee of Creditors. We hold that the Resolution Professional may add to existing claims of claimants already received, or admit or reject further Claims and update list of Creditors. But after categorisation of a claim by the IRP/Resolution Professional we hold that they cannot change the status of a Creditor. For example, if the Resolution Professional has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then he cannot review or change that position in the name of updation of Claim. It is also to be clarified that while updating list of Claims the Resolution Professional, can accept or reject claims which are further received and update list.

60. Based on the above discussion, we are of the considered opinion that the decision of the Adjudicating Authority to treat BVN Traders as a 'Financial Creditor' needs no interference, and thus, Appeal is disposed of with Reasons, Findings and Directions as recorded in this judgment. No orders as to costs.

61. The Registry is directed to send a copy of the judgment to Chairperson, Insolvency and Bankruptcy Board of India, for action deemed fit.

[Justice A.I.S. Cheema]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
18th DECEMBER, 2020

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