IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

Interlocutory Application No.CA-925 of 2018
In
Company Petition No. (IB)-50(PB)/2018
(Application filed u/s. 60(5) of the IBC, 2016)

In the matter of:

Dena Bank .... Applicant

Vs

Kuldip Kumar Bassi .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA-1154 of 2018
In
Company Petition No. (IB)-50(PB)/2018
(Application filed under Rule 11 of NCLT Rules, 2016 & Reg. 13 & 14 of The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 & u/s. 18 of the IBC, 2016)

In the matter of:

Andhra Bank .... Applicant

Vs

Kuldip Kumar Bassi .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA-1157 of 2018
In
Company Petition No. (IB)-50(PB)/2018
(Application filed to intervene in CA-925(PB)/2018)

In the matter of:

Vikas Aggarwal .... Applicant

Vs

Kuldip Kumar Bassi .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA-1237 of 2019
In
Company Petition No. (IB)-50(PB)/2018
(Application filed u/s. 60(5) of IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of:

GAIL (India) Ltd.

.... Applicant

Vs

Kuldip Kumar Bassi
(Resolution Professional of Asian Colour Coated Ispat Limited)

.... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA-2508 of 2019
In
Company Petition No. (IB)-50(PB)/2018

(Application filed for raising objection to the Resolution Plan)

In the matter of:

Berger Becker Coatings Pvt. Ltd. .... Applicant

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA - 1396 of 2019
In
Company Petition No. (IB)-50(PB)/2018

(Application filed under section 60(5) of the IBC, 2016)

In the matter of:

ACCIL Corporation Pvt. Ltd. .... Applicant

Vs

Kuldip Kumar Bassi
(Resolution Professional of Asian Colour Coated Ispat Limited)
.... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA - 2276 of 2019
In
Company Petition No. (IB)-50(PB)/2018

(Application filed u/s. 60(5) of the IBC, 2016 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of:

Asian Ispat FZ LLC .... Applicant

Vs

Kuldip Kumar Bassi
(Resolution Professional of Asian Colour Coated Ispat Limited)
.... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 2793 of 2019
In
Company Petition No. (IB)-50(PB)/2018

(Application filed u/s. 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016)

In the matter of:

Haryana Steel Mongers Pvt. Ltd. .... Applicant

Vs

Kuldip Kumar Bassi
(Resolution Professional of Asian Colour Ispat Limited)
and Anr. .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 1393 of 2019
In
Company Petition No. (IB)-50(PB)/2018

(Application filed u/s 30(6) r/w 31(1) of IBC, 2016 r/w Reg. 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016)

In the matter of:

Kuldip Kumar Bassi .... Applicant

Vs

JSW Steel Coated Products Ltd. & Anr. .... Respondents

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 1090 of 2019
In
Company Petition No. (IB)-50(PB)/2018
(Application filed u/s. 60(5) of the IBC,2016 r/w Rule 11 of NCLT Rules, 2016)

In the matter of:

Corporation Bank & Ors. ....Applicants

Vs

Asian Colour Coated Ispat Limited
(Through its Resolution Professional Kuldip Kumar Bassi) .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 99 of 2019& 2274 of 2019
In
Company Petition No. (IB)-50(PB)/2018
(Applications filed u/s 60(5) r/w Rule 11 of NCLT Rules, 2016)

In the matter of:

ACCIL Auto Steels Pvt. Ltd. .... Applicant

Vs

Kuldeep Kumar Bassi
(Resolution Professional of Asian Colour Coated Ispat Limited)
& Anr. .... Respondents

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 1395 & 2273 of 2019
In
Company Petition No. (IB)-50(PB)/2018
(Application filed u/s. 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016)

In the matter of:

ACCIL Steel Processors Pvt. Ltd. .... Applicant

Vs

Kuldip Kumar Bassi
(Resolution Professional of Asian Colour Coated Ispat Limited)
& Anr. .... Respondent

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 2277 of 2019
In
Company Petition No. (IB)-50(PB)/2018
(Application filed under Sec.60(5) r/w Sec.31 of IBC, 2016 & Rule 11 of NCLT Rules, 2016)

In the matter of:

Pradeep Aggarwal .... Applicant

Vs

Asian Colour Coated Ispat Ltd.
(Through its Resolution professional Mr. Kuldeep Kumar Bassi)
& Ors. .... Respondents

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Interlocutory Application No.CA – 2875 of 2020
In
Company Petition No. (IB)-50(PB)/2018
(Application filed u/s 60(5) r/w Rule 11 of NCLT Rules,2016)

In the matter of:

Interups Inc. .... Applicant

Vs

K K Bassi & Anr. .... Respondents

And

In the matter of:

State Bank of India .... Applicant/Petitioner

Vs

M/s. Asian Colour Coated Ispat Limited .... Respondent

Order pronounced on 19.10.2020
Order released on 26.10.2020

Coram:

SHRI B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SHRI NARENDER KUMAR BHOLA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the RP: -	Mr. Ramji Srinivasan, Sr. Adv. with Ms. Pooja Mahajan, Ms. Mohana N., Mr. Savar Mahajan, & Ms. Avni Srivastava, Advs.
For the CoC:-	Mr. Ankur Mittal, Ms. Jasveen Kaur & Ms. Meera Murali, Advs.
For the Resolution Applicant:-	Dr. Abhishek Mann Singhvi, Sr. Adv. & Mr. Abhinav Vashisht, Sr. Adv. with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Ruchi Choudhary, Ms. Madhavi Khanna, & Ms. Akshita Sachdeva, Advs.
For the Respondent:-	Mr. Samudra Sarangi, Ms. Srishti Khare, Advs. Mr. Rajiv Aneja, Mr. Mohit Gupta, Advs. for R-4 & 5. Mr. K. Datta, Ms. Anusha Nagarajan, Mr. Rajeev Aggarwal, Ms. Mehak Khurana, Ms. Apurva Bhardwaj, & Mr. Himanshu Singh, Advs. for R-1 & 2 Mr. Anand Chibber, Sr. Adv. with Mr. Nitin Kaushal, Mr. Ajay Kumar, & Mr. Himanshu Singh, Advs. Mr. Varun K. Chopra, Mr. Gurtejpal Singh, Mr. Shibham Sharma, Advs. for Gail Ltd. Mr. Abhishek Kumar, Adv. for CA-1090/19 Mr. Kabil Sibal, Sr. Adv. & Mr. Sudhir Makkar, Sr. Adv. with Mr. Vijayendra Pratap Singh, Ms. Anindita Roychowdhury, Ms. Vatsala Rai, Mr. Paresh Lal & Mr. Bharat Makkar, Advs. For CA-2875/2020

COMMON ORDER

Per B S V PRAKASH KUMAR, ACTING PRESIDENT

It's a common order dealing with Resolution Plan and objections raised over the Resolution Plan placed for approval under Sec. 31 of the Insolvency and Bankruptcy Code.

CA-925/2018, CA-1154/2018 & CA-1157/2018

2. Dena Bank (now merged with Bank of Baroda) filed CA-925/2018 for setting aside the decision of the RP rejecting the claim of Dena Bank stating that it is not a Financial Debt, and Andhra Bank (now merged with Union Bank of India) filed CA-1154/2018 for setting aside the decision of RP rejecting the Claim of Andhra Bank stating that it is not a Financial Debt.

3. The case of Dena Bank and Andhra Bank is, that their claims are based on a term loan extended by a consortium of Banks - Dena Bank, Andhra Bank, Central Bank of India and Corporation Bank - to ACCIL Auto Steels Private Limited, sister concern of the Corporate Debtor (herein after called as sister concern). As a guarantee to the loan given to its sister concern, for the Corporate Debtor has created mortgages over its properties i.e., Plot No.6 and 13, Industrial Estate, Bawal, and Haryana in favour of IL & FS Trust Company Limited as the Security Trust of the Consortium of Banks by way of deposit of Title Deeds vide Memorandum of Entry dated 27.06.2013 executed by the Corporate Debtor recording mortgage of the said properties, the Applicant Banks have filed these applications assailing the RP rejecting their claims by the RP.

4. Apart from the aforesaid Banks, one Mr. Vikas Aggarwal, Promoter of the Corporate Debtor Company has filed an Intervention Application (CA-1157/2018) in CA-925/2018 filed by Dena Bank for a declaration that these Banks do not qualify as Financial Creditors of the Corporate Debtor and for a consequential direction that the status of the mortgage of the properties be determined and clarified by the RP, before RP takes further steps in relation to the Resolution Plan of the Corporate Debtor and more particularly before submissions over the Resolution.

5. The point for determination hinges on the RP rejecting (mail dated 17.08.2018) the claim of Dena Bank on the premise that this claim does not fall within the ambit of any of the clauses of Sec. 5 (8) of the Code, including clause (i) for the reason that this Corporate Debtor has not executed any guarantee deed except creating mortgage in favour of the creditor by deposit of its title deeds. To say this proposition, the RP invited this Bench to the attention of an order passed by Allahabad NCLT in a case in between ***ICCI Bank vs. Mr Anuj Jain Interim Resolution Professional for JP Infratech Limited (CA 81/2018 in CP 77/2017 dated 09.05.2018)*** stating that if in a given transaction time value for money is not incorporated, claim cannot be defined as financial debt, so does this claim because it is only an equitable mortgage not supported by return along with time value for money and not supported by consideration.

6. However, notwithstanding the objections raised by the RP, the Resolution Applicant having categorically provided in the Resolution Plan that the mortgage of Plot No.6 and 13 admeasuring 18,900sq mts., Industrial Estate, Bawal, Haryana in favour of the Banks will not extinguish

and it will continue in favour of Vistra ITCL (earlier know as IL & FS Trust Company Ltd), Security Trustee (holding for the benefit of Consortium) even after the Plan is approved by this Adjudicating Authority, the interest of Applicant Banks stands protected with respect to their rights over the said property. This has been reiterated under the head of **"the excluded rights"** in the Resolution Plan approved by the CoC. The Resolution Plan Applicant has further stated that the action of the RP in unreservedly rejecting the claim of the Banks is erroneous.

7. In the backdrop of the provision placed in the Resolution Plan with regard to the Security created in favour of the Banks, we are of the view, now it does not warrant this Bench to decide as to whether or not the Banks claims are Financial Debts because the liability of the Corporate Debtor in favour of the Banks against the property has been recognized and admitted by the Resolution Applicant in the Resolution Plan filed for the approval.

8. When the provision in the Resolution Plan is notified to the Bankers, for they have raised no objection to the same, we hereby accordingly **disposed of** these two applications.

9. As to **CA-1157/2018**, the argument of the promoter director Counsel is, Dena Bank and Andhra Bank are not creditors of the Corporate Debtor. The Corporate Debtor does not owe any amount to these Banks, nor does it stand as guarantor for the loan facilities extended to its subsidiary, AASPL. In spite of it, the corporate debtor mortgaged its assets to the Creditor Banks.

10. For no guarantee being furnished by the corporate debtor along with creation of mortgage in favour of Dena Bank, the Counsel says, following the

principal laid down by Hon'ble Supreme Court in ***Anuj Jain Interim Resolution Professional for JP Infratech Limited vs Axis Bank Limited & Others (SCC Online SC 237)*** **holding that unless money is disbursed against the consideration for time value of money** (TVM) as defined u/s 5(8) of the Code, the claim of these Bankers cannot be considered as financial debt.

11. Against which, the Bank Counsel vehemently opposed the argument of the Promoter Director Counsel saying that these Bankers granted loan facilities looking at the security given by the Corporate Debtor, not by looking at the net worth of its subsidiary.

12. Here is the Applicant, continued as director of the Corporate Debtor and part of the promoter family. The Corporate Debtor is the alter ego of the family of this Applicant. The principal debtor is the subsidiary and the Special Purpose Vehicle (SPV) of this Corporate Debtor.

13. Indeed, this Corporate Debtor leased out the property involved in the mortgage to the principal debtor. Over and above, the Corporate Debtor created mortgage over the same property in consideration to the loan granted to its subsidiary i.e. the principal debtor.

14. Company can be said as an artificial person and an independent entity to the extent of limited liability, but the fact of the matter is, all companies run by living persons, therefore the acts committed by the companies cannot be said as solely done by the company.

15. To avail this loan, not only the Corporate Debtor Company, but also the Promoter Directors gave undertaking that they remain sureties to the loan granted by the creditors to the principal debtor. What normally banks look at in granting loans is the value of the assets mortgaged to it by the principal debtor and the guarantors/sureties. In this case, both the corporate debtor and the directors provided guarantee and they mortgaged their assets as security.

16. At the time of taking loan, all of them including corporate debtor extended their undertakings to ensure ₹308Crore loan was released to the corporate debtor's subsidy, now when time comes to pay it, all kinds of defences coming forth to frustrate the guarantees given by the directors and the corporate debtor.

17. The moot point in the argument of the applicant counsel is the mortgage created by the corporate debtor is not supported by consideration, because money has not been disbursed to the corporate debtor therefore the debt will not become financial debt.

18. Standing as surety and mortgaging its assets in favour of a creditor for the benefit done to a third party (principal debtor) is an age old doctrine. Ever since The Indian Contract Act 1872 has come into existence, it has become mandate upon the contracting parties, till date this principle is not turned down. The reasons are simple – 1) Consideration could be anything done by a promisee, if promisor made a promise against that consideration, it is a valid consideration, it need not be done for the promisor. This principle has not been altered in IBC; moreover IBC recognised it as

financial debt. 2) Over and above, The Indian Contract Act permits the creditor to proceed against the surety in the event principal debtor failed to repay the Creditor.

19. In the application filed by Dena Bank, it is evident that the sister concern of this corporate debtor availed loan facility of ₹308Crore from the Consortium of Banks, in pursuance thereof, its Sister Concern has executed Rupee Term Loan Agreement on 26.06.2013 in favour of Andhra Bank, Central Bank of India, Corporation Bank and Dena Bank for availing a loan of ₹308Crore, in consideration of it, this corporate debtor (as executant/mortgagor) contemporaneously on 26.06.2013 gave an undertaking in writing along with its subsidiary (as borrower) stating as follows:

> *(D)* ***One of the terms and conditions of the Common Loan Agreement, is that the repayment of the said Facility together with interest*** *at the rates payable thereon, penal interest, compound interest, liquidated damages, management fees, commission, remuneration, annual service charges, costs, charges and expenses and other moneys payable to the Lenders and/or their nominees,* ***shall be secured by way of security on first paripassu basis interse between the Lenders by deposit of title deeds of the immovable property belonging to the Mortgagor.***
>
> *(E) In view of the above, the Mortgagor has agreed to create a common security on first paripassu basis interse among the Lenders over the Mortgaged Property by way of mortgage by way of deposit of title deeds in favour of ITCL for and on behalf of the Lenders, who was*

appointed as Security Trustee vide Security Trustee Agreement dated 26.06.2013.

(F) ***The Executant has represented that it has obtained all the required approvals applicable on date for the Mortgaged Properties to be used as part of the Project land,*** *except for a No Objection Certificate for Creation of Mortgage of Plot No. 6 & 13, Sector-6, Industrial Growth Centre, Bawal, and Haryana from HSIIDC. With the permission of all the Lenders of the consortium, Mortgagors has been permitted a time for the submission of application and obtaining mortgage permission from HSIIDC and subject to that mortgage is accepted to be created.* ***Therefore, Facility Agreement and Security Trustee have called upon the borrower and Mortgagor to furnish undertaking thereof.***

20. *Now, therefore,* ***in consideration of the foregoing and other good and valuable consideration,*** *the receipt and adequacy of which are hereby expressly acknowledged, and the Mortgagor and the Borrower hereto hereby agree and undertake:-*

1. *That the No Objection Certificate Mortgage Permission for Creation of Mortgage of Plot No. 6 & 13, Sector 6, Industrial Growth Centre, Bawal, Haryana from HSIIDC* ***shall be obtained within 15 days of the signing of this Undertaking*** *and shall be deposited with the Security Trustee on or before the expiry of such period so as to perfect the security in favour of the Lenders.*

2. *That all the lenders of M/s. Asian Colour Coated Ispat Ltd. shall be intimated the regarding the creation of mortgage by Mortgagor for securing the facilities availed by the Borrower.*

21. These clauses of the undertaking given by the Corporate Debtor discloses –

1. It has been mentioned in the Common Loan Agreement that the repayment shall be along with interest at the rates payable thereon,

2. that repayment as per the term loan is secured by way of security on first pari-passu basis inter se between the lenders by the deposit of Title Deed of the immovable property belonging to the corporate debtor,

3. That the Corporate Debtor has agreed to create common security by way of mortgage by deposit of title deeds.

4. In the clause started NOW, THEREFORE, it is revealed that security has been given upon receipt of valuable consideration from the lenders, and the corporate debtor and the borrower undertook to deposit title deeds after taking NO Objection Certificate from HSIIDC.

5. If we see the legal meaning of the word "Undertaking", it is a written promise offered as security for the performance of a particular act required by a legal action. An undertaking with adequate security is a bond.

6. As we all know borrowing and giving surety entails three parties, one creditor, principal debtor and surety. In this case all three parties are there.

7, It is not the case of the promoter director that these transaction documents are not executed.

22. Even in the memorandum of entry recording creation of mortgage by deposit of Title Deed, the corporate debtor has categorically mentioned that the loan granted to this subsidiary is secured by way of common security on first pari-passu by the deposit of the Title Deed of the immovable property as described in Schedule 2 of this memorandum. This very applicant delivered the Title Deed to the lenders on creation of common security for the loan provided to its subsidiary/sister concern. In the declaration given by the promoter director on behalf of the corporate debtor, it was stated that the corporate debtor has mortgaged the assets towards the consideration of loan facility provided by the lenders to its subsidiary company. It was simultaneously entered into ROC records on filing Form 8 and charge has been created over the said property. None of the facts have been denied by the applicant.

23. **Now, the point for determination is as to whether or not the obligation against the corporate debtor is a financial debt.**

The facts in the present case are, (1) the borrower/principal debtor in the loan transaction is a subsidiary to the corporate debtor to run a business

interconnected with the business of the corporate debtor, (2) this loan transaction as well as creation of mortgage occurred in the year 2013 i.e. five year before Insolvency Proceedings were initiated against the corporate debtor.(3) The corporate debtor along with its subsidiary executed an undertaking that the repayment facility with interest as stated in the loan agreement is secured by way of this mortgage. By running through all these transaction documents, it is evident that this asset has been given as security to the loan granted to its subsidiary.

24. Whereas the facts of Jaypee Infratech Limited case are in contrast to the facts of the present case, in Jaypee case, (1) the principal debtor is holding company, mortgage was created by the subsidiary/corporate debtor against the loan given to the holding company, (2) important point is, the mortgage was created within the look back period as envisaged under Section 43 of the Code, (3) the court declared creation of mortgage in favour of the creditors is avoidable transaction, hence hit by section 43 of the Code, (4) mortgage was not considered as financial debt for money was not disbursed against the consideration for the time value of the money, therefore on that premise it was decided that such mortgage should not be given effect to. When already transaction itself is hit by section 43, it is obvious that there would not be any consideration against the promise (mortgage) made by JIL.

25. In the present case, this transaction has not fallen within the look back period as envisaged under Section 43 of the Code, it is not the case that it is an avoidable transaction, the transaction documents clearly reflects that the consideration for creating this mortgage is the loan granted to its

subsidiary to do a business connected to the corporate debtor. In this case holding company has given security to the loan granted to its subsidiary, but in the Jaypee case, it is converse to the situation existing in this case.

26. Now the facts available are already mentioned, the rest is to examine the section of law applicable to the facts. The promoter director says it is not a guarantee. Is it correct that the corporate debtor is not a surety?

27. Let us examine what is meant by consideration in Indian Contract Act. It is clear in the definition of consideration (Clause (d) of Section-2 of the Contract Act), *when the* ***desire of the promisor****, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.*

28. By giving a conscious reading, it is evident that consideration need not be something done directly to the promisor by the promisee, it could be anything done by the promisee to any other person at the desire of the promisor. If the promisor desire is to promise for something done for somebody else, it will become consideration for the promise he makes to the promisee.

29. It is more explicit in Chapter VIII of Indian Contract Act. When any issue with regard to surety sets in, the law springs into mind is Chapter VIII of the Indian Contract Act (Of Indemnity and Guarantee), the major variance in between the indemnity and guarantee is, in indemnity, there will be only

two parties, whereas in the case of guarantee, there will be three parties with promises either jointly or independently, indemnity covers the loss in case caused to the promisee, whereas in guarantee covers the creditor in the event default committed by the principal debtor, in the case of indemnity, liability arises only when contingency arises, **whereas in the case of guarantee, liability arises at the time promise made against the consideration received by the principal debtor.**

30. On reading defining section 126 of the Contract Act, it is a contract to perform the promise, or discharge the liability of a third person in case of his default. It may be oral or written. It is a sheer promise that binds the surety, in the phraseology of this section, the person making promise is called as surety, contract in between the creditor and the surety is called guarantee. Whether this surety gives something as security or not is secondary. There is no template to say that contract of guarantee shall be with specified terms and conditions. This liability of surety is envisaged as coextensive with that of the principal debtor in section 128 of the Contract Act, once guarantee is given, surety is estopped from saying the creditor shall first proceed against the principal debtor, then against the surety, only criteria is occurrence of default by the principal debtor. The undertaking given by the corporate debtor clearly indicates the loan provided by the creditor is secured by the mortgage created by the surety. That has been done. As I said, the surety need not say in many words – what all it needs is a promise to the creditor that the surety would discharge the liability in case principal debtor defaulted in repaying. All these rights emanate from the contracts; it is not

by operation of law creditor proceeds against the guarantor. There could be variance in writing; it makes no difference as long as intention is able to be culled out from the agreement. Default is implicit once repayment is not made on demand or defaulted repayment on terms. Here the guarantor has given blanket undertaking that loan and other incidental charges, including interest are secured by the security given by the corporate debtor. In any event, after vividly examining every limb of the provisions relevant now, we don't think any doubt is left to say the corporate debtor has given undertaking to pay the loan along with interest in the event of default. As to consideration, for section 127 of the Contract Act having stated that the something done for the benefit of the principal debtor is sufficient consideration to the surety for giving the guarantee, it cannot be said or construed that the liability created upon the guarantor is devoid of consideration. We don't know what the value of the asset is, but the consideration to the guarantee is receipt of ₹308Crore by the principal debtor.

31. In the back drop of the facts set against Contract Act, could it be said that the liability against the corporate debtor will not become financial debt? Let us see whether it is correct or not.

32. We cannot say the meaning of the consideration in IBC is other than the meaning given in Contract Act. If at all, a separate definition is given under IBC, beyond the definition that is given under Contract Act, then we are bound to follow such definition, in this Code, consideration has not been defined, therefore wherever the word consideration has been used, the meaning is to be construed from Indian Contract Act.

33. As we know first **claim** comes either before this Authority or the RP/liquidator, then the respective authority will examine whether it is a **debt** or not. During this process we have come across two words (1) **"claim"** and (2) **"debt",** both are defined in the Code, which are as follows:

Section 3(6) **"claim" means-**

(a) **a right to payment**, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) **right to remedy** for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, un-matured, disputed, undisputed, secured or unsecured;

Section 3(11) **"debt" means a liability or obligation in respect of a claim** which is **due from any person** and includes a financial debt and operational debt;

34. In short, claim denotes either right to payment or right to remedy for breach of contract. The phrase "right to payment" EMANATES from obligation or liability agreed upon. If it is said as 'right to repayment', then it could be understood, the obligation is for something directly paid to it. But it has only been said as right to payment. Right to payment arises from the agreement entered between the parties; it need not be always disbursal of

money to the person promising to pay. As we all know right to payment will be a liability or obligation against a person promised to pay.

35. When payment has not been done as agreed upon, then claim will become debt, if liability or obligation is in respect of a claim **which is due from any person. So in a nut shell, debt means simple failure to perform obligation or failure to discharge liability.**

36. At the time of framing of definition for debt under IBC, it has been defined that a liability or an obligation in respect of a claim which **is due from any person**, it need not be due from the Corporate Debtor. If a promise is made towards the obligation of somebody else, it is to be treated as claim against the person given obligation. To make a claim, the condition to be fulfilled is, there shall be a liability and it shall be due and payable. If liability is upon the Corporate Debtor to discharge, if such obligation is valid under law, it will tantamount to debt as stated in IBC. As per the definition of debt, obligation shall be there in respect of a claim which is due from any person, not necessarily from the corporate debtor. This definition of debt given in IBC covers both financial debt as well as operational debt. This classification is only species to genesis i.e., debt.

37. Let us take an illustration, "A" paid some x money to "B" at the desire of "C", for which "C" in turn promised he would discharge that obligation in the event of default. Once promise has been made, whether "C" ethically or legally thereafter can say that I need not discharge the obligation because money has been given to "B"? If so, what is the sanctity to the promises between the parties? Can "A" remain remediless against "C"? How the

obligation will be different when it comes to insolvency proceedings. What is the law available negating the principles of the Contract Act? Is it that insolvent company will be free from the obligation? The simple point is consideration received by the principal debtor will become consideration to the promise made by the corporate debtor.

38. To see whether the facts are in sync with Section 5(8) of the Code, we must break Section 5 (8), especially with definition part which is as follows:

Section 5 (8): "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(h) .....

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub clauses (a) to (h) of this clause;

39. Let us break up defining sub clause:

"Financial debt"/ means/ a debt along with interest/, if any, which/ is disbursed against the consideration / for the time value of money/ and includes –

40. Since the financial debt is defined and there being a mandate that it "means" as mentioned in this clause, we cannot go out of the frame to understand it, while doing so, we should read the words of this clause by taking other definitions to the words given in the Code, and the meaning we understand shall be contextual to the phraseology of the clause, not otherwise. Out of this definition financial debt, we have already examined two definitions, one the word "debt" from IBC and the word "consideration" from Indian Contract Act.

41. When it comes to financial debt definition, an addition has come to debt – that is interest. So interest is implicit in financial debt, at least in the general definition given in the beginning. The clause ***financial debt means debt along with interest,*** this clause does not require any further extension to understand the meaning because it is a complete sentence. When debt is along with interest, to my little knowledge, buying a debt to pay interest periodically is nothing but time value for money.

42. Then next word that comes is "if any" in between two commas. The word 'if' is a conjunction, but when the word 'if' comes along with word 'any', the word 'any' being a determiner with noun, it is normally used in negative sentences. Here the noun can be construed as implicit, which is debt. If the noun implicit is conceived as debt after the word 'any', second clause will be independent clause giving complete meaning such as debt disbursed against

consideration for time value of money. In some of the instruments such as insurance instruments, etc., interest component will not be there, but time value for money will be inbuilt and it will get multiplied over a period of time. This clause is nothing but to include other debts if any having time value for money. The word 'any' normally denotes unlikelihood; therefore the legislature intention could be if any other debt is there having time value of money, it would also come under the definition of financial debt.

43. The corporate debtor takes obligation upon itself for myriad reasons, may be for the benefit of itself, or its subsidies, or group companies, or for some other reason, our only job is to see whether it is reflecting in the records of the corporate debtor or not, but not to dig in to find out whether money actually come into the company or not. We have to go by the promises exchanged between them and to see what character underlying transaction has.

44. Here if whole some reading is given to this definition of financial debt, ***debt along with interest and any other debt disbursed against consideration for TMV.*** No doubt there shall be lawful consideration, without lawful consideration, agreement is void. Consideration could be either money or some action done for the benefit of third party. In this case, the consideration being money given to the principal debtor repayable along with interest, we are not dealing with other debts. **In this definition, it has not been stated that the obligation shall be for the money given to the corporate debtor. Therefore if passing of consideration is not stated between whom to whom, we cannot assume that it shall be disbursed to**

the corporate debtor alone. When the promise made to the loan granted to the principal debtor is valid consideration, when it has not been mentioned that disbursal shall be to the corporate debtor, the meaning of the consideration shall not be read as different from the definition given in the Contract Act. It is also true when the loan agreement with the principal debtor encompassed interest clause, it cannot be construed that guarantor obligation is only to pay principal, not interest. It is obvious that the guarantor has to pay principal as well as interest; therefore in the obligation against the guarantor time value for money is implicit. In guarantee, loan agreement is for time value of money, by loan agreement, money is disbursed to the principal debtor for time value of money, so promise made by the surety is to pay the debt along with interest in the event of default, so the present transaction is very much in sync with Section 5(8) definition clause.

45. Besides this, otherwise also this transaction is financial debt. If sub clause (i) is read, it is crystal clear if the guarantee is given in relation to a borrowing with a promise by third party to repay along with interest or covered under any sub clause from (a) to (h), it will become financial debt. In sub clause (a) money borrowed against the payment of interest, here principal debtor borrowed to repay along with interest. Therefore the guarantee, from all corners, is a liability falling within the definition of financial debt.

46. In view thereof, the proposition laid under Anuj Jain case supra cannot be read as a proposition holding that disbursal of money for the

benefit of Principal debtor is not a valid consideration, because in the said case, it has been said that the mortgage is hit by Section 43, over and above, it has also been laid down that there is no consideration to attract the definition of financial debt based on avoidance transaction. When it is declared as void transaction, then it is to be deemed as transaction devoid of consideration. I believe that the promoter director perhaps failed to read the ratio laid down in Jaypee Infratech case in the light of the facts of that case, therefore the ratio decided in Anuj Jain on the premise no consideration is not applicable to the present case.

47. In ***Pioneer Urban Land Infrastructure Limited and Another vs. Union of India ((2019) 8 SCC 416 – Three Judge Bench) in para no 81,*** it has been held even if any definition is construed as exhaustive, legislature is not precluded from inserting clauses including other categories having different characteristics. Of course, the clauses in addition to the definition being included making it manifestly clear what each clause is, their meaning cannot be stultified reading definition part into each and every clause. Definition is also not different; the only problem is perception of the promoter director.

48. As we all know Insolvency and Bankruptcy Code has come into existence by consolidation and amendment of laws for reorganisation and insolvency resolution of Corporate Persons, Partnership Firm and Individuals in a time bound manner for maximisation of assets of such person, to promote entrepreneurship, availability of credit and balance the

interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

49. This is only a guiding principle that is reflecting the concepts for which this Code has come into existence. We all know that preamble is not the body of statute. It only gives overall picture of the enactment.

50. We shall not forget that consolidation of rehabilitation under SICA, insolvency under Presidential Terms Insolvency Act and winding up of companies under Companies Act 1956/2013 has happened so as to have a compact module in a time bound manner for maximisation of value of the assets of such persons.

51. Here the point to be seen is, the concept of resolution in a time bound manner is no doubt for maximisation of the assets of companies or individuals as the case may be. But what for has this principle been brought in? The apparent reason is, rehabilitation through SICA failed, likewise winding up under Companies Act, used to run into decades letting the assets decayed into zero value. But this time bound maximisation is to promote entrepreneurship, availability of credit and balance of the interest of all the stakeholders. We must understand that entrepreneurship is a business activity, it does not specify about the corporate debtor alone. The consideration how the CoC shall go about a corporate debtor is dependent upon the business considerations tabled before it.

52. If any over-emphasis is made on any of these three limbs, to promote (1) entrepreneurship, (2) availability of credit and (3) balance the interests of

all the stakeholders including alteration in the order of priority of payment of Government dues, it is inevitable that remaining two limbs will get into imbalance.

53. This IBC sole aim is for time bound maximisation for overall growth of entrepreneurship, credit availability and other stakeholders of the company. Since creditors (financial as well as operational) interest created by agreements between parties, is to be considered as sacrosanct and insulated from all vagaries, leave of how much they get, at least their rights shall not be left unrecognised. The Indian Contract Act governs the definition of consideration, not IBC. It will become a chain reaction, if meaning of consideration is changed saying unless money is disbursed to the corporate debtor, it will make the entire code upside down, though the mortgagee right is far superior than personal right, he will not have any say in the CoC because he is not shown as member of the CoC, he cannot even be a dissenting Financial Creditor u/s 30 (2) of the Code. Where will the Mortgagee/creditor stand during resolution? May be his right could be protected in liquidation, when his right is right in liquidation, how could it be different when it comes to CIRP? Secured creditor and unsecured creditor could be called as subdivision to financial debt. For this reason only, in section 53 (1) (d), it has been stated that financial debts owed to unsecured creditors. Moreover tomorrow onwards Banks cannot grant loans by taking guarantees in. Ultimately this approach will become behemoth to the economy of the country; especially it will become a disaster to the domestic credit market.

54. The Code has already provided enough provisions as how to maximise the value of the assets within the time lines given there and how to protect the value of the Creditors and how to protect the remaining stakeholders of the company in the body of the enactment.

55. If this Code in detail looked into, it has carved out two baskets of debts - Operational Debt and Financial Debt. It is nowhere said that another basket is there to accommodate other debts. Therefore, the only effort that can harmonise the interest of the Creditors is, to ensure that the debt of each and every Creditor of the company is put in either of these two baskets. Instead of opening Pandora Box by creating another basket and put it in suspended animation, why not try to ensure each debt is accommodated in either of the baskets. Doctrine of exclusion cannot be called as constructive interpretation. Because, all Creditors provide different kinds of facilities, may be finance, may be goods, may be some long time assets, and may be services. But all provide some kind of value to the company hoping that they also could do business, this is for a mutual benefit. In my little knowledge, if any of these Creditors are deprived of availing the remedy under this Code which is very much available to others, it will lead to unfairness and arbitrariness. We all know remedies could be qualified such as operational debts and financial debts, but law is not aware of altogether forbidding remedy, which is open to other creditors served the debtor as they served.

56. Harmonisation is hall mark of justice system. As to classification between operational debt and financial debt, remedy is available to both. For there being rationality in making such classification, it cannot be called as

arbitrary. But if a creditor is altogether left out saying he will not fall in the category of financial creditor or in the category of operation creditor, it will certainly amount to arbitrariness.

57. We all know rounding concept. In rounding concept, if any decimal portion is there when the decimal portion is reaching to become one, it is considered as one. If the decimal portion is less than half, it is rounded off as zero. Every debt of the company shall invariably fall either under operational debt or financial debt. If you start classifying, and varying even on minor variation, innumerable classes will come into picture, it all depends upon our perception. How many types of debts will be there in the company? Only two, one is for operational purpose or debts emerge during trading, another is long term obligations, may be capital based, may be finance related.

58. May be some people running companies do some dubious things, we all know open several companies, start showing inter corporate loans, many ways of taking loans, but how could it be said that creditor shall suffer for the loan granted as per norms? It is a deeming fiction company has taken loan or goods or services for its business purpose because company does business for profit. Creditor will only look at the security provided by the borrower, either by it or through sureties. Every transaction the corporate debtor enters into, will obviously have commercial effect of borrowing, for that reason only in the catch-all clause (f) definition of Financial debt, it speaks of commercial borrowing, not commercial lending. Therefore, every debt payable by the corporate debtor shall be seen as having commercial

effect of borrowing. Of course, the debts relating to goods and services and Government dues towards taxes and other service charges, will fall under operational debts. If and when something borrowed from a creditor by the Corporate Debtor, it has to be deemed that such transaction has commercial effect of borrowing, notwithstanding the fact any interest clause is present or not, because Interest Act says courts has discretion to charge 18% interest upon the borrowing. When it is deemed corporate debtor acts for earning profit, could it be said that the corporate debtor can earn profit out of it, but the corporate debtor will not pay interest over the money borrowed? Could it be said that when contractual arrangement is not there, the claimant is not entitled to invoke the law available? If we see the Rule of Evidence, when main transaction is admitted, burden always shifts upon the opposite party to rebut the charge. If we forget the cardinal principle of order of proof, consistency and predictability will be lost.

59. For the reasons afore stated, there is no merit in the application filed by the promoter director therefore, this application is hereby **dismissed as misconceived.**

CA-1237/2019

60. It is an application filed by an Operational Creditor namely GAIL India Limited claiming ₹4,376.49Crore plus applicable interest against the Corporate Debtor in relation to supplying gas to the Corporate Debtor in two Gas Sale Agreements (GSA) executed between GAIL and the Corporate Debtor on 18.09.2014 and 12.02.2016 respectively.

61. On perusal of this application, it appears that there is an Article 14.1 in the agreement stating that the Corporate Debtor shall be liable to pay to GAIL an amount towards take or pay obligation which is 90% of the existing annual contract quantity. For the sake of clarity, Article 14.1 of the Agreement is hereby reproduced below:

> *If, after the Commencement Date, the Buyer shall have taken a quantity of Gas (after accounting for an adjustments pursuant to Article 13.11) for any Contract Year, that is less than, the AACQ for such contract year, then the Buyer shall pay to the Seller an amount for such Gas not taken by Buyer calculated as follows (it being understood that the Buyer shall not be obligated to pay for any such Gas not taken if such failure by the Buyer to take arises from a non-performance by the Seller of its obligations under this Agreement or which the Seller has failed to tender for delivery at the Delivery Point pursuant to this Agreement unless such failure of the Seller arises due to the circumstances under Articles 8.2€, or Article 9.1©, (for the avoidance of doubt the Pay for if Note taken (as defined below) obligations of Buyer shall become effective, and shall apply in respect of Gas scheduled for delivery on and after all commencement Date):*

62. The argument of GAIL is, since this Agreements period runs from the date of agreement till the year 2038 and 2028, the claim of the Applicant "take or pay liability" against the Corporate Debtor is calculated from due date till the end of the agreement i.e. 2038 and 2028 respectively and made a claim of ₹4,376.49Crore.

63. GAIL says that its claim satisfies the definition of claim u/s 3(6) of IBC and "debt" u/s 3(11) of IBC r/w Regulation 7 (2) (b) (i) of IBBI, for it is settled law that claim includes matured, un-matured, disputed and undisputed

claims. GAIL has expressed its predicament that it puts in huge investments to ensure availability of gas from USA, in the event the gas imported from other countries is not used by the consumer as agreed; GAIL would incur huge losses due to its contractual commitments for supply of gas till the end of the basic term.

64. To substantiate that the claim need not be arrears or due as on the date of making claim, GAIL counsel has relied upon the following two judgments, which are as follows:-

> *"Hon'ble NCLAT* ***in Andhra Bank Vs. M/s. F.M. Hammerle Textile Ltd. CA (AT) (Insolvency) No.61/2018*** *in para 9 has observed that "it is not necessary that all the claims as are submitted by the Creditor should be a claim mature on the date of initiation of resolution process/admission, even in respect of debt, which is due in future on its maturity, the "Financial Creditor" or "Operational Creditor" or "Secured Creditor" or "Unsecured Creditor" can file such claim.*
>
> *Further Hon'ble NCLAT in Export Import Bank of India Vs. Resolution Professional JEKPL, Pvt Ltd. CA (AT) (Insolvency) No. 304/2017 in para 55 has observed that "Maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims. The matter can be looked from another angle. It is only in case of debt and default a financial creditor or operational creditor may file applications under section 7 or 9. The 'Corporate Applicant' has also right to file application under section 10 for initiation of Corporate Insolvency Resolution Process against itself, if it has defaulted to pay the 'debt'. It does not mean that the persons whose debt has not been matured cannot file claim. The 'Financial Creditors' or 'Operational Creditors' or 'secured or unsecured creditors' all are entitled to file claim".*

65. To canvass that maturity of claim or default of debt is not the guiding factor for collating or updating the claim, GAIL has also cited the following judgments, which are as follows:-

> *"Hon'ble Supreme Court held that in* ***Swiss Ribbons Pvt. Ltd. & Anr, vs. Union of India & Ors, W.P (c) 99/2018*** *"Resolution Professional"*

has no adjudicatory power. The 'Resolution Professional' has to vet and verify the claims made and ultimately determine the amount of each claim".

Hon'ble Supreme Court held that in ***Essar Steel India Limited vs. Satish Kumar Gupta & Ors, Civil Appeal 8766-67/2019****, and "the role of the RP is not adjudicatory but administrative".*

Further Hon'ble NCLAT in Mr. ***S.Rajendran, Resolution Professional of PRC International Hotels Private Limited vs. Jonathan Mouralidarane, Company Appeal (AT) (Insolvency) No. 1018/2019*** *has held that Resolution Professional has no jurisdiction to determine the claim as pleaded in the Appeal. He could have only "collated" the claim, based on evidence and the record of the Corporate Debtor or as filed by Financial Creditor".*

66. In view thereof, GAIL says that it has sought for admission of its claim of ₹4,376.49Crore against the Corporate Debtor.

67. As against this, the RP Senior Counsel Mr Ramji Srinivasan submits that the aforesaid claim based on "take or pay obligation up to 2038/2028" is not read by GAIL in the perspective that has been mentioned in the agreement. **If Article 14 is read carefully, it is an admitted fact that pay and take clause is applicable only to the current calendar year but not to the entire period as mentioned by GAIL. On reading the clause, we have noticed that Take and Pay Liability Clause is restricted to calendar year, not for the entire agreement period as canvassed by the GAIL Counsel.**

68. By reading the Article and making calculation of the calendar year days of the respective year until before commencement of CIRP, the payment left to be paid to GAIL has come to ₹59.49Crore; therefore the RP has admitted ₹59.49Crore as its claim out of ₹4,376.49Crore claimed by GAIL.

69. In the back drop of these facts, when pay and take liability mandate is applicable only to the current calendar year and the RP having calculated the calendar year days until before commencement of CIRP, we are of the view that the RP has rightly calculated. It is not the case of this applicant that the period for which calculation made is incorrect. And it is not the case of GAIL that during the said calendar year, GAIL has supplied gas more than the value that has been admitted by the RP. For the days passed during the calendar year being calculated and the claim being admitted, GAIL claiming ₹4,376.49 till the years 2038 and 2028 (for whole contract period) is preposterous, therefore the same is hereby **rejected** save and except to the extent that has been admitted by the RP.

CA-2508/2019

70. It is an application filed by the Operational Creditor Berger Becker Coatings Private Limited claiming interest portion of ₹1.83Crore over and above the value of supply of goods ₹6.11Crore admitted by the RP on the premise that the Applicant is entitled for the interest component because it has been inbuilt in the invoice placed upon the Corporate Debtor stating that interest @20% p.a. shall be paid in the event payment has not been made within the credit period of 30 days from the date of invoice.

71. As against this, the RP counsel submits that the Corporate Debtor placed a purchase order upon the Applicant wherein it was not provided for any payment of interest and further stated that certain payments already made to the Applicant by the Corporate Debtor and certain Debit Notes issued by the Corporate Debtor were not reflected in the Ledger.

72. He has further stated that he sent another mail 13.02.2019 that an amount of ₹6.11Crore is verifiable and admissible out of the total claim amount of ₹7.94Crore, therefore requesting the Applicant to furnish further proof to substantiate its claim, failing which, the RP would issue that the admissible claim is acceptable to the Applicant.

73. As to the claim of interest on the principle amount @ 20% reflecting in the invoices, the RP says that this interest is only mentioned in the unilateral invoice issued by the Applicant as such RP is unable to consider the said request as part of the verifiable claim of the Applicant.

74. To substantiate this argument, the RP has relied upon the following judgment, which is as follows:-

> *"Hon'ble Apex Court in Committee of Creditors of Essar Steel India Limited through Authorized Signatory vs. Satish Kumar Gupta & Ors., Civil Appeal No. 8766 of 2019, wherein it has been recognized that the financial creditors and operational creditors constitute different classes of creditors and therefore may be given different treatment in a resolution plan. Thus, the differential treatment given to the classes of the creditors is not violative of the provision of the Code or any law for the time being inforce. Further, it has also been noted by the Hon'ble Apex Court that the ultimate discretion as to what is to paid and how much is to be paid to each class or sub class of creditors is with the Committee of Creditors and the RP has no role to play in the same (Ref: Para 56 of the Essar Judgement and para II (2) of the Reply @page 6)".*

75. That providing differential treatment in the Resolution Plan for different class of the Creditors is not violative of the provisions of the Code and the ultimate discretion as to what is to be paid and how much is to be paid to each class is vested in the realm of the Committee of Creditors,

therefore, the RP submits, there is no merit in the argument of the Applicant asking interest over the principal amount.

76. For the Applicant having raised a point that RP has not supplied information, the RP has further relied upon the following judgment, which is as follows:-

> *"Hon'ble Supreme Court of India held that in judgement Vijay Kumar Jain Vs. Standard Chartered Bank and Ors., Civil Appeal No. 8430 of 2018, where it has been held that the resolution plan is confidential in nature and such plan should only be provided to the creditors who are 'participants' of the meetings of the Committee of Creditors of the CD. Since the Applicant does not qualify as a participant, the Applicant is not entitled to the resolution plan of the CD".*

77. The RP says that the Resolution Plan is confidential in nature and such plan is only provided to the Creditors who are participants of the Committee of Creditors, therefore the Applicant is not entitled to the copy of the Resolution Plan of the Corporate Debtor.

78. In the ordinary course of business relating to trading, whoever needs goods, they will place a purchase order upon the trader, responding to the same, the trader will send invoices reflecting all the conditions to be complied with including rate of interest in the event the goods are sold on credit. If at all, the purchaser has any issue with regard to the interest portion mentioned in the invoice, he has to further communicate to the trader that he is not agreeable to charging interest and from thereof he shall not proceed with that contract anymore. It is not that interest can be charged only if money is taken on credit, it is even chargeable over the credit line in supplying goods in the event of payment is not made within the credit

period. Normal practice is, trader will not charge interest if payment is made during the credit period, if the payment is not made during the credit period, Operational Creditor will charge interest over the value of goods as stated in the invoice. This argument could be taken up in the event interest component is not mentioned in the invoice. Rule position is goods sold being valued on present value with a presumption cash would be simultaneously paid, but owing to market situation, customer and buyer relation, it has become a practice to supply goods on raising invoice mentioning credit period normally for thirty days, in case payment is not made within credit period as mentioned in the invoice, interest clause mentioned in the invoice will set in.

79. In most of the operational creditor cases, especially in relation to supply goods, there won't be any formal agreement between the parties, it will be only exchange of purchase order and invoices, therefore the RP cannot say that since it has not been mentioned in the purchase order, it is not binding on the Corporate Debtor.

80. As to supply of goods, they will sell goods with some margin over the costs of the goods, if the purchaser fails to pay the same for years together, the traders instead of getting any profits, they will incur loss by supply of goods which in turn will affect the business of Operational Creditor as well. It is not that IBC is blindfolded with regard to the rights of other stakeholders other than the corporate debtor.

81. Insolvency proceeding does not mean that it shall be for the benefit of insolvent alone ignoring the rights of other stakeholders. In any event, Operational Creditor will have to receive haircut as per the proportion come

to them, if interest is also not included, it will become double whammy upon the stakeholders.

82. The concept of insolvency is, distribution of loss among all the Creditors, as to distribution of loss, it is a compromise that comes upon from the stakeholders, but it could not be extendable to say that Operational Creditors are not entitled for interest which has been invoiced in the invoice, therefore, we are of the view that since this Corporate Debtor has never uttered any disagreement with regard to entitlement of interest and that too after supply of the goods, now the RP cannot take this stand to reduce the claim of this Operational Creditor, hence, we hereby order the RP to include the interest component with the principal and accordingly make a provision to this Operational Creditor along with other Creditors.

83. In the case of ***Vijay Kumar Jain vs. Standard Chartered Bank & Ors and Committee of Creditors of Essar Steel India Limited*** through ***Authorized Signatory vs. Satish Kumar Gupta & Ors. Supra***, it speaks of commercial wisdom in approving the Resolution Plan. But as to determination of the claim of the Creditors, it has to be determined as per the figures available and the law applicable over the transaction. This part cannot be called as part of the commercial wisdom of the CoC in approving the Resolution Plan. Accordingly, this application **disposed of**.

CA-1396/2019

84. The Applicant is a sister concern (ACCIL Corporation Private Ltd – hereafter called as ACPL) of the Corporate Debtor, for this Applicant has

taken ₹300Crore term loan, this Corporate Debtor has extended corporate guarantees to the ACPL lenders. Since CIRP has been initiated against this Corporate Debtor, which executed guarantee as aforesaid, ACPL lenders, claiming as Financial Creditors, have submitted their claim on the RP for the guarantee given by the Corporate Debtor. The same has been admitted by the RP stating that they are Financial Creditor as stated under the Code.

Now the grievance of the Applicant is, the RP has wrongly admitted the claims of the two ACPL lenders namely Karur Vysya Bank Limited and Indian Overseas Bank without considering the fact of restructuring these debts owed with the approval of requisite majority of ACPL lenders by SDR Scheme of RBI on 28.09.2017.The case of the Applicant is, as these lender having neither participated in restructuring nor acceded to the same, they can't lay any claim against this ACPL.

85. It has been further stated Karur Vysya Bank has already filed insolvency proceedings against the Applicant in NCLT, Jaipur, against which the Applicant has filed a Writ Petition disputing the same before the Hon'ble High Court of Rajasthan and the same is pending till date. Therefore, the Applicant submits the claim of the Karur Vysya Bank and Indian Overseas Bank against the guarantee given by the Corporate Debtor shall not be admitted by the RP.

86. In reply, the RP submits that this Applicant has no locus to question the admission of this claim because verification of claim is within the domain of the RP. It being clear on record that Corporate Debtor is shown as Guarantor against the loans taken by the Applicant; it is the bounden duty of the Resolution Professional to admit the claim as Financial Debt.

Moreover, the Corporate Debtor is not a party to the proceedings pending before the Hon'ble High Court of Rajasthan. It is a Bank debt, whether default is made out or not, in between the Applicant and the respective Bank.

87. On perusal of the facts available, we are of the view that this Applicant's interest is no way affected by admitting the claim of the Bankers, if at all, any interest is affected, it would be the interest of the Corporate Debtor, but not the Applicant's interest. If the principal debt itself is declared as not payable, this Corporate Debtor cannot step into the shoes of the creditor in the name of subrogation. In view thereof, we have not found any merit in the contention raised by this Applicant; therefore the same is hereby **rejected**.

CA-2276/2019

88. It is an application filed by Asian Ispat FZ LLC seeking directions for removing the claims of the lenders of the Applicant from the list of Creditors of the Corporate Debtor and asking for consequent changes in the constitution of Committee of Creditors.

89. The Applicant is a related party / sister concern of the Corporate Debtor, according to the records available, the applicant has taken loan from 12 Creditors to whom the Corporate Debtor has issued the Corporate Guarantee on behalf of this Applicant. Pursuant to which, when the said lenders filed their claim based on the guarantee given by the Corporate Debtor, the RP, considering the same as financial debt, collated the claim

which has constituted to 17.64% of the total financial debt of the Corporate Debtor.

90. On the given facts, the Applicant submits that since the debts were availed in UAE and the same is under contest in UAE, the RP could not have admitted the same before it is not finalised by the Foreign Court.

91. The Applicant further submits that RP duty is limited to verifying the claims received and the RP cannot act as an Adjudicating Authority for adjudication of disputes between the borrower and the Financial Creditor.

92. As to this, the RP submits that IBC does not prohibit foreign creditor/lender to make its claim under IBC, the same is evident in the ratio decided in "***Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674,*** *where the Hon'ble Supreme Court has stated that the Code cannot be construed in a discriminatory fashion so as to include those Operational Creditors who are residents outside India*".

93. It is on record in the books of Corporate Debtor about the guarantee given against the loans taken by the Applicant, therefore, the RP is obliged to admit the same as claim against the Corporate Debtor, by doing so, it cannot be held out that the RP has adjudicated the claim against the Applicant. It has been further stated that these claimants only get 1.47% of their admitted amount. Therefore, we have not found any merit in the application moved by the applicant, accordingly it is hereby **dismissed**.

CA-2793/2019

94. This Applicant namely Haryana Steel Mongers Pvt Ltd is an Operational Creditor making a claim of ₹1,68,85,713 against the Corporate

Debtor, out of which, the RP has admitted its claim as ₹1,41,26,943 whereupon this Applicant has not raised any objection.

95. The grievance of this Applicant is, that the RP accorded differential treatment to another entity namely M/s. Power2 SME Pvt Ltd. ("Power2 SME"), satisfying the claim of Power Tool SME during the moratorium by way of supply of goods from the assets of the Corporate Debtor for an amount equivalent to the alleged claim against the Corporate Debtor, putting power to Power2 SME in a beneficial position than the Applicant and other Creditors.

96. Since it is in satisfaction of pre-CIRP period claim, the Applicant has sought clarification from the Resolution Professional with regard to this preferential action, to which, according to this Applicant, the RP wrote a letter dated 12.11.2019 stating that Power2 SME that Power 2 had supplied material on job work basis, therefore returned the goods after rendering services, without mentioning the real issue that Power 2SME actually functioned in a manner similar to a Financial Creditor in terms of its business model and resultantly supplied valuable goods, stock and inventory to Power2 SME Pvt Ltd., which is a clear case of preferential treatment by supply of goods whereas other similar Creditors were subject to the rigors of the insolvency entailing a higher hair-cut not commensurate with the value due to them.

97. In addition to it, the Applicant submits that on the initial Intervening Application filed by Power2 SME, while Sec.7 Petition was pending, stating that it had supplied raw material to the Corporate Debtor on credit basis

and such raw material, finished goods received back and balance material lying in the Corporate Debtor's land belongs only to Power2 SME.

98. This Tribunal while admitting Sec.7 Petition adjudicated the application of Power2 SME on merit with a direction that Power2 SME Pvt Ltd shall make such claims before the RP.

99. In view thereof, the Applicant has prayed the following prayer:

> " (a) allow the present Application;
>
> (b) declare that the action of the Resolution Professional / Respondent No.1 with respect to the Corporate Debtor is against the provision of the Code;
>
> (c) declare that the transactions undertaken by the Resolution Professional / Respondent No.1 are 'preferential' transactions within the meaning of the Code, and pass such orders as deemed expedient in the interest of justice to ensure that no adverse effect of such preferential transaction reaches the creditors of the Corporate Debtor.
> Or in the alternative;
> Direct that the interests of the Applicant vis-a-vis other similarly placed creditors of the Corporate Debtor are suitably protected in the same/similar manner and that such measures to restore balance and equity, and to eliminate the effects of the differential/discriminatory treatment meted out to Power2 SME Pvt. Ltd. by the Resolution Professional/Respondent No.1, as are considered necessary and expedient in the interests of justice are immediately implemented by the Resolution Professional / Respondent No.1 such that the interests of all stakeholders are balanced and the CIRP of the Corporate Debtor is proceeded with in a fair and transparent manner".

100. Against which, the RP submits that this Applicant is an Operational Creditor, its claim was admitted, whereas the transaction between the Corporate Debtor and the Power2 SME stands on a different putting. Power2 SME has not submitted any claim to the RP in respect of any pre-CIRP dues; as per the agreement with Power-2, the inventory and goods were returned.

101. He has further stated that materials supplied to the Corporate Debtor by Power 2 SME are not the goods of the Corporate Debtor, which in fact given to the Corporate Debtor by Power2 SME through Job Agreement dated 28.09.2017 for processing raw material into finished goods and supply of finished goods to Power 2 SME on terms decided in the agreement.

102. Under the said agreement, Power2 SME had the sole right of ownerships on the raw material so supplied by Power2 SME to the Corporate Debtor which is reflected in 8.4 of the agreement which is as follows:

> *"8.4. The raw material supplied by Power2 SME or supplied on behalf of Power2 SME to the ACCIL shall be the property of Power2 SME and over such material the P2S shall have exclusive charge till dispatching of finished goods to the customers directed by the P2S and no bank, financial institution, ACCIL or any third person shall have any charge whatsoever over such material and finished goods."*

103. It is a fact on the date of CIRP initiation, the Corporate Debtor was in the possession of the material belonging to Power2 SME for 7200 Metric Tons, since the company during the CIRP period continuing as going concern, after finishing the job work returned the finished goods to Power2 SME, therefore, this Applicant could not have said that the RP has provided differential treatment for the benefit of Power2 SME in violation of Sec.14 of the IBC.

104. On perusal of the facts placed above, it is not the case of the Applicant that its claim has not been admitted, indeed he has set up his case stating that the Applicant supplied steel coils to the Corporate Debtor in furtherance of the Purchase Order issued by the Corporate Debtor to the Applicant, whereas, the agreement in between the Power2 SME and the Corporate

Debtor is a job work agreement to provide finished goods after processing done to the raw material given by the Power2 SME.

105. Even in the Intervening Application filed by Power2 SME, it states that it has supplied goods for servicing, the same is evident in the admission order, which has been recorded as follows:

> *"25. The Power2 SME Private Limited has filed an application being C.A.No.159(PB)/2018 dated 26.02.2018 for intervention under Order I Rule 10(2), Section 151 Code of Civil Procedure read with Rule 11 of the NCLT Rules, 2016. In the application it is submitted by the applicant-Power2 SME Private Limited that it is engaged inter-alia, in business of procuring and selling of raw material. Operational supplies, industrial etc. and providing the same to its customers against cash payment or on credit basis. It is further averred that the Corporate Debtor is also one of its customer against whom supply of raw material was made on credit basis. In this regard agreement dated 28.09.2017 and addendum dated 25.10.2017 & 17.01.2018 were executed between the applicant and the Corporate Debtor."*

106. If this factual aspect is considered in the light of IBC, supply of some material to the Corporate Debtor for attending some job work is always akin to the concept of bailment, therefore, since the company is a going concern during its ordinary course of business, the Corporate Debtor has to return the finished goods to the Bailer and moreover, Power2 SME nowhere claimed as a creditor. It is all through asked for return of its goods, therefore, return of goods through Power2 SME cannot be considered as preferential treatment beneficial to Power2 SME in deprivation of the same benefit to the Applicant.

107. When the Applicant itself made a claim and the same being admitted, when there is no grievance over admission, it cannot be subsequently turned

around showing the supply of return goods to some other company as its grievance; therefore the same is hereby **dismissed as misconceived**.

CA-1090/2019

108. It is an application filed by six Unsecured Dissenting Financial Creditors having "voting share in (%)" namely, Corporation Bank (2.36%), Union Bank of India (2.04%), IDBI Bank (1.79%), Commercial Bank of Dubai (0.96%), Indian Overseas Bank (0.94%) and Karur Vysya Bank (0.57%) aggregating to 8.66% of voting share in the CoC having a claim of ₹731.9Crore against the Corporate Debtor.

109. The Applicants are the lenders of a related party of the Corporate Debtor and their claims have been admitted based on the Corporate Guarantee executed by the Corporate Debtor to these lenders.

110. The grievance of this Applicant is, that this Resolution Applicant submitted a Resolution Plan to the RP on 08.03.2019 that is 'due date' for submission of Resolution Plan, over which, when the CoC had a discussion in the meeting convened on 16.03.2019, the Resolution Applicant proposed to submit the proposed Resolution Plan, accordingly the Resolution Applicant submitted an unsigned Revised plan on 06.04.2019 without much change to the earlier plan.

111. On the plan dated 06.04.2019, again CoC held a meeting dated 10.04.2019 and decided to put the plan dated 06.04.2019 to vote from

12.04.2019 to 16.04.2019. For the plan being unsigned revised plan, then Resolution Professional on 11.04.2019 sent an email to the Resolution Applicant to submit signed Resolution Plan. The Resolution Applicant counsel sent an email dated 12.04.2019, stating that on the basis of certain feedback it has received, the Resolution Applicant wanted to further revise the plan, and therefore sought for deferment on voting of the plan dated 06.04.2019. On such letter, the voting was deferred. Thereafter, the Resolution Applicant sent a revised version of Resolution Plan on 24.04.2019 increasing the total resolution amount from ₹1200Crore to ₹1550Crore by making changes to the distribution to various categories of Creditors, in that process, reduced payment to unsecured Financial Creditors from 17.1% to 1.4%, to Secured Financial Creditors increased from 17.1% to 30.84% and reduced the distribution to the Operational Creditors from 14.57% to 4.86%.

112. By these changes, the dissenting Unsecured Financial Creditors are slated to receive only 1.4% of the total value, which is less than what is set out for the Operational Creditors.

113. In view of these grievances, this Applicant has sought for following reliefs, which are given below:

> *"(a) detrimental revision in a resolution plan after the 'due date' by the Resolution Applicant.*
>
> *(b) revised resolution plan dated 24 April 2019 ("**Plan dated 24 April 2019**") submitted by JSW Steel Coated Products Ltd ("**JSW**") has in*

turn, changed the distribution inter-se creditors which is in violation of Section 30(4) read with Section 53;

(c) the commercial wisdom of CoC in allowing / ratifying the revisions in a resolution plan is not an unfettered/absolute power, but is limited by the priority as laid down under section 53(1),

(d) deferment of voting on the Plan dated 24 April 2019 done by the RP and thereby allowing the revisions in the original resolution plan vide Plan dated 24 April 2019 is illegal."

114. The Applicants submit that the RP has stated in his reply that Resolution Applicant has revised Resolution Plan in terms of the total resolution amount at the request and suggestion of CoC in the meeting held on 16.03.2019, but whereas the CoC has never suggested any change in the distribution pattern inter-se Creditors. The RP says that as to distribution, the Resolution Applicant has taken a commercial call but not the CoC.

115. It is further submitted that the process of submission of Resolution Plan and interaction between the RP and the prospective Resolution Applicant is governed by the request for the Resolution Plan in (RFRP) and Information Memorandum and Evaluation Matrix in terms of Regulation 36B of IBBI Regulation. Therefore, the Resolution Applicant cannot re-submit the Resolution Plan after due date i.e. 08.03.2019, therefore the Resolution Applicant could not have amended the Resolution Plan after due date i.e., 08.03.2019.

116. The Applicants submit that the revision of the Resolution Plan is in contravention of the RFRP and the change of distribution in the revised plan

between the inter-se creditors is detrimental to few Creditors (Applicant) and incremental for the key lenders.

117. The Applicants further submit that as to decrease of distribution in the revised plan to less than the Operational Creditors, the CoC should not have exercised their discretion in changing their priority amongst the Creditors violating the waterfall mechanism laid under Sub Section 1 of Section 53. Because Section 53 provides payment to the operational creditor under the head of 'any remaining debt and dues' (Operational Creditors), in the order of priority for distribution of assets, the operational creditors will come in que after defraying the dues of unsecured creditors, but on the contrary here the Operational Creditors are provided 4.86% of distribution as against 1.47% to the unsecured Financial Creditors, therefore, this Resolution Plan shall not be approved as presented by the CoC.

118. As against these submissions, the RP submits that the plan dated 06.04.2019 was not a signed version therefore on 11.04.2019, the RP requested the Resolution Applicant to urgently share the signed version of the plan dated 06.04.2019, to which, the Resolution Applicant sent an email dated 12.04.2019 seeking time to submit the revised plan.

119. When this information was circulated to the CoC members, State Bank of India having voting share of 27.77%, JM Financial Asset Reconstruction Company Private Limited having voting share of 25.59%, Bank of Baroda having voting share of 9.27% and Canara Bank having

voting share of 5.66% directed the RP to defer the voting on the plan dated 06.04.2019.Since this information has come from the CoC having voting share of 68.2% out of the total CoC, the plan dated 06.04.2019 was deferred. Finally when Resolution Applicant sent the Resolution Plan dated 24.04.2019 to the RP, the total resolution amount was increased from ₹1200Crore to ₹1550Crore making changes to the distribution of proceeds to various categories of creditors showing proposed payment to unsecured financial creditors reduced from 17.1% to 1.47% and increased the payment to operational creditors from 17.1% to 30.84%.In the next CoC meeting on 24.04.2019, the said deferment already given by the aforesaid CoC Members was unanimously ratified. The RP has also mentioned that ratification of deferment of voting was a specific agenda item in the meeting dated 24.04.2019.

120. On the Applicants, post such ratification, having made allegations against the RP in respect to the change in distribution, in the CoC meeting dated 30.04.2019, the Resolution Applicant informed the CoC members about increase in the overall plan and also change in the manner of distribution, over which, in the said meeting itself, the representatives of State Bank of India, JM Financial Reconstruction Company Pvt. Ltd. Bank of Baroda and Canara Bank re-confirmed that they have directed the RP to defer the voting on the earlier plan dated 06.04.2019 before 6.00 pm on 12.04.2019 itself.

121. The deferment of voting was done by the RP because the Resolution Applicant did not sign the plan and indicated they wished to revise the same, upon which, the RP took instructions from the Financial Creditors and deferred voting as per the directions. The RP further submitted that deferment instruction was ratified with 66% voting in the following CoC meeting.

122. The RP submits that there is no illegality on account of the differential treatment because it is the CoC that has to assess and analyse the feasibility and viability of the plan and the manner of distribution. He has further stated in the amended Section 30(4) of the code, it has been clarified that the CoC can decide the distribution inter-se creditors taking into account the nature of Security.

123. To substantiate the said point, the RP counsel has relied upon **"Essar Case" - CoC of *Essar Steel India Limited vs. Satish Kumar Gupta 2019 SCC Online SC 1478*.**

124. The RP counsel submits that, to these dissenting financial creditors, the only safeguard is, they shall not be paid less than the amount to be paid to those creditors in accordance with Sub Section 1 of Section 53, which is as follows:

> *"Para 30 : The total admitted secured financial debt of the CD is ₹4864.40Crore, against which as sum of ₹1499.99Crore is being paid. Further, the liquidation value of the CD is merely ₹619.5Crore. Therefore, since secured creditors are not being paid in full, and since*

the liquidation value of the CD is not enough to even pay the secured creditors in full, in case the CD had gone into liquidation, the Applicants (who are unsecured creditors) would not have been paid anything. As opposed to NIL recovery to the Applicants in liquidation, the Resolution Plan provides for payment of 1.47% (of admitted debt) to the Applicants. Therefore, the Resolution Plan is in compliance of the Code and the said Applicants have no locus to object to the same."

125. The counsel appearing on behalf of the CoC has adopted the submissions of the RP Counsel stating that CoC approved the Resolution Plan after considering the manner of distribution proposed in the plan.

126. In support of this contention that commercial wisdom of the CoC should be given paramount importance, he has relied upon the following judgements supra:

"(a) ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors., Supreme Court [Civil Appeal No. 8766-67/2019 and other petitions****: para 49, 54, 56-58;*

(b) ***K. Sashidhar vs. Indian Overseas Bank & Ors Civil Appeal No. 10673 of 2018:*** *".... the commercial wisdom of the CoC has been given paramount status without any judicial intervention. The legislature, consciously has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority."* ***Para 33****;*

(c) ***Kalpataru Steel Rolling Mills Limited (CA No. 931(PB)/2019 in Company Petition No.(IB) – 563 (PB)/2018) decided on 14 February 2020:*** *"In a particular case, what should be the percentage of claim amount payable to one or other 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' can be decided by Committee of Creditors based on facts and circumstances of each case.":* ***Para 37****.*

127. Upon hearing the submissions of either side, it appears to us that it is a fact on record that unsigned resolution plan was submitted on 08.03.2019, thereafter since majority of the CoC members specifically instructed the RP for deferment of the submission of the Resolution Plan. The Resolution Applicant, taking into additional facts into consideration, revised the plan increasing the plan value from ₹1200Crore to ₹1550Crore with the changes to the distribution (detailed in the table below):

	Original Resolution Plan dated 08.03.2019	Revised Resolution Plan dated 24.04.2019
Resolution Amount	₹1200Crore	₹1550Crore
Secured Financial Creditors	17.1%	30.84%
Unsecured Financial Creditors	17.1%	1.47%
Operational Creditors	14.57%	4.86%

128. Since the plan has not been revised, after giving an approval, moreover, the revised plan having shown increase of payment to the creditors, we have not found any violation of the procedure in filing a plan after the date was deferred. Moreover, since the plan was approved with requisite majority after giving an opportunity to all the CoC Members, no infraction has been found in approving the plan.

129. As to the change of distribution, it is no doubt correct that in the water fall mechanism once secured Financial Creditors are paid in full, if any residual is remained, then payment will percolate down to the unsecured Financial Creditors.

130. Regarding the proposition of law, since the secured financial debt of the Corporate Debtor itself is ₹4864.40Crore and the sum that is coming to the secured Financial Creditors is only ₹1499.99Crore out of the total financial debt of ₹4,864.40Crore, it could not be said that something could be left to be paid to the junior class i.e. unsecured Financial Creditors.

131. But when something has been paid to the dissenting Financial Creditors and Operational Creditors in the plan, there shall not be any differential treatment, inter-se creditors falling under Section 30(2)(b) of the Code, because explanation to 30(2)(b) Explanation-1 says that distribution shall be fair and equitable to the Creditors falling within this clause, which is as follows:

> *"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."*

132. Looking at Section 30(2), these explanations are applicable to 30(2)(b) which covers Operational Creditors as well as dissenting Financial Creditors. As per this explanation, it has been clarified that distribution as per clause (b) shall be fair and equitable to the creditors falling under the said category i.e. dissenting Financial Creditors and Operational Creditors.

133. If you see the following line of distribution under Section 53, the turn of the operational Creditors will come after distribution is made to the unsecured Financial Creditors. In the backdrop of it, if the distribution provided by the Resolution Applicant is examined within the ambit of fair and equitable concept, the dissenting Financial Creditors at least shall not be paid less than the Operational Creditors, if not more than the Operational Creditors.

134. In the final plan approved, the provision provided to the Operational Creditors is 4.86%, whereas dissenting unsecured Financial Creditors are provided only 1.47% of distribution which is patently unfair and un-equitable. When fair and equitable concept is made as a provision in the Section, it is the bounden duty of this Bench to ensure treatment is fair and equitable; at least it must be done on parity with each other.

135. Since this Bench is given jurisdiction as to whether plan is in compliance with Section 30(2) of the Code, it has jurisdiction to examine whether treatment inter-se between dissenting Financial Creditors and Operational Creditors is fair and equitable.

136. As to the ratio decided in the Essar Steel is in fact helping the dissenting Financial Creditors unfairly treated, because in the Essar Steel case the distribution to the operational creditors has been ordered on par with the secured Financial Creditors which is in contravention to the

waterfall mechanism envisaged under Section 53 of the Code, whereby, the commercial wisdom exercised by the CoC in Essar Steel being consistent with the waterfall mechanism envisaged under Section 53, the order of waterfall mechanism changed by NCLAT has been reversed by the Hon'ble Supreme Court.

137. We cannot misconstrue the concept of commercial wisdom to the CoC as discretion to provide more to the Operational Creditors and less to dissenting Financial Creditors, which is in contravention to the explanation given to Section 30(2)(b) of the Code. Accordingly, this application is hereby **disposed of** directing the Resolution Applicant to distribute the value in between the financial creditors and operational creditors at equal percentage.

CA-99/2019 & CA-2274/2019

138. The Applicant in CA-99/2019 & CA-2274/2019 is a sister concern of the Corporate Debtor. The Corporate Debtor has leased its Plot No.6 and 13, Sector-6, Phase II, G.C. Bawal, Haryana to the Applicant through a Lease Agreement dated 10.10.2012, over which the Applicant has set up a manufacturing plant.

139. It is also evident on record that Corporate Debtor had already created mortgage over Plot No.6 and 13 in favour of the lenders of the Applicant with i.e. IL & FS Trust Company Limited, as the Security Trustee.

140. The Corporate Debtor has purchased leased property for the purposes of bona fide industrial use, in pursuance thereof, the Applicant Company has been created as a Special Purpose Vehicle for the purposes of development of manufacturing plants/units on 20.09.2012.

141. To set up this unit, the Corporate Debtor on 10.10.2012 executed a Lease Agreement in favour of the Applicant. That apart, the said property was mortgaged by the Corporate Debtor on 26.06.2013 in favour of the Andhra Bank, Canara Bank, Central Bank of India and Dena Bank for filing a loan of ₹308Crore to the Applicant. The rest of the story is a known fact that CIRP has been initiated against the Corporate Debtor's. Thereof, the Resolution Plan being approved by the CoC and it is now pending before this Bench for approval under Section 31 of the Code.

142. Now the apprehension of this Applicant for filing this Intervention Applications are that, in the event lease is terminated, the Applicant company will be put to sufferance and it will be in violation of the law already being established, therefore, this Applicant in CA/99/2019, claiming that it has legal and equitable rights qua Plot No. 6 & 13, prayed that those plots should not be dealt within the resolution process of the Corporate Debtor and in CA/2274/2019 sought a declaration that the lease of the Plot No.6 & 13 in favour of this Applicant shall continue till original tenure of the lease and Plot No.6 & 13 is made available to the Applicant at a fair market value as a first right if it is intended to be sold by the Resolution Applicant.

143. As against this apprehension, the Resolution Professional as well as the CoC conjointly stated that the right of lease as well as the right of mortgage over the plots mentioned by the Applicant have not been dealt with adverse to the rights and contentions of this Applicant.

144. Substantiating the same, the Resolution Professional has reproduced the relevant provisions of the Resolution Plan, which is as follows:

> *"**Section 4 (Excluded Rights)**:*
> *...(E) the mortgage created by the Company over land bearing Plot No. 6 & 13 measuring 18900 sqmtrs. located in the Industrial Estate, Bawal, Haryana, pursuant to the Memorandum of Entry dated June 27, 2013 executed by the Company in favour of IL & FS Trust Company Limited (now known as Vistra ITCL (India) Limited) for the benefit of Andhra Bank, Central Bank of India, Corporation Bank and Dena Bank (now Bank of Baroda) for securing the loans granted to ACCIL Auto Steel Private Limited by the aforesaid lenders".*
> *Section 4(a) (Other Proposals under the Resolution Plan) of Part B (Financial Proposal) of the Resolution Plan shall stand restated as follows:*
> *"(iii) Plot 6 & 13: Other than the Rent Agreement dated October 10, 2012 executed between the Company and ACCIL Auto Steels Private Limited, any memorandum of understanding/agreement including any sale/lease agreement for sale or transfer of the land owned by the Company in Bawal (or any interest therein) shall stand terminated on the NCLT Approval Date without any payments being made from the Company to any person or entity in this regard...".*

145. On perusal of the apprehension of the Applicant and the Resolution Applicant providing safeguarding the Resolution Plan, we have not found any cause of action in the reliefs sought by the Applicant because the Resolution Plan has excluded dealing with right of lease as well as right of mortgage, therefore, this Applicant cannot have a right to acquire new rights that have not been mentioned either in the lease or in the mortgage deeds.

146. Since the Resolution Plan has not dealt with the Lease Agreement or mortgage, this Applicant cannot maintain any objection to the Resolution Plan on the ground that it has doubt whether subsequently the lease will survive or not.

147. Now the only point left to be decided by this Bench is, as to whether the approval of Resolution Plan is in-contravention of any of the process of law for time being in force or nullifying any of the rights of the Applicant with regard to the leasehold rights over the properties mentioned. With regard to this point, for there being no change to the rights of these applicants over the asset mentioned in the application, for their rights being recorded in the Resolution Plan as excluded rights, we have not found any merit in the objection, hence the applications are hereby **dismissed as infructuous**.

CA-1395 & 2273/2019

148. The Applicant in CA-1395/2019 and CA-2273/2019 is a Promoter Group Company and a sister concern of the Corporate Debtor which has filed these two applications objecting to certain provisions in the Resolution Plan relating to the treatment of Plot No.9A, Sector-6, Bawal, Haryana.

149. The case of the Applicant is, Haryana State Industrial Development Corporation Ltd (HSIIDC) allotted Plot No.9A to the Corporate Debtor which

was subsequently leased to the Applicant for setting up factory. In pursuance thereof, a Collaboration Agreement dated 08.09.2015 was entered into between the Corporate Debtor and the Applicant and one Kings Engineers Private Limited for transfer of allotment in favour of Kings Engineers Private Limited by the Corporate Debtor. It says Plot No.9A leased out to the Applicant by the Corporate Debtor through a Lease Agreement dated 29.12.2017.

150. Initially in the Resolution Plan it has been said that the Lease Agreement purportedly to be initiated in favour of the Applicant with regard to Plot No.9A could be terminated.

151. In the meanwhile the Applicant has also filed a Writ Petition before Hon'ble Punjab and Haryana Court seeking protection of its rights in Plot No.9A on the apprehension that the Plan would extinguish the Lease subsisting in favour of the Applicant, wherein, the Hon'ble Punjab & Haryana Court on 30.05.2019 passed an interim Order directing that the physical possession of Plot No.9A shall not be disturbed till the next date of hearing in the Writ Petition pending. Subsequent thereto, in the Resolution Plan approved with 79.3% on 28.06.2019, the Plan provides for termination of Agreement dated 08.09.2015 and Lease Agreement dated 29.12.2017 in respect of Plot No.9A.

152. The Reliefs in CA-1395/2019 and 2273/2019 are more or less same asking reliefs not to deal with Plot No.9A in the Resolution Plan and also a

direction that the Lease Agreement dated 29.12.2017 shall continue till the original tenure of the Lease and the property shall be made available at a fair market value to the Applicant as a first right provided it is intended to be sold by the Corporate Debtor/Resolution Applicant.

153. As against this submission, the RP counsel Mr. Ramji Srinivasan submits that the Resolution Plan is not in breach of the ex-parte High Court interim order dated 30.05.2019 stating that the RP shall not disturb the physical possession of the Applicant on Plot No.9A with a simultaneous direction that CIRP of the Corporate Debtor will continue pending disposal of the Writ Petition aforementioned.

154. When this Applicant filed two interim applications before the Hon'ble High Court in the same Writ Petition not to proceed with the voting of the Resolution Plan, the Hon'ble High Court Punjab and Haryana dismissed both the applications as withdrawn on 02.07.2019 and 11.07.2019.

155. It is also pertinent to mention that the Hon'ble Supreme Court on 20.09.2019 has stayed the operation of the ex-parte interim order dated 30.05.2019.

156. In furtherance of it, the Supreme Court on 30.09.2019 held in the same Writ Petition that the pendency of the Writ Petition will not act as an impediment to the CIRP of the Corporate Debtor.

157. The RP counsel has further submits that this Applicant has sought similar reliefs by way of multiple proceedings before different forums to stall the CIRP of the Corporate Debtor by indulging into forum shopping.

158. As to the allegation of differential treatment of the properties of the Corporate Debtor, the RP counsel submits that plan cannot be challenged on the basis it provides differential treatment in between Plot No.9A and Plot No. 6 & 13, both are the assets of the Corporate Debtor, if the treatment is different with regard to these properties, it is a commercial decision of the Applicant, since the same being discussed and approved by the members of the CoC, this Applicant cannot have a right to question the commercial decision of the Resolution Applicant which was duly discussed and approved by the members of the CoC.

159. To substantiate this argument, the RP counsel has relied upon "*CoC of* ***Essar Steel India Ltd vs. Sathishkumar Gupta (2019) SCC Online SC1478*** ..... *What is important is that it is the commercial wisdom of the majority of the Creditors which is to determine, through negotiation with the prospective Resolution Applicant, as to how and in what manner the Corporate Resolution Process is to take place*" Para 44.

160. The RP Counsel has further stated that the plan may legally provide the termination of onerous contracts entered into by the Corporate Debtor. To advance this argument, he has relied upon ***State Bank of India vs. Bhushan Steel Limited, CP (IB)/201(PB)/2017,*** which was upheld vide

Order dated 10.08.2018 and Maharashtra State Electricity Transmission Company Limited Vs. Sri City Private Limited and Others (Company Appeal) (AT) insole. No. 1401 of 2019 – NCLAT, holding that if the agreement is onerous, the same could be terminated by the CoC while approving the Plan because that onerous liability created by the Corporate Debtor shall not pass on to the Resolution Applicant.

161. The RP counsel has further stated that the agreements are neither adequately stamped nor registered under the Registration Act, that apart, the original of the purported Lease Agreement has not been provided. Moreover the minutes of the Board Meeting of the Corporate Debtor for the Year 2014, 2015 till 2017 and 2018 did not mention any reference to the any agreement being signed in respect of Plot No.9A.

162. In that purported Lease Agreement, the counsel says, a provision is made for payment of rental of ₹1lac per month by the Applicant, but whereas, on verification of records, it is noticed that no such rentals have been paid by the Applicant to the Corporate Debtor. He has further stated since this asset has been initially allotted to the Corporate Debtor by HSIIDC, as per that agreement, that asset shall not be further leased out without the consent of the HSIIDC. In this case, no such consent has been taken by the Corporate Debtor for any such transfer of Plot No.9A in favour of this Applicant.

163. On hearing the submissions of either side, it appears that the veracity of this transaction is pending for adjudication before the Hon'ble High Court Punjab and Haryana and then before the Supreme Court of India.

164. In these circumstances, for there is no stay against this asset as on date, the averments of the Plan will remain in force subject to the outcome of the proceedings pending before Hon'ble High Court Punjab and Haryana and Hon'ble Supreme Court of India. Accordingly, these applications are **disposed of**.

CA-2277/2019

165. The Applicant Pradeep Agarwal is a Promoter Director of the Corporate Debtor. He has filed this application challenging the provisions of the Resolution Plan and thereby seeking rejection of the Plan.

166. The Applicant has sought for the rejection of the Plan stating that he has extended personal guarantees to secure the debt of the Corporate Debtor. In pursuance thereof, he has also created mortgage by deposit of title deeds over land parcels owned by him situated in Khapoli, Maharashtra in the year 2010 to secure the debt availed by the Corporate Debtor. Likewise he has also furnished guarantees in favour of the lenders of the group companies of the Corporate Debtor.

167. Any resolution that takes place in insolvency proceeding is to bail out the company from its downfall, but not to bail out the promoters of the company to wriggle out from the obligations taken upon themselves at the time of taking loans to the Corporate Debtor.

168. According to this Applicant, the total admitted financial debt owed by the Corporate Debtor to the Financial Creditors is to the tune of ₹4864,39,65,599 for secured Financial Creditors and ₹1702,60,19,604 for unsecured Financial Creditors. As against these claims of the direct Financial Creditors, the Resolution Professional has proposed to pay an amount of ₹1499,98,93,253 as loan assignment payment (LAP) to the direct Financial Creditors as consideration for assignment of entire financial debt.

169. For this purpose, the loan assignment payment shall be a loan in the books of the Corporate Debtor which shall bear interest and deemed to have been made by the purchaser i.e. an entity nominated by Resolution Applicant in whose favour the debt shall be assigned. All the securities and guarantees for the said debt are also to be assigned to the purchaser with the reverse transfer/reservation of rights by the DFCs to proceed against the guarantees furnished by this Applicant to a pre-defined extent.

170. For a consideration of ₹1499.98lacs, this purchaser is poised to step into the shores of the DFCs and exercise rights in respect of the entire admitted financial debt presently owed to the DFCs. By which there will not be any reduction in the liability of the Corporate Debtor.

171. The applicant says by this arrangement, in reality there will not be any restructuring of the debt, this entire debt exposure is at the risk of becoming due and payable at any time at the discretion of the purchaser.

172. Out of this arrangement, the plan applicant is getting fully benefited because the assets of the Corporate Debtor continued to be subjected to security in favour of the purchaser for the entire debt, it could be recalled at any point of time because the arrangement is only assignment of debt in favour of the purchaser in net-net, this Resolution Applicant has not taken any immediate equity risk.

173. With regard to the CIRP costs and other operational debts, the Resolution Applicant proposes to set up an SPV to advance the loan to the Corporate Debtor by way of interest bearing loan to pay CIRP costs, workman and employees and Operational Creditors.

174. Out of the SPV loan, a sum of an ₹50Crore is proposed to convert into equity in the share capital of the Corporate Debtor. The remaining amount will remain as unsecured loan in the books of the Corporate Debtor.

175. As to Operational Debts such as debts to Jyoti Strips, CMIFPE Limited, Vijay Metal Alloys Pvt Ltd. and AM Metal Trading Company, they are proposed to be assigned to the SPV without consent of such Operational Creditors.

176. Such assignment without the consent of the Operational Creditors is outside the domain of IBC and ought not to be approved. The Applicant says whether Resolution pending for approval which neither achieve reduction in the debts and liabilities neither encumbrances over its assets nor does it propose a definite plan for reduction in the sale.

177. He says that Court does not provide assignment or down selling of debts by the Banks. In fact, presently down selling of loans/debts by banks and financial institutions can only be effected in favour of an Asset Reconstruction Company.

178. In support of it, he has circulated RBI Circular dated 07.06.2019 "prudential framework for resolution of Stressed Assets" stating that if a resolution with respect to the Banks is by way of Assignment, then the Resolution plan will deem to be implemented only when the debt is completely written off from the books of the banks.

179. Therefore, after advent of this Circular, assignment of debt to a person other than Asset Reconstruction Company is not available either under SARFAESI Act or under the Circular mentioned above, that apart, such assignment, if made, it must completely write off debt from the books of the Banks.

180. The Applicant further says that in the absence of certainty as to the underlying debt, guarantees and securities provided by the Applicant ought to be released because the Resolution Plan pending for approval does not contain any details as to how such restructuring shall takes place.

181. The grievance of the Applicant is, once the Plan is approved, it will remain binding on the Applicant in as much as the guarantees furnished by the Applicant continued post implementation of the Plan but the rights of the subrogation will get extinguished.

182. The counsel further says, as per Sec. 133 to 135 of the Indian Contract Act, any variance to the terms of the underlying debt would be sufficient to discharge the Applicant as Guarantor.

183. To substantiate this concept, the counsel has relied upon in a case in between ***Syndicate Bank vs. Channaveerappa, Beleri & Others (2006) 11 SCC 506*** which held as under:

> *"9. A guarantor's liability depends upon the terms of his contract.... We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract."*

184. He has further relied upon ***Punjab National Bank vs. Ram Dutt Sharma and Ors, 2003 SCC Online All 13454,*** which held as under:-

> *"The liability of surety, however, may cease if there is any variation in terms of contract between the creditor and the principal debtor, without*

consent of surety, and such variation shall discharge surety in respect of transactions subsequent to the variation vide Section 133 of I.C Act, 1872."

185. The Applicant counsel has expressed that since the Resolution Plan proposes that the personal guarantees of the Applicant shall stand assigned to the Purchaser along with the entire debt exposure therefore the purchaser will get the right to sue the Applicant to the extent of LAP. But whereas, the entire debt has been assigned to the Purchaser conferring enforcement rights upon the personal guarantees of the Applicant, though the LAP is ₹149,88,93,253, since the admitted financial debt being ₹4864,39,65,519, the guarantee will remain in force for the residual unpaid amount i.e. ₹3364,40,72,346 though this money is in fact not payable to the DFCs. Though full claim has been paid and though no provision has not been made to make full payment against the admitted claim to the DFCs, the DFCs have given the right to enforce the personal guarantees for the full admitted claim, which is nothing but a case of transfer of a mere right to sue. The counsel further says, since this transfer of mere right to sue is hit by Sec. 6 (e) of the Transfer of Property Act the applicant potentially faces double exposure. He further says as per Sec.30 (2) (c) of IBC, even if the CoC in its wisdom approved the Resolution Plan, if such Resolution Plan is in contravention to any of Sec.30 (2) provisions including (e) i.e. not to contravene any of the provisions of the law for the time being in force, the Adjudicating Authority can reject the Resolution Plan filed for approval u/s 31 of the Code.

186. To strengthen this proposition, the counsel has relied upon "*Para 42 of* ***K. Sasidhar vs Indian Overseas Bank (2019) SCC Online SC 257 & Para 48 of Essar Steel India Limited vs. Satish Kumar Gupta (2019) SCC Online SC 1478***".

187. For the present assignment being hit by Indian Contract Act as well as Sec.6 (e) of the Transfer of Property Act, the applicant counsel says, it shall be construed that this Plan is hit by Sec.30(2)(e) of IBC. On that ground itself, this Resolution Plan shall be rejected.

188. With regard to Para in ***State Bank of India vs. V. Ramakrishnan (2018)17SCC 394*** dealing with extinguishment of subrogation rights, the Applicant counsel says that the Hon'ble Supreme Court of India in Essar Steel supra declined to comment on the position of law laid down V. Ramakrishnan supra as follows:-

> *"25. Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI (e) to Form 6 contained in the Rules and Regulations 36(2) referred to above, require information as to*

personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having no pay for debts due without any moratorium applying to save him."

189. The counsel has relied upon ***P.S. Saathappan (dead) by LRs vs. Andhra Bank Limited and Others (2004) 11 SCC 672***, to say that the judgement is an authority for what it decides and not what may even logically be deduced there from, therefore, Essar Steel supra cannot be read in a manner so as to affirm anything more than actually what is said.

190. The applicant counsel has raised another legal proposition stating that, by approval of this Plan, the right of subrogation available to the Promoter Director with regard to the personal guarantees given by on behalf of the Corporate Debtor will extinguish for the reason Resolution Plan extinguishes all the liabilities against the Corporate Debtor. But on the other hand, as to the guarantees given by the Corporate Debtor on behalf of its group companies, such Asian Ispat, ACCIL Corporation, ACCIL Auto Steels, etc. they will remain intact with the Corporate Debtor to proceed against those Companies by invoking right of subrogation in the event those companies failed to repay the loans.

191. On one hand, the subrogation right against the Corporate Debtor is extinguished and the subrogation right against in favour of the Corporate

Debtor will remain intact by this Resolution Plan which is nothing but differential treatment constituting arbitrariness and irrationality.

192. In this case, the counsel says that on five occasions i.e. on 06.04.2019, 20.04.2019, 06.05.2019, 31.05.2019 and 17.06.2019, the Resolution Plan was altered after plan was filed on 08.03.2019. Even Form-H was amended on three occasions which is filed under Regulation 39(4) of IBBI Regulations though it is not permitted under law for the RP to amend Form-H once the same has been filed with the application for approval of the Resolution Plan. The counsel has further submitted the Corporate Debtor had given Corporate Guarantee to Central Bank of India in order to secure the dues payable by its sister concern ACCIL Auto Steels Private Limited.

193. In this case, though Corporate Guarantee has not yet become payable, the RP has allowed the claim of the Creditor against the guarantee given even before the Creditor invoked guarantee against this Corporate Debtor. This has been done simply on looking at NCLAT in ***Andhra Bank vs. M/s. Hammerlee Textiles Limited (Company Appeal) No. 61 of 2018***, wherein Andhra Bank is allowed to be the member of the CoC for the debt that has been considered as financial debt. However, no pay-out has been provided to Andhra Bank because its claim had not been matured.

194. In another case, where ACCIL Corporation Private Limited which now controlled and held by Perfect Engineering FZC (a Dubai based entity) pursuant to implementation of restricting, the debt of two of its lenders i.e.

Karur Vysya Bank and Indian Overseas Bank out of its five lenders is illegal and non-maintainable in the present form because they stood as dissenting lenders to the restructuring process initiated by RBI guidelines. Since the Applicant has challenged the illegality committed by the Karur Visya Bank before the Hon'ble Rajasthan High Court, R2 (RP) has allowed the claims of these Vendors against the guarantee given by the Corporate Debtor.

195. For the claim has been allowed and payout has been provided to Karur Vysya Bank, tomorrow the Corporate Debtor will exercise subrogation rights against ACCIL Corporation, ACCIL Auto Steels Private Limited and Asian Ispat FZ-LLC.

196. The counsel has further stated that the RP having filed CA 613 of 2019 in the present proceeding pertaining to Khapoli lands, in the absence of adjudication over such application, this entire process will become redundant, in the event the issue with relating to Khapoli lands is decided against the Corporate Debtor.

197. With regard to guarantee liability, when loan assignment is done, the liability of guarantee being connected to the debt, it cannot be separated from assignment, it goes along with assignment, therefore the promoter director cannot take out this argument against the plan. Right of subrogation is not a primary right, it is not conditional that creditor shall not proceed against the guarantor unless right of subrogation is available to the guarantor against the principal debtor. This right of subrogation is not a

right emanated out of any contractual rights; indeed this right will be available to the guarantor only after it has paid the dues of the principal debtor to the creditor. The creditor is under no obligation as to this subrogation right. It is the guarantor who comes forward to take the liability of surety upon itself notwithstanding whether it could realise its monies in the event creditor realised principal debtor dues from the guarantor. Since IBC has categorically envisaged that no liability will remain in force against the corporate debtor after plan approval, right of subrogation will not be available to the guarantors. It makes no difference to the right to proceed against the surety. The right to proceed against guarantor will remain in force because loan has been assigned to a purchaser. To the extent it has paid to the creditor, it is entitled to proceed against the guarantor. Resolution of debts cannot be misconstrued as full satisfaction of debts payable to the creditors. This is only a compromise or arrangement to the extent of the obligations against an insolvent company, but this will not take away the right of creditors to proceed against others who stood as guarantors and the assets mortgaged by others against the loan availed by the principal debtor.

198. With regard to Kapoli land issue in CA 613/2019, it will be dealt with avoidance applications. We have not found any differential treatment in dealing with guarantor issues, because the creditor can proceed against the guarantors to the extent of the liability owed to it. If at all payment is double to the creditor, that is not permitted, that is not the case here.

199. Accordingly this application is **dismissed as misconceived**.

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199. One Interups Inc. filed this application for a direction to the RP and the CoC to consider the proposal of the applicant, for submission for resolution plan and put the same to voting by the CoC, direct the RP to provide access to the data room and other information/documents sought with respect to the corporate debtor to the applicant so as to complete due diligence of the corporate debtor, inter alia, stay the proceedings for the approval of the resolution plan submitted by JSW (the Resolution applicant) till the CoC has considered the resolution plan submitted by the applicant

200. The applicant submits that it is a New York based professional financial group carrying the business of acquiring large asset acquisitions in association with prominent asset Management Company, private equity firms and strategic ultra-high net worth investors. The applicant submits if the applicant is allowed to submit the resolution plan; it will meet the twin fold test of (i) maximization of value and (ii) viability and feasibility.

201. It says that the resolution plan submitted by JSW was approved by the CoC in the month of June, 2019 for an amount of ₹1550Crore, whereas if this applicant is allowed to submit its resolution plan, its plan would be more than ₹2000Crore and would be able to give further break-up if the description and details of the corporate debtor are shared with the applicant.

202. As to JSW group, this applicant says that from the information memorandums dated 15.10.2019 and 20.01.2020 on the BSE website based on SEBI disclosures, it appears that the said acquisition is no longer viable or feasible to JSW group. The group has also accepted, 'may not be able to be successfully complete its planned acquisition since the plan of JSW group has not yet been approved by this Adjudicating Authority, the applicant sent its preliminary interest to the RP of the corporate debtor 12.06.2020, thereafter sent even a follow up letter to the RP on 08.07.2020, but whereas the RP rejected its Expression of Interest by stating that the CIRP process is over and plan is pending before this Adjudicating Authority for its approval. For its proposal being rejected by the RP despite the value offered by this applicant is over and above ₹500Crore to the plan approved by the CoC, it has filed this application under Section 60(5) of the Code seeking reliefs as mentioned above.

203. Responding to the same, the RP has submitted that the plan pending before this Bench for approval was approved by the CoC way back in the month of June, 2019, ever since, for one or other reason, the plan has remained pending before this Bench for approval for more than one year, this applicant has come before this Bench after lapse of one year from the date of approval of the plan by the CoC. As is known that CIRP process is a time bound process, once the plan is approved by the CoC by following due procedure, the said process cannot be repeated just by looking at with an offer of more money. When the CoC has approved the plan after examining its feasibility and viability out of the plans that have come, this Adjudicating

Authority cannot go back and examine the wisdom of the CoC in approving the resolution plan, therefore, this application shall be rejected at the first blush itself.

204. On which, the applicant senior counsel Mr. Kapil Sibal has argued that for value maximization being one of the core objects of the Code and CoC being entrusted with fiduciary duties of highest degree, it is incumbent upon the CoC to ensure that interest of all the stakeholders are protected and value maximization is achieved. He has further stated that the applicant is ready and willing to deposit a sum of ₹500Crore into an escrow account and ready to adhere to any direction that this authority deems fit with respect to such deposit. If its proposal is allowed to be submitted, the resolution plan amount would be 33% more than the amount offered by the resolution applicant/JSW, it is also ready to pay an additional amount of ₹400Crore in the following 12 months post the approval of the plan to ensure the corporate debtor continues its business as a going concern and is willing to invest further amount as may be required by the business plan of the company. The applicant undertakes to submit detailed resolution plan within 10 working days of getting access to the date room and all other relevant information of the corporate debtor as provided in the resolution plan. The counsel has stated that a communication was sent to State Bank of India, RP and CoC members that it has committed to provide 50 % of ₹2070Crore up front in the mode and manner agreeable to the lenders as part of the applicants total settlement offer proposed. Balance money would be paid within 30 days of acceptance of the resolution plan. He has further

stated if applicant is provided 10 working days to deposit 50 % and 15 days to file resolution plan after access is granted to the data room and information from the corporate debtor. To say that it is incumbent upon the CoC and the RP to ensure that interest of stakeholders is protected and maximum value is realized for the corporate debtor, he has relied upon the Judgment rendered in case of ***Hamond Power Solutions Pvt. Ltd. v. Sanjit Kumar; Comp. Appl. (AT) (Ins.) No. 606/2019 (Para 8 at Pg. No. 242 of the Judgment Compilation filed on 27.07.2020), Binani Industries Limited. v. Bank of Baroda; Company Appeal (AT) (Ins.) No. 82/2018 (Paras 17,29,30,32-34, 61).***

205. The applicant senior counsel has further argued that this adjudicating Authority has inherent power and can exercise its discretion in allowing the applicant to put forward his plan to consideration of CoC. He has further stated that various NCLT Benches exercised this inherent power stating that the code is paramount and not the regulations, therefore approval of any plan without looking into its merit is an Act which shall go against the objects of the Code, in turn will cast huge loss to the company.

206. The senior counsel has further stated that the concept of commercial wisdom of CoC is only limited to ensure that the plan submitted is legal, the same has been reiterated in ***Tata Steel Limited vs Liberty House Group Private Limited*** (NCLAT order dated 4th February 2019 in Company Appeal (AT) (Insolvency) No. 198 of 2018).

207. The applicant counsel has further stated that the applicant had already received communication dated 26.07.2020 from Commercial Bank of Dubai by filing an application for putting on record additional document through CA No. 3007/2020 before this authority. Beside this, IDBI Bank, which is also one of the financial creditors of the CoC has requested for the applicant proposal which has been communicated to all including this Authority and the CoC through its affidavit dated 30.07.2020. By looking at this communication, the applicant counsel submits that the CoC as a whole has opportunity to exercise its commercial wisdom qua the applicants plan.

208. The counsel has further stated the Resolution Professional is instrumental only to ensure compliance of requirements of the plan under Section 30(2) and he cannot exercise his own wisdom either in accepting or rejecting the resolution plan. To say that Resolution Professional should present all plans to the CoC for their consideration, he has relied upon ***Arcelormittal India (P) Ltd vs. Satish Kumar Gupta, (2019) 2 SSC 1 (Para 80) at Page No. 95.*** The Resolution Professional is a facilitator to the committee of creditors in discharging its functions while taking decisions during resolution process, and this process is supervised by the adjudicating authority. To established this proposition, the applicant relied upon ***Swiss Ribbons vs. Union of India (2019) 4 SSC 17, Para 91.***

209. The counsel has submitted that the Resolution Applicant (JSW) will not have vested right until its plan is accorded approval, therefore, it has no locus to challenge and counter the plan of this applicant, for which he cited

the case in between (Tata Steel vs. Liberty House Group Private Limited in CA 198/2018).

210. The counsel has stated that the time elapsed in this case is more than twice the time has prescribed under the Code, the time has been extended in many cases, so the time period could be extended in this case as well looking at an additional 33 percent money coming as against the plan presently pending for approval before this bench.

211. Owing to the above said reasons, the applicant counsel has sought for direction against the RP and the CoC to consider the proposal of the applicant for submission of the resolution plan and put the same to voting by the CoC and also for stay of the proceedings for the approval of the Resolution Plan submitted by JSW Steel till the CoC considered the resolution plan proposed to be filed by the applicant.

212. As against the submission, the counsel appearing on behalf of the Resolution Applicant, Dr. Abhishek Manu Singhvi, has submitted that he Hon'ble Supreme Court has time and again held that CIRP is a time bound process and ought to be completed within the statutory timeline. In this case EOI was given on 24.12.2018, thereafter resolution plan was approved by CoC on 28.06.2019 with 79.3% voting share, thereafter filed this plan for the approval of this bench on 10.07.2019, ever since this application has been pending for approval before this bench.

213. The counsel has relied upon ***Innoventive Industries Limited vs. ICICI Bank and Another, (2018) 1 SCC 407, Swiss Ribbons Private Limited and Another vs Union of India and Others, (2019) 4 SCC 17, Arcelor Mittal India Private Limited vs. Satish Kumar Gupta and Others, (2019) 2 SCC 1 and Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta and Others, 2019 SCC online SC 1478,*** to say that speed is the essence of the working of Bankruptcy Code for the reason that the longer the delay, the company will tend to atrophy, therefore delaying tactics shall not be permitted to hamper the resolution to the company.

214. As to the compliance of the Code, the counsel submits that the email sent by interrupts Inc. were marked to the CoC members but no member directed the RP to hold any CoC meeting for considering the request of the applicant. While hearing was in progress, on 27.07.2020 Commercial Bank of Dubai (CBD) holding 0.96% of the voting share, mailed on 26.07.2020 stating that the CoC member may consider the applicants proposal. Thereafter while the argument in the plan approval application concluded on 29.07.2020, IDBI Bank Limited, holding 1.79% voting share mailed to the RP on 31.07.2020 stating that this issue be placed before the CoC as an agenda item. Both CBD and IDBI Bank are creditors of sister concern of ACCIL. In any event the voting share of these two together being only 2.75% voting share against 79.3% voting share approved the resolution plan pending before this bench.

215. The senior counsel has further submitted that the application filed by this applicant is not maintainable under Section 60 (5) of the Code, to which he has relied upon ***Arcelor Mittal India Private Limited vs. Satish Kumar Gupta and Others, (2019) 2 SCC 1 and Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta and Others, 2019 SCC online SC 1478, Shri Ram Residency Private Limited vs. Kuldeep Verma NCLAT- Company Appeal (AT) (Insolvency) No. 202 of 2018 and M/s Om Logistics Ltd. vs. M/s NTL Electronics India Ltd. NCLT Delhi – IA No. 2392 of 2020 in CP(IB) No. 814(ND)/109*** to say once the resolution plan has been approved by the CoC, this Adjudicating Authority under Section 31 of Code is limited to examine as to whether or not the resolution plan as approved by the CoC under sub section 4 of Section 30 met with requirements as referred to in sub Section 2 of Section 30 of the Code. If it is satisfied that all the requirements of the Section 2 of Section 30 are complied with, this authority shall by order approve the resolution plan which shall be binding on the corporate debtor and others as mentioned in as Section 31. In view thereof, the respondent counsel has sought for rejection of this proposal for submitting the resolution plan at this belated stage.

216. On hearing the submission of both sides, it is apparent on record that this plan was approved by the CoC in the month of June 2019 i.e. more than one year before, as all of us know, and once the CIRP period is over, CoC will no more remain in existence. The sole object of this Court is to provide timely solution to the problem. With regard to maximization of value, it is

one of the objectives of the Code, but it does not mean in the name of maximization of value, this resolution process can neither be revived nor extended indefinitely. To accomplish this process, two elements are important, one is time another is procedure, if any of these two elements missing, it will lead to inconsistency and unpredictability. There is a reason for making time is essence of the Code, because under earlier regime, we failed in rehabilitation of the sick companies as well as in timely winding up companies. Maximization is always linked to time and procedure. If you see the timing of this applicant coming before this bench, it has come before this bench when the hearing on the approval of the resolution plan was about to be concluded. This applicant was neither present at the time RFRP was published inviting expression of interest nor at any time within one year period while this plan was pending for approval.

217. Assuming this applicant is allowed to file plan by seeing the magic figure of this applicant, if tomorrow somebody else comes and says that it would invest 50% more than this applicant's plan, then that also to be allowed by this bench. Where is the end for it? When jurisdiction itself is not given to this bench to revive the CIRP period under Section 31 of the Code, I don't believe this bench will have jurisdiction to go beyond the mandate of the Section. Section 60(5) is only a jurisdiction given to deal with a point that is not covered by a Section of law. When explicit and specific provision gives a mandate to do a certain act, this Adjudicating Authority cannot invoke jurisdiction under Section 60(5) of the Code and ignore the mandate given under specific provision, in this case under Section 31 of the Code.

218. It has been time and again stated by the Supreme Court of India that what plan is to approved what plan is not to be approved is within the ambit of CoC, when jurisdiction is earmarked by the Code itself, this adjudicating authority transgress into somebody else's jurisdiction. Here it is the CoC. What all this bench to do is, whether or not the plan that has come for approval under Section 31 is incompliance with the Section 30(2) of the Code. The reason behind this logic is, Section 30(2) of the Code covers the rights of all the stake holders involved in this process, to maintain balance with regard to the rights of dissenting Creditors and Operation Creditors. After all, it is the money of the creditors and other stake holders, when CoC is given lead role to decide the fate of the company by complying with Section 30(2) of the Code, this bench will not have any role to interfere with their actions.

219. As to this applicant is concerned, he cannot be called as stake holder of the Corporate Debtor, he cannot be even called as Unsuccessful Resolution Applicant, he is like any other buyer goes to the market to buy something that was already sold by the shop owner. Therefore, this applicant cannot be called in any sense as aggrieved to come before this bench with this application, it can't even be called that it has has grievance over something done by the CoC or by the RP because its expression of interest was not there as on the date the plan was approved. We have to see the consequences, in case this application is allowed. The CoC is to be revived that is not permitted under law. Time is essence of the Code, that

will be violated. What will happen to the successful resolution applicant, who already deposited ₹100Crore, one year before? What will happen to the right of the applicant, who followed every procedure for its plan to be approved by the CoC? Moreover, no procedure is set out under the Code to grant leave to a person to file a resolution plan after one plan was already approved by the CoC. When a procedure is set, when time is set, it is to be understood that maximization of the value of the company is to be seen within the time and the procedure set out not by transgressing the jurisdiction conferred upon this bench in dealing with issues falling under the Code.

220. Therefore, we do not find any merit in the application filed by the applicant; therefore this application is hereby dismissed as misconceived.

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221. The resolution professional **(RP)** has submitted the resolution plan by filing this application u/s 30(6) of the Insolvency & Bankruptcy Code **(Code)** as approved by the Committee of Creditors u/s 30(4) of the Code for the approval of this Adjudicating Authority u/s 31 of the Code.

222. On perusal of this application it is understood that this adjudicating authority on 20.07.2018 admitted the company petition for commencement of Corporate Insolvency Resolution process (CIRP) and appointed an interim resolution professional, in pursuance thereof, CoC was constituted and first

meeting of CoC was held on 20.08.2018, wherein the applicant was confirmed as the resolution professional, then on 01.10.2018 invitation for submitting Expression of Interest (EOI) was issued, upon which 12 EOI's were received by the RP thereafter CIRP period was extended for another 90 days on 04.01.2019. since 08.03.2018 being the last date of receipt of the resolution plan, this successful resolution applicant (SRA) submitted the plan and it was discussed in the CoC on 12th , 16th March, 2nd April 2019 thereafter SRA on 6th April 2019 submitted a revised unsigned resolution plan. In the meantime, CIRP period was again extended on 10.04.2019, on the same day 15thCoC meeting was held, wherein it was decided to vote upon the plan on 12th April 2019 at 6:00 PM and conclude on 16th April 2019 upto 6:00PM. When the date came for voting, SRA again informed the RP that, on the basis current feedback it had received, it was considering further revision in the plan and requested the RP some more time to submit the revised plan. On instruction received from the CoC, the RP deferred the voting process. Then SRA sent the revised resolution plan to the RP on 24.04.2019 increasing the overall amount of the plan from ₹1200Crore to ₹1550Crore for distribution interse creditors. As to deferment of the voting the CoC, in its 16th meeting held on 24.04.2019, the CoC ratified the deferment of the voting on the plan. After such ratification, SRA submitted the revised signed resolution plan on 06th May 2019. The plan having come before the CoC, the meeting was held on 31st May 2019, in the said meeting it was decided to put the revised plan to vote from 6:00 PM on 3rd June 2019 till 6:00 PM on 10th June 2019. Since this authority on 07.06.2019 passed an interim order in CA-1090 of 2019 and CA-1093 of 2019 directing that the

result of ongoing voting process would be subject to result of those applications. RP on the same day received an email from SRA stating that considering the applications filed by Bank of Baroda, it would make an amendment to the resolution plan accordingly he requested for time, where upon, on 12th June 2019 CoC agreed with 51.39% voting that voting on the resolution plan be deferred. Finally, the SRA on 17th June 2019, filed a final addendum to the resolution plan on receipt of the said addendum, the CoC on 20th June 2019 decided that the voting on the Successful Resolution Plan (SRP) would begin at 6:00 PM on 21st June 2019 and end at 6:00PM on 28th June 2019. In the voting result declared on 28th June 2019, it has come out that the plan was approved with 79.3% of voting shares of the CoC. For the plan being approved, SRA furnished the performance bank guarantee of ₹100Crore. For the entire process was completed, the SRA having furnished bank guarantee of ₹100Crore, this plan was filed before this authority on 10th July 2019 for the approval under Section 31 of the Code.

223. Summary of the claims received by the RP as follows:

Nature of Creditor	**Amount Claimed (Crs in ₹)**	**Amount Admitted (Crs in ₹)**
Secured Financial Creditors	4866.12	4864.40
Unsecured Financial Creditors	2124.72	1702.60
Financial Creditors (all)	**6990.84**	**6567**
Operational Creditors (Government)	222.06	220.26
Operational Creditors (Employees and workmen)	0.10	0.10

Operational Creditors (Other than above)	4,736.97	335.86
Operational Creditors (all)	4,959.13	556.22
Total	**11,949.97**	**7,123.22**

224. The RP mentioned that the average fair value of the company has been assessed as ₹1298.31Crore and average liquidation value has been assessed as ₹619.15Crore.

225. The resolution has provided details of the claims admitted by the RP, the amount provided against the admitted claims by the resolution plan and also the percentage of the provision made again the respective heads, which are as follows:

S. No.	Category of Stakeholder	Amount Admitted (Crs in ₹)	Amount provided (Crs in ₹)	Percentage (%)
1.	Secured Financial creditors	4864.40	1499.99*	30.84%
	Unsecured Financial Creditors	1702.60	25**	1.47%
	Total FCs	**6567**	**1524.99**	
	Operational Creditors (Govt.)	220.26	9.87	4.48%
	Operational Creditors	0.10	0.10	100%

	(Employees and workmen)			
	Other Operational Creditors	335.86	15.05	4.48%
	Total OCs	556.22	25.01	4.50%
	Total	**7,123.22**	**1,550.00**	**21.76%**

226. With regard to CIRP costs, they would be paid out of the cash flows of the company within 30 business days from the date of approval of this plan, in any event, if the cash flows are not sufficient, the balance would be paid by the SRA on priority basis.

227. With regard to direct financial creditors payments, it has stated that they would be paid within 30 business days from the date of approval, the loan assignment payment (LAP) shall be transferred to special purpose vehicle (SPV) account, and from that account, payments will be released to the direct financial creditors.

228. It has been further stated in the plan, LAP will be made to direct financial creditors towards assignment/novation of the 'Remaining Debt' to the purchaser (SPV or a nominee of SRA). Remaining debt means all rights, title, interest of the creditors in and to admitted financial debt less the corporate guarantee debt, along with all rights, assets, title, charges, encumbrances, mortgages and guarantees (including the personal guarantees issued by Mr. Pradeep Kumar Agarwal to the direct financial

creditor to the extent of loan assignment payment (LAP), and any beneficial interest therein, securing such debt (but Excluding the Excluded Rights), which will be assigned/novated to the purchaser pursuant to the resolution plan.

229. The plan has also included **'Excluded Rights'** which are as follows:

(A) Personal guarantees provided by persons other than Mr. Pradeep Aggarwal, (B) any mortgage and/ or hypothecation provided by ACCIL Hospitality Limited, and (C) corporate guarantees provided by AGR Steel Strips Private Limited and ACCIL Hospitality Limited, (D) the personal guarantees provided by Mr. Pradeep Aggarwal to the Direct Financial Creditors, but only to the extent of the Residual Guarantee Amount (admitted debt of Direct Financial Creditors less Loan Assignment Payment), and (E) the mortgage created by the Company over land bearing Plot Nos. 6 & 13 measuring created by the Company over land bearing Plot Nos. 6 & 13 measuring 18900 sq.mts., located in the Industrial Estate, Bawal, Haryana, pursuant to the Memorandum of Entry dated June 27, 2013 executed by the Company in favor of IL & FS Trust Company Limited (now known as Vistra ITCL (India) Limited) for the benefit of Andhra Bank, Central Bank of India, Corporation Bank and Dena Bank (now Bank of Baroda), for securing the loans granted to ACCIL Auto Steel Private Limited by the aforesaid lenders. (Ref: Section 1.12 of the Addendum at @ 8)

230. For the corporate debtor has given corporate guarantee to related entities namely Asian Ispat FZC, Dubai, ACCIL Corporation Private Limited and ACCIL Auto Steel Private Limited, a provision has been made to pay ₹49,72,89,816 (corporate guarantee debt) payment against the admitted debt of ₹1566,14,03,007 (corporate guarantee debt) to the related entity creditors, to whom the corporate guarantee has been given by the company. It has been said that this payment would made within 30 business days from the date of approval of this plan. To pay this amount, the SPV shall provide a loan of ₹75Crore (SPV Loan) to the company inter alia for payment of the said amount. This amount will remain deposited in CIRP account, for the release of the same for the aforesaid creditors as and when RBI approval is received.

231. Regarding payments to operational creditors, provision of ₹25.01Crore was made in the plan to pay to the operational creditors, since breakup has been shown in the table above; it has not been repeated here. As to these payments, it has been stated it would be paid from the 30 business days from the date of approval.

232. The business plan in the resolution plan has stated that on the approval date, steering committee will be constituted comprising of representative each of three secured financial creditors which have the largest share in the admitted financial debt and the RP. In the place of existing vote of directors, interim board comprising of two independent directors (nominated solely by the steering committee) and the RP and the

one person nominated by SRA will come into existence on the date of approval.

233. An independent O&M contractor (nominated by the SRA and appointed by the interim board) shall be responsible for the O & M of the company facilities.

234. On and from the effective date, this interim board will be replaced by new Board of Directors constituted by the SRA. Regarding the existing employees of the company, they will continue to be employed by the company with right of rationalizing the manpower of the company.

235. With regard to supervision and implementation of the resolution plan, it has been set out in the plan that the SPV will be issued and allotted Five Crore Equity Shares for ₹50Crore by way of conversion of part of the SPV Loan. If any further conversion is required, it may be done at the option of the SRA and the SPV. Simultaneously the existing issued equity share capital of the company comprising ₹88,776,270 equity shares of face value of INR 10 each held by the shareholders of the company shall be entirely cancelled and extinguished without any payment to such shareholders and with no requirement to add 'and reduced' in the name of the company.

236. The authorized share capital of company shall stand altered to ₹1800Crore comprising 180Crore equity shares of ₹10each. Accordingly the capital clause of the memorandum of association shall and without any

further act, deed, instrument, resolution or writing be replaced by the following clause *"the authorized share capital of the company shall automatically, stand altered to ₹1800Crore comprising of 180crore equity shares of ₹10 each".*

237. It is being said in the resolution plan that the name of the company may be changed post the effective date. It is also being said that the company (CD) is not ordinarily permitted to carry forward its unabsorbed business losses in case of a change in the shareholding of such company in excess of 51% as per Section 79 of the Income-tax Act, 1961. This restriction does not apply if such change in shareholding takes place pursuant to a resolution plan approved under the IBC, provided that the jurisdictional principal commissioner of Income-tax or the jurisdictional commissioner of Income-tax)as appropriate), is afforded reasonable opportunity to express his views in this regard. Accordingly, the Resolution Professional shall, or cause the Company to, serve a notice to jurisdictional principal Commissioner of Income-tax or the jurisdictional commissioner of Income-tax (as appropriate) immediately after this Resolution Plan is submitted to the NCLT for its approval, and the Company should be permitted to carry forward its unabsorbed business losses notwithstanding a change in the shareholding of the company pursuant to this Resolution Plan.

238. With regard to this point, when all past liabilities are waived off, nothing has been left as liability, we do not believe this approval could be

accorded to the company, therefore carrying forward of losses is not permitted.

239. The plan has also stated that the SRA shall be allowed to take possession of the premises, all passwords, and bank account details on the effective dates. On the effective date, the Memorandum of Association and Articles of Association of Company shall automatically without any further Act or deal, be substituted and replaced with the form of Memorandum of Association and Articles of Association as set out in Annexure-9 of the Resolution Plan. The SPV shall infuse a minimum amount of ₹250Crore as equity to the extent required for the business purposes, within two years of the NCLT approval date.

240. Regarding reversal of preoperational transaction, under value transaction, extortionate transaction and fraudulent trading, SRA has submitted that reversal of these transactions by the Adjudicating Authority will be to the benefit of the company, therefore company will not be required to transfer any such amounts / assets to the creditors. All domain names, servers, being currently used by the company shall continue to be available for use of the company for a period of three months from the effective date. With regard to stamp duty liabilities and Tax liabilities which arises after NCLT approval date, pursuant to the transaction contemplated under this resolution shall be exempted, this clause is not acceptable under IBC because by virtue of approval of the Resolution Plan, the liability arose before admission of the company petition could be extinguished but not any

liabilities that arose after admission date. If any claim has been admitted but not reflected in the books of the company, the SRA says, shall be accounted for in the books of accounts of the company as per accounting principles up to the effective date.

241. The effective date will come into effect on the date on which steps one, two, three, four and five as set out in Schedule 2 are completed. Following this authority approval date, but prior to the commencement of step 3 of Schedule 2, the SRA shall infuse an amount aggregating to ₹650Crore (equity commitment), from the new lenders as per the source of funds set out in Schedule 3, As to this infusion is concerned, if the SRA brings the funds in accordance with law in force, the SRA need not seek leave of this authority for getting those funds.

242. As to the list of approvals, the SRA has sought for exemptions under applicable law for implementation of this resolution plan identified in Companies Act, 2013, with regard to this approval, the SRA needs to comply with the procedure set out under the Companies Act read with IBC, with respect to shareholders approvals, it is already inbuilt in the Code, therefore no special leave is required.

243. With regard to regulatory (CCI) approval, since it is an Act dealing with competition in the market, this company is liable to follow the principles under competition Act, once the plan is approved. In relation to the approval by the RBI with regard to overseas direct investment, the corporate debtor

company is bound by RBI regulations in relation to overseas direct investment, in the event the corporate debtor commits into any action violating the RBI regulations, RBI is at liberty to take action against this company.

244. With regard to procedural requirement of applicable law other than IBC, since in Section 30(2)(e) it has been stated that this Plan does not contravene any of the provisions of the law for the time being in force, it cannot be said the overriding effect under Section 238 of the Code is applicable to the Resolution Plan.

245. If at all it has been categorically mentioned that any specific procedure is exempted either under Section 30 or under Section 31, that has to be in compliance with the law in force, except to the extent exemptions provided under the Code.

246. With respect to shareholders approval for reduction and in explanation to Clause E, the Resolution Applicant need not take any approval from the shareholders. It goes without saying that the plan approved by this Bench, is binding upon various stakeholders as mentioned in Section 31 of the Code to the extent it does not contravene any of the provisions of the law for the time being in force.

247. With regard to licences and approvals, whatever approvals that are in force, may remain continue, but the Resolution Applicant/Corporate Debtor shall comply with all terms and conditions as stated in the Agreements.

248. As to claims, if any, to be paid to the person given licence and approval, if any due is left to be paid by the Corporate Debtor before admission, they shall be waived, but as to restoration of any licence or any other compliance, for the Resolution Applicant is aware of all these defects as on the time the Resolution Applicant filed the plan, the Applicant cannot seek for restoration without requisite compliance.

249. Regarding assets and claims wherever modifications are directed in independent applications, they shall be given effect to. For this plan is spread in various schedules running into several pages, since all these aspects have not been brought to the notice of this Bench at the time of making submissions, we hereby hold that whichever provision that is inconsistent with Section 30(2)(e) of the Code, it shall be treated as not approved by this Bench.

250. Accordingly, this Resolution Plan is **approved**.

Sd/-

(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT

Sd/-

(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)