NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 274 of 2020

[Arising out of Impugned Order dated 09th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi in Company Petition (IB.) No. 706(PB)/2018]

IN THE MATTER OF:

Amit Bharana
(Erstwhile Director of Apex Buildsys)
C-146, 1st Floor, Sarvodya Enclave
New Delhi – 110017 **...Appellant**

Versus

Gian Chand Narang
Resolution Professional
For Apex Buildsys Ltd
Block B-2, Flat No. 214
Varun Apartment, Sector – 9, Rohini
New Delhi – 110085 **...Respondent**

With

Company Appeal (AT) (Insolvency) No. 291 of 2020

IN THE MATTER OF:

1. **Nitin Sharma**
   R/o B-84 S-2
   Dilshad Colony, Delhi – 110095 **...Appellant No.1**

2. **Naveen Chand**
   R/o P-35, Private Colony
   Sri Niwas Puri, New Delhi – 110065 **...Appellant No.2**

3. **Sandeep**
   R/o Vill.-Tulsipur, Post – Jansath,
   Distt.-Muzaffarnagar, UP - 251201 **...Appellant No.3**

4. **Vinay Kumar**
   R/o 154 Urenia Bisauli
   Budaun – 243720 **...Appellant No.4**

5. **Jatendra Singh**
   R/o L-274B, IInd Floor
   Sector – 9, Vijay Nagar
   Ghaziabad, UP – 201001 **...Appellant No.5**

6. Pushkar Vats
R/o 304SF, Block – 16
Sector Omicron-III, Greater Noida
UP – 201310 ...Appellant No.6

Versus

Gian Chand Narang
Official Liquidator for Apex Buildsys Ltd.
Block B-2, Flat No. 214
Varun Apartment, Sector – 9, Rohini
New Delhi – 110085 ...Respondent

With

IA No.1047 of 2020 in Company Appeal (AT) (Insolvency) No. 274 of 2020

IN THE MATTER OF:

Amit Bharana ...Appellant

Versus

Gian Chand Narang ...Respondent

Present:

For Appellant : Mr Apoorv Agarwal and Mr A. M. Dar, Advocates

For Respondent : Mr Arun Kathpalia, Senior Advocate with Mr Abhishek Anand, Mr Shikhar Singh, Mr Viren Sharma and Mr Aman Nath, Advocates for R-1

Mr Abu John Mathew, Mr Nalin Kumar and Mr Aman Nath, Advocates for ICICI

J U D G M E N T

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

These two Appeals emanate from the common Impugned Order dated 09th January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Principal Bench, New Delhi in Company Petition (IB.) No. 706(PB)/2018, whereby the Adjudicating Authority has passed an order for

liquidation of the Corporate Debtor under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**'). The Parties are represented by their original status in the Company Petition for the sake of convenience.

2. These brief facts of the case are as follows:

The Resolution Professional filed an Application under Section 33(1) of the I&B Code, 2016 in CP (IB.) No. 706(PB)/2018 for liquidation of the Corporate Debtor Apex Buildsys Private Limited allowed by the Impugned Order is challenged in these Appeals.

3. Appellants contend that the Company Petition No. 706(PB)/2018 filed by ICICI Bank (from now on referred to as 'Financial Creditor') was admitted under Section 7 of the I&B Code, 2016 by order of the Adjudicating Authority dated 20th September 2018. The Corporate Debtor has been engaged in design, engineering, fabrication and erection of the pre-engineered metal building and structures. It was being operated through its Plants in Pant Nagar, (Uttrakhand and Umred, Nagpur). The Resolution Professional after collation of the claims aggregating to Rs. 444.60 Crores formed the Committee of Creditors (in short "CoC"). The IRP was later on confirmed as the Resolution Professional. During CIRP the RP appointed two valuers for determination of the liquidation value of the Corporate Debtor. The average Liquidation value based on the valuation given by two valuers was determined as Rs.119.36. After that, the Resolution Professional prepared information memorandum and invited expression of interest. The Resolution Professional received 14 EOI's, and out of these two of the Resolution Plans submitted were placed before the CoC which felt that both these plans were conditional. Therefore,

the CoC summarily rejected these plans and passed a Resolution on 22nd October 2019 for liquidation of the Corporate Debtor with 87.30% of voting share.

4. The Resolution for liquidation for Corporate Debtor was approved by CoC under its commercial wisdom with the required voting share threshold of 87.30%. Therefore, the Adjudicating Authority has allowed the Application filed under Section 33(1) of the Code for liquidation of the Corporate Debtor. Mr Gyan Chand Narang was appointed as Liquidator in terms of the Section 34(1) of the Code, which is under challenge in this Appeal.

5. The Appellant has challenged the liquidation order on the ground:

- That the liquidation order defeats the purpose of the Code, which contradicts the Preamble of the Code and is against the ethos of the Resolution Process.

- That the Resolution Professional had received more than 9 EOI's (Expression of Interest) and four Resolution Plan, however, none of them was put to the vote. They were all dismissed, based on mere discussion and deliberations. Though the Hon'ble Supreme Court has time and again emphasised CoC's commercial wisdom and voting importance.

- The Resolution Professional failed in his duties towards the Corporate Debtor, which is evident from the recorded minutes of the CoC meetings. It is evident from the recorded minutes that the RP did not make any efforts in coming up with a resolution for the

Corporate Debtor. The Resolution Professional has always shown a strong inclination towards taking the Company to liquidation instead of utilising the time, negotiating the terms of Resolution Plan and maximising the value of the assets of the Corporate Debtor which led to huge depreciation in the valuation of the property of the Corporate Debtor.

- The Resolution Professional has also failed in his duties in apprising the CoC with the latest development in law whereby the Hon'ble Supreme Court in Municipal Corporation of Greater Mumbai v Abhilash Lal 2019 SCC Online SC 1479 clarified that in the event property is not owned by the Corporate Debtor, the Administrative Authorities that leased the property to the Corporate Debtor will have the right over the property. Their rights will not be affected by Section 238 of the Code. Based on the law laid down by Hon'ble Supreme Court, the sale of properties of the Corporate Debtor during liquidation will be impermissible. The CoC has not been informed about the same. Therefore, RP has failed in his duties under Section 24(2) of the I & B Code read with 21(9) of the Code.

- The Adjudicating Authority has erred in not granting the erstwhile director an opportunity to be heard and not considering the Resolution Professional's glaring misrepresentations.

- That the Adjudicating Authority has completely ignored the employees' efforts of the Corporate Debtor, who all have worked

diligently to ensure that the Corporate Debtor remains a going concern and stays in business during CIRP.

6. In Appeal No.291 of 2020 Appellant has challenged the liquidation order on the same grounds as taken in Appeal No. 274 of 2020.

7. The Resolution Professional contends that the Appellant has no locus to challenge the Impugned Order dated 09th January 2020. The Adjudicating Authority, after due consideration of the material on record and after considering the facts that the Resolution Plans were conditional; it did not conform to the requirements of the Code; the CoC had concluded that the liquidation of the Corporate Debtor is the most viable solution and in the absence of any legally compliant Resolution Plan has passed the Order of Liquidation.

8. IA No.1047 of 2020 is filed by the Financial Creditor ICICI Bank, on being aggrieved by the interim order passed by this Appellate Tribunal dated 14th February 2020, whereby Liquidator was directed not to sale, transfer or alienate the movable or immovable property of the Corporate Debtor and create any third party interest during the pendency of the Appeal.

9. It is contended by the applicant that Liquidator is restrained from selling, transferring or alienating movable or immovable property of the Corporate Debtor, which has the effect of stay on order dated 09th January 2020 passed by the Adjudicating Authority, which is against the settled principles of law and has affected the rights of the applicants, which will be

pre-judicial. Therefore, the applicant requested for impleadment as a party respondent in the Appeal and sought opportunity of a hearing.

10. We have heard the arguments of the Learned Counsel for the parties and perused the records.

11. The Liquidation order is challenged mainly because the Resolution Professional had not laid the Resolution Plans before the CoC for voting and based on discussion and deliberations Plans were rejected.

12. The Appellant's challenge to the Liquidation Order is two-fold. Firstly, the government's leasehold land cannot be considered for deciding the liquidation value and Assets of the Corporate Debtor. The valuation made therein is included to count the liquidation value of assets of the Corporate Debtor. Secondly, five Resolution Plans have been compliant with the terms and provisions of the I&B Code. The said Resolution Applicants could not compete due to the higher valuation wrongly shown after considering the leasehold right of the Corporate Debtor.

13. The Learned Counsel for the Appellant emphasised the judgment of Hon'ble Supreme Court passed in Municipal Corporation of Greater Mumbai ('MCGM') Vs. Abhilash Lal (2019) SCC Online SC 1479 and contended that the leasehold property could not be transferred in liquidation. The valuation of the said properties cannot be included in the valuation whilst ascertaining the liquidation value of the assets of the Corporate Debtor.

14. In response to the above, the Respondent contended that the Hon'ble Supreme Court judgment passed in the above-mentioned case of MCGM is not applicable to the facts of this case. It is contended that in the instant case State Industrial Development Corporation of Uttrakhand Limited (in short 'SIDCUL') have leased land vide lease deed dated 20th March 2006 admeasuring 65,201.42 sq. mt. Pant Nagar, Uttrakhand for a period of 90 years and similarly, Maharashtra Industrial Corporation (in short 'MIDC') have vide lease deed dated 18th August 2008 leased out at Plot No. D-3 admeasuring 2,56,473 sq. mt. situated at Umred Industrial Area, Umred to the Corporate Debtor for a period of 95 years. The facts of 'MCGM' case show that the said judgment dealt with a situation where no lease deed was executed favouring the Corporate Debtor. Hence, in view of the execution of lease deeds in favour of the Corporate Debtor, the value of the said properties can be utilised to count the liquidation value.

15. It is further argued on behalf of Respondent that recent amendment by Ordinance No. 16/2019 w.e.f 28.12.2019 , notified in the Gazette of India, stipulates that a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, Local Authority, Sectoral Regulator or any other Authority constituted or any other law for the time being enforce, cannot be suspended or terminated on the Grounds of Insolvency.

16. The Counsel for the Respondent No 2, Resolution Professional, further contends that all Resolution Plans received were either non-compliant or conditional. Since no viable Resolution Plan was accepted and CIRP was going

to end on 14th November 2019, the RP proposed for liquidation of Corporate Debtor. The same was placed before the CoC, which approved it by 87.30% vote share.

17. The Counsel for the RP submits that the Appellants have challenged the 'commercial wisdom' of CoC, which resolved to liquidate the Corporate Debtor. But the Appellant have intentionally not made the CoC a party to the present Appeal. Therefore, the Appeal should be dismissed for non-joinder of necessary party.

18. The Counsel for the RP further submits that during CIRP, the RP ran the Corporate Debtor as a going concern. Employees were not granted increments for the last three years which were provided by the RP during CIRP. The TDS on employees' salary was not deposited by the promoters from Financial Year 2017-18 till the commencement of CIRP. An amount of Rs.17 Crores was due towards statutory liability on the date of initiation of CIRP. During the CIRP period, all statutory dues were duly deposited by the RP besides the TDS on salaries of employees from Financial Year 2017-18 onwards. It is further submitted that commercial wisdom of the CoC is paramount and the legislature has not endowed the Adjudicating Authority or the Appellate Authority to analyse or evaluate the commercial wisdom of the CoC. The Learned Counsel placed reliance law laid down by the Hon'ble Supreme Court in case of ***K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150***.

19. Learned Counsel for the RP further referred the report of Bankruptcy Law Reforms Committee dated 04th November 2015, wherein primacy have been given to CoC to evaluate the various possibilities and make a decision. It has been observed that:

> *"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 in to 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 of 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."***

The report also highlights that having timelines is the essence of the Resolution Process while dealing with the aspect. It is noted that the Code would facilitate the assessment of the enterprise's viability at a very early stage. The relevant extract of the report is as under:

"The Committee choice the followings 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 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) <u>The legislature and the courts must control the process of Resolution, but not be burdened to make business decisions.</u>***
>
> *(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.

……

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."

20. Learned Counsel for the Appellant argued that it is evident from the record that the Resolution Plans were only discussed and deliberated by the CoC in different meetings and after discussion every time CoC gave direction for improvement in the financial terms indicated in the Resolution Plan and further for removing conditions precedents in the Resolution Plan. It also

appears that no voting process was done for approval or rejection of Resolution Plan. However, the approval or rejection of the Resolution Plan can only be made by the CoC's voting process. Appellant contends that the Resolution Plans were discarded even without voting and liquidation of Corporate Debtor was recommended, which is against the settled law laid down by Hon'ble Supreme Court.

21. In reference to the above argument, we want to discuss the law laid down by Hon'ble Supreme Court regarding the approval of Resolution Plan by the CoC and scope of review by the Adjudicating Authority and the Appellate Authority.

22. Hon'ble Supreme Court in the case of ***K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257 at page 186*** has held that;

> ***"52.*** *As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and*

mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

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.

83. *Assuming that this provision was applicable to the cases on hand, non-recording of reasons for approving or rejecting the resolution plan by the financial creditor concerned during the voting in the Meeting of CoC, would not render the final collective decision of CoC nullity per se. Concededly, if the objection to the resolution plan is on account of infraction of ground(s) specified in Sections 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For, the approval of the resolution plan by CoC can be challenged on those grounds. However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable, is not open to challenge before the adjudicating authority (NCLT) or for that matter the appellate authority (Nclat). If so, non-recording of any reason for taking such commercial decision will be of no avail. In the present case, admittedly, the dissenting financial creditors have rejected the resolution plan in exercise of*

business/commercial decision and not because of non-compliance of the grounds specified in Section 30(2) or Section 61(3), as such. Resultantly, the amended regulation pressed into service, will be of no avail."

23. On perusal of the minutes of the Meeting of different CoC, it is undisputed that every Resolution Plan found complaint with the Code's requirement was laid before the Committee of Creditors. In several meetings Committee of Creditors issued directions to the Resolution Professional for further negotiating with the Resolution Applicant and direction was given for submission of revised Resolution Plan. It appears that in the 18th CoC Meeting, which held on 22nd October 2019 ,the Resolution for liquidation for Corporate Debtor was passed with a vote share of 87.30%. It is also stated in the Minutes of 18th CoC that;

"After detailed discussions and deliberation, the unanimous view emerged that no alternative was available excepting for proposing liquidation of the CD, considering that no resolution plan is on the table apt for evaluation/consideration in view of the following factors:-

1) ***The major portion of financial proposals of both the Applicants, i.e. Rs50 Crores,*** *out of total proposed consideration of Rs.79.15 crores (besides proposed infusion of Rs.25.00 crores in the form of working capital/Capex etc) of Alchemist ARC and Rs.71.00 crores (plus Rs.20.00 crs if received from arbitration awards and proposed infusion of Rs.14.00 crs in the form of working capital) of M/s S.C. Agrawal,* ***is dependent on realisation of said amount from the sale of Land & Building of Pant Nagar unit of CD. No assurance/commitment was forthcoming from any RA in case such sale is not materialised.*** *Alchemist ARC have even added that the RA shall*

try to sell the land of Pant Nagar Plant in one year and if the RA is not able to sell the same within one year then lenders shall be free to sell the same directly to any potential buyer through liquidation/RP/MC.

2) Various other conditions precedent stipulated by both the RAs under the garb of reliefs and concessions etc.

3) The resolution plan consideration amount proposed by both the RAs is not commensurate with the intrinsic value of the Corporate Debtor, being even below the assessed Liquidation Value of assets of CD.

In view of the aforesaid terms of plans stipulated by both the RAs, it was noted that both the Plans are not feasible/viable, being non-compliant with Section 30 of the Code read with Regulation 37 of CIRP Regulations and as such the same can't be considered resolution plans per se within the meaning of the Code and Regulations framed thereunder. CoC, finding both the plans non-compliant with the provisions of the Code and requirements of RFRP, decided not to evaluate/consider them. CoC further decided to propose liquidation of the CD and directed RP to put up the Resolution for approval to this effect through E-Voting. The CoC also directed the RP to communicate the decision of the CoC to both the RAs appropriately and refund their EMD amount."

24. Based on the above decision of the Committee of Creditors, with 87.30% of vote share, i.e. more than the required threshold 66%, passed the Resolution for Liquidation of the corporate debtor. Thus the decision of liquidation of the Corporate Debtor is a valid order. It is pertinent to mention that in the case of K. Sashidhar (supra) Hon'ble Supreme Court has clearly laid down the law that upon receipt of rejected Resolution Plan the Adjudicating Authority is not expected to do anything more, but is obliged to

initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to evaluate the commercial decision of the CoC. It is further held that NCLT or NCLAT has no jurisdiction to reverse to commercial wisdom of the Committee of Creditors. It is also held in the above case that in terms of Section 30 of the I&B Code, the decision is taken collectively after due negotiations between the Financial Creditors, who are constituents of CoC and they express their opinion on the proposed Resolution Plan in the form of Votes, as per their voting share. In the Meeting of CoC the proposed Resolution Plan is placed for discussion and after full interaction in the presence of all concerned and Resolution Professional, the constituents of CoC finally proceed to exercise their option (Business/Commercial decision) to approve or not to approve the proposed Resolution Plan. In such a case, non-recording of reasons would not per se vitiate the collective decision of the Financial Creditors.

25. In the instant case, when revised Resolution Plans were laid before the CoC in its 18th Meeting, the CoC upon discussions and deliberations was of unanimous view that no alternative was available excepting for proposing the Liquidation of the Corporate Debtor, considering that no Resolution Plan is on the table apt for evaluation/consideration. Finally, Resolution for liquidation of the Corporate Debtor was laid for voting before the CoC, which was approved by a vote share of 87.30%. Since, after a deliberate discussion on the proposed Resolution Plans, the CoC took a commercial decision with required vote share and approved Resolution for liquidation of the Corporate

Debtor. Therefore, this decision is non-justiciable and Adjudicating Authority had no power to reverse the commercial decision.

26. The Learned Counsel for the RP further placed reliance on the decision of the Hon'ble Supreme Court in case of ***Committee of Creditors v. Satish Kumar Gupta 2020 (8) SCC 531***.

27. In the above-mentioned case, Hon'ble Supreme Court has held it is the CoC that has to decide whether or not to rehabilitate the Corporate Debtor through acceptance of a particular Resolution Plan, and such decision is left with the requisite decision of the CoC. It is further held that the very limited review is available which can in no circumstances trespass upon a business decision of the majority of the CoC but has to be within four corners of the Section 30(2) of the Code. It is further said that liquidation order being a consequence either upon expiry of the time of CIRP when no Resolution Plan is received or in the event, a Resolution Plan is rejected by the CoC as per Section 33 of the Code.

28. The Learned Counsel for the Appellants laid much emphasis on the judgment of the Hon'ble Supreme Court in case of ***Municipal Corporation of Greater Mumbai vs Abhilash Lal (2019) SCC Online SC 1479*** *has held that:*

> *"**48.** In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right - indeed its public duty - to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act.* ***This court is of opinion that Section 238 could be of importance when***

the <u>properties and assets are of a debtor</u> and not when a third party like the MCGM is involved. *Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the Resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question-which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."*

29. The facts of the MCGM case is mentioned in para 2 of the judgment, which is given below:

Para 2.

"MCGM owns inter alia, Plot Nos. 155-156, 162 and 168 (all plots hereafter called "the lands") in village Marol, Andheri (East) Mumbai. By a contract (dated 20th December, 2005) Seven Hills Healthcare (P.) Ltd. (the Company facing insolvency proceedings, hereafter "Seven Hills") agreed to develop these lands (which were to be leased to it for 30 years) and construct a 1500 bed hospital. MCGM stipulated several conditions, including that 20% of the beds had to be reserved for use by the economically deprived, and that Seven Hills had to complete the construction in 60 months (excluding monsoons). The sixty-month period ended on 24th April,

2013; the project however, was not completed. In terms of Clause 15(g), the lease deed had to be executed within a month after completion. However, the deed was not executed as the project was not completed. Further, Seven Hills had to pay lease rent at the annual rate of Rs. 10,41,04,000. MGCM alleges that there were defaults in these payments. In these circumstances, MCGM issued a show cause notice on 23rd January, 2018, proposing termination of the contract/agreement. It is submitted that Seven Hills owed MCGM an amount of Rs. 76,05,07,780."

30. It appears that in MCGM case, the issue involved was whether under the Resolution Plan, property for which the lease deed was never executed, can by way of the Resolution Plan, Government be directed to enter into a lease agreement. The facts of the above case are totally different from the instant case. In the instant case, the lease deeds have been executed in favour of the Corporate Debtor way back in the year 2006 and 2008, which are transferable upon payment of applicable transfer fee etc. as per related terms of the respective lease deeds. Thus, the ratio of the decision of Hon'ble Supreme Court in the MCGM case (supra) is not applicable to the facts of this case, because certain assets of the Corporate Debtor are leased by 'SIDCUL' and 'MIDC' in favour of the Corporate Debtor.

31. In case of MCGM case (supra) Hon'ble Supreme Court has dealt with a situation where lease deed was to yet to be executed upon completion of the project. Therefore the rights of MCGM can't be dealt with under a Resolution Plan, where lease was not executed in favour of the Corporate Debtor.

32. Based on the above fact situation, Hon'ble Supreme Court has held that Section 238 of the Code could be of importance in this case, when the property

and assets would have been of a Corporate Debtor, and not when a third party like the MCGM is involved. It is further held by the Hon'ble Supreme Court that the Adjudicating Authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and land. The authorities under the Code could not have precluded the control that MCGM has under the law to deal with its properties and the land in question, which undeniably are public properties.

33. It is pertinent to mention that by amendment of Section 33 of the Code, explanation has been added to sub-section (2) of Section 33. CoC empoweres to decide to liquidate the Corporate Debtor any time before the confirmation of the Resolution Plan. Relevant provision is as under:

> ***"33. Initiation of liquidation.—***
>
> *(1) Where the Adjudicating Authority,—*
>
> *(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-section (6) of Section 30; or*
>
> *(b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—*
>
> *(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;*
>
> *(ii) issue a public announcement stating that the corporate debtor is in liquidation; and*

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the Resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the Committee of creditors 1[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

2[Explanation.—For the purposes of this sub-section, it is hereby declared that the Committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]"

34. Thus, it is clear the CoC was empowered to decide to liquidate the Corporate Debtor at any time before confirmation of the Resolution Plan, including any time before the preparation of Information Memorandum.

35. It also appears that when CoC noticed that both the Resolution Plans were not feasible and viable, and are being non-compliant which Section 30 of the Code read with Regulation 37 of CIRP Regulation thus. The same could not be considered the Resolution Plans per se within the Code and Regulations' meaning framed thereunder. Consequently, the CoC decided to propose the liquidation of the Corporate Debtor and on voting the same was passed by a majority of 87.30% of voting share of the Members of CoC.

36. Based on the above discussion, we are of the considered opinion that both the Appeals sans merit hence dismissed—no order as to costs. The interim order passed by this Bench stands vacated. IA also stands disposed of accordingly.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Anant Bijay Singh]
Member (Judicial)

[V. P. Singh]
Member (Technical)

NEW DELHI
12th JANUARY, 2021

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