

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 957 of 2019**

**IN THE MATTER OF:**

**JSW Steel Ltd. ...Appellant**

**Vs.**

**Mahender Kumar Khandelwal & Ors. ...Respondents**

**Present: For Appellant: - Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.**

**For Respondents: - Mr. Abhinav Vasisht, Senior Advocate with Mr. Saurav Panda, Mr. Shantanu Chaturvedi, Ms. Charu Bansal, Ms. Mahima Sareen, Ms. Priya Singh and Mr. Shreyas Gupta, Advocates for 'Resolution Professional'**

**Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.**

**Mr. Zoheb Hossain and Mr. Agni Sen, Advocates for ED. Mr. Sanjay Shorey, Director and Mr. P. Atchuta Ramaiah, Joint Director and Mr. Chandrashekhar (SPP) CBI.**

**Company Appeal (AT) (Insolvency) No. 1034 of 2019**

**IN THE MATTER OF:**

**Sanjay Singal & Anr. ...Appellants**

**Vs.**

**Punjab National Bank & Ors. ...Respondents**

**Present:** For Appellants: - Mr. Harin Raval, Senior Advocate with Mr. Arvind Kumar Gupta, Ms. Henna George, Mr. Kartikey Kanojiya and Ms. Sukanya Singh, Advocates.

For Respondents: - Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.

Mr. Abhinav Vasisht, Senior Advocate with Mr. Saurav Panda, Mr. Shantanu Chaturvedi, Ms. Charu Bansal, Ms. Mahima Sareen, Ms. Priya Singh and Mr. Shreyas Gupta, Advocates for 'Resolution Professional'

Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.

**Company Appeal (AT) (Insolvency) No. 1035 of 2019**

**IN THE MATTER OF:**

**Kalyani Transco**

**...Appellant**

**Vs.**

**Bhushan Power & Steel Ltd.**

**Through Resolution Professional & Ors.**

**...Respondents**

**Present:** For Appellant: - Mr. Rajiv Ranjan, Senior Advocate with Mr. Nikhil Palli, Ms. Aliya Durafshan, Advocates

For Respondents: - Mr. Abhinav Vasisht, Senior Advocate with Mr. Shantanu Chaturvedi, Ms. Charu Bansal, Ms. Mahima Sareen, Ms. Priya Singh and Mr. Shreyas Gupta, Advocates for 'Resolution Professional'

Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.

Mr. Arvind Kr. Gupta, Advocate for Mr. Sanjay Singal

**Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.**

**Company Appeal (AT) (Insolvency) No. 1055 of 2019**

**IN THE MATTER OF:**

**Jaldhi Overseas Pte. Ltd. ...Appellant**

**Vs.**

**Bhushan Power Steel Ltd. & Ors. ...Respondents**

**Present: For Appellant: - Mr. Dhruv Mehta, Senior Advocate with Mr. Kumar Shashank Shekhar, Mr. Diwakar Maheshwari and Ms. Pratiksha Mishra, Advocates.**

**For Respondents: - Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.**

**Mr. Abhinav Vasisht, Senior Advocate with Mr. Shantanu Chaturvedi, Ms. Charu Bansal, Ms. Mahima Sareen, Ms. Priya Singh and Mr. Shreyas Gupta, Advocates for 'Resolution Professional'**

**Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.**

**Company Appeal (AT) (Insolvency) No. 1074 of 2019**

**IN THE MATTER OF:**

**Medi Carrier Pvt. Ltd. ...Appellant**

**Vs.**

**Mahendra Kumar Khandelwal,  
Resolution Professional of Bhushan Power  
and Steel Ltd. & Anr.**

**...Respondents**

**Present: For Appellant: - Mr. Abhijeet Sinha, Mr. Sidhartha Sharma, Mr. Arjun Asthana and Ms. Sreenita Ghosh, Advocates.**

**For Respondents: - Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.**

**Mr. Abhinav Vasisht, Senior Advocate with Mr. Shantanu Chaturvedi, Ms. Charu Bansal, Ms. Mahima Sareen, Ms. Priya Singh and Mr. Shreyas Gupta, Advocates for 'Resolution Professional'**

**Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.**

**Company Appeal (AT) (Insolvency) No. 1126 of 2019**

**IN THE MATTER OF:**

**CJ Darcl Logistics Ltd.**

**...Appellant**

**Vs.**

**Mahender Kumar Khandelwal  
Resolution Professional of Bhushan  
Power & Steel Ltd.**

**...Respondent**

**Present: For Appellant: - Mr. Manu Beri, and Mr. Varun Varma, Advocates.**

**For Respondents: - Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa, Advocates for CoC.**

**Company Appeal (AT) (Insolvency) No. 1461 of 2019**

**IN THE MATTER OF:**

**State of Odisha & Ors.**

**...Appellants**

**Vs.**

**Bhushan Power & Steel Ltd. & Anr.**

**...Respondents**

**Present: For Appellants: - Mr. Rana Mukherjee, Senior Advocate with Ms. Kirti Mishra, Ms. Kanika Sharma and Ms. Apurva Upmanyu, Advocates.**

**For Respondents: - Mr. Kapil Sibal, Mr. Arun Kathpalia and Mr. Neeraj Kishan Kaul, Senior Advocates with Mr. Manmeet Singh, Mr. Anugrah Robin Frey, Ms. Nishtha Chaturvedi, Ms. Kauser Husain, Ms. Diksha, Mr. Deepak Joshi and Ms. Abhilasha Khanna, Advocates.**

**Mr. Ramji Srinivasan, Senior Advocate with Mr. Spandan Biswal, Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Mr. Prafful and Ms. Sylona, Advocates for CoC.  
Dr. Sukant Vats, Public Prosecutor, CBI, BS & FC**

**Mr. Sanjay Shorey, Director (Legal & Prosecution) and Mr. Pasumarty Atchuta Ramaiah, Joint Director (in all the appeals)**

**J U D G M E N T**

**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In the ‘Corporate Insolvency Resolution Process’ of ‘Bhushan Power & Steel Limited’- (‘Corporate Debtor’), the ‘Resolution Plan’ submitted by ‘JSW Steel Limited’ (‘Resolution Applicant’) has been approved by the

Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned Judgment dated 5<sup>th</sup> September, 2019 with certain conditions.

After the approval of plan when Monitoring Committee was monitoring the change of management, on 10<sup>th</sup> October, 2019, the Directorate of Enforcement of Central Government attached assets of 'Bhushan Power & Steel Limited'- ('Corporate Debtor') under Section 5 of the 'Prevention of Money Laundering Act, 2002'.

2. 'JSW Steel Limited' is 'Successful Resolution Applicant', in its appeal has sought for setting aside/ modification of conditions imposed in paragraph 128 sub paras (e), (f), (g), (i), (j), (k) of the impugned order dated 5<sup>th</sup> September, 2019. It has also raised objection and challenged the jurisdiction of Directorate of Enforcement to attach the properties of the 'Bhushan Power & Steel Limited'- ('Corporate Debtor'), after change of hands.

3. In view of such development, one of the questions raised is whether after approval of a 'Resolution Plan' under Section 31 of the Insolvency and Bankruptcy Code, 2016, is it open to the Directorate of Enforcement to attach the assets of the 'Corporate Debtor' on the alleged ground of money laundering by erstwhile Promoters.

4. One of the appeals has been filed by the Promoters- 'Mr. Sanjay Singhal and Anr.'. and some other appeals have been preferred by 'Operational Creditors', as discussed below.

**JSW Steel Limited**

5. The Appellant- 'JSW Steel Limited' has sought for setting aside/ modification of conditions imposed in paragraph 128 sub paras (e), (f), (g), (i), (j), (k) of the impugned order dated 5<sup>th</sup> September, 2019, relevant of which are:

*"128. As a sequel of the above discussion, CA No-254(PB)/ 2019 is allowed and the resolution plan of JSW-H1 Resolution Plan Applicant is accepted. The objections raised by the Ex-Directors cum Promoters of the Corporate Debtor and Operational Creditors are hereby over-ruled. However, the acceptance and approval of the resolution plan shall be subject to the following:*

*xxx xxx xxx*

*(e) We also approve the appointment of Monitoring Agency from the date of this order until the closing date. Accordingly, the CoC and the RP would continue as Monitoring Agency.*

*(f) The power of the Board of Directors of the Corporate Debtor shall remain suspended until the closing date.*

*(g) Various reliefs sought from the statutory authorities under the Income Tax Act, 1961, Ministry of Corporate Affairs, Department of Registration and Stamps, Reserve Bank of India and others are also disposed of. We do not feel persuaded to accept the prayer made in the resolution plan yet the resolution plan applicant may file appropriate applications before the competent authorities which would be considered in accordance with law because it would not be competent for the Adjudicating Authority-NCLT to enter into any such area for granting relaxation, concession or waiver is wholly within the domain of competent authorities.*

*xxx*

*xxx*

*xxx*

*(i) The criminal proceedings initiated against the erstwhile Members of the Board of Directors and others shall not effect the JSW-H1 Resolution Plan Applicant or the implementation of the resolution plan by the Monitoring Agency comprising of CoC*



*and RP. We leave it open to the Members of the CoC to file appropriate applications if criminal proceedings result in recovery of money which has been siphoned of or on account of tainted transactions or fabrication as contemplated under the provisions of the Code or any other law. Those applications shall be considered in accordance with the prevalent law.*

- (j) The RP is directed to redistribute the profits earned by running the Corporate Debtor during the Corporate Insolvency Resolution Process in accordance with the judgment of the Hon'ble NCLAT rendered in the case of **Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors.**, Company Appeal (AT) (Ins.) No. 242 of 2019 decided on 04.07.2019 and the action to be taken by the RP is evident from the reading of para 211 of the said judgment.*
- (k) The case in which the Adjudicating Authority or the Appellate Authority could not decide the claim on merit, all such Applicants may raise the issue before an appropriate forum in terms of Section 60(6) of the Code. The other 'Financial Creditors/*

*Operational Creditors’ would not be entitled any remedy under Section 60(6) of the Code.”*

6. On 14<sup>th</sup> October, 2019, when the appeal preferred by ‘JSW Steel Limited’ was taken up, learned counsel for the parties brought to our notice that the Deputy Director of the Directorate of Enforcement, New Delhi by order dated 10<sup>th</sup> October, 2019 attached part of the assets of the ‘Corporate Debtor’ (Bhushan Power & Steel Limited).

7. The Union of India through Ministry of Corporate Affairs was asked to clear its stand in view of the stand taken by the Directorate of Enforcement that it has power to seize assets of the ‘Corporate Debtor’ even after approval of the ‘Resolution Plan’ under the ‘I&B Code’. The stand of the Union of India was recorded on 14<sup>th</sup> October, 2019 as follows:-

*“6. In the reply-affidavit filed by Union of India through Ministry of Corporate Affairs in consultation with Department of Financial Services and the Banks, the following statement has been made in support of stand taken by Union of India:*

*“3) That pursuant to the captioned notice, the Ministry had called for meeting of the officials of Department of Financial Services and the*

*Banks who were members of the Committee of Creditors on October 3<sup>rd</sup>, 2019 to ascertain their views and formalize the response of this Ministry, in view of rippling effects it would have in this case as well as other cases as well. In the meeting, it was unanimously recognized that the rights of Secured Financial Creditors are to be protected in the resolution of the Corporate Debtor and the incumbent resolution applicant is bona fide investor who acquires and takes over the Non-performing Assets (NPA) company as a going concern and facilitates maximization of the value of assets of the corporate debtor, revival of a failing company and realization of dues of creditors to the extent possible under an open, transparent National Company Law Tribunal (NCLT) supervised process.*

- 4) *It is submitted that under the process envisaged under the Insolvency & Bankruptcy Code, 2016 (“IBC”), once a Resolution Plan is approved by the Ld. Adjudicating Authority, it is binding on all stakeholders. **Before***

***approving the Resolution Plan, objections are heard by the Ld. Adjudicating Authority and once hearing on the Resolution Plan and objections is completed before the Ld. Adjudicating Authority and the Resolution Plan is approved, such approved Resolution Plan is binding on all stakeholders, including all government agencies. The provision of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 by which Section 31(1) was amended, makes it amply clear that a resolution plan is binding on Central Government and all statutory authorities.***

- 5) *It is submitted that if any Corporate Debtor is undergoing investigation by the Central Bureau of Investigation (“CBI”), Serious Fraud Investigation Office (“SFIO”) and/ or the Directorate of Enforcement (“ED”), such investigations are separate and independent of the Corporate Insolvency Resolution Process (“CIR Process”) under the IBC and both can*

*run simultaneously and independent of each other. It is further submitted that the erstwhile management of a company would be held responsible for the crimes, if any, committed under their regime and the new management taking over the company after going through the IBC process cannot be held responsible for the acts of omission and commission of the previous management. In other words, no criminal liability can be fixed on the successful Resolution Applicant or its officials.*

- 6) *In so far as the corporate debtor or its assets are concerned, after the completion of the CIR Process, i.e. a statutory process under the IBC, there cannot be any attachment or confiscation of the assets of the Corporate Debtor by any enforcement agencies after approval of the Resolution Plan. The CIR Process is an open and transparent statutory process wherein under Resolution Plans are invited from bona fide*

*Prospective applicants who are not hit or disqualified under Section 29A of the IBC.*

- 7) *Resolution Plan submitted by the interested Resolution Applicants are duly examined and validated by the Resolution Professional and the Committee of Creditors (“CoC”). Once the Resolution Plan is voted upon and approved by the CoC, it is submitted to the Ld. Adjudicating Authority for its approval. The Ld. Adjudicating Authority after hearing the objections, if any, and being satisfied that the Resolution Plan is in compliance with the provisions of the law, approves the Plan. The CIR Process is desired to ensure that undesirable persons do not take control of the Corporate Debtor by virtue of Section 29A of the IBC. **The purpose and scheme of the CIR process is to hand over the company of the corporate debtor to a bona fide new resolution applicant. Any threat of attachment of the assets of the corporate debtor or subjecting the corporate debtor to proceedings by investigating agencies for wrong doing of***

***the previous management will defeat the very purpose and scheme of CIR process, which inter-alia includes resolution of insolvency and revival of the company, and the efforts of the bank to realise dues from their NPAs would get derailed.***

*Otherwise too, the money realised by way of resolution plan is invariably recovered by the banks and public financial institutions and other creditors who have lent money to the erstwhile promoters to recover their dues which they have lent to the erstwhile management for creation of moveable or immovable assets of the corporate debtor in question and therefore, to attach such an asset in the hands of new promoters or resolution applicant would only negate the very purpose of IBC and eventually destroy the value of assets.*

- 8) ***In light of the above, it is respectfully submitted that the ED while conducting investigation under PMLA is free to deal with or attach the personal assets of the erstwhile promoters and other accused***

*persons, acquired through crime proceeds and not the assets of the Corporate Debtor which have been financed by creditors and acquired by a bona fide third party Resolution Applicant through the statutory process supervised and approved by the Adjudicating Authority under the IBC. In so far as a Resolution Applicant is concerned, they would not be in wrongful enjoyment of any proceeds of crime after acquisition of the Corporate Debtor and its assets, as a Resolution Applicant would be a bona fide assets acquired through a legal process. Therefore, upon an acquisition under a CIR Process by a Resolution Applicant, the Corporate Debtor and its assets are not derived or obtained through proceeds of crime under the Prevention of Money Laundering Act, 2002 ("PMLA) and need not be subject to attachment by the ED after approval of Resolution Plan by the Adjudicating Authorities."*



8. Taking into consideration the fact that the 'Directorate of Enforcement', has taken stand contrary to the stand taken by the Government of India, this Appellate Tribunal stayed the order of attachment dated 10<sup>th</sup> October, 2019 passed by the Deputy Director, 'Directorate of Enforcement' with regard to part property of the 'Corporate Debtor' (Bhushan Power & Steel Limited). Further, direction was issued not to give effect to the 'Resolution Plan' and impugned order dated 5<sup>th</sup> September, 2019, so far it relates to the payment of the creditors, was stayed.

9. On 25<sup>th</sup> October, 2019, this Appellate Tribunal taking into consideration the conflicting stand, passed following order:

*“25.10.2019— Before deciding the case on merit, it is desirable if the two wings/ Departments of the Central Government sit together and settle the issue.*

*Prima facie, we are of the view that if the assets are seized by the Enforcement Directorate and finally hold that the assets were purchased out of the 'proceeds of crime', in such case, the amount as may be generated out of the assets will come within the meaning of 'Operational Debt' payable to*

*the Enforcement Directorate for which it may file claim in terms of the Insolvency and Bankruptcy Code, 2016.*

*To give an opportunity to the different wings/ Departments of the Central Government, we adjourn the matter.*

*Post these appeals 'for orders' on 18<sup>th</sup> November, 2019 at 2.00 p.m. on the top of the list.*

*In the meantime, the Respondents may file their respective reply affidavit within 10 days and rejoinder, if any, be filed within a week thereof."*

10. The matter was adjourned and finally the Hon'ble the President of India promulgated an Ordinance making further amendment in the 'Insolvency and Bankruptcy Code, 2016', published in the Gazette of India extraordinary Part II- Section 1, dated 28<sup>th</sup> December, 2019, to resolve the issue.

11. The preamble of Ordinance making further amendment in the 'Insolvency and Bankruptcy Code, 2016' reads as follows:

*"WHEREAS a need was felt to give the highest priority in repayment to last mile funding to*

*corporate debtors to present insolvency in case the company goes into corporate insolvency resolution process or liquidation, to provide immunity against prosecution of the corporate debtor, to prevent action against the property of such corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions and to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016;*

*AND WHEREAS the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 has been introduced in the House of the People on the 12<sup>th</sup> day of December, 2019;*

*AND WHEREAS the aforesaid Bill could not be taken up for consideration and passing in the House of the People;*

*AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;.....”*

12. After Section 32 of the Principal Act, the following section has been inserted which came into force at once:

*“32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-*

*(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*

*(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted*

*or filed a report or a complaint to the relevant statutory authority or Court:*

*Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:*

*Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted*

*and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.*

*(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not-*

*(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*

*(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted*

*or filed a report or a complaint to the relevant statutory authority or Court.*

*Explanation.— For the purpose of this sub-section, it is hereby clarified that,—*

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;*
  - (ii) nothing in this sub-section shall be construed to bare an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.*
- (3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the*

*immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”*

13. On 13<sup>th</sup> January, 2020, this Appellate Tribunal issued notice to ‘Directorate of Enforcement’ and the Central Government through the Secretary, Ministry of Corporate Affairs, *inter alia*, directed:

*“The Directorate of Enforcement and the Central Government through the Secretary, Ministry of Corporate Affairs on behalf of the Serious Fraud Investigation Office and the Central Bureau of Investigation are allowed to file additional reply affidavit by 20<sup>th</sup> January, 2020 stating therein as to whether ‘JSW Steel Limited’, whose plan has been approved, are covered by the newly inserted Section 32A of the Insolvency and Bankruptcy Code, 2016. In case, the answer is in negative, they*



*will enclose the evidence in support of their stand after serving a copy of the same on the learned counsel for 'JSW Steel Limited' and other Appellants."*

14. The Union of India through Regional Director, Northern Region, Ministry of Corporate Affairs, has taken specific plea that 'JSW Steel Limited' (Resolution Applicant) does satisfy the conditions prescribed under Section 32A and cannot be held to be ineligible in terms of Section 32A (2) (i) as quoted hereunder:

*"7) That in light of the aforementioned provisions of the IBC, the Code does not envisage any role of the Central Government to check that the Resolution Plan submitted during the course of a corporate insolvency resolution process, satisfies the conditions as set forth in Section 29A, 30, 31 and 32A. Specifically with respect to Section 32A, the onus has been placed by the Code on the Adjudicating Authority and the Investigating Authorities to ensure that conditions prescribed under 32A are met, before approval is granted for any resolution plan.*

8) *The instant Affidavit is made bona fide, clarifying the stance of Respondent No.03 on the notice dated 13/01/2020, passed by the Hon'ble Appellate Tribunal. This Affidavit is filed without the stand of the Central Bureau of Investigation (“CBI”), which is an independent investigating authority. The order dated 13/01/2020 of the Hon'ble Appellate Tribunal has been forwarded to the CBI on 16/01/2020 by the answering respondent with a request to take appropriate action on this order.”*

15. The Central Bureau of Investigation has appeared, which is making investigation, has not alleged any act of money laundering or other acts against 'JSW Steel Limited' or its management.

16. The Serious Fraud Investigation Office is under the control of the Ministry of Corporate Affairs has also not pleaded anything against 'JSW Steel Limited' or its management.

17. Mr. Sanjay Shorey, Director (Legal and Prosecution), Ministry of Corporate Affairs, appearing on behalf of 'Union of India' submitted that 'JSW Steel Limited' has not been held to be 'related party' by the 'Resolution Professional' or the 'Committee of Creditors' or the 'Adjudicating Authority'.

18. However, in spite of issuance of the Ordinance dated 28<sup>th</sup> December, 2019 and insertion of Section 32A, a contradictory stand has been taken by the Directorate of Enforcement.

19. According to Directorate of Enforcement, it is incumbent on the 'Successful Resolution Applicant' to make a self-declaration that whether the benefit of sub-sections (1) & (2) of Section 32A would be available to it upon fulfilment of the conditions laid down therein; and whether the 'Successful Resolution Applicant' was a promoter or in the management or in the control of the 'Corporate Debtor' or a related party. Therefore, this Appellate Tribunal should call for such a declaration by way of an affidavit from the 'Resolution Applicant' i.e. 'JSW Steel Limited'.

20. Aforesaid stand taken by the Directorate of Enforcement cannot be accepted, in absence of any mandate under Section 32A that the 'Successful Resolution Applicant' after approval of the plan is required to give any such declaration as to whether the benefit of Section 32A will be applicable to them or not. Only the competent authority can decide such issue if any such allegation is levelled.

21. The next plea taken by the Directorate of Enforcement is that Section 32A introduced w.e.f. 28<sup>th</sup> December, 2019 is prospective and would not apply to 'Resolution Plan' which has already been approved under Section 31 of the 'I&B Code'. It was submitted that the 'Resolution

Plan' was approved on 5<sup>th</sup> September, 2019 and Section 32A has come into force on 28<sup>th</sup> December, 2019.

22. The plea taken by the Directorate of Enforcement is fit to be rejected for the following reasons.

23. Section 31(1) of the 'I&B Code' reads as follows:

***“31. Approval of resolution plan.— (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:***

*PROVIDED that the Adjudicating Authority shall, before passing the order for approval of*

*resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.”*

24. The ‘Resolution Plan’ having approved by impugned order dated 5<sup>th</sup> September, 2019, is binding on ‘Corporate Debtor’ (Successful Resolution Applicant herein), its employees, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force.

25. Attachment of assets of the ‘Corporate Debtor’ which is under change of the hands whose order of attachment was passed on 10<sup>th</sup> October, 2019 i.e. after one month seven days under Section 5 of the ‘Prevention of Money Laundering Act, 2002’.

26. As contradictory plea was taken by two Departments of the Central Government, time was allowed to resolve the issue. Only thereafter, after deliberation by the Central Government, the Ordinance has been issued on 28<sup>th</sup> December, 2019 inserting Section 32A. The preamble suggests that a need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency in case the company goes into corporate insolvency resolution process or liquidation, to provide immunity against prosecution of the corporate debtor, to prevent

action against the property of such corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions and to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016.

27. After the approval of the 'Resolution Plan', as the attachment order was passed by the Deputy Directorate of Enforcement, we left the matter to the Central Government to decide as to whether to provide immunity against the prosecution to the 'Corporate Debtor' or to take action against the 'Corporate Debtor' and the 'Successful Resolution Applicant'. The Ordinance having issued pursuant to direction of this Appellate Tribunal to the Central Government which on deliberation resulted into issuance of Ordinance, we hold that Section 32A will be applicable to the present case- 'JSW Steel Limited'.

28. Learned counsel for the 'Directorate of Enforcement' submitted that 'JSW Steel Limited' ('Successful Resolution Applicant') is a 'related party' and, therefore, even if Section 32A is applied in the present case, related party including associate company of the Promoter/ Corporate Debtor is not eligible.

29. Reliance has been placed on the definition of 'related party' as defined under Section 5(24), as follows:

**“5. Definitions.—.....(24) "related party", in relation to a corporate debtor, means—**

*(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;*

*(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;*

*(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;*

*(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;*

*(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;*

*(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or*

*instructions of a director, partner or manager of the corporate debtor;*

*(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;*

*(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;*

*(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;*

*(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;*

*(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;*

*(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;*



*(m) any person who is associated with the corporate debtor on account of—*

*(i) participation in policy making processes of the corporate debtor; or*

*(ii) having more than two directors in common between the corporate debtor and such person;*

*or*

*(iii) interchange of managerial personnel between the corporate debtor and such person;*

*or*

*(iv) provision of essential technical information to, or from, the corporate debtor”*

30. The definition of “associate company” under the Companies Act, 2013, as defined under Section 2(6), has also been highlighted to suggest that a Company in which other Company has significant influence may not be a subsidiary company but includes a joint venture company:-

**“2. Definitions.—** (6) “associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

*Explanation.—For the purposes of this clause, “significant influence” means control of at least twenty per cent. of total share capital, or of business decisions under an agreement;*

31. It was submitted that the expression “significant influence” is also defined in the *explanation* to Section 2(6) of the Companies Act, 2013 and it includes control of or participation in business decisions under an agreement. It also relied on Section 2(27) which relates to “control” includes controlling the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, as under:

**“2. Definitions.—** .....(27) “control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.”

32. It is stated that during the course of PMLA investigation, it has come to notice that M/s. ‘Bhushan Power & Steel Limited’- (‘Corporate

Debtor') and 'M/s. JSW Steel Limited' are associated as shareholders holding 24.09% and 49% equity respectively in a Joint venture company namely 'M/s. Rohne Coal Company Private Limited'. The composition of the equity shareholding as per annual return filed with Ministry of Corporate Affairs is as follows:

S. No.	Name of the Company	CIN/FCRN	Holding/ Subsidiary/ Associate/ Joint Venture	% of shares held
1	JSW Steel Ltd.	L2710MH1994PLC152925	Joint Venture	49.00
2	BPSL	U27100DL1999PLC108350	Joint Venture	24.09
3	Everbest Consultancy Services Ltd.	U74999MH2016PTC287605	Joint Venture	20.01
4	Jai Balaji Industries Ltd.	L27102WB1999PLC089755	Joint Venture	6.90

33. Further, as per the updated information filed with Ministry of Corporate Affairs in Annual Return 2018-19, the company was formed in 2008 and is still in operation.

34. In the light of the above, it was submitted that under Section 32A (1), the liability of the 'Corporate Debtor' shall not cease for the impugned offences under 'Prevention of Money Laundering Act, 2002' as the 'Resolution Plan' approved by the Adjudicating Authority is not resulting in change in management or control of the 'Corporate Debtor' to a person who was not a related party of the 'Corporate Debtor', for the reason the 'JSW Steel Limited' is a 'Related Party' of the 'Corporate Debtor', being an Associate Company which has formed a joint venture company.

35. It was submitted that the benefit of the provisions of Section 32A (2) is not available to the properties attached of the 'Corporate Debtor' vide PAO dated 10<sup>th</sup> October, 2019.

36. Reliance has been placed on different decisions of this Appellate Tribunal and also the Hon'ble Supreme Court, but it is not required to refer to the same for the reasons below.

37. A person is not eligible to submit a resolution plan, if such a person, or any other person acting jointly or in concert with such person is ineligible in terms of clauses (a) to (j) of Section 29A, as follows:

***"29A. Persons not eligible to be resolution applicant.—*** A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

*(a) is an undischarged insolvent;*

*(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);*

*(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) [or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*

*Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:*

*Provided further that nothing in this clause shall apply to a resolution applicant where such*

*applicant is a financial entity and is not a related party to the corporate debtor.*

*Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.*

*Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such*

*resolution plan by the Adjudicating Authority under this Code;*

*(d) has been convicted for any offence punishable with imprisonment –*

*(i) for two years or more under any Act specified under the Twelfth Schedule;*

*or*

*(ii) for seven years or more under any law for the time being in force:*

*Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:*

*Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I;*

*(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):*

*Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;*

*(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;*

*(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:*

*Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such*



*resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;*

*(h) has executed 4 [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;*

*(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or*

*(j) has a connected person not eligible under clauses (a) to (i).*

*Explanation I . — For the purposes of this clause, the expression "connected person" means—*

*(i) any person who is the promoter or in the management or control of the resolution applicant; or*

*(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or*

*(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):*

*Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor: Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as*

*may be prescribed], prior to the insolvency commencement date;*

*Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—*

*(a) a scheduled bank;*

*(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;*

*(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of*

*the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);*

*(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

*(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;*

*(f) such categories of persons as may be notified by the Central Government.”*

38. A person cannot be held to be ineligible till it is shown that it comes within any of the disqualifications under clauses (a) to (j) of Section 29A.

39. It is not the case that 'JSW Steel Limited' filed plan in concert with any person who is ineligible in terms of any of the clauses (a) to (j) of Section 29A. It is only alleged that 'JSW Steel Limited' is a 'related party' of erstwhile Promoter of the 'Corporate Debtor'.

40. In this regard, Section 5(24) of the 'I&B Code' provides that:

**“5. Definitions.—** .....(24) *“related party”, in relation to a corporate debtor, means-*

*xxx*

*xxx*

*xxx*

*(i) a body corporate which is a holding, subsidiary or any associate company of the corporate debtor, or a subsidiary of a holding company to which a corporate debtor is a subsidiary.....”*

41. Upon a perusal of Section 32A (1) (a) of the ‘I&B Code’ read with the aforesaid definition, it is *ex facie* evident that the ‘JSW Steel Limited’ is not an associate company/ related party of the ‘Corporate Debtor’. While ‘Rohne Coal Company Private Limited’ is an ‘associate company’ of the ‘Corporate Debtor’ as well as of the ‘JSW Steel Limited’, but by virtue of both having investment in such downstream joint venture company i.e. ‘Rohne Coal Company Private Limited’, the ‘JSW Steel Limited’ and the ‘Corporate Debtor’ do not become related parties of each other.

42. The Directorate of Enforcement is interpretation that Section 32A of the ‘I&B Code’ is prospective in nature and the benefit of such provision cannot be claimed by the Appellant is wrong and misplaced.

43. A plain reading of Section 32A(1) and (2) clearly suggests that the Directorate of Enforcement/ other investigating agencies do not have the powers to attach assets of a ‘Corporate Debtor’, once the ‘Resolution Plan’

stands approved and the criminal investigations against the ‘Corporate Debtor’ stands abated. Section 32A of the ‘I&B Code’ does not in any manner suggest that the benefit provided thereunder is only for such resolution plans which are yet to be approved. Further, there is no basis to make distinction between a resolution applicant whose plan has been approved post or prior to the promulgation of the Ordinance.

44. Further, even prior to the passing of the Ordinance, the 3<sup>rd</sup> Respondent i.e. Union of India through Ministry of Corporate Affairs in its ‘Affidavit in Reply’ dated 10<sup>th</sup> October, 2019, had categorically stated that:

*“5) It is submitted that if any Corporate Debtor is undergoing investigation by the Central Bureau of Investigation (“CBI”), Serious Fraud Investigation Office (“SFIO”) and/ or the Directorate of Enforcement (“ED”), such investigations are separate and independent of the Corporate Insolvency Resolution Process (“CIR Process”) under the IBC and both can run simultaneously and independent of each other. It is further submitted that the erstwhile management of a company would be held responsible for the crimes, if any, committed under their regime and the new*

*management taking over the company after going through the IBC process cannot be held responsible for the acts of omission and commission of the previous management. In other words, no criminal liability can be fixed on the successful resolution applicant or its officials.*

*6) In so far as the corporate debtor or its assets are concerned, after the completion of the CIR Process, i.e. a statutory process under the IBC, there cannot be any attachment or confiscation of the assets of the Corporate Debtor by any enforcement agencies after approval of the Resolution Plan.*

*7). Resolution Plan submitted by the interested Resolution Applicants are duly examined and validated by the Resolution Professional and the Committee of Creditors ("CoC"). Once the Resolution Plan is voted upon and approved by the CoC, it is submitted to the Ld. Adjudicating Authority for its approval. The Ld. Adjudicating Authority after hearing the objections, if any, and being satisfied that the Resolution Plan is in compliance with the provisions of the law, approved the Plan. The CIR Process is desired to*

*ensure that undesirable persons do not take control of the Corporate Debtor by virtue of Section 29A of the IBC. The purpose and scheme of the CIR Process is to hand over the company of the corporate debtor to a bona fide new resolution applicant. Any threat of attachment of the assets of the corporate debtor or subjecting the corporate debtor to proceedings by investigating agencies for wrong doing of the previous management will defeat the very purpose and scheme of CIR Process, which inter-alia includes resolution of insolvency and revival of the company, and the efforts of the bank to realise dues from their NPAs would get derailed. Otherwise too, the money realised by way of resolution plan is invariably recovered by the banks and public financial institutions and other creditors who have lent money to the erstwhile promoters to recover their dues which they have lent to the erstwhile management for creation of moveable or immovable assets of the corporate debtor in question and therefore, to attach such an asset in the hands of new promoters of resolution applicant*



would only negate the very purpose of IBC and eventually destroy the value of assets.

8). ***In light of the above, the ED while conducting investigation under PMLA is free to deal with or attach the personal assets of the erstwhile promoters and other accused persons, acquired through crime proceeds and not the assets of the Corporate Debtor which have been financed by creditors and acquired by a bona fide third party Resolution Applicant through the statutory process supervised and approved by the Adjudicating Authority under the IBC. In so far as a Resolution Applicant is concerned, they would not be in wrongful enjoyment of any proceeds of crime after acquisition of the Corporate Debtor and its assets, as a Resolution Applicant would be a bona fide assets acquired through a legal process. Therefore, upon an acquisition under a CIR Process by a Resolution Applicant, the Corporate Debtor and its assets are not derived or obtained through proceeds of***

***crime under the Prevention of Money Laundering Act, 2002 (“PMLA”) and need not be subject to attachment by the ED after approval of Resolution Plan by the Adjudicating Authorities.”***

*(Emphasis supplied)*

45. The Union of India had unequivocally stated that after the completion of the ‘Corporate Insolvency Resolution Process’, there cannot be any threat of criminal proceedings against the ‘Corporate Debtor’, or attachment or confiscation of its assets by any investigating agency, after approval of the ‘Resolution Plan’. In any event, by virtue of Section 238 of the ‘I&B Code’, the ‘I&B Code’ has an overriding effect over anything inconsistent therewith in any other law. Accordingly, it is clear that subsequent promulgation of the Ordinance is merely a clarification in this respect. Therefore, it is *ex facie* evident that the Ordinance being clarificatory in nature, must be made applicable retrospectively.

46. It is not the case of the Directorate of Enforcement that ‘JSW Steel Limited’ comes within clause (a) of Section 5(24) as a director or partner of the said ‘Corporate Debtor’- ‘Bhushan Power and Steel Limited’ or a relative of a director or partner of the ‘Corporate Debtor’. It is not holding

position as a key managerial personnel of the 'Corporate Debtor' or a relative of a key managerial personnel of the 'Corporate Debtor'.

47. There is nothing on the record to suggest that there is a limited liability partnership or a partnership firm in which 'JSW Steel Limited' is a partner of the 'Bhushan Power and Steel Limited'.

48. It is not the case of the Directorate of Enforcement that in a private company in which a director, partner or manager of the 'Bhushan Power and Steel Limited' was a director and 'JSW Steel Limited' holds more than two per cent of its share capital.

49. The allegation is not that 'JSW Steel Limited' a public company of which a director, partner or manager of the 'Corporate Debtor' is a director and holds along with relatives, more than two per cent of its paid-up share capital.

50. The allegation is that in a joint venture Company namely— 'M/s. Rohne Coal Company Private Limited', 'Bhushan Power and Steel Limited' and 'JSW Steel Limited' are holding 24.09% and 49% equity respectively.

51. 'JSW Steel Limited' has taken specific plea that it is not a 'related party' of erstwhile 'Bhushan Power and Steel Limited'- ('Corporate Debtor') and placed on record the following facts:

**“II. The Appellant is not related party of the Corporate Debtor**

10. The basis of ED’s submissions that the Appellant is a related party of the Corporate Debtor is the existence of a company namely Rohne Coal Company Private Limited (“RCCPL”) which was incorporated in 2008 as a joint venture amongst (i) JSW Steel Ltd. (Appellant); (ii) Bhushan Power and Steel Ltd. (Corporate Debtor) and (iii) Jai Balaji Industries Ltd. In this regard, Appellant seeks to place on record the following facts:

(i) The Appellant had individually applied to the Government of India for allocation of a Coking Coal Block. Such application was not made jointly with any entity. However, by letter of intent (“LoI”) dated 9<sup>th</sup> April, 2017, the Government of India, through Ministry of Coal, proposed joint allocation of Rohne Coking Coal Block amongst the aforesaid three companies, including the Appellant and the Corporate Debtor herein, with their respective proportionate share of coal reserve.

(ii) At the behest of the Ministry of Coal, a joint venture agreement dated 05.03.2008 was executed

*by and amongst the Appellant, Corporate Debtor and Jai Balaji Industries Ltd., pursuant to which RCCPL came to be incorporated.*

*(iii) Vide the LoI and the proportionate share of coal reserve allotted to each Allocattee specified thereunder, the Appellant was entitled to 69.01% of coal reserve. Further, as per the JVA, the Appellant was entitled to subscribe to 69.01% of the share capital of RCCPL together with its affiliate company/s. Therefore, the Appellant had directly subscribed to 49% of the share capital in RCCPL and one of its affiliate, Everbest Consultancy Services Pvt. Ltd. had subscribed to the remaining 20.01% of share capital.*

*(iv) While the Coal Block was under development, the Hon'ble Supreme Court of India vide its order dated 24.09.2014 passed in Manohar Lal Sharma v. The Principal Secretary & Others. W.P. (Criminal) 120/2012, cancelled the allocation of the coal blocks by the Government of India (to States and private sector industries). Consequently, the allocation of Coal Block to RCCPL stood cancelled and the operations of RCCPL have been inactive since the*

*said cancellation. Further, post the cancellation, the Coal Block has been allotted to National Mineral Development Corporation (NMDC).*

*(v) While the operations of RCCPL have been inactive since the cancelation of the Coal Block, the joint venture has not been dissolved as on date, on account of a pending litigation with respect to the Coal Block before the Hon'ble Delhi High Court in Rohne Coal Co. Ltd. vs Union of India and Ors. WP (C) 11551/2015 and the resolution of issues with respect to reimbursement of costs incurred by RCCPL for development of the mine until it was cancelled.”*

52. The Appellant- 'JSW Steel Limited' had fully disclosed its association with 'Rohne Coal Company Private Limited' in the 'Resolution Plan'. It has also disclosed the association of the 'Corporate Debtor' with 'Rohne Coal Company Private Limited'.

53. After taking into account the disclosures made by 'JSW Steel Limited', the 'Resolution Professional' had confirmed that the Appellant- 'JSW Steel Limited' is not disqualified under Section 29A of the 'I&B Code' to submit its 'Resolution Plan', which was also accepted by the 'Committee of Creditors' who approved the plan. The Adjudicating

Authority also had gone into the question of ineligibility and approved the plan.

54. The Notification of Government of India through Ministry of Coal dated 9<sup>th</sup> April, 2007 shows that 'JSW Steel Limited' in its individual capacity applied for allocation of 'Rohne Coking Coal Block' in its favour. However, there being more applicants, the Central Government contemplated to make joint allocation of Rohne coking coal block in favour of 'M/s. JSW Steel Ltd.', 'M./s. Bhushan Power & Steel Ltd.' and 'M/s. Jai Balaji Sponge Ltd.' for meeting their proportionate share of requirement of coal, as extracted below:

**ANNEXURE - A**

No. 38011/4/2006-CA-I  
Government of India  
Ministry of Coal

New Delhi, dated the 9<sup>th</sup> April, 2007.

To:

1. M/s. JSW Steels Ltd.,  
12, Bhikaji Cama Place,  
New Delhi - 110 066.
2. M/s. Bhushan Power & Steel Ltd.,  
4<sup>th</sup> Floor, Tolstoy House,  
Tolstoy Marg,  
New Delhi - 110 001.
3. M/s. Jai Balaji Sponge Ltd.,  
5, Beattick Street,  
1<sup>st</sup> Floor,  
Kolkata - 700 001.

Sir,

I am directed to inform that Government are contemplating to make joint allocation of Rohne coking coal block in favour of M/s. JSW Steel Ltd., M/s. Bhushan Power & Steel Ltd. and M/s. Jai Balaji Sponge Ltd. for meeting their proportionate share of requirement of coal. Based on the mineable capacity of the total geological reserves and requirement of coal as assessed by CMPDIL, proportionate share of reserves is indicated in table below :-

Block Name/ Seam	Geological Reserves Million Tonnes	Mineable reserves (MT)	Mine Capacity (MT)	Applicant	Coal Requirement for 30 yrs. (MT)	% Satisfaction level based on requirement of RCHC coal	Proportionate share of coal reserve (MT)
ROHNE	410	350	8.0	M/s. JSW Steels Ltd.	13.52x30 = 405.6 (5.32 for plant at Bailhary and 8.2 for plant at Sankhote, Barchanod)	43	172.53
				M/s. Bhushan Power & Steel Ltd.	4.72x30 = 141.6 (1.82 for plant at Sambalpur in Orissa and 2.9 for plant at Singhbhum, Barchanod)	43	60.23
				M/s. Jai Balaji Sponge Ltd.	1.38x30 = 40.5 for plant at Ranpur, West Bengal	43	17.23

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2. In the case of joint allocation, the block can be mined by the joint allocatees under any of the three options as given below :-

**Option I :** The mining be carried out in consortium of two or more allocatees in any given block by constituting a joint venture/special purpose vehicle company wherein there would be equity stake and management participation from all the consortium partners. The production from the mine could be distributed among the consortium partners in proportion to their assessed requirement at the time of allocation, net of linkages, if any. The equity shares should be held in proportion to the assessed requirement of all the consortium partners.

**Option-II :** In this option, one allocatee company would be designated as the leader for the block and a few other allocatees would be designated as the associates for that block. The allocation would be made to the leader and the associates but the mining lease will be granted to the leader, all investments will be made by the leader, all mining operations will be carried out by the leader and the production from the mine will be shared between the leader and the associates in the ratio of their respective assessed requirement at the time of allocation. The price at which the coal will be given to the associates would be determined by the Central Government/its agency and would be called the 'transfer price'.

**Option-III :** In this option, for each block one allocatee would be chosen as the leader. The allocation will be made to the group of leader and associates jointly but the mining lease of each block would be given to the designated leader who would make the investment and carry out the mining operations. The production from the mine will be shared between the leader and the associates in proportion to their actual requirement/assessed requirement at the time of allocation, whichever is less. In this option, the local CIL subsidiary company will have a role to play. They would arrange the transfer of coal from the leader to the associates as per the ratio determined at the time of allocation, at a price to be determined by the Central Government/its agency. The CIL subsidiary would be permitted to charge some nominal service charges.

3. In accordance with the three options as indicated above, the joint allocatees may discuss the modalities mutually acceptable to them and finalise a legally binding and enforceable agreement, opting for any one of the above mentioned three arrangements. The agreement should be in conformity with the provisions of the Coal Mines (Nationalisation) Act, 1973 and the guidelines issued in this regard. The agreement may cover, inter-alia, issues such as share in equity, production sharing, rights and liabilities, penalties etc. In case Option III is preferred, then a tripartite agreement between the leaders, associates and the local Coal India subsidiary such that no liability devolves on the local CIL subsidiary in any case including in cases of no or less production by the leaders or no or less offtake by the associates, and CIL subsidiary is fully indemnified against any liability, has to be entered into.

4. You are requested to exercise the requisite option and to submit an agreement, duly signed by all the parties concerned and legally tenable, to this Ministry within 30 days from the date of issue of this letter. In case no response is received within the stipulated time, the Government reserves the right to reconsider allocation of block to the contemplated allocatees.

Yours faithfully,

(V.S. Rana)

Under Secretary to the Govt. of India.

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55. All the three options suggest that either two or more of them had to make a consortium or one of them will be designated as 'leader' of the block and others as 'associates' of the block. The third option was that in each block, one allocatee will be made to the group of leader and associates jointly.

56. There was a compulsion on the part of 'JSW Steel Limited' for allocation of Rohne Coking Coal Block though it applied for individual allotment, because of mandate of the Central Government. They had to share jointly with the two others including 'M./s. Bhushan Power & Steel Ltd.' and 'M/s. Jai Balaji Sponge Ltd.' for meeting their proportionate share of requirement of coal.

57. We hold that where a party for the purpose of its business, if mandated by the Central Government to join hands together and are forced to form a consortium or as joint associate, such person ('Resolution Applicant') cannot be held ineligible in terms of Section 32A (1) (a) on the ground of 'related party'.

58. In fact, the contention of the Directorate of Enforcement that the Appellant- 'JSW Steel Limited' is a 'related party' of the 'Corporate Debtor' as per Section 5(24) is based upon a complete misconception and misinterpretation of Section 32A (1) (a) and Section 5(24) of the 'I&B

Code'. To fall within the ambit of Section 32A (1) (a), a 'Resolution Applicant' has to be either:

- (i) A promoter of the Corporate Debtor; or
- (ii) In the management or control of the Corporate Debtor; or
- (iii) A related party of the Corporate Debtor.

In the context of the present case, the 'Resolution Applicant' i.e. 'JSW Steel Limited' does not fall in any of the aforesaid categories.

59. Section 5(24) provides 'related party' in relation to the 'Corporate Debtor' means a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which a corporate debtor is a subsidiary.

60. Upon a perusal of Section 32A(1) (a) read with the aforesaid definition, it is *ex facie* evident that the Appellant- 'JSW Steel Limited' is not an associate company/ related party of the 'Corporate Debtor'. While 'Rohne Coal Company Private Limited' is an associate company of the 'Corporate Debtor' as well as of the 'JSW Steel Limited', but by virtue of both having investment in such downstream joint venture company, the 'JSW Steel Limited' and the 'Corporate Debtor' do not become related parties of each other.

61. The 'Resolution Professional' and the 'Committee of Creditors' vide their joint additional reply dated 22<sup>nd</sup> January, 2020 filed before this

Appellate Tribunal, have yet again certified that the Appellant- 'JSW Steel Limited' and the 'Corporate Debtor' are not related parties.

62. The question arises as to who are the Competent Authorities to decide ineligibility of the 'Resolution Applicant' under Section 29A or 32A (1) (a) and to find out whether it comes within the meaning of 'related party' for the purpose of ineligibility.

63. As per Section 30(1), the 'Resolution Applicant' while submitting 'Resolution Plan' has to file an Affidavit stating clearly that he is eligible or not eligible under Section 29A.

64. As per Section 30(3), the 'Resolution Professional' shall present to the 'Committee of Creditors for its approval such 'Resolution Plans' which confirm the conditions referred to in sub-section (2). It is only thereafter the 'Committee of Creditors' is empowered to find out whether the 'Resolution Applicant' is ineligible under Section 29A:

***“30. Submission of resolution plan.—(1) A resolution applicant may submit a resolution plan [along with an affidavit stating that he is eligible under section 29A] to the resolution professional prepared on the basis of the information memorandum.***

*xxx**xxx**xxx*

*(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).*

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

*Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution*

*plan where no other resolution plan is available with it:*

*Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:*

*Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that subsection]:*

*[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.]”*

65. It is only thereafter under Section 31, the Adjudicating Authority is to satisfy that the 'Resolution Plan' as approved by the 'Committee of Creditors' under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30.

66. The aforesaid provisions show that the following persons/ Authorities are empowered to decide whether a 'Resolution Applicant' is ineligible being 'related party' in terms of Section 29A or not:

(i) The 'Resolution Professional' in terms of Section 30(1) is to find out whether such statement has been made or not;

(ii) The 'Committee of Creditors' is empowered to decide whether the 'Resolution Applicant' is ineligible in terms of Section 29A. Thereby the 'Committee of Creditors' is also required to decide whether it is related party to the 'Corporate Debtor' or not.

(iii) The Adjudicating Authority while passing order under Section 31 can find out whether the 'Resolution Applicant' fulfils the conditions under Section 30(2) which includes Section 30(2) (e) and in terms of Section 29A can decide whether the 'Resolution Applicant' is a 'related party' to the 'Corporate Debtor'.

67. The Directorate of Enforcement has not been empowered under 'I&B Code' to decide the question. Even if the stand taken by the Directorate of Enforcement is accepted that 'JSW Steel Limited' is a

‘related party’ of ‘M./s. Bhushan Power & Steel Ltd.’- (‘Corporate Debtor’), the Directorate of Enforcement cannot decide whether ‘JSW Steel Limited’ is ineligible under Section 29A or Section 32A (1) (a) which can be determined by the ‘Committee of Creditors’/ Adjudicating Authority.

68. Section 29A was inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 dated 18<sup>th</sup> January, 2018 with retrospective effect i.e. from 23<sup>rd</sup> November, 2017. The main object that persons, who are ineligible in terms of clauses (a) to (j) are excluded from acquiring the company.

69. If a person becomes ineligible because of his own act, such person is not eligible to submit a ‘Resolution Plan’ individually or jointly or in concert with.

70. However, on the direction of the Central Government, if a person is asked to join hands with others for compliance of such direction a person cannot be held to be ineligible on the ground of ‘related party’.

71. In view of the aforesaid discussion, we declare the attachment of assets of the ‘Corporate Debtor’ by the Directorate of Enforcement pursuant to order dated 10<sup>th</sup> October, 2019 as illegal and without jurisdiction.

72. In so far as the relief as sought for by 'JSW Steel Limited' in its appeal is concerned, it will be considered only after the decision in the connected appeals, as detailed below.

**Appellant- Mr. Sanjay Singhal (Promoter)**

73. The Appellant is the Shareholder, Guarantor and erstwhile Promoter of 'Bhushan Power & Steel Limited'- ('Corporate Debtor'). The main ground taken by the Appellant- Mr. Sanjay Singhal is that 'JSW Steel Limited' is barred under Section 29A and is ineligible to file any 'Resolution Plan' since it is an 'associate company', a 'joint venture partner' and a 'related party' of 'Bhushan Power & Steel Limited'- ('Corporate Debtor').

74. Learned counsel for the Appellant placed reliance on Section 5(24) of the 'I&B Code' read with Section 2(6) & (27) of the Companies Act, 2013.

75. The aforesaid issue has already been discussed and decided in the preceding paragraphs which covers the argument of the Appellants. Therefore, the aforesaid ground taken by the Appellant (Promoter) is rejected.

76. In fact, Mr. Sanjay Singal and Anr. cannot take plea that they are involved in the matter under the PMLA Act, 2002. If their argument is



accepted then it is to be accepted that they have been rightly made accused by the Directorate of Enforcement in money laundering case.

77. As the Appellants- Mr. Sanjay Singal and Anr. have not pleaded that the assets of the 'Corporate Debtor' is from 'proceeds of crime' and this Appellate Tribunal is not empowered to decide such issue, we hold that the Appellant- Mr. Sanjay Singal and Anr. should not raise such issue for determination by this Appellate Tribunal.

78. It was submitted that neither the '**RFP**' nor the 'Resolution Professional' stated that distribution of profit/ earnings before interest tax depreciation amortization generated by the 'Corporate Debtor' during the 'Corporate Insolvency Resolution Process' ("CIRP EBITDA") shall go to the 'Resolution Applicant'. According to them, the 'Committee of Creditors' has accepted that distribution of profit/ earnings before interest tax depreciation amortization generated by the 'Corporate Debtor' during the 'Corporate Insolvency Resolution Process' ("CIRP EBITDA") should go to the benefit of Creditors.

79. The Judgment of the Hon'ble Supreme Court in "**Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478**" is binding on all the Courts including the Tribunals and the 'Committee of Creditors'. It depends upon the commercial wisdom of the 'Committee of Creditors'. The 'Resolution Plan'

submitted by 'JSW Steel Limited' has been approved by the Adjudicating Authority with modification by impugned order dated 5<sup>th</sup> September, 2019 and as the same has not been challenged by the 'Committee of Creditors', therefore, we are not inclined to interfere with the plan as approved by the Adjudicating Authority at the instance of ex-promoters/ shareholders Mr. Sanjay Singal & Anr. Further, as 'JSW Steel Limited' also raised this issue, we have discussed the same while deciding the appeal of 'JSW Steel Limited'.

80. It was submitted that the 'Resolution Professional' had not supplied the 'Resolution Plan' and other documents. However, we find that on 9<sup>th</sup> May, 2018, this Appellate Tribunal directed the 'Committee of Creditors' to consider the 'Resolution Plans', give reasons for rejecting any one or other 'Resolution Plans' and to provide it to the parties. The Appellants were given opportunity to peruse the 'Resolution Plan' on 26<sup>th</sup> July, 2018 as evident from the minutes of the 'Committee of Creditors' held on 27<sup>th</sup> July, 2018. At this stage, after availing such opportunity, it is not open to the Appellants- ex promoters to re-agitate same grievance.

81. In so far as the reliefs and concessions sought for by 'JSW Steel Limited' in its 'Resolution Plan' is concerned, it cannot be alleged to be hit by any existing law. No specific pleading has been made by Mr. Sanjay Singal- Ex-Promoters in this regard. If one or other party, ask for waiver of stamp duty for any transaction after the Insolvency Commencement

Date and tax liabilities, it is merely a prayer made and it cannot be alleged that because of such prayer for relief, 'Resolution Plan' is hit by Section 30(2) (e) of the 'I&B Code'.

82. The issue relating to extinguishing the liabilities of the lenders like guarantor and/ or subrogation has been raised in other appeals. The issue whether 'JSW Steel Limited' can take benefit of Section 32A as inserted by Clause 10 of the Ordinance dated 28<sup>th</sup> December, 2019 has already been discussed and decided in the preceding paragraphs which is reiterated.

We find no merit in this appeal. The appeal preferred by 'Mr. Sanjay Singal and Anr.' is dismissed.

**Appellant- Jaldhi Overseas Pte. Ltd.'**

83. The Appellant is a company incorporated in Singapore engaged in the business of freight and ship chartering operations and claims to be an 'Operational Creditor' of the 'Corporate Debtor' with the largest claim of Rs.151.37 Crores (in view of three International Arbitral Awards, pending execution as on the Insolvency Commencement Date).

84. Learned counsel for the Appellant submitted that even though the claim of the Appellant was admitted, suddenly in the third list of 'Operational Creditors' published by the 'Resolution Professional' on 21<sup>st</sup> September, 2017 the said admitted claim was unilaterally reduced to

Rs.70,31,538. In view thereof, the Appellant was constrained to approach the Adjudicating Authority seeking direction to the 'Resolution Professional' to rectify the gross error as the 'Resolution Professional' had failed to rectify the same despite follow up by the Appellant. Accordingly, the admitted claim was corrected by the 'Resolution Professional' pursuant to Adjudicating Authority's order dated 9<sup>th</sup> October, 2017.

85. It was submitted that in view of the said nature of functioning of the 'Resolution Professional' since the inception of the 'Corporate Insolvency Resolution Process', the Appellant, out of abundant caution, began to closely monitor the list of 'Operational Creditors' being regularly updated by the 'Resolution Professional'. In doing so, the Appellant noticed that on regular intervals the admitted amount indicated to select few 'Operational Creditors' were being revised by reduction in their amounts post admitting the same thereby clearly indicating, *inter alia*, that pre-Corporate Insolvency Resolution Process payments were being made towards admitted claims to such selective 'Operational Creditors' during the 'Corporate Insolvency Resolution Process'.

86. The Appellant being aggrieved by the above malafide act of the 'Resolution Professional', moved before the Adjudicating Authority challenging the legality of the making such pre-Corporate Insolvency Resolution Process payments by 'Resolution Professional' to select 'Operational Creditors', wherein the Appellant was allowed as an

Intervenor. In the said application, the 'Resolution Professional' had filed various pleadings, admitting to making such pre-Corporate Insolvency Resolution Process payments to select 'Operational Creditors'.

87. Learned counsel for the Appellant submitted that the Resolution Professional has undeniably made payments towards 'pre-Corporate Insolvency Resolution Process' dues/admitted claims to select 'Operational Creditors' during 'Corporate Insolvency Resolution Process'. This has resulted in a situation wherein such 'Operational Creditors' have been paid 100% of their admitted claims even before the approval and implementation of the 'Resolution Plan', while the remaining creditors would be paid amounts (if any) proportionately in terms of the 'Resolution Plan'. This act of the 'Resolution Professional' has resulted in inter-se discrimination between 'Operational Creditors'.

88. It was submitted that impermissibility in law to make 'pre-Corporate Insolvency Resolution Process' payment during 'Corporate Insolvency Resolution Process':

- (i) Payments made towards 'pre-Corporate Insolvency Resolution Process' dues/ admitted claims of creditors during 'Corporate Insolvency Resolution Process' is also against the scheme of the 'I&B Code', as per which all past dues/ liabilities of the 'Corporate Debtor' cannot be recovered by the creditors during

‘Corporate Insolvency Resolution Process’ and become subject to the final ‘Resolution Plan’ approved by the ‘Committee of Creditors’ and the Adjudicating Authority.

(ii) The Insolvency and Bankruptcy Board of India’s Circular No. IBBI/IP/013/2018 wherein it has been clarified that Insolvency Resolution Process Cost cannot include cost incurred, ‘pre- Corporate Insolvency Resolution Process’ or ‘post- Corporate Insolvency Resolution Process’

(iii) Explanation to Section 14(2) of ‘I&B Code’ added by way of Ordinance dated 28<sup>th</sup> December, 2019, further emphasises that ‘Operational Creditors’ can only be paid towards supplies made by them during ‘Corporate Insolvency Resolution Process’. The said provision is as below:

*“Where the IRP, or the RP as the case may be considers the supply of goods and services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supplier of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.”*

89. This issue stands decided by the Hon'ble Supreme Court in **“Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.–2019 SCC OnLine SC 1478”**, wherein the Hon'ble Supreme Court observed:

*“88. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective*

*resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.*

*89. The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor – see Clause 7 of the first addendum to the RFP dated 08.02.2018. On this short ground, this part of the judgment of the NCLAT is also incorrect.”*

90. Further, it was submitted by the Appellant- ‘Jaldhi Overseas Pte. Ltd.’ that the Impugned Order has misconceived the provisions of the Code and held at para 104 therein that *“view of the Hon’ble NCLAT in Binani Industries case (supra) did not meet the Legislative approval. It is appropriate to notice that Section 30 (2) (b) of the ‘I&B Code’ has been amended vide notification dated 5<sup>th</sup> August, 2019. There is thus no*



*contravention of law under Section 30 (2) (e) of the 'I&B Code'*. On the contrary, the said amendment, reverberates the ratio of the judgement passed by this Appellate Tribunal in *Binani Industries*, as the amendment clarifies that the distribution should be fair and equitable amongst creditors.

91. Learned counsel for the Appellant- 'Jaldhi Overseas Pte. Ltd.' submitted that the Appellant has been categorized as a 'contingent creditor' even though the 'Resolution Professional' has admitted the claim in full. In addition to the above discrimination, the 'Resolution Plan' approved by the Adjudicating Authority also further discriminates the Appellant. This is because while the 'Resolution Plan' proposes payment of 50% of all admitted claims of 'Operational Creditors' with a cap of Rs.350 Cr, the Appellant (which is the largest admitted 'Operational Creditor') was malafidely put in a different class namely 'identified contingent creditors'. As per the 'Resolution Plan', such identified contingent creditors (totalling to approximately Rs.5000 Crores) are to receive 10% of their claim, only and only if their claim crystalizes within a period of two years from date of approval of the 'Resolution Plan', subject to maximum of 35 Crores.

92. It was further submitted that the aforesaid categorization of the Appellant's admitted claim as an 'identified contingent creditor' was also contradictory to 'Resolution Professional's own letter of 20<sup>th</sup> February,

2019, whereby the Appellant was informed that its status under the 'Resolution Plan' was as per the list of 'Operational Creditors' available on the website of the 'Corporate Debtor'. The Impugned Order, however, at para 106, has failed to appreciate that by treating the Appellant differently from other 'Operational Creditors', the 'Resolution Plan' is in derogation to Section 30 (2) (e) of the 'I&B Code' as it is not fair and equitable to all creditors.

93. In the present case, as the Appellant has been categorised as 'contingent creditor', we hold that the Appellant who claims to be 'Operational Creditor' but his claim has not been crystalized which made him 'contingent creditor' and as such cannot claim equitable treatment with all other Creditors.

Therefore, no ground is made out to interfere with the impugned order of approval of the plan.

**Appellant- Medi Carrier Private Limited**

94. At the time of approval of the 'Resolution Plan' submitted by 'JSW Steel Limited', the Appellant- 'Medi Carrier Private Limited' ('Operational Creditor') moved application under Section 60(5) of the 'I&B Code' for *inter alia* seeking payment of its outstanding dues arising out of transportation services rendered between 27<sup>th</sup> July, 2017 to 31<sup>st</sup> March, 2018 i.e. during the 'Corporate Insolvency Resolution Process' period. The Adjudicating

Authority rejected the application under Section 60(5) while approving the plan of 'JSW Steel Limited' by impugned order dated 5<sup>th</sup> September, 2019.

95. According to counsel for the Appellant, it was involved in various ongoing contracts for transportation of final goods of the 'Corporate Debtor' since 2012 and has been transporting the goods at various critical locations of the 'Corporate Debtor'. On 9<sup>th</sup> August, 2017, the 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' was initiated and about that time, the Appellant having large outstanding showed its inability to carry on any further transportation works for the 'Corporate Debtor'. However, owing to the critical nature of the services rendered by the Appellant, the Appellant was identified as a critical trade creditor on the basis of criticality of services, the Appellant provided to the 'Corporate Debtor' during the 'Corporate Insolvency Resolution Process' on the advice of Technical Advisor.

96. Accordingly, the 'Resolution Professional' in order to incentivize the Appellant, entered into an agreement with the Appellant to clear its outstanding dues arising out of the transportation works carried before commencement of 'Corporate Insolvency Resolution Process' as a consideration for carrying out transportation works during the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor', so that the final

goods could be transported to the buyers to keep the 'Corporate Debtor' as a going concern.

97. As per the said agreement, the 'pre-Corporate Insolvency Resolution Process' dues of the Appellant were cleared by the 'Resolution Professional' in a span of around 10 months from 27<sup>th</sup> July, 2017 and numerous payments were issued reflecting the invoice against which payments were made. Payments were released to the Appellant only after following the detailed 21 steps procedure in the Indent Processing. It is stated that after the Resolution Process, due to clerical mistake on the part of the 'Resolution Professional', it has not cleared the number of dues including the dues during the 'Corporate Insolvency Resolution Process'.

98. Learned counsel for the 'Resolution Professional' submitted that no directions were issued by him to make payments of 'pre-Corporate Insolvency Resolution Process' period claims and the admitted claim of the Appellant to the tune of Rs.7,62,47,071/- will be accordingly dealt with in accordance with the approved 'Resolution Plan'.

99. It was submitted by the 'Resolution Professional' that no promises were made and no assurances given to the Appellant to pay the outstanding dues, which have been paid only on completion of the 'Corporate Insolvency Resolution Process'.

100. It was further submitted that after gaining knowledge about the said mistake at the plant level, the 'Resolution Professional' took immediate corrective steps by issuing revised payment advices to all such 'Operational Creditors', including the Appellant herein clarifying that the payments were authorised only towards services availed during 'Corporate Insolvency Resolution Process' period of the 'Corporate Debtor'.

101. As the order of 'Moratorium' having issued under Section 14 of the 'I&B Code', the Appellant- 'Medi Carrier Private Limited' was not entitled to receive any amount towards 'pre- Corporate Insolvency Resolution Process' dues. It is accepted that in spite of the same, by virtue of so-called agreement, it was paid. After completion of the 'Corporate Insolvency Resolution Process' to treat the Appellant at par with other 'Operational Creditors' and if the amount wrongly paid was adjusted against the amount payable during the 'Corporate Insolvency Resolution Process', the Appellant cannot derive any advantage of any agreement which was against Section 14 of the 'I&B Code'.

The appeal is dismissed.

**Appellant- 'Kalyani Transco'**

102. The Appellant- 'Kalyani Transco' is the 'Operational Creditor' of 'M/s. Bhushan Power & Steel Limited' ('Corporate Debtor'), according to

it, the 'Corporate Debtor' owed a sum of Rs.5,21,64,476/- to the Appellant on account of transportation of solid waste.

103. It is alleged that the meaningful participation was denied to the 'Operational Creditors' since complete copies of relevant documents and 'Resolution Plans' were never shared with the 'Operational Creditors'.

104. In the present case, there is nothing on the record to suggest that the Appellant in its individual capacity as 'Operational Creditor' had more than 10% of the dues of the 'Operational Creditors' to remain present during the meeting of the 'Committee of Creditors'. Therefore, the question of supplying the complete copy of the relevant documents and 'Resolution Plan' does not arise.

105. The other ground taken in that 'JSW Steel Limited' is hit by Section 29A of the 'I&B Code' as it is a 'related party' of 'M/s. Bhushan Power & Steel Limited'. However, such plea cannot be accepted in view of the findings already recorded above.

We find no merit in this appeal preferred by Appellant- 'Kalyani Transco'. It is accordingly, dismissed.

**Appellant- State of Odisha**

106. According to Appellant- 'State of Odisha', it is legally entitled to recover a sum of approx. Rs.139,15,80,504/- on account of entry tax

dues in view of the finality of the issue with regard to the legality of the levy upheld by the Hon'ble Supreme Court vide Judgment reported in (2017) 12 SCC 1. The said case filed by State of Orissa wherein 'Bhushan Power & Steel Limited' was one of the Respondents also was decided by this Judgment) followed by the Judgment and order dated 9<sup>th</sup> October, 2017 passed by the Hon'ble Supreme Court in **"State of Kerala & Ors. v. Fr. William Fernandez etc.— Civil Appeals No. 3381-3400 of 1998"**. In the said case, the Hon'ble Supreme Court upheld the legislative competence of the State Legislature to impose entry tax on the goods imported from other State as well as outside the country.

107. Learned counsel appearing on behalf of the 'Resolution Professional' submitted that no claim was filed by the State of Odisha before the 'Resolution Professional'. The 'Committee of Creditors' approved the 'Resolution Plan' on 16<sup>th</sup> October, 2018. The Adjudicating Authority (NCLT) also approved the plan on 5<sup>th</sup> September, 2019. It is only after the approval of the plan by the Adjudicating Authority (NCLT), on 18<sup>th</sup> November, 2019, the Appellant filed the claim.

108. In the present case, as we find that the claim of the 'State of Odisha' was not filed during the 'Corporate Insolvency Resolution Process' after approval of the plan by the Adjudicating Authority (NCLT), claim filed by the Appellant (filed on 18<sup>th</sup> November, 2019) cannot be entertained.

109. In **“Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478”**, the Hon’ble Supreme Court held:

*“88. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the*



*business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”*

110. In view of the decision of the Hon’ble Supreme Court, the ‘State of Odisha’ cannot recover any dues of earlier period of date of approval of the plan.

111. Apart from the fact the present appeal has been preferred by ‘State of Odisha’ much beyond the period of 15 days after 30 days’ time of preferring the appeal. In such case also, in absence of any power of this Appellate Tribunal to condone the delay beyond 15 days after 30 days of preferring the appeal, in terms of Section 61(2) the present appeal is not maintainable.

We find no merit in the appeal preferred by ‘State of Odisha’. It is accordingly dismissed.

**Appellant- ‘CJ Darcl Logistics Limited’**

112. The grievance of the Appellant- ‘CJ Darcl Logistics Limited’ is against collation of claim by the ‘Resolution Professional’. It was submitted that the Adjudicating Authority while passing the impugned

order on 5<sup>th</sup> September, 2019 failed to adjudicate numerous issues pertaining to the illegal and void actions of the 'Resolution Professional' in relation to the total amount payable to the Appellant.

113. Learned counsel for the Appellant submitted that the Adjudicating Authority wrongly clubbed all the 'Operational Creditors' in one group and they have only adjudicated the issues arising in one 'Operational Creditor's matter as a lead matter instead of adjudicating the distinct issues of different 'Operational Creditors'.

114. It is alleged that the 'Resolution Professional' verified the claim amount of Rs.7,73,80,565/- but after approval of the plan, it was shown that part of the 'pre-Corporate Insolvency Resolution Process' was paid to the Appellant- 'Operational Creditor'. The 'Resolution Professional' had only shown one PDC amounting to Rs.15,00,000/- only and he remained silent on the rest of the deducted amount.

115. According to the Appellant, it is concerned on the difference in the amount which were paid to them as they have acknowledgement on various invoices.

116. However, as we find that the Appellant was paid amount towards 'pre- Corporate Insolvency Resolution Process', which is completely against the provisions of Section 14 of the 'I&B Code', the 'Resolution

Professional' has rightly adjusted the same while deciding the amount payable to the 'Operational Creditors'.

We find no case made out to interfere with the impugned order. Therefore, the prayer is rejected.

**Case of 'JSW Steel Limited' and its prayer:**

117. The grievance of the Appellant- 'JSW Steel Limited', as noticed earlier, is against part of the conditions imposed in paragraph 128 sub paras (e), (f), (g), (i), (j), (k) of the impugned order dated 5<sup>th</sup> September, 2019. With respect to the specific conditions imposed in para 128 sub paras (e), (f), (g) and (i), there exists no *lis* between the parties as appears from record placed by the Appellant and the 'Committee of Creditors'. Reliance has been placed on the decision of the Hon'ble Supreme Court in "***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478***".

118. The protection from attachment of assets of the 'Corporate Debtor'/ protection from penal financial liability pursuant to action taken by the Directorate of Enforcement has already been dealt with in the preceding paragraphs. We have already held that the Directorate of Enforcement failed to show that the Appellant do not meet the criteria under Section 32A (1) (b) of the 'I&B Code'.

119. In view of the findings as detailed above, we hold that the assets of the 'Corporate Debtor' ('Bhushan Power & Steel Limited') of which 'JSW Steel Limited' is a 'Successful Resolution Applicant' is immune from attachment by the Directorate of Enforcement.

120. The requirement of Section 32A (1) (b) of the 'I&B Code' is that the investigation agency must have reason to believe that the 'Resolution Applicant' had abetted or conspired for the commission of the offence on the basis of material in its possession as on date. The phrase "on the basis of material in its possession" along with the usage of the words "has" and "reason to believe that he had abetted or conspired.." has to be necessarily construed as, the material in the possession of investigating agency as on the date when such agency is called to provide its confirmation/ certification with respect to Section 32A (1) (b) of the 'I&B Code'.

121. If the investigating agency is permitted to keep such confirmation in abeyance till the investigation is complete in all respects then the object and purpose of introducing Section 32A (1) (b) will be defeated and no 'Resolution Applicant' would come forward to implement its 'Resolution Plan' for the fear of the assets of the 'Corporate Debtor' being attached.

122. The intent of the 'I&B Code' affected on attachment of the assets of the 'Corporate Debtor' by the Directorate of Enforcement after approval of the 'Resolution Plan'. In this background, the intent and purpose of the insertion of Section 32A is to provide certainty to the 'Resolution Applicant' that the assets of the 'Corporate Debtor' as represented to him and for which he proposes to pay value/ consideration in terms of the 'Resolution Plan', would be available to him in the same manner as at the time of submissions of the 'Resolution Plan'. Mere assertion of the Directorate of Enforcement in its reply, that it needs to further investigate the matter to examine or comment if there has been any abetment or conspiracy by the Appellant establishes that it has no reason to believe on the basis of material in possession of Directorate of Enforcement, as on date, that meets the criteria under Section 32A (1) (b) of the 'I&B Code' for denial of immunity to the Appellant and the 'Corporate Debtor'.

123. On merit, we have also held that the conditions as stipulated in Section 32A (1) (b) and ineligibility under Section 29A is not attracted. Therefore, the relief to the extent sought for by 'JSW Steel Limited' is allowed.

124. In so far as the conditions imposed in the impugned order in relation to distribution of profit/ earnings before interest tax depreciation amortization generated by the 'Corporate Debtor' during the 'Corporate Insolvency Resolution Process' ("CIRP EBITDA") is concerned, in

paragraph 128(j), the Adjudicating Authority directed the ‘Resolution Professional’ to redistribute the profits earned by running the Corporate Debtor during the Corporate Insolvency Resolution Process in accordance with the judgment of this Appellate Tribunal in “**Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors.,—Company Appeal (AT) (Ins.) No. 242 of 2019**” decided on 4<sup>th</sup> July, 2019 with further direction to the ‘Resolution Professional’ to take action accordingly.

125. The decision of this Appellate Tribunal in “**Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors.**” (Supra) fell for consideration before the Hon’ble Supreme Court in “**Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478**”. The Hon’ble Supreme Court observed:

*“89. The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor – see Clause 7 of the first addendum to the RFP dated 08.02.2018. On this*

*short ground, this part of the judgment of the NCLAT is also incorrect.”*

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.

127. We accordingly, set aside the part of the conditions as made in Paragraph 128 (j) of the impugned order dated 5<sup>th</sup> September, 2019 which relates to distribution of profit during the ‘Corporate Insolvency Resolution Process’. The Monitoring Committee with the help of the ‘Resolution Professional’ will now go through the RPF issued in terms of Section 25 of the ‘I&B Code’ and as consented to by the ‘Resolution Applicant’ (‘JSW Steel Limited’) will make distribution of profit accordingly. The condition imposed at paragraph 128 (j) stands substituted with the aforesaid observations.

128. It is pleaded that there is ambiguity regarding List A which is mandatory part of the ‘Resolution Plan’. Paragraph 128 (g) of the impugned order reads as follows:

*“(e) Various reliefs sought from the statutory authorities under the Income Tax Act, 1961, Ministry of Corporate Affairs, Department of*

*Registration and Stamps, Reserve Bank of India and others are also disposed of. We do not feel persuaded to accept the prayer made in the resolution plan yet the resolution plan applicant may file appropriate applications before the competent authorities which would be considered in accordance with law because it would not be competent for the Adjudicating Authority-NCLT to enter into any such area for granting relaxation, concession or waiver is wholly within the domain of competent authorities.”*

129. Section 1.12 of the Resolution Plan deals with:

- (i) **List ‘A’:** certain items forming an integral part of the Resolution Plan, which were deemed to have been granted by virtue of approval of the Resolution Plan by the Adjudicating Authority, as they are in the nature of standard and ordinary implications of any resolution plan approved by an Adjudicatory Authority which is binding on stakeholders.
- (ii) **List ‘B’:** reliefs, concessions and entitlements for which specific orders were sought from the Adjudicating Authority as part of approval of the Resolution Plan.



130. However, the imposition of condition in Para 128(g) of the impugned order has created an ambiguity whether the same is intended to be limited to the reliefs and concessions set forth in List 'B' of Section 1.12 of the Resolution Plan or whether the aforesaid paragraph also relates to the matters in List 'A' of Section 1.12 of the Resolution Plan which constitute a mandatory part of the Resolution Plan.

131. While in para 121 of the impugned order, the Adjudicating Authority has separately dealt with List 'B' and has specifically observed that it cannot grant various concessions sought under List 'B', however, an ambiguity has crept in the concluding para 128(g) where it is unclear if such paragraph relates to only List 'B' or whether it extends to List 'A' also.

132. It was submitted that if para (g) of the impugned order also relates to 'List A', such condition would also amount to material modification of the Resolution Plan, without the consent of the Appellant, which has otherwise been found fit for approval.

133. List A is the integral part of the Resolution, therefore, the following orders shall be deemed to have been granted by virtue of approval of the Resolution Plan:

- (i) approving the Capital Reduction in the manner as contemplated under the Resolution Plan;
- (ii) approving the Amalgamation in the manner as contemplated under the Resolution Plan;
- (iii) the Existing Board shall stand vacated and be replaced by the Reconstituted Board;
- (iv) All penalties, interest, delayed payment charges, any other liabilities for any non-compliance with statutory obligations including taxes, including delays in filing returns or payment of tax dues, against the Company shall stand settled in accordance with the provisions of this plan as approved by NCLT.
- (v) All penalties, interest, delayed payment charges, any other liabilities for any non-compliance with applicable labour and employment Laws shall stand settled to the extent and in the manner provided in this Resolution Plan as approved by NCLT.
- (vi) Any right of subrogation, reimbursement, or recompense against the Company under any corporate guarantee, letters of comfort or similar instruments, or any obligation provided by any promoter, affiliate or Related Party of the Company shall stand extinguished and become null and void as of the NCLT Approval Date.

- (vii) Any right of any shareholder of the company under any shareholder agreement with the Company shall stand extinguished as of the NCLT Approval Date and such shareholder agreement shall stand terminated as of the NCLT Approval Date and no such shareholder shall be entitled to exercise any right including objecting to any amendment of the articles of association of the Company on and from the NCLT Approval Date.

134. Paragraph 128 (i) of the impugned order is:

*“(i) The criminal proceedings initiated against the erstwhile Members of the Board of Directors and others shall not effect the JSW-H1 Resolution Plan Applicant or the implementation of the resolution plan by the Monitoring Agency comprising of CoC and RP. We leave it open to the Members of the CoC to file appropriate applications if criminal proceedings result in recovery of money which has been siphoned of or on account of tainted transactions or fabrication as contemplated under the provisions of the Code or any other law. Those applications shall be considered in accordance with the prevalent law.”*

135. We find that the second part of para 128 (i) of the impugned order is inconsistent with para 13 of the Addendum Letter forming part of the Resolution Plan, which plan has been duly approved by the ‘Committee of Creditors’ as well as the Adjudicating Authority. With respect to the beneficiary of monies received from tainted transactions, the ‘Resolution Plan’ states as under:

*“In relation to any transactions entered into by the Company before the Insolvency Commencement Date that has been identified by the Resolution Professional as preferential, undervalued, extortionate credit transaction or fraudulent transaction under the S. 43 to 66 of the IBC and for which application is filed by the Resolution Professional with appropriate adjudicating authority under IBC (“**Identified Transactions**”), in the event such adjudicating authority orders the payment of any monies relation to such Identified Transactions to the Corporate Debtor and the Corporate Debtor has received such monies prior to the 3<sup>rd</sup> (third) anniversary of the Effective Date (“**Recovered Monies**”), then such amount of the Recovered Monies which pertain to and are prorate*

*for the period prior to the Insolvency Commencement Date shall be paid by the Corporate Debtor to the Financial Creditors which is remaining after deducting (a) any and all costs or expenses incurred by the Corporate Debtor in relation to the recovery of such Recovered Monies or for representing itself in any actions in relation to such Identified Transactions, including any appeals thereof, (b) any payments to be made by the Corporate Debtor pursuant to the avoidance of such Identified Transactions including any return or refund of any benefits availed or available by the Corporate Debtor, and (c) payment of any present or future potential taxes, levies and holdbacks (such balance of the Recovered Monies (pertaining to the period prior to the Insolvency Commencement Date and which is prorated for such period) hereinafter referred to as “**Pass Through Monies**”).”*

136. Para 13 of the Addendum Letter stipulates that in the event that the Adjudicating Authority directed that monies were to be recovered on account of the Identified Transaction, only if the ‘Corporate Debtor’ had

received such monies prior to the 3<sup>rd</sup> anniversary of the Effective Date, then the beneficiary of such monies would be the 'Committee of Creditors' on a prorata basis (after deduction of Pass Through Monies as defined in the Resolution Plan).

137. Therefore, Para 128(i) of the impugned order ought not to have modified the specific *inter se* understanding between the 'Committee of Creditors' and the Appellant on sharing of such proceeds, which has been recorded in Para 13 of the Addendum Letter and forms a part of the 'Resolution Plan'. Further, since this is a matter which relates to a commercial understanding between the 'Committee of Creditors' and the Resolution Applicant as recorded in the 'Resolution Plan', in light of **"Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478"**, such commercial understanding be given effect to, without any modification.

138. In light of the above, we set aside the condition stipulated in second part of para 128(i) of the impugned order, regarding monies recovered from tainted and other such transactions, as being contrary to the agreed position in terms of para 13 of the Addendum Letter, which forms a part of the 'Resolution Plan'.

139. There is ambiguity regarding interim management mechanism.

**Para 128(e) of the impugned order** – *“We also approve the appointment of Monitoring Agency from the date of this order until the closing date. Accordingly, the CoC and the RP would continue as Monitoring Agency”*

**Para 128(f) of the Impugned order** : *“The power of the Board of Directors of the Corporate Debtor shall remain suspended until the closing date”*

140. The ‘Resolution Plan’ as submitted by the Appellant- ‘JSW Steel Limited’ provides for the interim management mechanism as under:

**“a) Appointment of turnaround experts**

*“On and from the NCLT Approval Date and until the Effective Date, it is proposed that the Company will continue to be managed and controlled by the Reconstituted Board (defined below). The representatives of 3 (three) Approving Financial Creditors which have the largest share in the Admitted Financial Debt (and who are also members of the CoC), shall form the **Steering Committee**” which shall have the sole obligation to recommend independent persons, to the Reconstituted Board. On the NCLT Approval Date, (i) the existing board of directors of the Company*

*(the “Existing Board”) shall be deemed to have resigned and board shall stand vacated; (ii) the persons recommended by the Steering Committee shall be inducted as directors of the Company (“Reconstituted Board”); (iii) the person acting erstwhile Resolution Professional shall be appointed as a monitoring professional (“Monitoring Professional”) who shall continue to perform the duties as were discharged by the Resolution Professional during the CIRP Period (subject to decisions of the Reconstituted Board, in accordance with Applicable Law), and the Resolution Applicant and the Company shall enter into suitable contractual arrangements with the Monitoring Professional to perform the aforementioned duties; and (iv) an independent O&M contractor (identified by the CoC from a list of O&M contractors provided by the Resolution Applicant) shall be responsible for the operation and maintenance of the Company’s facilities.”*

*[Para 2(a) of Part A of the Resolution Plan at pg. 3]*



141. In para 51 of the Impugned order, the Adjudicating Authority has acknowledged the entire scheme for interim management of the 'Corporate Debtor' until the implementation of the 'Resolution Plan'. There is no observation or holding in the impugned order that such process of interim management of the 'Corporate Debtor' has not been approved or has been carved out from the scope of approval of the 'Resolution Plan'.

142. However, in view of the observations of the Adjudicating Authority in para 128(e) of the impugned order, it is stated that the 'Resolution Professional' has interpreted that the 'Resolution Plan' has been modified to such extent. It is thus clarified that :

- (i) The direction in para 128(f) of the impugned order that the existing Board of Directors shall remain suspended until the closing date is only to ensure that the previous suspended board of directors does not stand revived on account of the completion of the CIR Process, and does not interfere with the interim management mechanism in the Resolution Plan.
- (ii) The Board of Directors of the Corporate Debtor would be reconstituted as per the Resolution Plan which provides that (a) existing board stands vacated, and

- (b) the 'Reconstituted Board' may be appointed by the 'Steering Committee' comprising of the representatives of 3 (three) approving Financial creditors which have the largest share of admitted financial debt in the Committee of Creditors.
- (iii) The reference to the 'Monitoring Agency' in the impugned order may be read as a reference to the Steering Committee and the Monitoring Professional as set out in the Resolution Plan and that the implementation of the Resolution Plan until the Effective Date would be by the 'Reconstituted Board', also in terms of the Resolution Plan.
- (iv) Any actions taken by the 'Monitoring Agency' as constituted in the impugned order in interim to be deemed to have been valid, without requiring any further action/ratification from the 'Reconstituted Board' so that the operations of the Corporate Debtor during the pendency of this Appeal is not affected.

143. In so far as condition imposed by the Adjudicating Authority at paragraph 128 (k) of the impugned order is concerned, the matter requires consideration in view of the decision of the Hon'ble Supreme Court in "***Committee of Creditors of Essar Steel India Limited v.***

**Satish Kumar Gupta & Ors.—2019 SCC OnLine SC 1478**". In the said case, the Hon'ble Supreme Court held:

*"88. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the*

*successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count.”*

144. Therefore, the conditions stipulated by the Adjudicating Authority at paragraph 128(k) of the impugned order being against the provisions of law, is set aside. The Appellant being the ‘Successful Resolution Applicant’ cannot be asked to face with undecided claims after the ‘Resolution Plan’ submitted by him and accepted by the ‘Committee of Creditors’ as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully takes over the business of the ‘Corporate Debtor’, as held by the Hon’ble Supreme Court.

145. Learned counsel for the Appellant- ‘JSW Steel Limited’ submitted that ‘Bhushan Power & Steel Limited’- (‘Corporate Debtor’) has 25.6% shares in ‘Nova Iron Steel’ after approval of the plan, 25.6% of the shares of ‘Bhushan Power & Steel Limited’ now stands transferred in favour of the ‘Resolution Applicant’- ‘JSW Steel Limited’. After such transfer, the ‘Resolution Applicant’- ‘JSW Steel Limited’ cannot be treated as promoter of ‘Nova Iron Steel’. Such declaration was sought for but not clarified by the Adjudicating Authority. Therefore, we have made it clear.

146. Reliance has been placed on the decision of this Appellate Tribunal in **“JSW Steel Limited v. Ashok Kumar Gulla & Ors.– Company Appeal (AT) (Insolvency) No. 467 of 2019”**. In the said case, when similar issue was brought to the notice of this Appellate Tribunal, this Appellate Tribunal by order dated 11<sup>th</sup> December, 2019 clarified through its judgment dated 4<sup>th</sup> December, 2019 relating to such liberty. Similar prayer has been made before us.

147. Whether ‘Bhushan Power & Steel Limited’- (‘Corporate Debtor’) has 25.6% shareholding in ‘Nova Iron Steel’ is a question of fact. However, if there is any such share of ‘Bhushan Power & Steel Limited’- (‘Corporate Debtor’) in ‘Nova Iron Steel’, after approval of the plan and on acquisition of ‘Bhushan Power & Steel Limited’ by ‘JSW Steel Limited’, we hold:

(a) The Company on approval of the ‘Resolution Plan’ stand declassified as a promoter/ part of promoter group of any company or entity, including any subsidiaries or joint ventures or Associate Companies in which the ‘Corporate Debtor’ has made an investment including ‘Nova Iron Steel’ and shall not be required to follow any separate procedure for reclassification of the Company as ‘public shareholders’ of such companies.

(b) If the ‘Corporate Debtor’ has any right over ‘subsidiary companies’, ‘associate companies’, ‘joint venture companies’ of the ‘Corporate Debtor’, once ‘Successful Resolution Applicant’ (‘JSW

Steel Limited') takes over the 'Corporate Debtor', it will be open to the 'Corporate Debtor' to decide whether it will continue with such right of 'subsidiary companies', 'associate companies', 'joint venture companies' or any other companies in which 'Corporate Debtor' has share.

(c) It is further ordered that the company on approval of the 'Resolution Plan' shall stand declassified as promoter/ part of promoter/ group of promoter of any company or entity, including any 'subsidiaries companies', 'associate companies', 'joint venture companies' including 'Nova Iron Steel' in which 'Corporate Debtor' has made an investment and it is not required to follow any separate procedure for reclassification of the company as "shareholders of such companies".

148. The impugned Judgment dated 5<sup>th</sup> September, 2019 passed by the Adjudicating Authority approving the plan submitted by 'JSW Steel Limited' is approved with aforesaid modification/ clarification as made above. The order of stay of implementation of the plan stands vacated. The approved plan be given effect immediately in the manner as ordered by the Adjudicating Authority and modified/ clarified by this Appellate Tribunal.

149. The appeal preferred by 'JSW Steel Limited' is allowed. The appeals preferred by 'Mr. Sanjay Singal', 'Kalyani Transco', 'Jaldhi Overseas Pte.

Ltd.', 'Medi Carrier Pvt. Ltd.', 'CJ Darcl Logistics Ltd.' and 'State of Odisha & Ors.' are dismissed.

150. For the reasons aforesaid, the application for impleadment of Mrs. Aarti Singal, equity shareholder and guarantor of the 'Corporate Debtor' is also rejected.

151. However, the Judgment passed by the Adjudicating Authority (National Company Law Tribunal) and this Appellate Tribunal will not come in the way of the Directorate of Enforcement or the 'Serious Fraud Investigation Office' or the 'Central Bureau of Investigation' to proceed with investigation or to take any action in accordance with law against erstwhile promoters, officers and others of the 'Corporate Debtor'. No costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

NEW DELHI

17<sup>th</sup> February, 2020

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