NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1490 of 2019

[Arising out of Impugned Order dated 10th December 2019 passed by the Hon'ble National Company Law Tribunal, New Delhi Bench, in C.A. (IB) No.1577/KB/2019]

IN THE MATTER OF:

Shrawan Kumar Agrawal Consortium
(A Consortium of Mr Shrawan Kumar Agrawal,
Mr Anup Bansal, Mr Ghanshyam Dalia and
Mr Dhruv Kumar Agrawal)
Through Sh. Shrawan Kumar Agrawal
Having its office at:
219, 2nd Floor, Krishna Complex
Jagatpur Road, Raigarh – 496001, Chattisgarh
e-mail: shrawan@barbrik.in **...Appellant**

Versus

1. **Rituraj Steel Private Limited**
   Through its Authorised Representative
   Having its office at:
   The East Park, Agrasen Chowk
   Magarpara Road, Bilaspur
   Chhatisgarh – 495001 **...Respondent No.1**

2. **Sh. Amresh Shukla**
   Resolution Professional of
   City Mall Vikash Private Limited
   F-05, Jaiseep Complex
   112 Zone-II, M.P. Naga
   Bhopal – 462011 **...Respondent No.2**

3. **Committee of Creditors**
   City Mall Vikash Private Limited
   Through its Members
   F-05, Jaiseep Complex
   112 Zone-II, M.P. Naga
   Bhopal – 462011 **...Respondent No.3**

Present:

For Appellant : Ms Anju Jain, Mr Hitesh Sachar and Ms Nandita Chaudhary, Advocates

For Respondent : Mr Anuj Kumar, Advocate for R-1.

Mr Abhijeet Sinha, Mr Susheel Joseph Cyriac, Ms. Richa Bharadwaj and Mr Saikat Sarkar, Advocates for R-2 with Mr Amresh Shukla, RP in person.
Mr Pankaj Jain, Advocate for Intervenor.
Dr Naurya Vijay Chandra, Advocate with Ms. Sucheta Gupta, CS for JM Financial.
Mr Darpan Wadhwa, Sr. Advocate

With

Company Appeal (AT) (Insolvency) No. 78 of 2020

IN THE MATTER OF:

Rituraj Steel Private Limited
Through its Authorised Representative
Mr Rituraj Bajpai
The East Park, Agrasen Chowk
Magarpara Road, Bilaspur
Chhatisgarh – 495001 **...Appellant**

Versus

1. **Sh. Amresh Shukla**
   Resolution Professional of
   City Mall Vikash Private Limited
   F-05, Jaiseep Complex
   112 Zone-II, M.P. Naga
   Bhopal – 462011 **...Respondent No.1**

2. **Shrawan Kumar Agrawal Consortium**
   Through its Authorised Representative
   219, 2nd Floor, Krishna Complex
   Jagatpur Road, Raigarh
   Chattisgarh – 496001 **...Respondent No.2**

3. **Committee of Creditors**
   City Mall Vikash Private Limited
   Through its Members
   F-05, Jaiseep Complex
   112 Zone-II, M.P. Naga
   Bhopal – 462011 **...Respondent No.3**

Present:

For Appellant : **Mr Anuj Kumar and Mr Shudhansu Kr. Singh, Advocates**
For Respondent : **Mr Abhijeet Sinha, Mr Susheel Joseph Cyriac, MsRicha Bharadwaj and Mr Saikat Sarkar, Advocatesfor R-1 with Mr Amresh Shukla, RP in person.**

Ms Anju Jain and Mr Hitesh Sachar, Advocates.
Dr Naurya Vijay Chandra, Advocate with
Ms Sucheta Gupta, CS for JM Financial.

With

Company Appeal (AT) (Insolvency) No. 184 of 2020

IN THE MATTER OF:

PHIL Minerals Beneficiation &
Energy Private Limited
CIN: U13100CT2006PTC018459
11-B, Sai Plaza Link Road Bilaspur
Chhattisgarh – 495001
E-mail: philmineralsbsp@yahoo.in
Phone No.: 9205117285 **...Appellant**

Versus

1. **Amresh Shukla**
   Resolution Professional for
   City Mall Vikash Private Limited
   F-05, Jaiseep Complex
   112 Zone-II, M.P. Naga
   Bhopal – 462011
   E-mail: insolvencyprofessionalsindia@gmail.com **...Respondent No.1**

2. **J.M. Financial Services Limited**
   Ground & 8th Floor, Kankaria Estate
   6 little Russel St. Kolkata
   West Bengal – 700071 **...Respondent No.2**

3. **Punjab National Bank**
   Katora Talaab Branch, Gurukh Tower
   Katora Talaab, Raipur
   Chattisgarh – 496001 **...Respondent No.3**

4. **Shrawan Agarwal Consortium**
   P.H.- 18-20, Village Kotmar Near Mahupalli
   District Raigarh, Raigarh (C.G.) – 496001 **...Respondent No.4**

Present:

For Appellant : **Mr. Pankaj Jain and Ms. Sneha Pandey, Advocates**

For Respondent : **Mr. Abhijeet Sinha, Mr. Susheel Joseph Cyriac, Ms. Richa Bharadwaj and Mr. Saikat Sarkar, Advocates for R-1 with Mr. Amresh Shukla, RP in person.**
Ms. Anju Jain and Mr Hitesh Sachar, Advocates.
Dr. Naurya Vijay Chandra, Advocate with
Ms. Sucheta Gupta, CS for JM Financial.

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These Appeals emanate from the common order passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata, dated 10th December 2019, passed in C.A. (IB) No.1577/KB/2019, under Section 31 of the Insolvency and Bankruptcy Code 2016 (in short **I&B Code**'),whereby the Adjudicating Authority, Kolkata Bench has issued directions for fresh bidding within 15 days and file the re-approved Resolution Plan by 31st December 2019 and conclude the process, ignoring the approval of the Resolution Plan by the Committee of Creditors (in short 'CoC') with a vote share of 84.70 per cent. All these three Appeals are against the common order; therefore, for the sake of convenience, they all are being decided together.

2. The Appellant in Appeal No.1490 of 2019 is challenging the legality of the impugned order on the ground:

- That the Appellant herein is the successful resolution applicant, whose Resolution Plan has been approved by the Committee of Creditors with 84.70% of voting share.

- The Appellant contends that after the approval of the resolution plan by the CoC, the RP filed the same before the Adjudicating Authority for its approval under Section 31 of the I&B Code, 2016. But during the hearing for the approval of Resolution

Plan, the two other unsuccessful Resolution Applicants preferred C.A. No.1577/KB/2019 and C.A. No.1690/KB/2019 before the Adjudicating Authority. It further contends that the Adjudicating Authority ignored the settled position of law and had reversed the commercial decision of CoC.

- The Appellant herein is the successful resolution applicant, City Mall Vikash Private Limited, alongwith the Respondent No.1 (Appellant in Appeal No.78 of 2020) and Rare Asset Construction Company Limited proposed their respective Resolution Plan. The final figures of the bid amount offered by the bidders are as under:

  (i) H1 (Appellant in Appeal No.1490/2019) bidder (total bid amount) is Rs.89.86 crores.

  (ii) H2 (Appellant in Appeal No.184/2020) bidder offered Rs. 85.66 crores.

  (iii) Rituraj Steels Private Limited (Appellant in Appeal No.78/2020) offered Rs.57 crores.

- The Resolution Plan of H1 bidder stood approved by votes of 84.70% of CoC. The Learned Counsel for the Appellant contends that after approval of the Resolution Plan with requisite majority of CoC, the Adjudicating Authority has jurisdiction under Section 31(1) of the I&B Code, which is circumscribed by Section 30(2) of the Code. The Appellant further placed reliance

on the judgment of the Hon'ble Supreme Court passed in case of:

- K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150
- Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others (2019) SCC OnLine SC 1478

3. The Appellant further contends that as per the law laid down by the Hon'ble Supreme Court in the cases mentioned above, it is clear that the Adjudicating Authority, under Section 31, is having limited power of judicial review which has to be within the four corners of Section 30(2) of the Code and the same cannot, in any circumstance, trespass upon the commercial wisdom of the CoC. The approach of the Adjudicating Authority while directing the re-bidding to take place after the approval of Resolution Plan by the requisite majority is erroneous, as a Resolution Plan is neither a sale nor an auction, and not a recovery proceeding or liquidation proceeding.

4. Appellant in Company Appeal No.184 of 2020 has assailed the impugned order based on the evaluation process; alleging that the Resolution Professional has conducted the proceeding in a non-transparent manner without affording an opportunity of hearing to the applicant; that the H1 bidder was declared on NPV basis and Evaluation Matrix was not followed; the approval of CoC is forged as the conditions required for the Resolution Plan was not followed; the RP manipulatively conducted the bidding process and vitiated the whole process of approval of the Resolution Plan.

5. The Appellant of Company Appeal No.78 of 2020contends that the prospective resolution applicant has a right to receive complete information as to the Corporate Debtor, debts owed by it, and its activities as a going concern before the commencement of CIRP. In the instant case, the Appellant was not given an opportunity, and hence the whole process is biased towards H1 bidder.

6. The Appellant further contends that there is a complete bypass of the provisions of sub-regulation (5) of Regulation 36B and sub-Regulation (2) of Regulation 39 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process) for Corporate Persons Regulation, 2016. It is further contended that the Respondent No.1 has not complied with the provisions of Section 30(2) and further, Section 30(4) of the Code that mandatorily requires the CoC to comply with the provisions of maximization of assets before approval. Since the CoC in the instant case has overlooked the maximization of assets and as such, the Adjudicating Authority has all the right to interfere under Section 31 of the Code. The appellant has placed reliance on the judgment of the Hon'ble Supreme Court in *Essar Steel India Limited through Authorized Signatory Vs. Satish Kumar Gupta and Others* (2019) SCC OnLine SC 1478, *Swiss Ribbons Pvt. Ltd. Vs. Union of India* and *Maharashtra Seamless Limited Vs. Padmanabhan Venktesh & Others*.

7. The Appellant further contends that the Respondent No.1 had admitted before the Adjudicating Authority that the Appellant herein had placed a bid of Rs.92 crores. Though the Appellant has placed a bid of Rs.102 crores, even the figure of Rs.92 crores is higher than the bid

approved for H1, i.e. Rs.89.86 crores. It is further pointed out that the fair value of the assets of the corporate debtor is Rs.136.12 crore. Thus, the figure of the Appellant was the highest, but the same had not been considered.

8. Heard the arguments of the Learned Counsel for the parties and perused the records.

9. Admittedly, in the instant case the Adjudicating Authority while exercising its power under Section 31 of the Code for approval of the Resolution Plan, has directed the Resolution Professional for fresh bidding within 15 days and file the re-approved Resolution Plan, despite approval by the CoC with 84.70% vote share.

10. The question that arises for our consideration is as under:

> ***Whether the Adjudicating Authority has exceeded its jurisdiction in passing order for re-bidding, despite the approval of the Resolution Plan by CoC, with a vote share of 84.70% of votes****?*

11. It is pertinent to mention that Hon'ble Supreme Court in case of ***K. Sashidhar v. Indian Overseas Bank*****, (2019) 12 SCC 150: (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257at page 187**has laid down the law regarding approval of Resolution Plan. It is held that;

> ***"52.*** *As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but*

is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. ***There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. 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. That is made non-justiciable.***

55. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting

share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements*. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board****. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code……..*

55. ……..The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality *applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative****. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.***

57. *On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)", which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute.* ***The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable****. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds—be it under Section 30(2) or under Section 61(3) of the I&B Code—are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision.*

58. *Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with Section 31(1) of the I&B Code. No other inquiry*

would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.

"59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75%(after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors.....

64. *Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned,* ***there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof****. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the adjudicating authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited*

grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent of voting share to approve the resolution plan; and in the process authorise the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

12. Further in the case of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others (2019) SCC OnLine SC 1478 Hon'ble Supreme Court has held that:

"Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

45. *As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Section 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 and Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674, the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate*

debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. ***After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this court in K. Sashidhar (supra) is of great relevance****……*

> *"44. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)" - which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute****. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31****. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not*

comply with any other criteria specified by the Board. Significantly, the matters or grounds - be it under Section 30(2) or under Section 61(3) of the I&B Code - are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

45. Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.

46. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of

not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

48. *Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar (supra).*

49. *The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set*

out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. ***No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC much less of the dissenting financial creditors for not supporting the proposed resolution plan****. Whereas, from the legislative history, there is contraindication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.*

51. *Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate*

Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

13. Further, the Hon'ble Supreme Court in case of Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Others Civil Appeal No.4242 of 2019 judgment dated 22nd January 2020 has held that:

"28. The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, ***the Adjudicating Authority has to be satisfied that the requirement of Sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel (supra), the***

relevant passage (para 54) of which we have reproduced in earlier part of this judgment. *The case of MSL in their appeal is that they want to run the company and infuse more funds.* ***In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.***

The Hon'ble Supreme Court in case of K. Shashidhar (supra) has explicitly laid down the law that there is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act based on a thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision**.** 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. That is made non-justiciable. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to the scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is about matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides for: (i) the payment of

insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board.

14. In the instant case, the Adjudicating Authority has overturned the decision of the CoC regarding approval of the Resolution Plan despite being approved by 84.70 percent of the vote share of the CoC, on the pretext of maximisation of value of the corporate debtor. The provisions investing jurisdiction and authority in the NCLT has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. In the circumstances as stated above, it is clear that the Adjudicating Authority cannot interfere with the commercial wisdom of CoC. The direction for rebidding for maximisation of the value of the corporate debtor also amounts to an interference in the business decision of the CoC, which is not permitted in law.

15. Thus it is clear that the Adjudicating Authority is having limited power of judicial scrutiny under Section 31, which has to remain within the four corners of Section 30(2) of the Code and the same cannot, in any circumstance, trespass upon the commercial wisdom of the CoC. The directions of the Adjudicating Authority for re-bidding, after the approval of

Resolution Plan by the requisite majority, is not in consonance with the law laid down by Hon'ble Supreme Court in K. Shashidhar (supra) case, as a Resolution Plan is neither a sale nor an auction but it all depends on the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority and 'that is made non-justiciable'. Thus, the Appeal No 1490/2019 deserves to be allowed.

16. The Appeal No.78 of 2020 which is filed on the ground that the prospective resolution applicant has a right to receive complete information as to the Corporate Debtor, debts owed by it, and its activities as a going concern, before the commencement of CIRP and the Appellant was not given an opportunity and hence the whole process is biased towards H1 bidder is also not a ground which can justify the judicial scrutiny by the Adjudicating Authority on this ground.

17. The Appellant has further assailed the impugned order on the ground that the respondent no.1 has not complied with the provisions of Sections 30(2) and 30(4) of the Code, which mandatorily require the CoC to comply with the provisions of maximization of assets before approval. Since the CoC in the instant case has overlooked the maximation of assets and as such, the Adjudicating Authority has all the right to interfere under Section 31 of the Code.

18. It is pertinent to mention that the Adjudicating Authority has a very limited power of judicial scrutiny and the statutory provision does not permit the Adjudicating Authority to interfere with the commercial wisdom

of the CoC. Even for maximisation of value of the assets of the Corporate Debtor, the Adjudicating Authority is not entitled to overturn the business decisions of the Corporate Debtor.

19. Appellant of Appeal No 78 of 2020 further contends that the fair market value of the assets of the corporate debtor is Rs.136.12 crore and the Respondent No.1 had admitted before the Adjudicating Authority that the appellant herein had placed a bid of Rs.92 crores. Though the appellant has placed a bid of Rs.102 crores, even the figure of Rs.92 crores is higher than the bid approved for H1, i.e. Rs.89.86 crores. Thus, the figure of the Appellant was the highest, but the same had not been considered.

20. The object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of Sub-sections (2) and (4) of Section 30 thereof.

21. The ground that the bid amount is below the fair market value of the corporate debtor also fails in the light of the decision of the Hon'ble Supreme Court in case of Maharashtra Seamless (supra) wherein the Hon'ble Supreme Court has noted that '*the Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede*

ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis.'

22. Thus, in the light of directions of Hon'ble Supreme Court, it is clear that under judicial scrutiny of the Resolution Plan based on the equitable perception, the Court cannot question the Commercial wisdom of CoC and indulge in quantitative analysis. Thus appeal No 78 of 2020 fails and is therefore dismissed.

23. The Appellant in Company Appeal No.184 of 2020 has assailed the impugned order based on the evaluation process; alleging that the 'Resolution Professional' has conducted the proceeding in a non-transparent manner; without affording an opportunity of hearing to the applicant; that the H1 bidder was declared on NPV basis and Evaluation Matrix was not followed; the approval of CoC is forged as the conditions required for the Resolution Plan was not followed; the RP manipulatively conducted the bidding process and vitiated the whole process of approval of the Resolution Plan.

24. There is nothing on record to show that the RP manipulatively conducted the bidding process. It is also clear that the role of the Resolution Professional is only that of a facilitator. Evaluation matrix of the Resolution Plan also falls within the parameters of commercial wisdom of the CoC, which is non-justiciable. Thus appeal No 184 of 2020 also fails and is therefore dismissed.

25. Therefore in the light of the above discussion, the Appeal No. 1490 of 2019 is allowed.

26. Based on the discussion above we are satisfied that the Resolution Plan satisfies the muster of sub clause (2) and (4) of Sec 30 of the Code.

In the circumstances stated above, the impugned order passed by the Adjudicating Authority/National Company Law Tribunal, Kolkata, dated 10th December 2019, passed in C.A. (IB) No.1577/KB/2019, under Section 31 of the Insolvency in Bankruptcy Code 2016 (in short **I&B Code**'), whereby the Adjudicating Authority, Kolkata Bench has issued directions for fresh bidding within 15 days and file the re-approved Resolution Plan by 31st December 2019 is set aside and remitted back to the Adjudicating Authority to pass order for approval of Resolution Plan, in the light of directions given by us.

There shall be no order as to costs.

[Justice Bansi Lal Bhat]
Member (Judicial)

[V. P. Singh]
Member (Technical

[ShreeshaMerla]
Member (Technical)

NEW DELHI
05th MARCH, 2020

pks/nn