NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 203 of 2020

[Arising out of Order dated 02.01.2020 passed by the National Company Law Tribunal, Principal Bench, New Delhi in in C.A. No. 1816(PB) of 2019 in C.P.(IB) No. 101 (PB) 2017]

IN THE MATTER OF:

Committee of Creditors of Educomp Solutions Ltd. ...Appellant

Versus

Ebix Singapore Pte. Ltd. & Anr. ...Respondent

Present:

For Appellant: **Mr. Arun Kathpalia, Sr. Advocate with Ms. Misha, Advocate**

For Respondent: **Mr. Ritin Rai, Sr. Advocate with Mr. Gautam Swarup, Advocate for R-1**
Mr. Sumesh Dhawan for Promoters
Mr. Abhishek Sharma and Ms. Ashly Cherian, Advocates for RP(R-2)

J U D G M E N T

Venugopal M. J

Introduction

The Appellant (Committee of Creditors of Educomp Solutions Ltd., through State Bank of India) has focused the present appeal being aggrieved with the impugned order dated 02.01.2020 in C.A.No.1816(PB) of 2019 in Company Petition (IB) No. 101(PB)2017 passed by the Adjudicating Authority ('National Company Law Tribunal') Principal Bench, New Delhi.

2. The Adjudicating Authority in the impugned order dated 2.1.2020 in C.A. No.1816(PB) of 2018 from paragraph 23 to 30 had observed the following: -

> *"23. Section 30(2)(d) of the Code mandates the Adjudicating Authority to ensure that there are effective means of enforcement and implementation of the Resolution Plan. Similarly, the proviso to sub-section (1) of Section 31 of the Code mandates Adjudicating Authority to ensure effective implementation of the resolution plan. The object in approval of the resolution plan is to save the corporate debtor and to put it back on its feet. An unwilling and reluctant resolution applicant, who has withdrawn his resolution plan, neither can put the corporate debtor back to its feet nor the effective implementation of its resolution plan can be ensured.*
>
> *24. No doubt the withdrawal of the resolution plan at this advance stage has*

caused great prejudice to the creditors/stake holders and legal consequences on the withdrawal of the resolution plan shall follow as per law. The Resolution Professional and CoC are free to take action as per law consequent upon withdrawal of the resolution plan by resolution applicant including on the issue of refund of the earnest money deposited by the applicant.

25. Be that as it may compelling an unwilling and reluctant resolution applicant to implement the plan may lead to uncertainty. The object of the Code is to ensure that the Corporate Debtor keep working as a going concern and to safeguard the interest of all the stake holders. The provisions of the Code mandate the Adjudicating Authority to ensure that the successful resolution applicant starts running the business of the Corporate Debtor afresh. Besides

Court ought not restrict a litigant's fundamental right to carry on business in its way under Article 19(1)(g) of the Constitution. Once the applicant is unwilling and reluctant and itself has chosen to withdraw its resolution plan, a doubt arises as to whether the resolution applicant has capability to implement the said plan. Uncertainty in the implementation of the resolution plan cannot also be rule out.

26. In the facts the prayer for withdrawal of resolution plan is allowed with cost and also subject to other legal consequences as per law.

27. It is relevant to note here that the Corporate Insolvency Resolution Process against the Corporate Debtor was initiated vide order dated 30.05.2017 passed in IB-101(PB)/2017. Under third proviso to sub-section (3) of Section 12 of the Code the

corporate insolvency resolution process period has expired on 16.11.2019.

28. Ordinarily the Corporate Insolvency Resolution Process period must be completed with the outer time limit provided under the Code. However, in exceptional cases in order to achieve a resolution and to avoid to drive the corporate debtor into liquidation, Adjudicating Authority (NCLT) can extend the outer time limit provided under the Code.

29. It is relevant to refer to the decision of the Hon'ble Supreme Court in Civil Appeal No. 8766-67 of 2019 in the matter of Committee of Creditors of Essar Steel India Limited Versus Satish Kumar Gupta & Or. Decided on 15th November 2019, where it was inter-alia held that:

"Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly

arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors

owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate 132 Tribunal to extend time beyond 330 days.

Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the

corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation."(emphasis given).

30. In the facts the Corporate Insolvency Resolution Process period in the present case is further extended by 90 days from 16.11.2019. The Resolution Professional and the members of Committee of Creditors are directed to expedite the possibility of achieving resolution of the stressed assets of the corporate debtor within the extended period."

and partly allowed the application in the aforesaid terms with cost of Rs. one lakh to be paid by the 1st Respondent/Applicant in the corpus of the 'Corporate Debtor'.

3. Challenging the validity, propriety and legality of the Impugned Order dated 02.01.2020 passed by the Adjudicating Authority, the Learned Counsel for the Appellant contends that the impugned order was passed in erroneous exercise of jurisdiction by the Adjudicating Authority.

4. According to the Appellant, the Adjudicating Authority by means of the Impugned Order had allowed the 1st Respondent / 'Successful Resolution Applicant' to withdraw its 'Resolution Plan' (approved 'Resolution Plan') which

was approved by a majority of 75.36% of the 'Committee of Creditors' and pending approval before the Authority as per Section 31 of the 'I&B' Code. Moreover, the 'Resolution Professional' of the 'Corporate Debtor' and the 'Committee of Creditors' were directed to expedite the possibility of achieving Insolvency Resolution of the 'Corporate Debtor' within the extended period of 90 days from 16.11.2019, although the order was passed only on 2nd January, 2020.

Appellant's Submissions

5. The Learned Counsel for the Appellant submits that the Adjudicating Authority being a creature of statute (under IBC) is bound within the four corners of statute and cannot travel beyond its jurisdiction prescribed under the statute and in support of the same refers to the decisions **B. Himmatlal Agrawal v. Competition Commission of India and ors. 2018 17 SCC page 421** and **Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited and Ors. (2017)16 SCC 498**. Therefore, the stand of the Appellant is that the Adjudicating Authority had wrongly allowed the plea of withdrawal of 'Resolution Plan' beyond its jurisdiction.

6. The Learned Counsel for the Appellant comes out with a plea that it is within the exclusive ambit of the 'Committee of Creditors' to examine and determine the feasibility and viability of the approved 'Resolution Plan' and the Impugned Order is an erroneous one because of the reason that the Adjudicating Authority could not permit a 1st Respondent / 'Resolution Applicant' to withdraw from the

commitment made before the 'Committee of Creditors' which had crystallized into a concluded contract.

7. The plea of the Appellant is that the reasoning of the Adjudicating Authority in the Impugned Order about the impracticability to implement a plan by an unwilling 'Resolution Applicant' has conferred sanctity to an unlawful conduct of the 1st Respondent and also defeated the objective of the Code.

8. The Learned Counsel for the Appellant to lend support to its contention that an 'Adjudicating Authority' is not to encroach upon the majority decision of the 'Committee of Creditors' except for the grounds specified under sub-section (a) to (e) of Section 30(2) of the 'I&B' Code relies on the judgement of the ***Hon'ble Supreme Court in the case of 'Committee of Creditors' of 'Essar Steel Ltd.' Vs. 'Satish Kumar Gupta and Ors.' (Civil Appeal No. 8766-67 of 1999 dated 15.11.2019)*** and the decision of the ***Hon'ble Supreme Court in 'K.Sashidhar' Vs. 'Indian Overseas Bank' reported in 2019(3) Scale Page 6.***

9. The Learned Counsel for the Appellant comes out with an argument that the request for a 'Resolution Plan' prepared as per Section 25(2)(h) of the 'I&B' Code clearly mentioned that 'no change or supplemental information to the 'Resolution Plan' shall be accepted after the 'Resolution Plan' submission date and in this regard the Learned Counsel for the Appellant refers to Clause 1.13.5 of the 'RFRP'.

10. It is represented on behalf of the Appellant that Clauses 1.8.4 of the 'RFRP' as well as Clause 1.10(1) clearly stipulated that a 'Resolution Plan' is irrevocable

and a 'Successful Resolution Applicant' was not permitted to withdraw the 'Approved Resolution Plan'.

11. Yet another contention of the Appellant is that the 1st Respondent / 'Successful Resolution Applicant' had discussed, and consented to a 'Resolution Plan' after accepting the conditions is not to be allowed to withdraw a mutually consented 'Resolution Plan' and withdraw from a legally binding Plan based on the plea of delay, which was not in the hands of 'Committee of Creditors' at all.

12. The Learned Counsel for the Appellant submits that to claim the validity of the 'Approved Resolution Plan' was only six months is misplaced, as the said period of six months in clause 1.8.3 of 'RFRP' is the minimum validity period and in fact Clause 7 of the Approved Resolution Plan when read in the context of 'RFRP' (of which it was required to be compliant) is only a reference to the 'Resolution Plan' being valid for six months for acceptance of the 'Committee of Creditors'.

13. The Learned Counsel for the Appellant contends that the 1st Respondent / 'Successful Resolution Applicant' in accordance with 'RFRP' had conducted its own due diligence and appraisal of the 'Corporate Debtor' and after receipt of full information relating to the affairs of the 'Corporate Debtor' had submitted its 'Resolution Plan' to the 'Committee of Creditor' which was after extensive negotiations approved by 75.36% majority. Also that it is the stand of the Appellant that the 1st Respondent / 'Successful Resolution Applicant' continues to be interested in the 'Corporate Debtor', as is evident from the letter sent by it

on 1.6.2020, having seen interest in the 'Corporate Debtor' and emphasizing that the software licences granted by the 'Corporate Debtor' have become more relevant in the current circumstances where online education appears to be only viable medium of education.

14. The Learned Counsel for the Appellant submits that the reliance placed on the side of 1st Respondent / 'Successful Resolution Applicant' in regard to the applications filed by Creditors seeking investigations is misconceived because of the reason that said applications were filed in May, 2018 and the said applications were disposed of on 9.8.2018(viz. before the orders were reserved on the approval application).

15. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that Section 32A of the 'I&B' Code grants immunity to a 'Resolution Applicant' from any offences committed by the 'Corporate Debtor' prior to the commencement of CIRP and provides certainty to the 'Successful Resolution Applicant', that the assets of the 'Corporate Debtor' has represented would be available in the same manner as at the time of submission of a 'Resolution Plan', which was recognized in the judgement of this Tribunal in '***JSW Steel Limited' Vs. 'Mahender Kumar Khandelwal and Anr.' (vide Company Appeal (AT)(Ins.) No. 957 of 2019)***. Hence, because of the protection granted u/s 32A of the Code, the withdrawal of 'Resolution Plan' by the 'Successful Resolution Applicant' citing SFIO Investigation into the affairs of 'Corporate Debtor' is an incorrect one and in this connection on behalf of the Appellant a reference was

made to the order dated 16.03.2020 of ***Delhi High Court in W.P. (CRL.) 3037/2019 'Tata Steel BSL Limited' and Ors. Vs. 'Union of India and Ors.'***

16. The Learned Counsel for the Appellant points out that the reliance placed by the 'Successful Resolution Applicant' in regard to the judgement of this Tribunal in ***'Tarini Steel Company Pvt. Ltd.' Vs. 'Trinity Auto Components Ltd.'(Company Appeal (AT)(Ins.) 75/2018)*** is not correct because of the reason that the said judgement had allowed withdrawal of the Plan owing to the onerous modifications set forth by the Adjudicating Authority itself, thereby altering the basis of the 'Approved Resolution Plan' therein. Likewise, the reliance placed by the 1st Respondent / 'Successful Resolution Applicant' in respect of the order of ***'Satya Narain Malu' Vs. 'SBM Paper Mills' in MA 1396/2018, 827/2018, 1142/2018 and 828/2018 in CP(IB)-1362(MB)/2017*** is an erroneous one, as in the given case, the withdrawal of the 'Resolution Plan' was allowed on account of settlement plan submitted by the 'Corporate Debtor' therein, had offered better value to the creditors of the 'Corporate Debtor'.

17. Continuing further, the Learned Counsel for the Appellant points out that the reliance placed by the 'Successful Resolution Applicant' on the judgement of CIRP process of ***'Metalyst Forging Ltd.' (Company Appeal (AT)(Ins.)1276/2019)*** is of no significance, since in the said case the finding was in regard to the inadequacy of information in the 'Information Memorandum' whereas in the present case, no such finding was recorded by the Adjudicating Authority.

18. The Learned Counsel for the Appellant contends that the Adjudicating Authority firstly had allowed the withdrawal of the 'Approved Resolution Plan' and later granted only 42 days, when the Insolvency and Bankruptcy Board of India(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 envisages a minimum period of 105 days to complete the entire process, demoralizes the interests of 'Committee of Creditors' and other stakeholders of the 'Corporate Debtor' but also places the 'Corporate Debtor' at the brim of liquidation.

19. The Learned Counsel for the Appellant submits that upon the 'Approved Resolution Plan' being put to vote, 74.16% of 'Committee of Creditors' voted in favour of the 'Approved Resolution Plan'. Later, the ***'Chhatisgarh State Electricity Board Gratuity and Pension Trust' and 'Chhatisgarh State Electricity Board Provident Fund Trust'(collectively CSEB)***(having a vote share of 1.195%) vide e.mail dated 23.3.2018 requested its vote to be treated as ***'yes'*** for having not participated in lieu of a technical error.

20. On behalf of the Appellant, it is brought to the notice of this Tribunal that as the voting share in favour of the 'Approved Resolution Plan' would be 75.36%, the 'Resolution Professional' filed an application CA No. 165(PB)2018 before the Adjudicating Authority seeking directions among other things on the future course of action to be adopted and on 28.2.2018, the Adjudicating Authority had directed the 'Resolution Professional' to file an approval application and the issue

regarding the votes received late shall be considered along with the approval application.

21. The Learned Counsel for the Appellant contends that in view of the law laid down by this Tribunal in ***'Jyoti Structures Ltd.' (Company Appeal) (AT)(Ins.) No. 461/2018 and upheld by the Hon'ble Supreme Court in Civil Appeal No. 3434-3436 of 2019 as per order dated 15.04.2019.*** The e.mail from 'CSEB' intimating the 'Resolution Professional' in regard to the technical mal-function and non-recording of its affirmative vote, having been received earlier to the lapse of 270 days period (i.e. 27.2.2018) and hence, the said plea is not to be countenanced in the eye of Law.

23. The Learned Counsel for the Appellant contends that the grounds raised by the 'Successful Resolution Applicant' in CA 1816(PB) of 2019 (withdrawal application) were raised already and rejected in CA 1252(PB) of 2019 in CP(IB)No. 101(PB) of 2017 (dismissed application) as per order dated 10.07.2019. Further, once the matter whether on a question of fact or question of Law was decided between the two parties in one suit or proceeding and the decision is final neither party will be allowed in future to canvass the said matter again and refers to the decisions **(i) Nagabhushanammal v. C. Chandikeshwaralingam (2016) 4 SCC 434 (ii) Hope Plantations Ltd. v. Taluk Land Board, Peermade and Anr. (1999) 5SCC 590; and (iii) Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and Anr. AIR 1960 SC 941.** When the Adjudicating Authority had rejected the

aforesaid pleas and reliefs raised by the 'Successful Resolution Applicant' in the dismissed application, the withdrawal application' was barred by *'Res Judicata'.*

24. The Learned Counsel for the Appellant submits that the plea of the 'Successful Resolution Applicant' and the finding rendered by the Adjudicating Authority that the prayer for 'withdrawal' was not considered while disposing of CA 1252(PB)/2019 is in the teeth of the very principle of *'Res Judicata' as* elucidated by various Courts which held that the relief must be deemed to have been denied for what was claimed but not granted necessarily gets denied in judicial or quasi-judicial proceedings as per decision ***'State Bank of India' Vs. 'Ram Chandra Dubey', (2001) 1 SCC Page 73, reiterated in the decision of Hon'ble Supreme Court A.P.S.R.T.C. and Ors. Vs. 'B.S. David Paul', (2006) 2 SCC page 282.***

25. The Learned Counsel for the Appellant points out that Rule 11 of the 'National Company Law Appellate Rules, 2016' has recognised the inherent powers in regard to the matters relating to the court for meeting the ends of justice.

26. The Learned Counsel for the Appellant relies on the decision of Hon'ble Supreme Court in '***Arcelor Mittal India Pvt. Ltd.' Vs. 'Satish Kumar Gupta' (2019)2 SCC page 1 at special page*** wherein at paragraph 86 it is observed 'that the act of the Court shall harm no man'.

27. The Learned Counsel for the Appellant refers to the decision of the ***Hon'ble Supreme Court 'Swiss Ribbon' Vs. 'Union of India'; (2019)4 SCC at page 17***

wherein at paragraph 11 and 12 it is observed that the intent of the Code is to ensure revival and continuation of the 'Corporate Debtor' as a going concern and Liquidation is to be only a last resort.

28. The Learned Counsel for the Appellant cites the order of High Court of Delhi dated 16.3.2020 in ***WP (Crl.)3037/2019 and Crl. MA 39126/2019 'Tata Steel BSL Ltd.' and Ors. Vs. 'Union of India and Ors.'*** wherein at paragraph 6 (by referring to Section 32A(1 of IBC as inserted by the Amendment Act) had clearly observed that from the express language of the aforesaid provision that a 'Corporate Debtor' would not be liable for any offence committed prior to the commencement of CIRP and the 'Corporate Debtor' would not be prosecuted if a 'Resolution Plan' was approved by the Adjudicating Authority.

29. The Learned Counsel for the Appellant refers to the order dated 13.03.2020 in WP (Crl.) 712/2020 MA Nos. 5449 and 5450 of 2020 wherein by relying on Section 32A(1 of IBC)the Writ Petition was allowed because of the fact that there was no dispute that 'Resolution Plan' was approved by the Adjudicating Authority and the impugned order dated 16.8.2019 and the impugned summons dated 21.8.19 were set aside and the impugned complaint (CC No. 770/2019) against the Petitioner therein was also set aside and further it was clarified that this order would not affect the prosecution of the erstwhile promoter or any of the officers who may be directly responsible for committing the offences in relation to the affairs of the petitioner company.

1st Respondent's Contentions

30. *Per Contra* it is the submission of Learned Counsel for 1st Respondent / 'Resolution Applicant' that the doctrine of *'Res Judicata'* or Constructive *'Res Judicata'* has no applicability to the facts of the instant case and its application to deny a 'Resolution Applicant' is right to withdraw a 'Resolution Plan' after the expiry of its validity period would result in denial of justice for the undermentioned reasons:-

> *a) CA 1252/2019 was filed to seek information regarding the financial condition of the Corporate Debtor given the long lapse of time since the submission of the Resolution Plan and upon receipt of that information, to seek (if necessary) revaluation of the Plan.*
>
> *b) In the light of law laid down in* ***Deccan Value*** *case, the Adjudicating Authority dismissed the application CA 1252/2019 on 10.07.2019 as no ground for revaluation was made out. Further, the Adjudicating Authority in CA 1252/2019 had restricted adjudication to issues concerning the non-grant of information and material sought by the Resolution Applicant and hence, the*

consequent relief of 'revaluation of the Plan' are indeed 'withdrawal' thereof was not dealt with.

c) The cause of action for CA No. 1816/2019 was completely different, as it was premised on an acceptance of the unavailability of information, and on account of various factors including the erosion of commercial substratum of the 'Corporate Debtor' sought withdrawal of the 'Resolution Plan' simpliciter.

d) No reasons were furnished and there was no bar for the 'Resolution Applicant' later exercising his right and entitlement to withdraw the 'Resolution Plan' on the basis that its validity had expired and he was no longer interested in pursuing the same.

e) The Adjudicating Authority had not consciously adjudicated the issue of 'withdrawal of 'Resolution Plan' filed by the 1st Respondent which is evident from the order dated 10.07.2019 in CA 1252 of 2019 and

confirmed by the express findings of the Adjudicating Authority in the impugned order.

f) The order dated 10.07.2019 in CA 1252/2019(disentitling the 'Resolution Applicant' to financial information of the 'Corporate Debtor') cannot act as a bar to the 'Resolution Applicant' in exercising its right to withdraw the plan (after the expiry of its validity period), the 'Resolution Applicant' filed CA 1816/2019 which was allowed by the impugned order.

g) There is no infirmity in the impugned order which appreciates that there was no conscious adjudication of the principal issue that arises in the present proceedings viz. the right of a 'Resolution Applicant' to withdraw its 'Resolution Plan' after the expiry of its validity and that the disposal of CA 1252 of 2019 would not act as a bar in filing CA 1816/2019 on the principle of 'Res Judicata' or constructive 'Res Judicata'.

31. The Learned Counsel for the 1st Respondent contends that the 'withdrawal of 'Resolution Plan' was legally permissible as per the terms of the documents governing the CIRP of the 'Corporate Debtor' and also under the Code. In this

connection, the plea of the 1st Respondent is that the contractual stipulations forming the basis of the 'Resolution Plan' read with the scheme of the code allow for withdrawal of the 'Resolution Plan' prior to the approval of the Adjudicating Authority, upon lapse of stipulated time frame. Moreover, the 'Resolution Plan' was rendered commercially unviable on account of lapse of substantial time and severe and inordinate delays in the 'Corporate Insolvency Resolution Process' ***qua*** the 'Corporate Debtor'.

32. The Learned Counsel for the 1st Respondent points out that severe mis-management and gross financial irregularities and fraud in the affairs of 'Corporate Debtor' during the period from (2014-2018) was subsequently uncovered combined with regulatory and criminal investigations into the financial affairs of the 'Corporate Debtor'.

33. The Learned Counsel for the Respondent emphatically takes a plea that the 'RFRP' issued by the 'Committee of Creditors' inviting prospective applicants to submit 'Resolution Plan' is similar to the request for proposal or invitation to tender and the 'Resolution Plans' submitted by the Applicants in response to such invitation or 'offers' / 'proposal' comparable to tenders. In this regard, the learned Counsel for the 1st Respondent adverts to Clause 1.1.5 of 'RFRP' which reads as under:-

> *"The intent of this RFRP is to request Resolution Plan(s) from Resolution Applicant(s) who may willing to submit a resolution plan for*

the Company in accordance with the terms of this RFRP, the IB Code and other Applicable Law".

34. The Learned Counsel for the 1st Respondent refers to Clause 1 of the covering letter for submission of 'Resolution Plan' (format 1, Annexure III to the RFRP) which runs as follows: -

"We, the undersigned Resolution Applicant having read and examined in detail the RFRP and the Information Memorandum, set out the offer and the related information in relation to the resolution of Educomp Solutions Ltd."

35. In *pith and substance*, the stand of the 1st Respondent is that '*RFRP'* issued by the Appellant is an invitation to offer' and that the 'Resolution Plan' is an 'offer' submitted by the 1st Respondent pursuant to the '*RFRP*' in short such an offer being a qualified one, it binds the offer or / promise or i.e. the 'Resolution Applicant' only when such an offer is accepted as per its term.

36. The other contention advanced on behalf of the 1st Respondent is that the covering letter for submission of 'Resolution Plan' explicitly points out that all the terms and conditions of the 'Resolution Plan' would be valid for acceptance for a period of six months from the date of submission of the Plan and as such the 'Resolution Plan' submitted by the 1st Respondent is to be a qualified offer, which is not open for an acceptance for an indefinite period. Also that when

there was a delay of several months in the approval of 'Resolution Plan' the 1st Respondent is at liberty to withdraw from *'RFRP'* after completion of six months from the date of submission of 'Resolution Plan' as per decision of ***Hon'ble Supreme Court 'Riya Travel & Tours (India)(P) Ltd. v. C.U. Chengapa,(2001) 9 SCC 512.***

37. The Learned Counsel for the 1st Respondent refers to Clause 1.1.6 of *'RFRP'* which visualises that the 'Resolution Plan' submitted by the 'Resolution Applicant' would be binding on all the parties (specifically including the 'Resolution Applicant') only upon the approval of the Adjudicating Authority in terms of Section 30(6) of the Code. It is the contention of the 1st Respondent that when such approval is yet to be granted, in view of which, even as per terms of *'RFRP'* the 'Resolution Plan' cannot be said to be binding on the 'Resolution Applicant' merely upon approval by the 'Committee of Creditors'.

38. The Learned Counsel for the 1st Respondent submits that even from clause 1.10(1) of *'RFRP'* the 'Resolution Plan' shall be binding on the 'Resolution Applicant' only upon the approval of the Adjudicating Authority and it is only from such point that the 'Resolution Applicant' would not be permitted to withdraw the 'Resolution Plan'. Therefore, it is quite clear that the 'Application for Withdrawal' filed by the 'Resolution Applicant' was earlier to the stage of approval by the 'Adjudicating Authority' u/s 30(6) of the 'I&B' Code.

39. The Learned Counsel for the 1st Respondent takes a stand that the 'Corporate Debtor' was admitted into insolvency on 30.5.2017 by the

Adjudicating Authority and that on 13.11.2017 the 'Corporate Insolvency Resolution Process' was extended by 90 days till 24.2.2018 because of the reason that there was no significant progress in 'CIRP'. Apart from that, a request for 'Resolution Plans' was issued by the Appellant on 05.12.2017 and pursuant to the 'RFRP', the 'Resolution Plan' was submitted by the 1st Respondent on 19.02.2018(as amended on 21.2.2018). Further, as the statutory period was coming to an end on 24.2.2018, at the time of hearing before the Adjudicating Authority on 27.2.2018, the 'CIRP' qua the 'Corporate Debtor' was extended by the Adjudicating Authority with a direction to the 'Resolution Professional' to continue to discharge all its functions as 'Resolution Professional' under the code till further orders. Later, on 7.3.2018, an application was filed by the 'Resolution Professional' before the Adjudicating Authority for approval of 'Resolution Plan'.

40. The Learned Counsel for the 1st Respondent brings it to the notice of this Tribunal that on 2.7.2018 the 'Resolution Applicant' addressed a letter to the 'Resolution Professional' noting that the validity of the 'Resolution Plan' as expiring in August and that it would be Perforced to among other things, withdraw the 'Resolution Plan' on account of complete erosion of the commercial substratum of the 'Corporate Debtor'. However, no reply was received by the 1st Respondent to the said letter which points out the fact that after August, 2018, the 'Resolution Applicant' was at full liberty to withdraw its plan and upon such withdrawal, it would follow that such plan would be not capable of being implemented. Moreover, after lapse of more than 18 months from the date of submission of 'Resolution Plan' viz. 19.2.2018 and 27 months from the CIRP

commencement date, the application for its approval was still pending before the Adjudicating Authority on 10.09.2019 when the application for withdrawal of the Plan filed by the 1st Respondent culminated in the impugned order.

41. It is represented on behalf of the 1st Respondent that erosion of commercial considerations underlying the 'Resolution Plan' / 'offer'/constitutes sufficient basis for withdrawal of the 'Resolution Plan' and in this connection, on behalf of the 1st Respondent, reliance is placed of the judgement rendered by this Tribunal in **'Tarini Steel Company Pvt. Ltd.' V. 'Trinity Auto Company Ltd. and another' reported in 2018 SCC online NCLAT page 650.**

42. The Learned Counsel for the 1st Respondent points out that subsequent to the submission of 'Resolution Plan', reports of fraud and mis-management of the affairs of 'Corporate Debtor' related to the period from 2014-2018 emerged and in a meeting convened on 13.8.2018, the Appellant passed a Resolution with 77.85% for an appointment of an independent agency to conduct a special investigation audit of the 'Corporate Debtor'. As a matter of fact, the said Resolution was in pursuance of the orders of the Adjudicating Authority which took note of the allegations against the 'Corporate Debtor' and directed the 'Resolution Professional' to file an application to that effect and the 'Special Audit' is yet to be conducted.

43. The Learned Counsel for the 1st Respondent submits that the 'Resolution Applicant' later discovered the initiation of investigations by Serious Fraud Investigation office which too led the Resolution Applicant to believe that the

affairs of the 'Corporate Debtor' were being severely mis-managed and were exposed to criminal investigations. Under these identical circumstances, the 'Resolution Plan' was permitted to be withdrawn as it was held to be commercially unworkable as per order dated 7.2.2020 in CA (AT)(Ins.)1276/2019, 'Committee of Creditors' of **'Metalyst Forging Ltd.' V. 'Deccan Value Investors L.P. and ors.'.** Further that this Tribunal affirmed the decision of the Adjudicating Authority in **'Deccan Value Investors L.P.** and **'DVI PE (Mauritius) Ltd.' Vs. 'Deutsche Bank AG' reported in 2019 SCC online NCLT page 731.**

44. The Learned Counsel for the 1st Respondent submits that an 'Adjudicating Authority' is to independently satisfy itself that in terms of Section 30(2)(d) there are adequate provisions for 'implementation and supervision of the 'Resolution Plan' and this position is well supported by the decisions of ***Hon'ble Supreme Court 'K.Shashidhar' V. 'Indian Oil Corporation' 2019 SCC online 257 para 42*** and the 'Committee of Creditors' of ***'Essar Steel' V. 'Satish Kumar Gupta and Ors.' 2019 SCC online 1478 at para no. 47.***

45. The Learned Counsel for the 1st Respondent takes a plea that it is well within the powers of the Adjudicating Authority and also this Tribunal to withhold approval to the Plan and / or allow the withdrawal thereof as per *'Inherent powers'*.

46. In regard to the plea of *'Res Judicata'*, the Learned Counsel for the 1st Respondent contends that the 'Resolution Applicant' could not have sought

withdrawal of the 'Resolution Plan' in CA 1252/2019 without having been provided with a information and material sought and in view of this aspect alone, the applicability of the doctrine of '*Res Judicata*' or constructive '*Res Judicata*' ought to be ruled out. In fact, the relief prayed for in C.A. 1252/2019 clearly shows that the 'Resolution Applicant' was seeking information and details relating to the various events and sought to ascertain the financial position of the 'Corporate Debtor'. As a matter of fact, only consequent upon being provided with such information and material, that the 'Resolution Applicant' also sought leave to suitably revaluate and revise the 'Resolution Plan'. Therefore, it is clear that **de hors** being provided with the said material, the relief of 'Revaluation' or revision of the 'Resolution Plan' does not arise at all. When the antecedent relief (of being provided with the financial information) is not granted, the question of granting the subsequent relief cannot arise.

47. The Learned Counsel for the 1st Respondent submits that the cause of action leading to CA No. 1816 of 2019 and the relief sought therein were wholly indifferent. Indeed, the Adjudicating Authority had denied the requests of the Appellant to seek information and details relating to the affairs of the 'Corporate Debtor' and having accepted the said order and given up the right to such information and material, the 'Resolution Applicant' therefore, merely sought withdrawal of the 'Resolution Plan' simpliciter.

48. The Learned Counsel for the 1st Respondent refers to the decision of Hon'ble Supreme Court in '***Escorts Firms Ltd.' V. 'Commissioner Kumaon***

Division, Nainital, U.P. and Ors., (2004) 4 SCC page 281 at special page 305 wherein it is observed as under: -

> *"51. Res Judicata is a plea available in civil proceedings in accordance with section 11 of the Code of Civil Procedure. It is a doctrine applied to give finality to 'lis' in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is 'everything that may form an object of rights and includes an object, subject matter or status' and res judicata literally means: 'matter adjudged: a thing judicially acted upon or decided; a thing or matter settled by judgement'. Section 11 of CPC engrafts this doctrine with a purpose that a 'final judgement rendered by a court of competent jurisdiction on merits is conclusive as to the rights of the parties and their privies, and, as to them,*

constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."

49. The Learned Counsel for the 1st Respondent points out that in the decision of **Hon'ble Supreme Court 'S.Labbai' v. 'Hanifa' AIR 1976 SC 1569** wherein one of the essential requirements for applicability of the doctrine of 'Res Judicata' is observed that "*The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.....*"

50. The Learned Counsel for the 1st Respondent relies on the decision of **Hon'ble Supreme Court 'Kaushik Cooperative Building Society' v. N.Parvathamma (2017) 13 SCC 138'** whereby and whereunder it is observed as follows:-

"To constitute matter resjudicata, the conditions to be proved are that the litigating parties are the same, that the subject matter is also identical and the matter has been finally decided between the parties by a court of competed jurisdiction".

51. The Learned Counsel for the 1st Respondent contends that there was no conscious adjudication on merits of the issues arising in C.A. 1816/2019 in the earlier order dated 10.9.2019 arising out of CA 1252/2019 and in fact the order dated 10.9.2019 is not a 'reasoned order' with a view to attract the application of the doctrine of *'Res Judicata'*.

52. The Learned Counsel for the 1st Respondent cites the following Supreme Court decisions: -

i) In the decision **Daryo v. State of UP (1962) 1 SCR 574, 591** wherein it is observed as under: -

> *"26....If a Writ Petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors*

weighed in the mind of the court and that make it difficult and unsafe to hold such a summary dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32, because in such a case there has been no decision on the merits by the Court…"

ii) In **Erach Boman Khavar v. Tukaram Shridhar Bhat (2013) 15 SCC 655** it is held as follows: -

"39. *From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits.*

50. The principles stated in Arjun Singh, Satyadhyan Ghosal and the other authorities clearly spell out that the principle of res judicata operates at the successive stages in the same litigation but, the basic foundation of res

judicata rests on delineation of merits and it has atleast an expression of an opinion for rejection of an application. As is evident, there has been no advertence on merits and further the learned company judge had guardedly stated two facets, namely, "not necessary to grant the present Judge's summons" and "liberty to the applicant to apply if necessary". On the seemly reading of the order we have no shadow of doubt that the same not have been treated to have operated as res judicata as has been held by the Division Bench. Therefore, the irresistible conclusion is that the Division Bench had fallen into serious error in dislodging the order leave by the learned Company Judge to file a fresh suit."

iii) In **Ferro Alloys Corpn.Ltd. & Anr. V. Union of India (1999) 4 SCC 149** it is observed as follows: -

"24. It is obvious that in the aforesaid proceedings no issue arose for consideration as to whether ....Consequently whatever observations might have been made by

this Court while dealing with Issue 4, cannot be said to be an express decision on the vexed question as to whether the assessment of the need for chrome ore, so far as the appellant is concerned.. It is therefore difficult to agree with the contention of the learned Senior Counsel for the respondents that such an issue was expressly adjudicated upon by this court in the aforesaid decision and the findings thereon, therefore, could not be made the subject matter of fresh proceedings between the parties. Not only were the contesting parties not heard on the issue but also there was no final decision thereon inter se these parties…."

iv) and the observations in **Daryo v. State of UP (1962) 1 SCR 574, 591** were supported by the decision of Hon'ble Supreme Court in **Kunhayammed v. State of Kerala (2000) 6 SCC at page 359.**

v) In **Ajay Arjun Singh v. Sharadendu Tiwari and Ors. 2016 6 SCC 576** it is observed and held that *'a vague, cryptic and casual order in former proceeding containing finding that was neither directly in issue nor properly examined cannot amount to 'Res Judicata'.*

53. The Learned Counsel for the 1st Respondent points that Section 74 of the 'I&B' Code which prescribes punishment for breaching the terms of moratorium order or 'Resolution Plan' u/s 14 is inapplicable to the facts of the instant case and in this connection relies on the decision **Ashok Paper Kamgar Union V. Dharam Godha, (2003) 11 SCC page 1** wherein it is held that 'in order to constitute contempt the order of the court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extraordinary effort nor should be dependent either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case.

54. Also the Learned Counsel for the 1st Respondent refers to the decision **Chhotey Lal V. L.Chaukilal Alias Hari Shankar 1952 SCC** wherein at para 5 it is among other things observed that what is material is the existence of the intention not to pay the demanded arrears and not the reason or motive for that intention.

55. The Learned Counsel for the 1st Respondent seeks in aid of the decision of **Hon'ble Supreme Court S.Sundaram Pillai V. Pattabiraman (1985) 1 SCC at page 591 at special page 606** wherein at paragraph 26 it is observed as under:-

> *…." a consensus of the meaning of the words willful defaults appears to indicate that default in order to be willful must be intentional, deliberate, calculated and conscious, with full knowledge of legal*

consequences flowing therefrom. Taking for instances, where a tenant commits default after default despite oral demands or reminders and fails to pay the rent without any just or lawful cause, or it cannot be said that he is not guilty of willful default because such a course of conduct manifestly amounts to willful default as contemplated either by the act or by other Acts."

2nd Respondent's Pleas

56. The Learned Counsel for the 2nd Respondent submits that three 'Financial Creditors' of the 'Corporate Debtor' filed applications seeking a Special Investigation Audit / Investigation into the affairs / certain transactions entered into prior to the 'CIRP' and that 'Financial Creditor' and 'COC' Members had filed CA 358/2018(IFC applications) on 3.5.2018, Axis Bank ('Financial Creditor'/COC Member) filed CA 448(PB) of 2018 on 31.5.2018 and State Bank of India preferred CA 639(PB) of 2018 around July, 2018 seeking investigation of the affairs / transactions of the 'Corporate Debtor' with respect to the statements / irregularities in the affairs of 'Corporate Debtor' in its Annual Accounts on the basis of certain articles / Media Reports published in a publication 'the Wire'.

57. According to the 2nd Respondent the aforesaid applications along with the plan approval application were heard by the 'Adjudicating Authority' and that the 'Resolution Professional' was directed to convene COC meeting to discuss about these applications and pursuant to the directions in terms of the order dated 9.8.2018, the 13th COC meeting of the 'Corporate Debtor' took place on 13.8.2018 and a 'Resolution' for conducting special investigation audit of the 'Corporate Debtor' by an independent agency was approved by the 'Committee of Creditors' by voting share of 77.85%. Also, it was resolved that an application would be filed by the 'Resolution Professional' seeking consent / order of the Adjudicating Authority to conduct the 'Special Investigation Audit'.

58. The Learned Counsel for the 2nd Respondent points out that the 'Resolution Professional' filed CA 793(PB) of 2018 Investigation Audit Application in view of the order dated 28.2.2018 and in accordance with the resolutions passed in 13th 'Committee of Creditors' meeting, seeking directions to carry out the investigation audit of the 'Corporate Debtor'. As a matter of fact, at this point of time, the 1st Respondent / 'Resolution Applicant' was participated in the proceeding in the matter and was aware of all directions issued by the Adjudicating Authority in respect of these applications.

59. The Learned Counsel for the 2nd Respondent brings to the notice of this Tribunal that on 4.10.2018 the Adjudicating Authority had directed the 'Resolution Professional' to file an affidavit in relation to the transactions carried

out by the 'Corporate Debtor' as per section 43,45,50 and 66 of the 'I&B' Code. Hence, the 'Resolution Professional' filed a short affidavit dated 8.,10.2018 pertaining to a Transaction Audit' conducted by BDO u/s 43,45,50 and 66 of the Code, on 6.12.2016. In fact, by means of the said affidavit, the 'Resolution Professional' mentioned that on the basis of Books of Accounts and other relevant materials, no transactions in his opinion were found which required to be avoided or were fraudulent in terms of Section 43, 45 and 60 of the Code.

60. The Learned Counsel for the 2nd Respondent contends that the 'investigation audit application' was heard on numerous dates and finally orders were reserved in the said audit application. However, in this application no orders came to be passed by the Adjudicating Authority as the approval application (CA 195/2018) itself was heard and reserved for orders on 10.1.2019. Therefore, in the absence of any direction under the investigation audit application by the Adjudicating Authority, the investigative audit was not conducted. In this connection, the Learned Counsel for the 2nd Respondent submits that in the first withdrawal application the 1st Respondent / 'Resolution Applicant' among other things sought a relief to direct the 'Resolution Professional' to supply a copy of Special Investigation Audit to it forthwith and when no audit was conducted, the question of not providing the report as contended by the 1st Respondent / 'Resolution Applicant' does not arise.

61. On behalf of the 2nd Respondent, it is brought to the notice of this Tribunal that the Central Bureau of Investigation had conducted search at the Corporate

Office of the 'Corporate Debtor' on 11.2.2020 and that the said search was conducted on the basis of 'First Information Report' lodged by the State Bank of India on 10.2.2020 on its behalf and various 'Consortium Banks'. Also, that the CBI team took numerous documents from the Corporate Office of the 'Corporate Debtor' and that the list of documents' taken by the Central Bureau of Investigation was circulated to the members by way of email dated 29.3.2020 prior to the holding of 16th COC meeting dated 30.3.2020.

62. The Learned Counsel for the 2nd Respondent points out that later on numerous occasions the CBI team had visited the corporate office of the 'Corporate Debtor' and remained there for 15 days and requisitioned the customer agreements relating to financial year 2011-2012 and an intimation of search conducted by the Central Bureau of Investigation as well as list of documents provided to CBI was shared with the COC through email dates 17.2.2020 and 19.2.2020 and later on 29.3.2020.

63. The Learned Counsel for the 2nd Respondent points out that the 'Ministry of Corporate Affairs' through its order No. 32/2018/SFIO/CL-II dated 01.08.2018 had ordered an investigation into the affairs of 'Corporate Debtor' by the Serious Fraud Investigation Office and that the 'Resolution Professional' visited the SFIO office on 25.9.2018 for internal discussions and the 1st communication requisitioning documents / information was received from the said office by the 'Resolution Professional' during October, 2018 and that various documents / information were duly provided to the said office based on requisition and further

is being provided to them as and when required and that the last communication received from SFIO was around 22.6.2020. Added further, presently the CBI and SFIO proceedings are pending and continuing.

64. **Evaluation**

Before the Adjudicating Authority in CA 1252/2019 in (IB) 101(PB) of 2017 the 1st Respondent / Applicant had prayed the undermentioned reliefs: -

(i) Direct that the Ld. 'Resolution Professional' a copy of the Special Investigation Audit to the Resolution Applicant forthwith;

(ii) Direct that the Ld. Resolution Professional supply a copy of the Certificates under Section 43,45,50 and 66 of the Insolvency and Bankruptcy Code, 2016 to the Resolution Professional forthwith;

(iii) Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on *11.04.2018, pending detailed consideration of the same by the Resolution Applicant;*

(iv) Grant the Resolution Applicant sufficient time to re-evaluate its proposals contained

in the Resolution Plan, and also to suitably revise/modify and/or withdraw its Resolution Plan;

(v) Pass any other order(s), and/or any other consequential reliefs as deemed fit and proper by this Hon'ble Tribunal in the facts and circumstances of the case.

65. The Adjudicating Authority on 10.7.2019 had observed that ***"this is an application filed by one 'Ebix Singapore Pvt. Ltd.' seeking re-valuation of the Resolution Plan submitted by it before the Resolution Professional"*** and dismissed CA No. 1252(PB)/2019 stating that there was no ground for considering the prayer sought in the application was made out.

66. Again, the 1st Respondent / 'Resolution Applicant' filed CA No. 1310 of 2019 and sought the following reliefs:-

i. *Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;*

ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to

refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;

iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vide order dated 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;

iv. Pass any other order(s), and/ or any other consequential reliefs as deemed fit and proper by this Hon'ble Tribunal in the facts and circumstances of the case.

67. The Adjudicating Authority in CA 1310(PB)/2019 on 5.9.2019 had observed the following: -

"In para 'B(xii)' under the caption 'facts of the case', the following averments have been made

"xii. That the present Applicant had also filed an Application dated 05.07.2019 bearing PB/1A/1252/2019 under Section 60(5) of the

Code, seeking revision/revaluation of the Resolution Plan. However, the same was dismissed by this Hon'ble Tribunal and during the course of hearing in the said Application, this Hon'ble Court put it to the Resolution Applicant to withdraw the Resolution Plan by way of a separate Application. The present Application for withdrawal of the Resolution Plan is being made in pursuance of the same. Copy of Application dated 05.07.2019 bearing PB/IA/1252/2019 under Section 60(5) of the Code, seeking revision/revaluation of the Resolution Plan is annexed hereto as Annexure 4."

The italic portion of the aforesaid para shows that the prayer for withdrawal of the Resolution Plan has been made inter alia on the suggestion of the Court which is neither reflected in the order nor is born out from any record. Such an averments imputing to the Court something which has never been said is condemnable. The cause of action cannot be based on any such things."

and accordingly dismissed the application with liberty to the Applicant to file fresh one on the same cause of action, if so advised.

68. The 1st Respondent / 'Resolution Applicant' filed yet another CA 1816/2019 before the Adjudicating Authority and sought the following reliefs: -

> i. *Allow the Resolution Applicant to withdraw the Resolution Plan dated 19.02.2018 (along with the Addendum/Financial Proposal dated 21.02.2019) submitted by it, and as approved by the Committee of Creditors;*
>
> *ii. Direct the Ld. Resolution Professional and/or Educomp Solutions Limited and the Committee of Creditors to refund the Earnest Money Deposit of Rs. 2,00,00,000/- furnished by the Resolution Applicant in respect of the Resolution Plan;*
>
> *iii. Withhold approval of the Resolution Plan sanctioned by the Committee of Creditors of the Corporate Debtor, as filed before this Hon'ble Tribunal on 07.03.2018 and recorded vide order dated 11.04.2018, pending detailed consideration of the same by the Resolution Applicant;*

iv. Pass any other order(s), and/ or any other consequential reliefs as deemed fit and proper by this Hon'ble Tribunal in the facts and circumstances of the case.

69. It is the plea of the 1st Respondent / 'Resolution Applicant' in CA No. 1252 of 2019 that it is to be furnished with full details as to the financial position of the 'Corporate Debtor' and also information as to various illegal and fraudulent transactions conducted by it and the failure to furnish the necessary details amounts to a denial of material information, which is in negation of Section 29 of the 'I&B' Code. Furthermore, the 1st Respondent would have to take on extreme financial positions on the basis of 'Resolution Plan' and substantial changes in the financial position of the 'Corporate Debtor' would in law and in equity deserve reconsideration. Moreover, to protect the interests of shareholders, the copy of the special investigation audit may be made available to the 'Resolution Applicant'. That apart, the 'Resolution Professional' prayed for the supply of certificates u/s 43,45,50 and 66 of the 'I&B' Code to the 'Resolution Professional' forthwith.

70. It comes to be known that no audit was conducted in respect of the (i) relief prayed for by the 1st Respondent /'Resolution Applicant' in CA 1252/2019 and as such it is held by this Tribunal that the question of non-supply of the copy of Special Investigation Audit would not arise on any count.

71. In regard to the (ii) relief prayed for by the 1st Respondent /'Resolution Applicant' in CA 1252/2019 that the 'Resolution Professional' may be directed to supply with a copy of certificates Under Sections 43,45,50 and 66 of the 'I&B' Code to the 'Resolution Applicant', it is brought to the notice of this Tribunal on behalf of the 2nd Respondent/'Resolution Professional' that a short affidavit was filed by the 'Resolution Professional' dated 8.10.2018 relating to 'transaction audit' conducted by BDO as per Sections 43,45,50 and 66 of the 'I&B' Code on 6.12.2016 and through the said affidavit, the 'Resolution Professional' mentioned that on the basis of books of accounts and other relevant material no transactions in his opinion were found which needed to be avoided or were fraudulent as per Sections 43,45,50 and 66 of the 'I&B' Code. Indeed, there may not be any embargo for the 1st Respondent/'Resolution Applicant' to obtain a copy of the aforesaid short affidavit directly from the Learned Counsel from the 2nd Respondent /'Resolution Professional' and to subjectively satisfy itself in this regard.

72. However, the Adjudicating Authority while passing the order of dismissing the application in CA No. 1252(PB)/2019 dated 10.7.2019 had not specifically dealt with the aspect of supply of copy of certificates under Sections 43,45,50 and 66 of the 'I&B' Code. Likewise, the (iii)(rd) relief withholding of approval of 'Resolution Plan' sanctioned by the 'Committee of Creditors' of 'Corporate Debtor' was also not expressly adverted to by the Adjudicating Authority at the time of dismissing the CA No.1252(PB)/2019. To put it precisely, the Adjudicating Authority while dismissing CA No.1252(PB)/2019 on 10.7.2019 had merely

mentioned about the ivth relief prayed for by 1st Respondent /'Resolution Applicant' viz. the revaluation of the 'Resolution Plan' submitted by it before the 'Resolution Professional' but not granted the said relief but merely mentioned that "no ground for considering the prayer sought in the application is made out" by passing a speaking order but merely mentioned, no ground for considering the prayer sought in the application is made out and the said application was dismissed as such.

73. It is relevant to point out that the relief of withholding of 'approval of Resolution Plan' made in CA No.1252(PB)/2019 was again claimed by the 1st Respondent /'Resolution Applicant' in CA No.1310/2019 as iiird relief. The relief prayed for in CA 1310/2019 by the 1st Respondent/'Resolution Applicant' to allow him to withdraw the 'Resolution Plan' dated 19.2.2018 etc. was not claimed in CA 1252 of 2019 similarly, the iind relief in CA 1310 of 2019 claiming refund of earnest money deposit of Rs. 2/- crores from the 'Resolution Professional' and/or 'Educomp Solutions Ltd.' furnished by the 'Resolution Applicant' in respect of 'Resolution Plan' was not claimed in CA 1252 of 2019.

74. It is evident that the Adjudicating Authority while dismissing the CA No. 1310(PB)/2019 on 5.9.2019 with certain observations made against the 1st Respondent had granted to it, to file fresh one on the same cause of action, if so advised and resting on the said liberty, the 1st Respondent/Applicant had filed yet another CA 1816 of 2019 wherein the impugned order was passed by the Adjudicating Authority on 2.1.2020.

Res Judicata

75. In regard to the principle of 'Res Judicata' it is to be pointed out that the said principle is a prohibition against the Court / Tribunal. An inter-party order passed by a competent Tribunal binds them even if it is an erroneous one. If an order is passed in a given proceedings and the same became final, then in Law, it would be binding at a later stage of the proceeding, in the considered opinion of this Tribunal. 'Res Judicata' prohibits an 'inquiry' at the very threshold and bar the trial of a suit or a given proceeding.

76. The Rule of constructive 'Res Judicata' is enshrined in explanation iv of Section 11 of the Civil Procedure Code. In fact, the doctrine of 'Res Judicata' applies to all judicial proceedings and equally to all quasi-judicial proceedings before Tribunals. When any matter might and ought to have been raised as a ground of defence in an earlier proceeding but that was not made, then in Law to avoid plurality of litigations and to bring about finality in it, such matter was deemed to have been constructively in issue and as such is taken as 'determined'.

77. In the decision **'Ram Kirpal' V. 'Rup Kurai(1883)11 I.A. 37** the privy Council held that an interlocutory judgement in a suit is binding upon the parties in every proceeding in that suit.

78. Further, a party is to claim all the reliefs as available at the time of filing of an 'Application'. Any intentional omission bars the 'Second Application'. Also, that if a party is aware of his / its claim and omitted to sue for it, it will be

precluded from suing for it again, even though the said omission is an involuntary or an accidental one, as opined by this Tribunal.

79. It is to be pertinently pointed out that if a relief is claimed in a suit but is not expressly granted in the 'Decree', it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be 'Res Judicata', as per decision **'Rock Tyres Chandigarh' V. 'Ajit Jain' AIR 1998 P&H at page 202.**

80. In regard to the aspect of 'cause of action' it means that all essential fact constituting the right and its infringement. A second claim petition raising issues which could have been raised in the first claimed petition and which were relatable to the cause of action' is barred as per decision of **Hon'ble Supreme Court 'K.V. George, Secretary to Govt.', Trivandrum reported in AIR 1990 SC page 53.**

81. In the instant case, the 1st Respondent / 'Resolution Applicant' had omitted to claim the relief No. (i) and (ii) viz. to permit him to withdraw the 'Resolution Plan' dated 19.2.2018 and the claim of seeking refund of earnest money deposit of Rs. 2/- crores furnished by it in respect of the 'Resolution Plan' in CA 1252 of 2019 and as such it is precluded from suing for it (by way of filing CA 1310/2019) even though such omission may be either an intentional or accidental or involuntary one.

82. Although the iiird relief of withholding of approval of 'Resolution Plan' sanctioned by the 'Committee of Creditors' is very same one claimed in CA No. 1252 of 2019 is the very same one as iiird relief in CA 1310/2019 and

notwithstanding the fact the same was not dealt with in CA 1252 of 2019 order dated 10.7.2019, in view of the dismissal of said CA 1252(PB)/2019 by the Adjudicating Authority and the said order which had attained finality and more so in the absence of any 'Appeal' being filed against the said order, then the dismissal order of CA 1252 of 2019 order dated 10.7.2019 binds the 1st Respondent/'Resolution Applicant' as an 'Inter-se' party.

83. In so far as the plea of the 1st Respondent / 'Resolution Applicant' that it was constrained to file CA 1310(PB)/2019 based on the suggestion of the Adjudicating Authority and in the absence of same not being borne out from any record or neither reflected in the order passed in CA1252/2019 dated 10.7.2019, it was not open to the 1st Respondent to file CA 1310(PB)/2019 and the Adjudicating Authority had observed that the 'cause of action' could not be based on such things and dismissed the CA 1310(PB)/2019 granting liberty to the 1st Respondent / 'Resolution Applicant' to file fresh one on the same cause of action, if so advised.

84. Coming to the aspect of the plea of the 1st Respondent / 'Resolution Applicant' that it filed CA 1816/2019 before the Adjudicating Authority only based on the liberty being granted to it to file the same on same 'cause of action', if so advised, as per order dated 10.7.2019 in CA 1310(PB)/2019, this Tribunal pertinently points out that the Adjudicating Authority in the particular circumstances of the present case has no power to grant /reserve liberty to bring a fresh application and hence, the subsequent application filed by the 1st

Respondent /'Resolution Applicant is barred by the principle of 'Res Judicata' notwithstanding the liberty to file fresh one.

85. At this juncture, it is worth to recall and recollect that decision in **'Watson' V. 'Collector of Rajshahye' reported in (1869)12 MIA 160, 12 WR 43 PC** wherein the former suit was dismissed for the plaintiff's failure to produce evidence but a direction was given that a plaintiff could institute a fresh proceeding as if no suit was brought but it was held that the subsequent suit was barred by 'Res Judicata' for the reservation was of no effect.

86. In CA 1816/2019 the 1st Respondent / 'Resolution Applicant' had stated that the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' had far exceeded the statutory time line by more than 17 months and that since the financial considerations underlying the 'Resolution Plan' were no longer justifiable to it and that apart it is extremely concerned with the investigation that was conducted by the SFIO into the affairs of the Company, the 'Resolution Plan' ought to be allowed to be withdrawn by it.

87. Although the Adjudicating Authority in the impugned order in CA 1816(PB)2018 in Company Petition No. (IB)-101(PB)/2017 dated 2.1.2020 at paragraph 11 had observed that 'while dismissing CA No. 1252(PB)/2019 the prayer for withdrawal of 'Resolution Plan' was neither considered nor was ever dealt with. The issue of withdrawal of 'Resolution Plan' by the Applicant has never been considered consciously on merit and / or adjudicated upon in CA No. 1252(PB)/2019 and proceeded to mention that 'doctrine of constructing 'Res

Judicata' does not apply to the issues/points, or any 'lis' between the parties that was not decided previously and despite been pleaded was not considered by court/Tribunal and expressly dealt with in the order so passed etc., this Tribunal is of the considered view that these observations are not legally tenable because of the latent and patent fact that the grounds raised by the 1st Respondent / 'Successful Resolution Applicant' in CA 1816(PB)2018 (withdrawal application) were projected earlier and rejected in CA No. 1252(PB)/2019 through an order dated 10.7.2019. Furthermore, the plea of the 1st Respondent / 'Successful Resolution Applicant' and the finding of the Adjudicating Authority that the prayer for withdrawal was not considered while disposing of CA No. 1252(PB)/2019 is quite in tune with the very principle of 'Res Judicata' which means that the reliefs should be deemed to have been denied when what were claimed being 'not granted' which unerringly points out that they were denied or refused by the Adjudicating Authority. Even an order / decision of a competent Court/Tribunal on a point of Law operates as 'Res Judicata'. The principle of 'Res Judicata' is that cause of action for second proceeding merged in first proceeding does not survive any more. In reality, 'Res Judicata' precludes a party from averring the same thing in 'successive litigations'. As such, the contra view taken by the Adjudicating Authority that the doctrine of constructive 'Res Judicata' does not apply to the issues/points or any 'lis' between the parties that was not decided previously etc. is negatived by this Tribunal. Per contra, unhesitatingly this Tribunal holds that the withdrawal application CA

1816(PB)2019 is barred by the principles of 'Res Judicata' / Constructive 'Res Judicata'.

Withdrawal of Resolution Plan

88. In regard to the plea of 'withdrawal of Resolution Plan' made in CA 1816/2019 before the Adjudicating Authority, the 1st Respondent / 'Resolution Applicant' had averred that the 'Insolvency Resolution Process' in regard to the Company commenced on the date of the admission of petition u/s 9 of the Code on 30.5.2017 and the statutory period of limitation for completion of proceedings under the 'I&B' Code viz. 180 days lapsed on 30.11.2017 and further 90 days period was extended as per Section 12 of the Code, which came to an end of 30.01.2017. As a matter of fact, the statutory permitted period of 270 days for completion of 'Corporate Insolvency Resolution Process' had expired and more than 24 months had passed since that date.

89. According to the 1st Respondent / 'Resolution Applicant' the financial/commercial considerations underlying the 'Resolution Plan' are no longer viable to it and that the financial position and profile of the 'Corporate Debtor' may have altered and / or deteriorated significantly and further that the Special Investigating Audit of the Company between 2014 and 30.1.2018 was subsequently never conducted, the 'Resolution Plan' ought to be permitted to be withdrawn by it and that the Adjudicating Authority based on the facts of the case had allowed the prayer for withdrawal of 'Resolution Plan' with cost etc. and the said impugned order in CA 1816(PB) of 2019 is valid and justifiable one.

90. In response, it is the stand of the Appellant that the reliance placed by the 1st Respondent / 'Resolution Applicant' in respect of clause 1.8.3 of 'RFRP' read along with Clause 7 of the 'Approved Resolution Plan' to claim the validity of the 'Approved Resolution Plan' was only six months is an incorrect one because of the reason the said six months period in clause 1.8.3 of 'RFRP' is the minimum validity period. Further, Clause 7 of the 'Approved Resolution Plan' read in the context of 'RFRP' is only a reference to the 'Resolution Plan' being valid for six months for acceptance of the 'Committee of Creditors' and in short post 'Committee of Creditors' approval the 'Resolution Plan' is a statutory binding contract only conditional to the approval of Adjudicating Authority which can be refused only on account of non-compliance of the conditions mentioned in Section 30(2) of the Code which is conspicuously absent in the present case. Therefore, it is submitted on behalf of the Appellant that the 1st Respondent / 'Resolution Applicant' is bound by the 'Approved Resolution Plan' duly accepted by the 'Committee of Creditors'. On behalf of the Appellant, a reliance is placed upon the judgement of this Tribunal in **Apollo Jyoti LIC and Ors. v. Jyoti Structures Ltd. Company Appeal (AT)(Ins.) No. 461/2018 dated 19.03.2019** wherein it is observed that the 'Committee of Creditor' is empowered to change its decision on rejection of 'Resolution Plan' but within 270 days.

91. The aim of 'Resolution' is for maximization of the value of Assets of the 'Corporate Debtor' and thereby for all creditors. The 'I&B' code defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It is to be remembered that no one is either buying or selling

the 'Corporate Debtor' through 'Resolution Plan'. A 'Resolution Applicant' may furnish a 'Resolution Plan' to the 'Resolution Professional' who is then to examine the said plan to see that it conforms to the requirements of Section 30(2) of the Code. If the plan satisfies the such requirements, the plan is to be placed before the 'Committee of Creditors' for its approval u/s 30(3) and can be approved by the 'Committee of Creditors' by a court of not less than 66% under Sub-Section (4).

92. After the approval of the 'Resolution Plan' it is to be submitted to the 'Adjudicating Authority' under Section 31 of the Code. The Adjudicating Authority at this juncture, is to apply its judicial mind to the 'Resolution Plan' so presented and after being subjectively satisfied that the plan meets or does not meet the requirements mentioned in Section 34 of the Code may either approve or reject such plan.

93. Be it noted, that subsequent to the approval of 'Resolution Plan' by an Adjudicating Authority an application may be filed before the Adjudicating Authority by a person in-charge of the management or control of the Business and operations of the 'Corporate Debtor' for an order seeking the assistance of the local district administration in implementing the terms of a 'Resolution Plan'.

94. Although the 1st Respondent/'Resolution Applicant' had taken a plea in that it is not bound by the 'Resolution Plan' submitted by it and is at liberty to withdraw from the 'RFRP' after the completion of six months from the date of submission of the 'Resolution Plan', this court holds that the Adjudicating Authority after approval of the 'Resolution Plan' by the 'Committee of Creditors'

had no jurisdiction to entertain or to permit the withdrawal application filed by the 1st Respondent/'Resolution Applicant'.

95. In the instant case, notwithstanding the fact only upon the approval of the 'Adjudicating Authority' the 'Resolution Plan' of the 'Resolution Applicant' would be binding on all the parties and further that the application for withdrawal was filed by the 1st Respondent/'Resolution Applicant' was filed earlier to the stage of 'Approval' by the 'Adjudicating Authority' yet this Court comes to an cocksure conclusion that the 'Adjudicating Authority', in law cannot enter into the arena of the majority decision of the 'Committee of Creditors' other than the grounds mentioned in Section 32(a to e) of the 'I&B' Code. Moreover, after due deliberations, when the 1st Respondent/'Resolution Applicant' had accepted the conditions of the 'Resolution Plan' especially keeping in mind the ingredients of Section 25(2)(h) of the 'Code' to the effect that 'no change or supplementary information to the 'Resolution Plan' shall be accepted after the submission date of 'Resolution Plan' then it is not open to the 1st Respondent/'Resolution Applicant' to take a '***topsy turvy'*** stance and is not to be allowed to withdraw the approved 'Resolution Plan'.

96. Coming to the aspect of there being a delay in completion of 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor' i.e. after lapse of more than 18 months from the date of submission of the 'Resolution Plan' (i.e. 19.2.2018) and 27 months from the 'Corporate Insolvency Resolution Process' commencement date the application for its approval was still pending before the Adjudicating Authority on 10.09.2019, when the application for withdrawal of

plan was filed culminating in the impugned order, it is to be relevantly pointed out by this Tribunal that when the orders on the approval application were reserved by the Adjudicating Authority then such delay cannot be taken advantage of by a litigant because of the fact that '***Actus curiae neminem gravabit' i.e. the act of Court shall harm no person which is embedded in jurisprudence(vide Jang Singh V. Brij Lal, 1964) 2 SCR page 146 at special page 149.*** 97. The 2nd Respondent had clearly pointed out before this Tribunal that no special investigation audit was conducted and, therefore, the 1st Respondent/'Resolution Applicant' cannot have a grievance that the 'Resolution Professional' had not supplied it a copy of the said Audit Report. Further, the CBI and SFIO proceedings initiated against the 'Corporate Debtor' are pending and hence, and in any event Section 32A of the 'I&B' Code grants immunity to the 1st Respondent/'Resolution Applicant' in respect of the offences committed by the 'Corporate Debtor' before the start of 'CIRP'. Also, that it specifies that the assets of the 'Corporate Debtor' as represented will be available in the right manner as at the time of furnishing of 'Resolution Plan'. When that be the fact situation, the 1st Respondent/'Resolution Applicant' taking an umbrage of pending 'SFIO investigation' of the affairs of 'Corporate Debtor' or the CBI investigation to file CA 1816(PB) of 2019 (withdrawal application) is unworthy of acceptance.

98. It must be borne in mind that the 1st Respondent/'Resolution Applicant' even after the expiry of six months had proceeded with the approval of the 'Resolution Plan' and the fact of the matter is that the 'Resolution Plan' is to be

valid for six months, for acceptance of 'Committee of Creditors', is certainly not a favourable circumstance in favour of the 1st Respondent / 'Resolution Applicant'. During the period from August, 2018 till January 2019 when the orders were reserved by the 'Adjudicating Authority' on the approval application, the 1st Respondent/'Resolution Applicant' took part and, therefore, by any stretch of imagination, it cannot be said that the validity of the 'approved plan' was only six months period and such plea is not well founded.

Result

99. Be that as it may, on a careful consideration of respective contentions, taking note of qualitative and quantitative upshot and keeping in mind the facts and circumstance of the instant case which float on the surface, this Tribunal comes to an irresistible conclusion that the views arrived at by the Adjudicating Authority in CA No.1816(PB)/2019 in C.P.(IB)No. 101 (PB) 2017 to the effect (i)that doctrine of 'Res Judicata' does not apply to the present case (ii) in granting the relief of withdrawal of 'Resolution Plan' with costs and resultantly allowing the aforesaid CA No. 1816(PB)/2019 in C.P.(IB)No. 101 (PB) 2017 partly specifying the terms therein with costs of Rs. 1 lakh to be paid by the 1st Respondent/'Resolution Applicant' are clearly unsustainable in law and accordingly, they are set aside in furtherance of substantial cause of justice. Resultantly, the present Appeal succeeds.

In fine, the present Appeal is allowed with no costs. The impugned order dated 02.01.2020 in CA No. 1816(PB)/2019 in C.P.(IB)No. 101 (PB) 2017 is set aside for the reasons ascribed in this Appeal by this Tribunal. The CA No.

1816(PB)/2019 is dismissed. I.A. No. 531/2020(seeking exemption to file clear copy etc.) is closed.

[Justice Venugopal. M]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

29th July, 2020

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