

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL****PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(INS) NO.612/2021**

**(Arising out of judgement and order dated 31.05.2021 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi (Principal Bench), New Delhi in IA No.901/2021 in (IB)-470(ND)/2019)**

**In the matter of:**

Rajesh Narang  
S/o Kimti Lal Narang,  
Ex Director of Durha Vitrak Pvt LTd,  
R/o C-145, Pushpanjali Enclave,  
Pitampura,  
New Delhi-34

Appellant

Vs

Durha Vitrak Pvt Ltd,  
Aishwarya Mohan Gahrana  
Resolution Professional,  
Having office at  
D-74-76, Second Floor, B.K. Dutt colony,  
New Delhi-110003.

LIC Housing Finance Ltd,  
Through its Authorised Representative  
Laxmi Insurance Building,  
Asaf Ali Road,  
New Delhi-110002

Respondents.

For Appellant: Mr Rajat Bhardwaj, Advocate.  
For Respondent. Mr Sharad Tyagi, Ms Yukti Makan, Ms K. Gayatri,  
Ms Anupriya Gupta, Advocates for R1 and R2

**JUDGEMENT**  
**(9<sup>th</sup> December, 2022)**

**JUSTICE RAKESH KUMAR, MEMBER (JUDICIAL)**

The present appeal has been preferred by an ex-Director of Durha Vitrak Pvt Ltd who was running a full operational hospital namely Febris Multispeciality Hospital of 150 beds (hereinafter referred to as ‘Corporate Debtor’) which was earlier under Corporate Insolvency Resolution Process (hereinafter referred to as ‘CIRP’). The appeal has been preferred under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as IBC).

The appellant herein has assailed the order dated 31.05.2021 passed by the Adjudicating Authority, National Company Law Tribunal, Principal Bench, New Delhi in I.A. No.9010/2021 in (IB)/470(ND)/2019 (hereinafter referred to as NCLT). By the said order learned NCLT has allowed an application i.e. IA No.9021/2021 filed under Section 33(2) of the IBC Code. The said application was filed by Resolution Professional (hereinafter referred to as ‘RP’) namely Mr. Aishwarya Mohan Gahrana. It is appropriate to reproduce the order dated 31.05.2021 as follows:-

“ORDER

*It is an IA filed u/s 33(2) of the Insolvency & Bankruptcy Code, 2016 ("the Code") by the Resolution Professional (RP) seeking liquidation order based on the resolution passed by the CoC in its 6th meeting held on 28.01.2021 with a requisite majority as contemplated under I&B Code, 2016.*

*2. On perusal of this application, it appears that this (IB)-470(ND)/2019 was admitted on 08.11.2019 and this Applicant was appointed as IRP and he invited claims from the creditors and constituted CoC only of one Financial Creditor i.e. LIC Housing Finance Limited as the other Financial Creditor i.e. Dr. Arinjaya Jain was a related party to the Corporate Debtor. Subsequently, IRI was appointed as RP in the First Meeting of CoC held on 09.12.2019, and he appointed two Registered Valuers to value the assets of the Company.*

*3. In furtherance of it, the RP prepared the Information Memorandum and apprised the CoC in its 4th meeting dated 29.04.2020 that the Copy of Information Memorandum may be obtained after submitting the confidential undertaking and Form G for inviting the expression of interest was published on 17.08.2020 after the approval of the CoC in same meeting. The Form-G was again issued on 14.09.2020 after the discussion held in the fifth CoC meeting held on 07.09.2020. This authority also extended the CIR Period for further 90 days and excluded the period from 25.03.2020 to 31.07.2020 due to Covid-19. In furtherance to the publication of Form G, the resolution professional received an expression of interest from 4 prospective resolution applicants. However, the resolution professional received two proposed resolution plan pursuant to the final list of prospective resolution applicants. In the 6th CoC dated 28.01.2021, the CoC discussed the resolution plans received and was not inclined to consider any resolution plan considering them to be not feasible and viable and pass resolution for initiation of liquidation process of the Corporate Debtor which is as follows:-*

**"RESOLVE THAT** pursuant to Section 33(2) of the Insolvency and Bankruptcy Code, 2016 and the rules made thereunder, the consent of members of the Committee of Creditors be and is hereby accorded to approve the filing of an application with Hon'ble Adjudicating Authority, regarding the initiation of liquidation of Corporate Debtor and to appoint existing Resolution Professional, subject to given consent to act as liquidator, as the liquidator of the Corporate Debtor.

**"RESOLVE FURTHER THAT** in pursuant to Regulation 4(2) of 1BBI (Liquidation Process) Regulations, 2016, the

liquidator shall be entitled to a fee of Rs. 1,25,000/- (Rs. One Lakh Twenty-Five Thousand only per month).

**"RESOLVED FURTHER THAT** the Resolution Professional be and is hereby authorized to submit an application before the Hon'ble Adjudicating Authority and to do all such acts, deeds and things as may be required or considered necessary or incidental thereto."

4. Looking at the application and averments thereof, we are of the considered opinion that this is a fit case for liquidation, therefore, we hereby order for liquidation of the company with directions as follows:

a. The Mr. Aishwarya Mohan Gahrana, holding Registration No. IBBI/ IPA-002/ 1P-N00135/2017- 2018/10351 having [email-aishwaryam\\_gahrana@yahoo.com](mailto:email-aishwaryam_gahrana@yahoo.com) is appointed as the Liquidator in terms of Section 32 of the Code;

b. Registry is directed to communicate this Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;

c. The Order of Moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect and a fresh Moratorium under Section 33(5) of the Insolvency and Bankruptcy Code shall commence;

d. This order shall be deemed to be a notice of discharge to the officers, employees and the workmen of the corporate debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016;

e. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant rules and regulations.

f. The Liquidator shall follow up and continue to investigate the financial affairs of the Corporate Debtor in accordance with provisions of Section 35(1) of the Code.

g. The liquidator shall also follow up the pending applications for their disposal during the process of liquidation including initiation of steps for recovery of dues of the Corporate Debtor as per law.



made Resolution Professional (hereinafter referred to as 'RP'). After being appointed as IRP, Mr. Gahrana on 16.11.2019 took over the Corporate Debtor. As per the appellant at that time when IRP took over the Corporate Debtor it was generating a revenue of Rs.87 lakhs in the month of November, 2019. The appellant offered unconditional support to RP to continue the operation of the Hospital to maximise the value of the Corporate Debtor. In the Paper Book at Page 6 monthwise revenue of the Corporate Debtor is reflected in chart which is reproduced hereinbelow:

S.No.	Month	Receipt	Credit Billing	Total in Rs.
1	April 2019	31,71,687/-	18,49,530/-	50,21,217/-
2	May 2019	39,77,753/-	19,58,928/-	59,36,681/-
3	June, 2019	32,70,450/-	18,76,906/-	51,47,356/-
4	July, 2019	43,02,166/-	19,63,676/-	62,65,842/-
5	August, 2019	45,10,666/-	19,68,947/-	64,79,613/-
6	Sep 2019	25,84,228/-	14,81,812/-	40,66,040/-
7	Oct 2019	20,92,020/-	14,09,413/-	35,01,433/-
8	01.11.19 15.11.19	- 87,33,348/-	92,517/-	88,25,865/-
9	16.11.19 30.11.19	- 6,20,223/-	21,563/-	6,41,786/-

10	01.12.19	-	7,05,052/-	6,634/-	7,11,686/-
	15.12.19				

It is further case of the appellant that at the time when IRP took over the Corporate Debtor the hospital was having a strength of approximately 100 employees and doctors. The doctors strength has been reflected in a chart at running page 7 which is as follows:-

S.No.	Month/Period	No. of Doctors
1	October 2019	17
2	1.11.19 to 15.11.19	15
3	15.11.19 to 30.11.19	8
4	December 19	5

It is further case of the appellant that during CIRP the RP instead of taking step to continue the hospital as going concern was taking all steps to create a situation for liquidation. Even the RP had not taken any step to get certain dues of the Corporate Debtor recovered from the concerned Govt Departments/Agencies. Without adhering to provisions contained in Section 25 of the IBC

Code the RP in connivance with the financial creditors mainly LIC Housing Finance Ltd who was having about 93% voting shares in the CoC filed an application under Section 33(2) of the IBC Code for initiating liquidation proceeding. It has also been argued that Learned NCLT without examining viability of going concern of the Corporate Debtor mechanically allowed the petition filed by the RP.

It is further case of the appellant that after filing of the application under Section 33(2) of the IBC Code it was heard by the Division Bench of NCLT consisting Hon'ble Justice BSV Prakash Kumar, Acting President and Hon'ble Mr. V.K. Subburaj, Member (Technical) and order was reserved. However, before passing of the order one of the Member of the Bench i.e. Member (Technical) demitted the office. Even thereafter on 20.05.2021 order was passed by a Bench consisting of Hon'ble Justice Mr. BSV Prakash Kumar, Acting President sitting with Hon'ble Mr. Hemant Kumar Sarangi, Member (Technical). Since it was against principle of natural justice a rectification petition was filed by one of the ex-Director namely Mr. Rakesh Saxena with a prayer to rectify the order dated 20.05.2021. After noticing the fact that before the pronouncement of order Mr. V.K. Subburaj had already demitted the officer the said order i.e. order dated 20.05.2021 was declared

as void and matter was directed to be reopened for hearing by the regular Principal Bench i.e. Acting President and Hon'ble Member (Technical) Mr. Hemant Kumar Sarangi and it was directed to be listed on 31.05.2021 for hearing. Thereafter the impugned order was passed.

During the course of hearing it was submitted by Mr. Rajat Bhardwaj, learned counsel for the appellant that total loan amount was Rs.33 crores for which EMI was fixed as Rs.50 lakhs approximately. However, due to reasons it was beyond the control of the appellant, the loan account was termed as NPA and thereafter in the month of February, 2019 a petition under Section 7 of the IBC Code was filed by the financial creditor. Learned counsel for the appellant has drawn our attention to statement made in para Q at Page 26 of the Memo of Appeal which is quoted hereinbelow:-

*“Q. The Committee of Creditors meeting was conducted on 09.12.2019 despite the repeated request on behalf of the Appellant to take immediate steps with regard to continue operations of the Hospital, the same were ignored by the RP for the reasons best known to the RP. The fact that the payment was to be received to the tune of Rs. 1,78,50,211 Crores (approx.) from*

*the Government Departments namely Delhi Police, Municipal Corporation of Delhi, Delhi Govt Employees Health Scheme, Central Industrial Security Force, Central Government Health Scheme, etc was simply ignored and no steps till date has been taken by the RP in this regard. The RP mentions the concern in the Minutes of the Meeting but fails to take any steps in support of the continuation of the operations of the Hospital.”*

Learned counsel for the Appellant has also drawn our attention to running page 60 of the Memo of Appeal to show that in the Hospital upto month of October, 2019, there were 17 doctors. He further by way of referring to Page 61 of the Memo of Appeal tried to persuade the Court that till 15<sup>th</sup> November, 2019 there were 15 doctors. However, immediately after the RP took over the charge of the hospital, number of doctors started drastically decreasing. Learned counsel for the appellant has drawn our attention to running page 62 to show that till 30<sup>th</sup> November, 2019 the number of doctors was reduced to 8, by December 15, it came down to only 5 and till 31<sup>st</sup> December there remained only one doctor namely Mr. Amit Garg, Department of Paediatric. This chart is at page 63 and 64 of the Memo of Appeal. He further submits that in the month of January and thereafter there remained no doctor in the hospital.

Similarly learned counsel for the appellant has drawn our attention to Annexure 13 which is from running page 67 to 76 showing reduction in number of staff in the hospital and what was the strength when RP took the charge of the Corporate Debtor. In the month of October, 2019 as per chart there were total 82 employees, till 8<sup>th</sup> November, 2019 the number of employees were 76, and till 30<sup>th</sup> November, 2019 there were 71 employees. Thereafter the number of employees started decreasing and till 12<sup>th</sup> December, 2019 it was reduced to 69 number of employees and thereafter by 31<sup>st</sup> December, 2019 number of employees came down to 45. In the month of January, 2020 the strength of employees/staff was reduced to the negligible number of 8 which is reflected at Page 76.

Learned counsel for the appellant further submits that in the Meeting of COC, one of the Appellant, being suspended director of the CD offered Rs.32.5 crores. However, same proposal was outrightly rejected by the CoC under the leadership of RP. By way of referring to Page 106 and 107 of the Memo of Appeal, learned counsel for the Appellant submits that in the 4<sup>th</sup> Meeting of CoC which was held on 29.5.2020 proposal was to re-start hospital which was outrightly rejected by the RP. Even though during the

pandemic i.e. Covid 19 period when there was complete scarcity of beds in hospitals, despite direction issued by the Hon'ble Delhi High Court on 18.05.2021 the RP did not take step even to apply for renewal of the licence of the hospital and frustrated the direction of the Hon'ble Delhi High Court. He further submits that the approach of the RP from the very inception was not to see the CD as going concern and this was the reason that the Resolution Plan which was offered by one Lala Munni Lal Manghe Ram Charitable Trust which offered for Rs.25 crores was turned down and the said Resolution Plan was rejected. Learned counsel for the appellant submits that in CIRP it is mandatory required for the RP to take all steps to see that the CD may continue as going concern and liquidation is last resort. However, the RP in the present case with malafide intention right from the very beginning was proceeding to see that the CD may proceed in liquidation instead of revival of the same. To substantiate his submission learned counsel for the appellant has referred to his written submission filed on 14.7.2022 wherein relevant portion of the Judgement of the Hon'ble Supreme Court reported in (2019) 4 SCC 17 in the matter of Swiss Ribbons Pvt Ltd and Anr Vs UOI & Others has been mentioned which is reproduced hereinbelow:

*“Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.”*

In view of the aforesaid facts and circumstances it was argued by the learned counsel for the appellant that order of liquidation is fit to be set aside. Learned counsel for the appellant has also referred to certain facts disclosed in rejoinder as well as written submissions filed on behalf of the appellant.

Mr. Sharad Tyagi, learned counsel has appeared on behalf of both the Respondents i.e. Durha vitrak Pvt LTd through Mr. Aishwarya Mohan Gaharana, RP as well as LIC Housing Finance Ltd which is one of the major financial creditors. Mr. Tyagi, learned counsel opposing the appeal firstly referred to para 2 of the Joint

Reply filed on behalf of Respondent No.1 i.e. RP and Respondent No.2 i.e LIC Housing Finance Ltd. It is better to reproduce the same para 2 of the joint reply:

*“That the Appellant has obtained a stay vide order dated September 07, 2021 from this Hon’ble Appellate Tribunal by twisting and misrepresenting the facts of the case, whereas the correct facts of the matter are totally different. The attitude and approach of the ex-directors of Durha Vitrak Private Ltd (Corporate Debtor/CD) was non-cooperative since the beginning of taking over the control of the CD by the IRP. The same is evident from the applications which are sub-judice before the Hon’ble Adjudicating Authority filed against the ex-directors of the CD for non-cooperation on their part, due to which the IRP/RP could not access various information/documents pertaining to the CD, details of which are as follows:-*

Sr N o.	Application Number	File d by	Date of filing

1	<p>CA No.177/2020 filed under Section 19(2) of IBC against the following</p> <p>a. Rajesh Narang( ex director of CD)</p> <p>b. Dr. Rakesh Saxena (ex director of CD)</p> <p>c. Gulshan Bansal (Chartered Account of CD)</p> <p>d. Krishna Kumar Jha (CEO of CD)</p> <p>The ex directors of the CD have not even filed their reply till date.</p>	RP	Around January 02, 2020
2	<p>IA No.5150/2020 filed under Section 60(5) of IBC with the</p>	Co C	Novemb er 23, 2020

	<i>prayer for providing relevant information/documents to the RP pertaining to the CD</i>		
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*Despite the evident non-corporation on the part of the ex-directors of the CD, the RP made his best efforts to revive the CD and prepared an Information Memorandum (IM) after collection of information from various sources and issued Expression of Interest on 2 (Two) occasion being on August 16, 2020 and again on September 14, 2020, at the instance of Committee of Creditors.”*

He further submits that CIRP was commenced on 08.11.2019. At the time of initiation of CIRP, the CD was having only Rs.12858/- in its account and its CD unit i.e. Febris Multispeciality Hospital was having Rs.15300/- only in its account. The aforesaid accounts were lying in the Axis Bank. On 6.11.2019 total amount of Rs.4138/- of CD/Hospital was lying in ICICI Bank. He further submits that since September, 2019 the employees of the Corporate Debtor were on strike. To substantiate his submissions that the employees were on strike, learned counsel for the Respondent has drawn our attention to Page 51, 52 and 53

those are photo copies of the clips of electronic news. He further submits that the account of CD was declared NPA on 7.4.2018. He has also drawn our attention to running page 101 of joint reply to show that on 11.5.2020 the RP sent mail which was 9<sup>th</sup> reminder seeking cooperation of both the ex-directors for preparation of Balance Sheet. He has also drawn our attention to para 7 and 9 of the joint reply to show complete non-cooperation by the ex-directors. By way of referring to statement made in para 7, 8, 9, 10 and 13 of the reply, Mr, Tyagi, learned counsel submitted that the appellant has never rendered any cooperation nor he took steps for supplying information and relevant documents to the RP. He further submits that the registration certificate of the Hospital was valid upto March, 2020. However, due to failure on the part of suspended directors the licence was not got renewed and he placed the proceeding of the 4<sup>th</sup> CoC to highlight his submissions. On the point of revival/restarting of the Hospital it was argued by the learned counsel for the Respondent that RP had taken all steps. He has drawn our attention to running Page 155 i.e. Resolution passed in the 4<sup>th</sup> COC whereby it was resolved to invite Expression of Interest. Mr Tyagi, learned counsel has emphatically argued that though certain resolution plans were received but since they were

not viable the CoC decided to reject the same. He submits that in the commercial wisdom the decision was taken and as such the said decision may not be faulted by either of the parties. To substantiate his submission the learned counsel for the Respondent has drawn our attention to Page 20 and 21 para 19 of the joint reply. In para 19 learned counsel has referred to para 142 of judgement of Hon'ble Supreme Court passed in Kalpraj Dharamshi & Ors Vs Kotak Investment Advisors Ltd and ors. Civil Appeal No.2943-2944, 3138-3139m 2949-2950 if 2020 and Civil Appeal Nos 847-848 of 2021 which are reproduced hereinbelow:

*“142.....It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.*

*155. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B code.”*

Similarly in the same para i.e. para 19 of the joint reply reference has been made to para 46 of a judgement of Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Ltd through

Authorised Signatory Vs Mr. Satish Kumar Gupta and other Civil Appeal No.8766-67 of 2019, which is quoted hereinbelow:

*“46.....Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.”*

By way of referring to aforesaid judgement it has been argued that decision for liquidation was commercial wisdom and as such the order impugned may not be interfered with.

Besides hearing learned counsel for the parties we have examined entire material available on record and after going through the same we are satisfied that neither impugned order is required to be approved nor the conduct of RP can be considered as a conduct which was expected from a RP. The basic object of the IBC is to see that even if there is financial crunch or a company is in default, the approach should be to get the said company/entity as going concern. Time without number it has been held that a step for revival of the CD would be the first step

and this is the reason that under the Code there is provision for inviting interest for selecting persons competent to take over the CD and also to clear the outstanding of the creditors. In any event liquidation of a CD under the IBC Code is considered as last nail in a coffin. The object to keep a CD as going concern is a rule whereas carrying the CD for liquidation is exception. On minute examination of proceeding of all the CoCs Meeting which have been brought on record in running Page 77 to 144 of the Memo of Appeal we are really dissatisfied by the approach of RP.

The RP who was expected to proceed independently, in the present proceeding has proceeded as if he was one of the partner of the main financial creditor i.e. LIC Housing Finance Ltd. Once IRP/RP is appointed by the Adjudicating Authority he acts as a public servant and as a public servant it is expected that he will proceed in a fair and independent manner. However, after going through entire proceeding of the CoC we are completely dissatisfied with the conduct of the RP. Before going to deliberate in detail on the proceeding of the CoC it would be proper to firstly notice that even in the present proceeding that too before the Appellate Tribunal the RP has appeared through a common Advocate who has appeared on behalf of the RP as well as financial creditor i.e.

LIC Housing Finance Ltd. Reply which has been filed in the present appeal has also been filed jointly by RP and Financial Creditor. This act of the RP is itself a glaring example of biasness.

So far as conduct of the RP is concerned it can be deprecated on the point that after initiation of the CIRP when first Meeting CoC was to be held, the RP chose to visit the premises of the financial creditor and first CoC Meeting was held on 9<sup>th</sup> December, 2019 at Meeting Room of M/s LIC Housing Finance Ltd, Regional Office, 2<sup>nd</sup> floor, Jeevan Deep Building, Sansad Marg, New Delhi. In the said COC Meeting there was only one financial creditor, i.e. LIC Housing Finance Ltd. 2<sup>nd</sup> CoC Meeting was again held at the same place i.e. Meeting Room of LIC Housing Finance Ltd on 14.1.2020. At running page 94 of Memo of appeal it is evident from the resolution on 14.1.2020 i.e. 2<sup>nd</sup> Meeting of CoC that Committee expressed its intention to meet again on 25.1.2020 morning at 10 AM at the **same place for 3<sup>rd</sup> Meeting of CoC.** Meaning thereby that Meeting was to be held at Meeting room of M/s LIC Housing Finance Ltd. However, the proceeding of 3<sup>rd</sup> CoC which was held on 25.1.2020 indicates that Meeting of 3<sup>rd</sup> CoC was held at room of M/s Fair and Just Legal solution LLP, Sector 62, Noida. Page 95 i.e. 1<sup>st</sup> page of the Meeting CoC reflects Members

of the CoC and their authorized representative presence. This chart reflects that in the said Meeting only financial creditor i.e. M/s LIC Housing Finance Ltd was represented by its five representatives whereas in respect of other two financial creditors namely Siemens Financial Services Pvt Ltd and HDFC Bank Ltd whose voting share was 4.66% and 1.97% respectively, there was none appearance. Similarly the CD was non-represented. Thereafter 4<sup>th</sup> Meeting of CoC was held on 29.7.2020 at Aishwarya M Gaharan & Associates, 2<sup>nd</sup> floor in Jangpura Extension, New Delhi of course through video conferencing. Running page 102 of the Memo of Appeal i.e. part of the 4<sup>th</sup> Meeting of COC reflects that in Item No.6 the CoC took note about the change of address of Resolution Professional, since RP informed that the registered office of the Resolution Professional has been changed w.e.f. 1.2.2020 to 4 Birbal Market, 2<sup>nd</sup> Floor, Jangpura Extension, New Delhi, NCTof Delhi. We are of the opinion that being RP it was duty on his part to show his independence and fairness, but visiting the premises of LIC Housing Finance Ltd who was the major financial creditor i.e. having above 93% of voting right in the CoC reflects that it was neither independent nor fair. Rather it can

be inferred that he was only sharing interest of one of the major financial creditor.

Besides the conduct of the RP regarding visiting the place of one of the main financial creditor for CoC Meeting, on examination of the proceeding of 6<sup>th</sup> CoC Meeting it is evident that right from the very inception he has not taken even any step to see CD as going concern rather the conduct of the RP shows that he was pre-determined for liquidation of the CD. However, to cover up his such intention, he was creating documents and filing petitions against the suspended directors of the CD. On going through running page 79 of the Memo of Appeal which is part of the minutes of the 1<sup>st</sup> Meeting of the CoC it appears that in the 1<sup>st</sup> Meeting itself which was held on 9.12.2019 the RP informed the Committee that the CD was having its multispeciality hospital at Narela, Sector 7, North West Delhi which was not working fine due to scarcity of working capital and mis-management of day to day operation. He also informed that working conditions was not satisfactory whereas the appellant has taken specific stand that the hospital till the date of taking over by the IRP was running smoothly and generating fund also. The chart which has been brought on record in the Memo of Appeal reflects that the CD was

running Febris Multispeciality Hospital of 150 beds and till when IRP was appointed the CD was generating revenue of 87 lakhs in the month of November, 2019.

It is also evident from the fact disclosed in the Memo of Appeal that the strength of Doctors and staff/employees were also sufficient till the initiation of CIRP. However, immediately after IRP took charge it started reducing and within one or two months it was reduced to a negligible number. These facts are itself enough to draw an inference that the RP had given incorrect picture to the CoC in the Meeting. Moreover, in the 1<sup>st</sup> Meeting there was only one financial creditor i.e. LIC Housing Finance Ltd and this meeting was attended by both suspended directors of the CD in presence of Mr. Aishwarya Mohan Gaharana and Mr. Sharda Tyagi, legal advisor.

In the 2<sup>nd</sup> CoC Meeting which was held on 14.01.2020 besides LIC Housing Finance Ltd two other financial creditors namely Siemens Financial Services Pvt Ltd and HDFC Bank Limited were represented through their representatives and one of the director from the CD, Mr Rajesh Narang was also present. Even during 2<sup>nd</sup> CoC the RP **placed before the committee measures required before the Committee. The committee discussed the same in**

**detail. The committee noted that presently there are no chance for functioning of the hospital due to the negative public image, mismanagement and lack of required working capital.** In the said 2<sup>nd</sup> CoC Meeting the appellant also expressed to place the proposal before the LIC Housing Finance Ltd, however, the same was denied. Running page 93 of the Memo of Appeal i.e. Part of the 2<sup>nd</sup> CoC Meeting reflects that the present appellant had even asked the Members “what their intention behind the decision of not to accept his proposal”?

The intention of the RP is further evident on examining the proceeding of the 3<sup>rd</sup> CoC held on 25.1.2020 wherein except LIC Housing Finance Ltd none of the other financial creditors or even CD were present. We have already noticed that in the last meeting i.e. 2<sup>nd</sup> Meeting of CoC it was resolved for holding meeting at the same place i.e. Meeting room of LIC Housing Finance Ltd. However, the 3<sup>rd</sup> Meeting was held at a different place in Noida and that too there were none appearance of remaining two financial creditors and CD and even in this proceeding certain alarming things were discussed that is reflected from running page 97 and 98 of the Memo of Appeal. At page 97 in Item No.4 the Committee even discussed for invocation of personal guarantee by the

Members of the CoC. On the one hand in earlier CoC Meeting it was discussed that no information was provided by the CD. However, item No.8 of the CoC which is at page 104 of the Memo of Appeal gives an impression that sufficient information were available. It is appropriate to reproduce Item No.8 and 9 at running page 104-105 respectively of Memo of Appeal as follows:-

***“Item No.8: To take note of the status of valuation***

*The Resolution professional informed that for want of complete information and documents valuation could not be complete on time. Valuers required certain information without which complete picture cannot be drawn for valuation. All details of property and assets are not available.*

*If all information is available the valuation report may be available within one month and we hope it by August end.*

*The Committee also raised the issue of the high cost of the valuation. The Resolution Professional appraised that the details about the appointment of the valuers were also placed before the second meeting of the committee of creditors.*

*Further, we require valuers under all three classes **as we have assets under all three classes land and building, plant and machinery and financial assets.** Under the law, we require two valuers for each class. So we need to pay a total of six*

*valuers. All valuers are required to value corporate debtor as a whole for their values as going concern as well as liquidation values. The work involved is not comparable to the routine valuation of certain and limited assets. Therefore, it seems a high cost.”*

**Item No.9 :To take note of the status of Forensic audit.**

*The Resolution Professional informed that he received three proposals and appointed M.K. Agarwal & Company, New Delhi with the least amount of fee quotation. The auditor communicated to the Resolution Professional earlier about completion of about 70% work as of now. It is also informed that forensic auditor started work even when the advance of the fee has not been provided but seeking advance amount at earliers.*

The RP on the one hand without the approval of the CoC was taking major decision but on the other hand before the CoC he was giving a picture that he was not getting any information. It is reflected from Page 105, Item No.9, that the RP informs the CoC that he had received three proposals and appointed one M.K. Agarwal and Co, New Delhi. However, even there were some proposals to restart functioning of the hospital, but, on flimsy ground it was turned down. At this stage it is necessary to

reproduce the proposal and discussions regarding re-functioning of the hospital by the CoC which is at page 106 to 107, as follows:-

***“C-Proposal to restart functioning of Hospital***

*The Resolution Professional informed that there were some proposals to restart the functioning of the hospital.*

*Mr. Saxena, member of the suspended board of directors, mentioned that there is a proposal to restart the operations received from a third party and the proposal is mailed to the resolution professional and a director.*

*The Resolution Professional submitted that without proper license and permission to run a hospital we cannot run a Covid Care Centre or other health care facility in violation of the general law related to run a hospital. We cannot try to make profit risking the life of patients, quality of services and compliance of various health laws.*

*The Resolution Professional also mentioned that a proper proposal should include registered medical professionals under commitment.*

*The committee requested to provide a proper proposal with all licenses renewal as a primary and essential condition along with details of doctors, medical and non-medical staff details, consideration amount, working capital to be introduced, net-worth, proper finance back up, security amount offered,*

*performance guarantee, services to be offered including OPD and IPD services, proper maintenance of hospital and details of assets and machinery of hospital planned to be used.*

*Members of the suspended Board of Directors committed to getting all required licenses to run the hospital at earliest.”*

From the Memo of Appeal it is further evident that during peak period of Covid 19 on 1<sup>st</sup> April, 2020 a proposal was submitted to the RP for running the hospital and was ready to spend appropriate funds for restoration of servicing of the existing facility at Febris Multispeciality Hospital and other offers were also given but same was also not accepted by the RP. The said proposal is at running page 119 to 124 of the Memo of Appeal.

The ill intention of the RP is further evident on perusal of the proceeding of the 4<sup>th</sup> CoC Meeting held on 29<sup>th</sup> July, 2020 whereby unreasonable eligibility criteria under Section 25(2)(h) to invite prospective resolution applicants was included. Running page 109 of the Memo of Appeal i.e. part of the 4<sup>th</sup> CoC Meeting dated 29<sup>th</sup> July, 2020 depict regarding fixation of eligibility criteria which are as follows:-

*“a. A net-worth of Rs.5 Crores as per last audited balance sheet and turnover of Rs.10 crores as per last financial year and a record of profitability of last 3 financial years; or*

*b. In case of any other person having net worth 5 crores of their own or holding company or promoters and having a sufficient means of finance in form of a bank balance or fixed deposit or sufficient fund from a committed source of finance of Rs.1 crore or more;*

*Each person submitting an expression of interest shall submit a non-refundable earnest money deposit of Rs.15 lakhs in case of a plan not accepted or approved, which will be adjustable in case plan accepted and approved. However, this amount shall be refunded in case the person withdraws before finalization of Final List of Prospective Resolution Applicants.”*

The condition of forfeiture of Rs.15 lakh even in case of non-acceptance and/or approval of the expression of interest itself reflects that the very invitation of expression of interest was to frustrate or deter the participants to offer any express of interest. It appears that this stringent criteria was fixed on 29.07.2020 in the 4<sup>th</sup> CoC Meeting. However, at much belated stage on 7<sup>th</sup> September, 2020 in 5<sup>th</sup> CoC Meeting it was resolved to substitute the said condition. It would be appropriate to reproduce the said

Resolution which is at running page 131 of 7<sup>th</sup> September, 2020

Meeting:

***“Resolved that on-page 6 of “Invitation of Expression of Interest”***

*in place of words:*

*“Each person submitting an expression of interest shall submit a non-refundable earnest money deposit of Rs.15 lakhs in case of the plan not accepted or approved, which will be adjustable in case plan accepted and approved. However, this amount shall be refunded in case the person withdraws before finalization of Final List of Prospective Resolution applicants.”*

*Following words shall be substituted with effect from the date of issue of the documents:*

*“Each person submitting an expression of interest shall submit a refundable earnest money deposit of Rs.15 lakhs.*

*The Demand Draft shall be made in favour of “Durha Vitrak Private Ltd”*

***Resolved further that the Resolution Professional may circulate the amended copy to all parties concerned with it.”***

After almost about 3 months from the date of inviting expression of interest such modification that too in a CIRP was

meaningless. Rather an adverse inference can be drawn against the RP in such a situation.

In 6<sup>th</sup> Meeting CoC which was held on 28.1.2021 Resolution Plan submitted by at least two namely Unicon Builders and Lala Munni Lal Manghe Ram Charitable Trust were considered and rejected. Lala Munni Lal Manghe Ram Charitable Trust in its resolution plan had firstly mentioned Rs.21 crores, however, during discussion they offered upto Rs.25 crores for resolution plan but same was rejected. This offer had come in the month of January, 2021 whereas it has been noticed that the running hospital was made non-operational immediately IRP, who is presently RP, had taken charge of the CD. In hospital premises there were number of plant and machinery. Since it had become non-operational obviously from the month of December, 2019 to January, 2021 i.e. after lapse of more than one year certainly those plant and machinery without any operation must had been rusted and decayed due to inaction of the RP. There is no reason to come to the conclusion that even 7 storey huge hospital building was maintained during said period. Since for such a long period the hospital building, plant and machinery all had remained stand still

naturally it suffered a lot, which can be one of the reasons for decrease in the value of the CD property.

In the present case we have noticed that even during initial period of CIRP the appellant had offered Rs.32.5 crore. However, the said proposal was outrightly rejected. The proceeding of 2<sup>nd</sup> CoC held on 14.1.2020 reflects that the appellant had orally proposed its intention for making an offer of Rs.32.5 crores lump sum. It has been discussed in Item No.11 at running page 92, 93 of Memo of Appeal which is quoted hereinbelow:

***“The member of the suspended board of directors **Mr. Narang** made a proposal orally and communicated his intention to place it in on record in writing that promoters of the corporate debtors are indented to make an out of court settlement with one of the financial creditors and member of the committee M/s LIC Housing Finance Ltd by making an offer of Rs.32.5 crores lump sum. The proposal was not consented by the members of the committee unilaterally and same has been communicated to Mr. Narang.***

*The representative of the LIC Housing Finance Limited have conveyed Mr. Narang that corporate insolvency resolution process can be withdrawn only if entire payment of the LIC Housing Finance Limited be made in one go. Same views were expressed*

*by representative of Siemens Financial Services Pvt Ltd and HDFC Bank Ltd.*

*All representatives communicated that all payment of all members of the committee of creditors should be settled in one go only thereafter the committee may consider the settlement.*

During Covid period the Hon'ble Delhi High Court in CWP No.5049/2021, CM No.15453/2021 on 18<sup>th</sup> May, 2021 on the petition filed by one of the directors in a Writ Petition directed the Govt of NCT of Delhi, Respondent No.1 to take a decision with respect to offer of the petitioner for running the hospital. The order dated 18.05.2021 passed by the Division Bench of Hon'ble Delhi High Court consisting Hon'ble the Chief Justice and Ms Justice Jyoti Singh is quoted hereinbelow:

*“Proceedings have been conducted through video conferencing.*

*1. Learned counsel for the Petitioner submits that the Petitioner is a Doctor by profession and was a Director in the Company which, prior to the appointment of the Insolvency Resolution Professional by NCLT, was running a multispeciality hospital under the name of Febris situated at Narela, New Delhi. It is a 150 bedded hospital and also accessible to people from Haryana and Uttar Pradesh.*

*2. Counsel for the Petitioner submits that independent of the NCLT proceedings, the petitioner is offering the hospital facility to*

*Respondent No.1 and is ready and willing to deposit Rs.15 Lakhs as an initial contribution as also Rs.4 Lakhs p.m. for running the hospital. The remaining funds would be generated from the money paid by the patients. The hospital is a multispecialty hospital and in the present circumstances of Pandemic Covid-19 with extreme scarcity of hospitals and beds, this would go a long way to benefit the people of this city. Petitioner also undertakes that he will not take the control of the hospital or claim any right over it as the proceedings are pending before the NCLT and the Petitioner is only offering the services of his team of doctors and para-medical staff to make the hospital operational during this pandemic situation as a goodwill gesture.*

*3. Having heard learned counsels for both sides and looking into the facts and circumstances of the case, we hereby direct Respondent No.1 to take a decision with respect to the aforesaid offer of the Petitioner, subject to the undertaking given by him with regard to the contribution of funds and the control over the running of the hospital and also looking to the reply affidavit of Respondent No. 3 file in this petition. These aspects of the matter will be kept in the backdrop while taking a decision in the matter by Respondent No.1. Since the offer, if accepted, can be useful in the present circumstances, we hope and expect Respondent No.1 to take a decision as expeditiously as possible as and not later than three weeks from today.*

*4. With these observations, the writ petition and the application are disposed of.”*

The entire record and proceeding of the CoC Meeting, which we have discussed hereinabove, reflects that even the order of the Hon'ble Delhi High Court was also not complied with whereas the order was very much specific.

We can take judicial notice of the fact that during the peak period of Corona when such offers were made to run the hospital, all the citizens were crying for medical help and running for getting bed in hospitals. Number of Covid patients died due to non-availability of beds in the hospital. However, even during such a situation the behaviour of RP was detrimental to the entire society. It is common knowledge that during Covid period number of hospitals besides rendering service to society generated huge funds, however, even in such situation in the present case, to the reasons best known to him, the RP did not allow anyone to run the hospital as going concern.

We are of the opinion that in such a situation considering all those facts it was not appropriate for the NCLT to allow application filed by the RP under Section 33(2) of IBC. The order impugned is otherwise also liable to be set aside on the ground that same is not

in accordance with law which can be inferred on perusal of all the three orders which were passed on 20.05.2021, 25.5.2021 and last order dated 31.5.2021 which is under challenge in the present Appeal. We have already reproduced the impugned order dated 31.05.2021. For just decision in the matter it is appropriate to reproduce remaining two orders i.e. order dated 20.05.2021 and 25.05.2021 as follows:

*“ORDER Pronounced on 20.05.2021”*

*It is an IA filed u/s 33(2) of the Insolvency & Bankruptcy Code, 2016 ("the Code") by the Resolution Professional (RP) seeking liquidation order based on the resolution passed by the CoC in its 6th meeting held on 28.01.2021 with a requisite majority as contemplated under I&B Code, 2016.*

*2. On perusal of this application, it appears that this (IB)-470(ND)/2019 was admitted on 08.11.2019 and this Applicant was appointed as IRP and he invited claims from the creditors and constituted CoC only of one Financial Creditor i.e. LIC Housing Finance Limited as the other Financial Creditor i.e. Dr. Arinjaya Jain was a related party to the Corporate Debtor. Subsequently, IRI was appointed as RP in the First Meeting of CoC held on 09.12.2019, and he appointed two Registered Valuers to value the assets of the Company.*

*3. In furtherance of it, the RP prepared the Information Memorandum and apprised the CoC in its 4th meeting dated 29.04.2020 that the Copy of Information Memorandum may be obtained after submitting the confidential undertaking and Form G for inviting the expression of interest was published on 17.08.2020 after the approval of the CoC in same meeting. The Form-G was again issued on 14.09.2020 after the discussion held in the fifth CoC meeting held on 07.09.2020. This authority also extended the CIR Period for further 90 days and excluded the period from 25.03.2020 to 31.07.2020 due to Covid-19. In furtherance to the publication of Form G, the resolution professional received an expression of interest from 4 prospective resolution applicants. However, the resolution professional received two proposed resolution plan pursuant to the final list of*

prospective resolution applicants. In the 6th CoC dated 28.01.2021, the CoC discussed the resolution plans received and was not inclined to consider any resolution plan considering them to be not feasible and viable and pass resolution for initiation of liquidation process of the Corporate Debtor which is as follows:-

**"RESOLVE THAT** pursuant to Section 33(2) of the Insolvency and Bankruptcy Code, 2016 and the rules made thereunder, the consent of members of the Committee of Creditors be and is hereby accorded to approve the filing of an application with Hon'ble Adjudicating Authority, regarding the initiation of liquidation of Corporate Debtor and to appoint existing Resolution Professional, subject to given consent to act as liquidator, as the liquidator of the Corporate Debtor.

**"RESOLVE FURTHER THAT** in pursuant to Regulation 4(2) of 1BBI (Liquidation Process) Regulations, 2016, the liquidator shall be entitled to a fee of Rs. 1,25,000/- (Rs. One Lakh Twenty-Five Thousand only per month).

**"RESOLVED FURTHER THAT** the Resolution Professional be and is hereby authorized to submit an application before the Hon'ble Adjudicating Authority and to do all such acts, deeds and things as may be required or considered necessary or incidental thereto."

4. Looking at the application and averments thereof, we are of the considered opinion that this is a fit case for liquidation, therefore, we hereby order for liquidation of the company with directions as follows:

a. The Mr. Aishwarya Mohan Gahrana, holding Registration No. IBBI/ IPA-002/ 1P-N00135/2017- 2018/ 10351 having [email-aishwaryam\\_gahrana@yahoo.com](mailto:email-aishwaryam_gahrana@yahoo.com) is appointed as the Liquidator in terms of Section 32 of the Code;

b. Registry is directed to communicate this Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;

c. The Order of Moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect and a fresh Moratorium under Section 33(5) of the Insolvency and Bankruptcy Code shall commence;

d. This order shall be deemed to be a notice of discharge to the officers, employees and the workmen of the corporate

debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016;

*e. The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant rules and regulations.*

*f. The Liquidator shall follow up and continue to investigate the financial affairs of the Corporate Debtor in accordance with provisions of Section 35(1) of the Code.*

*g. The liquidator shall also follow up the pending applications for their disposal during the process of liquidation including initiation of steps for recovery of dues of the Corporate Debtor as per law.*

*h. The Liquidator shall submit a Preliminary Report to the Adjudicating Authority within seventy-five days from the liquidation commencement date as per Regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016;*

*i. Copy of this order be sent to the financial creditors, corporate debtor and the Liquidator for taking necessary steps;*

*j. IA-901/2021 filed in IB-470/(ND)/2019 is disposed of in terms of the aforesaid terms.”*

*(B.S.V Prakash Kumar)  
Acting Chairperson*

*(Hemant Kumar Sarangi)  
Member (Technical)”.*

**“Order dated 25.05.2021:**

*It is an application filed by an ex-director Mr. Rakesh Saxena stating that the order dated 20.05.2021 mistakenly released in the name of Acting President and the Hon’ble Member (Technical)*

*Shri Hemant Kumar Sarangi, but the matter was heard and had been ordered by the Acting President and the Hon'ble Member (Technical) Dr. V.K. Subburaj, therefore, sought for rectification of the mistake crept in the said order.*

*On realising the mistake crept in, since the Hon'ble Member (Technical) Dr. V.K. subburaj with whom this matter was heard has already demitted Office, the order that has come in the name of Acting President and Technical Member Shri Hemant Kumar Sarangi is hereby declared as void and the matter is reopened for hearing by the Regular Principal Bench i.e. the Acting President and the Hon'ble Member (Technical) Shri Hemant Kumar Sarangi.*

*List IA 2323/2021 for hearing on **31.05.2021**.*

*(B.S.V Prakash Kumar)  
Acting Chairperson*

*(Hemant Kumar Sarangi)  
Member (Technical)".*

Admittedly first order i.e. 20.05.2021 was passed by a Division Bench of which one of the Member i.e. Technical Member was not party at the time of hearing and reserving orders. This was the reason that on petition filed by one of the directors for rectification of the order, the same Bench on 25.05.2021 declared the earlier order i.e. order dated 20.05.2021 as void and directed to post on

31.05.2021 for hearing afresh and thereafter impugned order was passed. If we examine both the orders i.e. 20.05.2021 and 31.5.2021 juxtapose we can draw an inference that same order i.e. order dated 20.5.2021 has been reproduced on 31.05.2021. Meaning thereby that without further hearing or rehearing the earlier order was reproduced. On this score itself the impugned order is liable to be set aside.

Considering the facts and circumstances which we have elaborately discussed hereinabove it is evident that the RP had not taken any reasonable step to get the CD as going concern which is mandated as per Section 25(2)(h) or he acted in accordance with Section 24 of the Code and as such there is no reason to allow the impugned order to further continue. According the order dated 31.5.2021 passed in IA No.901/2021 in (IB)-470(ND)/2019 by National Company Law Tribunal, Principal Bench, New Delhi is hereby **set aside and matter is remitted back to the NCLT to re-examine the issue and consider to change the RP.**

The holding of the CoC Meeting in the premises of the Financial Creditor and also joint filing of the reply by RP and financial creditor also reflects that something was going on in between the parties.

Before parting with the order since we have noticed many infirmities and illegalities committed by the RP, it is desirable to direct IBBI to conduct an enquiry regarding conduct of the RP and other circumstances which led to filing of petition under Section 33(2) of the IBC before the NCLT. During enquiry IBBI is also required to examine as to whether in entire episode any cognisable offence had come to fore or not. It goes without saying that the RP was proceeding as a public servant and as such it was expected that he will act independently. If during enquiry by the IBBI any material comes showing prima facie commission of cognisable offence, in that event, it would be appropriate for the IBBI to lodge FIR for its statutory invention to its logic end.

The Registry is directed to communicate the order to IBBI through its Chairman forthwith for its compliance.

**(Justice Rakesh Kumar)**  
**Member (Judicial)**

**(Dr. Ashok Kumar Mishra)**  
**Member (Technical)**

**bm**