IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

I.A.No. 791/2021
In
(CP.(IB) No.179/HDB/2020)

In the Matter of:

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

In the Matter of:

TRIMEX INDUSTRIES PVT. LTD., Trimex Towers, No. 1 Subbaraya Avenue, C.P Ramaswamy Road, Alwarpet, Chennai – 600018.

…Applicant/Operational Creditor ("OC")

-Versus-

1. **M/s. SATHAVAHANA ISPAT LTD.,** Rep. by its Resolution Professional, Mr. Bhuvan Madan, A-103, Ashok Vihar Phase–3, New Delhi- 110 052.

…1st Respondent/Corporate Debtor ("CD")

2. M/s. JC FLOWERS ASSET RECONSTRUCTION PVT. LTD., Rep. by its Authorized Signatory 12th Floor, Crompton Greaves House, Dr. Annie Besant Road, Worli, Mumbai, Maharashtra – 400 030,

…2nd Respondent / Committee of Creditors ("CoC")

3. M/s. JINDAL SAW LTD., Rep. by its Authorized Signatory A – 1, UPSIDC Industrial Area, Nandgaon Road, Kosi Kalan, Mathura, Uttar Pradesh – 281 403, and also at JINDAL Centre, No.12, Bhikaiji Cama Place New Delhi – 110 066,

…3rd Respondent /Prospective Resolution Applicant ("PRA")

***Appearances (through video conferencing*)**

For the Petitioner : Mr. P.H. Arvindh Pandian, Sr.Advocate for
Mr. Thriyambak J.Kannan, Advocate.

For the 1st Respondent : Mr. S.S. Dash, Sr. Advocate for
M/s. Ajay Razvi/Shashank Agarwal, Advocates.

For the 2nd Respondent : Mr. Ramji Srinivasan, Sr.Advocate for
M/s. Shubhabrata Chakraborti, Adv.

For the 3rd Respondent : Mr. C.S. Vaidyanathan, Sr.Advocate for
M/s. Manoj Kumar Singh, Adv.
Ms. Daizy Chawla, Adv.

Order reserved on: 27.09.2022
Order pronounced on: 14.10.2022

Coram:

Shri P. Mohan Raj : Member (Judicial)

O R D E R

Per P. Mohan Raj, Member, (Judicial)

1. This Application is referred to me to hear as a single Bench under Section 419(5), of Companies Act, 2013, and Rule 60(2) & (3), NCLT Rules, 2016, by the Hon'ble President NCLT-New Delhi, for disposal.

2. This Application was originally filed before the NCLT-Hyderabad in main CP. (IB) No.179 of 2020 under Section 60(5), IBC, 2016, R/w Rule 11, NCLT

Rules, 2016, for the following reliefs.

(i) To direct the Financial Creditor JC Flowers Asset Reconstruction Company Private Limited to disclose all information as to the funding it had received towards and for the purpose of receiving the assignment of the Financial Debt of M/s. Sathvahana Ispat Limited.

(ii) To appoint the Applicant as an observer on the Committee of Creditors of M/s. Sathavahana Ispat Limited so as to ensure that the Committee of Creditors of M/s. Sathavahana Ispat Limited function in a transparent and fair manner to ensure the best interests of all the operational creditors.

(iii) To restrain the 3rd Respondent form submitting any resolution plan for the Corporate Insolvency Resolution Process of 1st Respondent pending the hearing and disposal of the present application.

(iv) To restrain the 2rd Respondent form considering any resolution plan for the Corporate Insolvency Resolution Process of 1st Respondent submitted by the 3rd Respondent pending the hearing and disposal of the present application.

(v) Pass such further or other orders and reliefs as this Tribunal may deem fit and necessary in the facts and circumstances of the case.

The brief contents of the Applicant are as follows:

3. The Applicant is one among the Operational Creditors of the Corporate Debtor. The petition filed by one M/s. Thirumal Logistics under Section 9, IBC, 2016, against the CD was admitted by the Adjudicating Authority on 28.07.2021. Prior to the admission, its financial book debts from major Financial Creditors, viz., Canara Bank, State Bank of India and Union Bank of India, along with that of IFCI (a Non-Banking Finance Company) were to the tune of Rs.1660,20,00,000/- (Financial Debt).

4. The entire Financial Debts of corporate debtor was assigned to second Respondent for a consideration of Rs.532,00,00,000/-, which was paid by it in two modes, viz., 15% by pledging security receipts to the primary and end-point allottee, namely, M/s.Siddeshwari Tradex Pvt. Ltd. ("**Siddeshwari**"), via a trustee company, namely, M/s. Axis Trustee Services Ltd., in respect of which a charge also created, and the balance 85% from private investors. Accordingly, the second Respondent is the sole successor of Financial Creditor of the CD, as well as, the Sole Member in the CoC of the CD.

5. The Resolution Professional ("**RP**") issued an invitation for Expression of Interest ("**EoI**") on 05.10.2021. The provisional list was issued on 01.11.2021, wherein the seven (07) Expressions of Interest submitted by different Resolution Applicants (i.e.) four (04) by M/s. Sarda Mines Private Limited, and one (01) each by M/s. Vedanta Ltd., M/s. Welspun Crop Ltd., and M/s. Jindal Saw Ltd., were

considered.

6. In the meantime, since the CD was a running concern, to cater to its repair and maintenance works, a Request for Proposal ("**RFP**") was issued by the IRP on 04.09.2021. The Works Contract thereof was on 14.10.2021 and 16.10.2021 with the approval from the 5th CoC issued to the PRA/3rd Respondent, on 18.10.2021 since it was the only entity to submit the RFP.

7. Albeit, M/s. Siddeshwari not a named stake holder in this CIRP of the CD, it prominently a key instrument of the various stake holders of this CIRP. It is completely owned and possessed by Mr. Prithivi Raj Jindal, and his family members constitute its Board of Directors as on the date of filing this application. The said Mr.Prithvi Raj Jindal, who is shareholder in M/s. Siddeshwari, is also a director and a key managerial person in the PRA.

8. Thus, in the above awarding of the repair and maintenance works to the PRA there exists a scheme of unitary collusion as a means to usurp a falling CD with a minimal wastage of resources. In this situation, it is impossible for the CoC to act in a manner that exudes 'commercial wisdom' without allowing the betterment of the interests of M/s. Siddeshwari, and there by the CoC pollutes the possibility of a better outcome for the CD and the other Operational Creditors.

The brief contents of the Reply of the 1st Respondent are as follows:

9. The assignment of the Financial Debt from the original lenders of the CD in favour of CoC cannot be challenged by the Applicant/OC in this CIRP. The

application filed on the basis of conjectures and surmises is liable to be dismissed. The OC with only 1.28% stake in the total admitted debt has filed this application only to stall the CIRP. The OC also submitted its EOI and its name was also included in the provisional list of the Resolution Applicants. However, the OC failed to submit its Resolution Plan, Evaluation Matrix and Information Memorandum.

10. The OC instead has filed this application to restrain the CoC from considering the Resolution Plan submitted by the PRA towards the CIRP of the CD, and for other reliefs. The application is pre-mature and devoid of any merit. Even before consideration by the CoC, the OC has made assumptions and is casting aspersions with the sole intent to delay the proceedings. The contract for repair and maintenance of the running manufacturing facilities of the CD awarded to the PRA by the RP will not be a cause, not to consider the resolution plan of 3rd respondent.

The brief contents of the Reply of the 2nd Respondent are as follows:

11. The Resolution Plans, etc. submitted by the PRA/3rd Respondent are being assessed and evaluated evaluation by the RP and the CoC. The applicant through the present applications is prematurely seeking to eliminate its competitor PRA and derail the CIRP of the corporate debtor. The present application is a mere abuse of process with the sole intention to delay the CIRP.

12. Section 29–A. IBC, 2016, bars various persons, including those connected only to the CD from proposing a Resolution Plan if they are wilful defaulters, etc. This section does not bar any person connected to the FC, either

directly or indirectly, from proposing a Resolution Plan. In the CIRP, the CoC has been given paramount status without any judicial intervention for ensuring completion of the processes within the time lines prescribed by the IBC, 2016.

13. When the CoC is yet to finalize the results relating to the Resolution Plans received by it, it is too premature to challenge them on false and frivolous grounds. The assignment of the financial debt to the CoC is not statutorily prohibited. The CoC acquires financial assets from banks and financial institution in accordance with regulations provided by Reserve Bank of India at a mutually agreed value. The CoC neither is a related party to the CD nor is barred or disqualified from becoming a constituent of the CoC under the provisions of IBC, 2016.

14. The PRA is not disqualified under the provision of IBC, 2016, to submit the Resolution plan. The relationship, either direct or indirect, between the CoC and PRA is of no consequence. The IBC, 2016, does not prohibit a related party of a member of the CoC from presenting a Resolution Plan. The OC wants to take away the statutorily enshrined rights and duties of the RP and CoC under the IBC, 2016.

15. The prayer of the OC restraining the CoC from considering the Resolution Plan of the PRA, when the latter is fully eligible to participate in the CIRP of the CD is a deliberate attempt to oust a particular PRA to gain a competitive advantage over its competitors. This application is filed on speculative, hypothetical and vague grounds, and therefore deserves to be dismissed.

The brief contents of the Reply of the 3rd Respondent are as follows:

16. The Applicant has filed this Application with a sole motive to oust the PRA, its competitor. The OC has also failed to show any illegality or irregularity in the funding for acquiring the debt from the banks and IFCI by the CoC, which doesn't harm any of the stakeholders of the CD. The contract of repair and maintenance was awarded to the PRA by the Resolution Professional only with the approval of COC after following a transparent and due public process. The contract was awarded considering the expert's recommendation and technical evaluation to keep the CD as a going concern.

17. The PRA is a reputed "total pipe solutions" providing public listed company. It is seen from the records available in the public domain that M/s. Siddeshwari subscribed to certain non-convertible debentures issued by the CoC, which appears to be the source of part of the monies utilized by it to acquire the security receipts in M/s. Axis Trustee Services Ltd., which the CoC is required to hold. This does not mean that the PRA is one and the same entity of M/s. Siddheswari. It is pertinent to note that funding by M/s. Siddeshwari to the CoC was in no way financed by the PRA.

18. The acquisition of security receipts by M/s. Hexa Securities and Finance Company ("**Hexa**") or extension of the funding to the CoC by M/s. Siddeshwari can in no way be considered as financing the PRA. The provisions of IBC, 2016, permit a Financial Creditor to propose a Resolution Plan. While so, the

OC making the aforesaid legal position the entire premise of this instant application is legally un-tenable. The contention of the OC that the charge worth Rs.500 crores created by the PRA in March, 2021 was in some way connected to this acquisition is strongly denied. The charge was created three months prior to the acquisition of debt by the CoC, and also much earlier to the original Financial Creditors advertising the accounts of the CD for sale on 25.05.2021.

19. The OC apprehends that the PRA is a "related party"to the CoC since both of them used the same trusteeship service to create the charge. At present the Resolution Plans have been submitted which are being scrutinized by the RP prior to putting them for voting by the CoC. Therefore, no cause of action has arisen unless and until the plan of the PRA is approved by the CoC. The mere suspicion of the OC cannot be the reason to disqualify the PRA in the event the same is otherwise qualified under the IBC, 2016.

20. A reading of section 30(5) of the IBC, 2016, reveals that even a Financial Creditor member of the CoC can submit a Resolution Plan. There is no conflict of interest in a Financial Creditor proposing a Resolution Plan, but in fact it is only consistent with the principles of value maximization. Only section 29A restricts the persons from submitting a Resolution plan. The award of a contract for repair and maintenance of the assets of the CD to the PRA does not disqualify it to submit a Resolution Plan.

21. Based on the pleadings, certain points were framed for determination.

However, since the PRA had already submitted its resolution plan to the RP, the aforesaid third point became infructuous constraining reframing of the following three points for consideration.

(i) Whether the 2nd respondent can be directed to disclose all Information as to the funding it had received for acquiring the financial debt of the 1st Respondent by way of an assignment under SARFEASI Act?

(ii) Whether the Applicant has locus standi, to be appointed as an Observer in the meetings of the members of the Committee of Creditors of the Corporate Debtor?

(iii) Whether the committee of creditors be restrained from considering the resolution plan of the 3rd respondent/prospective resolution applicant which has already been submitted by the Resolution Professional to the CoC?

22. The Hon'ble Members, NCLT-Hyderabad, on 05.05.2022 concurred on their determination in respect of Points (I) and (II), but differed on Point (III) as follows, viz.: –

(A) The Hon'ble Member (Judicial) held that the Applicant failed to demonstrate any illegality requiring lifting of the corporate veil and dismissed application with cost of Rs.25,000/-.

(B) The Hon'ble member (Technical) disagreed with the Judicial Member and gave a separate finding as follows, viz.: –

"Entire process of the Corporate Insolvency Resolution from the date of auction conducted by the original Financial Creditors is vitiated and the collusion between various group companies of srespondents' no.2 and 3 is apparently visible. The fraudulent conduct of CIRP is writ large on the face of CIRP of the corporate debtor.

I consider the relief sought by the applicant herein against Point (iv) of this IA has merit. Accordingly, this prayer is allowed by invoking the power given to the Adjudicating Authority under Section 60(5) of the I & B Code, 2016. In the result, the Committee of Creditors is directed not to consider the Resolution Plan submitted by respondent No.3."

23. The above divergent opinion on Point (III) necessitated the Hon'ble President, NCLT-Delhi, to refer it to the Hon'ble Judicial Member, NCLT-Amaravati, who recused herself. Subsequently, the matter was on 03.09.2022 referred to me for disposal singly. Hence, the only Point that needs to be answered in this reference is,

"Whether the Committee of Creditors be restrained from considering the Resolution Plan of the 3rd Respondent/ Prospective Resolution Applicant which has already been submitted by the Resolution Professional to the Committee of Creditors?"

ARGUMENTS OF THE RESPECTIVE COUNSEL:

24. The Applicant/OC has prayed to restrain the CoC from considering the Resolution Plan submitted to it by the PRA. The basis for this relief is that the CoC and PRA are related parties. It is argued that the CoC, the PRA, M/s.Siddeshwari and M/s. Hexa are all group companies, which have colluded with each other. The PRA is holding a key position in the latter two companies, and the said two companies funded the purchase by the CoC of the entire Financial Debts of the CD from its original Financial Creditors.

25. Thus, the PRA taking advantageous position held by the CoC as the sole successor of Financial Creditor and the member in the CoC of the CD, has submitted the Resolution Plan and further obtained the works contract for repairs and maintenance of the CD corporate, Further, the PRA was awarded the contract for Rs.226 Crores by the RP by an order dated 18.10.2021. Hence, the PRA has donned four hats and played different roles and dominated the entire CIRP against the interests of the other stake holders in the CD.

26. It is also argued that the RP instead of proceeding with the Resolution Plans submitted by the other Resolution Applicants has unnecessarily considered the disputed plan of the PRA and has kept silent without bothering about the delay and expiry of the resolution period. The RP failed to act in the letter and spirit of Regulation 39(1) (c) and further failed to gather the necessary information and records pertaining to the fact that the PRA is the sole person behind the CoC who

has hijacked the entire CIRP. The OC further argued that the RP failed to act diligently, and instead has acted in a biased manner causing prejudice to the rights of the other operation creditors and other stakeholders of the CD.

27. The RP/1st Respondent contends that he acted as per the provisions of the IBC, 2016, and the Regulations thereof. The Scheme of the Code mandates the RP to function under the umbrella of the CoC, and hence the contention of the OC that the RP can proceed with other plans leaving the PRA is neither within the ambit of the RP nor statutorily permitted. In support of its contention, the RP relies upon the clear and unambiguous wordings in Section 25(2) (i), of IBC 2016 extracted below: –

"Present all resolution plans at the meeting of the committee of creditors",

28. It is also argued that Section 5(24), proviso to Section 21(2), 28(1)(f) and 29A of the IBC, 2016, define the related party only to the CD and restrain the RP to admit them into the CoC, and not to undertake any related party transactions without prior permission from the CoC and receipt of resolution plan, but there is no such restriction to related party in respect of the Financial Creditor, and hence the RP acted in accordance with the Code. The RP in accordance with Regulation 36A (10) CIRP Regulation 2016 also issued to the OC the Provisional List of Resolution Applicants and called for objections to exclude or include any Resolution Applicant named in the Provisional list. This was never objected to by anyone, including the OC, and hence the OC is estopped from subsequently raising any objection.

29. It is further argued that Rule 11 of NCLT Rules 2016 is not *parimetria* to section 151, Code of Civil Procedure, 1908, and hence this instant Petition filed under section 60(5), IBC, 2016, and Rule 11, NCLT Rules, 2016, is not maintainable. It was finally argued that the RP meticulously followed the Regulation 39(1) (c) and scrutinized the information and documents produced by the PRA and placed before the CoC as stipulated under Regulation 39(2).

30. The CoC/2nd Respondent argued that it was assigned the Financial Debts of the CD by the Consortium led by Canara Bank in a manner known to law, under Section 5, SARFESI Act, 2002, and the RBI guidelines. Pertinently, the assignor banks are public sector entities. The Applicant/OC has no *locus standi* to question the validity of the said assignment in IBC proceedings. It is also unnecessary to the OC to know the source of the CoC to get the assignment, albeit the source of funding was furnished by it.

31. The relief to restrain the CoC from considering the Resolution Plan of the PRA respondent amounts to restraining the CoC from carrying out its functions as provided in section 30(4), IBC, 2016, and hence such a relief cannot be granted. The only bar provided under the IBC is to consider the Resolution Plan of the party related to the CD, and not that of the party related to the Financial Creditor. It is further argued that an application under section 60(5) is not maintainable prior to an admission of plan and in this regard the Judgments of the Hon'ble Apex Court rendered in *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors*. reported in

(2019) 2 SCC 1, and *Ebix Singapore Pte, Ltd, vs. Committee of Creditors of Educomp Solutions Ltd. &Ors.*, reported in 2021 SCC Online SC 707cases are relied upon, and it is accordingly submitted that this instant petition is liable to be dismissed *in limine*, since it is premature.

32. The PRA/3rd Respondent argued that if this instant Application is conceded it leads to nullify the role of CoC under the Code. The OC having missed the bus to raise any objection, when the RP called for them pursuant to issuance of the Provisional list mentioning the Resolution Applicants in accordance with the Code, cannot now be permitted as an afterthought to file this instant Application, which is neither maintainable nor sustainable. The OC is also named in the final list of Resolution Applicants, which however was not considered when it failed to submit the Resolution Plan, Evaluation Matrix and Information Memorandum. Hence, this application is not filed with a *bonofide* intention, since the OC is attempting to avoid the competition indirectly, when it directly failed to qualify to be appointed as the Prospective Resolution Applicant.

33. It is argued that all the transactions are carried out in a transparent manner. The PRA filed an affidavit as required under section 30(1), IBC, 2016, which was examined and confirmed by the RP as provided under section 30(2), and also placed before CoC as provided under section 30(3), and accordingly the next step provided for in section 30(4) thereof cannot be skipped. The PRA is not disqualified in any manner, and hence this instant application is liable to be

dismissed.

ANSWER TO THE REFERENCE:

34. The pleadings filed and arguments advanced on both sides, leads the answer to the Reference simply lies in demonstrating that the CoC cannot be restrained from considering the Resolution Plan of the PRA, *unless* the PRA is disqualified to be termed as a Resolution Applicant. In this context, Sec.29–A, IBC, 2016, defines the "persons not eligible to be resolution applicant". In answering this Reference, the merits in the case of the OC are first discussed before adverting to the legal position.

35. The arguments of the Applicant/OC that the PRA acted in a planned manner to get an undue advantage in the CIRP of the CD, that the PRA colluded with the CoC in planning the CIRP and that the latter acted in a biased manner prejudicial to the rights of other creditors and interests of the CD, are unsustainable and rejected for the following reasons, viz.: –

(I) They are bereft of any tangible evidence, but only based on presumptions and apprehensions;

(II) The mere facts that Mr. Prthivi Raj Jindal holds a key managerial position in M/s.Siddeshwari, which funded the assignment of the Financial Debts of the CD from the original Financial Creditors in favour of the CoC, does not substantiate the aforesaid allegations;

(III) The above said M/s. Siddeshwari has been duly constituted under the provisions of the Companies Act ("**CA**"), 2013, and the debts were duly assigned in a duly conducted e–Auction adopting the "Swiss Challenge" method;

(IV) The presumptions and apprehensions are beyond the ambit of this Authority under the IBC, 2016, or does not withstand the legal scrutiny;

(V) In accordance with section 21, IBC, 2016, the CoC as the assignee of the original Financial Creditors is not a related party of CD,

36. The nexus, if there is any, as argued by the OC on the date of assignment on 25.06.2021 of the Financial Debts by a Consortium of Nationalized Banks and a NBFC governed by the RBI guidelines and the date of order passed on 28.07.2021 admitting the CD into CIRP is unsustainable and rejected for the following reasons, viz.: –

(I) Any such alleged, presumed and apprehended nexus cannot be challenged by the OC before this Authority;

(II) Likewise, the quantum of consideration paid by the CoC towards the assignment and the mode of its payment also cannot be challenged before this Authority, and

(III) In fact, the OC does not have the *locus standi*, which is conferred only upon its assignor, to question the validity of the assignment and genuineness thereof in a proceeding, before competent Authority.

37. Admittedly, the proviso to section 30(5), IBC, 2016, permits a financial creditor, who is also a member of the CoC, to submit a resolution plan. The section further permits a resolution applicant to attend the meeting of the CoC and also to vote, if it is also a financial creditor, when its resolution plan is being considered. Regulation 35, IBBI (RP for Corporate Person) Regulations, 2016, mandates that every member of the CoC shall maintain confidentiality of the fair and liquidation values and shall not use such values to cause an undue gain or undue loss to other.

38. However, it is presumed and apprehended by the OC that in the instant case there will be a failure to adhere to the aforesaid Section and Regulation due to conflict of interest since the CoC and PRA are one and the same and/or are related parties disabling the former to adhere to the Regulation and enabling the latter to be a selector in the voting process.

39. In view of the proviso to section 30(5) it is only a figment of imagination by the OC to state that the related party of the Financial Creditor is prohibited from submitting the resolution plan, more particularly when it is not statutorily barred in Sec.29–A, IBC, 2016. Hence, the allegation of collusion between the CoC and PRA on the only ground that they are related parties is unsustainable.

40. It is pertinent to note here that Regulation 35(2) mandates that only "after the receipt" of resolution plans, the Resolution Professional shall provide the fair and liquidation values to the CoC. The next Regulation in 35(3) provides sufficient safe guards by insisting upon the Resolution Professional to maintain

confidentiality of the fair and liquidation values. Hence, there is neither any conflict of interest nor inconsistency in the application of the aforesaid Section and Regulation in the instant case. Further, the apprehension is patently bogus, since the OC failed to submit its Resolution Plan, Evaluation Matrix and Information Memorandum, after provisionally listed as a prospective resolution applicant.

41. The Applicant/OC in support of his presumption and apprehension relies upon the interim stay order granted by the Delhi High Court in writ proceeding, in which the validity of section 30(5) is challenged. A similar interim order has also been granted by the Andhra Pradesh High Court. The apprehension albeit attractive has no legal backing, since the interim order which is only *in personam* has not struck down section 30(5). The section is still subsisting in the Code, and hence has to be followed in letter and spirit by this Authority as envisaged in the Code.

42. The argument by the OC that the Resolution Professional of the CD has included an onerous 16% default interest clause in the repair and maintenance contract only to prevent others from participating in the tender process, and that it reflects collusion and absence of due diligence on the part of the Resolution Professional is unsustainable and rejected for the following reasons, viz.: –

(I) It is settled Law that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The judicial scrutiny is confined as to whether the choice of

decision is made lawfully and not to check whether the choice of decision is sound since in evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence;

(II) The onerous default interest clause only ensures that the awardees of a high value contract is not negligent or lackadaisical, but is diligent and serious in maintaining the CD in a working condition towards its value maximization;

(III) The OC was not prevented, in any manner whatsoever, in participating in the tender process, and in fact there were no other participants, except the PRA only, in the tender process;

(IV) The contract having been awarded to the PRA must only by aggrieved by the onerous default interest clause, and

(V) The allegation being argued in the absence of any pleadings thereof is patently and only an afterthought.

43. The argument by the OC that the Resolution Professional of the CD has not proceeded to complete the CIRP within the mandated time frame after the order was pronounced on 05.05.2022 is unsustainable and is rejected for the following reasons, viz.: –

(I) An interim stay was initially granted in this instant Application, which was finally dismissed simpliciter on 05.05.2022 by the Hon'ble Judicial Member;

(II) However, the Hon'ble Technical Member differed with the above dismissal by specifically directing the CoC in Para 43.9 not to consider the Resolution Plan submitted by the PRA;

(III) The interim stay terminated and merged with the final order of dismissal passed by the Hon'ble Judicial Member, but the parties hereto could not be relegated to the same position they would have been but for the interim stay due to the divergent direction of the Hon'ble Technical Member (see *State of U.P. thr. Secretary &Ors. vs. Prem Chopra* (Civil Appeal No.2417/ 2022) decided on 25.03.2022), and

(IV) In view of the divergent opinion between the Hon'ble Members, the final order dated 05.05.2022 has not reached finality, but is pending in this Reference, and

(V) The divergent opinion has placed the Resolution Professional of the CD in a situation constraining him to await the outcome in this Reference, and hence the CIRP could not be completed within the time frame as mandated in the Code.

44. The argument that this application filed under section 60(5) R/w Rule 11, NCLT Rules, 2016, is not premature, and is maintainable in the pre–voting stage before the CoC considers the Resolution Plan submitted by the PRA is unsustainable and rejected for the following reasons, viz.: –

(I) Patently, this application is filed only on the presumption and apprehension that CoC will approve the Resolution Plan submitted by the PRA and hence it is premature, and any application filed on future contingencies is unsustainable;

(II) A mere contemplation or possibility that a right may be infringed without any legitimate basis for the right, would not be sufficient to hold that the pleadings disclose a cause of action as held by the Hon'ble Apex Court in *Colonel Shrawan Kumar Jaipuriya vs. Krishna Nandan Singh and Anr.* (Civil Appeal No. 6760/2019) decided on 02.09.2019;

(III) Section 30(2), IBC, 2016, enables challenging before this Authority the approval by the CoC of the Resolution Plan, if the specific requirements set out therein are complied with, and in the absence of any such compliance, there is no cause of action to grant the relief, and

(IV) The inherent and residuary powers conferred upon this Authority cannot supersede or nullify the specific provisions (section 30(2)) available in the Code as held by the Hon'ble Apex Court in *Swiss Ribbons (P.) Ltd. v. Union of India*reported in (2019) 4 SCC 17.

45. In the CIRP, an IRP is appointed and the CoC is formed, which appoints a resolution professional and then the process of inviting resolution plans for it to consider and vote on begins. It is at this stage that section 29–A, IBC, 2016, assumes relevance as it controls who may submit insolvency resolution plans with

respect to a CD. The effect of this provision is that promoters and the incumbent management of a company undergoing the CIRP (i.e.) the CD, are not allowed to bid for the rehabilitation of their own company. In the context of insolvency, the control over deciding the future of a corporation shifts to its creditors from its shareholders resulting in a change in management during the CIRP. India follows the creditor-in-possession regime, which is indicative of more scepticism towards the incumbent management than a debtor-in-possession regime.

46. The reason is that those who have contributed to the downfall of the CD should not be allowed to play a continuing role in its future, since its downfall is due to the actions of its management. Further, in accordance with the Code, once the CD is admitted into the CIRP and an IRP appointed, the incumbent management of the CD stands suspended and its management is entrusted with the IRP. Hence, whether a person is related to the CD or not has to be determined on or prior to the date of admission of the CD into the CIRP and not thereafter.

47. However, the Code does not prohibit the related party to the Financial Creditor to submit the resolution plan, and if the prayer of the OC is granted then certain provisions of the Code become redundant. Section 30(2) entrusts upon the RP to examine each of resolution plan and place them before the CoC for its consideration as provided in section 30(3). Any interference by the Adjudicating Authority in this process certainly amounts to injuncting the RP and CoC from functioning and discharging their duties and responsibilities as mandated under the

Code, which is neither envisaged therein nor under any Law. The Code has assigned certain duties/responsibilities to the RP and CoC in their arena, in which the Adjudicating Authority has no entry or access to replace them.

48. In the instant case, giving an opportunity to the CoC to consider the Resolution Plan submitted by the PRA would not in any manner, whatsoever, detract from the integrity of the Code. Section31 enables the Adjudicating Authority to act only after the resolution plan submitted by the RP is approved by the CoC, and prior to that it is the domain of the RP and COC to decide. There is no bar on anyone to approach this Adjudicating Authority if the Resolution Plan is prejudicial to the CD, or is in violation of any law or procedural requirement.

49. The PRA was awarded the repairs and maintenance contract by the RP of the CD on 18.10.2021. This, according to the OC, has made the PRA a related party to the CD, and hence the PRA is barred from submitting the Resolution Plan in view of section 5(24) (m) (iv), IBC, 2016. This argument of the OC is unsustainable and rejected for the following reasons, viz.: –

(I) The contract was awarded to the PRA only after the CD was admitted into CIRP;

(II) The contract was awarded in a transparent manner based on an expert's opinion by advertising a Request for Proposal and following the due process;

(III) The object and reason for initiating the contract is to ensure the value maximization of the CD by continuing its operations, and

(IV) In the event, the PRA is associated with the essential technical information pertaining to the CD after awarding of the contract, it is inevitable since it is necessary to continue the CD as an ongoing concern; even otherwise, the OC has not explained what technical information of the CD is available with the PRA.

50. The OC finding fault with awarding of the repairs and maintenance contract to the PRA by the RP of the CD on the basis of Circular issued by the Central Vigilance Commission of CVC and stipulating seven months' time period to complete the works awarded contract is contrary to the contemplation in the Code that the CIRP has to be completed within six months' time, and hence is inapplicable. In fact, the PRA took seven months' time period to complete the works under the awarded contract, and thus exceeded the six months' time period contemplated in the Code to complete the CIRP. However, this will not vitiate the contract awarded to the PRA in the absence of any challenge from any quarter and in view of section 12(2), IBC, 2016. Hence, this would not give any cause of action to restrain the CoC from considering the Resolution Plan submitted by the PRA.

51. The argument of the OC that in the event the Resolution Plan of the PRA is approved by the CoC it will prejudice the stakeholders of the CD and it is against the principal of natural justice is unsustainable. The CoC is the sole successor

the original Consortium of the Financial Creditors and the OC and others are the Operational Creditors of the CD. The Operational Creditors do not have the ability to vote unless the CD has no Financial Creditors in accordance with section 21, IBC, 2016.

52. In exchange for limited participation in the CIRP, the Code offers Operational Creditors certain protections. They are guaranteed a minimum portion of plan distribution proceeds which equals the amount they would have received in the event of the company's liquidation. The interest of the Operational Creditors is protected under section 30(1) (b). In the absence of any information about the resolution plans submitted by the PRA and other resolution applicants, it is not possible to ascertain how the resolution plans submitted by the others are more feasible, optimal and suitable than that of the PRA. Hence, it is patent that this application is filed only on presumptions and surmises.

53. It is pertinent to state here that the OC having failed to comply with certain formalities after being included in the provisional list of the PRA's circulated by the RP of the CD is no more in the race in the CIRP of the CD. The provisional list was published on 01.11.2021 under Regulation 36(10) and the OC by an e–Mail dated 05.11.2011 was granted five days' time to object upon the exclusion or inclusion of any Resolution Professional therein as provided in Regulation 36(11), but no objection was received either from the OC or anyone. Hence, the OC has no personal interest to claim injunction as a matter of right, since it is barred under

section 41(j) of the Specific Relief Act 1963,

54. The endeavor of the OC herein is patently to circumvent the situation. When the statute requires a thing to be done in a particular manner it must be done in that manner or not at all (see *Nazir Ahamed vs King Emperor*reported in A.I.R. 1963 P.C. 253). The said principle is applicable in all four squares to the facts of the instant case, since the OC having failed to object at the right time when called for in accordance with the Regulations has filed this application bye passing the Regulation under the guise of invoking the inherent powers of the Authority, which neither is encouraged nor allowed.

55. I would like to conclude that the factual scenario in the instant case is best depicted by the Hon'ble Apex Court in *India Resurgence ARC Pvt. Ltd. v. M/s Amit MetaliksLtd. &Anr.* [Civil Appeal No.1700 of 2021] reported in 2021 SCC Online SC 409, as follows: –

> *"11. it needs hardly any elaboration that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake*

the character of a legal grievance and cannot be taken up as a ground of appeal."

56. In these circumstances, the reference is answer that the Committee of Creditors cannot be restrained from considering the Resolution plan of the 3rd respondent and I agree with the findings of the Hon'ble Judicial Member and accordingly am of the view that this application deserves to be dismissed as held by him. I direct the Registry to place this order before the NCLT-Hyderabad to pass appropriate orders with regard to disposal of the Application.

57. The Registry is directed to send e-mail copies of the order forthwith to all the partieshereto and their Ld. Counsel for information and for taking necessary steps,

58. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ
Date: 2022.10.14 14:45:24 +05'30'

P. Mohan Raj,
Member (Judicial)

Signed on this 14th day of October, 2022.

Supriya-p.s