NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.552 of 2019

[Arising out of Order dated 25th April, 2019 passed by National Company Law Tribunal, Hyderabad Bench in Company Application No.665 of 2018 and Company Application No.52 of 2019 in Company Petition (IB) No.24/7/HDB/2018]

IN THE MATTER OF: **Before NCLT** **Before NCLAT**

Srei Equipment Finance Limited,
"Vishwakarma", 86 C,
Topsia Road (South)
Kolkata – 700046 — Appellant

Vs.

Mr. Prabhakar Nandiraju,
Resolution Professional
MIC Electronics
Limited,
A-4/II
Electronic Complex
Kushaiguda,
Hyderabad – 500062
Telangana — Respondent

For Appellant: **Mr. Abhijeet Sinha and Mr. Shambo Nandy, Advocates**

For Respondent: **Mr. S. Chidambaram, for RP**

With

Company Appeal (AT) (Ins) No.976 of 2019

[Arising out of Order dated 31st July, 2019 passed by National Company Law Tribunal, Hyderabad Bench in I.A. No.686 of 2019 in Company Petition (IB) No.24/7/HDB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Srei Equipment Finance Limited, "Vishwakarma", 86 C, Topsia Road (South) Kolkata – 700046		Appellant
Vs.		
1. Cosyn Limited Through its Managing Director 3rd Floor, TP House, Jai Hind Gandhi Rd, VIP Hills, Silicon Valley, Madhapur, Hyderabad, Telangana 500081		Respondent No.1
2. RRK Enterprise Private Limited Through its Managing Director, 111-B Vengal Rao Nagar Hyderabad – 500038 Telangana		Respondent No.2
3. Sri Siva Lakshmanarao Kakarala Laan Resorts & Hotel Private Limited Door No.8-2-1201/ 112/A/32, 33 Natco House, Road No.2, Banjara Hills, Hyderabad, Telangana		Respondent No.3

4. Mr. Prabhakar Nandiraju, Respondent No.4
Resolution Professional,
MIC Electronics Limited,
A-4/II
Electronic Complex,
Kushaiguda,
Hyderabad – 500062

For Appellant: **Mr. Abhijeet Sinha and Mr. Shambo Nandy, Advocates**

For Respondents: **Mr. Prity Kumari, Advocate for R-3**
Mr. S. Chidambaram, for RP

J U D G E M E N T

(03rd February, 2021)

A.I.S. Cheema, J. :

1.(A) Company Appeal (AT) (Ins) No.552 of 2019 has been filed by the Appellant against common Order dated 25th April, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) in I.A. 665 of 2018 and I.A. 52 of 2019 which were filed by the Appellant in Company Petition (IB) No.24/7/HDB/2018. Both the I.A.s filed by the Appellant were dismissed.

I.A. 665 of 2018 was filed by the Appellant when in seventh meeting of the COC (Committee of Creditors), the claim of Appellant – Financial Creditor was reduced along with voting share. Subsequently, the Resolution Plan filed was taken up by COC and Plan of one Consortium Cosyn Ltd. (Respondents 1 to 3 in Company Appeal (AT) (Ins) 976 of 2019) came to be approved by COC. Thereafter Appellant filed I.A. 52 of 2019 seeking direction to COC to include claim of the Appellant for

Rs.10.40 Crores (by which the claim had been reduced) and correct the voting share and to reconsider the Resolution Plan. These I.A.s came to be dismissed as per the Impugned Order dated 25th April, 2019.

Thus the Company Appeal (AT) (Ins) No.552 of 2019 is filed.

(B) Company Appeal (AT) (Ins) No.976 of 2019 has also been filed by the same Appellant and this Appeal has been filed after the Resolution Plan which was approved by COC has been approved by the Adjudicating Authority by Impugned Order dated 31.07.2019. This Appeal has been filed primarily on the basis that the Resolution Plan was approved after deducting part of the claim of the Appellant and the Resolution Plan was approved by the Adjudicating Authority without taking into account effect of 2019 Amendment to IBC (Insolvency and Bankruptcy Code, 2016) according to which, the Appellant is entitled to a minimum amount equivalent to the amount which the Appellant would have realised in the event of liquidation of the Corporate Debtor. The Appellant has claimed that the average liquidation value would be Rs.12.98 Crores but what has been approved for the Appellant was only Rs.8.64 Crores out of admitted amount of Rs.32.29 Crores. The admitted amount is challenged in Company Appeal (AT) (Ins) No.552 of 2019.

2. Both the Appeals have been heard together. Decision in Appeal No.552 of 2019 will affect claim in Appeal No.976 of 2019. Thus both Appeals are being decided together. We will first take up Company Appeal (AT) (Ins) No.552 of 2019.

Company Appeal (AT) (Ins) No.552 of 2019

3. It is argued and claim in Appeal is that Appellant is non-banking financial company. It entered into Loan-cum-Hypothecation Agreement on 12th May, 2011 and again on 15th June, 2011 with the Corporate Debtor – MIC Electronics Ltd. Subsequently, Appellant entered into Loan Agreement dated 27th September, 2012 with M/s. Micronet Technologies Ltd. and Loan Agreement dated 30th June, 2013 with M/s. Maave Electronics Pvt. Ltd., Group Companies of the Corporate Debtor. It appears that there were disputes and arbitration proceedings were initiated between Appellant and Corporate Debtor. Subsequently, to resolve the disputes, it is claimed that Corporate Debtor and its group/associate Companies approached the Appellant for one-time settlement and Loan-cum-Hypothecation Agreement dated 22nd September, 2016 was entered by the Appellant with Corporate Debtor, M/s. Maave Electronics Pvt. Ltd. and M/s. Micronet Pvt. Ltd. The Agreement is referred by the Appellant at Annexure A-2 (Page – 14). Appellant is referred in it as Lender/Company; Corporate Debtor as "Borrower" and the other two Companies by their name/s and/or as Third Part/Fourth Part. The Appellant has referred to the contents of the said Agreement and claimed that the four loan agreements were rescheduled and restructured and the total agreed dues of Rs.35.20 Crores were settled for Rs.23.50 Crores. It is claimed that from this amount, Rs.10 Crores were to be repaid as per Schedule – II of the

Agreement and balance Rs.13.50 Crores was to be paid by issuing and allotting 52 Lakhs equity shares of the Corporate Debtor at Rs.26/- each equity share with a lock-in period of one year from date of issuing the same. Appellant claimed that 52 Lakhs shares at Rs.20/- per share were issued and allotted to the Appellant on 12th May, 2017 by the Corporate Debtor and value of these shares was Rs.10.40 Crores only. It is claimed that for balance Rs.3.10 Crores, Corporate Debtor was required to issue and allot additional shares but Corporate Debtor failed to allot the additional shares. It is claimed that the alleged shares were in the nature of security and were held by the Appellant as pledgee of shares. The Appeal claims and it is argued that there was failure on the part of Corporate Debtor with the terms of Agreement and Notice dated 13th July, 2017 (Annexure A-3 - Page 93) was issued. Subsequently, another Notice dated 16th September, 2017 (Annexure A-4 – Page 97) was issued in terms of Clause 2.1.1(ii)(d) of the Agreement and Appellant withdrew the concessions and reinstated the original claim along with interest amounting to Rs.39,27,81,934/-. The Appeal claims and it is argued that as Corporate Debtor defaulted, Appellant filed Application under Section 7 of IBC on 3rd January, 2018 (Annexure A-5 – Page 99) and the same was admitted on 13th March, 2018 as per Order (Annexure A-6 – Page 111). The admission Order was challenged by Director of Corporate Debtor but the Company Appeal (AT) (Ins) No.105 of 2018 was dismissed vide Orders dated 26.07.2018 (Annexure A-7).

4. The Appeal further claims that after the CIRP was initiated the Appellant filed claim in Form 'C' on 29th March, 2018 (Annexure R-1 – Page 6 of Reply - Diary No.13078) for Rs.43,68,84,792/-. The Appellant claims to be Secured Financial Creditor. Appellant claims that on 11th August, 2018, Respondent Resolution Professional – Prabhakar Nandiraju sent letter seeking clarification from the Appellant with regard to 52 Lakhs equity shares which were issued (Annexure A-8 – Page 128) and the Appellant replied to the same on 29.08.2018 vide Annexure A-9 (Page – 129). The Respondent filed CA 407 of 2018 (Annexure A-10 – Page 130) to declare Clause 2.1.1(ii)(c)(iv) as null and void and not binding on Corporate Debtor.

5. The seventh COC meeting took place on 24th October, 2018 (Annexure A-11 – Page 137). According to the Appeal, in the said meeting, the Respondent – Resolution Professional had reduced the claim of the Appellant to the extent of Rs.10.40 Crores and voting share of Appellant was reduced from 16.09% to 12.25%. Being aggrieved, the Appellant filed I.A. 665 of 2018 (Annexure A-12 – Page 169) against such reducing of voting share. The CIRP continued and the eleventh meeting of COC took place on 6th December, 2018 (Minutes – Annexure A-13 – Page 175). In this meeting, the Resolution Plan was approved and the Appellant participated in the meeting and voted against the Resolution Plan.

6. Thereafter, the Appellant filed I.A. 52 of 2019 (Annexure A-14 – Page 197) seeking direction to COC to include the claim of Appellant to the extent of Rs.10.40 Crores and restore original claim to the extent of Rs.43,68,84,792/- and to restore original voting share of the Appellant to 62.09% and to reconsider the Resolution Plan.

7. Adjudicating Authority on 08.04.2019 by Order (Annexure A-15 – Page 204) in I.A. 407/2018 held that the terms/clauses of the Agreements cannot be challenged before it and that as Resolution Professional has in 7th Meeting himself reduced voting percentage of Appellant, the I.A. had become infructuous.

8. The Adjudicating Authority heard the parties and the Impugned Order dated 25.04.2019 after referring to the disputes raised recorded the point for consideration and its findings and reasons as under:-

> "10. The point for consideration before this Adjudicating Authority is whether the Applicant is entitled to a claim of Rs.43,68,84,792/- and restoration of voting percentage at 16.09% of the Application.
>
> 11. From perusal of material record, this Adjudicating Authority finds that the stand of the Applicant that it is merely a pledgee of the shares is incorrect as the said shares were admittedly transferred to the demat account of the Applicant on 12.05.2017. Therefore, the Applicant becomes the absolute owner of the said shares, of course with a rider of a lock-in period of one year before which the Applicant is not entitled to sell the said shares. That being so, this Adjudicating Authority holds that the Resolution Professional is right in taking into account the value of 52,00,000 Shares @

> Rs.20/- per share and accordingly reducing a sum of Rs.10.40 Crores from and out of the original claim of Rs.35.02 Crores. It is pertinent to note that the value of the shares of any Listed Company are fluctuating one and value of shares are taken into account based on the date of transaction. Therefore, the claim of the Applicant that the shares should have been valued based on the date of the submissions of his claim is hereby rejected.
>
> 12. In view of the foregoing discussion, this Adjudicating Authority finds no infirmities with regard to the admission of the claim of the Applicant by Resolution Professional. Accordingly, IA No.665/2018 and IA 52/2019 are hereby dismissed. No order as to costs."

9. The Respondent – Resolution Professional has filed Reply/Counter (Diary No.13078) and it is argued that the Appellant in Form 'C' (Annexure R-1) had claimed Rs.43.69 Crores as the dues. The only issue being raised is regarding non-inclusion of claim with respect to 52 Lakhs shares of Corporate Debtor issued at price of Rs.20/- each and it is claimed that the same is a pledge. Resolution Professional claims that as per the Loan Hypothecation Agreement dated 22.09.2016 (Agreement – in short), the outstanding was Rs.35.02 Crores and the same was reduced to 23.5 Crores. This amount was to be discharged by payment of Rs.10 Crores in instalments and balance Rs.13.5 Crores was to be met by the Corporate Debtor by issuing 52 Lakhs equity shares at the price of Rs.26/- per share with lock-in period of one year. According to the RP, the Appellant – Lender is still holding the same shares in its Demat Account. The Resolution Professional claims that as per the Agreement,

52 Lakhs shares @ Rs.20/- each were allotted to the Appellant on 31.03.2017 is not in dispute. (Issued and allotted on 12.5.2017 as per Demat Credit Statement – Annexure R-2). According to him, they are not pledged shares but they are free shares. The shares were allotted is not in dispute. Demat Statement for the period 1st January, 2017 to 15th May, 2017 is at Pages – 11 and 12 – Diary No.13078. It is stated that as loan payment was defaulted, Rs.35.02 Crores of original dues were to be restored but when 52 Lakhs shares worth Rs.10.40 Crores had been issued, the outstanding was required to be reduced. The Resolution Professional has referred the dues of the Appellant as under, in Written Submissions – Diary No.21866:-

"The correct dues of the Appellant **(See page 2, para 2 of Counter).**

Sl. No.	Particulars	Amount In Crore
1	Total Dues to SERI	35.02
2	12.05.2017- Allotment of 52,00,000 shares at price of Rs.20 per share	(10.40)
3	RTGS paid to SERI on 31.03.2017	(0.10)
4	RTGS paid to SERI on 26.09.2017	(0.10)
5	RTGS paid to SERI on 30.12.2017	(0.05)
6	Total Outstanding	24.37
7	Add: Interest @12%	5.91

8	Over due charges @ 36.5%	2.01
	Total dues considered by the Company	32.29

"

10. It is argued by the Resolution Professional that the Appellant is still holding 52 Lakhs shares at price of Rs.20/- per share amounting to Rs.10.40 Crores but at the same time is claiming these amounts as if the same are due, which is not tenable. The Appellant participated in the meetings even after reduction of the voting share from 7th to 11th COC meetings. The Respondent is supporting the Impugned Order. The Respondent is pointing out that the Agreement dated 22nd September, 2016 does not show that the shares issued were in the nature of security against loan. It is also argued that the Corporate Debtor issued 52 Lakhs shares worth Rs.10.40 Crores and this is reflected in the Balance Sheet of the Company. Thus, according to the Respondent, there is no fault in the reduction of the claim and consequent reduction in the voting share of the Appellant.

11. The learned Counsel for the Appellant submitted that the shares issued to the Appellant are being held by the Appellant as security. According to the learned Counsel, if the contents of the Agreement are seen, on sale of the shares after lock-in period if excess amount is received by the Appellant, Appellant was to return a part, and if less amount is received, Corporate Debtor was to pay and thus, the amount which the Appellant had to recover was being assured.

12. It would be appropriate to reproduce the relevant contents of the Agreement dated 22.09.2016. Para – 2.1 is as under:-

"ARTICLE II

AGREEMENT AND CONDITIONS FOR LOAN

2.1 Facility and Application of Proceeds & Terms of Disbursement

2.1.1 The parties to the instant agreement had agreed that by way of the instant agreement, the entire claim in respect of the Four Agreements being No.HL0044090 dated May 12, 2011, Agreement No. HL0046121 dated June 15, 2011, 45611 dated June 30, 2013 and No. HL0062166 dated Sept 27, 2012, would be re-scheduled and restructured in the following manner:

[i] The present accumulated dues as agreed upon by and between the parties herein under the 4 aforesaid agreements being Rs. 35,02,00000/- (Rupees Thirty Five Crores and Two Lacs Only).

[ii] Out of the aforesaid amount of Rs.35,02,00,000 - (Rupees Thirty Five Crores Two Lacs Only), a sum of Rs.23.50 (Rupees Twenty Three Crore Fifty Lakh) only would be repaid alongwith interest in the following manner:

[a] The parties have agreed that the Borrower will pay off Rs.10 Crores (Rupees Ten Crores Only) alongwith interest as mentioned in Schedule I and in the manner as set out in Schedule II. This amount of 10 Crores will be considered as a facility extended to the Borrower Company.

[b] It is further agreed between the parties that the Borrower would as a security keep the property more fully described in this Schedule V herein below, which was also part of the security of the earlier agreements being HL0044090 dated May 12, 2011 and Agreement No. HL0046121 dated June 15, 2011 in favour of the party of the First Part by a registered Memorandum of Deposit of Title Deeds executed on 30th August, 2011.

[c] i) Against the balance amount of Rs.13.5 crores (Rupees Thirteen Crores Fifty Lakhs Only) provided to the Borrower, the Borrower Company would issue 52,00,000/- numbers of shares of the Borrower Company @ Rs.26/- per share morefully described in Schedule IV therein these shares will be issued on preferential allotment basis in compliance with SEBI guidelines, rules and regulations. The shares so issued will be held by the Lender under lock in period for a period of one year (12 months) from the date of issuance of the same as per SEBI guidelines.

ii) The said shares shall be issued by the Borrower Company within a period of 90 days from date of execution of these presents.
iii) After a period of one year from the date of issuance of the said shares the Lender would be entitled to sell the said shares in the open market and recover the market value of the same.

iv) If at the time of sale of the shares by Lender, the value of the shares in the market is above Rs.31/- (Rupees Thirty One) per

share, the Lender shall retain an additional 30% of the value over and above Rs.31/- per share. The balance 70% of the difference amount being the value over and above Rs.31/- (Rupees Thirty One Only) per share shall be refunded to the Borrower.

(c) However in case the shares are sold in the open market and the value of the shares as on the date of sale of the shares is lower than the price of Rs.31/-(Rupees Thirty One) per share the Borrower Company shall pay the difference amount together with within a period of 15 days from the date of demand made by the Lender.

[d] It is further agreed that the concessions on the entire dues of Rs.35,02,00,000/- (Thirty Five Cores and Two Lacs Only) given by the Lender in this agreement are extended only on the assurance of the Borrower Company that the settled amount of Rs.23.5 Crores together with accrued interest will be cleared and/or realized without default in the manner as mentioned herein. However in case of non realization of a sum of Rs.23.5 Crores together with accrued interest or any part thereof in terms of this instant agreement, all the concessions shall stand withdrawn.

(e) In view of the aforesaid payment structure the claims in respect of the party of the Third Part and the party of the Fourth would also be taken as settled between the parties to this agreement.

(f) All the assets (including those hypothecated by the parties of the

> Third and Fourth part) will be returned back to the party of the Second Part only after issuance of the shares by the party of the Second Part and after completion of all formalities since the assets are lying in the custody of several Receivers."

13. The Appellant is trying to interpret these terms of the Agreement, now to claim that the shares to be issued were in the nature of pledge. The learned Counsel for the Appellant accepted that the terms nowhere state that the shares would be held as pledge. There is no dispute that 52 Lakhs shares were issued by the Corporate Debtor to the Appellant on 12th May, 2017 (see Appeal Para 7(k)). The Application under Section 7 was filed only subsequent to such issue on 3rd January, 2018. The Appellant has continued to hold the shares. What the Appellant is trying to interpret as pledge in Sub-Clause C(iv) is a contingent Clause which contingency has not arisen. Shares of listed Company have been transferred in name of Appellant and are held by Appellant with right to sell after one year (which is now over). When to sell after 1 year, the period is not fixed. When title in the shares has passed with right to further sell by choice (after the lock in period as per SEBI guidelines), the transaction cannot be held to be pledge under Section 172 of the Indian Contract Act, 1872. Reading the Agreement dated 22.09.2016 we are unable to hold that the transfer of shares was only a security and not absolute transfer. We do not agree with the Counsel for the Appellant

that the shares were pledged. The learned Counsel for Respondent has argued that if there had been a pledge, it would reflect in the Demat Statement. Considering the record, fact remains that the shares were allotted to the Appellant as per the Agreement. May be, at the time when the shares were allotted, the rate was Rs.20/- per share, the Corporate Debtor being a listed entity.

14. The Appellant on 13.07.2017, issued Notice (Annexure A-3) and without specifying amount claimed that there was unpaid financial debt arising out of Agreement dated 22nd September, 2016 and threatened the Corporate Debtor with IBC proceedings. Later, the Appellant sent Notice dated 16th September, 2017 (Annexure A-4) and informed the Corporate Debtor as under:-

> "Since the account became irregular, under a Loan Cum Hypothecation Agreement dated 22nd September 2016, the above mentioned loans were restructured upon your request.
>
> You have defaulted in making payment as per the terms of the said agreement. Further as per the terms of the said agreement Srei is entitled to recover the entire dues at its sole discretion. Accordingly as on 16th September 2017 an amount of Rs.39,27,81,934 (Rupees thirty nine crore twenty seven lakh eighty one thousand nine hundred & thirty four only) is due and payable by you.
> In view of the above, we hereby call upon you to make the payment of an amount of Rs.39,27,81,934 (Rupees Thirty nine crore twenty seven lakh eighty one thousand nine hundred & thirty four only) due as on 16th September 2017 forthwith, failing which we will be constrained to take legal action at your cost and consequence which you may please note."

15. The Appellant has treated the Agreement to have been defaulted and claims that it is entitled to recover entire dues of Rs.39,27,81,934/-. Thus, the Appellant having got transferred 52 Lakhs shares to itself, after treating the Agreement to be in default, and after withdrawing concessions, still wants to rely on the contingent Clause. Now Appellant wants to read the same as pledge, which we do not agree. The Appellant never offered to return the shares (which it could not considering the Agreement). Counsel for Resolution Professional has argued that in law, under Section 67 of The Companies Act, 2013, also, the Corporate Debtor cannot buy back its shares. We do not find that the Resolution Professional erred in reducing the claim of the Appellant in proportion and in reducing the voting share of the Appellant. We do not find error with the Impugned Order. The learned Counsel for Appellant has referred to some Judgements on the basis that there is relationship of Pawnor and Pawnee. As we find that pledge itself is not established, we need not refer to the Judgements cited.

16. The learned Counsel for the Appellant argued that while admitting the Appeal, the Adjudicating Authority had treated the amount claimed in this context as pledge. What appears is that in Application under Section 7 (Annexure A-5), Appellant claimed the shares to be pledged and the Adjudicating Authority at the time of arguments (Order Annexure A-6) after referring to the rival claims and some observations, proceeded on the basis that there is occurrence of default in respect of Rs.10 Crores

due and payable in Para – 19 of the admission Order and referred to the Judgement in the matter of **"Innoventive Industries Ltd. vs. ICICI Bank"** (2018 1 SCC Page 407) where there were observations that Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy that default has occurred and it is of no matter that the debt is disputed so long as the debt is "due" i.e. payable. The Adjudicating Authority at that time on such analysis proceeded and admitted the Application under Section 7. Thus, we do not find any substance in the argument of the learned Counsel for Appellant that the Adjudicating Authority in the present Impugned Order dated 25th April, 2019, in a way reviewed its earlier Order.

17. For the above reasons, we do not find any substance in the present Appeal.

18. Company Appeal (AT) (Ins) No.552 of 2019 is dismissed.

No Orders as to costs.

Company Appeal (AT) (Ins) No. 976 of 2019

19. This Appeal has been filed against the acceptance of the Resolution Plan in the eleventh meeting of COC dated 6th December, 2018. It refers to the same relationship of the Appellant with the Corporate Debtor based on the four Loan Agreements of 2011, 2012, 2013 which culminated into the Agreement dated 22nd September, 2016 which we

have referred while dealing with Company Appeal (AT) (Ins) No.552 of 2019 in the Judgement. In this Appeal also, the Appellant has pointed out that the Respondent No.4 (Resolution Professional) after seeking clarification with regard to 52 Lakhs shares which were allotted to the Appellant reduced the admitted claim of the Appellant by Rs.10.40 Crores being the value of the shares which were allotted. On such basis, seventh meeting was held which led to filing of I.A. No.665 of 2018 and when the Resolution Plan was approved, which was opposed by the Appellant, the Appellant filed I.A. 52 of 2019. It is stated that CA 407 of 2018 which has been filed by the Resolution Professional was disposed of by the Adjudicating Authority vide Order dated 8th April, 2019 (Annexure A-15 – Page 219). It is argued that in its Order, the Adjudicating Authority did not interfere with the impugned Clauses of the Agreement and as the RP had proceeded in the seventh meeting reducing the voting percentage of Appellant, the I.A. 407 of 2018 was treated as infructuous. The Appeal mentions that against Order dated 25th April, 2019, the Appellant has filed Company Appeal (AT) (Ins) No.552 of 2019 (referred supra).

20. Coming to the Resolution Plan approved, this Appeal claims that the Adjudicating Authority failed to consider the 2019 Amendment. The Resolution Plan submitted by Respondents 1 to 3 makes provision to pay Appellant only Rs.8.64 Crores out of admitted amount of Rs.32.29 Crores. It is stated that the admitted amount is challenged in Company

Appeal No.552 of 2019. Appellant claims that being dissenting Financial Creditor, Appellant is entitled to at least value of secured assets which at the time of execution of Loan Agreement was Rs.35,02,00,000/-. According to Appellant, the average liquidation value of the securities of Appellant is Rs.12.98 Crores. The Appellant is, however, being paid only Rs.8.64 Crores and thus it is necessary to interfere in the Resolution Plan which has been approved.

21. The Respondents 1 to 3 were served in this Appeal. However, only Respondent No.3 has appeared and filed Reply (Diary No.19641). Respondent No.3 who is part of the consortium which has been Successful Resolution Applicant, has justified the acceptance of the Resolution Plan by COC. It is stated that the Plan was approved on 06.12.2018 in eleventh meeting by majority of 83.25%. The Resolution Plan was approved by Adjudicating Authority vide Impugned Order dated 31.07.2019. Against said approval, no Appeal was filed till 13.09.2019. It is claimed that when Amendment Act, 2019 was enforced w.e.f. 06.08.2019, there was no proceeding or Appeal pending. It is claimed that there was no contravention of law as was applicable when the Resolution Plan was approved by COC and the Adjudicating Authority. The total dues of Appellant were considered after deducting value of 52 Lakhs shares. The mandate of Section 30(2) and Section 30(4) of the Amended Act and CIRP Regulations has been complied with while arriving at the amount payable. Commercial wisdom of COC cannot be

trespassed in judicial review unless there is non-compliance of Section 30(2), 30(4) of IBC and Regulation 39 of CIRP Regulations, 2016, the challenge of the Appellant is merely to the quantum. The approved Resolution Plan is binding on all the stakeholders.

22. The learned Counsel for the Appellant in this Appeal No.976 of 2019 submitted that as stated in Appeal No.552 of 2019, the Resolution Plan approved has been with deduction of the claim of the Appellant to the extent of Rs.10.40 Crores and reducing voting share. The learned Counsel referred to Section 30(2)(b)(ii) read with Section 30(4) as per the Amendment Act 26 of 2019 and submitted that the Appellant as dissenting Financial Creditor is entitled to amount which shall not be less than the amount to be paid to such Creditor in accordance with Sub-Section (1) of Section 53 in the event of a liquidation. The learned Counsel referred to Judgement in the matter of **"Committee of Creditors of Essar Steel India Limited versus Satish Kumar Gupta & Ors."** 2019 SCC OnLine SC 1478 which in Para – 109 is as under:-

> "**109.** When it comes to the validity of the substitution of Section 30(2)(b) by Section 6 of the Amending Act of 2019, it is clear that the substituted Section 30(2)(b) gives operational creditors something more than was given earlier as it is the higher of the figures mentioned in sub-clauses (i) and (ii) of sub-clause (b) that is now to be paid as a minimum amount to operational creditors. The same goes for the latter part of sub-clause (b) which refers to dissentient financial creditors. Mrs. Madhavi Divan is correct in her argument that Section 30(2)(b) is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a certain minimum amount, the

> minimum in the case of operational creditors being the higher of the two figures calculated under sub-causes (i) and (ii) of clause (b), and the minimum in the case of dissentient financial creditor being a minimum amount that was not earlier payable. As a matter of fact, pre-amendment, secured financial creditors may cramdown unsecured financial creditors who are dissentient, the majority vote of 66% voting to give them nothing or next to nothing for their dues. In the earlier regime it may have been possible to have done this but after the amendment such financial creditors are now to be paid the minimum amount mentioned in sub-section (2). Mrs. Madhavi Divan is also correct in stating that the order of priority of payment of creditors mentioned in Section 53 is not engrafted in sub-section (2)(b) as amended. Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is the commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder."
>
> (Emphasis Supplied)

Para 110 and 111 also may be reproduced as relevant to deal with arguments (infra). They read as under:-

> "**110.** As has been held in this judgment, it is clear that Explanation 1 has only been inserted in order that the Adjudicating Authority and the Appellate Tribunal cannot enter into the merits of a business decision of the requisite majority of the Committee of Creditors. As has also been held in this judgment, there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the Committee of Creditors; provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment.

> **111.** Equally, Explanation 2 applies the substituted Section to pending proceedings either at the level of the Adjudicating Authority or the Appellate Authority or in a Writ or Civil Court. As has been held in *Swiss Ribbons* (supra) and *ArcelorMittal India* (supra) (see paragraph 97 of *Swiss Ribbons* (supra) and paragraph 82, 84 of *ArcelorMittal India* (supra)), no vested right inheres in any resolution applicant to have its plan approved under the Code. Also, the Federal Court in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*, AIR 1941 FC 5 and later, this Court in *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers* (2003) 6 SCC 659 (at paragraphs 16 and 17) have held that an appellate proceeding is a continuation of an original proceeding. This being so, a change in law can always be applied to an original or appellate proceeding. For this reason also, Explanation 2 is constitutionally valid, not having any retrospective operation so as to impair vested rights."

23. Learned Counsel for the Respondents argued that Section 30(2)(b) was amended w. e. f. 16th August, 2019 while in the present matter, the Resolution Plan was approved by COC on 06.12.2018 and Adjudicating Authority on 25th April, 2019 and at that time, the protection under Section 30(2) was only with regard to Operational Creditors. It is argued by Counsel for Resolution Professional that the value of the shares was correctly reduced and the listed company cannot buy back its own shares under Section 67 of the Companies Act, 2013. It is argued that the benefit of the Amendment in Section 30(2) of IBC cannot be extended to the Appellant as the Explanation 2 which gives retrospective benefit would not help the Appellant as on 16th August, 2019, the present Appeal had not been filed and the same was filed only on 13th September, 2019.

24. Section 30 Sub-Section (1) and (2) after amendment as per Act 26 of 2019 was enforced w.e.f. 16.08.2014 may be reproduced for reference and the same reads as under:-

> "**30. Submission of resolution plan**.— (1) A resolution applicant may submit a resolution plan [along with an affidavit stating that he is eligible under section 29-A] to the resolution professional prepared on the basis of the information memorandum.
>
> (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
>
> (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the [payment] of other debts of the corporate debtor;
>
> [(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—
>
> (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
>
> (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,
>
> whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.
>
> *Explanation 1*.—For removal of doubts, it is hereby clarified that a distribution in accordance with the

provisions of this clause shall be fair and equitable to such creditors.

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

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

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

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

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

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

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

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

Relevant part of Amended Sub-Section 4 of Section 30 reads as under:-

> "(4) The Committee of Creditors may approve a resolution plan by a vote of not less than [sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:.....]"

25. The present Appeal was filed on 13th September, 2019. The effort of the learned Counsel for the Respondent to submit that the benefit of amended Sections 30(2) and 30(4) cannot be extended as date on which the Amendment was enforced i.e. 16th August, 2019, no proceeding or Appeal was pending or that it had become time barred, needs to be rejected. When the Impugned Order was passed and the Appeal was filed, we had heard the Appellant and Counsel for Respondent No.3 who had appeared and the delay of six days in preferring Appeal was condoned on 20th September, 2019. That Order has not been challenged. The Impugned Order was passed on 31.07.2019 and when the Appeal has been filed and delay has been condoned, we are unable to accept argument that the benefit of the amendment can be denied. Above para – 111 of Judgement in the matter of "Essar Steel" also makes it clear that Appellate Proceeding is continuation of original proceeding. Thus when

Appeal is admitted after condoning delay, Appellant is entitled to claim that it is entitled to benefit of the Amendment Act.

Now it needs to be seen if the Resolution Plan as approved is in compliance of the Amended Provision as far as regards the Appellant keeping in view para – 109 (referred supra) in Judgement in the matter of "Essar Steel".

Further dictation

26. This Appeal along with Company Appeal (AT) (Ins) No.552 of 2019 were reserved for Judgement on 25th November, 2020. When we sat down to write the Judgements, it was felt necessary that the Resolution Professional should assist this Tribunal with certain particulars and facts and figures. As such, we posted this Appeal for directions on 4th January, 2021. On 4th January, 2021, we passed the following Order:-

"**O R D E R**
(Virtual Mode)

> **04.01.2021** 1) This Appeal along with Company Appeal (AT) (Ins) No.552 of 2019 was heard and reserved for Judgement by us on 25.11.2020. We have now listed this Appeal today for directions.
>
> 2) Heard Mr. Abhijeet Sinha for the Appellant, Ms. Prity Kumari for Respondent No.3 and Mr. S. Chidambaram for Resolution Professional – Respondent No.4. Counsel for Respondent No.4 states that in Company Appeal (AT) (Ins) No.552 of 2019, he has filed Reply and arguments but not in this Appeal.

3) Appellant has claimed in Appeal that the Resolution Plan approved makes provision to pay the Appellant only Rs.8.64 Crores out of admitted amount of Rs.32.29 Crores (Which admitted amount of Appellant is under challenge in Company Appeal (AT) (Ins) No.552 of 2019.) Appellant has further claimed that as dissenting Financial Creditor, it is entitled to at least the value of its security interest which at the time of execution of Loan Agreement was Rs.35,02,00,000/-. Appellant claims the average liquidation value of securities held by Appellant would be Rs.12.95 Crores.

4) Resolution Professional in Company Appeal (AT) (Ins) No.552 of 2019 in Counter has claimed that after deducting value of 52 Lakhs shares issued, the claim of Appellant was admitted for dues of Rs.32.29 Crores.

5) Appellant has relied on Amendment Act 26 of 2019 and Judgement in the matter of "Committee of Creditors of Essar Steel India Limited versus Satish Kumar Gupta & Ors." (2019 SCC OnLine SC 1478) para - 109.

6) We have already heard the parties in Company Appeal (AT) (Ins) No.552 of 2019 and this Appeal and are yet to decide the issues raised in both Appeals. We have noticed that Resolution Professional has not responded to the averments made in this Appeal and we require his response, especially to the above claims of the Appellant.

7) (i) Keeping all issues still open, we direct Resolution Professional to file Affidavit responding to above averments and claims of Appellant.

(ii) The Affidavit should further confirm in terms of Amended Section 30(2)(b)(ii) if the Resolution Plan provides for the payment of debts of Appellant – Financial Creditor, who did not vote in favour of the Resolution Plan (in such manner as may have been specified by the Board), which shall not be less than the amount to be paid to such Creditor in accordance with Sub-Section 1 of Section 53 of IBC, in the event of a liquidation of the Corporate Debtor. If no, what should be the payment.

8) Resolution Professional is further directed to file copies of Form 'G' (Regulation 36A(2)) and Form 'H' (Regulation 39(4)).

9) Resolution Professional is directed to file the Affidavit and documents as directed within 10 days, after serving copies of the Affidavit on Counsel for Appellant and Respondent No.3 and after serving copy on Respondents Nos.1 and 2 along with copy of this Order. Proof of service be filed with regard to service of Affidavit on Respondents 1 and 2.

10) List this Appeal on 19.01.2021 for further hearing as part heard."

27. In response, the Resolution Professional filed Affidavit dated 11th January, 2021 along with two Annexures (Diary No.24809). When the matter came up before the Tribunal on 19th January, 2021, we passed the following Order:-

"**ORDER**
(Virtual Mode)

19.01.2021 The Resolution Professional is not present. His counsel is present in Virtual Mode.

2. We have seen the affidavit filed by the Resolution Professional vide Diary No. 24809. We are not satisfied with the affidavit. The Affidavit does not comply with the directions as were given by us on 04th January, 2021. Direction 7 (i) to Resolution Professional required the Resolution Professional to respond to the claims of the Appellant referred in earlier part of the Order. There is no reference and specific response by the Resolution Professional with regard to claims noted in Paragraph 3 of the Order dated 04th January, 2021. There is no response to directions as given in Paragraph 7 (ii) also.

3. The Resolution Professional is duty bound to Assist this Tribunal. The Resolution Professional is not a litigant but a responsible officer under the provisions of IBC. Resolution Professional needs to specifically comply with directions given and put on

record facts and calculations, not merely relying on unamended Section 30 (2) (b), but also, in the alternative, on the basis of Amended Section 30 (2) (b) (ii) as amended by Amendment Act 26 of 2019.

4. The Resolution Professional is directed to file further affidavit to strictly comply our directions dated 04th January, 2021. The same may be filed within a week serving copies of the same to the parties including Respondent Nos. 1 & 2.

List the Appeal for further hearing as 'Part-Heard' on **28th January, 2021**.

On the said date, the Resolution Professional should also remain available in Virtual Mode."

28. Consequently, the Resolution Professional appeared in Virtual Mode before us on 28th January, 2021 after filing the second Affidavit/further Affidavit dated 21st January, 2021 vide Diary No.24977. We had then directed that we will hear the parties with regard to these two Affidavits filed. Accordingly, the parties were heard on 1st February, 2021.

29. It would be appropriate to reproduce the further Affidavit filed by the Resolution Professional which reads as under:-

"1. I, N. Prabhakar, S/o. N. Suryanarayana, aged about 55 years, R/o. Door No. 11-12-7, Road No. 1 Income Tax Colony, Sri Rama Krishna Puram, Hyderabad – 500035, do hereby solemnly affirm and state as under:

2. I am the Resolution professional of MIC Electronics Limited, Hyderabad.

3. As per the directions of Hon'ble NCLAT dt. 19.01.2021, the Respondent (RP) herein submits the following:

   1) After due deliberations the COC approved the resolution plan on 06.12.2018 during its 11th COC Meeting. The Resolution plan was approved by Hon'ble NCLT on 31.07.2019 and the amendment to Section 30(2)(b)(ii) was on 16.08.2019, having retrospective effect on certain conditions.

   2) With reference to Para 3 of order dated 04.01.2021, it is confirmed that, as per approved Resolution Plan the Appellant is entitled for Rs.8.64 Crores out of admitted claim amount of Rs.32.29 Crores. This admitted amount of Rs.32.29 Crores is under challenge in Appeal No.552 of 2019. The dues at the time of execution of loan agreement was Rs. 35.02 Crores, is also correct. However the average value of the secured assets held by Appellant is Rs.12.86 Crores (this is derived from the valuation given by two independent valuers, Valuer – 1 = Rs.12.72 Crores and Valuer – 2 = Rs.13.00 Crores and the average being 12.86 Crores – Copy of the valuation reports are enclosed as **Annexure -1).**

   3) With reference to Para 7 (ii) of order dated 04.01.2021 it is humbly submitted that the Appellant is entitled as per Amended Section 30(2)(b)(ii) Rs.8.60 Crores. This figure arrived under Section 53(1) is explained below:

      Average liquidation value of total assets of the Company is Rs.53.01 Crores **(Copy of statement of Average Liquidation Value is at Annexure -2).** CIRP Cost is Rs.5.8 Crores. Available for distribution for various creditors is Rs.47.21 Crores. Priority will be given to Secured Financial Creditors along with 24 months dues to workers i.e. Rs.3.45 Crores and proportionately workers are entitled for Rs.92 Lakhs and the Appellant

proportionately will get Rs.8.60 Crores against the admitted claim of Rs.32.29 Crores.

4) For interpretation of Section 30(2)(b)(ii), I relied upon the following decisions:

a. DBS Bank Ltd., Singapore vs. Mrs. Sailendra Ajmera & another in Company Appeal (AT) Insolvency No.788 of 2019 (**Para 10**).

b. Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors. Civil Appeal No.8766-67 of 2019 (**Para 18**).

c. The relevant pages of case laws are attached as **Annexure – 3** to this Affidavit for ready reference."

30. The learned Counsel for the Appellant submitted that Judgement in the matter of "DBS Bank" was not with regard to challenge of Resolution Plan but the distribution. It is argued that the Resolution Professional has accepted that average value of the secured asset is Rs. 12.86 Crores. It is stated that Resolution Professional has relied on arguments in the matter of "Essar Steel". Counsel for Appellant submitted that para – 109 in the matter of "Essar Steel" is the relevant paragraph for consideration.

31. We have gone through the material placed before us and keep in view provisions of amended Section 30(1)(2)(ii) and read the same with Section 53(1) of IBC with paragraphs – 2 and 3 of the Affidavit filed by the Resolution Professional is material. The Resolution Professional has accepted that the average value of the secured asset of the Appellant is

Rs.12.86 Crores and has given his calculation in para – 3 of the Affidavit that even if the amended Section was to be applied, the figure arrived at under Section 53 (1) for the Appellant would be Rs.8.60 Crores. It is claimed that this has been provided in the Resolution Plan.

32. In view of the above, the challenge put up by the Appellant to the Resolution Plan with regard to provisions made for the Appellant in the Resolution Plan even if looked at from the alternative angle considering the amended provisions of Section 30 of IBC, would not survive.

However, the Appellant, as dissenting Financial Creditor, needs to be paid on Priority. As such we pass following order:-

ORDER

A. Company Appeal (AT) (Insolvency) No. 976 of 2019 is partly allowed. The Appellant shall be paid Rs. 8.60 Crores, under the Approved Resolution Plan, on priority.

Except for relief to this extent, there is no substance in the Appeal and is disposed accordingly.

B. Company Appeal (AT) (Insolvency) No. 552 of 2019 and Company Appeal (AT) (Insolvency) No. 976 of 2019 are disposed accordingly.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

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