National Company Law Tribunal ITEM NO : 168

Allahabad Bench

C A No. 223/2018 & CA No. 266/2018 in CP No.(IB) 77/ALD/2017

ATTENDENCE - CUM-ORDER SHEET OF THE HEARING OF ALLAHABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 04.06.2019

NAME OF THE COMPANY: Jaypee Greens Krescent Homes Buyers Welfare Association Vs. Jaypee Infratech Ltd.

SECTION OF I & B CODE: 60(5)(c) IBC

Sl. NO.	Name	Designation	Representation	Signature
1.				
2.				

CA NO. 223/2018 & CA NO. 266/2018 IN CP NO.(IB) 77/ALD/2017

Sh. Shubham Agarwal holding brief of Sh. Rahul Agarwal, Advocate for the IDBI Bank.

The present case is taken up for pronouncement of order as passed by the Learned Member of the Reference Bench, which is received on 3rd June, 2019. The order (as passed by the Reference Bench) is pronounced in the open Court. The parties are liberty to act as per the order.

A copy of the order (as passed by the Reference Bench) be provided to the concern party at their request.

The matter is fixed for further consideration.

List the matter on 15th July, 2019.

Dated: 04.06.2019

—Sd—

SAROJ RAJWARE,
MEMBER (T)

—Sd—

H.P. CHATURVEDI,
MEMBER (J)

Typed by:
Md. Zaid
(Stenographer)

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH III (IN REFERENCE)
NEW DELHI

CA.495(PB)/2019
With
CA No.223/ALD/2018
& CA.No.266/ALD/2018 in
CP No.(IB)77/ALD/2017

IN THE MATTER OF SECTION under Section 60(5)(c) of Insolvency and Bankruptcy Code, 2016).

In the matter of:

IDBI Bank Limited **...Financial Creditor**

Versus

Jaypee Infratech Limited **.... CORPORATE DEBTOR**

Coram:

R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)

Counsel for the Applicant In CA.No.223/ALD/2018 : **Mr. Rahul Agarwal, Mr. Bishwajit Dubey, Mr. Uday Khare, Mr. Sharajit Banerji, Mr. Aditya Marwah,Advocates**

Counsel for Respondent / Applicant in CA No.495/PB/ 2019 & CA No.266/ALD/2018 : **Mr. Sumit Batra, Mr. Sanjay Bhatt, Ms. Srishti Kapoor, Advocates**

Counsel for IBBI **Mr Mithun Shashank & Mr Vasanth Bharni, Advocates**

Counsel for MCA **: Mr Balooni, Company Prosecutor**

ORDER

1) This reference Bench of the Tribunal vide order dated 15.04.2019 has delineated in detail, the question referred to it arising out of the difference of opinion expressed by the Hon'ble Members of Allahabad Bench vide their order dated 13.12.2018 and thereafter, in exercise of the powers vested in the Hon'ble President, NCLT under Section 419(5) of the Companies Act, 2013, the same being referred to it. The said order dated 15.04.2019 also records in detail the facts and circumstances leading to the reference as well as circumstances which in the opinion of this reference Bench necessitating for it, seeking the views of Union of India, through the Ministry of Corporate Affairs and the Insolvency and Bankruptcy Board of India (IBBI), being the Regulator which had framed the Regulations for their inputs in relation to the issue on hand. With a view to obviate repetition, however to make the present order more intelligible and for immediate reference, the earlier order dated 15.04.2019 is annexed to the present order as Annexure 'A'.

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2) In relation to the applications as filed by the Home Buyers Association on the one hand and on the other by IDBI on behalf of the Lenders, to recapitulate only the question of law as framed by the Hon'ble Members of NCLT, Allahabad and the respective decisions rendered by each of them, in relation to the same, for ready reference is reproduced as under:

Question of law raised in the order of NCLT, Allahabad Division Bench:

i. The question of law that has been raised in both applications, one by Nine Home Buyers Association and other by eight Financial Creditors, all of them being the members of Committee of Creditors(CoC) is whether the various threshold voting share fixed for the decision of the CoC under various sections of the I & B Code needs to be followed literally or whether they are only directory, and if so, what procedure has to be followed in determining the voting percentage among the CoC to pass a particular resolution.

Decision of Hon'ble Member (Judicial)

ii. Therefore , in order to advance the object of I & B Code and the Amendment Act 2 of 2018 and with a view to safeguard the interests of all classes of creditors and all stakeholders, I am of the considered view, "That in case where the CoC comprise Real Estate Class of creditors upto 50% of voting share or more than when there is a

dead lock in passing the resolutions , the highest number of voting share in favour of the resolution has to be taken into consideration without looking into the threshold limit provided under various provisions of the I&B Code, except for the purpose of withdrawal of the petition, the approval of the resolution plan, and liquidation i.e under Section 12A,30(4) and 33(2) respectively, so that CIRP would continue for the time being in the meanwhile the Central Government may bring amendment to the relevant provisions of the I&B Code and CIRP regulations prescribing the procedure to be followed in determining the voting share for passing various resolutions where CoC comprise of Real Estate Class of Creditors 50% or more and when there is dead lock in passing the resolutions, or else the CIRP which remained static continue to be the same not only in this case, but in the cases of similar nature where Real Estate /Home Buyers as a class that comprise majority percent voting share abstain from voting."

Decision of Hon'ble Member (Technical)

iii) In the case on hand, even if all Banks and 17% of Home Buyers vote in favour of the Resolution Plan, it will still not sail through as it would not receive mandatory voting percentage of 66%.Therefore, required important/crucial decisions will still fail U/s 12A, 30(4) and 33(2), bringing CIRP to a halt at these crucial stages. Therefore, the lasting solution to the problem of dead lock

can only be found by treating Home Buyers as a class and their voting pattern taken with reference to total voting share of the class, to reflect the will of the class.

3) It is pertinent to note that the decision of the Committee of Creditors (COC) and the resolutions passed there at for enabling the smooth progress of a Corporate Insolvency Resolution Process (CIRP) of a Corporate Debtor (CD) are primarily driven by the voting strength exercised by the financial creditors as its members in accordance with the provisions of IBC, 2016 and the regulations framed thereunder. As already brought out in the order dated 15.04.2019, at paragraph 3 of the said order annexed as Annexure 'A" to the present order, differing voting share percentages have been prescribed under Insolvency and Bankruptcy Code, 2016 (IBC) for passing a particular resolution, whether it be for the appointment of a Resolution Professional (RP) or for say approval of a resolution plan. "Voting share" for the purpose of IBC,2016, and thereby for ascertaining whether the respective threshold percentage limits have been attained or not, has been defined under Section 5(28) of IBC,2016 which is to the following effect:

5(28) "voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

4) The above definition of voting strength has not undergone any change since IBC, 2016 was brought into force on and from 01.12.2016, despite two amendments in the meanwhile being brought into effect, namely Insolvency and Bankruptcy Code (Amendment) Act, 2018 (for brevity called as Amendment Act, 2018) with retrospective effect on and from 23.11.2017, and Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (for brevity called as Second Amendment Act, 2018) again made effective with retrospective effect on and from 06.06.2018. Going by the above definition, it is clear that the voting share is required to be computed in relation to the share of voting right of a single financial creditor based on the proportion of the financial debt owed to the said financial creditor by the corporate debtor i.e) the total financial debt owed by the corporate debtor. For eg) if the total financial debt owed by the Corporate Debtor is say Rs.10000/- and in relation to a particular financial creditor it owes, say Rs.2000/- the voting share of that particular financial creditor as required to be computed which is evident from the above definition and for easy comprehension condensed hereunder by way of a formulae for a better understanding, will be 2 out of 10 or percentage wise 20%, i.e:-

$$\frac{\text{Financial debt owed to a single Financial Creditor} \quad * 100}{\text{Financial debt owed by the Corporate Debtor}} = \frac{2000 \quad * 100}{10000}$$

* '100' included in the above formulae, though not included in the definition, for obtaining the voting share percentage of a single financial creditor.

5) 'Financial Creditor' and 'Financial Debt' for the purpose of better understanding the terms respectively used in the definition of `voting share' under Section 5(28) takes its colour from the said terms defined as such under Section 5(7) and Section 5(8) of IBC,2016. Section 5(8) of IBC,2016, it must be noted, has undergone a significant change, as compared to the one at the time when IBC, 2016 was brought into force, by virtue of inclusion of an explanation to clause(f) of sub-section (8) of Section 5, whereby 'Home Buyers' as presently popularly called have been included in relation to a real estate transaction fulfilling the conditions as laid down in the said explanation. It is another matter that the vires of the said explanation to Section 5(8)(f) in itself is under challenge mooted by the real estate developing companies before the Hon'ble Supreme Court and which has also been consistently granting a stay of the proceedings before NCLT; i.e. this Tribunal in relation to the petitions initiated by the Home Buyers as financial creditors and the lead petition being W.P(C)No.43 of 2019 pending before the Hon'ble Supreme Court in the matter of Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.

6) Be that as it may, for the present and as the position as it stands today, a 'Home Buyer' by virtue of explanation to Section 5(8)(f) of IBC,2016 is a 'financial creditor' as defined by virtue of which inclusion it has

enabled a Home Buyer to be a part of the COC of the Corporate Debtor and to vote in the CoC of the Corporate Debtor with an individual voting share of his own in the CoC, the constitution of which is governed by Section 21 of IBC,2016. Upon a reading of Section 21 it is evident from sub-Section (2) of Section 21 that the CoC to be constituted by the Interim Resolution Professional (IRP) shall comprise all financial creditors of the Corporate Debtor, subject to the exclusion of 'a related party' of a Corporate Debtor from the CoC as provided in the 1st proviso to sub-Section (2) of Section 21. Further sub-sections (3), (4) and (5) of Section 21 also provides as to how the financial debt and voting share are required to be computed in case of existence of peculiar circumstances under a given situation, namely, in relation to a consortium agreement whereby a financial debt is owed to more than one financial creditor and also in relation to a financial creditor having a claim against a Corporate Debtor, in addition to a financial debt, of an 'Operational Debt'. Sub-Section (6) of Section 21 provides the manner of representation, participation and voting of a financial creditor falling under sub-Section (3) of Section 21 of IBC,2016 in the CoC. Sub-Section (6A) of Section 21 added and brought into effect from 06.06.2018 by virtue of the Second Amendment Act, 2018 provides as to when an authorized representative can act on behalf of one or more of financial creditors under situations contemplated under clauses (a) to (c) of the said sub-Section (6A) to Section 21 and the manner of representation,

participation and voting under such circumstances by an authorized representative on behalf of a financial creditor or a class of creditors exceeding the number as may be specified by the Board, meaning IBBI as defined under Section 3(1) of IBC,2016.

7) IBBI, by virtue of Regulation 2(aa) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, for brevity called hereinafter as CIRP Regulations, has sought to define "class of creditors" under which it is seen that in order to form a class, it must have at least ten financial creditors falling under the class. Under sub-Section (7) of Section 21 the Board has been given the power to specify the manner of voting and determining of the voting share in respect of financial debts covered under sub-Section (6) and (6A) ,and under sub-Section(8) of Section 21, it is provided that all the decisions of CoC shall be taken by a vote of not less than fifty one per cent of voting share of the financial creditors, except as otherwise provided in the Code.

8) The manner in which an Authorised Representative can act on behalf of a financial creditor as required to be chosen under the circumstances contemplated in sub-Section(6) and (6A) of Section 21, in relation to participation and voting has been detailed in Section 25A of the Code, namely IBC,2016 incorporated again by virtue of Second Amendment Act, 2018 and which for ready reference is extracted hereunder:

Rights and duties of authorised representative of financial creditors.

25A. (1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

(underline supplied)

(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions.

Provided *that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share.*

Provided further *that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.* ***(italics supplied for emphasis)***

(4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution

professional or resolution professional, as the case may be.

Explanation- For the purposes of this section, the "electronic means" shall be such as may be specified.

9) The manner of selecting the authorized representative, necessitated in view of Section 21(6) and 21(6A) read with Section 25A of IBC,2016, even though not provided for in IBC,2016, however, has been provided in the CIRP Regulations by the regulator namely IBBI, more particularly under Regulation 4A and Regulation 16A of the said Regulations brought into effect from 03.07.2018 and since particular emphasis was sought to be placed on the part of the home buyers in relation to the said Regulations, particularly in relation to ascertaining the class of creditors by the IRP and his choice by the highest numbers belonging to a particular class, the said regulations 4A and 16A are reproduced hereunder for ready reference:

Choice of authorised representative

4A (1) On an examination of books of account and other relevant records of the corporate debtor, the interim resolution professional *shall ascertain class(s) of creditors*, if any. (**italics supplied**)

(2) For representation of creditors in a class ascertained under sub-regulation (1) in the committee, the interim resolution professional shall identify three insolvency professionals who are-

(a) not his relatives or related parties;

(b) eligible to be insolvency professionals under regulation 3; and

(c) willing to act as authorised representative of creditors in the class.

(3) The interim resolution professional shall obtain the consent of each insolvency professional identified under sub-regulation

(2) to act as the authorised representative of creditors in the class in Form AB of the Schedule.]

Authorised Representative

(1)The interim resolution professional shall select the insolvency professional, *who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class*:

(**italics supplied**)

Provided that the choice for an insolvency professional to act as authorized representative in Form CA received under sub-regulation (2) of regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall

provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated. Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties. (**italics supplied**)

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of the committee (Rs)
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

10) A broad scheme of the relevant provisions of IBC, 2016 and the regulations, namely, the CIRP Regulations has been given as above broached by the parties as relevant for the issue under consideration. In addition, relevant sections of IBC, 2016 as well as the CIRP regulations which have not been extracted as above will be considered and dealt with at the appropriate place in the instant order in paragraphs *infra*.

11) Now turning to the submissions of the Home Buyers and Lenders who it is claimed as of February 2019 to be constituting 59.1% and 40.8% respectively of the voting share in the CoC with the remaining 0.09% ascribed to that of Fixed Deposit holders, of which percentages there seems to be no major dispute, however, there exists a difference of view in relation to the voting share to be taken into consideration in relation to the home buyers in the CoC and thereby impinging on the computation of overall voting share percentage of CoC. The first question which arises is as to whether the aggregate voting share should be computed based only on the individual voting share of those financial creditors who have chosen to give specific instructions to their Authorised Representative (AR) in relation to voting for a particular resolution or the majority voting share percentage of that particular class, namely, home buyers obtained in relation to a particular

resolution should be treated as the voting share percentage of the entire class of home buyers, thereby automatically assuming the voting share of individual financial creditors who had chosen to abstain, for whatever reasons best known to them, as an affirmative vote for the majority decision of that class, namely home buyers, who have chosen to exercise their voting share by giving specific instruction in this regard to their AR. The next question which also arises in light of the differing view expressed by the stakeholders is in relation to computing the voting strength obtained for resolution(s) based on total voting share percentage in value terms or to be considered in relation to voting share of members on the principle of members who are 'present and voting' for the resolution(s). The above difference of view of the home buyers on the one hand and the lenders on the other, has led to each of these financial creditors jockeying their respective stands by trying to interpret the provisions of IBC, 2016 and the CIRP Regulations to suit their convenience before this Tribunal, be it before this reference bench or before the Regular bench, as well as based on their dogmatic approach in digging their heels in the CoC as well, thereby completely putting the resolution process of the corporate debtor as well as the CIRP into a jeopardy, which obviously is not in the interest of any of the stakeholder concerned and is neither conducive, taking into consideration the

avowed objects for which IBC, 2016 was brought in to effect as reflected in the Statements of objects and reasons for enacting IBC, 2016, interalia, for timely resolution of insolvency to support development of credit markets and encourage entrepreneurship nor in the interest of the financial creditors themselves, when an onus has been placed upon them by the provisions of IBC, 2016 and as reinforced by the Hon'ble Supreme Court in several of its decisions including in Innoventive Industries Ltd Vs. ICICI Bank & Anr in Civil Appeal Nos.8337-8338 dated 31.08.2017, wherein extracts of Bankruptcy Law Reforms Committee of November, 2015 was reproduced by the Hon'ble Supreme Court, more particularly at paragraph 16 of the said judgement, with particular emphasis that once a default takes place control is supposed to transfer to the creditors and equity owner having no say and to also highlight that speed is the essence for insolvency resolution and the longer the delay, the more likely it is that liquidation will be the answer, thereby making it imperative for the financial creditors to make all out efforts to pilot the corporate debtor out of the troubled waters it faces due to the crisis of insolvency, before allowing the corporate debtor to sink into liquidation thereby taking along with it the entire body of creditors, including workmen and employees, all of which are not conducive for any of the stake holder nor to the economic welfare of the nation which

also made the Hon'ble Supreme Court to observe that every effort should be made to try and see that the corporate debtor should be kept as a going concern and resolution should be given every chance and in effect holding that resolution should be the norm and liquidation to be an exception as was held in Arcelormittal India Pvt. Ltd vs. Satish Kumar Gupta & Ors in Civil Appeal Nos.9402-9405 of 2018. This position has been again reaffirmed in the matter of Swiss Ribbons (P) Ltd and another v. Union of India and others in WP(C) No.99 of 2018 and other connected writ petitions by the Hon'ble Supreme Court, while dealing with the primary focus of IBC, 2016, at paragraph 12 of the said judgement wherein it has been stated that it is to ensure revival and continuation of the corporate debtor rather than a corporate death by liquidation and cannot be used as a mere recovery legislation of the creditors.

12) At this stage it is also required to note that even in relation to a company which is more than adequately solvent, a dead lock situation may arise due to disputes between the promoters/shareholders of a company who are in control of the affairs of the company due to several factors including competing claims, however to resolve such a dead lock, this Tribunal under the provisions of Companies Act, 2013 has been vested with an

equitable jurisdiction and failing in its efforts to resolve the deadlock, to order winding up of the company in exercise of the said jurisdiction. However, as an adjudicating authority under IBC, 2016 which constitutes a separate code by itself, as stated by the Hon'ble Supreme Court, this Tribunal only has limited powers even in relation to approval or rejection of a resolution plan under Section 30(4) read with Section 31 of IBC, 2016 and the attendant regulations thereunder as being commercial decisions and cannot to seek to judicially review the decisions of COC and that such an exercise of jurisdiction cannot be assumed to itself which has been in effect abhorred by the Hon'ble Supreme Court in K.Sashidhar vs. Indian Overseas Bank & Ors in Civil Appeal No.10673 of 2018. Still on the decision rendered as recently as 05.02.2019, the Hon'ble Supreme Court in relation to the approval of resolution plan and construing Section 30(4) of IBC, 2016 and the threshold limit to be achieved for an approval of resolution plan has observed as follows at paragraph 26 in the judgement to quote:

> **What is significant is the second part of the said provision, which stipulates the requisite threshold of "*not less than seventy five percent of voting share of the financial creditors*" to treat the resolution plan as duly approved by the CoC. That stipulation is the quintessence and made mandatory for approval of the resolution plan. Any other interpretation would**

result in rewriting of the provision and doing violence to the legislative intent.

Presently by virtue of the Amendment Act of 2018 and Second Amendment Act, 2018, Section 30(4) has been amended and the words given within quotes in the highlighted portion as above stands amended, on and from 06.06.2018, to read as 66% instead of the earlier 75% without in any way altering the necessity to obtain ***not less*** than the prescribed voting percentage. Thus, whether pre or post amendment of Section 30(4) of IBC, 2016, the necessity to obtain not less than the prescribed percentage stands as such and the attainment of which percentage is a condition precedent as it has been held to be mandatory by the Hon'ble Supreme Court. Thus, it necessarily follows that where similar phraseology is used in IBC, 2016 for the purpose of attaining a threshold percentage in order for a resolution to be considered as approved, the said percentage is required to be achieved and are hence required to be treated as mandatory. For eg) in sub section (8) of Section 21 of IBC, 2016 it has been provided that all decisions of the CoC shall be taken by a vote of not less than fifty-one percent of voting share of the financial creditors. A similar use of expression has been made by the legislature in Section 33(2) of IBC, 2016 in relation to the resolution as passed by the CoC to muster a voting of "not less than sixty six percent of the voting share" in relation to the liquidation of the corporate debtor under the circumstances stated therein. Again, under Section 22(2) in

the appointment of IRP as an RP, the resolution is required to attain a majority vote of not less than 66 percent of the voting share. Hence in the teeth of judgement of the Hon'ble Supreme Court in K.Sashidar's case, this reference bench is not able accept, the simplistic view, that save the three provisions as given in the decision of Hon'ble Member (Judicial) of Allahabad Bench to be treated as mandatory, the other threshold limits prescribed are to be treated only as directory as the said interpretation or construction, as observed by the Hon'ble Supreme Court would be doing violence to legislative intent.

13) However, in comparison, in relation to Section 12A, 12(2), 27(2) and 28(3) of IBC, 2016 the usage of "not less than" has been consciously avoided by the Legislature as evident from the extract below of the said relevant portions, namely the sub-section alone of the concerned sections: -

12A:

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

12(2)

The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of (sixty-six) per cent of the voting shares.

27(2)

The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

28(3)

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

14) Even though in relation to the above provisions there is a scope for different interpretation, taking into consideration the specific language used by the legislature as compared to the one used in Section 30(4) or such other provisions as were referred to earlier, whether an interpretation as sought to be given that the same can be considered only as directory does not lend any credence as the specified voting share percentages are required to be achieved as held in relation to Section 12A by the Hon'ble Supreme Court in the matter of Swiss Ribbons (P) Ltd and another v. Union of India and others vide paragraph 53 of the judgement rendered on 25.01.2019 to the effect that the high threshold of 90% of the CoC has to allow withdrawal as all financial creditors have to put their heads together to allow such

withdrawal and it explains why substantially almost all the financial creditors have to grant their approval and that in any case, the figure of ninety percent, in the absence of anything to show that it is arbitrary, must pertain to the domain of legislative policy. The above judgement was rendered, it must be noted when a challenge was mounted to the constitutional validity to the provisions of IBC, 2016 and the Hon'ble Supreme Court has held as above while specifically dealing with Section 12A as noted above. In view of the same, it is best left to the legislative policy and intent when it has chosen to fix specific voting share under the different provisions of IBC, 2016 to be garnered for approval of a resolution under a given situation as enunciated under the respective provisions itself and to hold otherwise would be doing violence to legislative intent and in relation to this aspect the reference bench of this tribunal is hence in concord with the view expressed by the Hon'ble Member (Technical) to the effect that merely treating certain threshold limits fixed as mandatory and others as directory will not be a solution to the problem. .

15)Again, having considered the judicial precedents as above and keeping same into consideration, let us now look to the submissions made by the respective counsels for the parties as well as upon notice, by the Ministry of Corporate Affairs through an affidavit filed by the Regional Director, Northern Region as well as IBBI, the regulator which have also come out with its views taking into consideration, public importance. For sake of brevity, the essence of their submissions under the respective captions alone are extracted as hereunder: -

i) HOME BUYERS

It is contended on behalf of the Home Buyers that the home buyers are a distinct "class" of financial creditors and a rule of majority among that class should be used to consider as the view of that "class" in relation to CoC decisions and not based on the principle of present and voting in the CoC, be it in any mode. Further, home buyers it is also pointed are manifestly the class of creditors who have similar rights and expectations and being a distinct class can be represented through authorized representative, and that they are a class of financial creditors, distinct from the well-organized financial creditor like Banks, financial institutions and other like non-banking financial companies and unlike these financial creditors the home buyers of whom it is submitted might not have a proper understanding or access to the voting mechanism for (e.g) that some of the home buyers may be old and infirm while others might not be well conversant with computer and internet and that in effect they cannot be treated like well-organized financial creditors in relation to exercising their voting share, and hence a purposive interpretation is required to be given in this regard with a view to protect the interest of the home buyers and not to lead the Corporate Debtor to liquidation which will otherwise severely prejudice the home buyers. Thus it is submitted by the home buyers, the ratio of financial creditors belonging to their class abstaining from giving instructions in relation to their respective individual voting share is disproportionately high, consistently touching anywhere between the mark

of 35% to 45%, save one or two instances of resolution relating to seeking for extension of CIRP of the corporate debtor beyond the mandated date or for conduct of additional forensic vote, in which the voting share abstaining was to the extent of around 25% of the voting share. Thus, invariably by taking into consideration the voting share required to pass a resolution with 66% of the voting share of CoC does not get passed thereby leading to a complete stalemate in CIRP of the corporate debtor. Hence to break this stalemate or impasse arising out of disproportionate voting share of home buyers abstaining, it is advocated on the part of the homebuyers that by adopting the principle of class voting in respect of Home Buyers who are anyhow treated as a separate class under the provisions of IBC, 2016 relating to their representation and participation through the authorized representative, in relation to the voting as well, the said principle is required to be applied or extended by considering the majority votes polled and thereby applying the rule of majority of their class, be it by approving or disapproving a particular resolution, to be the will of the entire class of Home Buyers having a 59.1% voting share in the CoC. In effect including those who have abstained from voting to be counted as the voting share accruing to the majority who have voted one way or the other and at best only deducting the voting share relatable to the votes cast against the majority voting share. The resultant voting share so arrived at, it is submitted is to be extrapolated as the voting share of the entire class of home buyers in the CoC. It is beseeched on the part of the home buyers, that this can be achieved, if this

Tribunal gives a purposive interpretation to the existing provisions of IBC, 2016 and the attendant regulations framed thereunder being the CIRP Regulations, as given by the Hon'ble Principal Bench in the matter of *Nikhil Mehta & sons (HUF) & Ors v. AMR Infrastructure Ltd in CA No.811(PB)/2018 in (IB)-02(PB)/2017* dated 29.09.2018 and applying the ratio to the facts and circumstances of the instant case, which it is submitted will go a long way in resolving the impasse created in the CIRP of the corporate debtor. In this connection the exercise of choice of the AR by a class of creditors as prescribed under Regulation 4A read with Regulation 16A as already extracted in paragraphs supra it submitted should be adopted. It is further pointed out that because of the receding time limit of even the extended period of CIRP by 90 days, over and above the initial period of 180 days having been exhausted, the resolution of corporate debtor is bound to reach a dead end and thereby ultimately lead to its liquidation which in no way helps the majority of the financial creditors holding 59.1% voting share in the CoC, however, as expressed by the learned counsel seems to be the intent of Lenders.

ii) LENDER

However, on behalf of the Lenders a strong exception is taken that the lenders are not inclined towards a resolution, as sought to be projected by the Home Buyers and it is only a notion which is pre-conceived on the part of the home buyers. Learned counsel in this regard represents that even before the

Hon'ble Supreme Court in the matter of Chitra Sharma's case while it was pending before it, the lenders have expressed their intent to give preference for the resolution of the insolvency of the corporate debtor rather than its liquidation. It is further submitted in relation to voting share which had abstained, that the decision taken by the COC on the voting items of the corporate debtor must be a conscious one and not based on mere assumptions on the decisions that might have been taken by the creditors who have abstained from voting. In relation to home buyers stand that manner of choice adopted for selecting an AR to be also adopted in counting the voting share in the CoC as well, it is submitted on behalf of the lenders that a statutory provision which permits a particular way of doing something has to be followed only in accordance with that provision and not under some other provision where the legislature has consciously not permitted such a procedure. Thus, tribunal ought to consider approving of voting items that have received majority voting share of the COC members who are present and voting or alternatively the percentage of only voting members whether confirming or opposing the decisions (after excluding abstained voting) to be counted and to see if that meets the required percentage as specified under the provisions of IBC, 2016.

iii) IBBI

The board, in short has taken a view, that according to the amended sub regulation 25(3) of the CIRP Regulations, the RP shall take a vote of the

members of the committee present and voting. The board states that the stakeholder who with adequate notice and opportunity to participate, does not do so, should be deemed to have given his or her assent to the other stakeholder to decide on the matter at hand. This presumption is necessary to prevent decisions being stalled as a result of non-participation.

iv) CENTRAL GOVERNMENT

The Central Government as evident from the affidavit filed has taken, keeping in view the larger public interest and for actualizing the preamble of the code, an outcome-based approach which would facilitate resolution of Jaypee Infratech Ltd. (Corporate Debtor) over liquidation to be adopted. Therefore, it is stated that home buyer may be treated as a sub class within the ambit of financial creditors. It is further stated that the voting threshold as prescribed under the code are mandatory in nature and not directory and for the purpose of deciding share and manner of voting by home buyers the principle of 'present and voting' may be applied. The resulting majority vote by this manner/mechanism may be considered as the vote for the whole of the sub class of home buyers.

16) Before proceeding further, in relation to the citation as quoted on behalf of home buyers namely Nikhil Mehta & sons (HUF) & Ors v. AMR Infrastructure Ltd in CA No.811(PB)/2018 in (IB)-02(PB)/2017 dated 29.09.2018 to draw support to their contention that a majority vote of home buyers as a class

should be treated as the will of the entire class and to have it extrapolated into the decisions of the CoC, with respect the said citation can be distinguished on facts as in relation to the composition of CoC in the case cited, it was exclusively of home buyers only and not of any other type of financial creditor(s), however, in the instant case, the CoC is comprising of home buyers, lenders and depositors and it is also required to be observed that in the said decision itself, a caveat has been provided to this effect at paragraph 38 of the said decision to quote " Therefore we would say that in case of dead lock the preference can be given to the decisions taken by the highest percentage in the Committee of Creditors and section 22(2) must be regarded as directory in nature in case CoC is comprised 100% of class of creditors Real Estate (Commercial & Residential)". Nothing further is needed to be said as its applicability in itself is limited to the peculiar facts and circumstances of the case as contemplated therein and cannot be made applicable to the facts and circumstances of instant case on hand and more particularly in light of the Hon'ble Supreme Court already holding Section 12A in Swiss Ribbons Case and Section 30(4) in K.Sashidhar's case as mandatory.

17) Coming again after a short digression in the preceding paragraph, however relevant to the case on hand, to the submissions of the various stakeholders, be it the home buyers and lenders, who have a direct stake in the affairs of the Corporate Debtor(CD) having invested their own valuable savings directly in the Corporate Debtor with a fond hope of obtaining a

shelter over their head or in the case of lenders who have lent to the CD out of public funds deposited pre-dominantly with them again by the public, it is also equally evident that the CD, in view of a mismatch as between the liabilities it owes as compared to the asset it owns being less, is thereby facing a situation of insolvency which is unable to be resolved because of a stalemate in existence as between the financial creditors, who are required under the provisions of IBC,2016 to pilot the resolution of insolvency of the Corporate Debtor to the mutual benefit of all the stakeholders by taking a balanced approach to insolvency resolution process and to act responsibly in discharging the onus cast upon them, based on mutual trust and confidence and not to adopt an approach of confrontation amongst themselves leading to deadlock and thereby liquidation of the CD. Unfortunately, instead of taking control of the affairs of Corporate Debtor and thereby their own investments as envisaged by IBC, 2016, which was not possible under the earlier dispensation relating to insolvency as the control of assets and affairs of an insolvent happened to be still in the control of the management of such companies, the home buyers had shown apathy despite enjoying an overwhelming majority of almost close to 60% voting share in the CoC and is not able to come together amongst themselves or with the lenders thereby virtually abandoning their premier position vis-à-vis the insolvency process of the corporate debtor all of which had only worsened their state in relation to their investments and has also landed the CIRP of the corporate debtor in a state of virtual limbo and thereby a deadlock or stalemate and consistently

knocking the doors of this Tribunal or the courts of justice for their aid. However, this Tribunal is also equally well aware that while trying to resolve the dead lock, unlike the equitable jurisdiction available to it under the Companies Act, 2013 to resolve the deadlock as between shareholders of a company, it should confine itself to the statute, namely IBC, 2016 and the attendant rules and regulations framed there under, as already brought forth in the preceding paragraphs, being a Tribunal named as an adjudicating authority under the statute and cannot go beyond the realm of the concerned statute as can be done behooving the High Courts of this country or for that matter of the Hon'ble Supreme Court and if done will be only exceeding its jurisdiction. This is evident from the manner in which the Hon'ble Supreme Court in relation to the corporate debtor at the conclusion of its judgement in Chitra Sharma's case in **WRIT PETITION (CIVIL) NO 744 OF 2017** has paraphrased at paragraph 42 of the said judgement of which paragraph had been extracted in full in the order dated 15.04.2019, however, again to be recalled under the context on hand, of the relevant sub-paragraphs being (i) and (ii) of paragraph 42 as under:

> 42. (i) In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders ***in accordance with the provisions of the IBC***;

(ii) ***We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors"***;

(Italics and highlight supplied)

18) Thus while the Hon'ble Supreme Court was fully conscious that it had interfered in the process of CIRP of the corporate debtor by re-calibrating the date of commencement of CIRP of the corporate debtor on and from the date of the order, i.e 09.08.2018 in exercise of the writ jurisdiction available under Article 32 of the Constitution and had issued directions in the exercise of its inherent power available to it under Article 142 as evident from sub-paragraph (i) of paragraph 42 extracted as above. It is also pertinent to note that by virtue of the italicized portion of paragraph (i) & (ii) of paragraph 42, the Hon'ble Supreme Court has directed this Tribunal in relation to extension of time of the CIRP, if necessary, as well as the constitution of the CoC both to be in terms of the provisions of IBC,2016. This necessarily connotes that this Tribunal is required to act within the confines of IBC, 2016 and that the constitution of CoC is required to be in accordance with law, namely Section 21 of IBC,2016 and cannot be beyond the scope of the provisions of Section 21 of IBC,2016 which deals with the constitution of CoC as evident from its perusal, and the dynamics of which provision has already been discussed in detail in paragraph 6 supra. At the cost of repetition sub-Section (2) of Section 21 of IBC,2016 clearly lays down that the Committee of Creditors shall comprise all financial creditors of the CD, meaning thereby all the financial

creditors are sought to be brought under one roof, subject of course they being not incapacitated due to their relationship with the CD and being considered as a 'related party'. Further, the segmentation of the financial creditors in the CoC in relation to voting is not envisaged at all as sought to be given a colour by the homebuyers nor class wise approval of the decisions of CoC is also envisaged under IBC, 2016 as it has been provided under Section 24(6) of IBC, 2016 that each financial creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor which precludes a financial creditor from voting on behalf of other financial creditors.

19) In this respect wisdom is required to be accorded to the Legislature of prior knowledge of the existence of the provisions of the erstwhile Companies Act, 1956 in relation to amalgamations, compromises and arrangements as well under the present provisions of Companies Act, 2013 including the corporate debt restructuring exercise under which each of the classes of members or creditors are required to accord their approval to a Scheme with the requisite voting strength. However, in relation to an insolvency resolution process, the Legislature has in its wisdom consciously thought it fit not to make such a distinction, class wise in the constitution of CoC and the voting thereat, save only in relation to filing of their claims for constituting a class for the sake of easier representation and participation through an AR without in anyway compromising their participation in the decision making process, meaning exercising their individual voting share according to individual

preferences, and also in view of the logistic challenges involved in conducting a meeting of the CoC with a huge number of financial creditors as brought in the written note circulated by IBBI, citing the report dated 26th March 2018 of the Insolvency Law Committee and it is pertinent to note that paragraph 11 of the said report has been extracted in K.Sashidhar's case with particular emphasis being laid upon by the Hon'ble Supreme Court to paragraph 11.6 of the said report of ILC being material which is to the following effect:

> **11.6. After due deliberation and factoring in the experience of past restructuring laws in India and international best practices, the Committee agreed to further the stated object of the Code i.e. to promote resolution, the voting share for approval of resolution plan and other critical decisions may be reduced from 75 percent to 66 percent or more of the voting share of the financial creditors. In addition to approval of the resolution plan under section 30(4), other critical decisions are extension of the CIRP beyond 180 days under section 12(2), replacement or appointment of RP under sections 22(2) and 27(2), and passing a resolution for liquidation under section 33(2) of the Code. Further, for approval of the other routine decisions for continuing the corporate debtor as going concern by the IRP/RP, the voting share threshold may be reduced to 51 percent or more of the voting share of the financial creditors.**

20) It is also equally important to note that subsequent to the submission of the report by ILC, the Second Amendment Act of 2018 was also brought into effect substantially reducing the voting threshold limits in relation to voting share of the financial creditors in percentage terms cutting across the different sections and by virtue of Second Amendment Act, 2018 wherein home buyers and their real estate transactions was also brought within the definition and ambit of Section 5(8) of IBC, 2016 as `financial debt' and as a consequence commensurate amendments have also been made in relation to Section 21 of IBC, 2016, inclusion of Section 25A of IBC, 2016 for enabling AR to act on behalf of class of creditors for the purpose of representation in the CoC. Consequent amendments to regulations have also been made to the CIRP Regulations by IBBI, some of which have been extracted in the earlier paragraphs of this order. However, it is important to note that in relation to voting, it is the individual voting share of each of the financial creditor according to his/her/its individual preference which is required to be exercised and acted upon by the AR and consciously the legislature has kept away from providing `class voting' or enmasse voting of a particular class in the COC or the majority vote of a particular class to be extrapolated in to the decisions of CoC as the vote of the entire class which is also evident upon a perusal of Section 24(6) of IBC, 2016 under the heading "Meeting of committee of creditors". In this regard hence we are unable to accept the submissions made on behalf of the home buyers that since the home buyers are wide spread throughout the country or some of them not having access to electronic or e-

mail voting or such other like facilities they are not able to exercise their individual voting preference, citing the reasons for large of home buyers abstaining from exercising their voting share. However, these sort of objections were made even in relation to Section 110 of the Companies Act, 2013 or its precursor in the earlier Companies Act, 1956, namely Section 192A in 2001, when postal ballot and e-voting were introduced or where general meetings were sought to be convened through audio/visual means, be it Board or general meeting, in relation to participation, all of which have not been accepted on the principle that the inexorable march of technology in every day life cannot be avoided. Compulsory de-mat of listed companies share is also a case in point. Hence, in this regard this reference tribunal is unable to buy the objections put forth on the part of the home buyers, more so in view of the written note circulated by IBBI before this reference Bench particularly giving a brief overview of the regulations governing the voting process providing for more than an adequate opportunity to every individual financial creditor having a voting share, be it a home buyer or a lender, to participate in the voting process as made at paragraph 25 of the said note, the material portion of which is reproduced hereunder:

> 25.The Code provides sufficient measures to make available information in advance to all the financial creditors, including the home buyer class creditors, under Regulation 8A of the CIRP Regulations and under Form CA under the Schedule to the said Regulations for submission of their claims. Further, they are also given opportunity to indicate the choice of an insolvency professional to act as their authorized representative. The home buyer class financial

creditors are also given electronic means of communication between the authorized representative and the creditors in the class under Regulation 16A(6) of the CIRP Regulations. Further, the authorized representative is under obligation to circulate the agenda of the CoC meeting to the creditors in a class and he shall announce the voting window at least 24 hours before it opens for voting instructions and another 12 hours for actual voting. Regulation 25(4) provides for the resolution professional to announce the decision taken on items along with the names of the members of CoC who voted for or against the decision or abstained from voting. This again, indicates that the members need to be present and vote in the meetings. Voting is also made open for 24 hours from the circulation of the minutes of voting for the benefit of the members who did not vote at the meeting by electronic system. Hence, it can be seen that the creditors in a class get every opportunity to understand their voting rights and the method of casting their vote. Since financial creditors, including class creditors, get prior information about the process and that they understand the issues at stake, their abstention cannot be regarded as negative voting, but as an implied consent. It is also brought to the notice of the Hon'ble NCLT that the Board has since done away with the concept of "dissenting financial creditor' from the CIRP Regulations w.e.f. 05.10.2018, which was earlier contained as Regulation 2(f) thereof.

21) One another submission which was made on behalf of the home buyers and which also seems to be the view of IBBI, as evident from the extract as above of paragraph 25 of the written note in addition to the procedure detailed of voting therein, is in relation to the aspect of abstinence on the part of home buyers and their voting share being very high, voting of the majority in the class be it approval or rejection of a resolution put to vote, should be considered as the vote of the class, to which also we are unable to accede, for

the simple reason that the voting share which abstains cannot either be said to have expressed their intention or at best wants to remain neutral, leave alone supporting the majority, which presumption is sought to be thrust with a view to resolve the dead lock created. It is also required to be noted that the voting share which had chosen to abstain may also have done the same consciously with a view to hurtle the corporate debtor to the liquidation mode as a necessary outcome of the collapse of the CIRP process and thereby finding a resolution. In this connection it is pertinent to note that the 2nd proviso to sub-section(3) of Section 25A specifically provides that if any financial creditor does not give prior instructions through physical or electronic means, the authorized representative shall abstain from voting on behalf of such creditor. The above section clearly evidences the legislature was quite conscious that a financial creditor should be given a choice to abstain from voting by not exercising his voting share or giving voting instructions which choice is in addition to the choice of voting in affirmative or negative manner to a particular resolution which is in line with the well established principles laid down in relation to voting dealt with by the Hon'ble Supreme Court in WRIT PETITION (CIVIL) NO.631 OF 2017 in the matter of Shailesh Manubhai Parmar v. Election Commission of India Through The Chief Election Commissioner & Ors in relation to voting, albeit by elected representative for candidates to the Upper House of the Parliament, wherein referring to the decision in Lily Thomas v. Speaker, Lok Sabha has stated that voting is a formal expression of will or opinion by the person entitled to exercise the right

on the subject or issue in question and that right to vote means the right to exercise the right in favour of or against the motion or resolution and such a right implies right to remain neutral as well. This principle equally applies herein as well, as a financial creditor has been given a choice to remain neutral for whatever reasons best known to him and that his neutral vote or abstaining voting share cannot be taken as a choice of affirming, as now touted by IBBI, or as a voting share in rejecting a particular resolution as was sought to be previously done by inclusion of the definition of `dissenting financial creditor' contained in Section 2(f) in the CIRP Regulations, which definition stood subsequently omitted on and from 31.12.2017.

22) In relation to the principle of `present and voting' to be made applicable to resolve the deadlock as suggested by the Central Government as well as IBBI and the threshold percentages be computed accordingly may not be a proper proposition in light of the views expressed by the Hon'ble Supreme Court in K.Sashidhar's case referred *supra* wherein at paragraph 28 of the said judgement after taking note of the procedure for conduct of CoC meeting and the voting process under Chapter VI and VII of CIRP Regulations has observed that the members of the committee need not participate during voting propria persona or in person but can do so through video conferencing or other audio or visual means and after taking note of Regulation 25 and 26 has stated that while Regulation 25 is about voting by the members of the Committee present in the meeting and Regulation 26 is about the voting by either electronic means or through electronic voting system all of which makes the application

of principle of `present and voting' concept remote, more so when as evident from the note circulated by IBBI taking into consideration Regulation 25(5) of CIRP Regulations, both prior to and after its amendment of 05.10.2018 can seek a vote of the members of the CoC who did not vote in the meeting after circulation of minutes.

23) In short, the grievance of the Home Buyers, seems to be against themselves arising due to non-participation of them, as a choice, or otherwise, which can be overcome only by themselves with a greater number voting in relation to resolutions so that their writ can run large in the CoC of the CIRP of the Corporate Debtor, and no court or tribunal can compel the members to participate in accordance with their voting strength or share nor can it act beyond the scope and ambit of the statute which if done will be only doing violence to legislative intent.

To sum up based on the above, this reference Bench of the Tribunal is hence of the considered view that

i) the Committee of Creditors (COC), taking into consideration Section 21(2) of IBC, 2016, shall comprise of all financial creditors and must be construed as one and cannot be segmented class wise particularly for the purpose of computation of voting share;

ii) The voting share as are prescribed and required to be achieved under the respective provisions of IBC, 2016 are mandatory in nature and cannot be held to be directory;

iii) For the computation of voting share required to be achieved as prescribed in IBC, 2016, class wise voting of financial creditors, be it home buyers or lenders or otherwise and to treat the majority vote of that particular class in relation to a resolution, particularly by adding the voting share of those financial creditors who had abstained, as the will and vote of the entire class in the COC cannot be accepted;

This reference is thus returned to be placed before the Hon'ble President, NCLT with the above conclusions for onward transmission to the Division Bench of NCLT, Allahabad to be pronounced in open court for the benefit of the concerned parties.

Sd/-

(R.VARADHARAJAN)
Member-Judicial

U.D.Mehta
24.05.2019