* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 21 August 2023**
Judgment pronounced on: 10 October 2023

\+ **ARB.P. 102/2022**

INDIAN OIL CORPORATION LIMITED ..... Petitioner
Through: Mr. Atul Sharma, Mr. Abhinav Agnihotri, Ms. Harshita, Agarwal, Mr. Dipan Sethi, Mr. Prahhav Garg, Advs.

versus

ARCELOR MITTAL NIPPON STEEL INDIA LIMITED ..... Respondent
Through: Dr. A.M. Singhvi and Mr. Arun Kathpalia, Sr. Advs. with Ms. Ruby Singh Ahuja, Mr. Ripu Daman Bhardwaj, Mr. Varun Khanna, Mr. Vishal, Ms. Kritika Sachdeva, Mr. Ashutosh P. Shukla, Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. **Indian Oil Corporation Ltd.**[1] seeks to invoke the jurisdiction conferred upon this Court by Section 11 of the **Arbitration & Conciliation Act, 1996**[2] for the constitution of an **Arbitral Tribunal**[3]

[1] IOCL
[2] The Act
[3] AT

in respect of disputes which are stated to exist and emanate from a **Gas Supply Agreement**[4] which was executed by it in favour of **Essar Steel Ltd**[5]. (originally) and which was thereafter assigned to **Essar Oil Limited**[6]. The GSA is dated 15 January 2009 and the dispute which stands raised essentially arises out of the "Take or Pay" obligation as contained in Article 14 thereof, and which empowered IOCL to call upon ESL to take remedial steps for payment in case it failed to lift the entire **Adjusted Annual Contract Quantity**[7].

2. The record would reflect that on 18 January 2012 the name of ESL was changed to **Essar Steel India Ltd.**[8] and an Assignment Agreement dated 14 November 2013 is stated to have been executed between IOCL, ESIL and EOL which constituted the "First Assignment Agreement" and was to remain valid upto 31 August 2014. In terms of the aforesaid agreement, ESIL assigned all its rights and obligations as flowing from the GSA to EOL. The parties are stated to have executed a "Second Assignment Agreement" on 25 September 2014 and which was to remain valid upto 30 September 2015.

3. On 04 May 2016, IOCL is stated to have placed ESIL on notice of its failure to comply with the AACQ for the Contract Year 2015 and consequently the former being entitled to invoke Article 14.1 of

[4] GSA
[5] ESL
[6] EOL
[7] AACQ
[8] ESIL

the GSA.

4. On 10 March 2017 the ESIL purporting to invoke powers conferred by Article 19.1 of the GSA proceeded to issue a notice of termination. The aforesaid termination was disputed by IOCL vide letter dated 21 March 2017, in which it asserted that Article 19.1 could have been invoked only if there had been a failure to provide the cumulative **Properly Nominated Daily Contract Quantity**[9] for over a period of 180 days. According to IOCL since it had not committed any breach of its contractual obligations, the termination notice was liable to be viewed as ineffective. Soon thereafter IOCL also issued a demand notice dated 27 April 2017 and subsequently, upon not receiving any payments, issued a notice of dispute dated 08 May 2017. It also called upon ESL to participate in the amicable settlement procedure as contemplated under the GSA. Since ESL apparently did not respond, IOCL on 11 July 2017 invoked arbitration in terms of the provisions of the GSA.

5. On 02 August 2017, **National Company Law Tribunal**[10], Ahmedabad admitted petitions filed by the State Bank of India and Standard Chartered Bank purporting to be under Section 7 of the **Insolvency and Bankruptcy Code**[11] seeking initiation of the **Corporate Insolvency Resolution Proceedings**[12] against ESIL. The said petitions came to be admitted and an **Interim Resolution**

[9] PNDCQ
[10] NCLT
[11] IBC
[12] CIRP

Professional[13] was appointed. The said IRP was later on confirmed as the **Resolution Professional**[14]**.** While responding to the notice invoking arbitration ESIL apprised the petitioner of the commencement of CIRP proceedings and the moratorium as declared by the NCLT vide its letter dated 07 August 2017.

6. Upon the RP taking over, public notices are stated to have been issued on 11 August 2017 and claims invited from all interested parties. Responding to the notice so issued by the RP, IOCL filed a claim of INR 3762,58,74,503/- on 16 August 2017. The said RP in terms of its communication dated 07 December 2018 apprised IOCL that its claim was being admitted for a notional amount of INR 1. The relevant extracts of the aforesaid email are reproduced hereinbelow:

> "Dear Sir/Madam,
> This is to inform you upon verification of your claim Form – B dated 16 August 2017 against Essar Steel India Limited, the following is the status of your claim filed under regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

Amount of Claim submitted	INR 3762,58,74,503
Amount of Claim admitted	Notional amount of INR 1 (Indian Rupee One only) to ensure your participation in the corporate insolvency
Reason for non-admission of entire claim amount	The remaining claim amount is not admitted because of pending dispute with respect to this claim as the arbitration proceedings were initiated by Indian Oil Corporation Limited

> You may take your own independent advice in this matter keeping in

[13] IRP
[14] RP

view the provisions of the Insolvency and Bankruptcy Code, 2016 and rule/regulations made under the said Code.
This is also to inform you that the erstwhile management of Essar Steel India Limited (Company) is stating that Indian Oil Corporation Limited (IOCL) sold the gas that was to be supplied to the to alternate buyer, thus, IOCL has not incurred any losses. You are therefore directed to file an affidavit to confirm that the gas that was to be supplied to the Company was not sold to any third party and it actually vanished because the Company had not taken it.

Thanking you,
Sincerely,
Satish Kumar Gupta
Resolution Professional"

7. It would at this stage and before proceeding further also be pertinent to refer to the following passages as they appeared in the Resolution Plan which ultimately came to be framed by the RP and was approved by the Committee of Creditors:

"XII. Other Terms of the Resolution plan

xxxx xxxx xxxx

Extinguishment of Claims:
1. Notwithstanding anything contained under Applicable Law or otherwise, the Claims pertaining to the Corporate Debtor shall stand extinguished, settled, abated and satisfied in the manner set out hereinafter:
a. Upon approval of the Resolution Plan by the Adjudicating Authority, except for payments/settlements under this Resolution Plan, no other payments or settlements (of any kind) will have to be made to any other Person in respect of the Claims filed under the Resolution Process and all Claims (including, for the avoidance of doubt, Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor till or as of the Insolvency Commencement Date along with any related Proceedings, including Proceedings for enforcement of any security interest, to the extent approved by the Adjudicating Authority, (other than in respect of invocation of corporate guarantees and personal guarantees issued

> for and on behalf of the Corporate Debtor by the Existing Promoter Group or their respective affiliates), shall stand irrevocably and unconditionally abated, discharged, settled and extinguished in perpetuity and if required, the Resolution Applicant, Corporate Debtor and its Stakeholders shall make necessary filings and take all necessary steps for the same."

8. As noted hereinabove, the aforesaid Resolution Plan came to be approved by the **Committee of Creditors**[15] on 25 October 2018. The plan as approved by the COC was also accorded sanction by the Adjudicating Authority in terms of an order dated 08 March 2019.[16] It, however, becomes pertinent to note that the Adjudicating Authority did not agree with the decision of the RP to admit the claims of operational creditors including the petitioner herein at INR 1. It, accordingly, and while disposing of the IAs that had been filed for its consideration observed as follows:

> "5. Therefore, these I.As. can be partially succeed only to the extent of such direction may be issued to the Resolution Professional to register their respective claims and to update the claims in the list of creditors, because we have already held in our separate order passed in I.As. Nos. 54 & 55 of 2018. However, the apportionment of these claims cannot be made as a matter of right, but only their interest, if any, can be taken care of while dealing with the I.A.No.431 of 2018 in succeeding paragraphs for consideration and approval of the Resolution Plan."

9. For the purposes of evaluating the issues which arise in the present petition, it would also be apposite to briefly notice the contentions which were raised by the petitioner before the NCLT in its

[15] COC

[16] Resolution Professional v. Essar Steel India Ltd., 2019 SCC OnLine NCLAT 750

IA. The Court extracts paras 12, 13, 15, 16, 17 & 18 thereof hereinbelow:

> "**12.** The Resolution Plan is wholly one sided and arbitrary as it provides that after the distribution of amounts to the Financial Creditors and Operational Creditors in terms of the Resolution Plan, all other liabilities and obligations of Operational Creditors shall stand extinguished in full and further that even all Litigations and proceedings in respect to the debts pending against the Corporate Debtor prior to commencement of CIRP shall stand abated thereby depriving the Applicant of any remedy to pursue the claim not provided for in the Resolution Plan.
>
> **13.** That under the impugned Resolution Plan, all inquiries. investigations, claims etc. even with regard to pending or future periods are sought to be deemed to be barred. Such a Resolution Plan is totally unheard of and dehors the substantive provisions of Indian Jurisprudence and the applicable laws. Thus, paragraph 9 of Annexure I to the Report being dehors the provisions of law, may be directed to be deleted.
>
> **15.** There is contravention of Section 30(2)(e) of the Code in as much as it seeks to extinguish all rights and obligations of the Applicant in respect of the claim of the Applicant, not provided for in the Resolution Plan, prior to the insolvency Commencement Date (ICD) as the same is not provided for anywhere in the Code.
>
> **16.** The Code itself does not provide for extinguishment of all rights and obligations of the creditors prior to the ICD on approval of the Resolution Plan. Neither the Resolution Professional nor the Resolution Applicant can validly extinguish all rights and obligations of the creditors be way of a Resolution Plan when no such power prescribed under the Code.
>
> **17.** Section 30 read with Section 31 of the Code along with Regulation 37 and 38 of the CIRP Regulations sets out the contours within which a resolution plan may be approved and given effect to. However, these provisions do not enable the Resolution Professional, the Committee of Creditors, much less the Resolution Applicant to unilaterally extinguish the rights of the creditors by way of a resolution plan.
>
> **18.** The Code does not provide for a process or a mechanism by

> which all rights and liabilities of the Applicant prior to the ICD can be unilaterally extinguished, thereby extinguishing the right to seek any remedy in relation thereto otherwise available to the Applicant in law. There is no provision either in the Code on in the Regulations to justify and/or sustain such extinguishment of remedy of the Applicant against the Corporate Debtor."

10. Since the claim of the operational creditors came to be introduced and made part of the Resolution Plan, various appeals against the decision of the NCLT came to be preferred before the **National Company Law Appellate Tribunal**[17]. In terms of its decision dated 04 July 2019 rendered in **Standard Chartered Bank vs. Satish Kumar Gupta**[18] and other connected appeals, while dealing with the claim of operational creditors including the petitioner herein it rendered the following pertinent observations:

> "**41.** In Interlocutory Applications filed by 'Dakshin Gujarat Vij. Co. Ltd.'; 'State Tax Officer'; 'Gujarat Energy Transmission Corporation Ltd.'; 'Bharat Petroleum Corporation Limited'; 'Indian Oil Corporation Ltd.'; 'MSTC Limited'; 'Gail (India) Limited' and 'Global Transnational Trading FZE' before the Adjudicating Authority, the Adjudicating Authority passed following directions:
>
> > "That these I.As. can be partially succeed only to the extent of such direction may be issued to the Resolution Professional to register their respective claims and to update the claims in the list of creditors, because we have already held in our separate order passed in I.As. Nos. 54 & 55 of 2018. However, the apportionment of these claims cannot be made as a matter of right, but only their interest, if any, can be taken care of while dealing with the I.A.No.431 of 2018 in succeeding paragraphs for consideration and

[17] NCLAT

[18] 2019 SCC OnLine NCLAT 388

approval of the Resolution Plan."

42. The grievance of 'Dakshin Gujarat Vij. Co. Ltd.'; 'State Tax Officer'; 'Bharat Petroleum Corporation Limited'; Indian Oil Corporation Ltd.'; 'MSTC Limited'; 'Gail (India) Limited'; 'Global Transnational Trading FZE'; 'Oil and Natural Gas Corporation Ltd.' and Indian Oil Corporation Ltd.' etc., is that inspite of direction of the Adjudicating Authority, the 'Resolution Professional' has not allowed their total claim.

43. The aforesaid part of order and direction given by the Adjudicating Authority having not been challenged by any person. Pursuant to our observation, the 'Resolution Professional' has provided the claim of the aforesaid 'Operational Creditors' and detailed below:-

I.A. No.	Name of Creditor	Amount of claim (Ps.) as per I.A. as per pages 34-41 of NCLT order
28/2018	Dakshin Gujarat Vij. Co. Ltd	313,23,33,224
446/2018	Dakshin Gujarat Vij. Co. Ltd	5882,28,00,000
467/2018	Dakshin Gujarat Vij. Co. Ltd	606,49,00,000
468/2018	State Tax Officer	544,00,00,000
443/2018	Gujarat Energy Transmission Corporation Ltd.	896,52,00,000
325/2018	Bharat Petroleum Corporation Limited	443,05,33,379
53/2018	Bharat Petroleum Corporation Limited	503,83,46,437
469/2018	Indian Oil Corporation Ltd.	3762,58,74,503
52/2019	MSTC Limited	813,30,00,000
438/2018	Gail India Limited	2,47,26,000
470/2018	Global Transnational Trading FZE	NA

> **200.** In view of the aforesaid observations, instead of rejecting the 'Resolution Plan' submitted by 'ArcelorMittal India Pvt. Ltd.', we modify the plan to safeguard the rights of the 'Operational Creditors' and other 'Financial Creditors': The impugned order dated 8th March, 2019 stands modified to the extent above. However, the other conditions laid down by the Adjudicating Authority and as mentioned in the 'Resolution Plan' is not interfered with.
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> **210.** Having heard rival contentions, we are of the view that the amount of profit if generated during the 'Corporate Insolvency Resolution Process', cannot be given to the 'Successful Resolution Applicant' as the 'Successful Resolution Applicant' has not invested any money during the Corporate Insolvency Resolution Process'. If one or other 'Financial Creditors' would have invested money during the 'Corporate Insolvency Resolution Process' to keep the 'Corporate Debtor' as a going concern, it can claim that it should get the interest out of the profit amount."

11. The aforesaid judgment was questioned before the Supreme Court in **Committee of Creditors of Essar Steel India Ltd. vs Satish Kumar Gupta and Ors.**[19]. The Supreme Court upon a detailed consideration of the statutory scheme underlying the resolution process as contemplated under the IBC explained the importance liable to be attached to the clean slate doctrine which had come to be enunciated and the statutory closure which ensues once a Resolution Plan comes to be duly approved. This Court deems it apposite to extract the following passages from that decision hereinbelow:

> "**107.** For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against

[19] (2020) 8 SCC 531

the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.

155. So far as Dakshin Gujarat Vij Co. (Respondent 11 in Civil Appeal Diary No. 24417 of 2019), State Tax Officer (Respondent 12 in Civil Appeal Diary No. 24417 of 2019), Gujarat Energy Transmission Corporation Ltd. (Respondent 17 in Civil Appeal Diary No. 24417 of 2019) and Indian Oil Corporation Ltd. (Respondent 18 in Civil Appeal Diary No. 24417 of 2019) are concerned, the resolution professional admitted the claim of the abovementioned respondents notionally at INR 1 on the ground that there were disputes pending before various authorities in respect of the said amounts. However, NCLT through its judgment dated 8-3-2019 directed the resolution professional to register the entire claim of the said respondents. NCLAT in paras 44, 45 and 201 of the impugned judgment upheld the order passed by NCLT as aforesaid and admitted the claim of the abovementioned respondents. We therefore hold that this part of the impugned judgment deserves to be set aside on the ground that the resolution professional was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.

156. The appeals filed by the Committee of Creditors of Essar Steel Ltd. and other civil appeals are allowed. The impugned NCLAT judgment is set aside, except insofar as Civil Appeals Nos. 6409, 7266 and 7260 of 2019 are concerned, which are dismissed. Insofar as Civil Appeals Nos. 6266 and 6269 of 2019 are concerned, the appeals are partly allowed in terms of this judgment. The writ petitions are disposed of in terms of the judgment. It is made clear that the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of ArcelorMittal dated 23-10-

> 2018, as amended and accepted by the Committee of Creditors on 27-3-2019, as it has provided for amounts to be paid to different classes of creditors by following Section 30(2) and Regulation 38 of the Code."

12. It becomes pertinent to observe that while dealing with the admission of claims at a notional value of INR 1 and which was the action proposed by the RP, the Supreme Court set aside the order of the NCLT as well as the NCLAT which had held that the claims of the operational creditors were liable to be factored in full in the Resolution Plan. The effect of the said decision was that the action of the RP admitting the claims of the petitioner at a notional value of INR 1 came to be affirmed and the Resolution Plan so amended conferred a seal of finality.

13. The respondent who was the successful Resolution Applicant acquired 100% of the shareholding of ESIL on 16 December 2019 and took over its management. Once the Resolution Plan had come to be successfully implemented and one would have thought that all controversies would have been laid to rest, the petitioner issued a notice dated 09 August 2021 calling upon the respondent to pay various amounts which according to it were payable in terms of the GSA and pertained to the Contract Years 2014, January to September, 2015, Contract Years 2016, 2017, 2018, 2019 and 2020. IOCL in terms of the aforesaid notice claimed an amount of INR 8772,30,79,969/-. The respondent by its letter of 12 September 2021 repudiated the claims as raised by the petitioner. This led to the

petitioner invoking arbitration against the respondent in terms of its letter of 29 October 2021. While responding to the aforesaid communication the respondent by its letter of 26 November 2021 denied all liabilities under the terminated GSA and called upon the petitioner to withdraw its notice. This led to IOCL issuing yet another letter dated 01 December 2021 asserting that the respondent had failed to select a sole arbitrator from the panel of three distinguished persons which had been provided and the petitioner consequently proceeded to nominate and name its nominee arbitrator in accordance with Article 15.6(ii) of the GSA. It further called upon the respondent to appoint its nominee arbitrator within a period of seven days therefrom. However, and since the respondent took no steps, the instant petition came to be filed before this Court.

14. Appearing for the petitioner Mr. Sharma, learned counsel submitted that the admission of claims at INR 1 and the approval of the Resolution Plan cannot possibly be viewed as a conclusive adjudication of the claims of the petitioner as flowing from the GSA and consequently the Court must take appropriate step for constitution of an AT. It was further submitted that the "Take or Pay" contained in the GSA gave rise to obligations which would continue upto 2028 and thus go far beyond the date when the Resolution Plan came to be approved. It was Mr. Sharma's contention further that the decision of the Supreme Court in *Committee of Creditors*, and more particularly Para 107 thereof, would indicate that the same had no application and

in any case cannot be read as depriving the right of the petitioner to raise claims which otherwise arise out of the GSA.

15. Mr. Sharma submitted that the Resolution Plan does not provide for or envisage the extinguishment of all claims of the petitioner and the admission of the claim at a nominal value of INR 1 cannot lead to such a conclusion. It was his submission further that the validity of the purported termination also did not form part of the proceeding which ensued before the Adjudicating Authority under the IBC. Mr. Sharma submitted that this too would constitute a valid ground and evidence the imperatives of an AT being constituted. It was also his submission that the petitioner asserts that the GSA is a continuing contract and, therefore, the liabilities which arise therefrom and which relate to the non-payment of dues is clearly a cause of action which continues to subsist notwithstanding the closure of proceedings under the IBC, and thus the petitioner is justified in calling upon the Court to exercise its jurisdiction conferred by Section 11.

16. On a more fundamental plane, Mr. Sharma argued that the various objections which are addressed by the respondent relate to the merits of the dispute all of which should be left open for the consideration of the AT. Learned counsel submitted that bearing in mind the contours of the Section 11 power and which proceeds on the principle of a prima facie consideration alone, all disputes must be left open for the consideration of the AT.

17. Appearing for the respondents Dr. Singhvi, learned Senior

Counsel firstly invoked the principles of extinguishment of claims and which according to him is a unique characteristic of the IBC. According to Dr. Singhvi the extinguishment of all claims including those which may have been admitted at a notional value of INR 1, would have to be considered not only in light of the principles that have been laid down by the Supreme Court but additionally in light of the expressed language of the Resolution Plan itself. Dr. Singhvi, apart from adverting to the extracts as appearing in the Information Memorandum and the other statutory disclosures which were made by the RP, also drew our attention to the following extracts as they formed part of the final Resolution Plan which was approved: -

> "Extinguishment of Claims:
>
> 1. Notwithstanding anything contained under Applicable Law or otherwise, the Claims pertaining to the Corporate Debtor shall stand extinguished, settled, abated and satisfied in the manner set out hereinafter:
>
> a. Upon approval of the Resolution Plan by the Adjudicating Authority, except for payments/settlements under this Resolution Plan, no other payments or settlements (of any kind) will have to be made to any other Person in respect of the Claims filed under the Resolution Process and all Claims (including, for the avoidance of doubt, Rejected Claims Amount and Verification Pending Amounts) against the Corporate Debtor till or as of the Insolvency Commencement Date along with any related Proceedings, including Proceedings for enforcement of any security interest, to the extent approved by the Adjudicating Authority, (other than in respect of invocation of corporate guarantees and personal guarantees issued for and on behalf of the Corporate Debtor by the Existing Promoter Group or their respective affiliates), shall stand irrevocably and unconditionally abated, discharged, settled and extinguished in perpetuity and if required, the Resolution Applicant, Corporate Debtor and its

Stakeholders shall make necessary filings and take all necessary steps for the same.

b. Upon approval of the Resolution Plan by the Adjudicating Authority, the payments contemplated in this Resolution Plan shall be the Corporate Debtor's full and final performance, and satisfaction, of all Claims (including Rejected Claims Amounts and Verification Pending Amounts) against the Corporate Debtor till or as of the Insolvency Commencement Date, shall stand irrevocably and unconditionally settled and extinguished in perpetuity.

c. Upon approval of the Resolution Plan by the Adjudicating Authority, subject to Clause (g) below, all contingent liabilities of the Corporate Debtor till or as of the Insolvency Commencement Date arising out of any Proceedings to which the Corporate Debtor is a party shall, unless otherwise stated in this Resolution Plan and irrespective of the final outcome of such Proceedings, stand irrevocably and unconditionally reduced to and capped at the amounts that would be realizable by the Claimant, if the contingent liability had fructified at any time prior to the Insolvency Commencement Date.

d. With effect from the Plan Approval Date, all Encumbrances created or suffered to exist over the assets of the Corporate Debtor or over the Securities of the Corporate Debtor, whether by contract or by Applicable Law, whether created for the benefit of the Corporate Debtor or any Third Party (except the Security Interest that is created or purported to be created for the benefit of the Resolution Applicant and/or its Connected Persons, and/or banks or financial institutions designated by the Resolution Applicant), shall stand unconditionally and irrevocably assigned or novated in favour of the Resolution Applicant or released (if required by the Resolution Applicant) upon making the relevant payments under the Resolution Plan on the Effective Date and all enforcement of security by any Persons commenced over any of the assets of the Corporate Debtor or over any Securities of the Corporate Debtor shall stand released and reversed, without the requirement of any further deed or action on the part of the Resolution Applicant or the Corporate Debtor including any priority of claims that could have otherwise been claimed by the Tax Authorities under

Section 281 of the Income Tax Act, 1961. The Resolution Applicant shall comply with all necessary procedural requirements for the same.

e. Other than as set out in this Resolution Plan, the Resolution Applicant and the Corporate Debtor shall have no responsibility or liability in respect of any Claims (whether contingent or crystallized, known or unknown, filed or not filed) against the Corporate Debtor attributable to the period prior to the Insolvency Commencement Date, including those relating to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor till or as of the Insolvency Commencement Date shall stand irrevocably and unconditionally abated, settled and extinguished in perpetuity.

f. Upon the approval of the Resolution Plan by the Adjudicating Authority, all pending Proceedings relating to the winding-up of the Corporate Debtor shall stand irrevocably and unconditionally abated in perpetuity. Upon such approval of the Resolution Plan, the Government Creditors and Trade creditors shall be deemed to have waived all termination rights on account of payment defaults, and rights to payment of penalty, default payment or any payment of like nature under any agreement or arrangement against the Corporate Debtor, including but not limited to any rights arising from any breach, default, act or omission, under any such agreement or arrangement executed by the Corporate Debtor and/ or the Resolution Professional for and on behalf of the Corporate Debtor.

g. Upon the approval of the Resolution Plan by the Adjudicating Authority, in relation to guarantees provided for and on behalf of, and in order to secure the financial assistance availed by the Corporate Debtor, which have been invoked prior to the Effective Date, claims of the guarantor on account of subrogation, if any, under any such guarantee shall be deemed to have been abated, released, discharged and extinguished.

It is hereby clarified that, the aforementioned clause shall not apply in any manner which may extinguish/affect the rights of the Financial Creditors to enforce the corporate guarantees and personal guarantees issued for and on behalf of the Corporate Debtor by the Existing Promoter Group or their

respective affiliates, which guarantees shall continue to be retained by the Financial Creditors and shall continue to be enforceable by them.

h. Upon the approval of the Resolution Plan by the Adjudicating Authority, all the outstanding negotiable instruments issued by the Corporate Debtor including demand promissory notes, postdated cheques and letters of credit, till or as of the Insolvency Commencement Date, shall stand terminated and the liability of the Corporate Debtor under such instruments shall stand extinguished unless otherwise determined by the Corporate Debtor in compliance with the provisions of Section VII or solely for the purpose of operating the Corporate Debtor as a going concern

i. On the Plan Approval Date, other than as contemplated under Section X, the rights of any Person (whether exercisable now or in the future and whether contingent or not) to call for the allotment, issuance, sale or transfer of shares or Securities or loan capital of the Corporate Debtor, whether on a change of control, or otherwise, shall stand unconditionally and irrevocably extinguished. In addition to the foregoing, on the Plan Approval Date, the right to receive distribution of any shareholder (by way of dividend, coupons etc.) that has accrued or relates to the period prior to the Plan Approval Date, shall stand unconditionally and irrevocably extinguished. All rights of any shareholder of the Corporate Debtor (not being the Resolution Applicant or its affiliates), whether arising under law or contract shall stand abated, suspended during the period between the Plan Approval Date and the Effective Date and the shareholder shall not have any rights to cause the Corporate Debtor to take any actions or restrain the Corporate Debtor from carrying on its activities.

j. All Claims (whether contingent or crystallized, known or unknown, filed or not filed) of Governmental Authorities in relation to all Taxes which the Corporate Debtor was or may be liable to pay (including with respect to financial years under assessment), all deductions and all withholding Taxes on any payment, as required under Applicable Law and pertaining to the period prior to the Insolvency Commencement Date shall stand extinguished on the Plan Approval Date.

k. All liabilities (whether contingent or crystallized, known

> or unknown, filed or not filed) in relation to any corporate guarantees, indemnities and all other forms of credit support provided by the Corporate Debtor prior to the Plan Approval Date (whether on behalf of Group Companies or otherwise) shall stand extinguished and discharged with effect from the Plan Approval Date.
>
> l. No Person shall be entitled to initiate any Proceedings to enforce any Claims or continue any proceedings in relation to any Claims in so far as the Claims relate to the period prior to the Plan Approval Date."

18. It was his submission further that as would be evident from the various pleas that have been taken by the petitioner before the Adjudicating Authority, a challenge to the validity of termination as well as the claim of the petitioner being pegged at INR 1 were clearly and admittedly canvassed and urged. Apart from the IA which was filed before the Adjudicating Authority Dr. Singhvi also drew our attention to the following averments as appearing in the appeal which was filed by the petitioner before the NCLAT: -

> "**31.** It is pertinent to mention herein that after the directions passed by the Adjudicating Authority on Appellant's application, the Resolution Profession (Respondent No.1) has updated the list of Creditors of the Corporate Debtor to include the amount being claimed by the Appellant but the same is meaningless and of no avail in as much as the Resolution Plan has already been passed by the Adjudicating Authority on 08.03.2019.
>
> **32.** It is also pertinent to mention herein that the Corporate Debtor had, by way of the communication dated 10.03.2017, sought to wrongfully terminate the GSA between the parties, which had been opposed to by the Appellant. The issue of termination of the GSA vitally affects the rights of the parties, more so of the Appellant. However, the Resolution Plan and/or the Order dated 08.03.2019 is absolutely silent on this aspect, giving rise uncertainty and ambiguity. Further the impugned Order does not, either explicitly or implicitly specify that only those claims are being settled which are

part of the Resolution Plan. To be noted that the issue of purported termination of the GSA is not considered in or *part* of the Resolution Plan. The Resolution Plan does not deal with and / or all issues that it ought to have and approval thereof is thus bad in law.

33. Not only does the Resolution Plan totally extinguish Appellant's huge claim of Rs. 3762,58,74,503/-, it also adversely affects future rights of the Appellant under GSA with ESIL. The Hon'ble Adjudicating Authority while approving the Resolution Plan has erred both in law and in appreciating the facts in the correct perspective and therefore, the Appellant is left with no other option but to prefer the present Appeal on the grounds mentioned hereinafter."

19. According to Dr. Singhvi the judgment of the Supreme Court in *Committee of Creditors* had in unequivocal terms set aside the judgments rendered by the NCLT and the NCLAT which had purported to revive the claims of the operational creditors such as the petitioner and negative the admission of claims at a notional value of INR 1 by the RP. According to Dr. Singhvi the aforesaid decision and once it had proceeded to modify the Resolution Plan and reversing its provisions to fall in accord with the decision of the RP, no dispute survives which may justify the reference to an AT. In so far as the plea of extinguishment of liabilities is concerned and the legislative policy underlying the same, Dr. Singhvi drew our attention to the following passages as appearing in the decision of the Supreme Court in **Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd.**[20]:

"**65.** Bare reading of Section 31 of the I&B Code would also make

[20] (2021) 9 SCC 657

it abundantly clear that once the resolution plan is approved by the adjudicating authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in sub-section (2) of Section 30, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is revival of the corporate debtor and to make it a running concern.

66. The resolution plan submitted-by the successful resolution applicant is required to contain various provisions viz: provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the corporate debtor under Section 53; or 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. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paíd to such creditors if accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor. Explanation 1 to clause (b) of sub-section (2) of Section 30 of the I&B Code clarifies for the removal of doubts that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the corporate debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan: Clause (e) of sub-section (2) of Section 30 of the I&B. Code also casts a duty on RP to examine that the resolution plan does not contravene any of the provisions of the law for the time being in force.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the corporate debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, The details with regard to all material litigation and

an ongoing investigation or proceeding initiated by the Government and statutory authorities are. also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the corporate debtor towards them are required to be contained in the information memorandum.

68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved.

93. As discussed hereinabove, one of the principal objects. of the I&B Code is providing for revival of the corporate debtor and to make it a going concern. The I&B Code is a complete Code in itself. Upon admission of petition under Section 7 there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the informatic memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that nay. be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on-going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the

> corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable."

20. It was submitted by Dr. Singhvi that the approval of a Resolution Plan under the IBC results in cessation and extinguishment of all claims other than those which may find place in the plan which comes to be approved. According to learned Senior Counsel any contrary view that may be taken would clearly fall foul of the principles as laid down by the Supreme Court in *Ghanashyam Mishra*. Dr. Singhvi commended for our consideration the fundamental legislative intention which weaves and constructs Section 30 and 31 of the IBC of ensuring that the successful Resolution Applicant is enabled to take over the corporate debtor on a clean slate and not be burdened by unforeseen liabilities and those which are neither factored in nor admitted in the Resolution Plan. According to learned senior counsel, the referral of the dispute to the AT would amount to a reopening of the Resolution Plan which would not only be wholly impermissible but would amount to overriding the judicial imprimatur which came to be rendered by the Supreme Court in *Committee of Creditors*.

21. It was lastly submitted by Dr. Singhvi that bearing in mind the legal position which emerges from *Ghanashyam Mishra*, the petition under Section 11 is liable to be dismissed even if one were to employ

the 'eye of needle' test as propounded in **NTPC Ltd. V. SPML Infra Ltd.**[21] Dr. Singhvi referred for our consideration the following passages from that decision:

> **"25.** ***Eye of the Needle:*** The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the *parties to the agreement* and the *applicant's privity* to the said agreement. These are matters which require a thorough examination by the referral court. The
>
> secondary inquiry that may arise at the reference stage itself is with respect to the nonarbitrability of the dispute.
>
> **28.** The limited scrutiny, through the *eye of the needle*, is necessary and compelling. It is intertwined with the duty of the referral court to *protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable*. It has been termed as a *legitimate* interference by courts to refuse reference in order *to prevent wastage of public and private resource* . Further, as noted in *Vidya Drolia* (supra), if this duty within the limited compass is not exercised, *and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court*. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to *act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator* , as explained in *DLF Home Developers Limited* v. *Rajapura Homes Pvt. Ltd.***"**

22. It was the submission of learned Senior Counsel that in proceedings like the present the Court would not be guided or influenced by the mere expediency to refer but be obliged to weigh and balance the closure which stands accorded to claims which formed part of a Resolution Plan which had come to be approved

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under the IBC. According to Dr. Singhvi, it is the aforesaid aspect of the present matter which renders the disputes raised "non arbitrable".

23. Having noticed the rival submissions which were addressed, this Court finds that it is called upon to principally answer two fundamental questions: -

A. Whether the approval of the Resolution Plan results in an extinguishment of all claims that the Petitioner could enforce against Arcelor Mittal?

B. Whether the approval of the Resolution Plan would render the disputes which are sought to be referred for the consideration of an AT non-arbitrable?

24. The legislative intent and command of Sections 30 and 31 of the IBC is an issue which is no longer res integra. In *Ghanashyam Mishra* as well as the host of judgments rendered in that context and which were duly noticed by the Supreme Court in that decision, the underlying theme has been the recognition of the right of the successful Resolution Applicant to take over the corporate debtor on a "clean" or "fresh" slate. Those decisions lay primordial importance of the successful Resolution Applicant being enabled to take over the corporate debtor without being burdened by any uncertainties or a specter of irresolution. The approval of the Resolution Plan is statutorily recognised as conferring a closure upon all claims that persons or entities may have had against the corporate debtor. The claims or liabilities which could have been enforced against the

corporate debtor are duly considered in the course of the CIRP with the Adjudicating Authority undertaking a detailed exercise with respect to identification of the various creditors of the corporate debtor, including the classes thereof, the scrutiny of claims received and the ultimate apportionment of the amounts deposited by the successful Resolution Applicant amongst the creditors inter se.

25. However, once the aforesaid process has been completed and the Resolution Plan comes to be approved, no fresh claims can be laid or enforced against the successful Resolution Applicant. The successful Resolution Applicant is only bound to meet the claims as may have been accepted and ultimately form part of the approved Resolution Plan. This issue assumes seminal importance since the successful Resolution Applicant cannot be left open to defend or oppose claims which are either not factored in the Resolution Plan nor can it be left to fend off actions that may be brought with respect to alleged or asserted dues of the corporate debtor which were not admitted. Taking any other position would clearly violate the clean and fresh slate doctrines which inform and imbue the resolution process under the IBC. The Supreme Court while alluding to the intent of the resolution process underlying the IBC had described this aspect as the "hydra headed monster". In fact, *Ghanashyam Mishra* significantly observes that all claims which are not part of the Resolution Plan shall stand extinguished and no person would be entitled to "initiate or continue" any proceedings in respect of the

claim.

26. Undisputedly and as would be evident from the challenges which were raised by the petitioner against the decision of the RP to admit its claim at a notional value of INR 1, it had assailed all aspects of the said decision including with respect to termination as well as the abridgment of its claim itself. Although the NCLT and NCLAT had accorded relief to the petitioner and reinstated its claim to an extent, those decisions came to be set aside by the Supreme Court in *Committee of Creditors*. The aforesaid decision of the Supreme Court thus lends an evident quietus to the entire controversy. While arriving at the said conclusion, the Court also bears in mind the final direction of the Supreme Court in *Committee of Creditors* and which commands the implementation of the Resolution Plan in terms of its observations and as framed by the RP. The Court is thus of the considered opinion that approval of the Resolution Plan in terms noticed by us above clearly amounts to the extinguishment of all debts that were owed by the corporate debtor except to the extent as was admitted in the Resolution Plan. The IBC and the resolution process does not contemplate matters being left inchoate. In fact, and to the contrary it exhorts one to accept the seal of finality and quietitude which stands attached to the approval of a Resolution Plan.

27. That then takes the Court to consider whether the dispute of which reference is sought could be said to fall within the ambit of what we commonly refer to as non-arbitrability. While the Court is

conscious of the Section 11 power contemplating a prima facie view being formed and a first review alone being undertaken, the decisions handed down on the scope of that jurisdiction also bids High Courts to ensure that dead disputes are not revived and parties forced to undertake arbitration. Thus, where issues which are canvassed on a Section 11 petition are found to be contested or even arguable, the High Court would desist from delving into the merits of the rival claims. The Supreme Court bids us to bear in mind that at the pre referral stage, the court is not supposed to undertake a mini trial for that would clearly be encroaching upon the jurisdiction of the AT. The Section 11 court would also not hesitate from referring disputes to the AT where it finds that contentious questions are raised or where even debatable issues are evident from the case set forth by parties. The Court while considering the issue of reference would refuse to do so only in situations where either the arbitration agreement is found to be non-existent, where the claim can ex facie be said to be unenforceable in law say for instance where it is barred by the statute of limitation or where the dispute of which reference is sought falls within the genre of non-arbitrability.

28. However, while examining the aforesaid aspects, the Section 11 court should also be conscious of delaying tactics that are sometimes adopted to stave off a reference as also being cognizant of the limited extent of review that it is obliged to undertake. If in the course of that limited review, it finds that a determination would remain

inconclusive, it must defer those aspects of non-arbitrability to be considered by the AT. These aspects have been lucidly explained in the recent decision of the Supreme Court in *NTPC* where it was held that it is only in cases where the question of non-arbitrability is self-evident, ex facie manifest and where it is possible to come to a clear and definite conclusion on the question of non-arbitrability that the Courts would refuse to refer parties to arbitration. In *NTPC*, while accepting that the Section 11 court is not expected to act mechanically and succumb to the expediency of referring parties to arbitration, it was pertinently observed that a refusal to refer would be justified when there is not "even a vestige of doubt" with respect to non-arbitrability or where it is evident that the matter is "demonstrably non-arbitrable".

29. When those principles are applied to the facts of the case, the Court comes to the firm conclusion that Question B is liable to be answered in the affirmative and in favour of the respondent. Once it is accepted that the approval of the Resolution Plan results in the extinguishment of all claims that the petitioner may have had, the dispute which is now sought to be canvassed cannot be permitted to be urged again before the AT. That would clearly amount to rewriting upon the clean slate based upon which the respondent took over the corporate debtor. A reference of the disputes as sought by the petitioner would clearly amount to a reopening of the Resolution Plan and which is clearly impermissible in light of the finality which was

accorded by the decision of the Supreme Court in *Committee of Creditors*. Empowering the AT to adjudicate or rule upon these disputes would also be contrary to the principles which were enunciated by the Supreme Court in *Ghanashyam Mishra*. The Court thus comes to conclude that on due application of the "eye of the needle" test, it is manifest that the disputes which are spoken of in the Section 11 petition are non-arbitrable and thus no reference to the AT is warranted.

30. The petition fails and shall stand dismissed.

YASHWANT VARMA, J.

OCTOBER 10, 2023
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