NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 551 of 2020

(Arising out of Order dated 20th January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai in MA/1250/2019 & MA/780/2019 in CP/280/IB/2018)

IN THE MATTER OF:

Shaji Purushothaman,
No.346-A, Pantheon Road,
Egmore, Chennai- 600008 ....Appellant

Versus

1. S. Rajendran
RP of M/s. Empee Distilleries Limited
No.188/87, 2nd Floor, Evlappan Mansion,
Habibullah Road, (Near Kodambakkam Rly Stn.)
T. Nagar, Chennai-600017

2. Union Bank of India
Rep. by its AGM, Mr. Renjith Swaminathan
Industrial Finance Bank,
Union Bank Bhawan, 1st Floor,
139, Broadway, Chennai- 600108

3. Andhra Bank
Rep. by its AGM, Mr. V. Gurusubramaniam
Andhra Bank
Mount Road Branch
95, Anna Salai, Mount Road, Chennai- 600 002

4. IFCI Factors Limited
Rep. by its VP, Mr. V.S. Ramesh Babu
2nd Floor, 142, Mahatma Gandhi Road,
Nungambakkam,
Chennai- 600 034

5. SBI Global Factors Limited
Rep. by its VC-Mumbai, Mr. Vishal Varma
6th Floor, Metropolitan Building,
Bandra-Kurla Complex, Bandra (E),
Mumbai- 400 051

6. IDBI Trusteeship Services Limited
Rep. by its SVP (EAAA) (VC-Mumbai),
Mr. Navin Sambtani,
Asian Building, Ground Floor
17, R. Kamani Marg, Ballard Estate,
Mumbai- 400 001

7. Edelweiss Asset Reconstruction Company Limited
Rep. by its SVP (VC-Mumbai), Ms. Nivedita Shetty
Edelweiss House
Off CST Road, Kalina
Mumbai- 400 098

8. M/s. SNJ Distilleries Pvt. Ltd.
Represented by its Director,
Ms. Geetha Jayamurugan
Old No. 47, New No.99,
Canal Bank Nagar, CIT Nagar,
Nandanam, Chennai- 600 035 **.....Respondents**

Present:

For Appellant:	**Mr. Kapil Sibal, Senior Advocate with Mr. Karuppaiah Meyyappan and Ms. Vibha Datta, Advocates.**
For Respondents:	**Dr. Abhishek Manu Singhvi, Senior Advocate with Mr. Kartik Seth, Advocate for R-1.**
	Mr. Avrojyoti Chatterji and Mr. Rajiv S. Roy, Advocates for R-2.
	Mr. Arun Kathpalia and Mr. P.H. Arvindh Pandian, Senior Advocates with Mr. Ajith S. Ranganathan, Mr. Ankur Kashyap, Mr. Avinash Krishnan Ravi and Mr. Rohit Rajershi, Advocates for R-8.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant is the Promoter/ Director of 'M/s. Empee Distilleries Limited'- ('Corporate Debtor'). He is aggrieved of the impugned order

dated 20th January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Division Bench, Chennai by virtue whereof the Adjudicating Authority allowed MA/780/2019 in CP/280/IB/2018 approving the Resolution Plan of 'SNJ Distilleries Limited'- (Successful Resolution Applicant) and dismissed MA/1250/2019 in CP/280/IB/2018 filed by the Promoter/ Director, seeking direction in the name of 'Financial Creditors' as also 'Union Bank of India' to submit Form FA in regard to the Settlement Plan to the Resolution Professional and Committee of Creditors, on the ground that the Promoter/ Director had failed to comply with the direction of this Appellate Tribunal and the Hon'ble Apex Court.

2. For better understanding of the controversy involved in this appeal, it is apt to have comprehensive view of the factual matrix of the subject matter. An application came to be filed by the Union Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code', for short) for initiating Corporate Insolvency Resolution Process qua 'M/s. Empee Distilleries Limited'- ('Corporate Debtor'). The Adjudicating Authority, Chennai Bench vide order dated 1st November, 2018 admitted the application of 'Union Bank of India'- (Financial Creditor) which was upheld by the Hon'ble Apex Court.

3. It is contended on behalf of the Appellant that the Appellant's Settlement Plan, in terms of liberty granted by this Appellate Tribunal and subsequently confirmed by the Hon'ble Apex Court has not been

considered by the Adjudicating Authority in terms of the liberty granted which envisaged substantial consideration of the Settlement Plan and its comparison with the approved Resolution Plan. It is submitted that the Adjudicating Authority has dismissed the Appellant's application on procedural non-compliance which could not be attributed to the Appellant. It is further submitted on behalf of the Appellant that the Settlement Plan was submitted to Union Bank of India on 30th November, 2019 well within the period prescribed by the Hon'ble Apex Court. It is submitted that the Union Bank of India which had given to understand that it had not appropriated the amount of Rs. 12.65 Crores paid to it was requested to provide a bank guarantee for the Corporate Insolvency Resolution Process expenses, however, Union Bank of India altered its stance later claiming that they had accepted the Manager's Cheque 23rd July, 2019 towards full and final settlement. Since it was a Saturday, Appellant requested for one working day to provide the Bank Guarantee which was denied arbitrarily and it was misrepresented to Appellant that the plan may be presented before the Committee of Creditors on 4th November, 2019. However, in its 11th Committee of Creditors' meeting no Form FA & BG was submitted by Union Bank of India and no cohesive decision was taken on plan giving an impression that subsequent meetings would be held to consider the said plan. It is further submitted that the Committee of Creditors and the Resolution Professional refused to compare the two plans and made unreasonable demands from the Appellant. It is further contended that

the Settlement Plan of Rs. 513 Crores is better than Resolution Plan of Rs.475 Crores. It is further submitted that Section 12A provides primacy of consideration of settlement plan given by the promoters, to a Resolution Plan or Liquidation. It is submitted that the Committee of Creditors does not have the last word and if the Committee of Creditors arbitrarily rejects a settlement plan, the Adjudicating Authority and this Appellate Tribunal can set aside such decision under Section 60 of the 'I&B Code'. By virtue of the summary dismissal of MA/1250/2019 liberty granted by this Appellate Tribunal and the Hon'ble Apex Court to the promoters for substantial consideration and comparison of their settlement plan, has been arbitrarily nullified. It is further submitted that the settlement plan of Appellant met all the parameters and could not be rejected on technical grounds without consideration of the merits of the plan. As regards the Resolution Plan of Successful Resolution Applicant, it is submitted that the mandatory procedure laid down in ***"Vijay Kumar Jain v. Standard Chartered Bank & Ors.- (2019) SCC OnLine SC 103"*** was violated and the suspended board was not allowed representation in the meeting approving the same. It is submitted that the declared net worth of the Successful Resolution Applicant is Rs.182.45 Crores whereas the proposed amount under the Resolution Plan is Rs.475 Crores. It is contended that the proposed payments may be made by infusing tainted and unaccounted money thereby violating the fiscal laws. It is further submitted that the shares of 24,000 public shareholders making of 38% of the paid up capital are

sought to be unilaterally delisted without any consideration in terms of the Resolution Plan but there is no such provision in the Settlement Plan of the Appellant. Furthermore, the subsidiaries of the Corporate Debtor are sought to be taken over in contravention of law. Certain instances of discrimination, bias and material irregularity towards the Resolution Applicant and Resolution Plan towards promoter and Settlement Plan have been pointed out which are in regard to general conduct of Resolution Professional during Committee of Creditors meetings, on request for additional time and compliance of order and proceedings of this Appellate Tribunal and of the Hon'ble Apex Court. Learned counsel for the Appellant tried to point out some circumstances projecting it as procedural irregularity on the part of the Adjudicating Authority and lack of jurisdiction while pronouncing the impugned order which pertain to publication of orders in regard to constitution of Benches and notification/ listing of matters before the Bench. It is contended that this has resulted in serious prejudice to the Appellant. It is contended that the Resolution Plan is to be approved by the Adjudicating Authority within 15 days from receipt of the application whereas the impugned order has been pronounced after 63 days after reserving the same. Exception has been taken to the conduct of the Acting President in issuing orders arbitrarily transferring members and constituting Benches which is stated to be called in question by other Judicial Members by way of Writ Petition which is pending consideration before the Hon'ble High Court of Delhi.

4. Per contra, it is argued on behalf of Respondent No.1 that the instant appeal filed on 12th March 2020 is hit by limitation in-as-much-as the date of filing of appeal is 46th day from the date of receiving of the certified copy of the impugned order i.e. 27th January, 2020. It is further submitted that the Appellant has time and again tried to scuttle the Corporate Insolvency Resolution Process. Four instances have been delineated in the flow chart commencing from initiation of Corporate Insolvency Resolution Process till pronouncement of impugned order to demonstrate the conduct of Appellant in exploiting the legal process. It is submitted that the Settlement Plan of the promoters of the Corporate Debtor was not submitted in Form FA accompanied with requisite Bank Guarantee as per Regulation 30A (2) of the IB Regulations, 2016 for withdrawal of application under Section 12A of the 'I&B Code'. Besides no credible source of funds was provided for the Settlement Plan. It is further submitted that the Settlement Plan sought concession, relief, deemed consent and approvals though the same was not a Resolution Plan. It is further submitted that after comparison of the Settlement Plan with the Resolution Plan, the Committee of Creditors arrived at the unanimous decision that the Resolution Plan was better than the Settlement Plan and the Settlement Plan was not acceptable to it. It is submitted that the Union Bank of India had taken stand in Committee of Creditors' meeting on 4th November, 2019 that it had neither appropriated the amount of Rs. 12.65 Crores nor accepted it as full and final settlement of all the dues of the Appellant and had kept the

amount in sundry account. It is further submitted that the same has no relevance to the present case as the rejection of the Settlement Plan was not limited to the requirement of bank guarantee but to the structure of the Settlement Plan. It is submitted that there was no formal voting but the Settlement Plan was rejected by the Committee of Creditors unanimously. As regards implementation of the Resolution Plan, it is submitted that the first meeting of the Monitoring Committee was held on 27th January, 2020. Resolution Plan amount being Rs.475 Crores, about Rs.150 Crores was received from Successful Resolution Applicant and disbursed on 27th and 28th January, 2020. Delisting of shares have taken place and same is in the final stage of getting a confirmation. Operational Creditors have been paid 80% towards their admitted dues in priority over the Financial Creditors who have been paid about 56.71% towards their total admitted dues. 100% payment towards the dues of VAT Department has been paid except the deferred payment of Rs.90 Crores as per the terms of the plan. As on 25th June, 2020, the total inflow of funds is to the tune of Rs.245 Crores approx. It is submitted that the Successful Resolution Applicant has commenced operations at the Corporate Debtor's plants with amount of Rs.10 to 20 Crores approx. being invested towards renewal of licences etc. and the operations are being conducted under the supervision of the Monitoring Committee with Respondent No.1 (Resolution Professional) as its Head.

5. Learned counsel for the Successful Resolution Applicant submitted that the appeal having been filed on 46th day computed from

the date of receipt of the certified copy of impugned order is hit by limitation and the appeal deserves to be dismissed on this ground alone. This is apart from the fact that the Appellant has failed to demonstrate that there was sufficient cause for filing the appeal beyond 30 days. Responding to allegations of Appellant in regard to allegation of impugned order being vitiated due to unlawful 'pronouncement' of the impugned order by the Adjudicating Authority, it is submitted that the Writ Petition No. 1926 of 2020 filed in this regard by the Appellant came to be dismissed by the Hon'ble Madras High Court on 19th March, 2020 and appeal preferred therefrom was dismissed by the Hon'ble Apex Court on 10th June, 2020. It is submitted that the Appellant has preferred the appeal during the continuation of the stay granted by the Hon'ble High Court which is abuse of process of the court and the delay does not deserve to be condoned. It is further submitted that multiple litigations have been filed by the Appellant to stall the approved Resolution Plan. Reference is made to 13 different litigations in connection with the Corporate Insolvency Resolution Process under the ruse of a settlement offer. It is submitted that the settlement offer emanating from a Promoter and Managing Director of the Corporate Debtor is an attempt of defeating the Resolution Process when the Resolution Plan of the Successful Resolution Applicant has been approved by 100% vote shares of the Committee of Creditors members. It is further submitted that expression of interest was invited twice and on both occasions the Resolution Applicant was directed to improve its

offer in comparison to the competing bidders. Finally the Resolution Plan was approved unanimously on 04th November, 2020. Approval from the Adjudicating Authority came on 20th January, 2020 i.e. after almost 15 months since initiation of Corporate Insolvency Resolution Process, delay having been occasioned on multiple occasions by the Appellant. It is further submitted that the Settlement Plan of the Appellant has been unanimously rejected by the Committee of Creditors after substantive application of mind. It is submitted that the Resolution Plan was found to be better upon its comparative analysis and comparison with the settlement offer. It is further pointed out that the settlement offer neither disclosed the source of funds nor was clear in regard to instalment plans for payment of Rs.124 Crores towards tax liabilities. Moreover, it contains clauses like "waivers", "reliefs and concessions" which are peculiar only to Resolution Plan. It is submitted that these relevant issues were considered in Committee of Creditors meeting on 04th January, 2020 in presence of the representatives of the Appellant and the decision regarding rejection of the Settlement Plan for reasons recorded is based on merit after reaching a subjective satisfaction that the Resolution Plan is better. This commercial wisdom of Committee of Creditors cannot be reviewed unless in exceptional circumstances which do not exist in this case. It is submitted that the Committee of Creditors has substantively applied its mind towards approval of the Successful Resolution Plan and the Settlement Plan has been rejected substantively. It is submitted that the Resolution Plan is

viable and takes care of all stakeholders' interest. It also maximises the assets of the Corporate Debtor. It is submitted that nearly 51% of the monies owed under the Resolution Plan stand paid and with part payments having been made to all creditors and Rs.275 Crores invested by Successful Resolution Applicant, the plan stands implemented and substantial commercial arrangements for commencing operations in the plants of the Corporate Debtor have been made.

6. Heard learned counsel for the parties at length and perused the relevant record.

7. The issues arising for consideration in this appeal are formulated as under:

(i) Whether the appeal is barred by limitation?

(ii) Whether the Settlement Plan of the Corporate Debtor has been improperly rejected and Resolution Plan of Respondent No.8 has been approved overlooking the illegalities/flaws?

Issue No.1

8. Section 61(1) of the 'I&B Code' providing for preferring of an appeal by the aggrieved person against an order passed by the Adjudicating Authority under Part II of the 'I&B Code' which *inter alia* includes orders passed in regard to approval of the Resolution Plan, prescribes a period of 30 days for filing of such appeal. This period is extendable by 15 days if this Appellate Tribunal is satisfied that there

was sufficient cause for not filing the appeal within the prescribed period. It is indisputable that the period of limitation prescribed under Section 61(2) is a special provision which overrides the provisions of Companies Act dealing with appeals and period of limitation prescribed therein. A plain reading of the provisions contained in Section 61(2) makes it amply clear that ordinarily an appeal preferred against an order of the Adjudicating Authority under Part-II of the 'I&B Code' is required to be filed within 30 days and only in exceptional circumstances when this Appellate Tribunal is satisfied that Appellant was prevented by any sufficient cause from preferring the appeal that the period of limitation can be extended but such period shall not exceed 15 days. Therefore, it has to be seen whether the appeal, if not preferred within the prescribed period of 30 days, has been preferred within the extended period of 45 days and if so, whether the explanation offered for delay in preferring the appeal does constitute a sufficient cause which prevented the Appellant from preferring the appeal within the prescribed period of 30 days. Under no circumstances an appeal can be preferred beyond 45 days and taking of cognizance of such appeal would be without jurisdiction. This Appellate Tribunal has consistently been of the view that appeals preferred under this Part beyond extended period of 45 days would be barred by limitation and this Appellate Tribunal will have no jurisdiction to entertain and hear such appeal. The question arising for consideration is which is the date relevant for computing of the period of limitation. Admittedly, in this

case, the impugned order was pronounced on 20th January, 2020 and the Appellant herein was a party to proceedings before the Adjudicating Authority. Therefore, knowledge of the impugned order is imputable with reference to the date of pronouncement of the impugned order. However, Section 420 of the Companies Act, 2013 prescribed the manner in which the National Company Law Tribunal (Adjudicating Authority) is to pass order. Sub-section (3) thereof mandates that the Tribunal shall send a copy of every order passed under this Section to all the parties concerned. The National Company Law Tribunal Rules 2016 also stipulates supply of free copy of the order to the parties. Based on interpretation of provisions contained in Section 61 of the 'I&B Code' read in juxtaposition with Section 420 of the Companies Act, 2013, this Appellate Tribunal held in ***"Mahendra Trading Company & Ors. v. Hindustan Controls and Equipment Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 97 of 2018"*** decided on 25th November, 2019 that the period of limitation is to be computed from the date free certified copy of the order passed by the Adjudicating Authority is provided to the party. This view holds the field till date. It is, therefore, manifestly clear that the period of limitation for filing appeal has to be counted with effect from the date certified copy of the impugned order was received by the Appellant viz. 27th January, 2020 and not with effect from the date of impugned order viz. 20th January, 2020. Admittedly, the appeal was filed on 12th March, 2020. Therefore, excluding the date of receipt of certified copy of the impugned order by

Appellant and the date of filing of appeal, it is unambiguously clear that only 44 days have been consumed in preferring the appeal. Viewed thus objection in regard to appeal being filed beyond the extended period of limitation has no substance and the same is overruled.

9. Yet another aspect of this issue is whether the Appellant has carved out a sufficient cause for condoning the delay of 14 days and for extension of period of 14 days beyond the prescribed period of 30 days in filing the appeal. It is not in controversy that the Corporate Insolvency Resolution Process under the 'I&B Code' is a time bound process and strict compliance of the timelines and adherence to the Schedule in terms of the prescribed Regulations has to be insisted upon. In the instant case, the Appellant received the copy of the impugned order on 27th January, 2020. It is brought to our notice that on the same day the Appellant filed Writ Petition No. 1926/2020 before the Hon'ble High Court of Madras though in para 10 of the Memo of Appeal the Appellant has declared that he has not previously filed any Writ Petition with regard to the impugned order. Same is true in respect of para 6 of the Memo of Appeal wherein the Appellant has declared that the appeal is filed within the prescribed time from the date of uploading of impugned order. This speaks of gross carelessness in drafting the appeal. However, at page 247 of the appeal paper book, there is an application for condonation of delay. An endeavour has been made to highlight in written submissions the factum of impugned order having been uploaded on the website on 25th January, 2020,

certified copy having been issued on 27th January, 2020, Writ Petition 1926 of 2020 having been filed before the Hon'ble High Court of Madras on the same day wherein stay was granted on further proceeding on 30th January, 2020 which came to be vacated with dismissal of the Writ Petition on 19th March, 2020. Though an efficacious remedy was available in the form of statutory appeal under 'I&B Code', it cannot be disputed that the substantive remedy in the form of Writ Petition filed on the very day of communication of the impugned order, followed by stay of proceedings and dismissal of the Writ Petition would bring the matter within the fold of remedy being pursued in exercise of legitimate right warranting its exclusion while computing the limitation and once it is recognised as a ground for extension of limitation within the ambit of Sections 14 and 15 of the Limitation Act, 1963, sufficient cause for condonation of delay can safely be said to have been made out for purposes of extension of time within the purview of Section 61(2) of the 'I&B Code'. Objection raised on this score is accordingly repelled and extension of 14 days in preferring the appeal is allowed.

Issue No.2

10. Fathoming through the depths of judicial record, it comes to fore that the Corporate Debtor was admitted into Corporate Insolvency Resolution Process as a sequel to admission of application of Union Bank of India under Section 7 of the 'I&B Code'. This happened on 1st November, 2018. Appeal carried to this Appellate Tribunal failed.

However, the Appellant, failing aggrieved, approached the Hon'ble Supreme Court where it expressed its willingness to clear the outstanding dues of the Financial Creditor within 15 days. The Hon'ble Apex Court passed order dated 14th June, 2019 granting liberty to the Appellant to move an application within two weeks before the Adjudicating Authority. Meanwhile, Appellant, claiming to have settled the matter with Union Bank of India and other Financial Creditors moved a Miscellaneous Application seeking setting aside of order of admission dated 1st November, 2018. By virtue of order dated 29th July, 2018, the Adjudicating Authority declined to set aside the order of admission with observations that settlement with all the Creditors with approval of 90% of the voting shares of the Committee of Creditors would be the proper course to be adopted within the mechanism of Section 12A subject to filing of an application by the Union Bank of India for withdrawal of application under Section 7 of the 'I&B Code'. The order dated 29th July, 2019 passed by the Adjudicating Authority came to be assailed before this Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 921 of 2019 which was decided on 6th September, 2019 against the Appellant with observations that there was no illegality in the impugned order. However, this Appellate Tribunal granted liberty to the Appellant to move an application under Section 12A for settling the claims of all the creditors including the guarantors. This Appellate Tribunal, taking note of the submissions made on behalf of the Financial Creditor- Union Bank of India that the Resolution Plan

has already been approved by the Committee of Creditors, further observed:-

> *"9. If an application u/s 12A is filed by the Appellant, the 'Committee of Creditors' may decide as to whether the proposal given by the Appellant for settlement in terms of Section 12A is better than the Resolution Plan as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the 'Committee of Creditors', we are not expressing any opinion on the same.*
>
> *The appeal stands disposed of. No costs."*

11. It is manifestly clear that while the appeal was dismissed on merit, this Appellate Tribunal granted liberty to move an application under Section 12A for settlement of dues of all creditors and guarantors leaving it to be decided by the Committee of Creditors as to whether Appellant's settlement proposal filed through the mechanism of Section 12A is better than the Resolution Plan as approved by it. It is free from doubt that such exercise was to be conducted by the Committee of Creditors after it had voted upon and approved the Resolution Plan of Respondent No.8 which implies that the already approved Resolution Plan by Committee of Creditors was subjected to a comparison with the settlement proposal emanating from the Appellant within the mechanism of Section 12A and the Committee of Creditors was required

to conduct an exercise in this regard. Admittedly, no application for withdrawal was filed by the Financial Creditor under Section 12A of the 'I&B Code'. The order passed by this Appellate Tribunal on 6th September, 2019 in Company Appeal (AT) (Insolvency) No. 921 of 2019 appears to have been assailed before the Hon'ble Apex Court in Civil Appeal No. 7591 of 2019. Vide order dated 4th October, 2019, the Hon'ble Apex Court, while issuing notice, directed *status quo* to be maintained. Subsequently, on 18th October, 2019, the appeal came to be dismissed. However, liberty given by this Appellate Tribunal was extended for two weeks. It is not in dispute that the Settlement Plan came to be submitted by the Appellant on 30th October, 2019. Letter issued by the Union Bank of India on 1st November, 2019 and addressed to the Appellant forming Page 137 (Annexure-A15) of the appeal paper book records the factum of the Union Bank of India having accepted offer of Rs.12.65 Crores by way of Manager's cheque dated 23rd July, 2019 drawn on HDFC Bank towards full and final settlement of dues payable by the Appellant, albeit with the assurance that Appellant will settle the dues with other creditors. However, the Bank has declined to accept the request of Appellant to issue Bank Guarantee for Rs.10.79 Crores towards Corporate Insolvency Resolution Process cost from the amount received, same being not in consonance with its stand before this Appellate Tribunal and the Hon'ble Apex Court. Page 138 of the appeal paper book is the communication from the Appellant to the Resolution Professional requesting for re-

scheduling the meeting of Committee of Creditors from 4th November, 2019 to 15th November, 2019 to enable it to participate in the meeting while submitting that to discharge its obligation of arranging the Bank Guarantee it was raising money by redemption of investments which was likely to be settled by 4th November, 2019 and he undertook to transfer Rs.10.79 Crores towards Corporate Insolvency Resolution Process cost to Union Bank of India to facilitate issuance of Bank Guarantee as mandated under Corporate Insolvency Resolution Process Regulations. It further emerges from Page 152 (Annexure-A18) that only a Settlement Plan dated 30th October, 2019 as submitted by the promoters of 'M/s. Empee Distilleries Limited' to Union Bank of India was forwarded to Resolution Professional and the requisite Form FA along with Bank Guarantee for Rs. 10.79 Crores towards Corporate Insolvency Resolution Process cost were not received by the Resolution Professional. It further emerges from the Minutes of 11th meeting of the Committee of Creditors that no source of funds were provided for in the Settlement Plan and Rs.124 Crores stated as payment in "12 instalments" was not stated to be in monthly or weekly or quarterly or annual instalments. Since some more time was sought and the Appellant requested for postponement of the Committee of Creditors meeting, the Committee of Creditors, keeping in view the direction of the Hon'ble Apex Court, declined the request as the two weeks' time to present the Settlement Plan ended on 1st November, 2019. The Committee of Creditors concluded that there was no application as per

Section 12A received from the Union Bank of India (Financial Creditor) along with the requisite Bank Guarantee and the plan presented by the promoters had no specific source of funds for the settlement of the dues. Thus, after detailed discussion and deliberation, the Settlement Plan submitted by promoters of Corporate Debtor to the Union Bank of India was not put to voting. It took a unanimous decision that the Settlement Plan of the promoter was not acceptable and asked Resolution Professional to place the decision before the Adjudicating Authority. Viewed in this context it can safely be stated that the plea of non-consideration of Settlement Plan by the Committee of Creditors within the prescribed parameters of law is without substance.

12. In ***"Swiss Ribbons Pvt. Ltd. v. Union of India- (2019) 4 SCC 17"***, the Hon'ble Apex Court while dealing with constitutionality of Section 12A of the 'I&B Code' observed that under Section 60 of the 'I&B Code', the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a **just** settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision. Emphasis has been laid on these observations of the Hon'ble Apex Court to buttress the arguments on behalf of the Appellant that the Settlement Plan of Appellant, which met all the parameters was rejected on technical grounds without considerations of the merits of the plan. This argument is misplaced as the Settlement Plan has been unanimously rejected by the Committee of Creditors after due deliberations and application of mind. Note dated

31st October, 2019 submitted by the Resolution Professional in regard to comparison of the Successful Resolution Plan with the Settlement offer of the Appellant forming Pages 142-151 of the appeal paper book clearly brings it to fore that upon completing analysis, Resolution Plan was found better than the Settlement offer. Three reasons assigned for non-acceptance of the Settlement offer, as already noticed, are that it did not disclose source of funds besides being ambiguous in regard to instalments plan for payment of Rs.124 Crores towards tax liabilities and for containing waivers and reliefs etc. like that of a Resolution Plan which could not be the conditions incorporated in a Settlement offer. The Settlement Plan was rejected by the Committee of Creditors in presence of the representatives of the Appellant in its meeting dated 4th November, 2019. Wading through pages 152-163 of the appeal paper book, it emerges that apart from the procedural non-compliances, the Settlement Plan submitted by the Appellant was found not to be better in comparison to the Successful Resolution Plan submitted by the Respondent No.8. Thus, there can be no hesitation in holding that the Settlement Plan was rejected by the Committee of Creditors on merits and upon comparison with the Successful Resolution Plan which was found to be better. The allegation emanating from the Appellant that the Settlement Plan was rejected by the Committee of Creditors on mere technicalities cannot be accepted.

13. Now dealing with the aspect of alleged illegality and flaws in the Resolution Plan submitted by the Respondent No.8, be it seen that the

Appellant has tried to portray the Successful Resolution Applicant as a person whose declared net worth is Rs. 182.45 Crores only whereas the Resolution Plan is for Rs. 475 Crores. It is contended that the proposed payments may be managed through infusion of tainted and unaccounted money. This is a bald statement and a mere speculation. There are ample methods of raising funds through legitimate means. It is further submitted on behalf of the Appellant that 24,000 public shareholders contributing 38% of the paid-up capital would get delisted without consideration while their deemed approval for delisting has been obtained in terms of the Resolution Plan. This is not a legal flaw and no prejudice can be claimed by Appellant on this score. Moreover, it is pointed out that the subsidiaries of the Corporate Debtor are sought to be taken over in conflict with law. No material has been placed on record to substantiate such allegation.

14. Approval of a Resolution Plan is essential a business decision resting upon the commercial wisdom of the Committee of Creditors which is ordinarily not justiciable. In ***"K. Sashidhar Vs. Indian Overseas Bank and Ors.- 2019 (12) SCC 150"***, the Hon'ble Supreme Court held:

> "***52.*** *As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction*

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

provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

53. *In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to CoC to evaluate the various possibilities and make a decision. It has been observed thus:*

> *"The key economic question in the bankruptcy process*
>
> *When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.*
>
> *The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or*

judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

(emphasis supplied)

54. *The report also highlights that having timelines is the essence of the resolution process. It then refers to the principles driving the design of the new insolvency bankruptcy resolution framework. While dealing with this aspect, it is noted that the Code would facilitate the assessment of the viability of the enterprise at a very early stage. The relevant extract of the report reads thus:*

"Principles driving the design

The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

(1) The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

(2) The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

(3) The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

(4) The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

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IV. The Code will ensure a collective process.

(9) The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the

negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

(10) The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

(11) The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.…"

(emphasis supplied)

55. *Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational*

creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

56. *For the same reason, even the jurisdiction of Nclat being in continuation of the proceedings*

would be circumscribed in that regard and more particularly on account of Section 32 of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code. Section 61(3) of the I&B Code reads thus:

> *"**61. Appeals and appellate authority**.—(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the adjudicating authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*
>
> *(2) ****
>
> *(3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely—*
>
> *(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
>
> *(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
>
> *(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*
>
> *(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or*

(v) the resolution plan does not comply with any other criteria specified by the Board."

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

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

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

59. *In our view, neither the adjudicating authority (NCLT) nor the appellate authority (Nclat) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per*

cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection."

In ***"Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta- 2019 SCC OnLine SC 1478"***, the Hon'ble Supreme Court held:

*"**Role of the committee of creditors in the corporate resolution process***

***33.** Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the*

Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Thus, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor. "Financial creditors" are defined in Section 5(7) of the Code as meaning persons to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. "Financial debt" is then defined in Section 5(8) of the Code as meaning a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Secured creditor" is separately defined in Section 3(30) of the Code as meaning a creditor in favour of whom a security interest is created and "security interest" is defined by Section 3(31) as follows:

> *"3. **Definitions**. - In this Code, unless the context otherwise requires. -*
>
> *xxx xxx xxx*
>
> *(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or*

arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

34. *It is settled by several judgments of this Court that in order to trigger application of the Code, a neat division has been made between financial creditors and operational creditors. It has also been noticed in some of our judgments that most financial creditors are secured creditors and most operational creditors are unsecured creditors. The rationale for only financial creditors handling the affairs of the corporate debtor and resolving them is for reasons that have been deliberated upon by the BLRC Report of 2015, which formed the basis for the enactment of the Insolvency Code.*

35. *At this juncture, it is important to set out the relevant extracts from the aforementioned report:*

"2. ***Executive Summary***

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The key economic question in the bankruptcy process

xxx xxx xxx

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they

hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.

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5. ***Process for legal entities***

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Business decisions by a creditor committee

All decisions on matters of business will be taken by a committee of the financial creditors. This includes evaluating proposals to keep the entity as a going concern, including decisions about the sale of business or units, retiring or restructuring debt. The debtor will be a non-voting member on the creditors committee, and will be invited to all meetings. The voting of the creditors committee will be by majority, where the majority requires more than 75 percent of the vote by weight.

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No prescriptions on solutions to resolve the insolvency

The choice of the solution to keep the entity as a going concern will be voted on by the creditors committee. There are no constraints on the proposals that the Resolution

Professional can present to the creditors committee. Other than the majority vote of the creditors committee, the Resolution Professional needs to confirm to the Adjudicator that the final solution complies with three additional requirements. The first is that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments. Secondly, the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented. Lastly, the plan should comply with existing laws governing the actions of the entity while implementing the solutions.

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5.3.1 ***Steps at the start of the IRP***

4. ***Creation of the creditors committee***

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75 percent of the creditors committee by weight of the total financial liabilities. The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained…The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The

Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.

5.3.3 ***Obtaining the resolution to insolvency in the IRP***

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going

concern. The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market."

(emphasis supplied)

36. *The aforesaid extracts follow what is stated in the UNCITRAL Legislative Guide which prescribes as follows:*

*"**2.** Nature or form of a plan*

*3. The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved. Some creditors, such as major customers or suppliers, may prefer continued business with the debtor to rapid repayment of their debt. Some creditors may favour taking an equity stake in the business, while others will not. Typically, therefore, there is a range of options from which to select in a given case. **If an insolvency law adopts a prescriptive approach to the range of options available or to the choice to be made in a particular case, it is likely to be too constrictive**. It is*

desirable that the law not restrict reorganization plans to those designed only to fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity. ***A nonintrusive approach that does not prescribe such limitations is likely to provide sufficient flexibility to allow the most suitable of a range of possibilities to be chosen for a particular debtor.***

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20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation*. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation).”*

(emphasis supplied)

37. *Section 24 of the Code deals with meetings of the Committee of Creditors. Though voting on the approval of a resolution plan is only with the financial creditors who form the Committee of Creditors, yet the resolution professional is to conduct the aforesaid meeting at which members of the suspended board of directors may be present, together with one representative of operational creditors, provided that the aggregate dues owed to all operational creditors is not less than 10% of the entire debt owed - see Sections 24(2), (3) and (4) of the Code. Voting shall be in accordance with the voting share assigned to each financial creditor, which is based on the financial debts owed to such creditors - see Section 24(6) of the Code.*

38. *Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors. Section 28 of the Code is important and is set out hereinbelow:*

> *"28.* ***Approval of committee of creditors for certain actions***
>
> *(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take*

any of the following actions without the prior approval of the committee of creditors namely:—

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under subsection (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

39. *Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.*

40. *Regulation 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the Committee of Creditors. The quorum at the meeting is fixed by Regulation 22, and the conduct of the meeting is to take place as under Regulation 24. Voting takes place under Regulation 25 and 26. Most importantly, Regulation 39(3) states:*

"39. ***Approval of resolution plan***

xxx *xxx* *xxx*

(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit

Provided that the committee may approve any resolution plan with such modifications as it deems fit."

41. *This Regulation fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.*

42. *In K. Sashidhar (supra), the role of the Committee of Creditors in the corporate resolution process was laid down by this Court thus:*

*"**20.** The CoC is constituted as per Section 21 of the I&B Code, which consists of financial creditors. The term 'financial creditor' has been defined in Section 5(7) of the I&B Code to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. Be it noted that the process of insolvency resolution and liquidation concerning corporate debtors has been codified in Part II of the I&B Code, comprising of seven Chapters. Chapter I predicates that Part II shall apply in matters*

relating to the insolvency and liquidation of corporate debtor where the minimum amount of default is Rs. 1,00,000/-. Section 5 in Chapter I is a dictionary clause specific to Part II of the Code. Chapter II deals with the gamut of procedure to be followed for the corporate insolvency resolution process. For dealing with the issue on hand, the provisions contained in Chapter II will be significant. From the scheme of the provisions, it is clear that the provisions in Part II of the Code are self-contained code, providing for the procedure for consideration of the resolution plan by the CoC.

21. The stage at which the dispute concerning the respective corporate debtors (KS&PIPL and IIL) had reached the adjudicating authority (NCLT) is ascribable to Section 30(4) of the I&B Code, which, at the relevant time in October 2017, read thus:

*"**30(4)**- The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors."*

22. If the CoC had approved the resolution plan by requisite percent of voting share, then as per Section 30(6) of the I&B Code, it is imperative for the resolution professional to submit the same to the adjudicating authority (NCLT). On receipt of such a proposal, the adjudicating authority (NCLT) is required to satisfy itself that the resolution plan as approved by CoC meets

the requirements specified in Section 30(2). No more and no less. This is explicitly spelt out in Section 31 of the I&B Code, which read thus (as in October 2017):

*"**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 subsection(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, guarantors and other stakeholders involved in the resolution plan.*

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

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39. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an

intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable."

43. *The importance of the majority decision of the Committee of Creditors is then stated in Section 31(1) of the Code which is set out 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, guarantors and other stakeholders involved in the resolution plan."

44. *Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.*

Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

45. *As has already been seen hereinabove, it is the Adjudicating Authority which first admits an application by a financial or operational creditor, or by the corporate debtor itself under Section 7, 9 and 10 of the Code. Once this is done, within the parameters fixed by the Code, and as expounded upon by our judgments in Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 and Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674, the Adjudicating Authority then appoints an interim resolution professional who takes administrative decisions as to the day to day running of the corporate debtor; collation of claims and their admissions; and the calling for resolution plans in the manner stated above. After a resolution plan is approved by the requisite majority of the Committee of Creditors, the aforesaid plan must then pass muster of the Adjudicating Authority under Section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by Section 30(2) of the Code. In this context, the decision of this court in K. Sashidhar (supra) is of great relevance.*

46. *In K. Sashidhar (supra) this Court was called upon to decide upon the scope of judicial review by the Adjudicating Authority. This Court set out the questions to be determined as follows:*

> *"**18.** Having heard learned counsel for the parties, the moot question is about the sequel of the approval of the resolution plan by the CoC of the respective corporate*

debtor, namely KS&PIPL and IIL, by a vote of less than seventy five percent of voting share of the financial creditors; and about the correctness of the view taken by the NCLAT that the percentage of voting share of the financial creditors specified in Section 30(4) of the I&B Code is mandatory. Further, is it open to the adjudicating authority/appellate authority to reckon any other factor (other than specified in Sections 30(2) or 61(3) of the I&B Code as the case may be) which, according to the resolution applicant and the stakeholders supporting the resolution plan, may be relevant?

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25. The Court, however, was not called upon to deal with the specific issue that is being considered in the present cases namely, the scope of judicial review by the adjudicatory authority in relation to the opinion expressed by the CoC on the proposal for approval of the resolution plan."

47. *After adverting to the 2016 Regulations, the Court set out the jurisdiction of the Adjudicating Authority as well as the Appellate Tribunal as follows:*

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

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

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

43. For the same reason, even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of Section 32 of the I&B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code. Section 61(3) of the I&B Code reads thus:

"61. Appeals and Appellate Authority.-(1) Notwithstanding anything to the contrary contained under the Companies Act, 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) xxx xxx xxx

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

xxx xxx xxx"

44. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)" - which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors.

Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds - be it under Section 30(2) or under Section 61(3) of the I&B Code - are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to

have been rejected by the CoC in exercise of its business decision.

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

46. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018,

66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

xxx xxx xxx

49. The argument, though attractive at the first blush, but if accepted, would require us to re-write the provisions of the I&B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground - to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the

recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the CoC can be interfered with by the adjudicating authority (NCLT), has been set out in Section 31(1) read with Section 30(2) and by the appellate tribunal (NCLAT) under Section 32 read with Section 61(3) of the I&B Code. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC muchless of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

51. Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the

proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such

a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

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

49. *However, Shri Sibal exhorted us to hold that K. Sashidhar (supra) missed a very vital provision of the Code which is contained in Section 60(5) of the Code. Section 60(5) reads as follows:*

> *"60.* ***Adjudicating Authority for corporate persons***
>
> *xxx xxx xxx*
>
> *(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

50. *It will be noticed that the non-obstante clause of Section 60(5) speaks of any other law for the time being in force, which obviously cannot include the provisions of the Code itself. Secondly, Section 60(5)(c) is in the nature of a residuary jurisdiction vested in the NCLT so that the NCLT may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner impact Section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by Section 31(1) of the Code. A harmonious reading, therefore, of Section 31(1) and Section 60(5) of the Code would lead to the result that the residual jurisdiction of the NCLT under Section 60(5)(c) cannot, in any manner,*

whittle down Section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside Section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. This argument also must needs be rejected."

15. It is manifestly clear that the commercial wisdom of the Committee of Creditors in regard to viability and feasibility of the Resolution Plan is final and this Appellate Tribunal cannot substitute its view for the commercial wisdom of the Committee of Creditors. Evaluation of the financial matrix, feasibility of the plan and its viability are areas falling within the ambit of business decision based on commercial wisdom of the Committee of Creditors and inquiry in appeal before this Appellate Tribunal is limited to the grounds under Section 61(3) of the 'I&B Code'. In the instant case, it is not disputed that the Successful Resolution Plan, apart from disclosing the source of funds in the form of infusion by the Resolution Applicant and receivables from Government has passed the muster before the Committee of Creditors and has been found better than the Settlement Plan offered by the Appellant/ promoter which was found lacking on many material aspects. A cursory look at the Resolution Plan reveals that apart from being viable it also takes care of the various stakeholders with Financial Creditors, workmen and employees and the statutory dues having their debt settled at 100% and Operational Creditors intended to be settled at

100% being currently paid 59% of their debts. That apart, an amount of Rs.7 Crore over and above the payout has been set aside as Contingent Liability Fund. This would, therefore, clearly indicate that the Successful Resolution Plan maximises the assets of the Corporate Debtor and balances the interest of all stakeholders.

16. On a careful consideration of the contentions raised in this appeal in the context of relevant considerations governing Corporate Insolvency Resolution Process manifesting in approval of Resolution Plan by the Committee of Creditors and finally getting approval of Adjudicating Authority, we are of the considered opinion that in the instant case the Settlement Plan/ offer emanating from the Promoter stands rejected at the hands of Committee of Creditors, after comparison with the Resolution Plan submitted by the Respondent No.8, on merit. The rejection is basically in regard to structure of the Settlement Plan and procedural non-compliance is only one of the grounds of rejection. What primarily appears to have weighed with the Committee of Creditors in discarding the Settlement Plan of Promoter is its structural layout, inability of the Promoter to satisfy the Committee of Creditors qua generation of funds/ mobilisation of resources and specific and clear cut debt/ claim satisfaction mechanism. Ambiguity in regard to generation /raising of funds for translating the Settlement Plan into action as also in regard to specific schedule of payment to various stakeholders being writ large on the face of the proposed Settlement Plan, it has met the inevitable fate of rejection at the hands of

Committee of Creditors. With all these features it is flabbergasting to hear the Appellant/ Promoter to say that the Settlement Plan was 'just' and has been arbitrarily rejected. The Resolution Plan submitted by the Respondent No.8 had already been approved by the Committee of Creditors prior to same being subjected to comparison with the Settlement Plan emanating from the Appellant/ Promoter and upon comparison by the Committee of Creditors it has again emerged as being viable, feasible and acceptable in priority to the proposed Settlement Plan of Promoter. In our considered opinion no exceptional circumstances justifying review of decision of Committee of Creditors in regard to rejection of the Settlement Plan and the approved Resolution Plan being a 'better one' do exist in the instant case.

17. As regards some irregularity pointed out by Appellant about constitution of Bench, pronouncement of impugned order, publication of notice etc., be it noticed that the Writ Petition preferred by the Appellant raising issue in this regard stands dismissed by the Hon'ble Madras High Court and appeal preferred therefrom to the Hon'ble Apex Court has also been dismissed.

18. Viewed in this context and having regard to the fact that nearly 51% of the monies owed under the Resolution Plan stand paid and commercial operations commenced by the Resolution Applicant, it cannot be said that a just settlement has been arbitrarily rejected and Resolution Plan submitted by Respondent No.8, in comparison to the

Settlement offer of Appellant/ Promoter is not better. Argument raised on this score is accordingly repelled.

19. For the foregoing reasons, we find that the impugned order does not suffer from any legal infirmity. The appeal lacks merit and the same is dismissed.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V.P. Singh]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI
27th August, 2020

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