

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (BENCH – II)**

IA No./ 239 / AHM / NCLT / 2022

IN

CP (IB) No./ 157/AHM/NCLT/ 2018

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016
Read with Rule 11 of the NCLT Rules, 2016]

IN THE MATTER OF:

Asset Reconstruction Company (India) Ltd.,
the authorised representative of the Committee of
Creditors of GPT Steel Industries Ltd.

... Applicant

Versus

Nivaya Resources Private Ltd.
(Formerly Known as GP Global Energy Pvt. Ltd.),
the Successful Resolution Applicant of GPT Steel Industries Ltd.

...Respondent No.1

And

Mr. Divyesh Desai
RP of GPT Steel Industries Ltd.

...Respondent No. 2

MEMO OF PARTIES

IN THE MATTER OF:

Asset Reconstruction Company (India) Ltd.,

the authorised representative of the Committee of
Creditors of GPT Steel Industries Ltd.

Having office at 2nd Floor, Sethi Chambers, Plot No.2,

D.D.A Local Shopping Centre, M.O.R. Land,

New Rajinder Nagar, New Delhi-110060

E-mail: varun.gupta@arcil.co.in

...Applicant

Vs.

Nivaya Resources Private Ltd.

(Formerly Known as GP Global Energy Pvt. Ltd.),

the Successful Resolution Applicant of GPT Steel Industries Ltd.

Registered Office at Office No.203, 2nd Floor, Plot No. 341, Ward No. 12/B

Banking Circle, Gandhidham, Kachchh, Gujarat-370201

E-mail: ajay.kurichh@gpglobal.com

...Respondent No.1

And

Mr. Divyesh Desai RP of GPT Steel Industries Ltd.

Having office at B2-402 B, Marathon Innova, Ganpatrao Kadam Marg,

Low Parel, Mumbai-400013

E-mail: divyeshdesai@singhico.com

...Respondent No. 2

IN ORIGINAL MATTER BETWEEN:

Asset Reconstruction Company (India) Limited

...Financial Creditor/Applicant

Vs.

GPT Steel Industries Ltd.

... Corporate Debtor

Order Pronounced on: 27/07/2022

Coram:

**DR. DEEPTI MUKESH,
HON'BLE MEMBER (JUDICIAL)
AJAI DAS MEHROTRA ,
HON'BLE MEMBER (TECHNICAL)**

Appearance:

For the Successful RA: Sr. Adv. Mr. Virender Ganda

For the COC: Adv. Deep Roy

For the RP: Adv. Mr. Monaal Davawala a.w. RP Mr. Divyesh Desai

ORDER

1. The present application is filed by the Asset Reconstruction Company (India) Ltd. (hereinafter referred to as "Applicant"), being the authorised representative of the Committee of Creditors ("CoC") of GPT Steel Industries Ltd. (Corporate Debtor) by passing the resolution with 96.95% voting share for filing the present application inter alia, seeking following reliefs:

- i. *Direct that the resolution plan of the Respondent No.1 be remanded back to the CoC so that the CoC can reconsider all the resolution plans submitted during the corporate insolvency process of the corporate debtor.*
- ii. *Provide any other directions which this Hon'ble Tribunal may deem fit in the facts and circumstances of the matter.*

2. The Respondent No. 1 is Nivaya Resources Private Limited (formerly known as GP Global Energy Private Limited), (the successful resolution applicant of the Corporate Debtor), a company registered under the Companies Act, 2013, having its registered address at Gandhidham Kachchh, Gujarat.

Brief facts are as under:

3. The Applicant had filed a petition for initiation of CIRP of the Corporate Debtor under section 7 of the Code, which was admitted on 2nd May, 2019 and Mr. Divyesh Desai was appointed as IRP, who was confirmed as RP on May 31, 2019.
4. The Respondent No. 1 had submitted a resolution plan which was approved in the 17th CoC meeting held on 10th February, 2020 with 82.41 % voting share of CoC members. A copy of the resolution plan is attached.
5. It is submitted by the Applicant that at the time of negotiations in relation to the resolution plan of the Respondent No. 1 and while considering the feasibility and viability prior to the approval of the aforementioned resolution plan, the following issues were discussed and highlighted:
 - a. After the plan was approved applicant sought from CoC, additional time for implementation of the plan. CoC called for a detailed note on the reasons for seeking additional time in making the relevant payments in terms of the Resolution Plan. The Respondent No. 1 in its resolution plan had provided a detailed note stating that neither the Respondent No. 1 nor any of its related parties have failed to implement or contributed to the failure of

implementation of any other resolution plan approved by any adjudicating authority at any time in the past. The Respondent No. 2 further mentioned that such extension in making the final payments was sought due to reasons beyond the control of Respondent No. 1 and had also suggested that it had agreed to make the balance payments in the matter of Allied Strips Limited by February 29, 2020.

- b. Additionally, in its resolution plan, the Respondent No. 1 had provided a valid credit rating and further undertaken to ensure that its parent entity, Gulf Petrochem FCZ in the United Arab Emirates would give a letter of comfort. The resolution plan submitted by the Respondent No. 1 was discussed and negotiated in the 16th meeting of the CoC held on January 29, 2020. The Respondent No. 1 assured the CoC that it would be in a position to honour and fulfil all its commitments under the resolution plan based on the strength of their parent entity. The Respondent, in its resolution plan, had stated that it was a part of the GP Global Group, having an annual global turnover of USD 5.5 billion. The resolution plan submitted by the Respondent No. 1 also suggested that the Respondent No. 1 was engaged in the business of export of various steel items, and it had achieved a turnover of INR 574 crores during the financial year 2018-19. Further, it was highlighted to the CoC that the Respondent No. 1 had a formidable credit rating which was also considered by the CoC while evaluating on the feasibility and viability of the resolution plan of the Respondent No. 1. A copy of the minutes of the 16th CoC meeting dated January 29, 2020 are attached.

6. It is further submitted by the applicant that in light of the aforementioned facts and disclosures made by the Respondent No. 1, the CoC considered the resolution plan of the Respondent No. 1 and the said resolution plan was approved by the CoC with 82.41% voting pursuant to the 17th meeting of the CoC held on February 10, 2020. RP filed an application before this Hon'ble Tribunal bearing number IA No. 159 of 2020 for approval of the resolution plan of the Respondent No. 1.
7. Subsequent to the approval of the resolution plan of the Respondent No. 1 by the CoC, the following facts came to the light and in the knowledge of CoC:
 - a. The credit rating of the Respondent No. 1 has deteriorated considerably and it was classified as 'default rating' for delays in servicing its debt obligations due to poor liquidity position. A copy of the default rating for the Respondent No. 1 as on June 04, 2021 is attached herewith and marked as Annexure-C.
 - b. The National Company Law Tribunal, Principal Bench vide its order dated November 01, 2021 in the matter of *Mr. Sandeep Mahajan, Monitoring Professional (Resolution Professional as appointed for Allied Strips Limited) vs GP Global Energy Private Limited [CA No. 1246/2019 in CP (IB) No. 46/2018]* referred the matter to the Insolvency and Bankruptcy Board of India ("IBBI") for taking appropriate action in light of the default in the obligations by the Respondent No.1 as the successful resolution applicant of Allied Strips Limited. The Hon'ble Principal Bench allowed the forfeiture of a sum of INR 10.55 crores in the referred matter and directed IBBI for taking appropriate actions. A copy of the said order dated November 01, 2021 is annexed. Additionally, the Hon'ble Principal

Bench vide its order dated November 01, 2021 in the matter of *Mr. Anil Kohli, Monitoring Professional (Resolution Professional as appointed for Tirupati Infraprojects Private Limited) [CA No. 1090/2020 in CP (IB) No. 104/2017]* in light of the default by the Respondent No. 1 in making the relevant payments under the resolution plan cancelled the approval for the resolution and directed the forfeiture of the amount of INR 20 crores already deposited by this Respondent No. 1 and further referred the matter to the IBBI for taking appropriate action. The copies of the said orders dated November 01, 2021 are annexed.

8. It has been highlighted in the aforementioned order dated November 01, 2021 in the matter of Allied Strips Limited that the parent company of the Respondent No. 1, Gulf Petrochem FCZ, which is registered in the United Arab Emirates, has been declared bankrupt. Further, the Court of First Instance in the Dubai International Finance Centre Courts vide its order dated September 13, 2020 has directed a worldwide freezing injunction on the promoters and shareholders of Gulf Petrochem FCZ, being the parent entity of the Respondent No. 1.
9. In furtherance to the interim circumstances and recent developments, the secured financial creditors of the Corporate Debtor called for joint lenders meeting dated March 04, 2022. Pursuant to the joint lenders meeting convened on March 08, 2022 aforementioned developments of the financial health of the Respondent No. 1 were discussed and deliberated by the members of the CoC. After detailed discussion and deliberation, all lenders authorised Asset Reconstruction Company (India) Limited, to file the present application seeking the resolution plan of the Respondent No. 1 to be sent back to the CoC for reconsideration. It was stated that in light of

public interest and to ensure that the public money is protected, it is important that the resolution plan be sent back to the CoC to reconsider. A copy of the minutes of the 18th meeting of the CoC dated March 08, 2022, is attached.

10. In light of the aforementioned factors, it was submitted that the resolution plan of Respondent No. 1 be sent back to the lenders, who be permitted to reconsider the resolution plan and call for new resolution plans from fresh proposed applicants if required. It is of utmost importance for the lenders to reconsider the resolution plan of Respondent No. 1 in order to achieve timely resolution of the Corporate Debtor and maximizing the value of the Corporate Debtor, as envisaged under the Code. It is also important to ensure that the Corporate Debtor is successfully resolved upon acquisition by the resolution applicant and Resolution Plan gets fully implemented.
11. It was submitted in furtherance to the aforementioned facts, that it is pertinent to highlight that in the background of defaults in obligations under the approved resolution plans in the CIRP of Allied Strips Limited and Tirupati Infraprojects Private Limited, and the order of the Hon'ble Principal Bench in the aforementioned matters, it is necessary for the resolution plan to be remanded back to the CoC for reconsideration and compliances. On account of the aforementioned default, which was not apprised or disclosed to the CoC, Respondent No. 1 has misrepresented the facts and provided false undertakings in its resolution plan.
12. Thus, it is absolutely clear from the above that the CoC has the power and authority to approve the resolution plans submitted by the prospective resolution applicants. The Hon'ble National Company Law Appellate Tribunal ("NCLAT") vide its order dated January 05, 2022 in *the Bank of*

Maharashtra vs Videocon Industries Ltd. & Ors. [CA (AT) (Ins) No. 503 of 2021] has upheld the rights of the CoC to reconsider and review its own decisions on the resolution plan. The Hon'ble NCLAT held that *"In view of the above stated analysis of facts and law, we have come to the conclusion that Section 30 (2) (b) of the Code has not been complied with and hence the approval of the Resolution Plan is not in accordance with section 31 of the Code. Accordingly, the approval of the Resolution Plan by the CoC as well as the Adjudicating Authority is set aside and the matter is remitted back to the CoC for completion of the process relating to CIRP in accordance with the provisions of the Code."*

13. It is settled law that the commercial wisdom of the committee of creditors is non-justiciable and the commercial decisions taken by the committee of creditors are beyond the purview of judicial review. Thus, it is the committee of creditors that has the final decision-making authority in relation to the approval/rejection of resolution plans.
14. The Applicant also relied upon the judgements passed by the Hon'ble Supreme Court in the case of *Sakri Vasu vs State of UP & Ors. [(2008) 2 SCC 409]* wherein it was held that *"It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control, the denial of which would render the grant itself ineffective."* The Hon'ble High Court of Madras in *Dhikpathy vs Chairman Chennai Port Trust [2001 SCC OnLine Mad 154]* has held that *"It is a well-settled principle that an authority who has the power to take a decision, has equally the power to review the said decision."*

15. It is further submitted that the aforementioned judicial precedents make it absolutely clear that the power to reconsider any decision is within the domain of the CoC/lenders jointly. It is settled law that the commercial wisdom of the committee of creditors is non-justiciable and thereby it is within the domain of the committee of creditors to review their decision.
16. The Hon'ble Supreme Court in the case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs NBCC (India) Limited & Ors. [2021 SCC OnLine SC 253]* has held that in the event the resolution plan requires modifications, the adjudicating authority must send back the resolution plans to the committee of creditors to reconsider. A similar position has been upheld by the Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Ltd., Through authorized signatory vs Satish Kumar Gupta & Ors. [(2020) 8 SCC 53]*, wherein it was held that “*Thus, while the Adjudicating Authority cannot interfere with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that interests of all stakeholders including the operational creditors has been taken care of. If the adjudicating authority finds, on a given set of facts, that the aforementioned parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.*”
17. Further, it was submitted that the resolution plans of Respondent No. 1 in the matters of Allied Strips Limited and Tirupati Infraprojects Private Limited have been remanded back to the committee of creditors.

18. It was further submitted that in light of the aforementioned judicial precedents, it is clear that the CoC is not functus-officio on the approval of the resolution plan and accordingly it is well established that the Hon'ble Tribunal is competent to send back the resolution plan to the CoC/Joint lenders for reconsideration.
19. In compliance with the order dated 15.03.2022, the applicant filed short notes along with the judgements to be relied upon in support of the issue that at the current stage of proceedings, this Tribunal has the jurisdiction to send the resolution plan back to the CoC for re-consideration. The gist of the submission is given below:

1. **CoC decision supreme and non-justiciable:**

- i. It is settled law and it is undisputed that the CoC of any corporate debtor undergoing insolvency resolution, has the sole right to decide on the terms of the resolution plan. That exercise of commercial wisdom by the CoC is also non-justiciable.
- ii. One of the first cases where the Hon'ble Supreme Court has laid out this principle is in the case of *K. Sashidhar Vs. Indian Overseas Bank and Ors (2019) 12 SCC 150 (decided on 05.02.2019) ("Sashidhar Judgement")*. The relevant para of the said Judgement is reproduced herein below:

“Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and the feasibility of the proposed resolution plan. They act on the basis of thorough

examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.”

2. Adjudicating Authority has the right to send back the resolution plan to CoC:

i. The Hon’ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Ltd., Through authorized signatory vs Satish Kumar Gupta & Ors. [(2020) 8 SCC 53],(decided on 15.11.2019)* (“*EssarSteel Judgement*”) has clearly held that, while considering the resolution plan, in case the AA feels that there is some reason to alter the resolution plan or in case the relevant parameters are not addressed, they have a right to send the resolution plan back to the CoC. Relevant portion of paragraph No. 73 of the said judgement is quoted below:

“This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include a judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the

Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.”

ii. This position has also been referred to by the Hon’ble Supreme Court in the case of ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs NBCC (India) Limited & Ors. [2021 SCC OnLine SC 253]*** decided on **24.03.2021**. The relevant portion of the paragraph is as follows:

“The jurisdiction of the Appellate Authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the Adjudicating Authority or the Appellate Authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by Code and exposted by this Court.”

- iii. Additionally, the Hon'ble NCLAT vide its order dated January 05, 2022, in *the Bank of Maharashtra vs Videocon Industries Ltd. & Ors. [CA (AT) (Ins) No. 503 of 2021]* has clearly affirmed the right to send back a resolution plan to the CoC for reconsideration. The relevant portion of paragraph 45 is quoted below:

“All these reflect that power to reconsider any decision is within the domain of CoC and even Hon'ble Apex Court in Catena of judgment held that the commercial wisdom of the CoCs is non-justifiable and hence, it is in the domain of CoC, particularly, if at a later stage, it finds in public interest and the amount of loss which the public exchequer is to bear with such unprecedented haircut in such a large fund employment, it is in the fitness of thing that the proposal can be remanded back to the CoC, particularly, in view of their own affidavit to review their decision. The CoC is not functus -officio on the approval of the Resolution plan and accordingly, the judicial precedents clearly established that the Adjudicating Authority and this Tribunal is competent to send back the Resolution plan to the CoC for reconsideration.”

- iv. From reference to the above, it is crystal clear that NCLT does have the right to send back resolution plan for reconsideration, if requested by the CoC.

3. Right to exercise commercial wisdom has an implied right to review the same:

The Hon'ble NCLAT, in the Videocon Judgement, has clearly stipulated that along with the right to exercise commercial wisdom, the CoC has the

right to review such a decision. In the instant case, even though CoC had approved the plan already, pursuant to an affidavit filed by the CoC, the Tribunal considered the request and allowed the plan to be sent back to the CoC for consideration. This was on the basis of the fact that CoC always has a right to review its decision. The relevant portion of paragraph 30 is appended below:

“While the AFCs constituting 94.98% of the CoCs of consolidated Videocon group of companies (Consolidated CDs), out of 95.09% who voted in favour of the Resolution Plan, has mentioned several reasons to remand the matter back to the CoC for its reconsideration and even gone ahead to state that the CoC and the RP to conduct a fresh process of inviting fresh expression of interest and resolution plan from all interested Resolution Applicants etc., to safeguard the interest of all stakeholders and the public money. It has accepted the fact that the significant observations regarding the low value of the resolution plan and the haircut of such a high magnitude being suffered by various Company Appeal (AT) (Ins) No. 503, 505, 529, 545 & 650 of 2021 classes of stakeholders including the MSME, backbone of the Indian economy and other operational creditors under the Resolution plan requires to be reviewed by the CoC. It has also been stated in unambiguous terms that they wish to give due consideration to observations in the impugned order and the stay order passed by this Tribunal on 19.07.2021. The CoC, majority of which are public sector banks and financial institutions dealing with public money is acting as the custodian of public trust and discharging its statutory role. The CoC is vested with a duty of trust and care. The CoC power is not without responsibility and

even the Hon'ble Apex Court has made the CoC decision on commercial matters non-justiciable. Keeping in view these factors in mind, the public sector banks and financial institutions etc., constituting approx.95% of the CoC (out of 95.09% voted in favour) have resolved to request this Tribunal to remand the matter back to the CoC for its reconsideration through an affidavit. We agree that the CoC if it has the power to approve the plan, has also the power to reconsider and review its own decisions on Resolution Plan. The power to approve, no doubt, carries with it the power to reconsider. As stated supra, the 'Board of Directors of the Companies who approves the proposal also at a later date review and even annuls the approvals in the course of the implementations, if observed and pointed out by the implementers, the difficulty and its economic or otherwise impact.'"

20. Through the written submissions , Respondent No.1 made the following submissions:

- a) The only other plan submitted during CIRP has already been rejected:
 - It is an admitted fact that the only other resolution applicant, i.e., M/s. Panch Tatva Promoter Pvt. Ltd., who had filed the application before this AA which was dismissed on July 3, 2020, and thereafter the said applicant filed an appeal before NCLAT and the said appeal was also dismissed on August 18, 2021. The said unsuccessful resolution applicant then filed appeal before Hon'ble Supreme Court, and the said appeal was also dismissed on September 17,2021.M/s. Panch Tatva Promoters Pvt. Ltd. was given eight opportunities by the same CoC to revise its

plans, but all such plans were found to be non-compliant by CoC.

b) CoC's soft corner for M/s. Panch Tatva Promoter Pvt. Ltd., for unknown reasons:

- In an appeal preferred by M/s. Panch Tatva Promoter Pvt. Ltd. against the order dated July 3, 2020 passed by this AA before the NCLAT wherein, the CoC tried to support the Appellant therein by taking a similar stand, which is presently sought before this AA.
- It is to be noted the appeal and the stand taken by the CoC for reconsidering the resolution Plan of the Respondent No. 1, was dismissed vide order dated August 18, 2021.

c) Order dated August 18, 2021, passed by the Hon'ble NCLAT has attained finality as against CoC:

- The order dated August 18, 2021, was challenged by M/s. Panch Tatva Promoter Pvt. Ltd. before the Hon'ble Supreme Court which was also dismissed vide order dated September 17, 2021. However, the said order dated August 18, 2021 was never challenged by the CoC and thus has now attained finality, as against the CoC.

d) Judgement in *Bank of Maharashtra vs Videocon Industries Ltd. & Ors. [CA (AT) (Ins) No. 505 of 2021]* is not applicable.

Major distinction points:

- Information Memorandum did not include substantial no. of assets, which resulted into lower liquidation value and

consequently, the resolution plan was received for a much lesser value.

- An order passed by AA was set aside hereby, modification of the resolution plan was ordered without remanding the plan back to the CoC.
- Resolution Plan was recorded to be non-compliant vis-à-vis sections 30(2)(b) and 31 of IBC.

e) This Adjudicating Authority has further dismissed the Application preferred by M/s. Panch Tatva Promoter Pvt. Ltd. objecting to the Resolution Plan.

f) CoC is guilty of approbating and reprobating:

- February 15, 2022 – Demand for renewal of performance Bank Guarantee was sought.
- February 19, 2022- Respondent No.1 provides renewed bank guarantee, valid up to February 19, 2023.

CoC needs to satisfy this AA in respect of what change in facts of the present case has arisen from February 15, 2022 (date on which Performance Bank Guarantee was sought) till March 11, 2022 (date of filing of the present application), which has given cause of action for filing the present application.

g) Basis for filing of the present application by CoC is Non-est.

i. The Orders dated November 1, 2021 passed by NCLT, Principal Bench, New Delhi in the matter of *Oriental Bank Of Commerce Vs. Allied Strips Ltd.* has been set aside by the NCLAT vide order dated May 6, 2022, and May 30, 2022.

ii. The Order dated November 1, 2021 passed by NCLT, Principal Bench, New Delhi in the matter of *Bank of India Vs. Tirupati Infraprojects Pvt. Ltd.* has been stayed by the NCLAT vide its order dated January 12, 2022.

21. We have considered the submissions made by the applicant and the respondents. The issue is whether a resolution plan which is already approved by the CoC, and which is pending before the Adjudicating Authority for approval can be withdrawn for reconsideration by the CoC on the discovery of new facts and events relating to the resolution applicant and whether the Adjudicating Authority is empowered to send back the resolution plan, on such request, to the CoC.
22. It is noticed that the present application was filed by the Asset Reconstruction Company (India) Ltd., being the authorised representative of the CoC by passing the resolution with 96.95% for filing the present application. It is also noticed that the parent company of Respondent No.1, i.e., Gulf Petrochem FCZ has been declared bankrupt and there is a freezing injunction on the promoters. The credit rating of the Respondent No.1 is in default as on June 04, 2021. The successful resolution applicant has defaulted in other CIRP of M/s. Allied Strips Ltd. and M/s. Tirupati Infraprojects Pvt. Ltd., wherein also he was the successful resolution applicant. In this background, the present application has been moved by the CoC/lenders, with 96.95% voting in its favour, for remanding back the resolution plan for reconsideration of the CoC. In our view, the resolution plan can be sent back for reconsideration to the CoC, considering the changed circumstances and the commercial wisdom of the CoC, with 96.95% voting, to seek permission of Adjudicating Authority for reconsideration of the resolution plan need to be considered for better prospects of Resolution. In our view, the Tribunal is

well within its rights to send back the resolution plan for reconsideration to the CoC, on request made by the CoC in its commercial wisdom. In our view that the resolution plan can be sent back to CoC, we are supported by the order of the Hon'ble NCLAT in the case of ***Bank of Maharashtra vs Videocon Industries Ltd. & Ors. [CA (AT) (Ins) No. 503 of 2021]*** wherein the Hon'ble NCLAT held that Adjudicating Authority is competent to send back a resolution plan to the CoC for re-consideration. For sake of ready reference, the relevant para of the said order is reproduced hereunder:

“All these reflect that power to reconsider any decision is within the domain of CoC and even Hon'ble Apex Court in Catena of judgment held that the commercial wisdom of the CoCs is non-justifiable and hence, it is in the domain of CoC, particularly, if at a later stage, it finds in public interest and the amount of loss which the public exchequer is to bear with such unprecedented haircut in such large fund employment, it is in the fitness of thing that the proposal can be remanded back to the CoC, particularly, in view of their own affidavit to review their decision. The CoC is not functus -officio on the approval of the Resolution plan and accordingly, the judicial precedents clearly established that the Adjudicating Authority and this Tribunal is competent to send back the Resolution plan to the CoC for reconsideration.”

23. The said issue of whether the NCLT can send back the resolution plan for reconsideration is settled by the Hon'ble Supreme Court in the case of ***Committee of Creditors of Essar Steel India Ltd., Through authorized signatory vs Satish Kumar Gupta & Ors. [(2020) 8 SCC 53],(decided on 15.11.2019) (“EssarSteel Judgement”)*** where it was held that, while considering the resolution plan, in case the AA feels that there is some reason

to alter the resolution plan or in case the relevant parameters are not addressed, they have a right to send the resolution plan back to the CoC. For sake of ready reference, the relevant para of the said order is reproduced:

“This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include a judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters.”

From reference to the above, it is crystal clear that NCLT does have the right to send back resolution plans for reconsideration if requested by the CoC.

24. As far as the second issue is concerned it is settled law that the CoC of any corporate debtor has the sole right to decide on the terms of the Resolution Plan and that exercise of commercial wisdom by the CoC is also non-justiciable. We are supported by the judgement of the Hon'ble Supreme Court has laid out this principle is in the case of ***K. Sashidhar Vs. Indian***

Overseas Bank and Ors (2019) 12 SCC 150 (decided on 05.02.2019) (“Sashidhar Judgement”). For sake of ready reference, the relevant para of the said order is reproduced:

“Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and the feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.”

25. In view of the above, we allow relief no. 1 prayed by the applicant and remand back the present resolution plan to CoC

26. The application is allowed and disposed of in terms of the above order.

S/d-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

S/d-

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

Rahul / LRA