NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 287 of 2020

[Arising out of Order dated 12.02.2020 passed by the National Company Law Tribunal, Court No. II, Mumbai Bench, Mumbai in M.A. 515/2020 in C.P.(IB)-1832(MB)/2017].

IN THE MATTER OF:

Mr. Abhijit Guhathakurta,
Monitoring Agency of the Corporate Debtor ...Appellant

Versus

Royale Partners Investment Fund Ltd. ...Respondent

Present:

For Appellant: Mr. Abhinav Vasisht, Sr. Advocate with Mr. Avinash Subramanian, Mr. Aakrshan Sahay and Mr. Naqul Sachdeva, Advocates

For Respondent: Mr. Sudipto Sarkar, Sr. Advocate with Mr. Kumar Anurag Singh, Mr. Naman Joshi and Mr. Arun Kathpalia, Senior Advocates for Intervenor

With

Company Appeal (AT) (Insolvency) No. 327 of 2020

[Arising out of Order dated 18.02.2020 passed by the National Company Law Tribunal, Mumbai Bench, Mumbai in MA 249/2020 in C.P.(IB)-1832/MB/2017]

IN THE MATTER OF:

Royale Partners Investment Fund Ltd. ...Appellant

Versus

Mr. Abhijit Guhathakurta
Monitoring Agency of the Corporate Debtor ...Respondent
Present:

For Appellant : Mr. Sudipto Sarkar, Sr. Advocate

For Respondent : **Mr. Abhinav Vasisht, Sr. Advocate with Akshita Sachdeva, Advocate for R-1**

Mr. Tushar A John, Advocate

J U D G M E N T

Venugopal M. J

Company Appeal (AT) (Insolvency) No. 287 of 2020

Being dissatisfied with the impugned order dated 12.02.2020 passed by the Adjudicating Authority (Reconstituted 'National Company Law Tribunal', Bench No. II, Mumbai) in MA No. 515/2020 in C.P. (IB)- 1832(MB)/2017, the Appellant/'Monitoring Agency' of the 'Corporate Debtor' has focused the instant Appeal before this Tribunal.

2. The Learned Counsel for the Appellant contends that the Adjudicating Authority ('NCLT') Bench No. II, Mumbai while passing the impugned order in M.A. No. 515/2020 dated 12.02.2020 had acted arbitrarily and exceeded its jurisdiction in staying the proceeding in M.A. No. 249 of 2020 which was heard at length and reserved for 'Orders' by an Erstwhile Bench / Co-ordinate Bench of 'NCLT', Mumbai.

3. The Learned Counsel for the Appellant submits that the Respondent herein was provided with an adequate opportunity to file a 'Reply' to the said

miscellaneous Application No. 249/2020 and a reply was filed prior to the hearing of the said miscellaneous application by the Adjudicating Authority.

4. The Learned Counsel for the Appellant submits that the 'Successful Resolution Applicant' raised numerous Defenses in reply to MA No. 249/2020 which were raised again in MA No. 515/2020 by it and that too when orders were reserved in MA No. 249/2020. Further, it is the contention of the Appellant, when the erstwhile Bench of 'NCLT', Mumbai had reserved orders in MA No. 249/2020 on 30.01.2020 the reconstituted Bench No. II, Mumbai had acted arbitrarily and in excess of its jurisdiction had stayed the proceedings in MA No. 249/2020 where the orders were reserved by the co-ordinate Bench. In short, it is the plea of the Appellant that the erstwhile Bench had the requisite jurisdiction to hear and reserve the matter on the day on which it was heard.

5. The Learned Counsel for the Appellant contends that the impugned order dated 12.2.2020 passed by the Adjudicating Authority / ('NCLT') Mumbai Bench, Court No. II is an example of 'Judicial Indiscipline' and, therefore, the same in the interest of justice is liable to be set aside by this Tribunal. In this connection, the Learned Counsel for the Appellant seeks in aid of the decision of Hon'ble Supreme Court ***Vikramjit Singh Vs. State of Madhya Pradesh reported in MANU/SC/0081/1992*** whereby and whereunder at paragraph – 3 it is observed as under:-

"3. The application was listed before Mr. Justice Gupta who by the impugned judgement cancelled the earlier order of Mr. Justice B.C. Varma and while so doing made strong remarks against grant of bail in cases like the present one. The appellant has now challenged the judgment before this Court. It appears that the learned Judge while passing the impugned order, failed to appreciate that no Bench can comment on the functioning of a coordinate Bench of the same Court, much – less sit in judgement as an Appellate Court over its decision. If the State was agreed by the order of bail by Mr. Justice B.C. Varma it could have approached this Court but, that was not done. The Judgement of Mr. Justice B.C. Varma, therefore, became final so far, the High Court was concerned. If the Appellant had misused the bail or new materials came to light it would have been open to the prosecution to move for cancellation of the bail, but that is not the position in the present case. On the basis of the

same materials and in the same circumstances in which the order was earlier passed in favor of the Appellant by the High Court the application for cancellation was made entirely as a sequel to the observations made by Mr. Justice Gupta while dealing with the application of another accused. It must be, therefore, held that Mr. Justice Gupta had no authority to upset the earlier order of the High Court. That which could not be done directly could also not be done indirectly. Otherwise, a party aggrieved by an order passed by one Bench of the High Court would be tempted to attend to get the matter reopened before another Bench and there would not be any end to such attempts. Besides, it was not consistent with the judicial discipline which must be maintained by Courts both in the administration of justice by assuring the binding nature of an order which becomes final and the faith of the people in the judiciary. The impugned order dated 16-7-91 is, therefore, set

aside and the order dated 6-7-90 granting bail to the Appellant is restored".

6. The Learned Counsel for the Appellant cites the decision of Hon'ble Supreme Court ***'Sant Lal Gupta and Ors. Vs. Modern Co-operative Group Housing Society Ltd. and Ors.'*** reported in MANU/SC/0859/2010 wherein at paragraph 18 it is observed as follows: -

"18. A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate rules of law form the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a co-ordinate bench must be followed. (Vide: Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and Ors. MANU/SC/0345/1967: AIR 1968 SC 372;

Sub-Committee of Judicial Accountability v Union of India and Ors. MANU/SC/0007/1992: (1992) 4 SCC 97; and State of Tripura v. Tripura Bar Association and Ors. MANU/SC/1078/1998: (1998) 5 SCC 637).”

7. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the Respondent / **‘Royale Partners Investment Fund Limited’** and Appellant in ***Company Appeal (AT)(Ins.)No.327/2020*** (being the *‘Successful Resolution Applicant’),* its ‘Resolution Plan’ was approved by the *‘Committee of Creditors’* of the *‘Corporate Debtor’* on 10.01.2019 and as per the plan, the same was to be implemented within 30 business days from the date on which the ‘Adjudicating Authority’ approved the same. Accordingly, when the ‘Committee of Creditors’ had approved the Plan on 10.01.2019 the *‘Resolution Professional’* of the Corporate Debtor filed an application u/s 30 and 31 of the ‘I&B’ Code before the ‘Adjudicating Authority’ for approving the ‘Resolution Plan’ of the *‘Successful Resolution Applicant’.*

8. The Learned Counsel for the Appellant proceeds to point out that the application filed u/s 30 and 31 of the IBC by the ‘Resolution Professional’ of the ‘Corporate Debtor’ was allowed by the Adjudicating Authority on 25.11.2019 and that the Appellant / Monitoring Agency (established under the ‘Resolution Plan’)

because of deliberate delay and failure on the part of the Respondent / 'Successful Resolution Applicant' was constrained to file **M.A. No. 249/2020** before the Adjudicating Authority on 22.1.2020 among other things seeking an implementation of the 'Resolution Plan'.

9. It is the stand of the Appellant that MA No. 249/2020 was heard at length and on 30.1.2020 and orders were reserved by the erstwhile Bench. However, on 29.1.2020 the Benches of 'NCLT' Mumbai were re-constituted by the President of the 'National Company Law Tribunal' (in exercise of the powers u/s 419 of the Companies Act, 2013) and the reconstitution of Benches was to come into effect from 3.2.2020.

10. The Learned Counsel for the Appellant points that in MA No. 515/2020 filed by the Respondent (**Royale Partners Investment Fund Limited / 'Successful Resolution Applicant')** the re-constituted 'NCLT' Mumbai Bench, Court no. II on 12.2.2020 at paragraph 4 had observed the following: -

> *"4. Learned Senior Counsel for the Applicant pressed for Interim Relief mentioned at Clause (h) on page-24 of the MA. Learned Counsel appearing on behalf of the Monitoring Agency sought some time to file reply in the matter. Considering the submissions made and the nature of the prayers, this Bench deems it necessary that the prayer in Clause(h) on*

page-24 of MA-515/2020 should be granted at this pint of time. We therefore stay all proceedings in MA 249/2020 until the next date of hearing in the present MA."

and the matter was directed to be listed on 28.2.2020.

11. On behalf of the Appellant, it is brought to the fore that on 27.1.2020, the erstwhile 'NCLT' Mumbai Bench in MA No. 249/2020 had interalia directed the Respondent to file its reply in next two days' time i.e. by 29.1.2020, (since it was mentioned from the Respondent side that MA No. 249/2020 was received about five days back and time was sought to file a reply) and it was specifically made mention of that the matter would be heard on 30.01.2020.

12. While rounding up, it is the fervent submission of the Learned Counsel for the Appellant that the Impugned Order dated 12.02.2020 is not consistent with 'Judicial Discipline' to be maintained by the Tribunal and, therefore, it is to be set aside, in furtherance of substantial cause of justice.

Intervenor's Pleas

13. According to the Learned Counsel for the Intervenor (IDBI Bank – the erstwhile 'Committee of Creditors'), in the present Appeal utmost significant question is raised in the interest of members of former 'Committee of Creditors' and accordingly, the Intervenor is heard.

14. The Learned Counsel for the Intervenor (IDBI Bank – the erstwhile 'Committee of Creditors') submits that post completion of pleadings in MA No. 249/2020 (with reference to Company Appeal (AT)(Ins.) No. 287/2020) arguments were heard and the matter was reserved for orders by 1st Bench of 'NCLT' Mumbai on 30.01.2020 and thereafter only the notification dated 29.01.2020 was issued by the President of 'NCLT' reconstituting the Benches at 'NCLT' Mumbai w.e.f. 03.02.2020. In this connection, it is the plea of the Learned Counsel for the Intervenor that notwithstanding the fact that the arguments were heard at length and the orders were reserved in MA No. 249/2020 on 30.01.2020 by the erstwhile Bench of 'NCLT', Mumbai, the Respondent / RPIFL attempted to mention the matter before the re-constituted Bench, which was dis-allowed by the Bench. Also, it is represented that in utter disregard to the rule of Law, the Respondent / RPIFL filed MA No.515/2020 before the re-constituted Bench among other things, had sought stay of the proceedings before the erstwhile Bench in MA No. 249/2020.

15. The Learned Counsel for the Intervenor takes a stand that the 2nd Bench of 'NCLT' Mumbai on 12.2.2020 in MA No. 515/2020 had stayed the proceedings before the 1st Bench, in MA No. 249 of 2029 (wherein orders were received), which is an invalid and illegal one in the eye of Law. Inspite of the said stay order, the 1st Bench of 'NCLT' Mumbai (erstwhile Bench) had passed the final orders in MA No. 249/2020 on 18.02.2020 whereby the Respondent /

RPIFL was directed to implement the 'Resolution Plan' within a week and being aggrieved therefrom, the Respondent / RPIFL as an 'Appellant' has preferred the Company Appeal (AT)(Ins.)No. 327/2020 before this Tribunal.

16. The Learned Counsel for the Intervenor prays for annulling the 'Impugned Order' to promote substantial cost of justice.

Respondent's Contentions

17. Conversely, it is the submission of Learned Counsel for the Respondent that in MA No. 249/2020 a reply was filed by the Respondent and the matter was heard extensively (after completion of pleadings) on 30.01.2020 before the Bench II of the 'NCLT', Mumbai and thereafter reserved for orders, which was pronounced on 18.02.2020.

18. Advancing his arguments, the Learned Counsel for the Respondent brings to the notice of this Tribunal that pursuant to the reconstitution of the Benches, the Respondent / Appellant in Company Appeal (AT)(Ins.) 327/2020 sought to mention the said M.A. No. 249/2020 before the reconstituted Bench No. II of 'NCLT' on 04.02.2020 and that the Appellant's / Respondent's (in Company Appeal (AT)(Ins.)No. 287/2020) Advocates were present in court for a different matter were able to oppose the same as a malafide one and as a result thereof, the re-constituted Bench No. II of 'NCLT' Mumbai had not permitted the 'mentioning'.

19. The Learned Counsel for the Respondent submits that there is no judicial indiscipline in pronouncing the order dated 18.2.2020 in MA No. 249/2020 by the earlier Bench, as in that matter, orders were reserved before MA No. 515/2020 was filed by the Appellant.

20. The Learned Counsel for the Respondent urges that the role of the 'Monitoring Agency' is limited to managing the day-today affairs of the 'Corporate Debtor' and that the said 'Agency' had without permission and sanction of the steering Committee first filed MA 1 (MA No.249/2020). Further, the plea of the Respondent is that it is the responsibility of the 'Steering Committee' to implement the 'Resolution Plan' and it may file such application, if so required. In reality, the 'Monitoring Agency' had not even consulted the 'Steering Committee' before filing of MA 1 (MA No.249/2020) and there was no 'Resolution' on record approving such an action.

21. The Leaned Counsel for the Respondent submits that in the absence of any prior approval of the 'Steering Committee' for filing MA1, (MA No.249/2020) the said 'Agency' does not have the ***'locus-standi'*** to file MA1 or Company Appeal (AT)(Ins.)No. 287/2020 before this Appellate Tribunal.

22. The Learned Counsel for the Respondent contends that the MA1 (MA No. 249/2020) filed by the 'Monitoring Agency' before the 'NCLT' Mumbai was a

'Premature' one and further there was malafide action on the part of 'Monitoring Agency' in filing MA No. 249/2020. Further, it is a stand of the Respondent

that although MA No. 249/2020 was filed on 15.01.2020, the 'Monitoring Agency' had not taken the approval of 'Steering Committee' for filing the said Miscellaneous Application and further, the said Committee was not arrayed as a party to the proceedings.

23. Yet another argument advanced on behalf of the Respondent is that in as much MA No.249/2020 had not dealt with the numerous challenges in implementing the approved 'Resolution Plan', by Respondent, the present Respondent (Appellant in Company Appeal (AT)(Ins.)No. 327/2020) had filed MA No. 515/2020 before the 'Adjudicating Authority' and the same is pending.

Discussions

24. There is no two opinion of a primordial fact that the erstwhile bench of 'NCLT', Mumbai on 30.01.2020 in MA No. 249/2020 in C.P.(IB)-1832(MB)/2017 after hearing had 'reserved the orders'. Earlier, when MA No.249/2020 came up for hearing before the erstwhile Bench, the Respondent was directed to file 'Reply' in next two days' time i.e. by 29.1.2020 and it was categorically stated that 'the matter would be heard on 30.01.2020. However, MA No. 515/2020 was filed by the 'Successful Resolution Applicant' / Royale Partners Investment Fund Ltd. (Appellant in Company Appeal (AT)(Ins.) No. 327/2020) seeking reliefs (a to j) mentioned therein. More specifically, in MA No. 515/2020 before the newly reconstituted Bench of 'NCLT' Mumbai, Court No. II, the 'Successful

Resolution Applicant' in serial No. (h) of the relief portion had sought the following: -

> *"That pending the hearing and final determination of the present application, this Tribunal may be pleased to stay all proceedings in MA No. 249/2020."*

25. As a matter of fact, the 'Adjudicating Authority' (erstwhile Mumbai Bench of 'NCLT') when it reserved orders in MA No. 249/2020 on 30.01.2020 comprised of different Members (both Judicial and Technical) than that of the newly reconstituted Bench of 'NCLT' Mumbai Bench, Court No. II which passed the orders on 12.2.2020. In the newly reconstituted Bench in Court No. II of 'NCLT', Mumbai, the Members (both Judicial and Technical) were different, than the former Bench of 'NCLT' and on 12.2.2020 the re-constituted Bench had stayed the proceedings in MA No. 249/2020 until the next date of hearing of MA No. 515/2020 and directed the matter to be listed on 28.02.2020.

26. Be it noted, that Rule 16 of 'National Company Law Tribunal' Rules, 2016 speaks of 'functions of the President of the "National Company Law Tribunal' which reads as under: -

> *"16 Functions of the President: - In addition to the general powers provided in the Act and in these Rules*

the President shall exercise the following powers, namely: -

a) *Preside over the consideration of cases by the Tribunal;*
b) *Direct the Registry in the performance of its functions;*
c) *Prepare an annual report on the activities of the Tribunal;*
d) *Transfer any case from one Bench to other Bench when the circumstances so warrant;*
e) *To withdraw the work or case from the court of a member;*
f) *Perform the functions entrusted to the President under this Rules and such other powers (sic may) be relevant to carry out its duties as head of the Tribunal while exercising the general superintendence and control over the administrative functions of the members, registrar, secretary and other staff of the Tribunal."*

27. Section 419(1) of the Companies Act, 2013 speaks of constitution such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government etc. As a matter of fact, 'Constitution of Benches' and 'Assignment of Cases' is left to the subjective administrative discretion of the President / Chairman of a Tribunal. Section 420(1) of the Companies Act, 2013 says that '***the Tribunal may, after giving the parties, to any proceeding before it, a reasonable opportunity of being heard pass such orders thereon as it thinks fit'.*** Needless

to state that the 'Tribunal' is to ascribe reasons for arriving at a conclusion, of course resting upon the materials on record.

28. Be it noted, that **Rule 60 of the 'National Company Law Tribunal' Rules, 2016 speaks of 'Matters relating to the Judgements or Orders of the Tribunal'.**

29. Rule **62 of the 'National Company Law Tribunal' Rules, 2016 under the caption reads as under:-**

> ***"Recusal:- (1) For the purpose of maintaining the high standards and integrity of the Tribunal, the President or a Member of the Tribunal shall recuse himself:-***
>
> ***(a) in any case involving persons with whom the President or the Member has or had personnel, familial or professional relationship;***
>
> ***(b) in any cases concerning which the President or the Member has previously been called upon in another capacity including as advisor, representative, experts or witness; or***

(c) if there exist other circumstances such as to make the President or the Member's participation seem inappropriate.

(2) The President or any Member recuse himself may record reasons for recusal;

Provided that no party to the proceedings or any other person shall have right to know the reasons for recusal by the President or the Member in the case."

30. It comes to be known that the Hon'ble President of 'NCLT', New Delhi, (in exercise of the powers conferred u/s 419 of the Companies Act, 2013) on 29.1.2020 had re-constituted the Benches at 'NCLT' Mumbai for the purpose of exercising and discharging the functions assigned by the statute which was in partial modification of the order dated 25.07.2020. The Benches comprised of the following Members and the order of reconstituted Benches at 'NCLT' Mumbai dated 29.1.2020 was to come into effect from 03.02.2020: -

*"**Bench at NCLT, Mumbai Court No. 1***

1. Ms. Suchitra Kanuparthi, Member(Judicial)
2. Shri V.Nallasenapathy, Member (Technical)

Bench at NCLT, Mumbai Court No. II

1. Shri Rajasekhar V.K. Member (Judicial)

2. *Shri Ravikumar Duraiswamy, Member (Technical)*

Bench at NCLT, Mumbai Court No. III

1. *Shri Bhaskara V.K. Member (Judicial)*
2. *Shri Shyam Babu Gautam, Member (Technical)*

Bench at NCLT, Mumbai Court No. IV

1. *Shri Rajasekhar V.K. Member (Judicial)*
2. *Shri Rajesh Sharma, Member (Technical)*

Bench at NCLT, Mumbai Court No. V

1. *Ms. Suchitra Kanuparthi, Member(Judicial)*
2. *Shri Chandra Bhan Singh, Member (Technical)"*

31. It is to be pointed out that as against the final order passed in MA No. 249/2020 in allowing the application on 18.02.2020 by the erstwhile 'NCLT', Mumbai Bench (which reserved orders in MA No. 249/2020 on 30.01.2020), the Appellant (Royale Partners Investment Fund Ltd.) / 'Successful Resolution Applicant' has preferred the Company Appeal (AT)(Ins.) No. 327 of 2020 before this Tribunal.

32. At this juncture, this Tribunal worth recalls and recollects the decision of ***Hon'ble Supreme Court in the State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, (2004) 11 Supreme Court Cases Page***

26 at special page 157 wherein at paragraph 339 it is observed as follows:-

> ***"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred to only to a larger Bench. (See Pradip Chandra Parija Vs. Pramod Chandra Patnaik (2002)1 SCC 1 at paras 6 and 7; following in Union of India v. Hansoli Devi (2002) 7 SCC 273 at para 2) But no decision can be arrived at contrary to are inconsistent with the law laid down by the coordinate Bench. Kalyani Stores AIR 1966 SC 1686 and K.K. Narula AIR 1967 SC 1368 both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown***

out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

33. Also, in the decision of ***Hon'ble Supreme of Court Union of India & Anr. Vs. Hansoli Devi & Ors. (2002)7 Supreme Court Cases page 273 at special page 274 it is held that 'judicial discipline and propriety demands that a Bench of two learned judges should follow a decision of a Bench of three Judges. But if a judge of two Learned judges concludes that an earlier judgement of three Learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is, to refer the matter before it to a Bench of three Learned judges setting out the reasons why it could not agree with a earlier judgement and then if the Bench of three learned judges also comes to the conclusion that the earlier judgement of a Bench of three learned judges is incorrect, then a reference could be made to a Bench of five learned judges etc."***

34. It is to be remembered the principle of ***"qundo aliquid prohibetur, prohibetur et omne per quod devenitur ad illud"*** is that an *'Authority is not to be permitted to evade a Law by shift or contrivance'.*

35. In a recent judgement of **Hon'ble Supreme Court in Criminal Appeal No. 452 of 2020(arising out of SLP(CRL) No. 2433/2020 S.Kasi V. State Through**

the Inspector Police, Samayanallur Police Station, Madurai dated 19.06.2020 it is held at paragraph 31 that *'a coordinate Bench cannot take contrary view and in event there was any doubt, a coordinate Bench can only refer the matter for consideration by a Larger Bench. The Judicial Discipline ordains so.'*

36. It is not out of place for this Tribunal to make a pertinent mention that ***'Probity', 'Judicial Decorum', 'Propriety'*** and '***Comity of Judicial Discipline'*** require that a coordinate Bench cannot stay an order which was reserved by another coordinate Bench of the same 'Tribunal'. In fact, the erstwhile Bench ('NCLT', Mumbai) which reserved orders in MA No. 249 of 2020 on 30.01.2020. On 30.01.2020 till it pronounces the order is *seized of the matter* and retains dominion over the said MA No. 249/2020 and when MA No. 515/2020 came up for hearing before the newly re-constituted Bench (Court No. II) of Mumbai in which an order of stay was granted on 12.02.2020 in respect of the pronouncement of orders in MA No. 249/2020 by the erstwhile Bench, the said order bristles with legal infirmity because of the fact that the newly re-constituted Bench of 'NCLT' Mumbai, Court No. II cannot make an inroad in respect of a matter *viz.* MA No. 249/2020 wherein the *'orders were reserved'* on 30.01.2020 by the erstwhile Bench. In short, the passing an order of stay of all proceedings in MA No. 249/2020 until the next date of hearing (28.02.2020) in MA No. 515/2020 by the newly re-constituted Bench, 'NCLT' Mumbai, Court No. II, on 12.02.2020 is ***perse*** an illegal, nullity and non-est one, in the ***eye of***

Law, in the considered opinion of this Tribunal, because of the reason that the newly re-constituted Bench cannot sit in judgement as an 'Appellate Authority' in respect of a subject matter, in which an order was reserved by the erstwhile Bench.

37. Added further, in the instant case, the newly re-constituted Bench of 'NCLT' Mumbai, Court No. II had the prudent option by passing an order in directing the office of registry of 'NCLT', Mumbai to place MA No. 515/2020 (filed by the 'Resolution Applicant' / Appellant in Company Appeal (AT)(Ins.) No. 327/2020) before the President of 'NCLT', New Delhi for obtaining necessary orders so as to post the said MA No. 515/2020 before the earlier Bench for hearing which reserved orders on 30.01.2020 in MA No. 249/2020. Unfortunately, such a proper/traditional recourse, cemented on sound and healthy principle of judicial propriety was not resorted to. No doubt in our jurisprudence 'precedents' do play a primary role in patronising the ***'Rule of Law'.*** At this juncture, it is worth to point out that in MA No.515/2020 pending hearing and final determination of the said application a relief was sought from the Tribunal to stay all proceedings in MA No. 249/2020.

38. To put it precisely, it is neither palatable / desirable nor permissible by the 'Co-ordinate Bench' of a Tribunal to fetter the hands of erstwhile Bench in passing necessary orders in MA 249/2020 which was admittedly heard and reserved for orders on 30.01.2020. In the case on hand, an order passed by a

co-ordinate Bench of the same Tribunal in reserving the matter in MA No. 249/2020, on 30.01.2020 must be reverred and the ***'judicial precedent'*** requires that as a ***'rule of practice'***, the same cannot be interfered with by the re-constituted Bench on any score. Only if the Members of the Adjudicating Authority('NCLT') do not brush aside the orders passed by a 'Coordinate Bench' of the same Tribunal, Certainty and uniformity in 'Law' can be achieved and preserved in our administration of justice.

39. In as much as the impugned order dated 12.2.2020 in MA No. 515/2020 staying all proceedings in MA No. 249/2020(which was heard by the erstwhile Bench on 30.01.2020 wherein orders were reserved) until the next date of hearing i.e. on 28.02.2020 is beyond the jurisdiction of the re-constituted Bench of 'NCLT' Court No. II, Mumbai, the said order with a view to prevent an aberration of justice and with a view to secure the ends of justice, is set aside by this Tribunal, of course in the interest of our institutional justice delivery system, with a benign hope and trust that such slipup will not recur again in future. **Consequently, the Appeal succeeds.**

Disposition

In fine, the present Appeal is allowed. No Costs. I.A. 754/2020 (stay Application) and I.A. 755/2020 (seeking exemption to file certified copy of the impugned order dated 12.02.2020 are closed. However, the Appellant is directed to file the certified copy of the 'Impugned Order' within one week from today.

Company Appeal (AT) (Insolvency) No. 327 of 2020

Introduction

40. The Appellant / 'Successful Resolution Applicant' has projected the instant Appeal being aggrieved with the impugned order dated 18.02.2020 passed by the Adjudicating Authority ('National Company Law Tribunal') Mumbai Bench in **MA No.249/2020 in C.P.(IB)1832/2017('MA1')** filed by the Respondent / 'Monitoring Agency' of the 'Corporate Debtor'.

Appellant's Contentions

41. The Learned Counsel for the Appellant submits that the 'Monitoring Agency' does not have the **'Locus-Standi'** to file MA No.249/2020 (MA No. 1) in which the impugned order was passed on 18.2.2020. It is the stand of the Appellant that the approved 'Resolution Plan' provides for an appointment of '***Steering Committee'*** for implementation of the 'Resolution Plan' and that the approved 'Resolution Plan' require the Steering Committee to appoint a 'Monitoring Agency' whose powers and functions are limited to the management of day-today affairs of the 'Corporate Debtor' by virtue of clause 3.9 (o) of the approved 'Resolution Plan'. Apart from that, on behalf of the Appellant it is brought to the notice of this Tribunal that clause 3.9 (1) and clause 3.9 (111) of the 'Resolution Plan' sets out that the 'Monitoring Agency' is required to function under the instructions,

control and supervision of the Steering Committee which comprised of three representatives of the 'Committee of Creditors' and two representatives of the Appellant.

42. The Learned Counsel for the Appellant contends that since the erstwhile 'Resolution Professional' of the 'Corporate Debtor' was managing the operations of the 'Corporate Debtor', the *Steering Committee* appointed the erstwhile 'Resolution Professional' as the 'Monitoring Agency', albeit, in a different capacity and not to continue as a 'Resolution Professional'.

43. In this connection, the stand of the Appellant is that as per Section 23 of the 'I&B' Code, the powers of 'Resolution Professional' ceases the moment a 'Resolution Plan' is approved by the Adjudicating Authority and accordingly the former 'Resolution Professional' was deemed to have handed over the charge upon approval of the 'Resolution Plan' by the 'NCLT', Mumbai Bench and now entrusted with the role and responsibility of the 'Monitoring Agency'.

44. The Learned Counsel for the Appellant proceeds to point out that in MA No. 249/2020 (MA1), the 'Monitoring Agency' had claimed that it is seeking implementation of the approved 'Resolution Plan' but neither MA No. 249/2020 (MA 1) deals with all the concerns for implementation of the 'Resolution Plan' nor that filing such an application was within the ambit of the 'Monitoring Agency'. Further, it is the responsibility of the '*Steering Committee'* to implement the 'Resolution Plan' and it may file such an application if so required.

45. The grievance of the Appellant is that the 'Monitoring Agency' had not even consulted with the '*Steering Committee'* before filing MA No. 249/2020 and there was no resolution on record approving such an action (in the absence of which the 'Monitoring Agency' had no authority to file such an application).

46. The Learned Counsel for the Appellant comes out with an argument that the rights, powers and the responsibilities of the 'Monitoring Agency' are circumscribed under the 'Resolution Plan' and even if the *'Steering Committee'* wanted, it could not have abdicated its functions to the 'Monitoring Agency'. Besides this, the Learned Counsel for the Appellant contends that the Steering Committee' is making efforts to implement the 'Resolution Plan' and naturally some delay had occurred due to economic fall out caused due to COVID-19 and despite the same, the Appellant is making its best efforts to implement the *'Approved Resolution Plan'*, defending frivolous litigations had also delayed its constructive actions.

47. The Learned Counsel for the Appellant submits that in as much as the 'Resolution Plan' is approved, the role of 'Resolution Professional' has come to an end, but the Monitoring Agency is acting as if it is continuing in the capacity of 'Resolution Professional' which is in clear contradiction of Section 23 of IBC and its powers as mentioned in the approved 'Resolution Plan'. Moreover, as per clause 3.2(ii)(a) of the approved 'Resolution Plan' and upfront consideration equivalent to INR 420/- crores (less payment towards) (i) balance insolvency

resolution process costs; and (ii) potential workmen's dues, if any (upfront consideration) is required to be paid by the Appellant within 30 Business Days from the 'Effective Dates'.

48. The Learned Counsel for the Appellant submits that the term 'Effective Date' has been defined to mean the day on which the approved 'Resolution Plan' becomes effective or comes into effect and the approved 'Resolution Plan' only came into effect on and from 16.12.2019. Further, the Learned Counsel for the Appellant points out that this Appellate Tribunal through its order dated 29.08.2019 had categorically laid down that the order of approval of 'Resolution Plan' will be subject to the decision of the Appeal, filed by '***ARCELOR Mittal India Pvt. Ltd.'*** challenging the decision of the *'Committee of Creditors'* approving the Respondent's 'Resolution Plan'. Accordingly, the approval order attained finality on 16.12.2019, when the said appeal was dismissed by this Tribunal.

49. The Learned Counsel for the Appellant contends that the period of 30 Business Days should have commenced from 16.12.2019 and accordingly after the 'Resolution Professional' had handed over the charge to the Appellant. However, the erstwhile 'Resolution Professional' had not till date been able to comply with the approval order. This apart, the 'Monitoring Agency' without any powers / responsibilities is claiming the payment of total consideration from 10.01.2020 and without any approval filed MA No.249/20 (MA No.1) on

15.01.2020. Indeed, the 'Monitoring Agency' at paragraph 7 of MA 249/20 had submitted that the total consideration viz. upfront consideration and deferred consideration aggregating to a sum of INR 480 crores paid by way of 'Non-Convertible Debentures' (Deferred Consideration) was required to have been paid on or before 10.01.2020. In fact, MA No. 249/20 was heard by the Adjudicating Authority on 29.01.2020 and the filing of the said miscellaneous application was a premature one and as a matter of fact, the impugned order does not even taken into account the order dated 29.08.2019 and / or rule upon which date be taken as an effective date.

50. The Learned Counsel for the Appellant submits that the 'Monitoring Agency' in MA No. 249/2020 claimed a total payment of Rs. 948/- crores from the Appellant, which is in violation of the approved 'Resolution Plan' and this is evidently an attempt on the part of some 'Lenders' and 'Monitoring Agency' to benefit from the resolution of the 'Corporate Debtor', at the expense of the Appellant.

51. The Learned Counsel for the Appellant contends that the Appellant is a Mauritius based Fund and it is required to raise funds from its investors and then bring the said money to India for such payment. Also that, the Appellant from 16.12.2019 onwards has been making best efforts to implement the approved 'Resolution Plan' but it had, among other things, faced the following hinderances: (i) non-submission of data / information by the 'Resolution

Professional' / 'Monitoring Agency' which ideally will have to be placed before its investors, as it is a regulated entity which raises funds from its investors and is answerable on its investments; (ii) defending litigations/proceedings initiated by the Monitoring Agency; (iii) adjustments of cash balances lying with the 'Corporate Debtor'; (iv) delay in adjudication of Miscellaneous Application No. 515/20(MA 2) filed by the Appellant before the Tribunal and (v) recent impact on the Indian and Global economy due to COVID-19. Therefore, it is the plea of the Appellant that it is to be granted relief as claimed in MA No. 515/20 and then be directed to implement the approved 'Resolution Plan', in addition to the direction to the 'Monitoring Agency' for sharing / providing all relevant information / data with regard to the 'Corporate Debtor'.

52. The Learned Counsel for the Appellant submits that at the time of submission of 'Resolution Plan', the Appellant was provided with data / information of 'Corporate Debtor' only as of 2017. Furthermore, for a successful revival of the 'Corporate Debtor' as well as the implementation of approval of 'Resolution Plan' the Appellant is required to be aware of / understand the ongoing projects (if any), assets converted to cash / receivables realized, receivables lost for non-completion of projects and other damages and recoveries by various 'Debtors'.

53. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that in terms of the 'Approval Order' the erstwhile 'Resolution

Professional' was categorically directed by the Tribunal to 'hand over all records, premises/factories/documents' to the 'Resolution Applicant' to finalize the further line of action required for starting of the operation etc. but the erstwhile 'Resolution Professional' pursuant to approval order or even after its appointment as 'Monitoring Agency' has high handedly been awarding sharing such data / information with the Appellant and only sought recovery of upfront consideration.

54. The Learned Counsel for the Appellant contends that the receivable and assets shown in 'information memorandum' have de-pleaded considerably as (i) the office of the 'Corporate Debtor' has been shut for a long time i.e. at least 6 months; and (ii) there was 25 ongoing projects of the 'Corporate Debtor' at the time of commencement of CIRP but as of February, 2020 there were less than 5 ongoing projects and none of the earlier projects have been completed by the 'Corporate Debtor'. Besides this, the 'Monitoring Agency' is also avoiding finalization of the audited accounts for the financial year 2018-19 and it is important for the Appellant to secure such information / data from the 'Monitoring Agency' as it is required to, interalia, understand the assets of 'Corporate Debtor' etc. Infact, the impugned order is in violation of Section 31 of 'I&B' Code and also para 28 of the approval order as it records 'sharing of data' cannot be a condition precedent to implementation of the approved 'Resolution Plan'.

55. The Learned Counsel for the Appellant contends that various provisions of the approved 'Resolution Plan' categorically lay down that entire payment obligation of the Appellant towards the 'Committee of Creditors' is limited to the total consideration of INR 900 crores and a harmonious construction of these clauses demonstrates that accrual of cash balances to the 'Committee of Creditors' forms a part of total consideration and is not in addition to total consideration. In this regard, the Learned Counsel for the Appellant refers to the clause which runs as follows: -

> *"Clause 3.2(ii) of the Resolution Plan categorically lays down that the Total Consideration amounting to a sum of INR 900 Crores will be pad to the financial creditors of the Corporate Debtor towards a full and final discharge of all their claims against the Corporate Debtor. For ease of reference and clarity Clause 3.2(ii) is also reproduced hereinunder: -*
>
> *"As regards the Financial Creditors, according to the List of Creditors, total claims filed by the Financial Creditors amount to INR 9552.99 Crores, out of which claims aggregating*

to INR 7487.45 Crores have been verified and admitted for the purposes of CIRP by the Resolution Professional ("Admitted Debt of Financial Creditors") The Resolution Applicant understands that the Admitted Debt for Financial Creditors also includes all un-invoked/invoked bank guarantees, which will continue until their expiry. Out of this aggregate amount of Admitted Debt, the Resolution Applicant has proposed to pay the following consideration to the Financial Creditors for full and final discharge of the Financial Creditors and for assignment of entire Claims and Admitted Debt of Financial Creditors to the Indian SPV:

a. Upfront Consideration equivalent to INR 420 Crores (Indian Rupees Four Hundred Twenty Crores) less payment towards (i) Balance CIRP Costs; and (ii) Potential Workmen's Dues, if any within 30 Business Days; and

b. Deferred Consideration equivalent to INR 480 Crore (Indian Rupees Four Hundred Eighty Crores) in the form of unlisted NCDs."

56. The Learned Counsel for the Appellant contends that clause 3.2(vi)(B) of the 'Resolution Plan' sets out that the total consideration is full and final settlement dues of the 'Financial Creditors' and that they have waived off the balance sum of their dues and the same is as follows:-

"It is hereby clarified that (ii) notwithstanding anything contained in this 'Resolution Plan', the aggregate of upfront consideration and deferred consideration (total consideration') shall be there full and final discharge provided to the claims of the 'Financial Creditors' upon receipt of which all claims of 'Financial Creditors' in relation to the admitted debt shall stand extinguished."

57. The Learned Counsel for the Appellant contends that if upon payment of INR 900/- Crores all claims and admitted debt of 'Financial Creditors' shall stand extinguished there is no sum against which the cash accruals sought by the 'Financial Creditors' can be adjusted by them.

58. According to the Learned Counsel for the Appellant the Clause no. 3.2(vi)(D) of the 'Resolution Plan', it does not propose to pay any sum over and above the total consideration to the 'Financial Creditors' and shall have no further liability. Further, the Learned Counsel for the Appellant adverts to Clause 3.2(vi) which provides that the 'Secured Financial Creditors' will only be entitled to received upfront consideration of INR 420 Crores and deferred consideration of INR 480 Crores (less the balance unpaid CIRP costs and admitted workmen's dues) and no more. In fact, Clause 3.2(viii) of the 'Resolution Plan' mentions that the cash balances of the 'Corporate Debtor' will accrue and be paid to the 'Financial Creditors' (less any balance CIRP cost and workmen's dues) till the date of implementation of the Plan i.e. till the date of upfront consideration.

59. The Learned Counsel for the Appellant submits that a combined and harmonious reading of clauses 3.1(ii), 3.2 (vi) and clause 3.2(viii) of the approved 'Resolution Professional' demonstrates that any payment made under the terms of clause 3.2 of the approved 'Resolution Professional' shall be adjusted from the upfront consideration and not in addition to upfront consideration. Therefore, it is a stand of the Appellant that the cash balances which are proposed to accrue to the 'Financial Creditor' ought to be adjusted from the upfront consideration payable by the Appellant.

60. The Learned Counsel for the Appellant submits that 'Monitoring Agency' is relying on clause 3.2 (viii) of the approved 'Resolution Professional' in isolation to

state that all the cash balances accrued during the intervening period is payable to the 'Financial Creditors' of the 'Corporate Debtor' and this misinterpretation is made with a sole intent of unjustly enriching certain creditors of the 'Corporate Debtor' at the expense of the Appellant.

61. The Learned Counsel for the Appellant contends that even assuming but not conceding that clause 3.2(vii) and 3.2(viii) of the approved 'Resolution Professional' are in conflict and cannot be harmoniously interpreted, it is the settled position of law that when the earlier clause and a later clause of the contract are in conflict to each other and both the clauses cannot be given effect to, then the earlier clause will prevail over the later clause. In this connection, the learned counsel for the Appellant relies on the Hon'ble Supreme Court decision in Radha Sundar Datta Vs. Mohd. Jahadur and Rahim and Others Reported in 1959 SCR at page 1309 wherein it is observed as under:-

> *"11. Now it is a settled rule of interpretation that if there be two admissible constructions of a document, one of which will given effect to all the clauses therein while the other will render one or more of them nugatory, it should be the former that should be adopted on the principle expressed*

in the maxim "ut res magis valeat quam pereat"

.....

"13..... In fact, there is a conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa."

62. The Learned Counsel for the Appellant submits that the approved 'Resolution Plan' does not entitle the 'Financial Creditors' any sum over and above the total consideration and the total consideration shall never exceed 900/- crores and, therefore, the cash receivables which are to be accrued to the 'Financial Creditor' are within the purview of total consideration and not in excess thereof. Further, it is the contention of the Appellant that the impugned order fails to comprehend the provisions of the approved 'Resolution Plan' and amends the 'Resolution Plan' by directing the Appellant to pay the total consideration (i.e. Rs. 900 crores) over and above Rs. 42/- crores already deposited / appropriated. Moreover, the impugned order directs the Appellant to make payment of Rs. 48/- crores towards additional

performance bank guarantee and as per the impugned order, the total consideration payable by the Appellant will be Rs. 990 Crores instead of Rs. 900 Crores.

63. The Learned Counsel for the Appellant vehemently takes a plea that the impugned order among other things fails to take into consideration that the additional performance bank guarantee is not to be paid by the Appellant, once the impugned order amends the 'Resolution Plan' and directs payment of the total consideration within seven days. Also that it is represented on behalf of the Appellant that the forfeiture of the performance Bank Guarantee' assumes failure of implementation of the 'Resolution Plan' and its only consequence of such an event would be liquidation of the 'Corporate Debtor'.

Respondent's Submissions

64. In response, the Learned Counsel for the Respondent submits that the 'Resolution Plan' of the 'Successful Resolution Applicant' (Respondent in Company Appeal (AT)(Ins.) 287/20) and the present Appellant in this ***'Appeal'***, was approved by the 'Committee of Creditors' of the 'Corporate Debtor' on 10.01.2019 and the 'Resolution Professional' of the 'Corporate Debtor' filed an application (in terms of Section 30 and 31 of the 'I&B' Code) before the Adjudicating Authority for approving the 'Resolution Plan' of the 'Successful Resolution Applicant' and that the said application was allowed on 25.11.19.

65. The Learned Counsel for the Respondent/Monitoring Agency of the 'Corporate Debtor' points out that the Monitoring Agency' (created under the 'Resolution Plan')

because of delay and failure on the part of 'Successful Resolution Applicant' was forced to file MA No. 249/20 on 22.1.2020 before the Tribunal praying for the

implementation of 'Resolution Plan' etc. After hearing the parties at length, on 30.1.20 the orders were reserved in MA No. 249/20 and before that, by virtue of an order dated 29.1.20 the Benches of the 'NCLT' Mumbai were re-constituted, which was to come into effect only from 03.02.2020.

66. The Learned Counsel for the Respondent brings it to the notice of this Tribunal that the 'Successful Resolution Applicant'/the Appellant in the present Appeal, on 06.02.2020 filed MA No. 515/2020 before the re-constituted 'NCLT' Bench No. II illegally seeking among other things a direction from reconstituted Bench No. II to stay the proceedings in MA No. 249/2020 (which was heard at length and reserved orders by the earlier bench of 'NCLT' Mumbai Bench No. II on 30.01.2020).

67. The Learned Counsel for the Respondent submits that by means of the impugned order dated 18.02.2020 in MA No.249/2020, the 'Successful Resolution Applicant'/ the present Appellant was directed to implement the 'Resolution Plan' within seven days from the date of the order and as against the said order dated 18.02.2020 the present Appellant filed Company Appeal (AT)(Ins.)No. 327/20 before this Tribunal on 25.02.2020 and a stay in respect of the impugned order.

68. The Learned Counsel for the Respondent contends that the '***ARCELOR Mittal India Pvt. Ltd.' (AMIPL'),*** an 'Unsuccessful Resolution Applicant' had (pursuant to the approval by the 'Committee of Creditors' of 'Successful Resolution Applicant's

plan) filed an application MA No.344/2019 before the Adjudicating Authority seeking rejection of the 'Resolution Plan' of the Appellant / Royale Partners Investment Fund Ltd. and that the said application was dismissed on 15.04.2019. In this connection, the Learned Counsel for the Respondent points out that the order in MA No. 344/2019 was assailed before this Tribunal, by the ***'ARCELOR Mittal India Pvt. Ltd.'*** and this Tribunal in Company Appeal (AT)(Ins.) No. 524/2019 on 29.08.2019 in the said Appeal at paragraph 4 had observed that '***pendency of the appeal will not come in the way of Adjudicating Authority to pass appropriate order u/s 31 of the Code which if approved shall be subject to the decision of this Appeal'.***

69. The Learned Counsel for the Respondent points out that the Adjudicating Authority had approved the 'Resolution Plan' of the 'Successful Resolution Applicant' / Appellant in Company Appeal (AT)(Ins.)No. 327/2020 on 25.11.2019 and based on the approval of 'Resolution Plan' by the Adjudicating Authority, the Company Appeal (AT)(Ins.)No.524/2019 was dismissed by this Tribunal on 16.12.2019 and indeed, numerous stakeholders had assailed the 'approval order' in which the 'Successful Resolution Applicant' is also a party and in none of the appeals, the implementation of the 'Resolution Plan' was stayed. However, in Company Appeal (AT)(Ins.) No.1510/2019 as per order dated 03.02.2020 this Tribunal had directed the erstwhile 'Resolution Professional' to keep this Tribunal informed about the implementation of the 'Resolution Plan'.

70. Continuing further, it is the submission of Learned Counsel for the Respondent that as per 'Resolution Plan' of the 'Successful Resolution Applicant' / RPIFL (the Appellant) was required to pay upfront consideration of Rs. 420/- Crores to the 'Financial Creditor' within 30 Business Days of the effective date viz. the date of approval of the Plan by the Adjudicating Authority. In fact, the said 30 Business Days expired on 10.01.2020 considering that the effective date commenced from 25.11.2019 i.e. the date of approval order. Only on account of violation of the 'Resolution Plan' the Monitoring Agency / Respondent was forced to file MA No. 249/2020 before the Adjudicating Authority.

71. The Learned Counsel for the Respondent contends that the order in MA No. 249/2020 to implement the 'Resolution Plan' within 07 days was passed on 18.02.2020 and that the order dated 29.08.2019 passed in Company Appeal (AT)(Ins.)No. 524/2019 passed by this Tribunal, relied on by the Appellant in no manner can be relied upon by the 'Successful Resolution Applicant' /Appellant for not implementing its 'Resolution Plan' in terms thereof.

72. The Learned Counsel for the Respondent submits that the Adjudicating Authority at paragraph 5.2 of the impugned order in MA No. 249/2020 had dealt with the aspect of ***'Locus-Standi'*** of the 'Monitoring Agency' and further it is clearly held by the Adjudicating Authority that the 'Monitoring Agency' as well as the 'Resolution Professional' who are part of the said agency are duty bound to do all that is required to see the successful implementation of the 'Resolution Plan' and

can file any application before the Adjudicating Authority for ensuring the successful implementation of the 'Plan'.

73. The Learned Counsel for the Respondent points out that the Adjudicating Authority in its approval order dated 25.11.2019 had specifically permitted the filing of miscellaneous application if required in connection with implementation of this 'Resolution Plan' and also that in addition to the liberty granted by the Adjudicating Authority in the approval order, the 'Resolution Plan' itself had provided the authority to the 'Monitoring Agency' to supervise the implementation of the 'Resolution Plan' and owing to the failure of the 'Resolution Applicant' in implementing the 'Resolution Plan' the 'Monitoring Agency' had filed the MA No. 249/2020.

74. The Learned Counsel for the Respondent contends that the Adjudicating Authority in the impugned order in MA No. 249/2020 dated 18.02.2020 had clearly observed that the contention of the 'Resolution Applicant' that he has not received detailed information of the 'Corporate Debtor' Company is not borne out by facts.

75. Apart from this, the stand of the Respondent is that the receipt of data or documents sought for by the 'Successful Resolution Applicant'/ Appellant is not a condition precedent to the implementation of the approved 'Resolution Plan' and that the approved 'Resolution Plan' is to be duly implemented by the Appellant within the time mentioned in the 'Resolution Plan'.

76. The Learned Counsel for the Respondent points out to the Letter of Intent (LOI) signed by the 'Successful Resolution Applicant' on 10.01.2019 wherein it was specifically mentioned at paragraph 9 that there is no condition precedent to implement the 'Resolution Plan' other than the approval from the Adjudicating Authority and the CCI (both of which approvals were granted) (vide para 9 reply affidavit of the Respondent / 'Monitoring Agency' of 'Corporate Debtor').

77. The Learned Counsel for the Respondent points out that the Tribunal's order dated 25.11.2019 requires the 'Resolution Professional' to hand over all records, premises, factories, documents to the Appellant 'to finalize the further line of action required for the starting of the operation' and this part of the order is not a condition precedent or in parallel to the implementation of the 'Resolution Plan' as was wrongly suggested by 'Successful Resolution Applicant'.

78. The Learned Counsel for the Respondent contends that the 'Monitoring Agency' in response to the e-mail dated 15.12.2019 from the 'Successful Resolution Applicant' had specified to it, that it had already shared the entire back-up of documents made available on the virtual data room as part of the 'Resolution Plan Process' through a flash drive on 29.11.2019 and the remaining information was shared on 24.12.2019, 26.12.2019 and in the 'Steering Committee' that took place on 07.01.2020. Besides this, the 'Monitoring Agency' together with the 'Corporate Debtor's team also made presentation to the 'Successful Resolution Applicant' on

24.12.2019 to provide an update on the status of completed and ongoing EPC projects.

79. The Learned Counsel for the Respondent submits that the 'Monitoring Agency' in good faith, without prejudice to the fact that supplying of information is not a condition to the implementation of Plan, again furnished all the information to the 'Successful Resolution Applicant' that were sought vide e-mail dated 16.03.2020. Inspite of all the information being furnished to the 'Successful Resolution Applicant', it has not taken any steps to implement the 'Resolution Plan' and according to the Respondent the 'Successful Resolution Applicant' is deliberately delaying the implementation of the 'Resolution Plan' on this pretext.

80. The Learned Counsel for the Respondent contends that in the matter of '**Ingen Capital Group LLC' Vs. 'V.Ramkumar' (Company Appeal(AT)(Ins.) No.795/2018)**, this Tribunal had initiated suitable actions under the provisions of the Code for non-implementation of the 'Resolution Plan' by the 'Resolution Applicant' who had not given effect to the 'Resolution Plan' and lay down conditions for its implementation when no such condition existed in the 'Resolution Plan'.

81. The Learned Counsel for the Respondent submits that the 'Resolution Plan' is an unambiguous one and further clear on '***treatment of the cash balances'*** and a reference is made to the 'process document' dated 04.10.2018 (as amended from time to time) in and by which the 'Resolution Plan' was required to provide 'that the available cash balances in the books of 'Corporate Debtor' upto the implementation

of resolution plan shall accrue to the 'Financial Creditors' and will not form part of the offering by 'Resolution Applicants'.

82. The Learned Counsel for the Respondent submits that the 'Resolution Plan' as modified by the 'Letter of Intent' dated 10.01.2019 as approved by the 'Committee of Creditors' and by the Adjudicating Authority contained in the order dated 25.11.2019 clearly provides that 6(4) the Resolution Applicant shall be vested with complete control and ownership of all that cash flows / receivables including cash accruals (arising after the date of payment of upfront consideration), bank accounts of the Corporate Debtor as soon as the 'Financial Creditors' are paid the upfront consideration.

83. The Learned Counsel for the Respondent adverts to the *'Letter of Intent'* dated 10.1.19 which was unconditionally accepted and acknowledged by the 'Successful Resolution Applicant' provides the following: -

> *"9. …Notwithstanding anything contained in the Resolution Plan it is clarified that despite any assumption made in the 'Resolution Plan' not being fulfilled satisfied or granted by the Adjudicating Authority, the Resolution Applicant hereby confirms that it shall still discharge the total consideration (as defined in the 'Resolution Plan and the cash balances of the 'Corporate Debtor' as contemplated*

in the 'Resolution Plan' to the Financial Creditors without limitation.

84. The Learned Counsel for the Respondent contends that the contents of the approved 'Resolution Plan', as modified by the 'Letter of Intent' was unconditionally accepted by the Appellant / 'Successful Resolution Applicant' and no other interpretation would come to the rescue of the Appellant because of the reason that the approved 'Resolution Plan' is a clear and un-ambiguous one.

85. The Learned Counsel for the Respondent refers to the judgment of this ***Tribunal 'JSW Steel Ltd.' Vs. 'Mahender Kumar Khandelwal & Ors.'*** (Company Appeal (AT)(Ins.) No. 957/2019') wherein after relying upon the judgement of the **Hon'ble Supreme Court in 'Committee of Creditors' of *'Essar Steel India Ltd.' Vs. 'Satish Kumar Gupta & Ors.' reported in 2019 SCC online SC 4178*** held that : *"126. The aforesaid decision having been reversed by the Hon'ble Supreme Court we hold that the distribution on the profit made during the 'Corporate Insolvency Resolution Process' should be made in terms of addendum to the RFP as held by the 'Hon'ble Supreme Court."*

86. The Learned Counsel for the Respondent contends that in the present case on hand, not only the 'Process Documents' as well as the 'Resolution Plan' and the 'LOI' specifically mentioned that 'the cash balances of the 'Corporate Debtor' will approve and be paid to the 'Financial Creditors' (less any balance CIRP costs) till

the date of implementation of the plan i.e. till the date of payment of the upfront consideration'.

87. Lastly, it is the submission of the Learned Counsel for the Respondent that the Appellant / 'Successful Resolution Applicant' is to implement the 'Resolution Plan' forthwith and takes over the 'Corporate Debtor' so that the 'Corporate Debtor' is relieved of from the purview of 'Corporate Insolvency', because of the reason the Company and its Creditors are suffering an irreparable loss as the 'Resolution Plan' is in Limbo owing to the present lockdown scenario and the future of the employees of 'Corporate Debtor' remains an uncertainty.

Intervenor's Pleas

88. At the outset, the Learned Counsel for the Intervenor (IDBI Bank – lead Bank) of the erstwhile of 'Committee of Creditors informs this Tribunal that the 'Intervenor' adopts the stand and arguments advanced on behalf of the 'Monitoring Agency'.

89. Continuing further, the Learned Counsel for the Intervenor points out that substantial time had already expired since the last date for implementing the 'Resolution Plan'. In fact, more than six months had elapsed, yet the Appellant / 'Successful Resolution Applicant' had not taken even the primary steps in implementing the 'Resolution Plan' (including the payment of upfront sum of Rs. 420 crores).

90. The Learned Counsel for the Intervenor contends that the 'commercial wisdom' of the creditors assumes pivotal significance and when the 'Resolution Plan' was approved by the 'Adjudicating Authority' the same is sufficient for refraining from interfering with the contents and provisions thereof. Apart from that, it is the plea of the Intervenor that non-implementation of the 'Resolution Plan' by the 'Successful Resolution Applicant' is disapproved by the 'Tribunals' and it is unexpectable if the 'Resolution Applicant' seeks to wriggle out of its obligations.

An Appraisal

91. It transpires that the Respondent / 'Monitoring Agency of 'Corporate Debtor' filed MA No. 249/2020 against the Appellant / 'Successful Resolution Applicant'/ RPIFL praying interalia and issuance of direction to the 'Resolution Applicant' forthwith implement the 'Resolution Plan' as approved by the Adjudicating Authority on 25.11.2019 without prejudice to the right of 'Committee of Creditors' to invoke and forfeit the ***'Performance Guarantee'***. The Appellant / 'Successful Resolution Applicant' (as Respondent) filed a preliminary reply before the Adjudicating Authority contending that (i) MA No. 249/2020 was not filed with the approval of the 'Steering Committee' and that the powers and functions of the 'Monitoring Agency' is limited to the conduct of day-today affairs of the 'Corporate Debtor' etc.

92. The Appellant /'Successful Resolution Applicant' had averred in its reply in MA No.249/2020 before the Adjudicating Authority that it is committed to implement the approved 'Resolution Plan' in its entirety but the 'Secured Financial Creditors' as well as the 'Monitoring Agency' (Applicant) and the 'Steering Committee' had failed to adhere to its binding terms. Also, that the Appellant/ 'Successful Resolution Applicant' before the Adjudicating Authority in MA No. 249/2020 had taken a stand that the payment of cash balances proposed to be made to 'Financial Creditors' forms a part of the aggregate payment obligation and not in addition to the aggregate payment obligation.

93. A perusal of the ***'Preliminary Reply Affidavit'*** filed by the Appellant(Royale Partners Investment Pvt. Ltd.)/ Respondent in MA No.249/2020 before the 'Adjudicating Authority' shows that an averment was made that, by way of the approved 'Resolution Plan', the Appellant shall be taking over the 'Corporate Debtor' as it existed as on the date of its approval and further that the 'Financial Creditors' do not have any rights over the assets of the 'Corporate Debtor' and, therefore, they cannot attempt to appropriate any part thereof, which would be an unlawful and illegal one but also contrary to the spirit and intent of the 'I&B' Code.

94. It is to be borne in mind that the 'I&B' Code defines 'Resolution Plan' as a plan for 'Insolvency Resolution' of the 'Corporate Debtor' as a going concern. It cannot be gainsaid that the 'Resolution Plan' is not a 'Sale'/'Recovery'/'Liquidation'/an 'Auction'. It is to be pointed out that the purpose of 'Resolution' is for

maximisation of value of assets of 'Corporate Debtor' and thereby for all creditors. It is to be remembered that it is not the maximisation of value of assets of value for a 'stakeholder' or 'set of stakeholders' such as 'creditors' and to promote entrepreneurship, availability of credit and balance the interests and this principle is too important. It cannot be denied that under a 'Resolution Plan' certain rights in 'Corporate Debtor' or assets and liabilities of the 'Corporate Debtor' will be exchanged and that is an ***'ancillary one'*** in the considered opinion of this Tribunal.

95. As a matter of fact, once approved by the 'Committee of Creditors', the 'Resolution Plan' is to be submitted to the Adjudicating Authority Under Section 31 of the 'I&B' Code. An Adjudicating Authority, at this juncture, is to apply his judicial mind to the 'Resolution Plan' so submitted and if the said Plan fulfills the requirement of Section 30 of the 'I&B' Code, he may either approve or reject such plan. Indeed, the 'Adjudicating Authority' is required to take a decision as per Section 31 of the 'I&B' Code, can peruse the reasoning to accept or reject one or other objection or suggestion and may express its own decision/opinion as per decision '***Rajputtanna Properties(P)Ltd. V. Ultratech Cements Ltd***.' ***reported in (2018) 144 CLA page 490(NCLAT).*** In fact, in the absence of any discrimination or perverse decision it is not open to 'Adjudicating Authority' or the Appellate Tribunal to modify a 'Resolution Plan' approved by the 'Committee of Creditors'.

96. To put it succinctly, Section 31 of the Code enjoins that once the 'Resolution Plan' is approved by an 'Adjudicating Authority' it binding on all interested parties. Of course, a threadbare scrutiny of a 'Resolution Plan' with great care, caution and utmost circumspection is very much required before recording a satisfaction in writing by an 'Adjudicating Authority'. 'Satisfaction' is a condition precedent for approval of a 'Resolution Plan'. Undoubtedly, the 'Resolution Plan' must resolve ***'Insolvency'.*** It cannot be forgotten that 'I&B' Code permits liquidation only on failure of 'Corporate Insolvency Resolution Process'.

97. If all the requirements as mentioned in Section 30(2) are satisfied an 'Adjudicating Authority' has to pass an order of approval of 'Resolution Plan'. After the 'Resolution Plan' is approved by an Adjudicating Authority, an application may be made to the said Authority by a person in-charge of the Management or control of the business and operations of the 'Corporate Debtor' for an order praying of an assistance from the Local District Administration in implementing the terms of the 'Resolution Plan'.

98. The Appellant / 'Resolution Applicant' (stepped into the shoes of 'Corporate Debtor') before the Adjudicating Authority had taken a plea that it had not received the detailed information of the Debtor Company. However, the 'Adjudicating Authority' at para 5(1) of the impugned order had clearly mentioned that the

Chairman of the 'Monitoring Agency' in its Minutes of the Meeting dated 07.01.2020 had mentioned that the data was furnished to the Appellant. But in

regard to the request of the Appellant for supply of the 'Multiple Data' the same was in the process of being gathered and it was taking time on account of less number of employees.

99. In regard to the request of the Appellant / 'Resolution Applicant' that provisional March, 2019 financial statement, the Appellant was informed that the said statements were not audited and was not approved by the Board and hence the same could not be parted with. Before this Tribunal, on behalf of the Respondent / 'Monitoring Agency' in the present Company Appeal it is submitted that the 'Monitoring Agency', in good faith, without prejudice to the fact that supplying of information is not a condition to the implementation of a plan, once again furnished all the information sought for by the Appellant / 'Successful Resolution Applicant' vide e-mail dated 16.03.2020. In this connection, it may not be out of place for this Tribunal to make a pertinent mention that the 'Steering Committee' in terms of the 'Minutes of the Meeting' had clearly informed the Appellant that it is not a condition precedent to share the data for implementing the approved 'Resolution Plan' and the same was to be implemented within the time specified. Also, that the Respondent / 'Monitoring Agency' of the 'Corporate Debtor' comes out with a plea that the Appellant was informed (for its e-mail dated 15.12.2019) that the entire back-up of documents was shared and made available on the virtual data room as part of the 'Resolution Plan Process' through a flash drive on 29.11.2019 and the remaining information was shared on 24.12.19,

26.12.19 and in the 'Steering Committee Meeting' that took place on 7.1.20 etc. Therefore, the plea of the Appellant that it was not supplied with detailed information of 'Corporate Debtor' is not accepted by this Tribunal.

100. Dealing with the aspect that the 'Monitoring Agency' has no 'Locus-Standi' to file MA No. 249/2020 before the Adjudicating Authority, and further it can file the same only there being specific authorization from the 'Steering Committee', this Tribunal opines that the approval order of the Adjudicating Authority dated 25.11.2019 pin pointedly granted liberty if deem fit and legally permissible to move miscellaneous application if required in connection with the implementation of this 'Resolution Plan' and as such the counter plea taken on behalf of the Appellant is negatived by this Tribunal especially considering the fact that for ensuring successful implementation of 'Resolution Plan' the 'Monitoring Agency' and the 'Resolution Professional' are to take a lead role in this regard.

101. As regards the plea that MA No. 249/2020 was filed by the Respondent before the Adjudicating Authority in a premature fashion and that the 'Monitoring Agency' without any powers / responsibility is claiming payment of total consideration from 10.01.2020 and without any approval filed MA No. 249/20, this Tribunal points out that as against the dismissal order in MA No. 344/2019 passed by the Adjudicating Authority, '***ARCELOR Mittal India Pvt. Ltd.'***('Unsuccessful Resolution Applicant') filed Company Appeal (AT)(Ins.) No. 524/2019 before this Tribunal and this Tribunal on 29.08.2019 had categorically

observed that the *'pendency of the appeal will not come in the way of Adjudicating Authority to pass appropriate order u/s 31 of the Code which if approved shall be subject to the decision of this Appeal'* and in fact the final order in MA No. 249/20 was passed on 18.02.2020 by the 'Adjudicating Authority'. Therefore, placing of reliance upon the order dated 29.08.2019 in Company Appeal (AT)(Ins.) No. 524/2019 by the Appellant / 'Successful Resolution Applicant' for non-implementation of its Resolution will be an ***'otiose'*** one.

102. It is evident that as per 'Resolution Plan' of the Appellant, it was required to pay 'upfront consideration' of Rs. 420/- Crores to the 'Financial Creditors' within 30 Business Days of the 'Effective Date' viz. the date of approval of plan by the Adjudicating Authority dated 25.11.2019. If calculated, from the approval order date 25.11.2019, the 30 Business Days came to an end on 10.01.2020. Resultantly, on account of violation of the 'Resolution Plan', the Respondent / 'Monitoring Agency' had filed MA No. 249/2020 before the Adjudicating Authority, which is perfectly maintainable in the ***'eye of Law'***, as opined by this Tribunal.

103. The other argument projected on the side of the Appellant / 'Resolution Applicant' that subsequent to the approval of 'Resolution Plan' by the 'Committee of Creditors' on 10.01.2019, all the cash balances and accrual should be adjusted against the upfront payment of Rs. 420/- Crores, it is brought to the notice of this Tribunal that the 'Resolution Professional' on several occasions had without any simmering doubt made it clear that any amendment to the provision to the

'Resolution Plan', as approved by the 'Committee of Creditors' in its meeting dated 10.01.2019 and subsequently submitted before the Adjudicating Authority by means of an application as per Section 30 of the 'I&B' Code is an impermissible one. As such, the contra stand taken by the Appellant is not accepted by this Tribunal.

104. A cursory perusal of the ingredients of para 3.2 (viii) and 6(iv) of the 'Resolution Plan' dated 25.11.2019 unerringly points out that till the date of implementation of the plan viz. till the date of payment of upfront consideration any cash which accrues to the 'Corporate Debtor's Company will only be paid to the 'Financial Creditors' (less any balance CIRP costs) and not to the Appellant. Hence, the contra plea of the Appellant is legally untenable.

105. It is candidly clear from the 'Letter of Intent', (signed by the Appellant on 20.01.2019) that there was no condition imposed to implement the 'Resolution Plan' other than the approval to be obtained from the 'Adjudicating Authority' and the 'CCI', which were secured.

106. Moreover, the 'Resolution Plan' is free from any doubt and quite clear on treatment of the cash balances, especially in the teeth of 'process document' dated 4.10.2018 which clearly mentioned that the 'Resolution Plan' was required to provide 'that the available cash balances in the books of the 'Corporate Debtor' upto the implementation of 'Resolution Plan' shall accrue to the 'Financial Creditors' and will not form part of the offering by 'Resolution Applicants'.

107. 'Speed' is the gist for an effective and efficacious functioning of 'I&B' Code. The longer the delay, it may induce 'Liquidation' and 'Value, Deterioration/Destruction'.

108. In the instant case, it cannot be brushed aside that nearly six months have gone by, from the order of approving the 'Resolution Plan' dated 25.11.2019 of the Appellant and the same is yet to be implemented by the Appellant till date. In the 'Preliminary Reply Affidavit', the Appellant / Respondent at paragraph 6 had stated that it had always shown its willingness and ability to execute the approved 'Resolution Plan' etc. As such, this Tribunal is of the earnest opinion that the Appellant / Respondent cannot avoid/evade/ or circumvent its 'solemn responsibility' to implement the 'Resolution Plan' unconditionally in stricto sense of the term, without any further procrastination.

109. Be that as it may, in view of the upshot, this Tribunal taking note of the facts and circumstances of the present case which float on the surface in a conspectus fashion and also keeping in mind that the 'upfront payment' was not made by the Appellant as well as the 'Non-Convertible Debentures' of Rs. 480/- Crores in favour of 'Financial Creditors' was not issued; comes to an inevitable and irresistible conclusion that the 'Adjudicating Authority' had rightly directed the Appellant / 'Resolution Applicant' to make: (a) payment of upfront amount of Rs. 420/- Crores which was already due consequent to the completion of 30 'Business Days' from the date of approval of the 'Resolution Plan' by it; (b) the issuance of

'Non-Convertible Debentures' of Rs. 480/- Crores in favour of the 'Financial Creditors'; (c) to deposit the balance performance guarantee of Rs. 48/- Crores within 90 days of the approval of the 'Resolution Plan' by granting a week's time and resultantly allowed the miscellaneous application No. 249/2020 on 18.02.2020 which in the considered opinion, of this Tribunal is free from any legal flaws. Resultantly, the present Appeal ***sans merits.***

Conclusion

In fine, the instant Appeal is ***dismissed, but without costs.*** I.A. No. 860/2020(stay application) and I.A. No. 861/2020(praying for an exemption to file certified copy of the impugned order) are closed.

[Justice Venugopal. M]
Member (Judicial)

[V.P. Singh]
Member (Technical)

NEW DELHI

25th June, 2020

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