SL. No.112

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Video Conference

CORAM: HON'BLE BHASKARA PANTULA MOHAN–MEMBER JUDICIAL
CORAM: HON'BLE DR.BINOD KUMAR SINHA-MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 25.07.2022 AT 10:30 AM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA No.882/2019 in CP (IB) No.276/7/HDB/2018
NAME OF THE COMPANY	Ind-Barath Energy (Utkal) Ltd
NAME OF THE PETITIONER(S)	Bank of Baroda
NAME OF THE RESPONDENT(S)	Ind-Barath Energy (Utkal) Ltd
UNDER SECTION	7 of IBC

ORDER

IA No.882/2019- Order pronounced vide separate sheets. IA No. 882/2019 is allowed with some observations.

Sd

MEMBER (T)

Sd

MEMBER (J)

Ajay

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH-II, HYDERABAD

IA No.882 of 2019
in CP (IB) No.276/7/HDB/2018
Under section 30(6) of the IB Code, 2016

In the matter of:-
M/s. Ind-Barath Energy (Utkal) Ltd.

Mr. Udayraj Patwardhan,
Resolution Professional of
Ind-Barath Energy (Utkal) Ltd.

...Applicant/
Resolution Professional

Date of Order: 25.07.2022

Coram: Shri BhaskaraPantula Mohan, Member Judicial
Dr. Binod Kumar Sinha, Member Technical

Parties/Counsel Present:

For the Resolution Professional :	Mr. K. Venugopal, Senior Counsel alongwith Mr.Niraj Kumar, Counsel
For the Resolution Applicant:	Mr. Gopal Jain, Senior Counsel alongwith Mr. D. Narender Naik
For the Financial Creditors:	Mr. Tushar Mehta, Solicitor General of India alongwith Mr. Ramakant Rai, Advocate

[PER: BENCH]

ORDER

1. Under consideration is an interlocutory Application bearing IA No.882 of 2019 filed by the Applicant/Resolution Professional (in short 'RP') in the matter of M/s Ind-Barath Energy (Utkal) Ltd. u/s. 30(6)of the Insolvency and Bankruptcy Code, 2016, for seeking approval of the Resolution Plan.

2. Brief facts leading to filing of the Instant Application are as under:-

a) That pursuant to an application filed by the Bank of Baroda under section 7 of the Insolvency and Bankruptcy Code, 2016 **("Code"),** the Adjudicating Authority by its order dated 29.08.2018 had ordered the commencement of Corporate Insolvency Resolution Process (**"CIRP"**) of the Corporate Debtor under the provisions of the Code. Further, Mr. Udayraj Patwardhan, the Applicant herein, was appointed as the Interim Resolution Professional to conduct the CIRP of the Corporate Debtor. The Applicant was later confirmed by the Committee of Creditors (**"COC"**) to continue as the RP for the Corporate Debtor.

b) That in the CIRP, the Resolution Plan received from M/s JSW Energy Limited, the Successful Resolution Applicant, wasapproved by the COC with 82.70% votes in their 18th meeting held on 09.10.2019. The results of the said voting were declared on 14.10.2019.

c) That pursuant to the said approval by the COC, the Applicant had also issued the 'Letter of Intent' dated 14.10.2019 which has also been accepted by M/s JSW Energy Limited.

d) That pursuant to the approval of the Resolution Plan by the COC, the Successful Resolution Applicant has also submitted the Performance Bank Guarantee bearing BG No.BDC-792-043647-001/19-20 dated 24.10.2019 for an amount of Rs.100,00,00,000/- (Rupees One Hundred Crores only) with the RP.

e) That the Resolution Plan outlines the payments to be made to different classes of creditors and stakeholders in accordance with the provisions of section 30(2).

-Sdl-

-Sdl-

f) That the amounts provided for the stakeholders under the Resolution Plan is as under:

Sr. No.	Heads of Payment	Resolution Proposal
1.	CIRP Costs	In full Note: The Resolution Applicant shall provide such amounts as are required to meet the unpaid CIRP Costs, subject to a maximum amount of INR 18,00,00,000/- (Rupees Eighteen Cores only). Any CIRP Costs over and above INR Rs.18,00,00,000/- (Rupees Eighteen Core only) shall be incurred after due consultation with the Resolution Applicant. If any amounts exceeding INR 18,00,00,000/- (Rupees Eighteen Crores only) are incurred towards CIRP Costs without the prior concurrence of the Resolution Applicant or by virtue of an Order of the NCLT or the National Company Law Appellate Tribunal then such amounts shall be deducted from the Upfront Payment to Secured Financial Creditors on a *pro rata* basis. In the event that the CIRP Costs incurred is less than INR 18,00,00,000/- (Rupees Eighteen Crores only), then the balance amount shall be

-Sdl-

- Sdl -

		distributed on a *pro rata* basis amongst the Secured Financial Creditors. Provided that, the CoC may in its discretion adopt a different manner of distribution (which may take into account the order of priority amongst Financial Creditors as laid down in section 53(1) of the IBC, including the priority and value of security interest of a Secured Financial Creditor) and such decision of the CoC shall be accepted by the Resolution Applicant, subject to there being no change in the Total Resolution amount.
2.	Workmen and employees, as Operational Creditors of the Company	INR 8,04,97,735/- (Rupees Eight Crores Four Lakhs Ninety Seven Thousand Seven Hundred Thirty Five only)
3.	Operational Creditors including Government Dues (other than workmen and employees)	INR 9,55,02,265/- (Rupees Nine Crores Fifty Five Lakhs Two Thousand Two Hundred Sixty Five only)
4.	Secured Financial Creditors	Upfront Payment to Secured Financial Creditors in consideration of Assignment of Admitted Secured Financial Debt:

-Sd-

-Sd-

		The total Admitted Secured Financial Debt shall be assigned by the Secured Financial Creditors to the SPV for an aggregate consideration of INR 1001,00,00,000/- (Rupees One Thousand One Crore only) on the terms set out in Schedule 2 (Resolution Plan Steps) of this Resolution Plan. Additionally, the Secured Financial Creditors shall be issued equity shares of INR 10 (Rupees Ten only) each (credited as fully paid up) of the Company such that at Implementation Date, the Secured Financial Creditors shall collectively hold equity shares corresponding to five per cent (5%) of the total paid up and issued equity share capital, after the infusion of the SPV Contribution, in the manner as set out in Schedule 2. Such equity shares shall be issued to the respective Secured Financial Creditors in the same proportion as the distribution of the Upfront Payment to Secured Financial Creditors. At the option of the Secured Financial Creditors, the equity shares may also be issued to a trustee who may hold the equity shares on behalf of all the Secured Financial Creditors.

		Note: The Resolution Applicant/ Company agrees that in relation to the TNGDCL BG Litigation, if it receives any compensation pursuant to any award passed by any arbitral tribunal or an order passed by any judicial, regulatory or administrative authority in the TNGDCL BG Litigation and such order is not stayed or appealed, then the TNGDCL BG Litigation Amounts, shall be payable to the Secured Financial Creditors, over and above the Upfront Payments to Secured Financial Creditors.
5.	Unsecured Financial Creditors	**Upfront Payment to Unsecured Financial Creditors in consideration of Assignment of Admitted Unsecured Financial Debt:** The total Admitted Unsecured Financial Debt shall be assigned by the Unsecured Financial Creditors to the SPV for an aggregate consideration of INR 7,00,00,000/- (Rupees Seven Crores only) on the terms set out in Schedule 2 (Resolution Plan Steps) of this Resolution Plan.
6.	**Total Resolution Amount** (save and	**INR 1025,60,00,000/- (Rupees One thousand Twenty Five Crores Sixty Lakhs only)**

-Sd-

-Sd-

	except the unpaid CIRP Costs)	
7.	Dissenting Financial Creditor	The Resolution Plan does not propose to make any distinction between the amounts payable to Financial Creditors who vote for or against this Resolution Plan, provided however that the Financial Creditors who do not vote in favour of this Resolution Plan will be entitled to receive at least the amount that they would have received in accordance with sub-section (1) of Section 53 of the IBC in the event of a liquidation of the Company. [Ref: 2.1.3 of Resolution Plan]

g) That the Resolution Plan contains a statement that it has dealt with the interest of all the stakeholders.

h) That the Resolution Plan provides for:

   a. The term of the plan and its implementation schedule;
   b. Management and control of the business of the Corporate Debtor during the term of the Resolution Plan;
   c. Adequate means for supervising its implementation.

i) That in the Resolution Plan, the Successful Resolution Applicant has demonstrated that the Resolution Plan:

   a. has addressed the cause of default;
   b. is feasible and viable;
   c. has provisions for its effective implementation;
   d. has provisions for approvals required and the timelines for the same;

-Sd/-

-Sd/-

j) That as part of the Resolution Plan, the Successful Resolution Applicant has also envisaged (a) approval of the capital reduction of the Corporate Debtor, and (b) approval of the amalgamation of the Special Purpose Vehicle (to be created by the Successful Resolution Applicant) with the Corporate Debtor pursuant to the provisions contained under Regulation 37 of the CIRP Regulations read with Section 31 of the Code, and will not be undertaken under the provisions of the Companies Act, 2013.

k) That under the Resolution Plan, the Successful Resolution Applicant has estimated an amount of Rs.1650 Crores which it will be required to infuse by way of additional funds (through sustainable debt and equity/quasi-equity instruments) for commencing the sustainable commercial operations of the Project. Further, as per the Resolution Plan it is provided that the said additional funds will be utilized for completing the balance works of the Project and for improving the operations of the Corporate Debtor.

l) That the Resolution Plan is subject to the following conditions and can be terminated by the Successful Resolution Applicant:

   a. Upon the occurrence of a Material Adverse Change before the implementation date;

   b. Upon the Resolution Plan being modified, or approved with any modifications by the COC or the Adjudicating Authority, without the prior written consent of the Successful Resolution Applicant.

m) That the Resolution Plan is further subject to the material assets being free from any and all attachment by any Government Authority, including but not limited to, the Enforcement Directorate, Central Bureau of Investigation, etc.

n) Reiterating the above, the counsel for the Applicant prayed to allow the instant Applicant.

3. That on 28.11.2019, Resolution Professional has filed an additional affidavit *inter-alia,* stating as under:-

a) That at the request of the Power Finance Corporation, 19th CoC meeting was conducted, wherein CoC members discussed about the amounts provided in the Form – H as well as the contents of the Resolution Plan.

b) That the PFC has proposed a specific distribution of the amounts to be received under the Resolution Plan among the Financial Creditors.The said proposal has been approved by 72.55 % votes.

4. While the Applicant/RP sought approval of the Resolution Plan so approved by the COC at its 18th meeting held on 09.10.2019 with 82.70% votes, the Learned Counsel for the Successful Resolution Applicant filed the following objections dated 28.11.2019, against it's own Resolution Plan :

a) That the Adjudicating Authority vide Order dated 18.12.2019 was pleased to allow the Impleadment Application bearing IA No.1156 of 2019 filed by JSW that JSW has filed another application bearing IA No.24 of 2021 in the present matter, seeking termination of Resolution Plan on the basis of Termination Notice issued by JSW on 02.02.2021 on account of occurrence of Material Adverse Change. The present Reply/Objections is being filed without prejudice to IA 24 of 2021 and is being filed in the alternative to it in view of the judgment recently passed by the Hon'ble Supreme Court in Ebix Singapore Private Limited V. Committee of Creditors of Educomp Solutions Limited &Anr., Civil Appeal No.3324 of 2020 And Its Connected Matters ("Ebix and connected matters") and

-Sd/-

-Sd/-

should not be read in derogation to the submissions made in IA 24 of 2021.

b) That the Plan Approval Application ought to be rejected or disposed of as the Resolution Plan in its current form is no longer 'viable' and 'implementable' in light of the Hon'ble Supreme Court's judgment in the Ebix and connected matters.

c) That the Supreme Court in Ebix and connected matters has held that a Plan having a MAC clause cannot pass the test of 'viability' and 'implementability'.

d) That the Resolution Plan submitted by JSW has a clause envisaging MAC and its consequences and the same has been approved by the Committee of Creditors (**"CoC"**). As per Section 1.13.16 of Part B (*Financial Proposal*) of the Resolution Plan (**"MAC Clause"**), any event or circumstance that occurs or is discovered **after the date of the Resolution Plan**which is materially adverse to the business, financial condition, or assets of the Corporate Debtor, resulting in an aggregate monetary impact of more than 10% (ten percent) of the Total Resolution Amount [i.e. 10%of INR 1025.6 Crore= INR 102.5 Crore] shall be considered as a material adverse change, entitling JSW to terminate the Resolution Plan till the Implementation Date.

e) That the Hon'ble Supreme Court in its judgment in Ebix and connected matters dealt with the issue or permitting a resolution applicant to stipulate certain contingencies in the Resolution Plan under which it can withdraw from the Plan.

f) That the Resolution Plan as it stands today cannot pass the test of 'viability' and 'implementability' as envisaged by the Hon'ble Supreme Court as this would make the resolution process indeterminate and unpredictable. Therefore, in such a case, as

-Sd-

-Sd-

the Resolution Plan does not pass the test of feasibility and viability u/s 30(2) of the Insolvency and Bankruptcy Code, 2016.

g) That the MAC Clause cannot be simply severed from the Resolution Plan by the Ld. NCLT as the same would amount to modification of the Resolution Plan by the Ld. NCLT. Such modification by the Ld. NCLT is impermissible under the law as neither the Code nor the Rules empower the Ld. Adjudicating Authority to modify a Resolution Plan once it has been approved by the CoC in its commercial wisdom.

h) That reliance is placed on the Hon'ble Supreme Court's judgment in the matter of Jaypee Kensington Boulevard Apartments Welfare Association &OrsVs.NBCC (India) Ltd. &Ors. CivilAppeal No. 3395 of 2020 wherein the Hon'ble Supreme Court held as follows:

"The Adjudicating Authority has no jurisdiction to enter into the commercial aspects of the resolution plan and to interfere with the wisdom of the Committee of Creditors. The submissions made on behalf of the IRP in this regard are correct that if the Adjudicating Authority was of the view that the plan did not meet with any particular requirement, it could have only sent it back to the CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same and the Adjudicating authority has erred in modifying the terms of the resolution plan and in not sending the matter back to the Committee of Creditors for reconsideration while extending an opportunity to the resolution applicant to make the necessary modifications."

In light of the aforesaid, it is respectfully submitted the Hon'ble Tribunal does not have the power to modify the Plan or severe the MAC Clause.

-Sd-

-Sd-

i) That unilateral modification of JSW's Resolution Plan is also impermissible under the terms of the Resolution Plan.

j) That the Resolution Plan of JSW consciously envisages termination or withdrawal of the Plan on the occurrence of MAC. That the MAC Clause is indispensable, and a fundamental clause of the Plan and it cannot be held to be invalid and severed from the Resolution Plan. In fact, the importance of the MAC Clause in the present case can be demonstrated from the fact of the conditions of the assets of the Corporate Debtor deteriorated to such an extent on account of sheer negligence and mismanagement by the Resolution Professional, that an occasion had already arose for JSW to invoke the MAC Clause, by way of Termination Notice dated 02.02.2021. It can be seen that the underlying conditions for invoking the MAC Clause and terminating the Resolution Plan has already occurred in the present case, which only serves to demonstrate the significance of the clause in the instant matter.

k) That the fundamental nature of the MAC Clause is borne out from the following clauses of the Resolution Plan-

(i)Clause 1.13.16(A)(ii) reads that *"The Resolution Plan shall be terminated or shall stand withdrawn upon the occurrence of any of the following, at the option of the Resolution applicant... upon the Resolution Plan being modified or approved with any modifications by the CoC or the Adjudicating Authority, without the prior written consent of the Resolution Applicant for such modifications.*

Clauses (b) and (c) of the MAC Clause 1.13.16 of the Plan provide that *(b) If the Resolution Plan is terminated or withdrawn in the manner set out herein, this Resolution Plan shall stand revoked, cancelled and be of no effect and be null and void....(c) (c) Notwithstanding anything contained in this Resolution Plan or any*

-Sd/-

-Sd/-

other document or instrument, if the Resolution Plan is terminated or withdrawn as above, the Resolution Applicant, and/or the SPV shall not be liable to make any payments to any person, including to the creditors of the Company or under any guarantee provided by, or on behalf of the Company, or on behalf of the Resolution applicant, and/or the SPV and their respective affiliates, under contract, equity or otherwise.

Clauses (d) of Information Conditions-Subject to requirements set out in the Resolution Plan, the approval or acceptance of the Resolution Plan **in its entirety** by the CoC and the Ld. NCLT will create a binding obligation on the Resolution Applicant and on all the stakeholders of the Company, including but not limited to all creditors (whether admitted or not) of the Company, in accordance with the provisions of the IBC.

l) That the MAC Clause forms an intrinsic and fundamental part of JSW's Resolution Plan, it cannot be held to be invalid and severed from the Resolution Plan.

m) That CoC in its commercial wisdom has accepted the MAC clause (with 82.70% approval), and a clause approved by the CoC in its commercial wisdom cannot be simply negated.

n) That the commercial wisdom of the CoC is non-justiciable and the same cannot be interfered with and the Court ought to cede ground to the commercial wisdom of the creditors. In view thereof, the Resolution Plan once approved by CoC cannot be interfered with or set aside by this Adjudicating Authority.

o) That considerable delay in approval of Resolution Plan has also been caused by the disagreement amongst the creditors themselves, on account of several applications filed by them

pertaining to inter-creditor disputes. Such delay is not attributable to JSW.

p) The following table demonstrates the applications and appeals that have been filed by the creditors and the RP themselves after approval of the Resolution Plan by the CoC:

Sl No.	**Application/ Appeal No.**	**Applicant before this Hon'ble Tribunal/ Appellant before NCLAT**
1.	IA No.1084 of 2019	Punjab National Bank
2.	IA No.1014 of 2019	Corporation Bank
2.	IA No.93 of 2020	Punjab National Bank
4.	IA No.614 of 2020	Jammu & Kashmir
5.	IA No.977 of 2020	Axis Bank
6.	IA No. N/A of 2021	Impleadment application in IA No. 1014 of 2019 by Power Finance Corporation Limited
7.	IA No.1084 of 2019	Mr. Udayraj Patwardhan v. MAIF Investment India 2 Pte. Ltd.
8.	Company Appeal (AT) No.1232 of 2019-withdrawn on 6.7.2021	MAIF Investment India 2 Pte. Ltd. It is relevant to note Hon'ble National Company Law Appellate Tribunal's order dated 13.11.2019 directing that *"during the pendency of the appeal if any order is passed by the Adjudicating Authority and Resolution Plan is approved, it will be subject to the decision of this Appeal."*
9.	Company Appeal (AT(Ins.) No.688 of 2020	Mr. Udayraj Patwardhan, Resolution Professional of IBEUL vs. Tata Capital Financial Solutions Pvt. Ltd. &Ors.
10.	Company Appeal (AT(Ins.) No.111 of 2021	Punjab National Bank vs. Mr. Udayraj Patwardhan and Ors.
11.	Company Appeal (AT(Ins.) No.132 of 2021	Punjab National Bank vs. Mr. Udayraj Patwardhan and Ors.

q) That pertinently, one of the appeals preferred by Punjab National Bank (**"PNB"**) has a direct bearing on the Resolution Plan and is

-sd-

-sd-

regarding appropriation of bank guarantee invocation amount of INR 120 Crore, which is currently kept by TANGEDCO in an interest-bearing fixed deposit account (**"TNGDCL BG Litigation"**). This Bank Guarantee was issued upon the request of the Corporate Debtor by PNB in favour of TANGEDCO. PNB is seeking deletion of a key condition of the Resolution Plan. As per para 2 to clause 3.1.4(a) of the Resolution Plan (which PNB is seeking to delete), JSW/IBEUL has agreed that in relation to the TNGDCL BG Litigation, if it receives any compensation pursuant to any award passed by any arbitral tribunal or an order passed by any judicial, regulatory or administrative authority in the TNGDCL BG Litigation and such order is not stayed or appealed, 50% (Fifty percent) of such amounts net of all expenses (whether procedural, incidental or otherwise) and taxes in relation to such proceeding, shall be payable to the Secured Financial Creditors, over and above the Upfront Payment to Secured Financial Creditor. However, PNB is insisting that this entire amount belongs to PNB. The Appeal is pending before the Hon'ble Appellate Tribunal and it is humbly submitted that any adverse decision in the said appeal would nullify the calculated assumptions made by the Answering Respondent and in all likelihood, would potentially derail JSW's plan to turnaround the assets of the Corporate Debtor.

r) That in light of significant delay already caused in the CIRP that too on account of CoC members, JSW cannot be held accountable for the same and be held responsible to implement the Plan as such delay has caused an *undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation.*

-Sd/-

-Sd/-

5. In reply to the objections raised by the Resolution Applicant, the Counsel for the RP submitted as under:-

a) The entire set of objections really resolves itself into a single objection, namely, that the SRA should be permitted to rely on the MAC Clause in its Resolution Plan in order to wriggle out of it. In fact, this Hon'ble Tribunal has already confirmed in its order dated October 14, 2021 in IA 24 of 2021 **(the "IA 24 Order")** in the context of this very resolution plan, **that** the SRA is barred by the judgement of the Hon'ble Supreme Court in the matter of Ebix Singapore (P) Ltd. V. Committee of Creditors of Educomp Solutions Ltd &Anrreported in 2022(2) SCC 401 **(the "Ebix Judgement")** from resiling from its Resolution Plan. The Ebix Judgement makes it clear that the MAC clause becomes unenforceable as soon as the COC has approved a resolution plan and that a resolution applicant cannot be permitted to rely upon it.

b) The determination of the 'viability' and 'feasibility' of the Plan falls solely within the ambit of the committee of creditors under Section 30(4) of the IBC. The Hon'ble Supreme Court has repeatedly held in a catena of cases that the issues covered by Section 30 (4) of the Code do not fall within the jurisdiction conferred by Section 31(1) of the Code on this Hon'ble Tribunal and that only the issues covered by Section 30(2) of the Code fall within the ambit of the jurisdiction of this Hon'ble Adjudicating Authority.

c) It is MAC clauses inthe resolution plan, providing that a resolution applicant can resile from the resolution plan on the ground of '*material adverse changes*' clauses which have been held to be 'unviable' and 'unfeasible'. However, the Hon'ble Supreme Court has neither rejected the resolution plan nor held the same to be unviable or unimplementable based on the mere existence of the

-Sd/-

-Sd/-

MAC Clause in a resolution plan. Moreover, the Hon'ble Supreme Court has, *inter alia*, held that the plan de hors the MAC clause shall prevail (See Ebix Judgement, para 162). Hence, the argument sought to be raised by the SRA in this regard is flawed in the light of the Ebix Judgement.

d) It is submitted that the Hon'ble Supreme Court in the Ebix Judgement, has *interalia*, held that it is not open for an SRA to withdraw its resolution plan post approval of the same by the members of the committee of creditors. As such, once a resolution plan has been approved by the committee of the creditors, the SRA is not permitted to wriggle out of the same, by way of termination and/or withdrawal.

e) Moreover, it has been further clarified in the *Ebix Judgement* that even if any clause exists in the resolutions plan which enables the SRA to resile from its resolution plan which has been approved by the members of Committee of Creditors, such as the MAC clause provided in Clause 1.13.16 of Part B (Financial Proposal) of the Plan in the present case sought to be relied on by JSW, such clause shall be rendered otiose and cannot be given effect to. It has been also clarified by the Hon'ble Supreme Court that even if the said clause, such as an MAC clause, has been mentioned in Form H, i.e., the compliance certificate filed by the resolution professional, the said clause cannot be given effect to, with the same being beyond the purview of the Code.

f) Hence, the Hon'ble Supreme Court in the *Ebix Judgement*, has unequivocally established that an SRA is not permitted to withdraw its resolution plan which has been approved by the members of the committee of creditors, in any manner whatsoever.

g) Without prejudice to the above, a bare perusal of the severability clause, i.e., Clause 1.13.7 sought to be relied on by the SRA, shows that the same can only be invoked after prior consent of the members of COC. As such the contentions of SRA are contrary to the severability clause itself. Further, the severability clause does not entitle the SRA to raise any objection to the approval of the Plan, and merely entitles the SRA to file an application before this Hon'ble Tribunal, with prior consent of the COC, to seek modification of its Plan to the extent any clause has been rendered unenforceable and/or invalid.

h) In a catena of judgements including *Innovative Ind. V. ICICI Bank* (2018) 1 SCC 407 (para 55) *Ghanshyam Mishra v. Edelweiss ARC Ltd* (2021) 9 SCC 657 (para 93) and *Pratap Technocrats v. Monitoring Committee of Reliance Infratel* (2021) 10 SCC 623 (para 46), the Hon'ble Supreme Court has held that the Code is a "complete code" and rights and liabilities are strictly regulated by the terms thereof. Accordingly, what is essential or 'intrinsic' to the Plan must only be considered in terms of the Code including, *inter alia,* compliance with Section 30(2) of the Code. Further, the MAC Clause has been held to be invalid by operation of law vide the *Ebix Judgement*. The MAC Clause, being alien to the scheme under the Code cannot be held to be intrinsic and/or fundamental to the Plan.

i) In fact, the delay in adjudication of IA 882 is attributable to the SRA considering that the SRA has preferred a number of baseless applications, *inter alia,* I.A.No. 613 of 2020 (seeking a transaction audit report) and IA No. 774 of 2020 (seeking site visit), wherein the SRA has sought stay on adjudication of IA 882. The said applications are pending adjudication. Therefore, the SRA cannot

-Sd-

-Sd-

be permitted to take advantage of its own wrong now by pleading that, in view of the delay, it ought to be allowed to resile from the resolution plan.

j) Most importantly, in the IA No. 24 Order this Tribunal has specifically held (at para 11) that *".... even admitting for the sake of argument that there is erosion of assets of the Corporate Debtor in this case and the Resolution Plan is pending approval of this Adjudicating Authority since 2019, still this Adjudicating Authority cannot permit the applicant to withdraw the Resolution Plan."* Thus, the plea of delay in approval of the Resolution Plan has already been decided against the SRA by this Tribunal and, in a sense, is *resjudicata* between the parties as far as this Tribunal is concerned. At the very least, issue estoppel would operate against the SRA and prevent it from raising the same issue again before this Tribunal.

k) Considering that there is no mention of such arguments, viz., 'deterioration of value of assets of IBEUL' and 'dereliction' in performance of duties by RP in the Reply to IA 882, this Tribunal ought not to hear and decide the arguments raised by the SRA in the course of its oral submissions.

l) The contentions of the SRA regarding dereliction in performance of duties by RP and deterioration of assets of IBEUL were specifically pleaded in IA 24, which was dismissed by this Tribunal in the IA 24 Order in view of the *Ebix Judgement*. As such, they must be deemed to have been decided by this Hon'ble Tribunal in the IA 24 Order, which bars the SRA from raising the same issue again in view of issue estoppel and principles analogous to res judicata.

m) That the contentions sought to be raised by the SRA regarding, inter alia, dereliction in performance of duties by RP and

-Sd-

-Sd-

deterioration of assets of IBEUL were raised by the SRA in IA No.24 which came to be dismissed by this Hon'ble Adjudicating Authority vide the IA 24 Order.

n) The relief sought by the SRA in its Reply to IA 882, i.e., 'Dismiss the Plan Approval Application bearing IA 882 as the Resolution Plan is conditional, not viable and implementable' is also, in effect, the same as the relief sought in IA 24, i.e.,, "Dismiss the plan Approval Application IA No.882 of 2019".

o) However, IA 24 has already been rejected by this Adjudicating Authority vide its order dated October 14, 2021. Therefore, it is apparent that the SRA is once again seeking the same relief, i.e., dismissal of IA 882, which has already been rejected by this Tribunal. Hence, the relief sought in the Reply to IA 882 is barred by the doctrine of issue estoppel. *(Hope Plantations Ltd v. Taluk Land Board Permade,*(1995) 5 SCC 228 (para 4). As such, this Adjudicating Authority is precluded to go into such issues of deterioration of assets of IBEUL and dereliction in performance of duties by RP, which have already been decided vide order passed in IA 24. The Supreme Court in Barkat Ali and Anr. V. Badrinarain (Dead) by LRs, (2008) 4 SCC 615, has held as follows:

p) The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage.

q) The said re-agitation of decided issues before this Tribunal coupled with the position that the SRA has already preferred an appeal before the Hon'ble National Company Law Tribunal, Chennai Bench **('NCLAT')** being company Appeal (AT) (Ins.) 332 of 2021

("Appeal"), assailing the order passed in IA 24 which is pending adjudication before the Appellant Tribunal, amounts to abuse of process of court. The Hon'ble Supreme Court in K.K. Modi v. K.N. Modi Andors. (1998) 3 SCC 573, has held as follows:

That the RP has performed its duties to "protect and preserve" the assets of IBEUL in accordance with the provisions of Sections 18 and 25 of the Code and has undertaken all such measures as were prudent and necessary – within the ambit of resources available to the RP and within the bounds of directions issued by the COC.

r) The SRA is accusing the RP of negligence only in order to somehow achieve its objective of wriggling out of its own Resolution Plan on the assumption that this plea somehow would distinguish the facts of the present case from the facts of the cases covered by the *Ebix Judgement.* The SRA ought not to be permitted to tarnish and blacken the reputation of the RP only in order to achieve its objective of resiling from the Resolution plan by hook or by crook despite the clear holding by the Hon'ble Supreme Court in the Ebix Judgement.

s) It is clear, however, that the RP himself can function only within the limitations of the resources available to maintain the assets of the Corporate Debtor. The SRA was fully aware of the fact that the thermal power units of the Corporate Debtor had not been functioning from 2016 much before it submitted its Resolution plan and that it had no revenues. Thus, the COC was also constrained in terms of the resources that it could make available to the RP to protect and preserve the assets of the Corporate Debtor. In so far as finances available to be spent on preservation and protection of the assets of the Corporate Debtor are concerned,

-Sd/-

-Sd/-

it is clear from the provisions of Section 25(2)(c) read with Section 28 of the Code that the RP functions completely under the control and supervision of the COC. Further, under Section 27 of the Code, the COC has the full power to replace the RP as well. It is vital to note in this regard that the COC has not made any complaint against the RP with respect to negligence or dereliction of duty.

t) IBEUL had no revenue of its own so the general principle of 'going concern' which envisages availability of revenue channel(s) for a corporate debtor was also not available in the present case.

u) The SRA was well aware of the maintenance efforts, the expenditure being incurred and the state of affairs of IBEUL and the same being in a state of disuse since 2016 and the plant and machinery lying at the Plant site were not being maintained as per the prescription of the OEMs at least since then. The SRA had conducted its comprehensive due diligence and site visits on two occasions, firstly in the month of March-April 2019 and again in the month of August, 2019 – September, 2019 and on both such occasions, the SRA had obtained "Techno–Economic Feasibility" reports in respect of the Corporate Debtor and submitted its Resolution Plan. Since the time the SRA had conducted its first due diligence before submitting its resolution plan under 1st RFRP, i.e., since March, 2019, the SRA had been well aware of the condition and the state of affairs of the assets of the Corporate Debtor and accordingly factored in the risks involved in acquiring such asset. The SRA is a leading player in the power sector and understands the nuisances of power sector, age of assets, impact of shut down of operation on the value of assets maintenance required, investment in re-commencing operations and erecting new plant, and cost transition when acquiring a plant such as the present one.

-Sd-

-Sd-

v) Pertinently, basis its due diligence, the SRA, being fully aware and mindful of the status of assets, had estimated that an amount of INR 1650 Crores would be required for commencing operation of IBEUL, which remained unchanged in the first resolution plan and the subsequent resolution plan (which was approved by the members of the COC) submitted approx. 6 months apart.

w) Thereafter, post approval of the Plan, the SRA/its representatives/agencies appointed by SRA, were continuously present on site from November 5, 2020 to March 2021along with approx. 33 Vendors appointed by the SRA (including Original Equipment Manufacturers ("OEM") such as M/s Harbin and M/sCethar Vessel, who had earlier refused to extend any services to the IBEUL as recorded in its TEV Reports). Pertinently, such site visits were undertaken by the SRA subject to the condition of non-invocation of the MAC clause.

x) However, despite such concurrent site inspections any dispute regarding the state of affairs of the assets of IBEUL was raised for the first time vide the notice dated February 02, 2021 whereby the SRA had sought to resile from the Plan.

y) With regard to the knowledge of the SRA regarding the state of affairs of the Corporate Debtor, it is further imperative to note that the budget statement of the CIRP cost reflecting the steps undertaken by the RP for protection and preservation of the assets of IBEUL was already provided to the SRA. The said statement included expenses incurred, *inter alia*, towards security services, for 11 KV lines, grass cutting, illumination of boundary wall and repair of boundary wall. As such, the SRA was well aware of the steps that have been taken by the RP

z) That IA 882 has been preferred by the RP under Section 30(6) of the Code. Pertinently, the provisions of the Code do not provide for filing of any reply/objections by a selected resolution applicant to its own resolution plan. As such, the Reply to IA 882 filed by the SRA cannot be considered by this Tribunal.

aa) That the Code, is a complete code in itself and therefore the jurisdiction exercised by the Hon'ble Adjudicating Authority is strictly circumscribed by the terms of the Code. Pertinently, the ambit of jurisdiction exercised by this Adjudicating Authority under Section 31(1) of the Code in respect of the application filed under section 30(6) of the Code is limited to ensuring compliance with the provisions of Section 30(2) of the Code. If the Hon'ble Tribunal is satisfied that the resolution plan meets the requirements provided in Section 30(2) of the Code, it shall approve the same.

6. CoC has filed its objections to the contentions raised by the Corporate Debtor as under:-

a. PFC is the lead lender of IBEUL and has been authorized to act on behalf of term lenders, namely, Bank of Baroda, LREC, Edelweiss Asset Reconstruction Company Limited, Union Bank of India, Punjab National Bank, Jammu & Kashmir Bank Limited and Phoenix AR:C: Private Limited (Collectively Referred as 'Term Lenders') of the Corporate Debtor who collectively represent a total of around 92% votes in the CoC of the Corporate Debtor.

b. The Application bearing No. IA No.882 of 2019 has been filed by the Resolution Professional of the Corporate Debtor under Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (IBC) inter alia for approval of the CoC approved Resolution Plan submitted by JLSLW by the Hon'ble Adjudicating Authority (Plan Approval Application). PFC (acting on behalf of the Term Lenders) is filing the instant Reply

-sd/-

-sd/-

in response to the Objections wherein JSW has sought the same prayer of dismissal of the Plan Approval Application as sought in I.A. No.24 of 2021 on the purported ground that the Resolution Plan is conditional, not viable and implementable.

c. That during the pendency of the plan Approval Application, JSW had filed an application bearing I.A.24 of 2021 in CP.(IB) No.276/HDB/2018 (Plan Rejection Application), wherein JSW had sought the same prayer of dismissal of the Plan Approval Application. JLW was trying to terminate/withdraw the Resolution Plan by placing reliance on Section 11.1316 of Part B (Financial Proposal) of the Resolution Plan, which is in the nature of the Material Adverse Change (MAC) clause. The main prayer sought by JSW in the Plan Rejection Application is reproduced below

> *"(ii) Dismiss the Plan Approval Application bearing I.A. No.882 of 2019....."*

d. On 14.10.2021, the Hon'ble Adjudicating Authority was pleased to dismiss the Plan Rejection Application in light of judgement dated 13.09.2021 passed by the Hon'ble Supreme Court in the matter of Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited &Anr, 2021 SCC Online SC 707 (Ebix).

e. That JSW's objections is liable to be rejected in light of the dismissal of its Plan Rejection Application vide order dated 14.10.2021. In both Objections and Plan Rejection Application, JSW has relied upon the MAC clause in order to seek dismissal of the Plan Approval Application. The Objections is also liable to be rejected in view of the Hon'ble Supreme Court's Judgement in Ebix.

f. That this Hon'ble Tribunal is not vested with the jurisdiction to entertain the Objections by SRA for dismissal of the Plan Approval Application on the basis of the MAC clause. The Objections are in

-Sd/-

-Sd/-

teeth of the principles of IBC since it does not contain any provisions allowing SRA to object and seek rejection/withdrawal of the resolution plan before the Hon'ble Adjudicating Authority.

g. That granting JSW prayer in objections would be in blatant disregard of the principles and spirit of IBC which seek to revise and resolve companies in financial stress.

h. That JSW has erroneously relied upon the MAC clause and para 179 of the Ebix Judgement to contend that the Hon'ble Adjudicating Authority ought to reject the Resolution Plan in totality as it does not pass the test of feasibility and viability under Section 30(2) of IBC. The Hon'ble Supreme Court in para 179 has only observed that the conditions for withdrawal or renegotiation of the Resolution Plan cannot pass the test of viability and implementability and not that such conditions will result in rejection of the Resolution Plan by the Adjudicating Authority. It is submitted that a Resolution Plan submitted before the Hon'ble Adjudicating Authority is binding and irrevocable as between the CoC and SRA and the current IBC regime does not recognize withdrawal or modification of the resolution plan once the resolution plan is approved by CoC and is filed before Hon'ble Adjudicating Authority. Thus, MAC Clause can only be exercised until the CoC is considering the resolution plan. In EbixJudgement, the Hon'ble Supreme Court has affirmed the above position of law and has also observed that the Hon'ble Adjudicating Authority lacks the authority to give effect to clauses that allow the withdrawal or modification of the Resolution Plan by SRA and that fit cannot compel CoC to negotiate further with SRA.

i. With regard to the objection that the Resolution Plan does not pass the test of feasibility and viability under Section 30(2) of IBC, it is submitted that as per Section 312 of IBC, the judicial review of the

-Sd/-

-Sd/-

resolution plan by the Hon'ble Adjudicating Authority has to be confined within the four corners of Section 30(2) of IBC. The consideration of feasibility and viability of a Resolution Plan is not covered under 30(2) of IBC. Instead, feasibility and viability is covered under Section 30(4) of IBC. Which is considered by the CoC in its commercial wisdom and such commercial wisdom is non-justiciable.

j. That with regard to implementation of the Resolution Plan, a proviso to Section 31 of IBC was inserted to provide that the Hon'ble Adjudicating Authority shall satisfy that the resolution plan has provisions for its effective implementation.

k. That the residual jurisdiction of Hon'ble Adjudicating Authority under Section 60(5)(c) of IBC cannot, in any manner, whittle down Section 31(1) of IBC, by the investment of some discretionary or equity jurisdiction in the Hon'ble Adjudicating Authority outsi9de Section 30(2) of ILBC, when it comes to a resolution plan being adjudicated upon by the Hon'ble Adjudicating Authority.

l. That Clause 1.13.7 of the Resolution Plan is a severability that Clause 1.13.7 of the Resolution Plan is a severability clause that addre3sses an event wherein the Resolutli9on Plan becomes unenforceable, or any provision of the Resolution Plan become3s invalid.

m. The prerequisite of approaching the Adjudicating Authority in such a scenario is obtaining the prior consent of the CoC. Without prejudice to the contention that the Resolution Plan is implementable it is submitted that, in any case, JSW has not even reached out to the COC before approaching the Hon'ble Adjudicating Authority. Moreover, the bare perusal of the said Clause shows that JSW has acted against the intent of the said clause to continue with

Sdl

Sdl

the Resolution Plan by seeking rejection of the Resolution Plan in totality. The said acts/omissions on behalf of JSW is in violation of Clause 1.13.7 of the Plan.

n. That JSW has already pleaded the ground of delay in its Plan Rejection Application which has been dismissed by the Hon'ble adjudicating Authority and as such, JSW ought not to be allowed to re-agitate the same ground again in objections. In any case, under Section 31 of IBC, the delay is not one of the grounds under which the Hon'ble Adjudicating Authority can reject a Resolution Plan in view of its limited jurisdiction for judicial review of a resolution plan.

7. Heard both the sides and perused the record, including the Resolution Plan and other documents submitted along with the Application.

8. It is a unique case where the Successful Resolution Applicant itself raised objections against it's own Resolution Plan claiming it to be 'incapable of effective implementation' on the ground that there has been erosion of value of assets of corporate debtor due to delay in approval of the Plan and failure on the part of the RP to protect and preserve the assets of the Corporate Debtor. The RP and CoC have assailed this view of the SRA on the ground that on the same facts, the SRA had earlier moved IA 24 of 2021 for withdrawal of the Resolution Plan invoking MAC Clause, which has been dismissed by the Adjudicating Authority following the Ebix Judgement of Hon'ble Supreme Court. Therefore, the SRA cannot object to the approval of its own Resolution Plan once again citing the same facts.

9. It is pertinent herein to make a note of the facts relating to Application bearing IA No. 24 of 2021 as under:-

a. Application bearing IA No. 24 of 2021 was filed by the SRA, *inter-alia*, seeking permission from this Adjudicating Authority to withdraw its Resolution Plan which is pending approval of this

-Sd-

-Sd-

Adjudicating Authority, citing the MAC Clause. The abstract of the prayer as sought in IA No. 24 of 2021 is as under:-

In light of the above-mentioned facts and circumstances and submissions made above and in view of the Termination Notice issued by the Applicant in terms of Clause 1.13.16 of the Resolution Plan, it is humbly prayed that this Hon'ble Tribunal may be pleased to grant the following reliefs:
(ii) Dismiss the Plan Approval Application bearing IA No. 882 of 2019;
(iii) Direct the Respondents Resolution Professional and the Committee of Creditors of the Corporate Debtor to return the Performance Bank Guarantee given by the Applicant and pending the outcome of this Application, restrain Power Finance Corporation Limited from invoking the Performance Bank Guarantee No. BDC-792-043647-001 dated October 24, 2109 and amended on October 19, 2020 of INR 100 Crores given by the Applicant.

b. After hearing both the sides, this Adjudicating Authority has passed following order:-

"6. The learned senior counsel Shri Gopal Jain appearing for the applicant submitted that in case of Ebix Singapore Private Limited (supra) there was no clause of permitting the Resolution Applicant therein to withdraw the Resolution Plan in case there is material adverse change in the assets of the Corporate Debtor. This aspect never fell for consideration of the Hon'ble Supreme Court. Hence the ruling is not applicable to the facts of this case.

7. We have gone through the rulings as relied on by all the learned counsels herein. It is difficult for us to accept the submissions of the learned senior counsel Shri Gopal Jain. In fact, we have already noted hereinabove the controversy then before the Hon'ble Apex Court, which is noted in paragraphs 27 and 28 of the ruling. It clearly shows that it was contended before the Hon'ble Apex Court in Ebix Singapore Private Limited (supra) that it may be permitted to withdraw the Resolution Plan for two main reasons, namely:

(i) Resolution Plan was pending approval of the Adjudicating Authority for more than 26 months, viz. beyond the statutory period under the I&B Code, 2016.
(ii) The tenure of the Government contracts then awarded to the Corporate Debtor therein, viz. Educomp, which was

-Sd-

-Sd-

crucial for its functioning may have ended leading to erosion of its substratum.

8. *The Hon'ble Supreme Court while answering both the points, held in paragraphs 178 and 179 of its judgment in Ebix Singapore Private Limited (supra) as follows:*

"178. Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC.

179. If the appellants' claim were to succeed, a clause enabling a Resolution Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3). It was contended before us

-Sd/-

-Sd/-

that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in K Sashidhar (supra), while discussing the jurisdiction of the Adjudicating Authority under Section 31 to evaluate a Resolution Plan, has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation" Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in all the three Resolution Plans that are in dispute in this present appeal."

In short, the Hon'ble Supreme Court had considered both the aspects, namely,

(a) Whether the Resolution Applicant can be permitted to withdraw the Resolution Plan, because there was delay in its approval by Adjudicating Authority? and

(b) During such period, if there is erosion of assets of the Corporate Debtor and on such grounds whether the Resolution Applicant can be permitted to withdraw the Resolution Plan?

9. *Further, the Hon'ble Apex Court categorically laid down in subsequent paragraphs of the same judgement that within the*

-Sd-

-Sd-

framework of the IB Code, 2016, the Adjudicating Authority will have no jurisdiction to allow modification or withdrawal of the CoC approved Resolution Plan by a Successful Resolution Applicant or to give effect to any Material adverse change clause in such resolution plan either U/s 31 or U/s 60(5) of the Code:

" 184. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan. Unlike Section 18(3)(b) of the erstwhile SICA which vested the Board for Industrial and Financial Reconstruction with the power to make modifications to a draft scheme for sick industrial companies, the Adjudicating Authority under Section 31(2) of the IBC can only examine the validity of the plan on the anvil of the grounds stipulated in Section 30(2) and either approve or reject the plan. The Adjudicating Authority cannot compel a CoC to negotiate further with a successful Resolution Applicant. A rejection by the Adjudicating Authority is followed by a direction of mandatory liquidation under Section 33. Section 30(2) does not envisage setting aside of the Resolution Plan because the Resolution Applicant is unwilling to execute it, based on terms of its own Resolution Plan.

185. Further, no such power can be vested with the Adjudicating Authority under its residuary jurisdiction in terms of Section 60 (5)(c). ..."

10. *Thus Hon'ble Supreme Court held in no uncertain terms that the Resolution Plan cannot be permitted to be withdrawn by the Resolution Applicant on any of the above grounds for want of provisions in the I&B Code, 2016.*

11. *So, even admitting for the sake of argument that there is erosion of assets of the Corporate Debtor in this case and the Resolution Plan is pending approval of this Adjudicating Authority since 2019, still this Adjudicating Authority cannot permit the applicant to withdraw the Resolution Plan. We hold that this application is not maintainable and hence stands rejected and disposed of."*

-Sd-

-Sd-

10. Basing on the above, the pertinent question falling for consideration of this Adjudicating Authority is as under:-

I. Whether this Adjudicating Authority can look into the issues of deterioration of assets after approval of Resolution Plan by unassailable majority of CoC Members again to decide as to whether the CoC approved Resolution Plan is capable of effective implementation or not?

II. Whether the SRA will be barred by estoppel in view of the dismissal of its IA 24 which was based on the same ground of detoriation of assets to the tune of Rs.304 Cr. terming it to be a Material Adverse Change for invocation of MAC?

III. Whether through its objections raised against the approval of its own Resolution Plan the SRA is seeking to achieve the same outcome of termination of the Resolution Plan which it failed to achieve by invoking MAC in IA24 of 2021?

11. In relation to the first issue, this Adjudicating Authority observes as under:-

i. During the detailed hearing of the matter, it was submitted on behalf of the Successful Resolution Applicant (SRA), that they are seeking termination of their own Resolution Plan with reference to the proviso of Section 31(1), which reads as under:

31. Approval of resolution plan.-

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, [1][including the Central Government, any State

-Sd-

-Sd-

Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being inforce, such as authorities to whom statutory dues are owed,]guarantors and other stakeholders involved in the resolution plan.

[2][Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.]

ii. It is submitted that since there has been significant erosion of assets due to negligence of the RP, the Resolution Plan as approved by the COC has been rendered 'incapable of effective implementation' and therefore, this Adjudicating Authority cannot derive the satisfaction as required in the proviso of Section 31(1) and the COC approved Resolution Plan needs to be terminated.

iii. When we carefully examine the proviso to Section 31(1), it appears to us that the proviso has been incorporated to ensure that the Resolution Plan itself contains provisions for its effective implementation. The Adjudicating Authority has to look into the various provisions of the Resolution Plan to satisfy itself that once Resolution Plan is approved by the Adjudicating Authority, there are sufficient checks and balances, demarcation of responsibilities and corresponding provisions as to the responsibilities required to be discharged with regard to the statutory compliances that are to be made during the implementation of the Resolution Plan. The satisfaction of the Adjudicating Authority has to be based on account of the fact that the Resolution Plan has incorporated these provisions for its smooth implementation, leaving no gaps which can hinder the implementation of the Resolution Plan. The

-Sd-

-Sd-

Hon'ble Supreme Court in the case of Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others in Civil Appeal No.4242/2019 have referred to the limited role of the Adjudicating Authority as regards approval of a Resolution Plan in the context of Section 31(1) of the Code as hereunder:

"Section 31(1) of the Code lays down in clear terms that for final approval of a Resolution Plan, the Adjudicating Authority has to be satisfied that the requirement of Section 30(2) of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the Resolution Plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the relevant passage (para 54) of which we have reproduced in earlier part of this judgment".

iv. Therefore, the proviso cannot be construed so as to allow the Adjudicating Authority once again to get into the questions of deterioration or revaluation of assets etc. which must be left to the commercial wisdom of the COC.

v. If the Plan has provisions as to how it will get implemented within the given timelines and other connected issues relating to responsibility for statutory compliances to be made, the Adjudicating Authority will not be having any jurisdiction to either terminate the Resolution Plan or even send it for reconsideration by the COC.

vi. In this connection, it will be important to make a reference to the Hon'ble Supreme Court's Judgement in Ebix case (supra) wherein the Hon'ble Supreme Court have categorically held in para 187 as follows:

"187. Permitting the Adjudicating Authority to exercise its residuary powers under Section 60(5) to allow for further modifications or withdrawals at the behest of the Successful Resolution Applicant, would be in the teeth of the decision of this Code in Essar Steel (supra) which held that Section 60(5)(c) cannot be used to whittle down Section 31(1) of the IBC by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Hon'ble Adjudicating Authority".

vii. Therefore, we are of the considered view that this Adjudicating Authority cannot look into the issues of deterioration of assets after approval of the Resolution Plan by unassailable majority of the COC members again to decide as to whether the COC approved Resolution Plan is 'capable of effective implementation or not' as canvassed by the SRA in the present proceedings.

viii. Question 1 is therefore answered in the negative.

12. As regards the IInd and IIIrd issues framed above, it is to be noted that SRA had earlier filed the IA 24/2021 raising the same issue of deterioration of assets to the tune of Rs.304 crores terming it to be a Material Adverse Change (MAC) entitling the SRA to withdraw from the CIRP process even after approval of their own Resolution Plan by the COC with unassailable majority. The said IA 24/2021 was rejected by this Adjudicating Authority, vide a reasoned Order dated 14.10.2021 wherein one of us, i.e. Dr.Binod Kumar Sinha, Member (Technical) was also part of the quorum which pronounced the Order. It has been brought to our notice that the SRA has taken our Order in IA 24/2021 in Appeal to the Hon'ble NCLAT, which is still pending. It

-Sd-

-Sd-

is admitted on behalf of the SRA that no stay on the said Order dated 14.10.2021 has been granted by the Hon'ble NCLAT in that matter.

13. The question that we need to answer here is that whether the SRA will be bound by the principle of estoppel by seeking the same relief by virtue of their objections filed to the instant IA 882/2019 filed by the RP seeking approval of the Resolution Plan.

14. The Learned Counsel for RP has argued that the pleadings of the SRA in the present proceedings are only based on MAC clause and the arguments that the Plan has become incapable of effective implementation has only been highlighted during the oral arguments. Reliance is placed on the Judgements in **The Workmen and Ors. Vs. M/s. Hindustan Lever Ltd. (1984) 1 SCC 728;** and **J.K. Iron and Steel co. Ltd., Kanpur vs. Iron and Steel Mazdoor Union, Kanpur, AIR 1956 SC 231** to project that a court or statutory tribunal cannot travel beyond the pleadings and cannot consider issues not raised in the pleadings.

15. It is also submitted on behalf of RP that since the relief sought in IA 24/2021 and in IA 882/2021 in the present proceedings are the same that is, 'dismissal of IA 882', the SRA is barred by the doctrine of "issue estoppel". Reliance is placed on the judgement of ***Hope Plantations Ltd v. Taluk Land Board Permade,*** **(1999) 5 SCC 590 (para 26);** and **Canara Bank vs. N.G.SubbarayaSetty (2018) 16 SCC 228 (para 4).** Our attention is also drawn to the **Hon'ble Supreme Court's judgement in Barkat Ali and Anr. V. Badrinarain (Dead) by LRs, (2008) 4 SCC 615**, wherein it has been held as hereunder:

-Sd/-

-Sd/-

"13. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage".

16. Factually speaking, the facts and arguments as taken in IA 24/2021 by the SRA and the facts and arguments taken in the instant proceedings while replying to IA 882 by the SRA remain the same. Even the main prayer seeking dismissal of the Application filed for the approval of the Plan and therefore termination of the COC approved Resolution Plan remains the same.

17. Considering the arguments submitted on behalf of the SRA in the instant proceedings which are based on the same facts and circumstances as projected in IA 24/2021, it is immediately discernible to us that the SRA, through its objections filed against the approval of its own COC approved Resolution Plan is seeking to achieve the same outcome, that is, withdrawal from the CIRP at this stage, when the Plan is already approved by the COC, which it could not achieve by invoking the MAC Clause in IA 24/2021. It is pertinent to note here that Hon'ble Supreme Court have categorically held in Ebix Judgement (para 244) that the residual power available to this Adjudicating Authority under section 60(5) cannot be exercised to create procedural remedies entailing substantive outcome on the process of Insolvency Resolution. During the course of arguments, it was argued on behalf of the SRA that in the Ebix Judgement itself Hon'ble Supreme Court had directed in para 237 that the COC may consider the revised proposal by the SRA (**Kundan Care**). It is pertinent to note here that the said direction was given by the Hon'ble Supreme Court in exercise of their jurisdiction under Article 142 of

-Sdl-

-Sdl-

the Constitution of India. No such powers are available with this Adjudicating Authority. Moreover, in the same Paragraph 237 Hon'ble Supreme Court have made it clear that in the event the revised Resolution Plan is not approved by the CoC, the original Resolution Plan as submitted before the Adjudicating Authority shall prevail.

18. Before closing the discussion on whether the objections made by the SRA in the present proceedings are barred by the Principles of res judicata, it is necessary to refer to necessary ingredients which have been categorically delineated by Hon'ble Supreme Court in the case of *Sheodan Singh V. Daryao Kumar*, as under:-

"9. A plain reading of Section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely:-

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the formed suit;

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

(iii) The parties must have litigated under the same title in the former suit;

(iv) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised;
and

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit"

19. Upon comparison of the above settled position of Law with the facts of the instant case, following points are observed by this Adjudicating Authority:

20. That the contentions raised by way of objections in the instant case have been directly and substantially dealt with by this Adjudicating Authority in the Application bearing IA No. 24 of 2021;

-Sd-

-Sd-

21. The contentions raised in Application bearing IA No.24/2021 and the objections raised in the instant IA No.882/2019 are between the same set of parties i.e., between CoC, RP and SRA;
22. The parties herein have more or less litigated under the same title;
23. The matter directly and substantially in issue in the objections raised by SRA herein have been heard and finally decided by this Adjudicating Authority in the Application bearing IA No. 24 of 2021.
24. Thus, it is amply clear that the objections raised by the SRA herein is clearly hit by the principles of bar of res-judicata.
25. In view of the discussion supra, the IInd and IIIrd issues framed above are answered in the affirmative. As a result, the objections raised by the SRA against approval of its own COC approved Resolution Plan are overruled being hit by the principles of res judicata.

26. The objections raised by the Successful Resolution Applicant are answered accordingly. Henceforth, this Adjudicating Authority is proceeding with considering the Resolution Plan as placed by RP for approval.
27. Section 30(2) of the Code as amended w.e.f. 06.08.2019 enjoins upon the Resolution Professional to examine each Resolution Plan received by him to confirm that such plan –
    a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the Corporate Debtor;
    b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-
        i. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

- Sd/ -

- Sd/ -

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

c) provides for the management of the affairs of the Corporate Debtor after approval of the resolution plan;

d) the implementation and supervision of the resolution plan;

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

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

28. Section 30(4) of the Code as it stands at present after the amendment reads as follows: -

"(4) The committee of creditors may approve a resolution plan by a vote of not less than sixty-six percent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board."

-Sd/-

-Sd/-

29. Section 30(6) of the Code enjoins the resolution professional to submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority. Section 31 of the Code deals with the approval of the resolution plan by the Adjudicating Authority, if it is satisfied that the resolution plan as approved by the committee of creditors under section 30(4) meets the requirements as referred to in section 30(2).

30. Thus, before approving the Resolution plan, it is the duty of the Adjudicating Authority that it should satisfy itself that the Resolution plan as approved by the COC meets the requirements as referred to in sub-section (2) of Section 30.

31. On perusal of the Resolution Plan, this Adjudicating Authority has observed that the Resolution plan placed for consideration provides for the following:

a) Payment of CIRP Cost as specified U/s 30(2)(a) of IBC, 2016.

b) Repayment of Debts of Operational Creditors as specified U/s 30(2)(b) of IBC, 2016.

c) Provides for management of the affairs of the Corporate Debtor, after the approval of Resolution Plan, as specified U/s 30(2)(c) of IBC, 2016.

d) The implementation and supervision of Resolution Plan shall be done by Insolvency Resolution Professional and by the COC as specified U/s 30(2)(d) of IBC, 2016.

e) The Resolution Plan is not in contravention to any of the provisions of Law, for the time being in force, as specified U/s 30(2)(e) of IBC, 2016.

f) The Resolution plan conforms to such other requirements specified by the Board.

-Sd-

-Sd-

32. In terms of Regulation 27 of CIRP Regulations, Liquidation value was ascertained through two registered valuers. The Liquidation value as ascertained by RP is Rs. 921.55 Crores on standalone basis and the fair market value is Rs. 3203.74 Crores.
33. The RP has complied with the code in terms of Section 30(2)(a) to 30(2)(f) and Regulations 38(1), 38(1)(a), 38(2)(a), 38(2)(b), 38(2)(c) & 38(3) of CIRP regulations.
34. The identity of the Resolution Applicants have been duly verified by the RP and affidavit as per section 30(1) of the Code has been obtained from the Resolution Applicants stating that it is not ineligible U/s 29A of the IB Code, 2016.
35. The Plan also provides for keeping the Company as a going concern and operate in its normal course of business upon implementation of the Resolution Plan.
36. That the RP has inter alia filed the following Certificate in Form H.

"I have examined the Resolution Plan received from Resolution Applicant, M/s JSW Energy Limited and approved by Committee of Creditors (CoC) of M/s. Ind-Barath Energy (Utkal) Ltd.

I hereby certify that-

i. the said Resolution Plan complies with all the provisions of the Insolvency and Bankruptcy Code 2016 (Code), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and does not contravene any of the provisions of the law for the time being in force.

ii. the Resolution Applicant, M/s. JSW Energy Limited has submitted an affidavit pursuant to section 30(1) of the Code confirming its eligibility under section 29A of the Code to submit resolution plan. The contents of the said affidavit are in order.

iii. The said Resolution Plan has been approved by the CoC in accordance with the provisions of the Code and the CIRP Regulations made thereunder. The Resolution Plan has been approved by 82.70%of voting share of financial creditors after

-Sd/-

-Sd/-

considering its feasibility and viability and other requirements specified by the CIRP Regulations.

iv. The 18th meeting of the CoC was held on 09.10.2019 and 82.70% voting share have attended the meeting.
And I sought vote of members of the CoC by electronic voting system which was kept open at least for 24 hours as per the regulation 26 82.70% voting share voted in favour of M/s JSW Energy Limited."

37. In ***K Sashidhar Vs. Indian Overseas Bank &Others,***decided on 05.02.2019 in Civil Appeal No.10673/2018 with CA Nos.10719/2018, 10971/ 2018 and SLP(C) No.29181/2018,the Hon'ble Supreme Court, noticing the provisions of section 30(4), held that if the CoC had approved the resolution plan by requisite percent of voting share, then as per section 30(6) of the Code, it is imperative for the resolution professional to submit the same to the adjudicating authority (NCLT). On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets the requirements specified in Section 30(2). No more and no less.

38. In the said judgment, in para 35, the Hon'ble Supreme Court held that the discretion of the adjudicating authority is circumscribed by Section 31 and is limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2) when the resolution plan does not conform to the stated requirements.

39. In the recent judgement in *Essar Steel* (*Civil Appeal No.8766-67 of 2019*) the Hon'ble Apex Court clearly laid down that the Adjudicating Authority will not have power to modify the Resolution Plan as

-Sd/-

-Sd/-

approved by the CoC in their Commercial Wisdom. In para 42 of the said judgment, Hon'ble Apex Court has observed as under:

> *Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in* ***K. Shashidhar*** *(supra).*

40. In view of the discussions in the foregoing paragraphs, the 'Resolution Plan' filed with the Application meets the requirements of Section 30(2) of the I&B Code, 2016 and Regulations 37, 38, 38(1A) and 39 (4) of IBBI (CIRP) Regulations, 2016. The 'Resolution Plan' is also not in contravention of any of the provisions of Section 29A. Hence, this Adjudicating Authority is satisfied that the Resolution Plan is in accordance with Law. Therefore, the 'Resolution Plan' annexed with Application bearing IA No. 882 of 2019 filed in CP(IB) No.276/7/HDB/2018 is hereby approved, which forms part of this Order and which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

41. However, the Resolution Plan approved shall not construe any waiver to any statutory obligations/liabilities arising out of the approved Resolution Plan and same shall be dealt in accordance with the appropriate Authorities as per relevant Laws. We are of the considered view that if any waiver is sought in the Resolution Plan,

-Sdl-

-Sdl-

the same shall be subject to approval by the concerned Authorities. The same view has also been held by Hon'ble Supreme Court in ***Ghanashyam Mishra and Sons Private Limited Versus Edelweiss Asset Reconstruction Company Limited***.

42. Accordingly, the MoA and AoA shall be amended and filed with the RoC for information and record as prescribed. While approving the 'Resolution Plan', as mentioned above, it is clarified that the Resolution Applicant shall pursuant to the Resolution Plan approved under Sub-Section (1) of Section 31 of the I&B Code, 2016, obtain all the necessary approvals as may be required under any law for the time being in force within the period as provided for in such law.
43. The approved 'Resolution Plan' shall become effective from the date of passing of this Order.
44. However, while in the course of arguments and from the records, we find that there are certain allegations of lapses on the part of the Resolution Professional in properly safeguarding the assets of the Company and also in communicating with the Successful Resolution Applicant (SRA). The claim of the SRA is that there has been a serious deterioration of assets beyond Rs.300 crores which cannot just be brushed aside but at the same time, this Bench is incapable of going into such details by virtue of the decisions of the Hon'ble Apex Court. However, in our understanding of the rationale behind the judgements of the Hon'ble Apex Court, it is certainly not the intention of the Hon'ble Court to lay down the Law that the Successful Resolution Applicant shall implement the Plan even if it is subsequently found to be unviable. Therefore, the doctrine of Legitimate Expectation is to be applied in the present context and the CoC consisting of Public Sector Undertakings shall act in a manner that is fair, just and reasonable. Therefore, it is for the

parties to sit across the table and take stock of the situation and in case there are any lapses on the part of the RP or any party (may be intentional or not), the same may be considered and a proper evaluation of the current situation can be done. We are again making it very clear, we are not expressing any opinion on the said point but it is legitimately expected of COC to deal with the situation in the fairest possible manner so as to enable the SRA to take over and run the unit in a viable manner. This shall establish as a precedent and would not discourage the corporate entities from proceeding or participating in any Resolution Plan. In case COC concur with our views that there may be lapses on the part of the Resolution Professional, the Monitoring Committee in future shall have to be headed or monitored by another person. This is only an opinion for the consideration of the COC. We only want COC to consider the situation in a pragmatic and fair manner.

45. We also take this opportunity to express our view that the appointment of a single individual as a Resolution Professional for such large scale industries, which have earlier been managed by a Group of Directors or Board of Directors with expertise from various fields, will only lead to a situation where the individual RP however talentful, educated, experienced and honest might be, it would become impossible for him/her to handle the affairs of such a huge company as a going concern. We hereby bring it to the knowledge of the litigants and also the Government to consider this aspect seriously and instead of appointing single individuals as RPs for large scale industries or companies, appointing a group consisting of professionals with expertise in various fields and a Government nominee collectively acting as RP would certainly find a meaningful solution and also effectively pursue the preamble/object of the Code.

-Sd/-

-Sd/-

46. This Adjudicating Authority hereby directs constitution of a Monitoring Committee comprising of one Representative of the Financial Creditor, One representative of the Resolution Applicant and the Resolution Professional. The RP to supervise the implementation of the Resolution plan and file status of implementation of Resolution Plan before this Adjudicating Authority from time to time.
47. The order of moratorium passed by this Adjudicating Authority under Section 14 of the I&B Code, 2016 shall cease to have effect from the date of passing of this Order.
48. The Resolution Professional shall forward all record relating to the conduct of the CIRP and the 'Resolution Plan' to the IBBI along with Copy of this Order, so that the Board may record the same on its data-base.
49. The Registry is directed to communicate this order to the Registrar of Companies, Hyderabad for updating the master data and to IBBI.
50. The Resolution Professional shall forthwith send a copy of this Order to the participants and the Resolution Applicant.
51. Accordingly, IA No.882 of 2019 is disposed of as allowed.

-sd-

DR. BINOD KUMAR SINHA
MEMBER TECHNICAL

-sd-

BHASKARA PANTULA MOHAN
MEMBER JUDICIAL

Santi/SKRathi/Syamala