IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT V

I.A. 828 OF 2023

IN

C.P. (IB) No. 2946 of 2019

Under Section 60 (5) of the Insolvency & Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016

Bank of India

...Applicant/ Financial Creditor

vs.

Mr. Vishal Ghisulal Jain & Ors.

...Respondent

In the matter of:

Bank of India

...Petitioner/Financial Creditor

vs.

Wadhwa Buildcon LLP

...Corporate Debtor

Order Dated: 20.03.2024

Coram:
Hon'ble Ms. Reeta Kohli, Member (Judicial)
Hon'ble Ms. Madhu Sinha, Member (Technical)

Appearance (Physically):
For the Applicant: Adv. Prajakta Menezes, Adv. Shavez Mukri a/w Adv. Rakesh Gupta

For the Respondent: Adv. C. Shadab i/b Adv. Ritesh Wagde (R2), Adv. Tanmay Kelkar i/b Adv. Aniruth Purusothaman (R1), Adv. Nandita Dethe i/b Singhania Legal Services (R5), Adv. Gaurav Joshi (R6), Adv.

Ashish Mehta a/w Adv. Sneha Mahawar i/b Eros Legal Alliance (R7)

ORDER

Per: Reeta Kohli, Member (Judicial)

1. The above Interlocutory Application bearing I.A. No. 828 of 2023 is filed by **Bank of India** (hereinafter referred to as the "**Applicant**") seeking directions against Mr. Vishal Ghisulal Jain and Ors. (hereinafter referred to as the "**Respondent**") under Section 60 (5) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "**the Code**") praying for following reliefs:

    i. To allow this Application and declare that the Resolution Plan dated 11 November 2022 as submitted by Successful Resolution Applicant/Suspended Partner of the Corporate Debtor, Mr. Ankit Wadhwa as void ab initio as Mr. Ankit Wadhwa is a wilful defaulter and ineligible in terms Section 29A of the Code for submitting Resolution Plan;

    ii. To Set-aside the decision of the Respondent No. 2 to 4, of approving the resolution plan dated 11 November 2022 as it is contrary to the provisions of the code;

    iii. Declare the Resolution Plan dated 11 November 2022 as ultravires as the same is contrary to the Code and "conditional in nature".;

iv. To replace the Resolution Professional, Mr. Vishal Ghisulal Jain and impose exemplary cost for misconduct and for prejudicing the entire CIRP and adversely affecting the rights of all stakeholders including homebuyers;

v. To replace Authorised Representative of the Homebuyers, Mr. Prabhat Jain who has acted in connivance with the Resolution Professional prior to his appointment as well as post his appointment by this Tribunal;

vi. To grant fresh period of 180 days for CIRP in interest of all stakeholders including homebuyers to be run by new appointed RP to reassess the claims correctly and reinstate correct voting rights in the COC and invite fresh Expression of Interest in view of maximization and wider participation in resolution;

vii. To direct investigation into the exorbitant CIRP cost by the newly appointed RP and/or by the COC;

viii. To direct the IBBI (Respondent No. 7) to furnish their report in furtherance to the compliance of the order dated 8 September 2021 of this Hon'ble Court;

ix. To direct IBBI (Respondent No. 7) to provide status on complaint filed twice by the Applicant against the Resolution Professional, Mr. Vishal Jain and the complaint as filed against Authorised Representative, Mr. Prabhat Jain.

x. To maintain status quo until the Resolution Professional, Mr. Vishal Jain and Authorised Representative, Mr. Prabhat Jain are replaced;

xi. Any other order which the Hon'ble NCLT may deem fit in the facts and circumstances of the case.

Brief Facts of the Case

2. The present Application has been preferred by the Bank of India, one of the members of CoC with a prayer to declare the plan submitted by the suspended director of Corporate Debtor, Mr. Ankit Wadhwa (Respondent No.6) as void-ab-initio on the ground of his being ineligible in terms of Section 29A of IBC being a 'willful defaulter'. The prayer is also made against the conduct of the RP (Respondent No. 1) attributing malafide to him and in view of the same for initiating appropriate proceedings and suspending his license.

3. In the present Application, the Respondent No.1 is the Resolution Professional (herein after referred to as **"RP"**) appointed vide order dated 14 October 2020 by this Hon'ble Tribunal and is the Resolution Professional of Corporate Debtor/Wadhwa Buildcon LLP incorporated under the Limited Liability Partnership Act, 2008 (herein after referred to as **"Corporate Debtor"**) undergoing Corporate Insolvency Resolution Process ("**CIRP"**) pursuant to admission Order dated 28 July 2020 passed by this Hon'ble Tribunal.

4. The Respondent No. 2, Mr. Prabhat Jain is the Authorised Representative (**"AR"**) of Financial Creditor in a class of Homebuyers and CoC Member of the Corporate Debtor.

5. The Respondent No. 3 i.e., Mr. Vishal Parab, Respondent No. 4 i.e., Mr. Vishal Patil and Respondent No. 5 i.e., Capri Global Capital Limited are Unsecured Financial Creditors and CoC Members of the Corporate Debtor.

6. The Respondent No. 6 is the Suspended Partner of the Corporate Debtor who is Successful Resolution Applicant and the Respondent No.7, is the Insolvency and Bankruptcy Board of India (**"IBBI"**).

7. The arguments advanced by the Ld. counsel for the Applicant is primarily on the following grounds

A) That the approval of the Resolution Plan of Respondent No 6 is illegal being against the Section 29A of IBC, 2016 as on the date of the submission of the plan he was already declared 'Willful defaulter'.

While elaborating the **first contention** that the Respondent No 6 i.e. SRA was ineligible being a willful defaulter on the date of the submission of the Plan, the Ld. counsel contended that the Corporate Debtor was admitted to CIRP on 28.07.2020. Respondent No. 6 submitted his Plan on 21.01.2021 which was submitted before the COC on 25.03.2021 for approval. This Plan was neither opened nor discussed or voted in any of the COC meetings. The COC did not take into consideration this plan, as substantial time had elapsed and many circumstances had changed during the pendency of this prospective Plan with respect to the claims, intrinsic value of the project, estimated cost escalation etc. etc. which directly or indirectly affected the Resolution Plan amount. Subsequently

afresh/revised Resolution plan was submitted by Respondent No. 6 on 11.11.2022 on the asking of the COC and the same was opened in the 13th COC meeting on 17.12.2022. Thereafter, the RP stated that Section 29A of the Code, eligibility of Successful Resolution Applicant shall be examined and only thereafter the vetting of the Revised Plan shall be done if it is in compliance of the Code and is fit to be placed before the COC for approval. The counsel vehemently argued that the Revised Resolution Plan is in fact a new and fresh Resolution Plan and the earlier Resolution Plan had no bearing on the Same as no eligibility of the SRA was examined at that stage and neither was the plan placed before COC for consideration. The RP instead of filing the eligibility of the SRA u/s 29A of the Code submitted that the Plan shall be placed before the COC only if the same is found to be in compliance with the Code. It is pertinent to mention that at the behest of the India Bulls Housing, Resp. no. 6 the Resolution Applicant was declared as 'willful defaulter' on 31.10.2022 prior to the submission of the Resolution Plan. Thus, it is evident that on the date of filing of the plan by the Resolution Applicant i.e. 11.11.2022 he was not eligible u/s 29A of the Code because of his having been declared as willful defaulter on 31.10.2022.

8. The relevant provisions of the IB Code so as to reemphasis the issue are reproduced hereunder :-

> ***"Section 29A Persons not eligible to be resolution applicant. -***
> *A* ***person shall not be eligible to submit a resolution plan,*** *if such person, or any other person acting jointly or in concert with such person—*
> *....*

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

240A. Application of this Code to micro, small and medium enterprises. –

(1) Notwithstanding anything to the contrary contained in this Code, the provisions of ***clauses (c) and (h) of section 29A shall not apply*** *to the resolution applicant in respect of corporate insolvency resolution process [or pre-packaged insolvency resolution process] of any micro, small and medium enterprises…"*

Thus the contention of the Ld. Counsel is that at the time of submitting the plan, SRA was ineligible in terms of Section 29(A) of the IBC as he was already declared a willful defaulter. Therefore the Plan submitted by Respondent No. 6 could not be considered for approval by COC.

9. Thus it is a clear case of dereliction of duty on the part of the Resolution Professional of not having checked the eligibility of Resolution Applicant (RA) on the submission of the Resolution Plan whereas it was incumbent upon the Respondent No.1 (RP) to Check the eligibility of the Resolution Applicant before putting up the plan for consideration before the CoC. The Respondent No. 1 (RP) never placed on record the correct facts regarding the eligibility of Respondent No. 6 before COC at the time of submission of the Resolution Plan. It is submitted that Sub section (b) of Section 29A is still applicable to Suspended Management of the Corporate Debtor even when the Corporate Debtor is a MSME. It is evident that Mr. Ankit Wadhwa, the Successful Resolution Applicant has been declared a willful defaulter by one of the Creditors and the

same is reflected from the records as available on the information utility namely, CIBIL.

10. The Ld. Counsel for the Applicant while emphasizing on the ineligibility of the Resolution Applicant submitted that it is Respondent No. 6 the SRA because of whose misdeeds (Along with others) led to the admission of the CD into CIRP. Now despite being a willful defaulter he cannot be permitted to submit a resolution Plan. This otherwise would lead to extending a benefit to a wrong doer at whose behest the Corporate Debtor has suffered and is made to undergo CIRP and also the homebuyers had to suffer. The counsel referred to the judgement of the Hon'ble Apex court in the matter of **Arcelormittal India Private Limited V. Satish Kumar Gupta (Civil Appeal Nos.9402 – 9405 / 2018)** wherein the Hon'ble Supreme court has held as under**–**

> *25….Concerns have been raised that persons who with their misconduct contributed to defaults of companies or are otherwise undesirable may misuse the situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process and gain or regain control of the Corporate Debtor….*
> *26. It is in this background that the section has been construed."*
> *56. Since Sec. 29A (c) is a see through provision……If a person has been promoter…….This ineligibility cannot be cured by paying off debts of the Corporate Debtor"*

B) The conduct of the RP and the Manner in which he conducted the entire CIRP Proceedings is against the

Code and the regulations; so as to grant the undue benefit to Respondent No. 6 i.e. Resolution Applicant to the prejudice of the Applicant.

11. While arguing the second contention, the Ld. Counsel submitted that in the entire process of CIRP the role of Respondent No. 1 / Resolution Professional has not been fair and he has conducted himself with the Prejudicial and biased mind so as to ensure that the plan of Respondent No. 6 is approved and the interest of the Applicant Bank is prejudiced. To elaborate the contention raised, the Ld. counsel submitted that firstly, there has been a huge delay on the part of the RP in Reconstitution of the COC. Secondly the conduct of the RP has not been in terms of the IBC and the CIRP Regulations. The Ld. counsel emphatically submitted that the mode and the manner in which the voting share of the Applicant in the COC has been reduced gradually from 100% to that of 29.57% and proportionally increasing the voting share of the home buyer and land owners from zero to 66.42% itself is questionable as immediately before every scheduled COC meeting, the fresh homebuyers were added to prejudice the interest of the Applicant and this gradual increase of the Homebuyers was to ensure that plan of Respondent No. 6 is approved with 66% mandate.

12. It is pertinent to submit that, at the time of formation of COC, share of the Applicant was 100% which by 13th COC meeting was reduced from 100% to 31.08%. The home buyers voting share was increased to 64.07% when the plan of the Resolution Applicant i.e. Respondent No. 6 was considered. While elaborating the conduct of the RP, the Ld. Counsel took us through various documents so as to prove that every time just before the CoC meeting, more Home Buyers were added so as to dilute the position/ authority of the

Applicant. It was because of this mala-fide conduct of the Resolution Professional which led to reducing the voting share of the Applicant. This in turn ultimately led to passing of the Resolution plan of Respondent No. 6 in the 15th COC meeting when the homebuyers voting rights were increased to 66.42%. In addition, the Ld. counsel submitted that the fact of the Resolution Applicant having been declared a willful defaulter on 30.10.2022 i.e. much prior to the submission of the Plan was withheld from the COC. The Resolution Plan which could not be put up before the COC for consideration was got approved by concealing the fact that RA has already been declared a willful defaulter. In addition the Ld. Counsel also emphasized the fact that the Resolution Professional did not give sufficient time for voting on the Resolution Plan of Respondent No. 6. The time of only 3 days was granted for approval of the Plan which itself shows that Respondent No. 1 was in extreme hurry to ensure the approval of the Plan of Respondent no. 6. The Applicant also submitted that against the conduct of the Resolution Professional they have already filed a complaint to IBBI bearing Complaint No. IBBI/C/2021/00557.

13. To further substantiate her arguments regarding the misconduct on the Part of Respondent No. 1 i.e. the RP, Ld. counsel submitted that even regarding the appointment of Authorized Representative, the RP has failed to act in terms of IB Code. It is necessary to appreciate the relevant regulations regarding the appointment of AR i.e. **Regulation 4A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Choice of authorised representative.** As per this regulation, the basic criteria required to be fulfilled for an eligible AR is same as an IRP/RP i.e., the person concerned must be registered with IBBI as an IP, must be independent of the Corporate Debtor (CD) and the

Resolution Professional (RP). The relevant Regulation 4A (2) is as follows:

> *"4A(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;*
> *[2][(aa) having their addresses, as registered with the Board, in the State or Union Territory, as the case may be, which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor:*
> *Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;]*
> *(b) eligible to be [3][resolution professional] under regulation 3; and*
> *(c) willing to act as authorised representative of creditors in the class."*

In the Present case, the Ld. Counsel submitted that a list of three Insolvency Professionals was published by the Interim Resolution Professional in the public announcement dated 30.07.2020 to act as AR of Creditors in class namely Mr. Mukesh Khaturia, Mr. Vakati Balasubramanyam Reddy and Mr. Baisani Rajendra Prasad. However, the Resolution Professional instead of appointing one of the persons from the list of the Authorised Representatives of the Home Buyers chose to appoint a stranger to the proceedings, Mr.

Prabhat Jain who even prior to his being appointed as an Authorised Representative was allowed to attend the CoC meetings. The Respondent No. 1 has failed to maintain the confidentiality by allowing an outsider i.e. Mr. Prabhat Jain (who had no authority to be part of COC) to attend the confidential proceedings. The fact that his name was not part of the List Published of three Insolvency Professionals to be made as Authorised Representative of the class of Creditors and was still made the AR speaks volumes about the conduct of the Respondent No. 1/RP. This itself proves that the Resolution Professional has miserably failed to comply with the IBBI regulations of the Appointment of AR and the fact that the AR was permitted to attend the COC proceedings even prior to his appointment as AR makes it evident that the RP and Authorised Representative were hand in glove and were working on the same agenda.

C) Extinguishment of personal Guarantees of Corporate Debtor to the Detriment of the Applicant.

14. The Ld. Counsel for the Applicant further emphatically argued that the Resolution Professional even failed to apprise the COC Members that the Resolution Plan as submitted by the Successful Resolution Applicant contains extinguishment of all the claims of the Secured Financial Creditors including the third party Securities. In addition the Plan also Extinguished the debt owed by Personal Guarantors and Other Guarantors along with the securities resulting withdrawal of the legal proceedings (inclusive of both civil and criminal proceedings) initiated against the Personal Guarantors and Other Guarantors. This act on the part of Respondent No. 1/RP has further caused prejudice to the rights of the Applicant. The Applicant further submitted that the Resolution Plan of the Corporate Debtor could

not deal with the third-party assets as it is settled law that Chapter 3 of Part III of the Insolvency and Bankruptcy Code, 2016 has been notified specifically for initiating the resolution process against personal guarantors of the Corporate Debtor and under no circumstances, the Code envisages that upon approval of a resolution plan, even the personal guarantees shall be absolved. Further, it is submitted that the assets of the personal guarantors are not covered as part of the assets of the Corporate Debtor during an ongoing CIRP and the moratorium does not apply to the personal guarantors. This shows that the entire intent of the Code was to keep the personal guarantors out of the revival process of the Corporate Debtor and thereby the lenders are empowered under the Part III of the Code to pursue separate and independent proceedings against the personal guarantors.

15. The Ld. counsel drew the attention of the court to the relevant para from the Resolution Plan stated to be detrimental to the interest of the Applicant bank.

*" **5. Payment to Financial Creditors:***

- *Upon payment of INR 10,74,85,629/- (Ten Crores Seventy-Four Lakhs Eighty-Five Thousand Six Hundred and Twenty-Nine Only) to Bank of India, the entire debt due to Secured Financial Creditors shall stand satisfied, settled and extinguished and no claims whatsoever shall subsist. The Securities for any debt to the Secured Financial Creditors shall stand unconditionally released upon payment of the above amount. The Secured Financial Creditors shall no longer be entitled to exercise any security interest with respect to any debt, whether or not expressly provided for in this Resolution Plan. Bank of India shall issue a certificate of discharge and no claims to the Corporate Debtor and also return the security documents to the Corporate Debtor forthwith and unconditionally release all the security available to them*

in connection with any amounts payable to them by the Corporate Debtor.

RA presumes that all the lenders where Corporate Debtor has given any guarantees have submitted their claim, if any. After payment of financial debt settlement amount, all any guarantees given by the Corporate Debtor is considered as fully and finally settled.

The effect of the above clause is that the Applicant will have to relinquish the charge over the Assets of the Personal Guarantors too, which not only is against the provisions of the Code but also contrary to law settled by the ***Hon'ble Apex Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors. (Civil Appeal No. 3395 of 2020)*** wherein the Hon'ble Court has inter – alia observed and reiterated that:

"178.1.1. It has been forcefully contended that the assets belonging to a third party cannot be utilised towards the resolution of insolvency of a corporate debtor, as held by this Court in the case of ***Embassy Property Development Pvt. Ltd. v. State of Karnataka and Ors.: (2019 SCC Online SC 1542)****. The decision in Anuj Jain (supra) has also been referred to submit that therein too, this Court disallowed JIL's assets from being utilised for securing the dues owed by JAL……*

186. We may observe that the decisions cited by the parties do not require much discussion. The principles in the cited decisions including those in the case of Embassy Property (supra) that the assets belonging to a third party

cannot be utilised towards resolution of a corporate debtor remain fundamental and beyond cavil."

16. The Ld. counsel for the Applicant further submitted that the so called commercial wisdom of the COC cannot absolve the rights and remedies available with the dissenting financial creditors against personal guarantors and other guarantors. The Applicant submitted that the Respondent No.2 to Respondent No. 4 having a majority voting share 66.64% has approved the said Resolution Plan of Respondent No. 6 despite he being not qualified in terms of Section 29A of the Code. Resolution Plan being conditional having clauses of extinguishment of all Financial Debt along with all guarantees and securities and withdrawal of all legal proceedings initiated against the Personal Guarantors and Other Guarantors is not only against the provisions of the Code but also against the law settled by the Hon'ble Supreme Court in the above stated cases. In the present case the Suspended director i.e. SRA has attempted to absolve himself of all liabilities of personal guarantors to the detriment of the Applicant. The RP has miserably failed to bring these relevant facts to the specific attention of the COC comprising of Homebuyers while approving the Resolution Plan of Resp. No. 6 and the impact of the same on the interest of the Applicant Bank. Therefore, this act on the part of the RP/Respondent No. 1 as well as SRA /Respondent No. 6 left the Applicant with no other option but to vote against the Resolution Plan.

17. It is further submitted that Code provides that decision of the majority of CoC Members once approved with 66% or more voting share is binding on all stakeholders. However, such decision, cannot override the legal rights of the Applicant which are outside the ambit of Section 30 i.e., legal rights of Applicant as available

under Part III of the Code. More specifically the rights available under section 95 of the Code cannot be allowed to be overridden by approval of conditional Resolution Plan.

18. It is submitted that mere approval of Resolution plan by the COC cannot absolve the civil as well as criminal liability of the personal guarantors and other guarantors. The claim of the Applicant is arising from the Term Loan Facility of INR 40 crores extended by the Applicant for the development of the Project 'Wadhwa Rhodesia' of the Corporate Debtor. It is submitted that the Applicant has also initiated legal proceedings against the Personal Guarantors and Other borrowers inter alia even against the Resolution Applicant, Mr. Ankit Wadhwa before the Hon'ble Debt Recovery Tribunal, Mumbai DRT III. It is also pertinent to mentioned that the Applicant has also filed Application before the Ld. District Magistrate of Thane for taking possession of immovable properties of Personal Guarantors and Other Guarantors over the Collateral Securities. Ld. District Magistrate of Thane vide order dated 30 July 2019 has directed the Tehsildar of Bhiwandi / Kalyan for preparing the inventory of the said Collateral Assets under the security of the Applicant and to handover the possession of the secured assets to the Authorised officer of Bank of India / Applicant.

19. It is further submitted that even after the CIRP is concluded, a guarantor cannot enjoy a right of subrogation when the payment is made by the guarantor with respect to the debt for which the guarantee is provided. This position has been settled by the Hon'ble National Company Law Appellate Tribunal ("NCLAT") in **Lalit Mishra & Ors. v. Sharon Bio Medicine Ltd** dated 14.11.2018, wherein the Appellate Tribunal held that the guarantor cannot

exercise its right of subrogation under the Indian Contract Act, 1872 as proceedings under the Code are not recovery proceedings.

20. Therefore, in light of the present factual matrix of the case and aforementioned grounds, it is submitted that the Final Resolution Plan as proposed by the RA and approved by the CoC is perverse, manifestly arbitrary, unjust and *ultravires*. Therefore, the Plan deserves to be treated as void-ab-initio.

21. The Ld. Counsel for the Applicant informed that against the conduct of the Respondent no 1 / RP they had filed a complained before the IBBI. After appreciating the case of the Applicant, the IBBI were pleased to issue show cause notice to RP/Respondent No. 1 and also suspended his license for two years by IBBI Disciplinary Committee vide order dated 19.06.2023. The Counsel also informed that the Resolution Professional preferred the Writ Petition before the Hon'ble High Court as CWP No. 19031 of 2023 wherein the Hon'ble High Court has been pleased to stay the notice issued by the IBBI vide order dated 7 August 2023. The matter is stated to be sub-judice.

RESPONDENT 1 - RP

22. In response to the allegations made by the Applicant qua the conduct of the RP, the RP made his submissions stating therein that he took the charge of the CD on 14.10.2020. After verification of claims of the creditors, constituted the COC with the Applicant having 98.3% voting share and one Mr Sujit Shetty with 1.36% voting share.

23. The RP after receiving/ admitting the claims of 6 home buyers reconstituted the COC. Subsequently on 26.09.2022 the RP placed on record, the report certifying the reconstitution of the COC.

Regarding the allegations of the Applicant with respect to the huge delay on the part of the RP in Reconstitution of the COC, the counsel for the RP submitted that he received the copy of the order dated 08.09.2021 on 14.09.2021 and the said fact has been recorded in the 8th meeting of COC. He further submitted that by 15.09.2021 he had received claims from 45 home buyers. He admitted the claims of these home buyers only in terms of the directions of the Hon'ble NCLT. To justify his conduct of appointing Mr Prabhat Jain as AR, the counsel for the RP submitted that the list of 3 IPEs to act as AR of creditors in a class was published. Out of 45 FCs in a class, 33 voted in favour of Mr Prabhat Jain. The Hon'ble tribunal vide order dated 20.04.2022 allowed the appointment of Mr Prabhat Jain as AR to represent the class of home buyers.

24. Regarding the change in the voting pattern by which the Applicant's voting share was reduced from time to time, the Ld. counsel contended that the COC was duly apprised of the same and all the minutes of the COC Meetings were duly approved. It is vehemently denied that RP has been admitting the claims selectively. It was submitted that the applicant has made frivolous allegations against the conduct of the Respondent No. 1/RP, merely because the voting share of the Applicant was reduced and that of other Financial Creditor was increased in terms of law by Respondent No. 1.

25. The Ld. Counsel for the RP submitted that the Applicant has nowhere alleged that the claims of the home buyers admitted by the RP are false or concocted. It is evident that the Applicant felt prejudiced due to the decrease in its voting share because of the addition of the other Financial Creditors. As a consequence the Applicant is raising false and frivolous allegations against the

conduct of Respondent No. 1. Justifying his conduct as RP, regarding the submission of plan of Respondent No. 6 Mr. Ankit Wadhawa, the counsel for the Respondent No. 1 submitted that at the time of submission of the Resolution Plan initially i.e. on 21.01.2021, Mr. Ankit Wadhwa was not declared as a wilful defaulter. The RA himself submitted an Affidavit stating that he is eligible under Section 29(A) of IBC. Regarding the voting on the Resolution Plan, the meeting was held on 20.01.2023 to vote on the revised resolution plan. The Respondent No. 1 circulated the minutes immediately so as to speed up the process. The CIBIL shows him defaulter subsequently, however, he was not a defaulter on the date of submission of the Resolution Plan i.e. on 21.01.2021. The RA was declared a 'wilful defaulter' in 30.10.2022. Thus, there is no wrong doing or de-reliction of duty on the part of the RP. Otherwise also the RP was of the considered opinion that in case the Resolution Plan of Resolution Applicant is not approved it is not only the Corporate Debtor who would suffer but it will also affect the interests of the Homebuyers as they may not be able to get their respective units/ flats. Thus keeping in view the interest of home buyers, the Resolution Professional ensured approval of the Resolution of Plan of Respondent No. 6.

RESPONDENT 5 - NBFC

26. The Ld. Counsel appearing for Respondent No. 5 principally adopted the arguments advanced by the Applicant and emphasised on the Rejection of the plan of the Resolution Applicant. In addition, it was submitted that as the revised Resolution Plan was not commercially viable and contained ultravires clauses of extinguishment of Personal Guarantees which were executed by the promoters as well as the other guarantors, the Resp. No. 5 objected to the said Resolution Plan. Despite such firm objections,

the Resolution Professional moved ahead and evaluated the Non-code compliant Resolution Plan. Hence the plan though approved by COC deserves to be rejected.

RESPONDENT NO. 6 – RA

27. While countering the arguments advanced by the Applicant for rejection of the Resolution Plan submitted by the answering Respondent, the Ld. Senior Counsel contended that the plans were first submitted by the RA on 21.01.2021 and revised plan was submitted on 11.11.2022. He further submitted that the RA is in the business of real estate. The plan proposed by the RA is to complete the Residential and commercial projects of the CD. The proposed plan envisages repayment of the money to the Creditors and also allotment of completed units to the home buyers. The case of the RA is that there are 3 undergoing infrastructure projects with the CD that is *'Wadhawa Rhodesia', 'Florence Pearl' and 'Wadhwa Regalia'*. The lands under all three projects are not owned by the Corporate Debtor. All the three projects are acquired by the development rights. If the RA is not allowed to develop the proposed land then the development rights go out of the hands of the Corporate Debtor and the Homebuyers will not be able to get their flats. The RA has proposed to infuse a sum of Rs. 2 crores in '*project Rhodesia'*. He further submitted that under the plan the Operational Creditor will be paid a sum of 52,19,682/- towards the full and final settlement. FCs will be paid 11,94,72,909/- towards full and final settlement and the employees of the Corporate Debtor will be retained.

28. He further submitted that the Resolution Plan already stands approved by the COC by 66% voting majority and the same is under challenge by the Applicant on the ground that the RA was declared

a wilful defaulter on the date of submission of Resolution Plan. The counsel vehemently contended that till date no order of declaring the RA as willful defaulter is served upon him. It is only through the Applicant that the RA got this information and immediately instituted appropriate proceedings before the Hon'ble High Court challenging the Declaration of RA as a wilful defaulter. It was further contended that though no show cause notice was issued to the RA before declaring him wilful defaulter still RA has already cleared the pending dues and have virtually settled the matter with Indiabulls Housing Finance who got the RA declared as a wilful defaulter. In addition, the Ld. Counsel referred to various judgements so as to emphasis that till the time the order declaring him a wilful defaulter is not communicated the same cannot be permitted to cause any prejudice to his interest. The Ld. Counsel referred to ***State of Punjab vs Amar Singh Harika, 1966 SCC online SC 48 (Para 11).*** and ***the Gujrat High Court Hans ispath Limited Vs Bank of Baroda*** holding that the bank cannot report the name of the wilful defaulter directly to RBI/CIBIL without providing the Copy of the Order passed and giving opportunity of hearing to the borrower.

29. While countering the arguments with respect to the date of eligibility under Section 29A of the Code the reference was made to the Judgement rendered in ***Mr. Jaidev Laxmidas Panchmatia v. Mr., Fanendra H Munot dated 25th May 2023 (2023) ibclaw.in 341 NCLAT (Paras 7, 10, 13 and 14)*** wherein it has been held that the ineligibility under S. 29A(b) only applies to a Promoter of an MSME at the date of submission of the Resolution Plan. Since, the promoter was not declared as a wilful defaulter on the date of submission of the Resolution Plan i.e.

21.01.2021, the same cannot be a ground for rejecting the Resolution Plan submitted by the Promoter.

30. **Re. Extinguishment of Personal Guarantees-** While responding to the issues of extinguishment of personal guarantees, the Ld. counsel has submitted that the Resolution Applicant has allotted a higher sum in the Resolution Plan as against the Liquidation Value for the Sole reason that the Personal Guarantee will be discharged on the approval of the Resolution Plan. It is not out of place to mention that there is substantial sum to be infused in to the projects as there will be construction costs and other expenses for completion of all the 3 projects. The Ld. Counsel further submitted that law is well settled that COC in its commercial wisdom can decide to provide for extinguishment of Personal guarantees under the Resolution Plan. The reference was made to the Judgement of Hon'ble NCLAT in ***SVA Family Welfare Trust g Anr. Vs. Ujaas Energy Ltd.& Ors. (2023) ibclaw.in 546 NCLAT (para 28).***

31. The present Resolution Plan not only safeguards the license of the RA but also protect the interest of the Homebuyers by allotting them completed units. Therefore, the Resolution Plan is in the interests of the home buyers.

FINDINGS

32. After having heard all the Ld. Counsels at length and upon perusal of the documents placed on record, we are of the considered opinion that there is substance in the contentions being raised by the Ld. Counsel for the Applicant Bank particularly with respect to the manner in which Respondent No. 1/Resolution Professional has conducted himself. The case of the Applicant is that at the time

of formation of COC the voting percentage of the Applicant was 100% which by 13th Meeting of COC was reduced to 31.08% and by 15th COC Meeting homebuyers voting rights were increased to 66.42%. In this backdrop it deserves to be appreciated that though the RA submitted the Plan initially on 21.01.2021, the same was never placed before COC for approval as the Applicant bank having majority voting share would not have approved the Resolution Plan of the RA. Thus the said Resolution Plan was kept pending by Respondent No. 1. In the meantime, Respondent No. 1/RP kept adding homebuyers as financial Creditors till their voting share was raised to more than 66% and that of the Applicant Bank was reduced to minority. It was the 15th COC meeting when the Homebuyers voting share had substantially increased so as to approve the Resolution Plan of Resp. 6 / RA. Thus now at this stage once the RP /Respondent no. 1 was sure of getting the Resolution Plan approved by majority home buyers, Respondent No, 6 was asked to submit the Resolution Plan afresh on 11.11.2022 and it is this plan dated 11.11.2022 which was approved by the COC constituted of Homebuyers to the detriment of Applicant Bank. Thus the manner in which Respondent No. 1 conducted himself to the detriment of the Applicant Bank is not above board.

In addition it further deserves to be taken note of that on the date when the fresh plan was submitted by RA/ Respondent no 6 i.e. on 11.11.2022, the RA was already declared as willful defaulter. The RA got declared willful defaulter by IndiaBulls on 30.10.2022. The said fact of RA being a willful defaulter hence not eligible under Section 29A of IBC was not brought to the notice of the COC. Bringing on record the fact of declaration of RA as willful defaulter would have rendered respondent No. 6 ineligible to submit the Resolution Plan. The only justification advanced by Resp. No. 1 / RP is that he relied upon the affidavit submitted by the RA stating

that he is not ineligible u/s 29A of the Code. This conduct of Resp. 1 / RP is clearly a dereliction of duty on his part. Firstly the RP waited for the opportune time to put up the Resolution Plan for approval. Secondly he withheld the factum of Respondent no. 6 being ineligible to submit a Resolution Plan. To justify his conduct he is attempting to take the shelter of factually incorrect affidavit having been submitted by Resolution Applicant. As the Plan submitted for consideration before the COC was the Plan dated 11.11.2022 and not that of 21.01.2021, hence the eligibility of the RA was to be seen as on 11.11.2022 when he was already declared a 'willful defaulter'.

33. The contention of the Ld. Counsel for the RA (Respondent no. 6) submitting that he has already paid the due amount to Indiabulls Housing Corporate which got him declared a willful defaulter is of no consequence as eligibility under Section 29A of the Code is to be seen on the date of Submission of the Resolution Plan. In the present case the plan which was considered for approval was submitted on 11.11.2022 when the RA was already declared a willful defaulter on 30.10.2022. On the other hand the contention of the Ld. Senior counsel appearing for RA is that the eligibility of the RA is to be seen on the date of submission of the Original Plan i.e. 21.01.2021. The RA was not declared a willful defaulter as on that date i.e. 21.01.2021. Declaring the RA as willful defaulter subsequently cannot be permitted to cause any prejudice to the interest of the RA. The Ld. Counsel further contented that on 11.11.2022 it was merely a revised plan which was submitted and thus the date of the submission of the Revised plan may not be of much significance as far as eligibility of RA is concerned.

34. Regarding the judgement referred by the Ld. Counsel for the RA in ***Mr. Jaidev Laxmidas Panchmatia(Supra)*** it deserves to be taken note of that the RA in that case was declared wilful defaulter after submission of his plan whereas in present case the RA is declared wilful defaulter on 31 October 2022 prior to the submission of plan dated 11 November 2022 which was put for voting.

35. The Hon'ble Supreme court ***in 2017 (7 SCC 474) in 2017 (7) SCC 474 in Arun Kumar Jagatramka Vs. Jindal Steel & Power Ltd.*** has been pleased to hold as under:-

> *"46. The report of the Insolvency Law Committee dated 03.03.2018 states that the intent behind introducing Section 29-A was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable.*
>
> *and further held as under:*
>
> *"53. This lines of decisions, beginning with Chitra Sharma and continuing to ArcelorMittal and Swiss Ribbons is significant in adopting a purposive interpretation of Section 29-A, Section 29-A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new avatar of resolution applicants."*

From the perusal of the above, it is evident that Section 29 A of the Code, is inserted in the code with certain purpose and objectives and to ensure that the person who is the cause of the problem either by design or by default cannot be permitted to be part of the process of solution. Thus in view of the observation made by the Hon'ble Supreme Court, it is evident that No Resolution Plan of the 'willful defaulter' can be permitted to be accepted or approved.

On the otherhand the Ld. Counsel for the Resolution Applicant/ Respondent No. 6 raised an argument stating that on the date of the submission of the Resolution Plan i.e. 21.01.2021, the Resolution Applicant was not a 'willful defaulter'.

36. After having appreciated the arguments advance by the Ld. Counsel for the RA and having gone through the documents submitted, it is evident that though the Resolution Plan was submitted on 21.01.2021. This plan was never put up before COC for consideration not ever opened/discussed or voted upon. The plan put up before COC was a fresh Plan submitted by Respondent No 6 on 11.11.2022. It cannot by any stretch of imagination be stated to be a negotiated or revised Resolution Plan as the earlier plan was never considered at all. Since it was a fresh plan submitted on 11.11.2022 the eligibility of the SRA /Respondent No. 6 under Section 29A of IBC was required to be seen on the date of submission of Plan i.e. 11.11.2022. The fact is on 11.11.2022 the RA /Respondent no. 6 was ineligible under Section 29A of IBC to submit the Resolution Plan as he was declared willful defaulter on 30.10.2022. Thus the said plan submitted by the SRA could not be approved by the COC.

37. It is pertinent to note the minutes of the COC wherein it was held as under –

"..Resolution Plan version 1.0 was submitted on 21st January, 2021 which was not taken to consideration as the substantial time was elapsed and many circumstances changed with respect to claims, intrinsic value of the project, estimated cost escalation etc. which directly or indirectly affecting the Resolution Plan amount. RP had sought extension and exclusion from the Hon'ble NCLT Mumbai and the same was allowed. Further the RP allowed to file a Resolution Plan by 11th November 2022."

Thus, from the perusal of the above it is evident that on 11.11.2022 It was virtually a new plan placed before COC by the RA. Thus it is this date i.e. 11.11.2022 which is material so as to check the eligibility of the Resolution Applicant under Section 29A of the Code and in the present case the Resolution Professional withheld the information of the eligibility of the Resolution Applicant from the COC as the plan of the RA may not have been approved by the COC. If the factum of his having being declared as a 'willful defaulter' had come to the knowledge of the COC. Hence, the requisite information was withheld from the COC.

38. Though, Resolution Professional/Respondent No.1 later on made an attempt to justify his conduct stating that it is the Resolution Applicant/ Respondent No. 6 who falsely submitted an affidavit stating that he is eligible to submit the Resolution Plan. It was incumbent upon Resolution Professional to verify the particulars submitted by the Resolution Applicant on the date of submission of the Resolution Plan, so as to ensure that the plan being submitted and being placed before the COC is by a person who is competent to do so.

39. We are conscious of the fact that the commercial wisdom of COC has to be honoured and the Adjudicating Authority should not question the same. But keeping in view the peculiar facts and circumstances of this case, we are constrained to notice that in the present case the constitution of COC was in such a manner that the Applicant bank was in minority having a meagre voting share of 29.57% and that of home buyers was more than 66% hence the COC was practically constituted of homebuyers only as far as the voting for Resolution Plan was concerned. Home Buyers being the most vulnerable section as their only concern is to ensure that they are able to get their respective units/flats. Thus, in the present case, it is not the '*Commercial Wisdom*' of a Financial Creditor which has prevailed upon the decision making but the most vulnerable section of COC i.e. home buyers who were the most gullible constituents of COC. Respondent No. 1 and Respondent No. 6 seem to have prevailed upon the Homebuyers so as to ensure the passing of the Resolution Plan against the mandate of IB Code and Regulations. In addition Homebuyers were not in a position to truly appreciate the effect of extinguishment of Personal Guarantees. In fact the COC lacked not only the commercial wisdom but also the legal acumen so as to appreciate the mandate of IBC and the impact of a non-compliant Resolution Plan.

40. In addition, the manner in which the confidential proceedings of the COC were allowed to be attended by a stranger to the proceedings i.e. Mr. Prabhat Jain who was not the Authorized Representative and was not even named in the list provided under the Regulation 4A of the Code, further corroborates the fact that RP /Respondent No. 1 has failed to conduct himself in an unbiased manner in terms of the provisions of the code and the regulations.

With respect to the conduct of the Respondent No. 1/RP we wish to state that being an RP is an onerous responsibility and RP is expected to conduct himself in an unbiased and responsible manner as he is an officer of the Court but in the present case the RP during the entire proceedings was steering the COC proceedings in such a way so as to achieve the objective of getting the Plan of Respondent No. 6 approved.

41. Therefore, keeping in view the above stated facts and circumstances, the manner in which the Resolution Professional conducted himself, we are of the considered opinion that it is a fit case where the I.A. deserves to be allowed and **the Resolution Plan submitted by Respondent No. 6 be set aside**. The copy of this order be forwarded to IBBI. The extension of 180 days for CIRP is granted to invite fresh expression of interest.

SD/- SD/-

Madhu Sinha **Reeta Kohli**
Member (Technical) **Member (Judicial)**
/Abhay/