IN THE NATIONAL COMPANY LAW TRIBUNAL
Kolkata Bench
Kolkata

Before Shri Jinan K.R., Hon'ble Member (J)

CA(IB) No. 871/KB/2018
in
CP(IB) No. 595/KB/2017

In the matter of:

An application u/s. 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

And

In the matter of:

An application u/s. 30(6) read with 31(1) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;

And

In the matter of:

Allahabad Bank, a banking company constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 and having its Head Office at 2, Netaji Subhas Road, Kolkata 700 001 and its Industrial Finance Branch at 9, R. N. Mukherjee Road, Kolkata 700001;

... ... **Applicant/Financial Creditor**

And

In the matter of:

SPS Steels Rolling Mills Limited, a company incorporated under the Companies Act, 1956 and a Company within the meaning of

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Companies Act, 2013 and having its registered office at 224A, A.J.C. Bose Road, Kolkata 700019;

... ... **Respondent/Corporate Debtor**

And

In the matter of:

Mr. Vijaykumar V Iyer, Resolution Professional of the Corporate Debtor, Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 3, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai 400 013.

... ... **Applicant**

Counsels appeared:

1.	Mr. Jishnu Saha, Sr. Advocate	] For the Resolution
2.	Ms. Suhani Dwivedi, Advocate	] Professional
3.	Mr. Deepanjan Dutta Roy, Advocate	]
1.	Mr. Om Prakash Rai, Advocate	] For the CoC
2.	Mr. Saikat Ray Chowdhury, Advocate	]
1.	Mr. Barnik Ghosh, Advocate	] For MSTC
2.	Mr. Amitesh P. Ray, Advocate	]
1.	Mr. Joy Saha, Sr. Advocate	] For the H-1 Bidder
2.	Ms, Sinthia Bala, Advocate	]
1.	Mr. S. N. Mookherji, Sr. Advocate	] For the H-2 Bidder
2.	Mr. Ratnanko Banerji, Sr. Advocate	]
3.	Mr. Kumarjit Banerjee, Advocate	]
4.	Ms. Srshti Burman Roy, Advocate	]
5.	Mr. Pankaj Agarwal, Advocate	]
1.	Ms. Manju Bhuteria, Advocate	] For the suspended
2.	Ms. Meenakshi Manot, Advocate	] Board of Directors
3.	Ms. Sweta Mohanty, Advocate	]
4.	Ms. Shreeradha Ghosh, Advocate	]

Order pronounced on 8th April, 2019

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ORDER

1. This is an application filed by the Resolution Professional for the approval of the Resolution Plan by the Adjudicating Authority, which is duly approved by the Committee of Creditors (In short, **CoC**) by 100% vote share of the members of the CoC.

2. The Allahabad Bank has filed the CP(IB) No. 595/KB/2017 u/s. 7 of the Insolvency and Bankruptcy Code, 2016 (**In short, I & B Code, 2016**) for initiating Corporate Insolvency Resolution Process (In short, **CIRP**) as against the Corporate Debtor, M/s. SPS Steels Rolling Mills Limited. Vide order dated 22/12/2017, the application was admitted by appointing Mr. Vijaykumar V. Iyer as Interim Resolution Professional. Thereafter, he was re-appointed as Resolution Professional.

3. As an Interim Resolution Professional, he has made public announcement in compliance of Section 15 of the I & B Code, 2016 calling for claims from the creditors of the Corporate Debtor. Upon receipt of the claims from the creditors, Resolution Professional has invited Expression of Interest (in short, **EoI**) from the interested resolution applicant and received two (2) Resolution Plans respectively from (a) Shakambhari Ispat &

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Power Limited (In short, **SIPL**) and (b) Takshvi TMT Mills Private Limited (In short, **TTMPL**).

4. It is stated that based on the affidavits and subsequent clarifications received from both the resolution applicants by the Resolution Professional, both the resolution applicants were found eligible under Section 29A of the Code.

5. It is submitted that during the 11th CoC meeting held on 08/08/2018, the Resolution Professional informed the CoC that TTMPL wished to submit a revised resolution plan, pursuant to the site visit and inspection of documents at the Corporate Office of the Corporate Debtor.

6. It is also submitted that at the 12th CoC meeting held on 10/08/2018, it was decided by the CoC to allow submission of revised financial offers by the two resolution applicants and for evaluation of the resolution plans along with the revised financial offers and CoC has decided to adopt a process for outbidding. Pursuant to the above, revised financial offers were received from both the resolution applicants. In the meantime, detailed Process for Outbidding was prepared and after deliberation with the resolution applicants and post concurrence from both the resolution applicants, it was finalised and adopted. Post finalization of the Process for Outbidding and acceptance by the resolution applicants, the sealed envelopes were opened in

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presence of the CoC and the resolution applicants. Both the resolution plans, including the revised financial offers, were then evaluated by the Process Advisor on the basis of the agreed Process for Outbidding and SIPL was declared as the H-1 bidder and TTMPL was declared as the H-2 bidder.

7. It is stated that as per the adopted Process for Outbidding, the CoC had proceeded to negotiate with H-1 bidder, that is, SIPL to further revise their financial offer. However, SIPL did not take the opportunity. Thereafter, H-2 bidder, that is, TTMPL was invited as per the adopted Process for Outbidding to revise the financial offer, if any, in the format included in the Process for Outbidding, such that it results into an increase in its score under the identified criteria, without any other change in the resolution plan, which should in any event at least be higher than H-1 Revised Evaluated Score, as determined by the Process Advisor. However, TTMPL, that is, H-2 bidder, after deliberations communicated to the CoC that it would not be able to submit a higher revised financial offer than SIPL, that is, H-1. Since H-2, TTMPL, decided not to submit a higher revised financial offer, SIPL, that is, H-1's resolution plan along with its final financial offer was declared as the highest evaluated resolution plan.

8. It is further stated that pursuant to the above, the CoC held further negotiations with the successful resolution

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applicant, which led to two addendums dated August 30, 2018 and September 1, 2018 respectively submitted by SIPL. The addendums read with the resolution plan of SIPL submitted on May 10, 2018 constitute the final Resolution Plan of the SIPL.

9. It is submitted that at the 14th meeting of the CoC held on 01/09/2018 the Resolution Plan of the SIPL was placed before the CoC for approval and it was agreed that e-voting shall be carried out on the Resolution Plan of SIPL between 7 P.M. on 02/09/2018 to 7 P.M. on 03/09/2018. In terms of e-voting results, the CoC unanimously approved the Resolution Plan of SIPL. Hence, this application is filed for approval of the Resolution Plan.

10. Pending consideration of this CA, a supplementary affidavit was filed on 18.02.2019, by the Resolution Professional contending in brief the following:-

(a) In the meanwhile, a writ petition (Civil) No. 1266 of 2018 was filed before the Hon'ble Supreme Court, by Mr. Bipin Kumar Vohra & Ors., being the suspended members of the Corporate Debtor wherein, vide order dated 22/10/2018, the Hon'ble Supreme Court has directed that the Resolution Plan shall not be approved by this Hon'ble Tribunal without leave of the Hon'ble Supreme Court of India. The primary contention raised by Mr. Bipin Kumar Vohra & Ors in the above mentioned writ petition was that they had not been provided with a copy of

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the Resolution Plan of SIPL. Vide order dated 31/01/2019 Hon'ble Supreme Court has allowed the above writ petition with the following directions:

> *"In each of these cases, the appellants will be given copies of all resolution plans submitted to the CoC within a period of two weeks from the date of this judgment. The resolution applicant in case of these cases will then convene a meeting of the CoC within two weeks thereafter, which will include the appellants as participants. The CoC will then deliberate on the resolution plans afresh and either reject them or approve of them with the requisite majority, after which, the further procedure detailed in the Code and the Regulations will be followed. For all these reasons, we are of the view that the petition and appeal must be allowed and the NCLAT judgment set aside."*

(b) In compliance with the above judgement of the Hon'ble Supreme Court, the Resolution Professional sent e-mails on 02/02/2019 to all the three(3) suspended directors of the Corporate Debtor to execute the Confidentiality Undertaking to enable the Resolution Professional to share the resolution plans. After compliance of the above by the suspended directors of the Corporate Debtor, the resolution plans were immediately shared with them. Resolution Professional also sent e-mail on

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04/02/2019 to the MSTC Limited (being the Operational Creditor's nominee) to execute the Confidentiality Undertaking. After compliance by the MSTC Limited, the resolution plans were also immediately shared with them.

(c) Pursuant to providing access to the Resolution Plans, the 17th meeting of the CoC was convened on 14th February 2019, which was attended by the members of the CoC, suspended directors of the Corporate Debtor, MSTC Limited, SIPL (H-1 Bidder) and TTMPL (H-2 bidder). At the meeting pursuant to the judgment of the Hon'ble Supreme Court, opportunity was provided to the suspended directors of the Corporate Debtor and the representative of the Operational Creditors to provide their views on the Resolution Plan. Both the Resolution Applicants were also given opportunity to consider and modify their Resolution Plans in view of the observations made by the Operational Creditors and the directors. After much deliberations, the Resolution Plan of the highest evaluated Resolution Applicant (SIPL) was put up for fresh voting as part of the 17th CoC meeting and the same was approved with a 100% voting share by the CoC members present. Subsequently, the sole member of the CoC who did not vote in the meeting of the CoC members, due to his absence, has voted through e-voting and thus the Resolution Plan has been approved by 100% vote share of the CoC. It is this

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Resolution Plan which is for consideration of this Bench for the approval u/s. 31(1) of the I&B Code.

11. Heard the Ld. Sr. Counsel for the Resolution Professional (In short RP), Ld. Counsel for the CoC, Ld. Sr. Counsel for the H-1 and H-2 bidders and the Ld. Counsel for the MMTC. Perused the records. No argument advanced on the side of suspended board of directors of the Corporate Debtor.

12. The resolution plan was submitted by the RP in a sealed cover opened by me in the open Court. The Ld. Sr. Counsel for the RP has submitted that the resolution plan contains all the mandatory requirements to be meted out as per Regulation 38 of IBBI (IRP For Corporate Persons) Regulations, 2016 and that an affidavit stating that the resolution applicant, H-1 bidder (SIPL) is eligible under Section 29A has been annexed with the resolution plan in compliance of section 30(1) and that the resolution plan submitted to the CoC for its approval conforms to all the conditions referred to in sub-section(2) of Section 30. He further would submit that in compliance of Hon'ble Supreme Court directions, opportunities were given to the members of the suspended board of directors of the Corporate Debtor (In short CD) and to the MMTC and the CoC considered the resolution plan afresh after hearing the members of the board of directors and operational creditors and again it was put to voting and the

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resolution plan of SIPL was finally approved in its 17th meeting held on 14th February, 2019 and it is liable to be approved.

13. The Ld. Sr. Counsel for the Resolution Professional also submits that RP has verified the contents of the Resolution Plan and confirms that it complies with the requirements as envisaged under Regulation 38 of IBBI (IRP For Corporate Persons) Regulations, 2016 as well as Section 30(2) of the Code, for which a copy of **Form H - Compliance Certificate** issued by the Resolution Professional is also annexed with the application as "**Annexure - 14**", (pages 326 to 331).

14. Two objectors alone come forward objecting the approval of the resolution plan. They are H-2 bidder (Takshvi TMT mills Pvt. Ltd) and MMTC, an operational creditor. H-2 bidder filed two applications challenging the approval of resolution plan. CA(IB) No. 810/KB of 2018 and CA(IB) No. 277/KB of 2019 are the said two applications. CA(IB) No. 810/KB of 2018 was filed challenging the methodology of process for outbidding chosen by the CoC for evaluating the revised bids and challenging the SIPL's (H-1 Bidder) eligibility under Section 29A of the Code. Pending consideration of CA(IB) No. 810/KB of 2018, RP filed supplementary affidavit in this application along with the approved resolution plan in view of the direction of the Hon'ble Supreme Court vide order dated 31.01.2019. It is at this juncture,

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CA(IB) No. 277/KB of 2019 was filed by the H-2 bidder raising similar contentions taken in CA(IB) No. 810/KB of 2018. It was filed on 27.02.2019. In addition to the said contentions, the H-2 bidder alleged that the RP did not afford an opportunity to the Applicant to improve its offer, including provisions made for the Operational Creditors, which is contrary to the letter and spirit of the judgment of the Hon'ble Supreme Court and that the H-2 bidder was not afforded an opportunity to improve its financial offer in the light of subsequent challenge to *permitted user agreement* by the RP in its application CA(IB) No. 05/KB of 2019. Both the said applications were dismissed vide separate orders. Therefore, the objections to the approval of the resolution plan by the H-2 bidder are found unsustainable and devoid of any merit.

15. The second objector is MMTC. MMTC has participated in many of the meetings of the CoC and all its objections regarding the acceptance of its claim and its request to consider it as a secured creditor were considered by the CoC and out of its claim of Rs. 300.44 crores, Rs. 8.56 crores alone was allotted to it which according to the Ld. Counsel for the MMTC, is discriminatory and prays for modification of the plan by allotting the amount at par with the financial creditor.

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16. Dissatisfied with the above referred allotment, the MMTC filed an application CA(IB) No. 1167/KB of 2018 on 14.11.2018 claiming that its claim being considered and admitted as a secured creditor, cannot be treated separately, but should be paid in line of secured financial creditors to the extent of the value of the raw materials pledged by way of security. It also claimed absolute right over the pledged goods. The Resolution Professional has arrived at a Liquidation value for the pledged materials lying with the Corporate Debtor. The MMTC being an operational secured creditor is only entitled to the liquidation value of the pledged materials and that was provided in the Resolution Plan and therefore the objection of the MMTC also is found unsustainable under the provisions of the Code and Regulations. The grounds alleged being found unsustainable, the application filed by MMTC also was dismissed.

17. In view of the dismissal of all the applications filed by the objectors and being satisfied that the Ld. Resolution Professional has completed the process by giving fairly good opportunities to both resolution applicants for arriving at the maximization of value for the stressed assets of the Corporate Debtor, and the CoC has approved the resolution plan of SIPL as the best plan among the two plans under consideration of the CoC and it is that plan which is approved by the CoC by a 100% vote share of

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the members of the CoC, and therefore, the plan is liable to be approved as per section 31 (1) of the Code.

18. The interference asked for by the unsuccessful bidder at the later stage of approval of the successful resolution plan, if considered by me, would lead to stretching of the maximum period of CIRP beyond 270 days, and would upset the entire process agreed by the resolution applicants under the guise of maximization of value. To my understanding, such a step is unwarranted in this case and against the provisions of the Code. Quoting marginal enhancement of bid amount at the time of final consideration of the question of approval of a plan if considered, the entire sanctity of the process mandated by the Code and Regulations would be disturbed. The CoC's decision not to consider the submission of unsuccessful bidder to provide an opportunity is within its power and in accordance with the provisions of the Code and Regulations. This is a case in which I take note a systematic way of maximising the value of the stressed assets of the Corporate Debtor has been adopted by the Resolution Professional with the approval of CoC and has given a healthy competition between the two bidders for raising the final bid offer after final voting has been done on 17/02/2019. The CoC finally approved the plan with 100% of its vote share. Moreover no *mala fide* is alleged or proved. In the said background, I am not bound to reopen the process.

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19. A reference to the Plan, it is understood that the assets of the Corporate Debtor are going to rest in a safer hand. SIPL is a Company, incorporated in the year 2001, and is engaged in the very same line of manufacturing process as the Corporate Debtor. It too is engaged in the production of TMT Bars. All the provisions of mandatory requirements are seen complied by the resolution applicant as per **From H** submitted by the RP. It provides provision for the payment of insolvency resolution process, payment of the debts of operational creditors, management of the affairs of the Corporate Debtor, and provides provision for implementation and supervision of the resolution plan. It also provides term of the plan and its implementation schedule. So it is a feasible and viable plan. This is a case in which the CoC has judiciously distributed the financial bids to the stakeholders respective to their entitlements. There is nothing in the plan, so as to disapprove it. The CoC has very well deliberated with the two plans and decided the viability, feasibility and financial matrix of each plans and approved one with 100% vote shares of the members of the CoC. Accordingly, I hereby approve the resolution plan of SIPL upon the following directions:-

(i) The Resolution Plan of **Shakambhari Ispat & Power Limited (SIPL),** which is approved by the CoC with 100% voting share, is hereby approved under provisions of sub-section (1) of Section 31 of the Insolvency and

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Bankruptcy Code, 2016, which shall be binding on the Corporate Debtor (**SPS Steels Rolling Mills Ltd.**), its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan.

(ii) The revival plan of the company in accordance with the approved Resolution Plan shall come into force with immediate effect.

(iii) The moratorium order passed under Section 14 shall cease to have effect.

(iv) The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.

(v) CA (IB) No. 871/KB/2018 in CP (IB) No. 595/KB/2017 is disposed of accordingly.

(vi) CA (IB) No. 05/KB/2019 and CA (IB) No. 937/KB/2018 are to be disposed of separately.

(vii) Copy of the orders in CA(IB) No. 810/KB/2018, CA(IB) No. 1167/KB/2018 and CA(IB) No. 277/KB/2019 form part of this order.

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Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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8/4/19
(Jinan K.R.)
Member (J)

Signed on this, the 8th day of April, 2019.

hb.

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH

KOLKATA

CA (IB) No.810/KB/2018
CP (IB) No.595/KB/2017

In the matter of:

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

And

In the matter of:

SPS STEELS ROLLING MILLS LIMITED, a Company incorporated under the Companies Act, 1956 and a Company within the meaning of Companies Act, 2013 having its registered office and carrying on business at "Elegant Tower", No. 224A, A.J. C. Bose Road, Kolkata 700017.

.....Corporate Debtor

And

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In the matter of:

M/S. TAKSHVI TMT MILLS PRIVATE LIMITED, having its Registered Office at 238B, Acharya Jagadish Chandra Bose Road, Sreepally, Bhowanipore, Kolkata, 700020, in the State of West Bengal.

..... **Applicant**

And

In the matter of:

SHRI VIJAYKUMAR V IYER, Son of Shri Vaidheeswaran Iyer, aged about 50 years, having Office at Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 3, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai - 400013.

.... **Non-Applicant**

Order Delivered on: 8th day of April, 2019

Counsels present:

1. **MR. S.N. MOOKHERJI, Sr. Advocate**	]
2. **MR RATNANKO BANERJI, Sr. Advocate**	] **For the Applicant**
1. **MR. JOY SAHA, Sr. Advocate**	]
2. **MS. SINTHIA BALA, Advocate**	] **For the H1 Bidder**

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3. MR. JISHNU SAHA, Sr. Advocate]
4. MS. SUHANI DWIVEDI, Advocate] For Resolution
5. MR. DEEPANJAN DUTTA ROY, Advocate] Professional

6. MR. OM NARAYAN RAI, Advocate] For Committee of
7. **MR. SAIKAT RAY CHOWDHURY, Advocate] Creditors**

ORDER

Per Jinan K.R., Member (Judicial)

1. This application being **CA (IB) No.810/KB/2018** has been filed by the Applicant/Takshvi TMT Mills Private Limited with the following prayers: -

i. Issue directions to the Resolution Professional not to give effect to the evaluation as carried out by him at the meeting of Committee of Creditors held on 10/8/2018 and accordingly, not to proceed with SIPL as H1 party and entitled to the Resolution Plan in the case of CD;

ii. To carry out process of identification of H1 bidder by conducting rebidding by the two Resolution Applicants and their fresh evaluation based on the evaluation matrix, as described in the Process Note dated 9/4/2018 or some

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other evaluation matrix to be communicated to the Resolution Applicants in advance of the bidding and prior to submission of bids.

2. It is the case of the applicant that the applicant has submitted a Resolution Plan (RP) along with other required documents with the Resolution Applicant (RA) on 10/5/2018 and the CoC took note of it on 15/5/2018.

3. It appears from the record that this Bench vide order dated 5/6/2018 extended the time of CIRP by 90 days for submission of RP till 7/9/2018. The CoC held a meeting on 2/7/2018 wherein the applicant presented its RP.

4. It is the case of the applicant that at the CoC meeting held on 8/8/2018, the applicant submitted that it is ready and willing to submit its revised RP and the CoC permitted submission of upward revised financial bids by two Resolution Applicants (RA's) including the applicant by 10/8/2018.

5. At the meeting of CoC held on 10/8/2018, the members were of the view that in the interest of maximization of bid amount, the revised financial bid of the applicant should be taken up. Another revised financial bid was submitted by the

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other RA viz. Shakambhari Ispat and Power Ltd. (SIPL) during on-going meeting of CoC on 10/8/2018.

6. It is the case of the applicant that the bids were to be evaluated on 9 (nine) criterion specified in the Process Note dated 09.04.2018 of the Resolution Professional, a copy of which is attached and marked as "Annexure-11" to the application. The "Swiss Challenge" method was adopted for determining the highest bidder subject to the condition that the rebidding would be restricted to improvements to be made by the bidding parties in respect of criterion (i) and (ii) in the Process Note, i.e. (i) Upfront amount, and (ii) Deferred amounts, and there would be no improvements to be offered by the bidding parties in respect of other 7 (seven) criterion.

7. It is the case of the applicant that it proposed to the CoC that both the RAs be allowed one more opportunity to submit their revised financial bids in sealed cover, which bids once evaluated in accordance with the Process Note dated 09.04.2018, would form the basis of the Swiss Challenge process, which request was accepted by the CoC. Accordingly, both the resolution applicants (in short RAs) submitted Revised Financial Bid on 10/8/2018 at 6 P.M. The latest

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Revised Financial Bids and the Resolution Plan submitted by two RAs were to be evaluated by RP.

8. The applicant submits that after submission of the Revised Financial Bids on 10.08.2018, a Note with detailed steps for determination of the highest bidder as per the Swiss Challenge, titled "Process for Outbidding" was circulated by the Resolution Professional to the two Resolution Applicants on 10.08.2018 after 10pm, which both the Resolution Applicants duly accepted. A copy of the "Process for Outbidding" dated 10.08.2018 is attached and marked as "Annexure-12". According to Appendix 3 to the 'Process for Outbidding', the explanation on methodology for calculation of scores for Evaluation of criteria no. 1, 2, 3, 4 and 5 of the Evaluation Matrix provides that Linear scoring is being used within the overall framework.

9. The applicant submits that while conducting evaluation of Revised Financial Bid of the applicant, the RP applied linear scoring in respect of items of Sl. No. 1, 2, 3, 4 and 5 of evaluation matrix and the evaluation conducted by the RP adversely affected the prospects of the applicant in achieving status as H1 bidder.

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10. The applicant has alleged that the other Resolution Applicant, viz. Shakambhari Ispat and Power Ltd.(or SIPL), may not be qualified under Section 29A of the I&B Code. The Managing Director of SIPL also owns a substantial share in Dytron Marketing Services Pvt. Ltd., a company which is a declared related party of the Corporate Debtor, SPS Steel Rolling Mills Ltd. due to common shareholders and management, and whose director is the son-in-law of Mr. Bipin Vohra, the director of the Corporate Debtor. It further alleges that SIPL entered into a Share Purchase Agreement dated 23.03.2018 with Dytron Marketing Services Pvt. Ltd. and that Corporate Debtor's account being a Non-Performing Asset in the books of Allahabad Bank, and SIPL being a related party of the Corporate Debtor, is liable to be held as disqualified for submission of a resolution plan, in view of Section 29A(c) read with Section 29A(j) and the explanation thereto of the I&B Code.

11. The applicant has raised the under mentioned grounds challenging the ranking of RAs:

a) the Share Purchase Agreement (SPA) are open for enforcement and the RP erred to have ignored the SPA.

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b) The RP has proceeded with declaring SIPL as eligible RA under Sec.29A of IBC based on the statement that Share Purchase Agreement has not been acted upon.

c) The RP has not spelt out as to how he has satisfied himself about eligibility of other RA under the provisions of Sec.29A of IB Code, 2016.

d) The action of the RP is not as per transparent method of working.

e) The Linear Scoring for evaluation is different from the formula as per the Process Note dated 9/4/2018.

f) The RP has not conducted complete inquiry disqualifying the applicant and has not reached at a logical conclusion. Upon the above said grounds, the applicant prays for allowing its application.

12. Shakambhari Ispat and Power Limited (in short SIPL) who was declared as H1 Resolution Applicant filed reply contending in brief, the following:-

13. The contentions of the applicant were denied by the SIPL and it contends that in the CoC meeting dated

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10.08.2018, the 'Process for Outbidding' was agreed to, prepared in consultation with and signed by both the resolution applicants. As neither of the parties increased their bid under the Process for Outbidding, the evaluation was done in terms of the process note dated 9/4/2018 and not in terms of Process for Outbidding. It also contends that there is no provision of the I&B Code or the Regulations framed there under which bars/prohibits any alteration of the Process Notes. It further states that Takshvi TMT Mills Pvt. Ltd., having agreed to the amendment of the initial process note and having signed the document for 'Process for Outbidding', their principal objection is vitiated by waiver, estoppel, acquiescence and the principles analogous thereto.

14. It is submitted that after completion of the evaluation process and upon being declared as the successful H1 RA, SIPL has been approved by 100% of financial creditors. A copy of the email by the Resolution Professional dated 14.08.2018 stating the same, is annexed and marked as Annexure-'D' to the reply affidavit. The allegation that SIPL is disqualified under Sec.29A of the Act is incorrect. It denies that the MD or any other director of SIPL is a shareholder of Dytron Marketing Services Pvt. Ltd. and further submits that no share purchase

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agreement in respect of purchase of any share of Dytron Marketing Services Pvt. Ltd. has been entered into by Mrs. Swati Agarwal, the Managing Director of SIPL, on 23rd March 2018 as alleged or at all. The allegation of the applicant that the RP has failed to conduct any enquiry is incorrect. The RP has conducted the CIRP with utmost transparency and in accordance with the provisions of IB Code. It submits that the applicant, as a desperate final attempt has approached this Tribunal with unclean hands and the said application is misconceived, *mala fide* and therefore, prays to dismiss the same with exemplary costs.

15. In response to the application filed by the applicant, the RP has filed affidavit in opposition wherein it has been contended that the Applicant and SIPL submitted their revised financial offers on their respective resolution plans in the CoC meeting of 10th August 2018. The RA's submitted their revised financial offers at 6 P.M. which were to be evaluated in accordance with the Process of Outbidding which was agreed on 10/8/2018 during the 12th CoC meeting. The revised financial offers were taken along with the existing resolution plan and the scoring in accordance with the Process for Outbidding was conducted for the first time to arrive at H1 and

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H2 on the same day. It was explained to them that the Process for Outbidding at Appendix III clearly mentions that linear scoring was to be applied for evaluation criteria at Sl. No.1, 2, 3, 4 and 5. The said Process for Outbidding was discussed, consensus arrived between the CoC and both the RAs and thereafter, final draft was signed by both the RAs. The RP clarified that the Process for Outbidding as signed by both the RAs, laid down in Appendix III the methodology for scoring to be linear scoring for evaluation criteria at Sl. No.1, 2, 3, 4 and 5. It was also clarified to the RAs by the RP that there could not have been two methods for scoring as seems to be the presumption as apparent from the application of the applicant.

16. It has been further stated that the evaluation of both the RAs with the revised financial offers based on the evaluation matrix, was carried out for the first time on 10/8/2018 by applying the agreed methodology in the Process for Outbidding.

17. The RP also explained that while scoring on the Linear method was to be applicable for evaluation criteria at Sl. No.1, 2, 3, 4 and 5 of the CoC, both the RAs had agreed at the 11th CoC meeting held on 8/8/2018 that the revised financial offers would be restricted to evaluation criteria at Sl. No.1 and 2 only. The Process for Outbidding clearly captures that pursuant to

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the evaluation and declaration of H1 and H2, the scoring for evaluation criteria at Sl. No.3, 4, 5, 6, 7, 8 and 9 would remain frozen. As such, the RP submits that the process followed was transparent and was as per the agreed method and applied uniformly to both the RAs. After evaluation it was the SIPL, who was the highest bidder and the applicant of this case was given opportunity to revise its financial offer for evaluation criteria at Sl. No.1 and 2 wherein the applicant chose not to revise its financial offer. The Applicant having participated in the Process for Outbidding cannot now turn around to state that it was not aware of the linear scoring being applied to Serial No s 1 to 5.

18. The Resolution Professional further submits that steps were taken by him to ascertain the eligibility of SIPL in terms of Section 29A of the Code and it was revealed after the RP's inquiries that no actual transfer of shares took place and no agreement was ever executed with regard to share purchase transaction between SIPL and Dytron. The allegations of the Applicant did not lead to any conclusion by the RP or the CoC that the disqualification under Section 29A(c) read with Section 29A(j) was in any manner applicable to SIPL, and the CoC found SIPL to be eligible and proceeded to vote upon and

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approve the resolution plan of SIPL with a 100% majority voting share. The RP submits that he has at all times acted in a transparent manner and in accordance with the provisions of the Code, and the rules and regulations there-under, and contends that the present application is liable to be rejected as false, frivolous and without any merit.

19. In its rejoinder filed by the applicant, it reiterated the same statements and contentions which have been mentioned in the application and the same have not been produced for avoiding repetition. The applicant states that it is an admitted position in the affidavit by the RP dated 10.09.2018 that the linear scoring method enumerated under the terms of process for outbidding was proposed on 10.08.2018, post submission of the revised financial offer from the applicant. As such, the purported change in the evaluation process as purportedly agreed by the applicant was an *ex post facto* alteration of the evaluation process and amounts to gross violation of the rights of the applicant and as such is not tenable in law. The agreement to manufacture between SIPL and Dytron, whose director is Mr. Ranveer Singh, who is the son-in-law of Mr. Bipin Vohra, MD and Promoter of CD, was signed on 29.11.2017 while the proceedings before NCLT were ongoing.

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The promoters of CD and SIPL had planned to act together and share the gains from working together. In view of the foregoing, the applicant submits that the reply of SIPL be rejected and the instant application be allowed by the Hon'ble Tribunal.

20. Heard Ld. Sr. Counsel Sri. S.N. Mookherjee and Ld. Sr. Counsel Mr. Ratnanko Banerji for the applicant, Ld. Sr. Counsel Shri. Joy Saha for the H1 bidder and Ld. Sr. Counsel Shri Jishnu Saha, appearing for the RP and Ld. Counsel Shri Om Narayan Rai for the CoC. Upon hearing the arguments and upon considering the contentions raised on both sides, the points that arise for consideration are the following:-

(i) Whether the CoC had modified the process notes by changing the methodology for evaluation of resolution plan in violation of any of the provisions of I&B Code or Regulations as alleged?

(ii) Whether H1 bidder (SIPL) is ineligible as per Sec.29A of the I&B Code as alleged?

(iii) Reliefs and costs

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Point No (i).

21. Having heard the Ld. Sr. Counsel appearing for the applicant as well as the H1 Bidder, Resolution Professional and Committee of Creditors, it is significant to note here certain relevant factors behind the approval of the Resolution Plan of SIPL (H1 Bidder). It is an admitted fact that there are only 2 (Two) Resolution Applicants at the stage of final round for bidding for the stressed assets of the Corporate Debtor. The two resolution applicants are **M/s. TAKSHVI TMT MILLS PRIVATE LIMITED (in short TTMills PL)** and **Shakambhari Ispat and Power Limited** (In short **SIPL).**

22. Before submission of the Resolution Plan, the criterion for evaluation of Resolution Plan of the Resolution Applicants has been finalised by the Committee of Creditors (CoC) and published the criterion viz., ***process note*** on 09.04.2018. Based on the criterion in the process note, both the Resolution Applicants submitted their respective Resolution Plans to the CoC through the Resolution Professional on 10th May, 2018, the last day fixed for submission of resolution plans by the resolution applicants. The CoC has considered both the Resolution Plans in the presence of both Resolution Applicants and after due deliberation, the CoC has ranked the Resolution Plan of SIPL superior to the Resolution plan

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of the Applicant TT Mills PL by 15th May, 2018. This ranking was done in accordance with the criterion in the process notes. So there was no change in the process notes till the first ranking of RAs.

23. Dissatisfied with the ranking the Applicant TT Mills PL filed **Interim Application I.A. No. 700/KB/2018** praying for cause production of certain documents and information by the Resolution Professional alleging that certain factors which could have been considered by the applicant for submission of the Resolution Plan were not supplied to it and sought permission to file revised Resolution Plan upon receiving the documents which were asked for as per the application. This Bench allowed the application vide **order dated 3rd August 2018** directing the Resolution Professional to provide the necessary information and documents which were asked for by the Applicant and permitted it to submit a revised Resolution Plan. In compliance of the directions, the Resolution Professional had given the documents and information as directed to the Applicant and the CoC in its meeting held on 8th August 2018, by considering the request of the Applicant gave one more chance to submit revised bids with improvement in the financial offer. So what was permitted is to improve its financial offer alone. The CoC, having permitted TT Mills PL to improve its financial offer, also gave permission to SIPL to submit its revised financial offer by 12.30 noon, on 10th August, 2018.

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24. Both RAs submitted their respective **Revised bids** in sealed envelopes. The Applicant has submitted the revised bid at about 12.30 p.m. and the SIPL submitted its revised plan at about 3.00 p.m. with a request to condone the delay and the CoC allowed the RA to submit it and thereby the RP was in receipt of both the revised bids by 10th August, 2018. Acceptance of the late submission of revised bid by SIPL was objected by the TT Mills PL. It complained that the SIPL having submitted the Revised bid later than the submission of the Revised bid by the Applicant, there are possibilities of leakages of materials furnished in the revised bid of the Applicant and since the Applicant expressed its concern about leakage of information given in the revised bid of the Applicant, the CoC in its utmost fairness, decided to give one more opportunity to the Resolution Applicants to **re-submit their revised Financial Bid** incorporating changes in the financial bids if so desired and gave 30 minutes for re-submission in a sealed envelope by proposing to evaluate the bid through the **Swiss Challenge method through a Process for Outbidding**. The process for outbidding criteria has been finalised by the CoC after deliberations with the Resolution Applicants. Both RAs agreed and endorsed the process to be adopted for the Swiss Challenge method by signing the process circulated at the meeting consisting of members of CoC and the RAs. It is this ***'process for outbidding'*** methodology introduced by the

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CoC at the request and consent of the Applicant which is under challenge in this case.

25. Both RAs had submitted their revised financial bids in sealed envelopes on 10.08.2018 itself. The process for outbidding was formulated exclusively for evaluating the financial bid finally submitted by the Resolution Applicants and the said process for outbidding was signed by both Resolution Applicants viz., **Shri Dipak Agarwal** of **SIPL** and **Shri Purushottam Parashar** for and on behalf of **TT Mills PL.** The CoC with the assistance of its advisors evaluated the financial bids and declared SIPL as H-1 bidder. Upon declaration of SIPL as H-1 bidder, the CoC again gave an opportunity to the Applicant to outbid SIPL but the applicant did not avail the opportunity and declined to outbid SIPL.

26. The above said factors are proved facts brought out from the available records in the case in hand. It is significant to note that till the final outcome of the evaluation was announced by the CoC, there was no challenge as against the process for outbidding from any one of the RAs. Upon finalisation of the process for ranking the plan, the RP put the successful plan for voting and voting on the successful plan of SIPL was held on 2nd and 3rd September 2018. Upon getting 100% votes, the CoC has approved the Resolution Plan of SIPL. The result of voting and consequent approval of resolution

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plan was reported to the AA by the RP. When the RP has communicated the result of the final scoring of the RAs, followed by declaration of SIPL as the successful Resolution Applicant, the applicant herein filed this application after knowing that CoC approved the Resolution Plan of SIPL by 100% Vote.

27. As per the evaluation, the score given to **SIPL** is **37.67** and to **TT Mills PL** is **33.15**. The financial bid offered by the **SIPL is Rs. 250 crores** (Rupees Two Hundred and Fifty Crores Only) and by **TT Mills PL** the Applicant herein, is **Rs. 228 crores** (Rupees Two Hundred and Twenty Eight Crores Only). It is this Resolution Plan of SIPL which was approved by the CoC by 100% vote which is under challenge. The Applicant being dissatisfied with the final ranking of RAs filed this application on 06.09.2018.

28. The above said factors are self-explanatory. The process of outbidding is a methodology adopted by the CoC for the sole purpose of ranking the revised financial offers. The original evaluation of the resolution plan was admittedly done as per the criterion laid down in the process note. The process of outbidding is certain methodology adopted by the Resolution Professional with the approval of the CoC for evaluation in a transparent manner and for having uniformity in evaluation of both the RAs' plans. The said methodology has been accepted by both the Resolution Applicants and they gave their consent by signing the document. Being

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dissatisfied with the result of the evaluation scores, the Applicant herein filed this application contenting that the RP applied linear scoring in respect of items of Sl. No.1, 2, 3, 4 and 5 of **evaluation matrix** and the evaluation conducted by the RP adversely affected the prospects of the applicant in achieving status as H1 bidder.

29. The copies of minutes of 11th CoC meeting held on 8th August, 2018 evidence that application of the methodology for ranking being the linear method was discussed at length and the CoC has taken a decision that the revised financial offers would be restricted to evaluation criteria at Sl. No.1 and 2 only. The above said discussions lead to a conclusion that the modification of process notes was done by the CoC with the consent of both RAs. Having given its consent, and failed in scoring higher score than the SIPL, can the Applicant be permitted to contend that the Linear Scoring for evaluation is different from the formula as per the Process Note dated 9/4/2018 and it is why its score became lower than the score given to the SIPL. I would say no.

30. Firstly, for the reason that the applicant does not at all come first even as per the scoring given on the basis of the evaluation matrix. The financial bid offered by it is also much below the financial bid offered by the H-1 bidder. Secondly, for the reason that the Applicant is estopped from challenging the said methodology (process for outbidding) as per Section 115 of the Indian Evidence

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Act, 1872. As per Section 115 of the said Act, no doubt the applicant, who had actively participated in the process of outbidding and having submitted its financial bid pursuant thereto and having consented to the said process of outbidding, is estopped from challenging the said methodology.

31. In regard to the application of Section 115 of the said Act, the Ld. Sr. Counsel for the Applicant submits that the rule of estoppel cannot apply in this case because there is no estoppel as against the statutory provision. According to him, Section 115 of the Evidence Act has no application in this case. It is good to read Section 115. It reads as follows:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

32. According to the Ld. Sr. Counsel for the Applicant, obtaining consent to the process of outbidding being in violation of Section 25(2) (h) of the Code and Regulation 36(B)(3) and (5) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, cannot come within the purview of rule of estoppel. He submits that since statute does not empower the CoC to modify the process notes after the date of submission of resolution plan, rule of

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estoppel cannot extend in this case. To strengthen the said argument that there is no estoppel as against statute, Ld. Sr. Counsel for the Applicant has cited **A.C. Jose Vs. Sivan Pillai And Others (1984)2 SCC 656**. The fact in the above cited decision is entirely different to the facts in the instant case. In the above said case, dispute is regarding jurisdiction of Election Commission of India in using voting machine without the sanction of the Government of India. The Hon'ble Supreme Court has held that "*According to the law as it stands at present, the order of the Commission directing casting of ballot by machines in some of the polling station was without jurisdiction*". The Hon'ble Supreme Court has applied rule of estoppel and further has held that "*No estoppel against statute*". In the instant case, there is no express bar under the provisions of the Code or under the Regulations barring the modification of the process note after the submission of the resolution plan with the consent of the resolution applicants. The facts in the above said case being different, it appears to me that the proposition as held in the above cited decision is not applicable in this case.

33. The Ld. Senior Counsel appearing for the Resolution Professional has submitted that the Applicant and SIPL having consented to the process for outbidding, there is no statutory

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violation of any of the provisions of the Code or Regulation. Referring to Section 25(2)(h) of the I&B Code, 2016 and Regulation 36(B)(3) and (5) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 granting a minimum 30 days does not mean that a process of outbidding with consent of the Resolution Applicants cannot be done as per the Regulation referred to above. According to him, the modification herein in the case in hand is limited to the financial bid submitted by the Resolution Applicants and the process for outbidding has been initiated only at the instance of the Applicant herein who was ranked as H2 bidder and it is at the initiative of the Applicant herein that the Committee of Creditors have had modification of the process notes by introducing within it, linear method for evaluation. Having failed in outbidding SIPL, the challenge against the scoring is only an attempt to abuse the process, he argued.

34. Referring to Clause 1.3.1 in the process notes, the Ld. Sr. Counsel for the Resolution Professional also submitted that the Committee of Creditors has got every power to amend the process notes at any time before the date of approval of Resolution Plan and therefore even if the modification amounts to modification of process note, it does not invalidate the modification. He also advanced an argument that the Regulation 36 being amended and Regulation

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36(B)(3) and (5) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 having been introduced with effect from 03.07.2018, the said Regulation cannot apply to a resolution plan submitted before the date of commencement of the said Regulation. Regulation 36(B) of the IBBI (IRP for Corporate Persons) Regulation truly came in force on 03-07-2018 and the last date of submission of Resolution Plans was on 10-05-2018. That being so, Section 36(B) of the Regulation is found not applicable in the case in hand. So the argument that the applicant was not given 30 days time for submission of revised bid as per Regulation 36(B)(3) and (5) is found devoid of any merit.

35. The Ld. Sr. Counsel for the H1 bidder on the other hand citing an English decision **United Dominions Limited versus Western and another reported in 1975, volume 3, AER 1017 at page 1022 placetum A and B, at 1024 at placetum B and F** attempted to stress that law does not permit a person to both approbate and reprobate and that the person once consented cannot, in disregard to the consent be allowed to escape from the consequences of the consent. The below mentioned para in the said judgement was relied upon to strengthen the said view:-

> ***"f. 'A man cannot escape from the consequences, as regards innocent third parties of signing a document if, being a man of ordinary education and competence, he***

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chooses to sign it without informing himself of its purport and effect.".

36. The process for outbidding is a methodology by fixing certain terms and conditions as to the identification of shortlisted Resolution Applicants on the basis of the revised bids submitted by the RAs. Truly, it was introduced after submission of the resolution plans. Being found that the applicant has not won the bid because its financial bid is much lower than the financial bid of the H1 bidder, and it scored less score as per evaluation matrix, it cannot be permitted to challenge the declaration as per rule of estoppel, as argued by the Ld. Sr. Counsel for the H1 bidder. To strengthen the said argument, he also referred to a decision namely **Cauvery Coffee Traders versus Hornor Resources (International) Company Limited, (2011) 10 SCC 420.** The **Hon'ble Supreme Court in para 10** has held as under:-

> ***"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."***

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37. The above said proposition is squarely applicable in the case in hand. It has come out in evidence that the Applicant has conceded to a note containing the detailed steps for declaration of the highest bidder as per the ***Swiss Challenge*** process for outbidding method which was circulated by the RP to both RAs, that the applicant itself has insisted the Swiss Challenge Method, that the Applicant has accepted the process of outbidding and submitted the revised financial bid pursuant to the process of outbidding, are all circumstances that lead to a conclusion that the Applicant has rushed to the Tribunal, with unclean hands so as to disturb the finalisation of a process of declaration, which according to me has been done by the RP and CoC with utmost care and caution following principles of natural justice and in a transparent manner so as to achieve maximisation of value of the assets of the Corporate Debtor.

38. In view of the above said discussions, I am of the considered view that the change in process notes being done with the express consent of both the RAs, the said change in no way violates any of the provisions of the Code or Regulations as alleged. No provision in the Code was brought to my notice by the Ld. Sr. Counsel for the applicant that a process note shall not be changed before the approval of the plan by the CoC with the consent of the resolution applicants for the purpose of achieving maximisation of value.

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Moreover, the Applicant being found estopped from challenging the process for outbidding which is the sole change to the process note for the purpose of ranking of SIPL as H-1 bidder and TT Mills Pl as H-2 bidder, the ranking is found legal and proper. The above said discussions lead to a conclusion that the modification of the process notes by changing the methodology for evaluation of resolution plan is not in violation of any of the provisions of I&B Code or Regulations as alleged. This point is answered accordingly.

Point No (ii)

39. The next contention on the side of the Applicant is that Mrs. Swati Agarwal and her husband, Mr. Deepak Kumar Agarwal who are the Promoter and Managing Directors of the SIPL are not qualified under Section 29(A) of the I&B Code. The Ld. Sr. Counsel for the Applicant has submitted that Mrs. Swati Agarwal owns special shares in Dytron Marketing Services Pvt. Ltd, (in short Dytron) which according to the Applicant is a related Party of the Corporate Debtor / SPS Steel Rolling Mills Limited due to common shareholders and management and control. It is also contended that SIPL has a manufacturing Agreement with Dytron for manufacturing TMT bars and that SIPL is using the trademarks owned by the Corporate Debtor as per an agreement in which Mr.

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Bipin Vohra, the Director and Promoter of the Corporate Debtor has signed as a witness in the agreement.

40. According to the Ld. Sr. Counsel for the Applicant, Mr. Ranveer Singh, the Director of Dytron Marketing Services Pvt. Ltd. is the son-in-law of Mr. Bipin Vohra and the Dytron and the Corporate Debtor, being a related party, the shareholding of Mrs. Swati Agarwal in Dytron proves that she is in control over the Management of Dytron and thereby is a related party of the Corporate Debtor as per Section 29A of the Code.

41. The above said allegation seems to have been raised on the strength of a purchase Agreement which was not acted upon. As per the alleged share purchase agreement dated 23-03-2018, Mrs. Swati Agarwal along with two others, agreed to purchase shares of Dytron held by three shareholders of the Dytron. It has come out in evidence that the above said purchase Agreement has not been acted upon. The shares as agreed to be purchased has not been purchased by Mrs. Swati Agarwal. The cheque issued by Mrs. Swati Agarwal has not been cleared but dishonored and for some reasons, Mrs. Swati Agarwal did not purchase the agreed shares and she was not at all a shareholder of Dytron as on the date of submission of the Resolution plan by the SIPL before the Resolution Professional in this case. It has come out in evidence that neither Mrs. Swati

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Agarwal nor any other directors of SIPL was a shareholder of Dytron on the date of submission of the Resolution Plan and also not a shareholder even after submission of the Resolution Plan.

42. One among the grounds highlighted on the side of the Applicant is that the RP has not conducted complete inquiry in the matter of disqualification of the applicant and has not reached at a logical conclusion. The said contention seems to be not true. The CoC has inquired into the allegation and nothing has been produced on the side of the Applicant before the CoC or before the RP to prove that any of the Directors of SIPL has control over the management of the Dytron or they have any manner of control over the Corporate Debtor. In the meeting held on 10-08-2018, the CoC had inquired with the Resolution Applicants so as to find out the correctness of the alleged ineligibility of SIPL under Section 29(A) of the Code but the CoC, having failed in obtaining any proof produced to the satisfaction of the CoC that any of the Directors of the SIPL had any control over the management and the affairs of the Dytron, or the Corporate Debtor, has taken a decision that SIPL is eligible in terms of Section 29(A) of the Code.

43. Section 5(24) of the Code defines a related Party in relation to the Corporate Debtor. None of the Parties defined as per Section 5(24) or 5(24A) of the Code applies in the facts and circumstances

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brought out in the case in hand. Being satisfied that none of the Directors of SIPL have acquired any shares in the Dytron, SIPL cannot be deemed to be a related party as defined under Section 5(24) of the Code. The decision of the CoC that SIPL is eligible in terms of Section 29(A) is therefore, found proper and legal.

44. The Ld. Sr. Counsel for the Applicant at this juncture has submitted that a permitted user agreement was entered into by and between Dytron and Corporate Debtor, allowing inter alia, Dytron to use '***Elegant***' brand upon payment of royalty of Rs.100/MT and that Dytron has high influence over the key managerial personnel of the Corporate Debtor, and so the manufacturing agreement entered into by the SIPL with the Dytron makes them ineligible under section 29A (c) of the Code. To strengthen the said argument, he cited **ArcelorMittal India Prvt. Ltd Vs. Sathish Kumar Guptha (2018 SCC online SC 1733).** What is alleged is that the SIPL had a manufacturing Agreement with Dytron and thereby took over the control over the Corporate Debtor, since the Dytron is a related party of the Corporate Debtor. There is no allegation that such an agreement was entered into by the SIPL with Dytron with an ulterior motive to take control over the Corporate Debtor.

45. The SIPL is a Company engaged in manufacturing TMT Bars. It entered into an agreement with Dytron Marketing Service Pvt. Ltd.

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to manufacture TMT bars upon placing orders by the Dytron. Can the said commercial arrangement be construed as an attempt to take control over the management or affairs of the Dytron or in turn take over the control over the management and affairs of the Corporate Debtor? I would say no.

46. The last date for submission of resolution plan was on 10.05.2018. Truly, there was an arrangement between SIPL and Dytron for manufacturing TMT bars by the SIPL. The manufacturing agreement was entered into in the month of November, 2017. According to the Ld. Sr. Counsel for the SIPL, the manufacturing agreement was only in force from November, 2017 to January, 2018 and there was no further business transaction in between Dytron and the SIPL.

47. Referring to **Arcelor Mittal India Private Limited,** the Ld. Senior Counsel appearing for the Applicant, attempted to highlight an argument that SIPL having entered into a Manufacturing Agreement with Dytron is in a position to manage/control over the Corporate Debtor/ SPS, who is related party of the Dytron. The test laid down in the above cited decision so as to determine the amount of control a resolution applicant can have over a corporate debtor does not at all satisfy in this case.

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48. On the other hand, the Ld. Senior Counsel appearing for the SIPL (H1 Bidder) referring to paragraphs 45 & 46 of the above cited case has submitted that the SIPL has no amount of control over the Corporate Debtor as defined in the above cited case and according to him, the control denotes only positive control as laid down in the above said decision. He also submits that the applicant has failed in proving a positive control in any manner over the Corporate Debtor, and therefore, applying the proposition as laid down in Arcelor Mittal India Private Limited case, the Applicant cannot succeed.

49. He also refers to **Swiss Ribbons Pvt. Ltd. and another Vs. Union of India and Ors(2019) SCC Online SC 73.** He brings to my attention Paragraph 75 in the above said judgment which reads as follows:

"........we are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(25A) show that such persons must be-connected with the resolution applicant within the meaning of Section 29A(j). This being the case, the said categories of persons who are collectively mentioned under the caption – relative obviously need to have a connected with the business activity of the resolution applicant. ***In the absence of showing that such person is – connected with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29A(j).*** *All the categories in Section 29A(j) deal with persons, natural as well as artificial, who are*

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connected with the business activity of the resolution applicant. The expression – related party, therefore, and – relative contained in the definition Sections must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant."

50. Nothing available in this case so as to prove that the SIPL had any connection with the business activities of corporate Debtor or that any one of the directors of the SIPL is related to the directors of the Corporate Debtor so as to fall within the category of prohibited relationship as per section 5(24A) of the Code.

51. The Ld. Senior Counsel for SIPL at this juncture also cited **Srei Infrastructure Finance Limited Vs. Canara Bank judgement NCLAT dated 08-06-2018** so as to highlight an argument that unless and until the name of the Directors of the SIPL comes in the books of accounts of the share register of the Corporate Debtor or in the share register of Dytron, SIPL could not be disqualified under Section 29(A).

52. In the above cited case, *the Resolution Applicant had purchased equity shares of the Corporate Debtor. However, although the Parties had shares, the same was not recognised or accounted in the books of accounts of the Corporate Debtor as the allotment of shares was not approved by the Stock Exchange.*

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In the said circumstances, the Hon'ble NCLAT has observed that. **"as the equity shares had not been accounted in the books of accounts or in the share register of the corporate Debtor, the Resolution Applicant could not be disqualified under Section 29(A) and was not related party"**. The above said observation of the Hon'ble NCLAT is squarely applicable in the case in hand. Here, in this case, the purchase Agreement of the shares has not been acted upon. Only because a share purchase agreement was entered into, it being not acted upon and no shares of the shareholders of the Dytron have been transferred in the name of the Director of SIPL, and none of the directors became the shareholder of the Dytron and none of the directors found a place in the register of shares of Dytron, the SIPL cannot come under the purview of related party as alleged.

53. It is significant to note that there is no allegation in the Application that the SIPL has direct control or management over the affairs of the Corporate Debtor company. What is alleged is that one of the promoters of SIPL by acquiring shares had control over the Dytron and Dytron being related to the Corporate Debtor, they are related party and *inter alia* exercising control over the corporate Debtor. As discussed above, the applicant has failed in cause producing any proof to strengthen the above said contentions.

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54. The Applicant has failed in proving that SIPL has any manner of control over the management of the Corporate Debtor which would fall within the purview of Section 29A(c) of the Code. None of the Directors of SIPL in the case in hand are exercising any manner of control over the Corporate Debtor directly or indirectly. The manufacturing Agreement with the Dytron also cannot be taken into consideration as an indirect control over the manufacturing business over the Corporate Debtor company. Even if the manufacturing Agreement has any indirect link with the business activities of the Corporate Debtor, that agreement being not in force on the date of submission of the resolution plan by the SIPL, I find no force in the said argument advanced on the side of the applicant. Nothing was brought in to prove that such an agreement was in force on the date of submission of the Resolution Plan.

55. One another contention put forward on the side on the Applicant is that a "*Permitted User Agreement*" had been entered into by and between Dytron and the Corporate Debtor on 17-07-2017 for permitting Dytron to use "***Elegant***" brand name of the Corporate Debtor and it is thereafter, on 29-11-2017 the Dytron entered into the manufacturing and procurement agreement with SIPL for manufacture of TMT bars under the brand name *Elegant*, which Dytron wanted to buy back entirely from SIPL. This alleged

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user agreement highlighted on the side of the Applicant is for showing that the user of brand name of Corporate Debtor was indicative of concert between the Corporate Debtor, Dytron and SIPL, particularly, as Mr. Bipin Vohra, the erstwhile Managing Director of the Corporate Debtor was a witness to the Agreement dated 29-11-2017.

56. The above said contention seems to be devoid of any merits. Admittedly, SIPL is engaged in manufacturing TMT bars. Manufacturing TMT bars in the brand name of Corporate Debtor was meant for supply of the end products to the Dytron and not to use the said brand name for the sale of the TMT bars manufactured by SIPL in the open market. None of the documents produced to prove that SIPL or its management is in any way connected with Mr. Bipin Vohra or his family members. The user Agreement cannot be construed as an agreement to take business control over the business of the Corporate Debtor. Admittedly, the Agreement has been entered into for supply of products manufactured by SIPL to the Dytron in the brand name specified by Dytron which may be a brand name of the Corporate Debtor. The said arrangement cannot be held as an arrangement to have a positive control over the business activities of the Corporate Debtor. The agreements referred to above, highlighted by the Ld. Sr. Counsel for the Applicant at any stretch of imagination, cannot be taken as a proof to satisfy any one

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of the tests laid down in the **Arcelor Mittal India Private Limited** referred to on the side of the Applicant.

57. What is brought out in the case in hand is that the SIPL has, at some point of time, had an association with Dytron for manufacturing certain products as per the demand of Dytron and it is a commercial association and not any other kind of association so as to take over the control over the manufacturing process of the Corporate Debtor or the Dytron. In the **Arcelor Mittal India Private Limited,** the Hon'ble Supreme Court has held that "*For the purpose of applying this sub section, any one of the three things which are disjunctive needs to be established. The Corporate Debtor may be under the management of the person referred to in Section 29(A). The Corporate Debtor may be a person under the control of such person or the Corporate Debtor may be a person on whom such person is a Promoter. None of the above three things satisfy in the case in hand.*" Here, in this case, none of the Directors of the SIPL is in any way connected with the promoter or in control of the management or control of the business of the Corporate Debtor, on the date of submission of the Resolution Plan and during the period, the Resolution Plan was under consideration. In view of the above said discussion, it appears to me that SIPL is not exercising any manner of control over the Corporate Debtor or Dytron and is not

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disqualified under Section 29A or under Section 29(A)(c) of the I&B Code, as alleged. This point is answered accordingly.

Point No (iii)

58. This is a unique case wherein the applicant has come with a challenge against its ranking as H-2 bidder, which according to me was resolved by the CoC with utmost care and caution in the context of value maximization. The allegations levelled by the Applicant are found feeble and unsustainable under law. The action of the RP is found transparent and was in accordance with the provisions of the Code and Regulations. It cannot be held that H-1 bidder is a related party of the Corporate Debtor since H-1 bidder has entered into a share purchase agreement. The share purchase agreement relied upon is found not acted upon long before the date of submission of the resolution plan by the H-1 bidder. The cheque allegedly handed over to the Dytron by the promoter of H-1 bidder (SIPL) was not encashed but was dishonoured. So, it has come out in evidence that the buyer never intended to purchase the shares as per the agreed terms or for some other reason, the buyer never performed her part of the obligation for buying the shares. It cannot be ruled out that this fact was well known to the Applicant. So, no doubt the applicant has come before this Tribunal without any clean hands.

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59. The permitted user agreement was brought in to show that the SIPL has an indirect control over the Corporate Debtor by manufacturing TMT Bars in favour of Dytron, in the brand name of the Corporate Debtor. Stressing upon the manufacturing agreement, a false attempt was made to show that H-1 bidder has acted in concert with one of the members of the suspended board of directors of the Corporate Debtor. Having failed in establishing that the SIPL's promoters have any manner of control over the Dytron management by way of acquiring shares of Dytron, the commercial arrangement that too for a temporary period cannot be considered as an attempt to take control over the manufacturing process of the Corporate Debtor.

60. It is significant to note here that one among the allegation was that one Mr. Bipin Vohra, a promoter of the Corporate Debtor, was a witness to the agreement entered into between SIPL and Dytron and the said conduct proves SIPL has influence over the Corporate Debtor. However, nothing was brought to my notice to prove that SIPL or its management is in any manner connected with Mr. Bipin Vohra or with any one of the members of the suspended board of directors of the Corporate Debtor. The relationship, if any, created by executing the manufacturing agreements cannot be considered as indicative of concert between the Corporate Debtor, Dytron and SIPL.

61. The applicant has miserably failed to prove any substantial grounds of proof evidencing that SIPL is a related party or it has in any manner acted in concert with either the Dytron or the Corporate Debtor. As held in **Arcelor Mittal** case, the expression "**control"** *in section 29A(c) denotes only positive control which means that mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with management, means de facto control of actual management or policy decision that can be or in fact taken*". The execution of manufacturing agreement between Dytron and SIPL and execution of permitted user agreement between Dytron and that Corporate Debtor do not satisfy the test at all as laid down in the **Arcelor Mittal** case. In view of the above said discussions, I am of the considered view that SIPL (H-1 Bidder) is not a disqualified person as per section 29A of the Code. Being satisfied that the objections raised as against the ranking of SIPL as H-1 bidder are without any merits, and are feeble and unsustainable under law, this application is liable to be dismissed with cost of Rs. One Lakh payable by the applicant to the Registry by way of Bank Draft in favour of Registrar, NCLT, Kolkata within one month from the receipt of this order. Considering the peculiar nature and circumstances of this case, awarding cost of **Rs. 1,00,000/- (Rupees One Lakh Only)** appears to me to be fair and just.

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Accordingly, this C.A. is dismissed with cost of Rs. One Lakh only.

Therefore, the **C.A. (IB) No. 810/KB/2018** is **disposed of** accordingly.

Sd
8/4/19.

(Jinan K.R.)
Member (J)

Signed on this 8th day of April, 2019.

/pd/vc

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CA (IB) No.1167/KB/2018

CP (IB) No.595/KB/2017

Coram: Shri Jinan K.R., Member (J)

In the matter of:

An application under Section 30(2) of the Insolvency and Bankruptcy Code, 2016.

And

In the matter of:

M/S. MSTC LIMITED, a Public Sector Undertaking under the Govt. Of India, having its Registered Office at 225C A.J.C. Bose Road, Kolkata 700071

.....Petitioner/Applicant

-VS-

1. **SHRI VIJAYKUMAR V IYER**, Son of Shri Vaidheeswaran Iyer, having Office at Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 3, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai - 400013. (Resolution Professional)

Respondent No.1

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1. **M/S. SPS STEELS ROLLING MILLS LIMITED**, a company incorporated under the Companies Act, 1956 and a Company within the meaning of Companies Act, 2013 and having its Registered Office at 224A, AJC Bose Road, Kolkata 700019.

.....Respondent No.2

Order Delivered on: 8th day of April, 2019

Counsels present:

1. MR. BARNIK GHOSH, Advocate	**] For MSTC Limited**
2. MR. AMITESH P. RAY, Advocate	**]**
3. MR JISHNU SAHA, Sr. Advocate	**] For the**
4. MR. SUHANI DWIVEDI, Advocate	**] Resolution**
5. MR. DEEPANJAN DUTTA ROY,	**] Professional/R-1**
Advocate	**]**
6. MR. OM NARAYAN RAI, Advocate	**]**
7. MR. SAIKAT RAY CHOWDHURY,	**] For CoC**
Advocate	**]**
8. MR RATNANKO BANERJI,	**] For the**
Sr. Advocate	**] Respondent/R-2**
9. MS. MANJU BHUTERIA, Advocate	**]**

Sd

ORDER

Per Jinan K.R., Member (Judicial)

1. This application being **CA (IB) No.1167/KB/2018** has been filed by the Applicant/petitioner before this Tribunal with the following prayers: -

i. To direct the Respondent No.1 to confirm the status of the claim of the Petitioner, a secured creditor in priority to the claims of the Financial Creditors;

ii. To direct the Respondent No.1 to declare that the outstanding claims of the Petitioner amounting to Rs. 300.44 crore (Rupees Three Hundred Crores Forty Four Lakhs Only) arising out of transactions be treated in priority to the claims of the Financial Creditors.

2. It is the case of the Applicant that the Applicant had entered into an agreement with the Respondent No.2 Company on 02/03/2010 and an Addendum dated 25/08/2017, wherein the Applicant had agreed to procure Pig Iron and other industrial raw material for and on behalf of the Respondent No.2. The procured raw materials would be pledged by the Respondent No.2 in favour of the Applicant. It was agreed between the parties upon receipt of the value of the pledged materials by the

Sd

quantity of pledged materials would be released from time to time by the Applicant to the Respondent No.2. It was also agreed between the parties in the event of shortfall in the quantity of pledged stock, the Respondent No.2 would be liable to pay with interest to the applicant.

3. The Applicant continued procurement of the materials, as per agreement, and the Respondent No.2 continued to pay for the same. However, subsequently, due to failure of the Respondent No.2 in paying for the procured materials, disputes arose and the matter was referred to arbitration and arbitration award was passed, which is annexed with the application marked as **Annexure 'C'.**

4. It is the case of the Applicant that Allahabad Bank, a Financial Creditor filed an application before this Tribunal wherein Respondent No.1 was appointed as the IRP, who published the public announcement. In response to the public announcement, the Applicant submitted its claim.

5. The Applicant submits that the Central Govt. has amended the regulation wherein it is stated "*The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors*". As the Applicant MSTC Ltd. is the Operational Creditor, it will get priority in payment over the Financial Creditor.

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6. The Applicant submits that the Applicant's pledged materials of Rs. 65.43 crores (Rupees Sixty Five Crores Forty Three Lakhs Only) have been illegally removed from the plant premises of the Respondent No.2 without pre-payment to the applicant. As such, the applicant lodged a criminal complaint against the directors and officials of the Respondent No.2.

7. The Applicant submits that the claim of the Applicant, to the extent of balance outstanding amount of Rs.300.44 crores as on 31/10/2018 be treated in priority to the claims of the Financial Creditors against the Respondent No.2. Under the aforesaid circumstances, the Applicant has made the prayer as stated above.

8. The Resolution Professional (RP) has filed a reply to the application filed by the Applicant wherein the RP has contended that the Applicant MSTC has been treated as a secured creditor for the CIRP of the Respondent No.2 Company (Corporate Debtor) and in the list of operational creditors as on 05.09.2018, MSTC has been categorised as "**Secured Creditor - Stock pledged with MSTC**" with a verified claim of Rs. 282,16,56,230.62/- (Rupees Two hundred Eighty Two Crores Sixteen Lakhs Fifty Six Thousand Two Hundred Thirty and Paise Sixty Two Only). The Resolution Plan approved by the CoC provides for the payment to the Operational Creditors under the

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Resolution Plan for payment to the Applicant in priority over the payments to the Financial Creditors. The RP in the 7^{th} meeting of the CoC intimated the applicant MSTC about the liquidation value due to it.

9. The RP submitted that pursuant to approval of the Resolution Plan by this Tribunal, the Applicant shall be entitled to the liquidation value of the pledged material lying with the Corporate Debtor, in priority over the Financial Creditors. As such, the RP submitted that the present application is premature, misconceived and based on inaccurate appreciation of facts.

10. In its rejoinder, the applicant submits that as per the I & B Code 2016, all secured creditors must be treated equally. There cannot be differential treatment between secured creditors and they cannot be put in two separate classification. The Applicant further submits that the Applicant is entitled to its entire value of materials pledged and not the liquidation value.

11. Heard Ld. Counsel for the Applicant as well as the Ld. Sr. Counsel for the RP and the Ld. Counsel for CoC. Perused the record.

12. The Applicant/ MSTC Ltd., a Central Public Sector undertaking under the Ministry of Steel, Govt. of India is in the business of facilitating transaction of import and

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export of raw materials of its customers. The Applicant had entered into an agreement with the Corporate Debtor/Respondent No.2 on 02/03/2010 wherein the Applicant had agreed to procure Pig Iron and other material for the corporate debtor. As per the terms of the said agreement, the applicant facilitated at the applicant's cost and expenses, the procurement of materials for and on behalf of the Corporate Debtor and upon procurement of such materials, the same would be pledged by the Corporate Debtor in favour of the applicant and upon receipt of payments by the Applicant towards the value of the pledged materials, the Applicant had to release proportionate quantity of pledged material from time to time to the Corporate Debtor. On the strength of the above said agreement, the Applicant has facilitated the procurement of 22144 MT of Pig Iron, 24008 MT of Sponge Iron, 31592 MT of Iron Ore and 22919 MT of MS Billets etc. to be given to the Respondent No.2 subject to payment for the same.

13. The RP has not objected the execution of the agreement. The applicant has submitted that while the RP and the CoC considered the claim of the Applicant, the applicant was not given priority in payment over the Financial Creditors as per the amended Regulation 38 of Insolvency and Bankruptcy Board of India (Insolvency

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Resolution Process for Corporate Persons) Regulations, 2016. The Regulation has been amended vide notification dated 05/10/2018 by providing *"the amount due to the Operational Creditor under Resolution Plan shall be given priority in payment over Financial Creditors."*

14. Referring to Regulation 38 read above, it is contended that the Applicant being an Operational Creditor will get priority in payment over the Financial Creditor and that such a priority has not been given to the Applicant herein and, therefore, the Resolution Plan approved by the CoC is in violation of the above said Regulation. It is also alleged that the Applicant has been considered as a secured creditor and, therefore, the claim of the Operational Creditor is to be treated as a claim of the secured creditor at par with the claim of the Financial Creditor. Upon the said contentions, the Applicant prays for issuing direction to the RP declaring that its claim be treated in priority to the claims of the Financial Creditors and the pledged material which has not been utilised by the Corporate Debtor is to be returned to the Applicant herein.

15. The contention that the Applicant MSTC is to be treated as a secured creditor on the strength of the pledge is not at all under challenge on the side of the RP. Ld. Sr.

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Counsel appearing for the RP, referring to **Annexure A**, a copy of list of creditors of the Corporate Debtor, submits that the applicant has been treated as a Secured Creditor for Corporate Resolution Process of the Corporate Debtor. Therefore, it is an admitted fact that the Operational Creditor herein has been treated as a secured creditor, in view of the fact that the memorandum of pledge admittedly was in force. A reference to the list of claim by Operational Creditors, it is understood that the Applicant herein has been ranked as 62nd claimant, and its claim is to the tune of Rs.297,36,01,404.00 (Rupees Two Hundred Ninety Seven Crores Thirty Six Lakhs One Thousand Four Hundred and Four Only) out of which the amount verified by the RP is to the tune of Rs. 282,16,56,230.62 and the applicant has been classified as secured creditor on the strength of stock pledged with the MSTC. So as per the reliefs sought for by the Applicant that the status of the applicant is to be confirmed as a secured creditor on the strength of the pledged stock by the Corporate Debtor has been squarely admitted by the RP. The objection in this regard is therefore found devoid of any merit.

16. Coming to the contention that no treatment has been given to the Applicant in priority to the claims of the Financial Creditors is also found devoid of any merit. As

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listed in **Annexure A,** the Applicant has been categorised as a secured creditor on the strength of the stock pledged with the MSTC and its verified claim has already been uploaded on the web site of the Corporate Debtor. Being confirmed as a secured creditor, the question is whether the declaration sought for by the applicant that its claim be treated in priority to the claims of the Financial Creditors, is to be considered in view of the amendment of the Regulation stated above. No doubt, as per the Regulation, the Operational Creditor of the Corporate Debtor is entitled to priority in payment over Financial Creditors. The Ld. Sr. Counsel for the RP has submitted that the claims of the Operational Creditors have been recognised by the CoC and provision has been made for payment to the Operational Creditors of the amount envisaged under the Resolution Plan for payment to MSTC in priority over the payment to Financial Creditors.

17. According to the Ld. Sr. Counsel for the RP, the Resolution Plan has been submitted in a sealed cover with the Registrar. The claim of the Applicant has been entertained by the CoC in its 11th meeting. According to the Ld. Sr. Counsel for the RP, the claim raised in the application has been considered by the CoC in the meeting held by the CoC and the Applicant has been summoned to appear in the meeting since the aggregate

Sd

dues of the Operational Creditor comes to more than 10% of the total debt of the Corporate Debtor and that notice has been sent to the MSTC and the representative of the MSTC has attended the meetings and the submissions of MSTC has been deliberated by the CoC and thereby deliberation has been recorded in the list of Operational Creditors after its claim has been verified. He further submits that MSTC cannot be said to have lien over the pledge material lying with the Corporate Debtor and that in regard to the pledge material lying with the Corporate Debtor, the liquidation value due to the MSTC has been arrived at and, therefore, MSTC cannot claim right over both the pledge material as well as its claim amount. The property pledged by the Corporate Debtor is the property of the Corporate Debtor and the pledged material has been taken into consideration by the RP and that MSTC cannot claim more than the amount entitled by it as a secured creditor and cannot invoke pledge sale as per the moratorium declared under Section 14 of the Code, he argued.

18. I find some force in the above said submission on the side of the RP. Admittedly, the applicant being an Operational Creditor, comes under the purview of section 30 (2) (b) of the Code. The statutory requirement to be satisfied in the nature of the claim in the case in hand is

Sd

that the distribution of financial bid amounting towards the Operational Creditors shall not be less than the amount to be paid to the Operational Creditor in the event of liquidation of the Corporate Debtor under section 53 of the Code. Here in this case, the CoC has distributed the financial bid amount judiciously. There are 161 Operational Creditors. None of the Operational Creditors other than the MSTC has come forward to challenge the distribution of the financial bid amount. Admittedly, MSTC got an allotment of Rs.8.56 Crores as against its claim of Rs. 300.44 crores.

19. At this juncture, Ld. Counsel for the MSTC referring to the judgement of the **Hon'ble NCLAT in M/s. Binani Industries Limited – Vs - Bank of Baroda in Company Appeal (AT) (Insolvency) No. 82 of 2018** submits that the Operational Creditor who is a secured Creditor has not been considered at par with the Financial Creditors and therefore there is discrimination in regards to allotment of the amount distributed by the CoC. According to him, a Secured Creditor here in this case is equal to the Financial Creditor who has got secured interest over the materials pledged to it and therefore is to be treated equally at par with the financial creditors.

20. The Ld. Sr. Counsel for the H-1 bidder as well as the Ld. Counsel for the Committee of Creditors referred to a

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judgement of the **Hon'ble Supreme Court** in **Swiss Ribbons Pvt. Ltd. And Another – Vs - Union of India and Others (2019 SCC online SC 73).** Para 30 of the above said decision reads as follows:

"The tests for violation of Article 14 of the Constitution of India, when legislation is challenged as being violative of the principle of equality, have been settled by this Court time and again. Since equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation. This aspect of Article 14 has been laid down in judgements too numerous to cite, from the very inception."

21. The above said propositions clearly describe how discrimination comes into play in a case of this nature. Discrimination comes into play when equally constituted creditors were treated differentially. Here in this case, the Secured Operational Creditor cannot be equated with the Financial Creditor. The distinction between the secured creditors and unsecured creditors and the Operational Creditor has also been dealt with by Hon'ble Supreme Court in the above cited case of **Swiss Ribbons Pvt. Ltd. and Another – Vs - Union of India and Others** (2019 SCC online SC 73). The Ld. Counsel appearing for the Operational Creditor has stressed his argument relying upon paras 44 & 45 of the above said judgement. It is also good to read the above said paragraphs:

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Para 44: ***"According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this Country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Service that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts***

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are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable."

Para 45: "Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."

22. The proposition laid down in the above said decision is squarely applicable in the case in hand. This is a case in which the Applicant has been classified as the secured creditor on the strength of a memorandum of pledge and not on the basis of loan agreement generally executed by the Financial Creditors by lending money to its Customers. MSTC is admittedly, a facilitator which entered into an agreement with the Corporate Debtor agreeing to facilitate the shipment of raw materials like Pig Iron, Iron Ore etc. The material brought is kept in the premises of the Corporate Debtor and the stock in use is to be pledged with MSTC till the Corporate Debtor pays off the amount due to MSTC. So MSTC only retains the possession of the pledged

Sd

materials until the payment, as per the contract is made. The Corporate Debtor retains the ownership. Therefore, the security in the case in hand is different than that of the security for availing a loan from the Financial Creditors.

23. In view of the above said discussions, it appears to me that the objections of the MSTC as regards the distribution of financial bids to the Operational Creditors are not discriminatory as alleged. In the above said circumstances, I do not find any justifiable reason to interfere with the decision of the CoC in allotting the amount found due to the applicant. The allotment is otherwise found in accordance with the provisions of the Code. Truly, there is nothing brought out on record to prove that the stand taken by the CoC that the applicant shall be entitled only to the liquidation value of the pledged material lying with the corporate debtor is incorrect. None of the relief sought for by the Applicant is therefore found liable to be allowed. The application is liable to be dismissed.

24. In the result, the **CA (IB) No.1167/KB/2018** is **dismissed**. However no order as to cost.

Sd
8/4/19
Jinan K.R.
Member (J)

Signed on this 8th day of April, 2019.

/VC

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CA (IB) No.277/KB/2019
CP (IB) No.595/KB/2017

In the matter of:

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

And

In the matter of:

M/S. SPS STEELS ROLLING MILLS LIMITED, a Company incorporated under the Companies Act, 1956 and a Company within the meaning of Companies Act, 2013 having its registered office and carrying on business at "Elegant Tower", No. 224A, A.J. C. Bose Road, Kolkata 700017.

.....Corporate Debtor

And

In the matter of:

M/S. TAKSHVI TMT MILLS PRIVATE LIMITED, having its Registered Office at 238-B, Acharya Jagadish Chandra Bose Road, 3rd Floor, Kolkata - 700020, in the State of West Bengal.

.....Applicant

Sd

And

In the matter of:

1. **SHRI VIJAYKUMAR V IYER**, Son of Shri Vaidheeswaran Iyer, having Office at Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 3, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai - 400013. (Resolution Professional of SPS)

.... Non-Applicant

Order Delivered on: 8th April 2019

Counsels present:

1. MR. S.N. MOOKHERJI, Sr. Advocate	**] For the**
2. MR. RATNANKO BANERJI, Sr. Advocate	**] Applicant**
3. MR. JISHNU SAHA, Sr. Advocate	**] For the**
4. MR. SUHANI DWIVEDI, Advocate	**] Respondent**
5. MR. DEEPANJAN DUTTA ROY, Advocate	**]**
6. MR. JOY SAHA, Sr. Advocate	**] For H1**
7. MS. SINTHIA BALA, Advocate	**] Bidder**
8. MR. OM NARAYAN RAI, Advocate	**] For CoC**
9. MR. SAIKAT RAY CHOWDHURY, Advocate	**]**

Sd

ORDER

Jinan K.R., Member (Judicial)

This application being **CA (IB) No.277/KB/2019**has been filed by the Applicant with the following prayers: -

i. Direction upon the Resolution Professional to disclose to the applicant a complete minute of 17th meeting of the CoC held on 14th February 2019 and the details and particulars of its challenge to the Permitted User Agreement between the Corporate Debtor and Dytron Marketing Services Private Limited, and Corporate Debtor and Prashant Properties Private Limited;

ii. Direction upon the Resolution Professional to reconvene a meeting of the CoC in consonance with the directions of the Hon'ble Supreme Court in its judgement dated 31/1/2019 for consideration of the applicant's improved bid for the CD;

iii. The Resolution Professional and/or CoC be directed to consider the increased offer of the applicant in respect of the resolution plan submitted on 10th May 2018 together with the revised financial offer made on 10/08/2018 and the further revised offer made on 25/2/2019 by way of an e mail sent to the RP, in line with its request in course of the 17th Meeting of the CoC.

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2. Brief facts of the case, as stated in the application are that the applicant is one of the resolution applicants of the Corporate Insolvency Resolution Process (CIRP) of the corporate debtor. Upon submission of the resolution plan by the applicant on 10/5/2018 and subsequent revision on 10/8/2018, the applicant emerged as H-2 in course of CIRP.

3. Subsequently, the applicant challenged the selection of SIPL as the H-1 in the CIRP of the corporate debtor and filed an application before the Tribunal being **CA (IB) No.810 of 2018**. The said interim application was filed challenging the selection of SIPL as H-1 on account of the unilateral change in the scoring methodology. The RP had filed reply to the said application and the H-1 had also filed a reply. The applicant had also filed its rejoinder in which the applicant herein had challenged the selection of SIPL as the H-1 applicant.

4. During pendency of **CA (IB) No.810 of 2018,** the suspended Board of Directors of the corporate debtor had filed a writ petition before the **Hon'ble Supreme Court being W.P. (Civil) No. 1266 of 2018** on account of non-furnishing of the resolution plan to the suspended Board of Directors of the corporate debtor wherein Hon'ble Supreme Court vide order dated 22/10/2018 had stayed the approval of the resolution plan submitted by H-1.

Ultimately the writ petition by a judgement dated 31/1/2019 was disposed of with certain directions.

5. It is the case of the applicant that thereafter, the applicant attended 17th CoC meeting held on 14/2/2019 wherein the applicant was informed that the suspended Board of Directors have made certain representations before the CoC. It was further intimated that one of the members of the suspended Board of Directors as also the nominee of the operational creditors had raised certain concerns pertaining to the provision made for operational creditors under the Resolution Plans submitted by both the Resolution Applicants. The applicant herein was further informed that the suspended Board of Directors has elaborated the reasons of the corporate debtor going into insolvency and historical antecedents and no exact details were available to the applicant.

6. The applicant sought an hour's time to table improved formal offer. Subsequently, the applicant was informed that the meeting of CoC was called off without affording the applicant an opportunity to table its improved offer within one hour.

7. It is the case of the applicant that the applicant had tendered an improved offer increasing its earlier offer to the RP by email dated 25/2/2019 in the interest of maximisation of proceeds in CIRP in line with the

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proposal of the applicant in the 17th meeting of the CoC with the improved financial offer as follows:-

i. Higher upfront payment to Financial Creditors.

ii. Higher amount earmarked for Operational Creditors of the corporate debtor.

iii. Provision for investment in the corporate debtor for improvement of operations.

iv. Equity of existing lenders.

8. The applicant submits that the purport of judgement of the Hon'ble Supreme Court was to allow an improved offer to be made before the CoC. By not allowing the applicant from improving its offer, the CoC and the RP have acted contrary to and in abrogation of the judgement of the Supreme Court. Under the aforesaid circumstances, the applicant has prayed before this Tribunal as stated above.

9. Shakambhari Ispat and Power Limited (SIPL), -1 Resolution Applicant filed reply to the application filed by the applicant. In its reply, it is stated that the applicant is neither a member of the suspended Board of Directors of the corporate debtor nor an operational creditor. The judgement and order of the Hon'ble Supreme Court dated 31/1/2019 deals with the rights of the suspended Board

Sd

of Directors and the operational creditors. As such, the applicant cannot seek to take any advantage of the order of the Hon'ble Supreme Court.

10. SIPL further submitted that 270 days period of the CIRP expired on 16/9/2018. Writ petition of the suspended Board of Directors was filed on 8/10/2018, after the expiry of the CIRP period. As such to restart and recommence the corporate insolvency resolution process by seeking to revise or increase the bid is contrary to law and the application is liable to be rejected and the attempt to make an improved offer by the applicant must be backed by proof of the ability and financial wherewithal of the applicant to honour such improved offer.

11. In reply to the application filed by the applicant, the RP has filed affidavit in opposition wherein it has been contended that the applicant has misunderstood the intent and scope of the judgement of the Hon'ble Supreme Court dated 31/1/2019 wherein the Hon'ble Supreme Court directed copies of the resolution plan to be provided to the erstwhile members of the Board of Directors of the corporate debtor. Thereafter, the RP was directed to convene a meeting of the CoC with the erstwhile members of the Board of Directors of the corporate debtor. The operative part of the judgement of the Supreme Court is quoted below:-

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"In each of these cases, the appellants will be given copies of all resolution plans submitted to the CoC within a period of two weeks from the date of this judgement. The resolution applicant is each of these cases will then convene a meeting of the CoC within two weeks thereafter, which will include the appellants as participants. The CoC will then deliberate on the resolution plans afresh and either reject them or approve of them with the requisite majority, after which, the further procedure detailed in the Code and the Regulations will be followed. For all these reasons, we are of the view that the petition and appeal must be allowed and the NCLAT judgement set aside."

12. It has been further stated that during the course of the CoC meeting held on 14/2/2019, the CoC decided not to provide additional time and opportunity to the applicant for revising its proposal since it is outside the scope of the judgement of the Hon'ble Supreme Court.

13. The RP further submitted that the improved offer sent by the applicant by email on 25/2/2019 for approval of the CoC has been sent to and shared with the CoC for their information and consideration. However, the RP has not received any reply from the CoC on the said email. As such, the RP prays the present application is liable to be rejected as false, frivolous and without any merit.

14. In its rejoinder filed by the applicant, the applicant reiterated the same averments what has been stated in its application. On the basis of the reply affidavit filed by the

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RP and CoC, the applicant also has chosen to file supplementary rejoinder raising similar contentions. The gist of the contention in the rejoinder is that the opposition raised by the RP, CoC and the H-1 bidder are cryptic, misconceived, erroneous and evasive and that the RP has failed to appreciate the purport and effect of the order of the Hon'ble Supreme Court dated 31/1/2019. For avoidance of repetition of the facts, I am not reproducing it.

15. Heard Ld. Sr. Counsels Mr. S.N. Mookherjee, Mr. Ratnanko Banerji appearing for and on behalf of the applicant, Ld. Sr. Counsel Mr. Jishnu Saha appearing for and on behalf of the RP, Ld. Sr. Counsel Mr. Joy Saha appearing for and on behalf of H-1 and Ld. Counsel Mr. Om Narayan Rai for the CoC, and perused the records.

16. This is the third application filed by one of the two resolution applicants, namely Takshvi TMT Mills Private Limited (In short TT Mills Ltd) whose resolution plan reached up to the final round of the bidding/outbidding process. This is an application mainly filed praying for reopening the bidding process for enabling the applicant to submit its revised financial offer. The Corporate Insolvency Resolution Process (CIRP) has been initiated in this case vide order dated 22.12.2017. The company petition being CP (IB) No.595/KB/2017 has been

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admitted by appointing Interim Resolution Professional (IRP) **Mr. Vijaykumar V. Iyer.** The **CIRP** was successfully completed within 270 days of the CIRP period which expired on 16.09.2018. **CA (IB) No. 871 of 2018** was filed by the Resolution professional (RP) on 10.09.2018 under Section 30(6) of the I & B Code, 2016 for approval of the resolution plan as approved by the CoC by 100% vote share, under Section 31(1) of the Code.

17. Pending consideration of the said application, one of the members of suspended board of directors filed W.P. (Civil) No. 1266 of 2018 before the Hon'ble SC, and Hon'ble S.C directed the AA not to approve the resolution plan. Vide common judgement dated 31.01.2019, the Hon'ble SC directed the CoC to provide copies of the resolution plans to the members of the suspended board of directors and operational creditors and to reconsider the plans after hearing them. In compliance of the direction, the CoC had convened the meeting and heard the suspended board of directors of the CD and the Operational creditors and re-approved the very same resolution plan of SIPL by very same vote share of 100%. Upon re-approval of the resolution plan, the RP filed the resolution plan along with a supplementary affidavit. It is this plan which is under challenge by the unsuccessful resolution applicant.

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18. This is an application purportedly filed on the strength of the judgement of the **Hon'ble Supreme Court in Civil Appeal No. 8430 of 2018** wherein the Ld. Sr. Counsel for the Applicant has relied upon Paragraph 22 of the Judgement for substantiating the argument that the Resolution Professional failed to give an opportunity to the Applicant to improve its offer despite the Hon'ble Supreme Court in the above said judgement directing the Resolution Professional to reconsider the Resolution Plan which has been approved by the Committee of Creditors by e-voting held on 03.09.2018 and on 04.09.2018. Upon getting approval of the resolution plan by 100% vote share, the RP has filed **CA (IB) NO. 871/KB/2018** u/s. 30(6) of the Code for the approval of the Plan. In the meanwhile, a WP (Civil) No.1266 of 2018 was filed before the Hon'ble S.C by Mr. Bipin Kumar Vohra & ors whereby vide order dated 22.10.2018 , the Hon'ble SC has directed the AA not to approve the resolution plan without the leave of the Hon'ble SC. That W.P was disposed by the Hon'ble S.C vide its common order dated 31.01.2019. The RP in compliance of the above judgement convened meeting of CoC on 14.02.2019 and heard the suspended Board of Directors of the Corporate Debtor and MSTC (operational Creditor). Upon hearing the views of the Directors and Operational Creditors, Resolution Applicants were given an opportunity to re-consider and modify their resolution plan in view of the observations made by the operational creditors and the

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directors, and put the resolution plan for re-voting.

19. After having many deliberations, the resolution plans of both the resolution applicants were reconsidered by the CoC and the same was put to **fresh voting** in the said meeting and the Plan of SIPL was again approved with a 100% voting share by the CoC members. Upon re-approval of the very same plan of SIPL, the RP filed a supplementary affidavit for the approval of the plan by the AA. It is at this juncture, this application has come up for consideration.

20. The Ld. Sr. Counsel for the applicant has submitted that on 14.02.2019 when the Committee of Creditors has convened the meeting for reconsidering the Resolution Plan, the applicant made a request to the Committee of Creditors to provide one hour for enabling the applicant to submit revised financial offer. However, the Committee of Creditors declined to provide that one hour and thereby on 25.02.2019, the applicant sent an e-mail to the RP requesting the Committee of Creditors to reconsider its increased financial offer which was not considered by the RP in violation of the directions in the above cited judgement. He prays for reconsideration of its financial offer submitted to the RP vide e-mail dated 25.02.2019.

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21. The Ld. Sr. Counsel appearing for the Resolution Professional as well as the Ld. Sr. Counsel appearing for the H-1 bidder as well as the Ld. Counsel appearing for the Committee of Creditors unanimously submitted that the Hon'ble Supreme Court has never issued any direction to reopen the Resolution Plan afresh so as to revise its earlier bid and according to them, the prayer for revising the bid making offer after the expiry of the period of CIRP process would be in violation of the Provisions of the Code and against the process for outbidding signed and agreed by the resolution applicants. According to the Ld. Sr. Counsel for the Resolution Professional, if it is permitted, the sanctity of the process for Outbidding agreed between the Resolution Applicants and the Resolution Professional would be lost and it is not permissible. Since this application is filed mainly on the strength of the above cited judgement, it is good to read para 22 of the Judgement relied upon on either side. It reads as follows:-

Para 22: "We may indicate that the time that has been utilized in these proceedings must be excluded from the period of the resolution process of the Corporate Debtor as has been held in Arcelormittal India Private Limited v. Satish Kumar Gupta, Civil Appeal Nos. 9402-9405/2018 (decided on 04.10.2018] (at paragraph 83). In each of these cases, the appellants will be given copies of all resolution plans submitted to the CoC within a period of two weeks from the date of this judgement. The resolution applicant in each of these cases will then convene a

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meeting of the CoC within two weeks thereafter, which will include the appellants as participants. The CoC will then deliberate on the resolution plans afresh and either reject them or approve of them with the requisite majority, after which, the further procedure detailed in the Code and the Regulations will be followed. For all these reasons, we are of the view that the petition and appeal must be allowed and the NCLAT judgement set aside"

22. At this juncture, the Ld. Sr. Counsel appearing for the Resolution Professional as well as the Ld. Counsel appearing for the H1 Bidder submitted that the prayers sought for in this application had already been made by the applicant before the AA during the course of the hearing held on 18.02.2019, and the said prayers had been disallowed by the AA, therefore, the applicant cannot seek to reopen the said issue again as the prayer is barred by the principles of *res judicata*. On 18.02.2019, this Bench passed the following orders disallowing the oral prayers of the applicant herein:-

"Citing the judgement of the Hon'ble Supreme Court, the Ld. Sr. Counsel appearing for the Resolution Professional submits that in compliance of the directions the Committee of Creditors convened the meeting by giving an opportunity to the erstwhile Directors of the Corporate Debtor and after hearing the erstwhile Directors both the Resolution Plans were considered afresh and the Resolution Plan which has been approved earlier has been re-affirmed as per the unanimous decision of the CoC and thereby to record the subsequent events took place after filing application for the approval of resolution plan RP has filed the Supplementary Affidavit. The said

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application, C.A. (IB) No. 871/KB/2018 has been filed for approval of the Resolution Plan by the Adjudicating Authority under Section 31(1) of the Code is pending for consideration.

At this juncture the Ld. Sr. Counsel appearing for the applicant in CA(IB) No. 810/KB/2018 submits that he is to be given an opportunity to file Supplementary Reply affidavit to the Supplementary Affidavit filed by the RP by directing the Resolution Professional to give a copy of the Supplementary Affidavit to the applicant for the reason that his requisition for reconsideration of the bid offer has not been considered by the Resolution Professional/CoC.

The Judgement of the Hon'ble Supreme Court has been read out to me at length. What I understood is that the Hon'ble Supreme Court has not directed to re-open the bidding by giving an opportunity to the Resolution Applicants, but directed the Resolution Professional/CoC to re-consider the Resolution Plan already considered by giving an opportunity to the appellant, Corporate Debtor who has been denied a copy of the Resolution Plan for raising their objections to the plan already approved and submitted for the approval after serving copy of the Resolution Plan to them.

According to the Ld. Sr. Counsel for the Resolution Professional a copy of the Resolution Plan has been served upon the Erstwhile Directors and they were heard and both Resolution Plans were considered afresh and put it for voting and the Resolution Plan already approved has been re-approved and therefore, the request on the side of the Applicant in CA(IB) No. 810/KB/2018 is liable to be rejected. I do find some force in the submission of the Ld. Sr. Counsel for the Resolution Professional. The prayer for issuing direction to serve copy of Supplementary Affidavit filed by the RP cannot be entertained in the light of judgement of the Hon'ble Supreme Court as submitted

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on the side of H2 bidder for the consideration of the points for determination in the application pending for the consideration.

In the aforesaid matter the prayer for issuing directions to the Resolution Professional for giving a copy of the Supplementary Affidavit filed along with the copy of the minutes of the CoC meeting held on 14th February, 2019 is disallowed. CA No. 810/KB/2018 is to be heard. List the C.A. along with all other pending C.As for hearing."

23. The Ld. Sr. Counsel appearing for the applicant (H1 Bidder) and Resolution Professional are also of the view that this Tribunal has no power to revise its own order and this Tribunal having taken note of the direction in the judgement of the Hon'ble Supreme Court cited above, it cannot pass an order directing the Resolution Professional to reopen the Bid.

24. The Ld. Sr. Counsel appearing for the Applicant referring to para 1 of the above cited judgement of Hon'ble S.C, submits that the issue answered by the Hon'ble Supreme Court in the above cited judgement is different than that of the issues considered by the AA on 18.02.2019 and that the Hon'ble S.C considered the question of providing a copy of the Resolution Plan to Members of the Suspended Board of Directors of the Corporate Debtor and thereby rule of *res judicata* is not applicable. Though the main issue in the above said judgement is not the issue as to whether a bidding process is to be reopened or not, in para 22 of the judgement above referred the Hon'ble S.C

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has clearly indicated that the Resolution Plan which has been approved in the case in hand is to be reconsidered for the sole purpose of hearing of the objection of the Operational Creditor and the members of the Suspended Board of Directors and nothing else. What I understood in the context of the facts in this case, is that in case the objections of the members of the Suspended Board of Directors are found worthy for consideration, the Committee of Creditors have been given liberty to reject the already approved Plan or re-approve the approved Plan considering their objections.

25. In view of the above said circumstances, I am of the considered view that the prayer for reconsideration of the resolution plan at the instance of any one of the resolution applicants is not at all an issue considered by the Hon'ble S.C. Therefore, entertaining such a prayer is outside the scope of the direction in the said judgement. Moreover, I am also of the view that the same prayers having been answered by me in the negative, I cannot reconsider the very same prayers which were disallowed by me vide order dated 18.02.2019. The very same prayers of the applicant having been rejected by me, it appears to me that I am not empowered to review my own order as there is no apparent error in the said order passed by me. It is also significant to note here that nobody challenged the said order and it is binding on me as there is no different

set of facts in this application brought to my notice. So also I am in full agreement with the argument advanced on the side of the RP that the present application is barred by principles of *res judicata.*

26. The Ld. Sr. Counsel for the applicant at this juncture has submitted that the Hon'ble Supreme Court has excluded the period of litigation in the light of Writ Petitions pending for consideration before the Hon'ble Supreme Court and therefore in the interest of maximization of value, the applicant's prayer for revising its financial offer is to be reconsidered. In the case in hand, the 270 period of CIRP has already been expired on 16.09.2018. The application being C.A. (IB) 871/KB/2018 u/s.30(6) of the Code for the approval of the resolution plan was filed on 10th September 2018. This AA was prevented from approving the said plan vide order dated 22.10.2018 of the Hon'ble SC in WP (Civil) No.1266/2018. That writ petition was disposed of by passing a common order in Civil Appeal No. 8430 of 2018 by the Hon'ble SC on 31.01.2019. In compliance of the direction in the above said judgement of the Hon'ble Supreme Court dated 31.01.2019, the RP has submitted a Supplementary Affidavit on 18.02.2019 for the approval of the Resolution Plan which has been re-approved with a 100% vote share and it is that application which is pending for consideration

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and thereby no question of exclusion of period of CIRP is applicable in this case.

27. On 16.09.2018, the CIRP period was expired. The Resolution Plan was placed before the CoC in its 14th meeting held on 01.09.2018 for the approval of the CoC. The Plan was put to voting and voting has held on 02.09.2018 and on 03.09.2018. The Plan was approved with 100% vote share. It is this plan again put to voting in the 17th CoC meeting held on 14.02.2019 in compliance of the directions issued by the Hon'ble Supreme Court vide its order dated 31st January 2019. The Hon'ble SC excluded the period utilized by the Hon'ble Supreme Court in the proceedings pending before it. The said exclusion seems to have been applicable to the cases wherein the CIRP period had expired during the pendency of the matter before the Hon'ble SC. The Hon'ble Supreme Court has considered several Writ Petitions and passed a common judgement in the said Writ Petition and in the case in hand, there being a Resolution Plan which has been already approved within the period of 270 days and reconsideration was ordered for a limited purpose discussed above, the question of exclusion of period of CIRP, in the peculiar nature and circumstances of this case, for enabling me to re-open the financial bid does not arise for consideration. Therefore, it appears to me that applying the proposition laid down in the above said judgement, this Adjudicating

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Authority is not empowered to exclude the period for the purpose of reconsideration of revised financial offer belatedly submitted by the Resolution Applicant to the Resolution Professional.

28. The Hon'ble Supreme Court having not directed to reopen the bidding process again in the instant case, I do not find any illegality committed by the Resolution Professional or the Committee of Creditors in not permitting the Resolution Applicant's prayer for enabling it to resubmit its improved Financial Offer. Allowing such a prayer would amount to violation of the proposition laid down in the above said judgement and also upset the Process for Outbidding signed and consented by the Resolution Applicants.

29. At this juncture, the Ld. Sr. Counsel appearing for the applicant submitted that in the interest of maximisation of value, the Applicant having submitted an improved financial offer on 25.02.2019 enhancing the financial bid to the tune of Rs. 40 crores, one more opportunity is to be given for reconsideration of the resolution plan of the Applicant. The maximum period of 270 days permissible under Section 12 of the Code was expired on 16.09.2018. The applicant has been given several opportunities to revise its bids. On 14.02.2019, when the resolution plans were re-considered as per the

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direction of the Hon'ble S.C., one more opportunity was again given to the Applicant for outbidding the SIPL as per the process for outbidding, but it failed to make any improved offers. According to the applicant, it asked for one hour's time which was declined by the CoC.

30. The applicant has not informed the RP or the CoC about the improved bid amount till 25.02.2019. Since the period of CIRP was expired long before the submission of the revised bid amount to the CoC and to the RP, non consideration of the revised bid by the CoC is not at all a violation of any of the provisions of the Code. In **K. Sashidhar V.Indian Overseas Bank and Others;** [2019] 148 CLA 497 (SC) it has been held that "*It is not open to the Adjudicating Authority to entertain a revised resolution plan after the expiry of the statutory period of 270 days*". In view of the above said circumstances, even if the applicant showed its readiness to improve the bids, it being submitted after the re-approval of the plan and after the expiry of the maximum period permissible under Section 12 of the Code, giving one more opportunity may amount to upsetting a process consented by the applicants themselves. Moreover, if I allow its prayer, it would amount to extending the CIRP period beyond 270 days which is impermissible under Section 12 of the Code.

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31. In the above said facts and circumstances, this application deserves no consideration. It is liable to be dismissed.

32. In the result, the **CA (IB) No. 277/KB/2019 is dismissed.** However, no order as to cost.

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8/4/19

Jinan K.R.

Member (J)

Signed on this 8th day of April, 2019.

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