

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH, COURT-IV

C.A.485/ND/2019

IN

C.P. No. IB-1059/ND/2018

(Under Section 30 (6) and 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016))

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
....Corporate Debtor

AND

IN THE MATTER OF:

MR. ANAND SONBHADRA
RESOLUTION PROFESSIONAL OF
M/s. SHUBHKAMNA BUILDTECH PRIVATE LIMITED

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The present application has been filed under Section 30(6) read with Section 31(1) of the Insolvency & Bankruptcy Code, 2016 ('the Code') read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('Regulations') on behalf of Mr. Anand Sonbhadra Resolution Professional (RP) of M/s. Shubhkamna Buildtech Private

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Limited ('Corporate Debtor'), seeking approval of the Resolution Plan submitted jointly by Mr. Surender Kumar Singhal and Mr. Sunil Kumar Agarwal ('Successful Resolution Applicant') and approved by the Committee of Creditors ('CoC') in its 6th CoC Meeting held on 09.10.2019.

2. Briefly stated, the facts as averred by the applicant in the application are stated are as follows:

- a) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated by Hon'ble NCLT vide its order dated 26.11.2018 in C.P.(IB)No. 1059/2018, petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- b) The applicant submits that the Corporate debtor i.e., M/s. Shubhkamna Buildtech Private Limited is engaged in the business of real estate construction and development and was in the process of developing the projects on a plot of land admeasuring 22565.77 sq/mts bearing plot no. GH-05/B is situated at Sector 137, Noida and Sector-01 Greater Noida.
- c) The applicant submits that the corporate debtor entered into purchase agreements for the purchase of flats/ commercial areas in the two projects of the corporate debtor i.e., Shubhkamna Advert Techomes Projects situated at Sector 137, Expressway, Noida and Shubhkamna City, Plot No. GH-02A, Sector-01, Greater Noida West (Noida Extension).
- d) The applicant submits that pursuant to the public announcement in Form A on 30.11.2018 and 07.01.2019 (vide order dated 02.01.2019), the interim Resolution Professional constituted the Committee of Creditors based on the claims received from the creditors of the Corporate Debtor. The tabular representation depicting the voting percentage along-with the claim admitted of the creditors in each class/ entity of the corporate debtor is as follow:-

Name of the Class/ Entity	Voting Share	Claim Admitted (INR)
Homebuyers/ Allottees	87.6%	536,70,62,437

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Merina Commotrade Pvt. Ltd.	1.67%	102,125,000
Canara Bank	0.11%	6,815,374
DHFL	3.51%	215,039,400
Rishi Kapoor	1.82%	111,221,500
UCO Bank	5.16%	316,377,832
Corporation Bank	0.13%	7,920,250
Total	100%	612,65,61,793/-

- e) The applicant submits that the first meeting of the COC was conducted on 07.02.2019, wherein the erstwhile IRP Mr. Gurkamal Hora Arora was replaced and Mr. Anand Sonbhadra was appointed as the Resolution Professional. The applicant further submits that Mr. Brij N. Kalra was appointed as Authorised Representative for class of Creditors being allottees under a Real Estate project as per Regulation 16A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The applicant adds that the Hon'ble NCLT confirmed the appointment of applicant as RP vide its order dated 12.02.2019 and the appointment of authorised representative vide its order dated 25.01.2019.
- f) The applicant submits that the CoC in second and third COC meeting held on 03.03.2019 and 18.05.2019 had discussed the information memorandum, evaluation matrix, appointment of registered valuers for conducting the valuation of the all three classes of assets, appointment of transaction auditor and other related matters.
- g) The applicant submits that the Expression of Interest in Form -G was issued on three occasions i.e., 23.03.2019, 09.06.2019 and 31.07.2019 respectively in 'Financial Express' in the English and 'Jansatta' in Vernacular language. The applicant further submits that three prospective resolution applicants came forward for submission of the resolution plan. The list of final prospective resolution applicants are as follow:-

S.No.	Prospective Resolution Applicant	Type of Industry	Date of Submission
1.	Consortium of Executives of Association of Home Buyer	Homebuyers	04/08/2019
2.	Sunder Kumar Singhal & Sunil Kumar Agarwal	Real Estate Sector	02/08/2019

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3.	Mahaluxmi Buildtech Limited	Real Estate Developer	04/08/2019
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- h) The applicant submits that the applicant had received the resolution plans from the two Prospective Resolution Applicants i.e., 1) Consortium -Executives of Association of Home Buyers (2) Surender Kumar Singhal & Sunil Kumar Agarwal on 10.08.2019 being the last date for submission of Resolution Plan.
- i) The applicant submits that applicant had upon deliberation and checking the compliance of the resolution plan received from the two prospective resolution applicants in compliance of the RFRP and the provisions of the Code, 2016, circulated the plan amongst the authorised representative, the homebuyers and other CoC members.
- j) The applicant submits that in the 6th CoC meeting held on 09.10.2019, the applicant presented a checklist of compliance of Resolution Plan with the Code as well as compliance of RFRP. The applicant further submits that after negotiations and deliberations by the CoC and considering the revised evaluation matrix, the resolution plan submitted by Mr. Surender Kumar Singhal and Mr. Sunil Agarwal was found compliant to the Code, 2016 and relevant regulations and they were declare as the Highest Bidder (H1). The applicant adds that the CoC had decided to amend the clause relating to the performance security from Rs.5 Crore to Rs.30 Crores.
- k) The applicant submits that the resolution plan submitted by the Successful Resolution Applicant was approved by CoC with an affirmative voting percentage of 87.60%. The applicant further submits that the details of the dissenting financial creditors along with the liquidation value is as below:-

Liquidation Value for Dissenting Financial Creditors				
Particulars of Dissenting Creditor	Voting Status	Admitted Claim	Provided in Plan	Liquidation Value
Secured Financial Creditors				
Dewan housing Finance Limited	Abstained	21.5	1.5	0
Canara Bank	Abstained	0.68	0.2	0.1820000
Merino Commotrade Private Limited	Dissent	10.21	1	0.7955513

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Unsecured Financial Creditors				
UCO Bank	Dissent	31.64		Delivery of Units against borrower's allotment &BBA
Corp. Bank	Abstained	0.79		Delivery of Units against borrower's allotment &BBA
Rishi Kapoor	Dissent	11.12	0.9	1.5231208

- l) The applicant further submits that the Successful Resolution Applicant ('SRA') has submitted an undertaking under Regulation 39(1)(c) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP regulations) that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.
- m) The applicant further submits that the successful resolution applicant has provided the performance security of Rs. 30 crores in the following form:-
- i. Corporate Guarantee from associate Company - Rs.16.45 crores.
 - ii. Collateral of Immovable Property (from another associate company)- Rs.13.55 crore.

3. While the applicant sought approval of the Resolution Plan so approved by the CoC in its 6th COC meeting held on 09.10.2019 with 85.67% votes, the following objections were filed against the approval of the Resolution Plan:-

3.1. A group of five dissenting Homebuyers i.e.,(1)Commander Rohtash Kumar Sharma, (2) Mr. Anil Kumar Kulshrestha, (3) Ms. Shalini, (4) Mr. Ranjan Singh and (5) Mr. Prashant Gaur (**'Objector No.1'**) had jointly filed their objections dated 04.03.2020 which are briefly stated as below:-

- a) The objector no.1 submits that the resolution plan suffers from the basic flaw that the two projects i.e., Shubhkamna City and Shubhkamana Techomes were merged for the purposes of the resolution plan and the same is against the principle of "Reverse

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3.3. New Okhla Industrial Development Authority (**'objector no.3'**) and Greater NDA Industrial Development Authority (GNIDA) (**'objector no.4'**) had during the course of hearing of C.A./485/2019 i.e., application for the approval of resolution plan had raised the following objections:-

a) The objector no.3 and objector no.4 submits that as per the terms of the resolution plan specifically clause 8.9 of the resolution plan, the objector no.3 and objector no.4 are restrained for future instalments, penalties for deviations, lease rents etc. for future. The relevant extract of the clause relied by the objector no.3 and objector no.4 is reproduced as below:-

"This plan proposes to pay NIL amount to Departments as the liquidation value accruing to them would be NIL. Also, if any further claim of any government authority such as NDA, GNIDA, Electricity department etc is received then that shall also be paid in NIL."

b) The objector no.3 and objector no.4 further submits that the lease premium and lease amount due during the CIRP period of the corporate debtor should form part of the CIRP cost in line with Regulation 31 of the CIRP Regulations, 2016.

c) The objector no.3 further submits that NOIDA Authority vide notice dated 05.07.2022 had claimed the outstanding lease rental and premium of Rs.13,84,40,999/-, which was due and unpaid after the cut-off date 31.01.2019 i.e., date up to which the claim of the NOIDA Authority has been admitted. The objector no.3 adds that the demanded claim of Rs.13,84,40,999/- is exclusive of the interest and penalty.

4. We have heard the submissions made by the Ld. Counsel for the applicant and objectors and have meticulously gone through the documents produced on record. Before, examining the Resolution Plan vis-à-vis with the mandatory compliance under the Code and the Regulations made thereunder, the objections raised to the approval of resolution plan needs to be determined.

5. With regard to the Objector No.1's objections, we are of the considered view that after the approval of the resolution plan by the committee of

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creditors, wherein the homebuyers as a class assented to the plan, any individual homebuyer, group of homebuyers or association of homebuyers cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance. The dissented homebuyers cannot be allowed to give their view point or grievances by way of objections to the resolution plan. Such objections are liable to be dismissed on this ground alone.

6. The Hon'ble Supreme Court in citation **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Limited & Ors [Civil Appeal No. 3995 of 2020] judgement dated 24.03.2021** had dealt with the similar issue i.e., as to whether, after approval of the resolution plan by the CoC, where homebuyers as a class assented to the plan, any individual homebuyer or any association of homebuyers could maintain a challenge to the resolution plan and could be treated as dissenting financial creditor or an aggrieved person?

*"164.4. Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. **There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code. In the larger benefit and for common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorised representative on the entire class of the financial creditor/s he represents.***

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164.5. **To put it in more clear terms qua the homebuyers, the operation of sub-section (3A) of Section 25A of the Code is that their authorised representative is required to vote on the resolution plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.”**

7. With regard to the Objector No.2's objections, we find that the resolution professional on receipt of the confidentiality undertaking from the objector no.2 had shared the fair value and liquidation value with the objector no.2. We further find that the valuation of all the three classes of assets of the corporate debtor were conducted by the IBBI panel registered valuer in compliance with the provisions of the Code, 2016 and the Regulation 35A of the CIRP Regulations made thereunder. We are further of the view that as per Section 30(2)(b) of the Code, 2016, the liquidation value required to be paid to the financial creditor is only qua the secured interest of the financial creditor and not qua the total liquidation value of the corporate debtor.

8. We further place our reliance on Hon'ble Supreme Court judgement in **India Resurgence ARC Private Limited v. M/s. Amit Metaliks Limited & Anr. [Civil Appeal No.1700 of 2021] judgement dated 13.05.2021**, wherein the Hon'ble Supreme Court in para 14.1, 14.2 and 15 of the judgement held as follow:-

“14.1. In Jaypee Kensington(supra), this Court repeatedly made it clear that a dissenting financial creditor would be receiving the payment of the amount as per his entitlement; and that entitlement could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him. It has never been laid down that if a dissenting financial creditor is having a security available with him, he would be entitled to enforce the entire of security interest or to receive the entire value of the security available

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with him. It is but obvious that his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him.

14.2. The extent of value receivable by the appellant is distinctly given out in the resolution plan i.e., a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly inapt and is rather ill-conceived.

15. The limitation on the extent of the amount receivable by a dissenting financial creditor is innate in Section 30(2)(b) of the Code and has been further exposted in the decisions aforesaid. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.”

9. With regard to the Objector No.3 and Objector no.4's objections, we find that the objector no.3 i.e., New Okhla Industrial Development Authority had filed its claim on 22.02.2019 wherein claim amount of Rs.415,322,996 was admitted by the Resolution Professional, whereas, objector No.4 i.e., Greater NDA Industrial Development Authority (GNIDA) had not filed its claim, However, in the information memorandum, unclaimed dues of GNIDA amounts to Rs.6064,54,762/-. Further, in view of the Hon'ble Supreme Court's judgement in **New Okhla Industrial Development Authority v. Anand Sonbhadra [Civil Appeal No. 2222 of 2021] judgement dated May 17,2022** it is a settled position that the NOIDA and GNIDA shall be the operational creditor.
10. On a perusal of the resolution plan, we observe that clause 8.9 of Chapter VIII (repayment plan) at pg.38 of the resolution plan provides for payment to NOIDA Authority and GNOIDA Authority. The relevant extract of the clause 8.9 is reproduced herein below:-

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8.9. Payment to NDA Authority & GNDA Authority:-

The RA proposes to pay Rs. 25 crores, and the payment shall be made in 6 (six) equal half yearly installments, first installment being 6 months from the Implementation Date. The dues of the GNDA for which no formal claim has been filed shall be settled at Rs.18.50 crores in 6 (six) equal half yearly installments, first installment being 6 months from the Implementation Date.

11. As regard to the objector no.3 and objector no.4's objection regarding the accrued and outstanding lease rentals and lease premium during the CIRP period of the corporate debtor i.e. from the CIRP commencement date (26.11.2018) till approval of the resolution plan by this Adjudicating Authority in accordance with Section 30 of the Code, 2016, we observe that the same will be covered under the definition of Insolvency Resolution Process cost as defined under Section 5(13) of the Code read with Regulation 31 of the CIRP Regulations, 2016. Further, it is an undisputed fact that the corporate debtor was in possession of the premises, consequently, exposed to the liabilities to pay lease rentals and lease premium due during the CIRP period as a part of the CIRP costs. The mere fact that CIRP has triggered and Moratorium has been imposed does not absolve the Corporate Debtor to pay for premises and facilities which is being enjoyed by the Corporate Debtor during the CIRP period. Resultantly, the same will be become part of the CIRP Costs which can be recovered when the Resolution Plan is approved. The objector no.3 and objector no.4 are directed to submit the details of the lease rentals and premium accrued and remaining outstanding during the CIRP Period to the Resolution Professional and the Successful Resolution Applicant within a period of 15 days from the pronouncement of this order, failing which the same shall not become the part of the CIRP Cost.

12. We further find that as per sub-clause 3 of Clause 8.12 of Chapter VIII- Repayment Plan provides for the dues of creditors during CIRP. The clause 8.12 (3) of Chapter VIII at pg. no.42 of the resolution plan is reproduced herein in verbatim:-

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3. Dues of Creditors during CIRP

"The dues incurred by the Resolution Professional (on behalf of SHUBHKAMNA) during the CIRP, towards the operational creditors shall be paid in terms of agreements with such operational creditors.

The Resolution Plan has been made on the assumption that all dues incurred by the Resolution Professional (on behalf of SHUBHKAMNA) during the CIRP and prior to the Effective Date, have been or will be paid as CIRP Costs. Therefore, except for CIRP Costs, any liabilities and/ or claims that arise between the Insolvency Commencement Date and the Effective Date shall stand waived, extinguished, abated, discharged in perpetuity as on the Effective Date, pursuant to the NCLT Approval Order.

Further, except as provided herein, no interest shall be paid for the CIRP Period, on any claim against SHUBHKAMNA (as on the Insolvency Commencement Date) be it of the financial creditor, operational creditor or any other claim arising on account of any financial liability, operational liability or any other contingent liability or dues, demands in connection with or against SHUBHKAMNA."

4. Upon comparison of the above settled position of law with the facts and circumstances of the present case before us, we are of the considered view that the objections as raised by objector no.1, objector no.2, objector no.3 and objector no.4 do not merit consideration except the objector no.3 and objector no.4's contention regarding the lease rentals and premium accruing and remaining outstanding during the CIRP Period, for the above said reasons and conclusions. Henceforth, this Adjudicating Authority is proceeding with considering the resolution plan as approved by the CoC in its 6th COC Meeting and filed before this Adjudicating Authority in C.A./485/ND/2019.
5. The salient features of the resolution plan submitted by Mr. Surender Kumar Singhal and Mr. Sunil Kumar Agarwal and as approved by the COC in its Sixth CoC meeting with an affirmative voting of 85.67% are reproduced herein below:

I. Background of the Resolution Applicant

The two individuals, joint applicants (hereinafter referred to as "**Resolution Applicant**"), one of whom is professionally qualified and practicing chartered accountant and the other has huge experience in conception and execution of residential, commercial and industrial

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Secured Financial Creditors ((Non Home Buyers)	Rs.2.7 Crores	Within 36 months, of Implementation Date	Through Escrow Account
Financial Creditors (Unsecured)	Rs.0.90* Crores	Within 36 months, of Implementation Date	Within 36 months, of Implementation

*The Resolution Applicants have given an undertaking to pay the liquidation value being Rs.1.52 Crores instead of as proposed in the above table to the dissenting financial Creditors.

Operational Creditors other than Workmen/Employees, Noida Authority and Greater Noida Authority

The total claims of the Operations Creditors amounts to INR 3.61 Crores which is detailed out in the below table :

Sr. No.	Name of Operational Creditor	Amount Claimed	Amount Admitted
1.	Concord Infrastructure Pvt. Ltd.	308,39,231	308,39,231
2.	Abhishek Shuttering Scaf Holding	53,15,087	53,15,087

As the liquidation value proposes to be paid to the Operational Creditor is NIL, therefore, Resolution Applicant proposes to pay **NIL** amount towards settlement of dues of all the Operational Creditors, being not less than the Liquidation Value.

Workmen/Employees

It has been noted in the approved Resolution Plan that on the date of submission of Resolution Plan, admitted dues of Workman/Employee is INR Rs.93,35,258/- That the Resolution Applicant promises to pay the entire amount of Rs.93,35,258/-in full subject to

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verification of their currency in employment; which shall be considered to be 24 months immediately preceding the CIRP commencement date for Workmen and 12 months immediately preceding the Insolvency commencement date in respect of Employees.

III. Plan for revival

The Resolution Applicant proposes to complete the pending works of both the projects and hand over the possession within a Time span of about 1.5 years for the Towers that are partially constructed and within 3 years for Towers whose construction has not yet started. Furthermore, the Resolution Applicant promises to re-brand SHUBHKAMNA BUILDTECH and undertakes to give a touch of freshness and positivity to the Projects.

IV. Period of implementation

The Resolution Applicant and its Associates have the requisite financial capacity and technical know-how to complete the balance work in a timely manner as per the Plan. Accordingly, the Resolution Applicant has taken into account and sought relief of various approvals in the Plan below to ensure effective and timely implementation of the same. The Resolution Applicant plans to take registration under RERA for both the projects. The details about step wise major pre-requisite after the effective date for applying and obtaining RERA registration and their estimated timelines are as below:

Sr. No.	Activity/Approval	Estimated Timelines
1.	Renewal of Environment Clearance	4 months from the date of approval
2.	RERA Registration	2 months from the date of renewal of environment clearance

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V. Sources of funding

A business implementation plan comprising delivery projections of the Project has been estimated by the Resolution Applicant as per the best of his judgment and past experience. The inflows proposed in funding the plan as stated herein below:

Particulars	Rs. (Crores)
Financial Outlay	
Upfront Consideration (Cash) toward IRP Cost+ Settlement of Claims of Workmen/Employee Dues + claims of OCs	3.40
Payment to FCs (secured & unsecured)	3.60
Construction of Techomes	140
Construction of City	193
NDA Authority	25
GNIDA Authority	18.5
Other Administrative & Misc exp	11.50
Total	395
Source of Funds(as per estimate of RA)	
From Resolution Applicant/Associates	20
Receipt from Financial Creditors	370
Monetization of unsold Inventory	5

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6. In view of Section 31 of the Code, the Adjudicating Authority, before approving the Resolution Plan, is required to examine that a Resolution Plan which is approved by the CoC under Section 30 (4) of the Code meets the requirements as referred under Section 30 (2) of the Code.

Section 30 (2) is quoted below: -

“(2) The resolution professional shall examine each Resolution Plan received by him to confirm that each Resolution Plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the Resolution Plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,


whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the Resolution Plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a Resolution Plan has not been approved or rejected by the Adjudicating Authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

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(iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a Resolution Plan;]

(c) provides for the management of the affairs of the Corporate debtor after approval of the Resolution Plan;

(d) The implementation and supervision of the Resolution Plan;

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

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

Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the Resolution Plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.]”

7. In respect of compliance of Section 30(2)(a) of the Code, it is seen that there is a provision in clause 5.1. (Payment of CIRP Cost) of Chapter-V of the Resolution Plan wherein it provides for the payment of the CIRP cost in priority to other creditors of the corporate debtor. The estimated CIRP cost as per the information provided will be Rs.220 Lakhs, which may increase during the course of CIRP Period, however, the actual CIRP cost will be paid in full in priority to any other creditor.
8. In respect of compliance of Section 30(2)(b) of the Code, it is seen that there is a provision in clause 5.2 (repayment of value to operational creditor) of Chapter-V of the resolution plan.
9. In respect of compliance of Section 30(2)(c) and 30(2)(d) of the Code, it is seen that the manner of the management of the affairs and control of the business of the Corporate Debtor has been provided in detail in Chapter - X (Management of Shubhkamna after Plan acceptance) and Chapter-XI (Implementation and supervision) of the Resolution Plan. The clause 3 (Monitoring and Supervision)of Chapter -XI of the plan, provides for the monitoring committee which states that upon the NCLT approval stage

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an implementation and monitoring committee comprising of Mr. Anand Sonbhadra, the present resolution professional shall be appointed as the supervisor and chairperson of the monitoring agency or as the monitoring professional to monitor and supervise the implementation of the plan. The period of implementation of the plan to be monitored by the Monitoring Professional is a period of 36 months.

10. In respect of compliance of Section 30(2)(e) and 30(2)(f) of the Code, it is seen that the declaration the plan is not in contravention of provisions of the applicable law has been provided in clause 5.8 chapter -V of the resolution plan and the confirmation to the effect that the resolution plan is in compliance with such other requirements as may be specified by the board has been provided in clause 5.10 chapter -V of the plan.
11. In respect of compliance regarding Regulation 38 of the CIRP Regulations, it is seen that the clause 8.12 (7) of chapter- VIII of the resolution plan provides how it will deal with the interest of all the stakeholders including Financial Creditors and the Operational Creditors and effective term and supervision of the resolution plan. Further, Chapter X, XI and XII provides for the implementation, supervision and management of the business of the corporate debtor.
12. In respect of compliance regarding Regulation 39(4) of the CIRP Regulations, the applicant has filed compliance certificate in Form-H certifying that the Resolution Plan submitted by the successful resolution applicant meets the requirements as laid down in various sections of the Code and the CIRP Regulations and there are sufficient provisions in the Plan for its effective implementation as required under the Code. Further, an affidavit has been obtained from the Successful Resolution Applicant stating that he is not ineligible under the provisions of Section 29A of the Code, 2016.



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13. On perusal of Form-H, we observe that one application bearing C.A./01/ND/2020 under Section 66 of the Code, 2016 was filed on 24.11.2019 before this Adjudicating Authority. We further observe that the fair market value of the corporate debtor as provided in Form- H is Rs.145.66 crores and the liquidation value of the corporate debtor is Rs.82.66 crores.

14. As to the relief and concessions sought in the resolution plan more specifically set out in Chapter- XIII (Other Terms of the Plan), taking into consideration the decision of the Hon'ble Supreme Court in the matter of **Embassy Property Development Private Limited v. State of Karnataka & Ors. in Civil Appeal No. 9170 of 2019**, we direct the Successful Resolution Applicant to file necessary application before the necessary forum/ authority in order to avail the necessary relief and concessions, in accordance with respective laws. The relevant part of the judgement is reproduced herein below:-

39. Another important aspect is that under Section 25 (2) (b) of IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Section 25(1) and 25(2)(b) reads as follows:

"25. Duties of resolution professional –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions:-

(a).....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi judicial and arbitration proceedings."

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

40. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the



corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."

15. In so far as the approval of the resolution plan is concerned, this authority is not sitting on an appeal against the decision of the Committee of Creditors and this Adjudicating Authority is duty bound to follow the judgement of the **Hon'ble Supreme Court in the matter of K.Sashidhar v. Indian Overseas Bank (2019) 12 CC 150**, wherein the scope and interference of the Adjudicating Authority in the process of the approval of the Resolution Plan is elaborated as follow:-

35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides : (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the

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Order delivered on: 12.09.2022

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projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

16. Also the Hon'ble Supreme Court of India in the matter of **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors., Civil Appeal No. 8766-67 of 2019, vid its judgement dated 15.11.2019** has observed as follows:

"38. This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants."

17. Thus, from the judgements cited supra, it is amply clear that only limited judicial review is available to the Adjudicating Authority under Section 30(2) read with Section 31 of the Code, 2016 and this Adjudicating Authority cannot venture into the commercial aspects of the decisions taken by the committee of the creditors.
18. We find that the corporate insolvency resolution process was initiated against M/s. Shubhkamna Buildtech Private Limited (corporate debtor) on 26.11.2018 and the resolution plan was approved by the CoC on 17.10.2019 (date of voting result), the application for approval of resolution plan by this Adjudicating authority was filed on 23.10.2019. The period of 180 days of CIRP ended on 25.05.2019 and further extension of 90 days period i.e., up to 22.10.2019 was granted by this Adjudication Authority vide order dated 31.05.2019. As per Section 12 of the Code, 2016, the Corporate Insolvency Resolution Process (CIRP) should be completed within 180 days or within the extended period of

90 days and mandatorily be completed within 330 days including any extension and the time taken in legal proceedings. Considering, the given factual position and in the interest of justice, this Adjudicating Authority suo-moto, hereby excludes the time period from the date of filing the application for approval of resolution plan till the date of approval of the resolution plan by this Adjudicating Authority.

19. Therefore, in our considered view, there is no impediment in giving approval to the Resolution Plan. Accordingly, we hereby **approve the Resolution Plan**, which shall be binding on the corporate debtor and its employees, shareholders of corporate debtor, creditors including the Central Government, any State Government or any local authority to whom statutory dues are owed, guarantors, successful resolution applicant and other stakeholders involved. In view of the above, **C.A. 485/ND/2019 stands allowed.**
20. It is declared that the moratorium order passed by this Adjudicating Authority under Section 14 of the Code shall cease to have effect from the date of pronouncement of this order.
21. However, the resolution plan shall not construe any waiver to any statutory obligations/liabilities arising out of the approved resolution plan and the same shall be dealt in accordance with the appropriate authorities concerned as per relevant laws. We are of the considered view that if any waiver is sought in the resolution plan, the same shall be subject to approval by the concerned authorities. The same view has been held by the Hon'ble Supreme Court in **Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited and Embassy Property Development case (supra).**
22. Accordingly, MoA and AoA of the corporate debtor shall be amended and filed with the RoC for information and record as prescribed. While approving the 'resolution plan' as mentioned above, it is clarified that

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the resolution applicant shall pursuant to the resolution plan approved under section 31(1) of the Code, 2016, obtain all the necessary approvals as may be required under any law for the time being in force within the period as provided for in such law.

23. The Resolution Professional shall forward all records relating to the Corporate Insolvency Resolution Process of the corporate debtor and the Resolution Plan to IBBI to be recorded at its database in terms of Section 31(3)(b) of the Code. The Resolution Professional is further directed to handover all the records, premises, properties of the corporate debtor to the Successful Resolution Applicant to ensure a smooth implementation of the resolution plan.
24. The approved 'Resolution Plan' shall become effective from the date of pronouncement of this order. The Approved Resolution Plan shall be part of this order.
25. Let the copy of the order be served to the parties

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(DR.BINOD KUMAR SINHA)

MEMBER (T)

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(DHARMINDER SINGH)

MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-IV

I.A.1517/ND/2022
IN
C.P.No. IB-1059/ND/2018

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

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
.....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
.....Corporate Debtor

AND

IN THE MATTER OF:

MR. SUNIL KUMAR AGARWAL & ANR.Applicants
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
THROUGH RESOLUTION PROFESSIONAL

MR. ANAND SONBHADRARespondent

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 on behalf of Mr. Sunil Kumar Agarwal and Mr. Surender Kumar Singhal ('applicant'/'successful resolution applicant') seeking directions from this Adjudicating Authority to remit the Resolution Plan dated 12.10.2019 submitted by the Applicant to the Committee of Creditors (hereinafter referred to as "CoC") of the M/s.

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Shubhkamna Buildtech Pvt. Ltd (hereinafter referred to as “Corporate Debtor”) for re-consideration of the resolution plan, in order to enable the Applicant to modify the said plan to the extent of inserting an escalation clause in the interest of substantial justice and equity.

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicants are as follows:-

- a) The applicant submits that the Corporate debtor i.e., M/s. Shubhkamna Buildtech Private Limited is engaged in the business of real estate construction and development and was in the process of developing the projects on a plot of land admeasuring 22565.77 sq/mts bearing plot no. GH-05/B is situated at Sector 137, Noida.
- b) The applicant submits that the corporate debtor entered into purchase agreements for the purchase of flats/ commercial areas in the two projects of the corporate debtor i.e., Shubhkamna Advert Techomes Projects situated at Sector 137, Expressway, Noida and Shubhkamna City, Plot No. GH-02A, Sector-01, Greater Noida West (Noida Extension).
- c) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited (“Corporate Debtor”) had been initiated by Hon’ble NCLT vide its order dated 26.11.2018 in C.P.(IB)No. 1059/2018, a petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited (“Operational Creditor”).
- d) The applicant submits that the applicants are the successful resolution applicants for resolving M/s Shubhkamna Buildtech Private Limited and have duly submitted the Resolution Plan dated 12.10.2019 which was subsequently approved by the Committee of Creditors of the Corporate Debtor in its 6th COC Meeting on 17.10.2019 with affirmative vote of 87.57% of the COC.
- e) The applicant submits that there has been an inordinate delay in approving the Resolution Plan submitted by the applicants, and as such, in CIRP of the Corporate Debtor where time is of essence, the value of the assets of the Corporate Debtor are depreciating on a daily basis and the prevalent market rates of raw materials and cost of construction for completing the pending projects of the Corporate Debtor are inflating exorbitantly in the wake of the Covid-19 pandemic.
- f) The applicant further submits that it is settled tenet of law as well as equity that the *act of court shall prejudice no man*, based on the legal maxim which subserves the cause of justice, namely, *actus curiae*

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neminem gravabit. To support its contention, the applicant had placed reliance on citation **Atma Ram Mittal v. Ishwar Singh Punia [(1988) 4 SCC 284]**.

- g) The applicant submits that pursuant to the outbreak of the Covid-19 pandemic coupled with the current economic scenario had severely affected the cost of construction with special emphasis on the inflation in the costs of carriage/freight, labour and raw materials. The applicant further submits that during the period of October-December, 2021 alone, construction costs were up 8-9% on an average for existing projects and in absolute terms, cost of materials went by 45-60% and labour charges went up 10-15% for the said period.
- h) The applicant submits that the powers of the CoC under the Code are unparalleled and even includes the power to reconsider a resolution plan. To support this contention, the applicants placed reliance on citations **Bank of Maharashtra Stressed Asset Management Branch Janmangal Vs. Videocon Industries Ltd. and Others (2022 SCC OnLine NCLAT 6)**; **Bank of Maharashtra Stressed Asset Management Branch Janmangal Vs. Videocon Industries Ltd. and Others (2022 SCC OnLine NCLAT 6)**.

3. The resolution professional of M/s. Shubhkamna Buildtech Private Limited had filed his reply to the averments of the applicants. The submissions of the resolution professional, respondent herein are stated in brief as below:-

- a) The resolution professional submits that delay in approval of resolution plan has been caused on account of factors not attributable to either the CoC or the resolution professional.
- b) The resolution professional further submits that the applicants are seeking indulgence of this Hon'ble Tribunal in a matter of prudence relating to an economic statute, wherein the power of such prudence has been allowed to the COC only, by the legislature. The resolution professional adds since the COC is not impleaded as party, the present application has no maintainability.
- c) The resolution professional submits that it would not be open for the applicants to seek a binding direction from this Hon'ble Tribunal to seek a binding direction in favour of the CoC to reconsider and renegotiate the resolution plan. To support the contention, the resolution professional had placed reliance on the citation **Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr. [(2022) 2 SCC 401]**

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4. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have been examined in detail. The issue is whether a resolution plan which is already approved by the Committee of Creditors and which is pending before the Adjudicating Authority for its approval can be remitted back to the COC for adding an escalation clause to the Resolution Plan presented by the applicant/ successful resolution applicant?
5. It is a settled law that the COC of the corporate debtor has the sole right to decide on the terms of the resolution plan and the exercise of commercial wisdom of the COC is non- justiciable. The successful resolution applicant is deemed to be aware of the provisions of the Insolvency and Bankruptcy Code, 2016 and its mechanisms.
6. Adverting to the facts of the present case, the public announcement were made on two occasions i.e., 29.11.2018 and 05.01.2019 respectively according to which last date for submission of the claim were 11.12.2018 and 12.01.2019 respectively. The resolution professional published Form G i.e., invitation for expression of interest on three occasions 23.03.2019, 09.06.2019 and 31.07.2019 respectively. The Committee of Creditors had approved the resolution plan submitted by Mr. Sunder Kumar Singhal and Mr. Sunil Kumar Aggarwal in corporate debtor's 6th COC meeting held on 06.10.2019 by affirmative vote of 87.57%. The resolution professional filed application bearing (C.A.No./485/2019) for the approval of resolution plan before this Adjudicating Authority on 23.10.2019 and the C.A. No./485/2019 was listed on 31.10.2019 for the first time.
7. Be that as it may, we observe that Successful Resolution Applicant are the two individuals, one of whom is professionally qualified practicing Chartered Accountant and the other has huge experience in conception and execution of projects of residential, commercial and industrial sector.

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Further, Mr. Surender Kumar Singhal is the chairman of Krish Group and Mr. Sunil Kumar Agarwal is the Managing Director of Krish Group. The above credentials of the Successful Resolution Applicant shows that the both the applicants have rich experience in the real estate industry and therefore, the applicants are very well aware of the risk of increasing the cost of construction materials and other risks associated in the real estate industry. Therefore, the Successful Resolution Applicant are deemed to be very well aware of all the inevitable risk of whatsoever nature including but not limited to risk of increasing cost of construction material, delay in approval of resolution plan etc. as are associated with submitting the resolution plan before the CoC for its approval.

8. At this juncture, it is relevant to refer to the Hon'ble Supreme Court's judgement in **Ebix Singapore Private Limited versus Committee of Creditors of Educomp Solutions Limited & Anr. [Civil Appeal No. 3224 of 2020]** held in paragraph 153 and 154 of the said judgement as follow:-

"153.Regulation 38(3) mandates that a Resolution Plan be feasible, viable and implementable with specific timelines. A Resolution Plan whose implementation can be withdrawn at the behest of the successful Resolution Applicant, is inherently unviable, since open-ended clauses on modifications/withdrawal would mean that the Plan could fail at an undefined stage, be uncertain, including after approval by the Adjudicating Authority. It is inconsistent to postulate, on the one hand, that no withdrawal or modification is permitted after the approval by the Adjudicating Authority under Section 31, irrespective of the terms of the Resolution Plan; and on the other hand, to argue that the terms of the Resolution Plan relating to withdrawal or modification must be respected, in spite of the CoC's approval, but prior to the approval by the Adjudicating Authority. The former position follows from the intent, object and purpose of the IBC and from Section 31, and the latter is disavowed by the IBC's structure and objective. The IBC does not envisage a dichotomy in the binding character of the Resolution Plan in relation to a Resolution Applicant between the stage of approval by the CoC and the approval of the Adjudicating Authority. The binding nature of a Resolution Plan on a Resolution Applicant, who is the proponent of the Plan which has been accepted by the CoC cannot remain indeterminate at the discretion of the Resolution Applicant. The negotiations between the Resolution Applicant and the CoC are brought to an end after the CoC's approval. The only PART J 150

conditionality that remains is the approval of the Adjudicating Authority, which has a limited jurisdiction to confirm or deny the legal validity of the Resolution Plan in terms of Section 30 (2) of the IBC. If the requirements of Section 30(2) are satisfied, the Adjudicating Authority shall confirm the Plan approved by the CoC under Section 31(1) of the IBC.

154. If the appellants' claim were to succeed, a clause enabling a Resolution Applicant to withdraw/seek modification for reasons such as a 'Material Adverse Event' could also be set up by a Resolution Applicant when it is being prosecuted under Section 74 (3). It was contended before us that Form H, which is a compliance certificate that is to be submitted by the RP to the Adjudicating Authority along with the Resolution Plan, mentions that the RP can enter details as to whether the Resolution Plan is subject to any conditionalities under Clause 12. Thus, the argument goes that this permits the Resolution Applicant to stipulate in the Resolution Plan certain contingencies under which it can withdraw the Plan, for instance if there is an occurrence of an 'Material Adverse Event'. A form is subservient to the statute. The conditionalities contemplated in Form H could be those which do not strike at the root of the IBC. They can include commercial conditions and business arrangements with the CoC. However, conditions for withdrawal or re-negotiation of the Resolution Plan cannot pass the test of 'viability' and 'implementability' as they would make the resolution process indeterminate and unpredictable. A two judge Bench of this Court in *K Sashidhar (supra)*, while discussing the jurisdiction of the Adjudicating Authority under Section 31 to evaluate a Resolution Plan, has observed that the Resolution Plan should "be an overall credible plan, capable of achieving timelines specified in the PART J 151 Code generally, assuring successful revival of the corporate debtor and disavowing endless speculation" 114. Section 30(2)(d) of the IBC and Regulation 38 of the CIRP Regulations also provide that the Resolution Plan should be implementable. In the absence of specific statutory language allowing for withdrawals or even modifications by the successful Resolution Applicant, it would be difficult to imply the existence of such an option based on the terms of the Resolution Plan, irrespective of, and especially when they do not form a part of Clause 12 in Form H, as is the case in all the three Resolution Plans that are in dispute in this present appeal.

9. Further, the Hon'ble Supreme Court, in the ***Ebix Singapore (Supra)*** held that the Adjudicating Authority have no jurisdiction to allow modification or withdrawal of the CoC approved Resolution Plan by a Successful Resolution Applicant or to give effect to any Material adverse change in any clause of the resolution plan either under Section 31 or section 60(5)

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of the Code, 2016. The relevant part of the observation of the Hon'ble Supreme Court in **Ebix Singapore (Supra)** is as below:-

*“158. Based on the plain terms of the statute, the Adjudicating Authority lacks the authority to allow the withdrawal or modification of the Resolution Plan by a successful Resolution Applicant or to give effect to any such clauses in the Resolution Plan*****”*

CONCLUSION


202. The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will PART L 186 be wholly unregulated by the statute.”


10. No doubt, the extraordinary circumstance of the Covid-19 pandemic would had a significant impact not only on the business of Corporate Debtor but also upon the successful Resolution Applicant whose Resolution Plan is pending the approval before the Adjudicating Authority. But the legislative intent of the Code, 2016 cannot be overridden by this Adjudicating Authority to render outcomes that can have grave economic implications which will impact the viability of the Code,2016

11. Thus, even considering the submissions of the applicant that pursuant to the outbreak of COVID-19 pandemic and rise in the inflation, increasing cost of the construction material and the resolution plan is pending approval of this Adjudicating Authority since 2019, still this Adjudicating Authority cannot permit the applicant to modify the resolution plan or remit the resolution plan to CoC for modification to the extent of adding the clause.



12. The Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Limited v. Amit Gupta [(2021) SCC OnLine 194, para71]** held that, the NCLT's residuary jurisdiction [under Section 60(5)(c)] though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do. Further, the Hon'ble Supreme Court observed that "this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC".
13. In the light of the above said discussions and judgements cited supra, we are of the considered view that the effect of allowing the Adjudicating Authority to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtor.
14. Accordingly, instant application i.e., **IA/1517/ND/2022 stands dismissed as to no orders to costs.**


(DR.BINOD KUMAR SINHA)
MEMBER (T)


(DHARMINDER SINGH)
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-IV

I.A.1496/ND/2020
IN
C.P.No.IB-1059/ND/2018

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

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
....Corporate Debtor
AND

IN THE MATTER OF:

RISHI KAPOOR
....Applicant
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
THROUGH RESOLUTION PROFESSIONAL
MR. ANAND SONBHADRA
.... Respondent

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed under Section 60(5) of the Code, 2016
read with Rule 11 of the NCLT Rules, 2016 on behalf of Mr. Rishi Kapoor
(‘applicant’) seeking the following prayers from this Tribunal :-

I.A.1496/ND/2020
IN
C.P.No.IB-1059/ND/2018
Ordered Delivered on: 12.09.2022

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- a) *'reject the resolution plan in relation to M/s. Shubhkamna Buildtech Private Limited filed vide C.A./485/2019 seeking approval of the resolution plan by the Adjudicating Authority and/or*
- b) *direct the resolution applicant to pay to the tune of 100% by way of delivery of flats at parity to UCO Bank and co-operative Bank.*
- c) *direct the IBBI to initiate appropriate disciplinary proceedings against the resolution professional by taking deliberate breach of duties under the Code and Regulations therein.*
- d) *pass such other orders to secure the interest of the applicant and his security against the debt in favour of the applicant.'*

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicant are as follows:-

- a) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated vide Hon'ble NCLT order dated 26.11.2018 in C.P.(IB)No. 1059/2018, a petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- b) The applicant submits that pursuant to the public announcement, the applicant had filed its claims before the Interim Resolution Professional and the claim was accepted in its entirety by the IRP to the tune of INR 11,12,21,500 which is inclusive of the principal amount to the tune of INR 9,23,00,000 and interest to the tune of INR 1,89,21,500. The applicant adds that it is an admitted position that the Applicant is a Financial Creditor and therefore a member of Committee of Creditors.
- c) The applicant submits that the resolution plan has been approved in complete violation of law including the provisions of the Code, 2016. The applicant further submits that the acts of the resolution professionals are in material irregularity of process which shall render the resolution plan untenable and liable to be rejected.
- d) The applicant submits that the resolution plan is in complete contravention of Section 30(2)(e) of the Code, 2016 and the CIRP Regulations. The applicant adds that the information memorandum issued by the Resolution Professional is in complete contravention of the Code and the Regulations made thereunder.

3. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have been examined.
4. Adverting to the facts of the present case, we observe that the resolution plan is approved by COC in 6th COC meeting held on 06.10.2019 (voting result date 17.10.2019) with 87.6% affirmative votes and application for approval of the Resolution Plan by the Adjudicating Authority was filed on 23.10.2019.
5. Further, this Adjudicating Authority in C.A. /485/2019 filed for approval of resolution plan had meticulously examined the CoC approved Resolution Plan in view of the provisions of Section 30 (4) of the Code read with Section 30 (2) of the Code and the CIRP regulations made thereunder. Further the resolution professional has filed the compliance certificate in Form-H certifying that the Resolution Plan submitted by the successful resolution applicant meets the requirements as laid down in various sections of the Code and the CIRP Regulations and there are sufficient provisions in the Resolution Plan for its effective implementation as required under the Code. Further, an affidavit has been obtained from the Successful Resolution Applicant stating that he is eligible under the provisions of Section 29A of the Code, 2016 and same is taken on record.
6. Further, we are of the considered view that in so far as the approval of the resolution plan is concerned, this authority is not sitting on an appeal against the decision of the Committee of Creditors and this Adjudicating Authority is duty bound to follow the judgement of the **Hon'ble Supreme Court in the matter of K.Sashidhar v. Indian Overseas Bank (2019) 12 CC 150**, wherein the scope and interference of the Adjudicating

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Authority in the process of the approval of the Resolution Plan is elaborated as follow:-

35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides : (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

7. Also the Hon'ble Supreme Court of India in the matter of **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta &**

I.A.1496/ND/2020
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C.P.No.IB-1059/ND/2018
Ordered Delivered on: 12.09.2022

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Ors., Civil Appeal No. 8766-67 of 2019, vid its judgement dated 15.11.2019 has observed as follows:

“38. This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.”

8. Thus, from the judgements cited supra, it is amply clear that only limited judicial review is available to the Adjudicating Authority under Section 30(2) read with Section 31 of the Code, 2016 and therefore, this Adjudicating Authority cannot venture into the commercial aspects of the decisions taken by the committee of creditors.
9. Thus, we are of the considered view that the applicant fails to raise any substantial arguments as to bring on record that the resolution plan is in complete contravention of the provisions of the Code, 2016 and other laws. Accordingly, the instant application i.e., **IA/1496/ND/2020 being devoid of merits, stands dismissed** with no orders to costs.

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

-Sd-

(DHARMINDER SINGH)
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-IV

I.A.1515/ND/2022

IN

C.P.NO. IB-1059/ND/2018

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

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
.....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
.....Corporate Debtor

AND

IN THE MATTER OF:

M/S. SACHDEVA BUILDCON PRIVATE LIMITED & ORS.Applicants
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
THROUGH RESOLUTION PROFESSIONAL

MR. ANAND SONBHADRARespondent

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 jointly on behalf of M/s. Sachdeva Buildcon Private Limited, Mr. Dinesh Kumar Sachdeva, Mr. Rohit

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Sachdeva, Mr. Praveen Kumari Sachdeva and Ms. Gunjan Sachdeva ('applicants') seeking directions from this Tribunal to direct the resolution professional to admit the applicant's whole claim of Rs.2,54,25,200/- and to supply the copy of the resolution plan to the applicants.

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicants are as follows:-

- a) The applicants submit that the Corporate debtor i.e., M/s. Shubhkamna Buildtech Private Limited is engaged in the business of real estate construction and development and was in the process of developing the projects on a plot of land admeasuring 22565.77 sq/mts bearing plot no. GH-05/B is situated at Sector 137, Noida.
- b) The applicants submit that the corporate debtor entered into purchase agreements for the purchase of flats/ commercial areas in the two projects of the corporate debtor i.e., Shubhkamna Advert Techomes Projects situated at Sector 137, Expressway, Noida and Shubhkamna City, Plot No. GH-02A, Sector-01, Greater Noida West (Noida Extension). The applicants adds that the applicant no. 1 i.e., M/s. Sachdeva Buildcon Private Limited had also extended loan facility to the corporate debtor.
- c) The applicants submit that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated vide Hon'ble NCLT order dated 26.11.2018 in C.P.(IB)No. 1059/2018, a petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- d) The applicants submit that the applicants had submitted their claim via registered speed post on 13.08.2019 before the resolution Professional and had approached the resolution professional several times via mail to know the status of their claim.
- e) The applicants submit that the applicants through their counsel approached the resolution professional via email dated 15.03.2022 and requested the resolution professional to provide a copy of the resolution plan along with the updated list of the creditors.
- f) The applicants submit that the reason for filing the present application is that in the event, the claim of the applicants is not been included in the resolution plan, the applicant shall lose every right or locus standi of the legitimate claim of the applicants, who are the financial creditor.

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3. The resolution professional of M/s. Shubhkamna Buildtech Private Limited had filed his reply to the averments of the applicants. The defence taken by the resolution professional, respondent herein are stated in brief as below:-
- a) The resolution professional submits that the Public announcement in Form A was published on 29.11.2018 to notify the creditors of the corporate debtor about the initiation of the corporate insolvency resolution process of the corporate debtor whereby last date to file claim is 11.12.2018. The resolution professional further submits that a revised public announcement dated 05.01.2019 was published by the interim resolution professional with respect to the CIRP proceedings of the corporate debtor, wherein the last date for submission of claims by the creditors was indicated as 12.01.2019. The resolution Professional adds that the applicants had not submitted the claim before the last date of submission.
 - b) The resolution professional submits that the applicants had claimed that they had filed their claim with resolution professional on 13.08.2019, however, the resolution professional had received the claim for the very first time through email dated 01.11.2019. The resolution professional further adds that the resolution professional vide emails dated 13.11.2019, 07.01.2020 and 22.11.2020 had repeatedly informed the applicants about the status of their claim.
 - c) The resolution professional submits that invitation for expression of interest was published in Form G on 23.03.2019 and revised Form G on 09.06.2019 inviting the PRAs for filing the resolution plans for the corporate debtor. The resolution professional adds that the Committee of creditors had approved the resolution plan submitted by Mr. Sunder Kumar Singhal and Mr. Sunil Kumar Aggarwal in its 6th COC meeting held on 06.10.2019.
 - d) The resolution professional further submits that it has been clearly included in Clause 8.6 Sub-clause 3 of the resolution plan that claims of allottees or unit buyers which are not included in the plan shall be considered for verification for a period of 60 days after the effective date. The resolution professional adds that effective date as defined in the Resolution Plan is the date of receipt of approval of the resolution plan by the Hon'ble NCLT.
 - e) The resolution professional submits that the Applicants had previously filed an Application bearing IA. No. 408 of 2020 for consideration of the claim filed by them. The resolution professional further submits that in pursuance to the said application (IA 408 of 2020), this Hon'ble Tribunal vide order dated 21.10.2020 observed the following:

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"I.A. No. 408 of 2020:

Learned Counsel Mr. Dinesh Kapoor for the applicants being five home buyers states that claim was filed on 13th August 2019, sent to Resolution Professional through speed post. Mr. Anand Sanbhadra states that Clause 8.6 sub-clause 3 specifically mentions that the claims of allottees or unit buyers which are not included in the plan will be entertained for the period of 60 days from effective date, subject to verification of the claim

This shall take care of the grievance of the application. Mr Dinesh Kapoor for the applicant states that the prayers in this application will be taken care by this clause of Resolution Plan is disposed of in terms of above order."

- f) To support the contention, the resolution professional had placed reliance on the citations **Mukul Kumar v. M/s. RPS Infrastructuture Limited [Company Appeal (AT) (Ins) No. 1050 of 2020 decided on 30.07.2021]** and **Harish Polymer Product v. Mr. George Samuel, RP of Jason Dekor Pvt. Ltd. [Comp App. (AT)(Ins) No. 420 of 2021 decided on 18.06.2021]**

4. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have been examined in detail.
5. The purpose of making public announcement is to make all the interested parties/stakeholders aware of the initiation of the CIRP of the Corporate Debtor so as to enable them to submit their claim and facilitate in preparing the information memorandum which is issued, subsequently, after the collection and collation of claims of the operational and financial creditors so as to provide the Resolution Applicant all relevant information so that the resolution applicant can make a legally and financially sound Resolution Plan for the Corporate Debtor as is required under Section 29 of the IBC.
6. We find that in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, very clear timeline has been prescribed

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under Regulation 12(2) for submission of claim with proof by the creditor who fails to submit the claim with proof within the time stipulated in the public announcement, quite obviously to enable the potential resolution applicants to submit realistic and workable resolution plans after due diligence, and which can be taken up further for finalisation. The relevant regulation is reproduced hereunder:

“12. Submission of proof of claims. –

(1) xxxxxx

(2) *A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.*

(3) Xxxxx ”

7. Adverting to the facts of the present case, the public announcement were made on two occasions i.e., 29.11.2018 and 05.01.2019 respectively according to which last date for submission of the claim were 11.12.2018 and 12.01.2019 respectively. The Committee of creditors had approved the resolution plan submitted by Mr. Sunder Kumar Singhal and Mr. Sunil Kumar Aggarwal in its 6th COC meeting held on 06.10.2019. The applicants claimed that they had submitted their respective claim on 13.08.2019 via speed post, however no proof of evidencing the submission of claim was attached by the applicants whereas the resolution professional submitted that the claim was received for the first time via email on 01.11.2019.

8. Be that as it may, we observe that more than about one year after the invitation of claims through public notice on 29.11.2018, the applicants had submitted their claim. The extended time period as per Regulation 12(2) of the IBBI (CIRP) Regulations, 2016 for submission of claims with proof is ninety days from the date of initiation of the insolvency resolution process. This period also expired on 11.04.2019 (i.e., 90 days from the 2nd public announcement). It is undisputed that the COC

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approved the resolution plan in its 6th CoC Meeting on 06.10.2019 and the application for approval of the Resolution Plan as approved by the Committee of Creditors was filed to the Adjudicating Authority on 23.10.2019 much before the said claim was preferred before the RP.

9. We are of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the Adjudicating Authority for approval, at this stage, if resolution professional is directed to entertain new claims, after the approval of resolution plan by COC, the CIRP would be jeopardized and the Resolution Process may become more difficult. Keeping in view the object of the IBC which is resolution of Corporate Debtor in time bound manner to maximize the value, if such belated claims of applicant is accepted at this stage the very purpose of IBC would be defeated.
10. We further find that the same applicants had filed an application bearing I.A, No. 408 of 2020 for same cause of action i.e., consideration of the claim filed by them. This Adjudicating Authority in pursuance to the said application (IA 408 of 2020), vide order dated 21.10.2020 held as follow:

"I.A. No. 408 of 2020:

*Learned Counsel Mr. Dinesh Kapoor for the applicants being five home buyers states that claim was filed on 13th August 2019, sent to Resolution Professional through speed post. Mr. Anand Sanbhadra states that **Clause 8.6 sub-clause 3 specifically mentions that the claims of allottees or unit buyers which are not included in the plan will be entertained for the period of 60 days from effective date, subject to verification of the claim***

This shall take care of the grievance of the application. Mr Dinesh Kapoor for the applicant states that the prayers in this application will be taken care by this clause of Resolution Plan is disposed of in terms of above order."

IA is disposed of in terms of above order."

11. We are of the considered view that this Adjudicating Authority vide order dated 21.10.2020 in I.A. No. 408 of 2020 has dealt with the issue of considering the applicant's belated claim. Moreover, it is a settled


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proposition of law that the resolution plan is a confidential document until it is approved by the Adjudicating Authority and copy of the Resolution Plan can only be shared with the Members and participants of the Committee of Creditors (CoC), therefore, any person being the outsider will not be entitled to receive a copy of the resolution plan.

12. This Adjudicating Authority in any view of the matter, is of the considered view that when the Applicants had already raised the specific issue of considering their belated claims before this Adjudicating Authority in I.A. 408 of 2020, than again raising same ground in the present application i.e., I.A. 1515 of 2022 is nothing but an abuse of process of court by the applicants, especially keeping in mind the very objective of the Insolvency and Bankruptcy Code, 2016. As a note of caution to the applicants, we strongly condemn the act of the applicants of filing the frivolous application, when the same issue has already been decided by this Adjudicating Authority.

13. Accordingly, in view of the above discussion and the order dated 20.10.2020 of this Adjudicating Authority in the I.A. 408 of 2020, instant application i.e., **IA/1515/ND/2022 stands dismissed as to no orders to costs.**



(DR. BINOD KUMAR SINHA)
MEMBER (T)



(DHARMINDER SINGH)
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-IV

I.A.4514/ND/2021
IN
C.P.No.IB-1059/ND/2018

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

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
.....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
.....Corporate Debtor
AND

IN THE MATTER OF:

RISHI KAPOOR
.....Applicant
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
THROUGH RESOLUTION PROFESSIONAL
MR. ANAND SONBHADRA
..... Respondent

ORDER DELIVERED ON:12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 on behalf of Mr. Rishi Kapoor ('applicant') seeking the following prayers from this Tribunal :-

- a) *'to direct the Resolution Professional to carry out the amendments in the Resolution Plan dated 12th of October 2019 filed for approval in*

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- I.A. No. 485 of 2019, to include the Applicant as an Allottee i.e. creditor in a class qua the allotments made to him;*
- b) to remand the Resolution Plan filed for approval in I.A. No. 485 of 2019 before the Committee of Creditors, for amending the Resolution Plan in terms of the present application in favour of the Applicant;*
- c) upon failure to alter the status and distribution qua the Applicant under the Resolution Plan in terms of the present application, reject the Resolution Plan filed vide I.A. No. 485 of 2019.'*

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicant are as follows:-

- a) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated vide Hon'ble NCLT order dated 26.11.2018 in C.P.(IB)No. 1059/2018, a petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- b) The applicant submits that pursuant to the public announcement, the applicant had filed its claims before the Interim Resolution Professional and the claim was accepted in its entirety by the IRP to the tune of INR 11,12,21,500 which is inclusive of the principle amount to the tune of INR 9,23,00,000 and interest to the tune of INR 1,89,21,500. The applicant adds that it is an admitted position that the applicant is a financial creditor and therefore a member of Committee of Creditors.
- c) The applicant submits that the agreement basis which the claims of the applicant were accepted is the Loan Agreement dated 27.12.2017 wherein the corporate debtor had executed allotment agreements for 30 units, details of which were specifically provided in Schedule-1 of the said agreement, in favour of the applicant against the sum received under the Loan Agreement dated 27.12.2017.
- d) The applicant further submits that additionally two flats bearing no. C-2/C-13 & C-2/14 in the Project Shubhkamna – Advert Techomes on Plot No. GH-05/B, sector 137, NOIDA admeasuring 1500 sq.ft. each; One flat bearing No. C-3/F-1 in the Project Shubhkamna – Advert Techomes on Plot No. GH-05/B, sector 137, NOIDA admeasuring 2195 sq.ft. each; Two flats bearing No. D-3/D-2 & D3/3 the Project Shubhkamna – Advert Techomes on Plot No. GH-05/B, sector 137, NOIDA admeasuring 1750 sq.ft. each; were also allotted under the Loan Agreement dated 27.12.2017 by the virtue of its clause 5.The

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applicant adds that the allotment agreements were issued in favour of the applicants qua all such additional five (5) units.

- e) The applicant submits that there are thirty-five (35) units allotted to the applicant under law for which the receipt of amount is acknowledged under the allotment letters and allotment agreements having being issued in favour of the applicant.
- f) The applicant submits that the applicant had filed an application bearing I.A. No. 510 of 2019 before this Adjudicating Authority seeking declaration of the Applicant as a "Secured" Financial creditor. The applicant further submits that the Hon'ble Adjudicating Authority vide its order dated 01.07.2021 **held that the applicant is an unsecured Financial Creditor at par with Financial Creditors in class of creditors being homebuyers.** The applicant adds that the finding so given by this Hon'ble Adjudicating Authority already cleared that the Applicant is at par with the homebuyers.
- g) The applicant submits that the Resolution Plan discriminated the applicant with that of other homebuyers. While the other homebuyers are given units under the plan, the applicant has been given a meagre sum of INR.90,00,000 (Ninety Lakhs Only) which effectively becomes INR.1,52,01,208 (One crore Fifty-Two Lakhs One Thousand Two Hundred Eight Only) since the applicant was dissenting Financial Creditor. The applicant further submits that discrimination is apparent on the face of it as the applicant is being given petty cash as against the allotments given to the other homebuyers.

3. The resolution professional of M/s. Shubhkamna Buildtech Private Limited had filed his reply to the averments of the applicants. The defence taken by the resolution professional, respondent herein are stated in brief as below:-

- a) The resolution professional submits that the applicant had filed its claim belatedly on 18.12.2018 in Form-C as unsecured Financial Creditor. The resolution professional further submits that the applicant took part in all the meetings of the committee of creditors and the applicant have never objected to the fact of being an unsecured financial creditor until the approval of resolution plan by the committee of creditors. The resolution professional adds that it is pertinent to note that the applicant, at no point, claimed to be recognized at par with the Homebuyers/Allottees.
- b) The resolution professional submits that the applicant had filed an application (I.A. 510 of 2019) before this Adjudicating Authority with a prayer to be recognized as a 'Secured Financial Creditor' on the basis of the loan agreement(s) entered between the applicant and the

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corporate debtor. The resolution professional further submits that this Adjudicating Authority vide order dated 01.07.2021 had dismissed the I.A.No.510 of 2019 and recognized the status of the applicant as an unsecured financial creditor. The resolution professional adds that vide order dated 01.07.2021, this Adjudicating Authority held that in the absence of the registration of charges, the loan cannot be disbursed against the valid security interest as required under the Code, 2016.

- c) The resolution professional submits that the applicant being aggrieved by the abovementioned order dated 01.07.2021, had filed Company Appeal (AT) (Ins) 579 of 2021 before the Hon'ble NCLAT. The resolution professional further submits that, in the Appeal so filed, the Applicant (Appellant therein) has prayed for setting aside of the impugned order and for being recognized as the secured Financial Creditor and the said Appeal is pending adjudication before the Hon'ble NCLAT.
- d) The resolution professional submits that on a perusal of the order dated 01.07.2021 passed by this Adjudicating Authority, that to be **“at par with that of the Allottees”** was only to refer to the **unsecured financial creditor status of the applicant just the same way the homebuyers/Allottees are unsecured financial creditors and not as secured financial creditors.**
- e) The resolution Professional submits that a bare perusal of the loan agreement dated 27.12.2017, clearly shows that the intent of entering into the agreement was to merely provide financial assistance to the corporate debtor and not to be treated as a homebuyer at any point of time. The resolution professional further submits that execution of the allotment agreements in relation to the units was only for the purpose of providing security for amount advanced. The resolution professional adds that any reliance on the said security interest/allotment letters by the applicants is non-est in law.
- f) To support the contention, the resolution professional placed reliance on **Santosh Wasantrao Walokar v. Vijay Kumar V. Iyer & Anr. (Company Appeal (AT) (Insolvency) No. 871.872 of 2019) decided on 24.01.2021, Harish Polymer Product v. Mr.George Samuel Ltd (Company Appeal (AT)(Ins) No. 420 of 2021) and Ebix Singapore Private Lyd versus CoC of Educomp Solutions Ltd (Civil Appeal 3224 of 2020).**

4. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filled by the parties. The

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relevant documents annexed with the respective submissions have been examined in detail.

5. Adverting to the facts of the present case, we are of the considered view that the facts and circumstances peculiar to the attendant case indicate that the genesis of the applicant's claim arises from the Loan Agreement dated 27.12.2017. On a perusal of the said loan agreement, we are of the opinion that the intent behind entering into the loan agreement was to merely provide financial assistance to the Corporate Debtor and not to purchase the units in the project, as the allotment agreements to the units were only for the purpose of providing security towards the amount advanced. Hence, we hold that the sole purpose of the loan agreement was to earn the profits and therefore by no stretch of imagination the applicant by virtue of the said loan agreement could fall under the class of home buyers, as the applicant is merely a speculative investor or financier who had advanced the money to the corporate debtor with a sole motive to receive the principal amount along with the interest.
6. At this juncture, it will be relevant to consider the order dated 01.07.2021 of this Adjudicating Authority in I.A. No. 510 of 219 wherein the prayer of considering the Applicant as a "Secured" Financial creditor is dismissed by this Adjudicating Authority. The relevant para 18 of the order dated **01.07.2021 in I.A. No. 510 of 2019** is reproduced below:-

"Heard submissions and perused the documents. We find force in the contention of the RP. Considering the fact that the loan was disbursed to the Corporate Debtor but the said is not supported with any documentary evidence to show the creation security interest as mentioned in the IBBI (Liquidation Process) Regulations, 2016. Hence the arguments that the present Applicant needs to be classified as a secured financial creditor cannot be accepted. The RP has rightly considered the absence of any proof of security documents and then declared the Applicant as unsecured Financial Creditor, at par with Financial Creditors in class of creditors being home buyers.

In absence of any registration of Charge in the ROC records of the Corporate Debtor, the present Applicant needs to be recognized as

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unsecured financial creditor. Moreover, the Resolution Plan is approved by the CoC and the Resolution Applicant cannot be put to hardship of facing new claim/new category of claim, as held by Hon'ble Supreme Court. We are not convinced by the arguments of the applicant but agree with the decision of the RP."

7. Be that as it may, it is an undisputed fact that the applicant had belatedly submitted its claim form in Form-C on 18.12.2018 and had never challenged his status as unsecured financial creditor before the approval of the resolution plan by the COC. The resolution plan is approved by COC in 6th COC meeting held on 06.10.2019 and application for approval of the Resolution Plan as approved by the Committee of Creditors was filed to the Adjudicating Authority on 23.10.2019, therefore, at this stage, the clock cannot be set back, to reconsider the status of the applicant and make the necessary amendments in the resolution plan, if any.

8. The Hon'ble Supreme **Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors [Civil Appeal No. 8766-67 of 2019]** held as follow:-

"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 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."

9. In addition to the above, we observe that the applicant had earlier filed an application bearing I.A. 510 of 2019 for seeking the status as secured Financial Creditor and in present application is seeking the status of Home Buyer pertaining to the same claim. Pertinent to note, that the applicant is simultaneously pursuing the appeal against the order dated 01.07.2021 in I.A. 510 of 2019 before hon'ble NCLAT bearing Company

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Appeal (AT) (Ins) 579 of 2021 seeking the applicant's status as Secured Financial Creditor. This act of applicant of filing multiple proceedings, on one pretext or the other clearly shows the attempt of the applicant to get the maximum recovery of the money advanced by the applicant. However, filing of such applications had not only scuttled the entire Corporate Insolvency Resolution Process, but is also against the very objective of the Insolvency and Bankruptcy Code, 2016. At the cost of repetition, we make it clear that in cantena of judgements, the Hon'ble Apex Court and Hon'ble NCLAT, had expressed and explained that the provisions of the Insolvency and Bankruptcy Proceedings are intended to bring the corporate debtor back to its feet and are not money recovery proceedings.

10. Accordingly, the instant application i.e., **IA/4514/ND/2021 being devoid of merits, stands dismissed** with no orders to costs.

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-IV

I.A.2563/ND/2021
IN
C.P.No.IB-1059/ND/2018

(Under Section 60 (5) read with Section 20 and 23 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
....Corporate Debtor
AND

IN THE MATTER OF:

SHUBHKAMNA FLAT BUYERS WELFARE ASSOCIATIONApplicant
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
THROUGH RESOLUTION PROFESSIONAL
MR. ANAND SONBHADRA Respondent

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 on behalf of M/s. Shubhkamna Flat Buyers Welfare Association, a society consisting of 89 members of Techome Project located at Sector 137, Noida, being one of the projects

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being developed by M/s. Shubhkamna Buildtech Private Limited ('applicant') seeking the following prayers from this Tribunal :-

- a) *"to direct the respondent to resuming the construction of the Techome project;*
- b) *to direct the respondent to resume the construction of the Techome Project;*
- c) *to direct the respondent to obtain the requisite approval from different authorities for starting construction*
- d) *to direct any contribution made by the homebuyers to be considered as CIRP Cost to be paid by the Resolution Applicant in full."*

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicant are as follows:-

- a) The applicant submits that the Corporate debtor i.e., M/s. Shubhkamna Buildtech Private Limited is engaged in the business of real estate construction and development and was in the process of developing the projects on a plot of land admeasuring 22565.77 sq/mts bearing plot no. GH-05/B is situated at Sector 137, Noida.
- b) The applicant submits that the corporate debtor entered into purchase agreements for the purchase of flats/ commercial areas in the two projects of the corporate debtor i.e., Shubhkamna Advert Techomes Projects situated at Sector 137, Expressway, Noida and Shubhkamna City, Plot No. GH-02A, Sector-01, Greater Noida West (Noida Extension).
- c) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated vide Hon'ble NCLT order dated 26.11.2018 in C.P.(IB)No.1059/2018, a petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- d) The applicant submits that a real estate company will be considered as a going concern, if the construction activity and the work with respect to handing over the flats/units are carried out and all such necessary acts are done to give same effect to it as it would have been if the corporate debtor was working before the initiation of CIRP. The applicant further submits that it is not only in their own interest but also in the interest of preserving the value of assets of the corporate debtor.
- e) The applicant submits that, as on the date of filing of the present application, over two and a half years have elapsed since the initiation of CIRP of the Corporate Debtor and there is no

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foreseeability of either the resumption of construction of the project or the completion of the same and handover of units to the members of the applicant society.

3. The resolution professional of M/s. Shubhkamna Buildtech Private Limited had filed his reply to the averments of the applicants. The defence taken by the resolution professional, respondent herein are stated in brief as below:-
 - a) The resolution professional submits that the resolution professional is managing the operation of the corporate debtor as provided under Section 20 of the Code, 2016 and the duty assigned to the Resolution Professional under Section 25 of the Code, 2016. The resolution professional further submits that the security guards are employed for the protection of the assets of the corporate debtor and performed the other activities.
 - b) The resolution professional submits that the corporate debtor did not have any funds, when it was admitted to the CIRP. The resolution professional further submits that resolution professional had not even received fees for almost 2 years and had not been able to earmark any amount of money for the protection of the assets of the corporate debtor due to shortage of funds. The resolution professional adds that an application (CA/485/2019) is pending before this Adjudicating Authority for approval.
 - c) The resolution professional submits that currently the corporate debtor doesn't have any resources to continue/ resume construction work of the Tech-home Project of the Corporate Debtor. The resolution professional further submits that the resolution professional has no objection to start the work but that would entail renewing approval of land developments authorities, RERA Registration and environmental clearances etc., for resuming the construction work.
4. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have been examined in detail.
5. It is an undisputed fact that the Committee of creditors had approved the resolution plan submitted by Mr. Sunder Kumar Singhal and Mr. Sunil Kumar Aggarwal in its 6th COC meeting held on 06.10.2019. and the

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application for approval of the Resolution Plan as approved by the Committee of Creditors was filed to the Adjudicating Authority on 23.10.2019.

6. We observe that on the date of hearing of I.A.2563/ND/2021, this Adjudicating Authority considering the submissions made by the applicants for seeking an opportunity to discuss the matter with the resolution professional and to explore how to prevent deterioration of the building vide order dated 17.11.2021, had directed the resolution professional to cooperate in the matter and apprise the status to the Adjudicating Authority on the next date of hearing.
7. The resolution professional had filed two joint affidavit dated 04.05.2022 and 04.07.2022 respectively, wherein the resolution professional submits that pursuant to the order dated 17.11.2021 of this Adjudicating Authority, several meeting among the authorized representative of the applicant along with other homebuyers and the resolution professional were held on 24.11.2021, 17.12.2021, 22.12.2021, 31.12.2021, 16.02.2022 and 13.03.2022 wherein a 'Pool and Construction Scheme' for completion of the construction of the projects were deliberated upon. The resolution professional further submits that for the Noida Project, I.A. 2563 of 2021 is voted in favour by majority of the class of creditors, however, for the Greater Noida (West) project the same was not voted in favour. Both the parties in affidavit dated 04.05.2022 seek the approval of "Pool and Construction Scheme" by this Adjudicating Authority.
8. The resolution professional through affidavits dated 04.05.2022 and 04.07.2022 had placed on record the following documents:
 - a) Copy of the "Pool and Construction Scheme" entered into between the applicant and respondent.
 - b) Copy of the e-voting results with regard to the resolution proposed for approval of "Pool and Construction Scheme"
 - c) Copy of the list of Allottees with respect to both the projects

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9. Adverting to the facts of the present case, we are of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the Adjudicating Authority for approval, at this stage, if resolution professional is directed to restart the construction of the project on the basis of "Pool and Construction Scheme" as agreed by the applicant, other homebuyers and the resolution professional, the same will either directly or indirectly impact the proposed resolution plan pending before this Adjudicating Authority, which may consequently requires modification in the resolution plan pending for approval including but not limited to change in timeline of handing over the completed units to the home buyers, proposed payment to be made by the creditors and other related provisions, which will create hindrances in the smooth implementation of the resolution plan and the CIRP would be jeopardized. We further find that the application for approval of resolution plan i.e., C.A./485/ND/2019 is approved by this Adjudicating Authority on 12.09.2022.

10. Accordingly, after considering the facts and circumstances peculiar to the attendant case, and in view of the application for approval of resolution plan i.e.,C.A./485/ND/2019 being allowed, the instant **application i.e., IA/2563/ND/2021 stands infructuous.**

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH, COURT-IV

C.A.01/ND/2020

IN

C.P.NO. IB-1059/ND/2018

(Under Section 66 of the Insolvency and Bankruptcy Code, 2016)

IN THE MATTER OF:

M/S. CONCORD INFRASTRUCTURE PRIVATE LIMITED
....Operational Creditor
Vs.

M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITED
....Corporate Debtor

AND

IN THE MATTER OF:

MR. ANAND SONBHADRA
RESOLUTION PROFESSIONAL
M/S. SHUBHKAMNA BUILDTECH PRIVATE LIMITEDApplicant
Vs.
MR. PIYUSH TIWARI & ORS.Respondents

ORDER DELIVERED ON: 12.09.2022

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SH. DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application has been filed on behalf of Mr. Anand Sonbhadra ('applicant'/resolution professional) under Section 66 of the Code, 2016 to bring fraudulent and wrongful transactions done by the suspended board

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directors of the corporate debtor to the notice of this Hon'ble Tribunal seeking the following relief(s):-

- a) *'to direct the suspended Directors of the Corporate Debtor, i.e. Mr. Piyush Tiwari, Mr. Diwakar Sharma and Mr. Deep Tiwari, to contribute INR 106.19 crores.*
- b) *report the transactions to the Insolvency & Bankruptcy Board of India for making a complaint to the Special Court under section 236 of the Code.'*

2. Briefly stated, the facts of this case leading to filing of this present interlocutory application, as averred by the applicant are as follows:-

- a) The applicant submits that the Corporate debtor i.e., M/s. Shubhkamna Buildtech Private Limited is engaged in the business of real estate construction and development and was in the process of developing the projects on a plot of land admeasuring 22565.77 sq/mts bearing plot no. GH-05/B is situated at Sector 137, Noida.
- b) The applicant submits that Corporate Insolvency Resolution Process against M/s. Shubhkamna Buildtech Private Limited ('Corporate Debtor') had been initiated vide Hon'ble NCLT order dated 26.11.2018 in C.P.(IB)No. 1059/2018, petition under Section 9 of the Code, 2016 filed by M/s. Concord Infrastructure Private Limited ('Operational Creditor').
- c) The applicant submits that the Committee of Creditors in its 2nd CoC meeting held on March 11, 2019 had approved the appointment of forensic auditor M/s. Haribhakti & Co. LLP to conduct the forensic audit of the books, records, papers, documents accounts and transactions relating to the corporate debtor.
- d) The applicant submits that the forensic auditor conducted the forensic audit and submitted the report with its comments on 06.10.2019. The applicant submits that on perusal of the forensic audit report and the accounting data available with the applicant, the applicant has determined that certain transactions falling within the purview of preferential, fraudulent or undervalued transactions that have been carried out by the suspended management of the corporate debtor.
- e) The applicant submits that the applicant has averred that monies siphoned off under avoidable transactions amount to INR 106.19 crores towards diversion of funds to a foreign related entity, personal expenses incurred from the account of the corporate debtor, questionable

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transactions carried out with supposed suppliers, potential diversion of funds to related entities, misappropriation of assets of the corporate debtor, unreasonable reduction in value of land in the books of the corporate debtor, potential diversion of monies to related/ unrelated parties in the form of interest free loan. The applicant further submits that the amount siphoned-off is summarized as below:-

Transaction	Amount (crores)
Diversion of funds to SBL-HK: Payments made on behalf of SBL-HK without any justification	2.72
Personal expenses incurred from the account of the Corporate Debtor: Expenses like purchase of gold, chocolates, wedding expenses etc. carried out from the account of the Corporate Debtor.	0.61
Questionable transactions carried out with supposed suppliers: Transactions visibly impossible and/or wrongful without any supporting documents carried out with suppliers of the Corporate Debtor.	51.40
Potential Diversion of Funds to related Entities: Transactions have been made with various related entities, without any record or reason, which in total has amounted to net recoverable amount by the Corporate Debtor.	27.60
Misappropriation of assets of Corporate Debtor: The Balance Sheet of the Corporate Debtor reflects several vehicles in the name of the Corporate Debtor, which have not been found by Resolution Professional and upon verification, most of the same have been found to have been registered in the name of third parties.	2.69
Unreasonable reduction in value of land: The value of land has been unreasonably reduced in the books of the Corporate Debtor	10.95
Potential diversion of monies to related/ unrelated parties in the form of interest free loans: Monies have been paid to unrelated parties, and upon recovery, paid on the same date to further transferees, without any justification.	8.61
Interest on residential properties of directors paid from the account of the Corporate Debtor: Properties are being used by Mr. Piyush Tiwari and Mr. Diwakar Sharma were paid for between the years 2011 to 2015 by the Corporate Debtor.	1.61
Total	106.19

- f) The applicant submits that the fraudulent transactions as enumerated above, have been carried out by the respondents with the sole intent of siphoning off cash from the Corporate Debtor and by thus dissipating the

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assets of the Corporate Debtor, to leave little for distribution among the creditors of the Corporate Debtor.

- g) The applicant submits that from the forensic report, it can be clearly established that the Directors/Corporate Debtor has entered into several fraudulent transactions thereby prejudicially affecting the rights and interests of the lenders / financial creditors of the Corporate Debtor and that the same are clearly in contravention of inter alia the provisions of section 66 of the Code.

3. We have heard Ld. Counsel for the applicant and perused the averments made in the application. The relevant documents annexed with the application have been examined in detail. The respondent had neither filed their reply nor appeared before this Adjudicating Authority for arguments in the C.A./01/ND/2020.

4. Before proceeding further on the matter, it would be appropriate to refer to Section 66 of the Code, 2016 relating to fraudulent transaction, which reads as under:

“Section 66: Fraudulent trading or wrongful trading.

1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.”

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such

default against which initiation of corporate insolvency resolution process is suspended as per section 10A.”

5. In order to bring the transaction within the scope of Section 66 of the Code, 2016, it is necessary to demonstrate that the business of Corporate Debtor has been carried on with the **“intent to defraud”** its creditor or for **“any fraudulent purpose”**. Further, Section 66(2) of the Code inter-alia mandates that the directors of the corporate debtor ought to have known that there was no reasonable prospect of avoiding the initiation of the CIRP and the directors did not exercise due diligence in minimizing the loss. Therefore, test is to look into the purported/alleged fraudulent transaction and to ascertain whether the alleged transactions established that the alleged transaction were made with intention to defraud and for fraudulent purpose
6. In support of the averments made in the application, the Ld. Counsel for the applicant had relied upon the Forensic Report dated 06.10.2019 and invited attention of this Adjudicating Authority towards diversion of funds to a foreign related entity, personal expenses incurred from the account of the corporate debtor, questionable transactions carried out with supposed suppliers, potential diversion of funds to related entities, misappropriation of assets of the corporate debtor, unreasonable reduction in value of land in the books of the corporate debtor, potential diversion of monies to related/ unrelated parties in the form of interest free loan as enumerated at Pg-31 of the Forensic Report dated 06.10.2019.
7. At this juncture, it is significant to refer to the decision of the Hon'ble Supreme Court in the matter of **Anuj Jain IRP for Jaypee Itratech Limited vs. Axis Bank Limited [Civil Appeal No. 8512 -8527 of 2019]**, wherein it was held that
*“29.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the **IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent.** In our view, in the*

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scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of under valuation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. **On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor.** We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. **Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code.** As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirement in view, while making a motion to the Adjudicating Authority.

8. Therefore, from the **Jaypee Infratech case cited above**, it is clear that Section 66 of the Code, 2016 contemplates that during the CIRP or liquidation process if it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order.
9. A perusal of the forensic report and its contents, relevant Tally entries of the books of the corporate debtor showing payments to related entities, travel expense, personal expenses of director accounted in the corporate debtor's account, explicitly reveals the fact that the corporate debtor has clearly

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consequently made the payments, which were not used for the business of the Corporate Debtor but otherwise and the said act of the suspended directors of the corporate debtor will squarely attract under the provisions of Section 66 of the Code, 2016. Consequently, the respondents herein i.e., Mr. Piyush Tiwari, Mr. Diwakar Sharma and Mr. Deep Tiwari, are directed to immediately contribute a sum of INR 106.19 crores, which was siphoned-off by the respondent, while managing the affairs of the Corporate Debtor within a period of 21 business days from the pronouncement of this order. The respondents shall be jointly and severally liable to contribute a sum of INR 106.19 crores, which was siphoned-off by the respondents while managing business of the corporate debtor.

10. We find that the Resolution Plan approved by the COC in its 6th meeting and submitted before this Tribunal for approval specifically provides for treatment of recoveries arising out of avoidance transactions. The Clause 7.5 of Chapter VII, pg 29 of the Resolution Plan dated 12.10.2019 as approved by the COC is reproduced below :-

“Chapter VII- Funding Plan and Sources of Funds

7.5. Passing of Benefit to Financial Creditors accruing from Avoidance Transaction:

The CD/ RA shall extend all possible cooperation for adjudication of any transactions u/s 43, 45, 49, 66, if any. 100% of the Net Amount received through Bank Transactions (if any) directed by the Adjudicating Authority that is received by the CD in respect of such transactions shall be passed on to the Financial Creditors in pro rata basis of the repayment of claims as proposed by the RA. If the land that has been sub-leased to AEPL comes back in the name of the CD at a later date, the Land/ FSI shall be sold and the receipts (net of cost) shall be distributed amongst the home buyers in pro-rata basis. Alternatively the FSI can be developed by the RA/CD and the cost of FSI shall be distributed amongst the Home Buyers in pro-rata basis once the entire inventory is sold and all the proceeds are received by the RA/CD. Further if any asset of SHUBHKAMNA which is not present in the Information memorandum / Balance sheet, is discovered in future during the resolution then 100% of the net benefit from their recovery will be passed on to the financial creditors in pro-rata basis of the repayment of claims as proposed by the RA. “

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11. In view of the aforementioned facts and the discussion, we are of the considered view that respondents i.e. suspended board of directors were involved in running the business of the corporate debtor in a fraudulent and wrongful manner, therefore, responsible and liable under the provision of Section 66 of the Code, 2016.

12. Accordingly, the instant application i.e., **C.A./01/ND/2020 stands allowed**, with a direction to the suspended board of directors i.e., Mr. Piyush Tiwari, Mr. Diwakar Sharma and Mr. Deep Tiwari, to deposit this aforesaid amount of Rs.106.19 crores with this Adjudicating Authority within two months from the pronouncement of this order, which shall be distributed to financial creditors proportionately.

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)

