2025 INSC 1165

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1808 OF 2020

KALYANI TRANSCO **...APPELLANT**

VERSUS

M/S BHUSHAN POWER AND STEEL LIMITED AND OTHERS **...RESPONDENTS**

WITH

CIVIL APPEAL NOS. 2192-2193 OF 2020

CIVIL APPEAL NO. 2225 OF 2020

CIVIL APPEAL NO. 3020 OF 2020

CIVIL APPEAL NO. 6390 OF 2021

INDEX

LIST OF ABBREVIATIONS

1.	**Arbitration Act**	**Arbitration and Conciliation Act, 1996**
2.	**BPSL**	**M/s Bhushan Power and Steel Limited**
3.	**CBI**	**Central Bureau of Investigation**
4.	**CCD**	**Compulsorily Convertible Debentures**
5.	**CIRP**	**Corporate Insolvency Resolution Proceedings**
6.	**CoC**	**Committee of Creditors**
7.	**CRP**	**Consolidated Resolution Plan**
8.	**Darcl**	**CJ Darcl Logistics Limited**
9.	**EBITDA**	**Earnings Before Interest, Taxes, Depreciation, and Amortisation**
10.	**ED**	**Directorate of Enforcement**
11.	**FC**	**Financial Creditors**
12.	**FIR**	**First Information Report**
13.	**IBBI (CIRP) Regulations**	**Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**
14.	**IBC or The Code**	**Insolvency and Bankruptcy Code, 2016**
15.	**India-Singapore CECA**	**India-Singapore Comprehensive Economic Cooperation Agreement**
16.	**IPC**	**Indian Penal Code, 1860**
17.	**IRP**	**Interim Resolution Professional**
18.	**Jaldhi**	**Jaldhi Overseas Pte. Limited**
19.	**JSW**	**JSW Steel Limited**
20.	**Medi**	**M/s. Medi Carrier Private Limited**
21.	**NCLAT**	**National Company Law Appellate Tribunal, New Delhi**
22.	**NCLT or Adjudicating Authority**	**National Company Law Tribunal, New Delhi, Principal Bench**
23.	**OC**	**Operational Creditor**
24.	**PAO**	**Provisional Attachment Order**
25.	**PC Act**	**Prevention of Corruption Act, 1988**
26.	**PMLA**	**Prevention of Money Laundering Act, 2002**
27.	**PRA**	**Prospective Resolution Applicants**
28.	**RBI**	**Reserve Bank of India**
29.	**RfRP**	**Request for Resolution Plan**
30.	**RP**	**Resolution Professional**
31.	**SRA**	**Successful Resolution Applicant**

J U D G M E N T

B.R. GAVAI, CJI

I. INTRODUCTION

1. This batch of six appeals are filed under Section 62 of the Insolvency and Bankruptcy Code, 2016[1] by erstwhile promoters and various Operational Creditors of the Corporate Debtor against the common final impugned judgment and order dated 17th February 2020 passed by the National Company Law Appellate Tribunal, New Delhi[2] in relation to the Corporate Insolvency Resolution Proceedings[3] of M/s Bhushan Power and Steel Limited.[4]

II. FACTS

2. The relevant facts which give rise to these appeals are:

2.1. The Banking Regulation Act, 1949 was amended w.e.f. 4th May 2017 to the effect that the Reserve Bank of India[5] was empowered to issue directions to the Indian Banks to initiate CIRP against major corporate defaulters.

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[1] **"IBC" or "the Code" for short.**
[2] **"NCLAT" for short.**
[3] **"CIRP" for short.**
[4] **"BPSL" for short.**
[5] **"RBI" for short.**

2.2. The RBI, vide circular dated 13th June 2017, identified 12 large scale corporate defaulters, with outstanding debts valued at Rs. 5,000 crore and above, now infamously known as the *"dirty dozen"*. The Corporate Debtor – BPSL was one of the defaulters identified by the RBI.

2.3. The Respondent No. 5 in the lead matter (Punjab National Bank) filed Company Petition C.P. No. (IB)-202 (PB) of 2017 under Section 7 of the IBC before the NCLT, which was admitted vide order dated 26th July 2017 and the CIRP commenced.

2.4. After the imposition of *moratorium*, the Interim Resolution Professional[6] on 28th July 2017 invited claims from all the creditors and stakeholders. A huge number of claims were raised by the stakeholders. For the *Financial Creditors*[7], the IRP admitted claims of Rs. 4,72,04,51,78,073.88/- (Forty-Seven Thousand Two Hundred and Four Crores Fifty-One Lakhs Seventy-Eight Thousand and Seventy-Three) and on the other hand for the *Operational Creditors*, claims of Rs.6,21,37,61,735/- (Six hundred and Twenty-one Crores

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[6] "IRP" for short.
[7] "FC" for short.

Thirty-Seven Lakhs Sixty-One Thousand Seven hundred and thirty-five) were admitted.

2.5. During the First Meeting of the Committee of Creditors[8] dated 1st September 2017, the IRP was confirmed as the Resolution Professional[9]. Pursuant to an advertisement published by the RP on 21st September 2017, thirteen Potential Resolution Applicants[10] including Respondent No. 2 in the lead matter (JSW Steel Ltd.) submitted their Resolution Plan to the RP.

2.6. In the 18th Meeting of the CoC dated 14th August 2018, the Resolution Plans were evaluated by the CoC and the plan submitted by JSW Steel Ltd. emerged as the highest evaluated plan based on the evaluation matrix formulated in accordance with the Code and the relevant regulations. The scores of every PRA were submitted to the NCLAT in a sealed cover. Negotiations were held with JSW Steel Ltd. and based on the said negotiations and discussions, a Consolidated

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[8] "CoC" for short.
[9] "RP" for short.
[10] "PRA" for short.

Resolution Plan[11] was submitted by JSW Steel Ltd. on 3rd October 2018.

2.7. On 7th October 2018, the RP called for a meeting of the CoC for consideration and approval of the CRP. In the CoC meeting held on 10th October 2018, the CRP submitted by JSW Steel Ltd. was considered, and further negotiations took place regarding the modifications to bring the CRP in compliance with the amended Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[12]. Pursuant to the negotiations, JSW Steel Ltd. submitted the addendum letter dated 10th October 2018 whereby it amended and clarified certain terms of the CRP to ensure compliance with the amended regulations.

2.8. After confirmation by the RP vide communication dated 14th October 2018, to all the members of the CoC that the CRP was in compliance with statutory requirements with the Section 30(4) of the Code, the CoC approved the same by the requisite majority and JSW Steel Ltd. was declared as the SRA and which we shall refer to as SRA – JSW hereinafter.

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[11] **"CRP" for short.**
[12] **"IBBI (CIRP) Regulations" for short.**

2.9. As per the communication dated 5th February 2018 by the RP, the SRA – JSW issued the Proposal Performance Guarantee for an amount of Rs. 100 crore on 11th February 2019 and it was issued a Letter of Intent by the RP.

2.10. Thereafter, the RP filed the Company Application No. 254 (PB)/2019 in C.P. No. (IB)-202 (PB) of 2017 on 14th February 2019 as per the mandate of Sections 30(6) and 31(1) of the IBC, read with Regulation 39(4) of the IBBI (CIRP) Regulations with a prayer to accept the Resolution Plan submitted by the SRA – JSW which had been duly approved by the CoC.

2.11. During the pendency of the aforesaid proceedings, the Central Bureau of Investigation[13] registered a First Information Report[14] being No. RCBD1/2019/E/0002 against the Corporate Debtor – BPSL and its directors and other related parties under Sections 420, 468, 471 and 477A read with Section 120B of the Indian Penal Code, 1860[15] and Section 13(2) read with Section 13(1)(d) of the Prevention of

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[13] **"CBI" for short.**
[14] **"FIR" for short.**
[15] **"IPC" for short.**

Corruption Act, 1988[16]. Based on the said FIR, the Directorate of Enforcement[17], registered a case bearing No. ECIR/DLZO–I/02/2019 on 25th April 2019 for offences punishable under the Prevention of Money Laundering Act, 2002[18].

2.12. Various applications raising objections were filed in the proceedings pending before the NCLT by the erstwhile promoters and some OCs of the Corporate Debtor – BPSL. The NCLT, vide common Judgment and Order dated 5th September 2019, dismissed the said applications and approved the Resolution Plan of the SRA – JSW subject to certain conditions.

2.13. Being aggrieved by some of the conditions imposed by the NCLT, the SRA – JSW filed Company Appeal No. 957 of 2019 under Section 61 of the IBC before the NCLAT.

2.14. Meanwhile, the ED passed a Provisional Attachment Order[19] being No. 11 of 2019 dated 10th October 2019 and provisionally attached the assets of the Corporate Debtor – BPSL under Section 5 of the PMLA.

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[16] **"PC Act" for short.**
[17] **"ED" for short.**
[18] **"PMLA" for short.**
[19] **"PAO" for short.**

2.15. Being aggrieved, the PAO was challenged by the SRA – JSW before the NCLAT by way of a separate application in the pending company appeal. Vide interim order dated 14th October 2019, the NCLAT stayed the implementation Resolution Plan as well as the PAO.

2.16. The CoC also challenged the said PAO before this Court by filing SLP (C) Nos. 29327 – 29328 of 2019. Vide order dated 18th December 2019, this Court issued notice and stayed the PAO.

2.17. Meanwhile, various other stakeholders filed appeals before the NCLAT challenging the final approval order of the NCLT dated 5th September 2019.

2.18. The NCLAT vide common impugned judgment dated 17th February 2020 allowed the appeal filed by SRA – JSW and modified some of the conditions that had been imposed by the NCLT in the approval order and dismissed the appeals filed by all the appellants herein challenging the approval order.

2.19. Being aggrieved by the common impugned judgment of the NCLAT dated 17th February 2020, these appeals have been filed.

2.20. A Civil Appeal No. 3362 of 2020 was filed by ED challenging the common Impugned Judgment dated 17th February 2020 passed by the NCLAT. The said appeal by the ED as well as the SLPs filed by the CoC were heard along with the present batch of appeals.

2.21. Vide order dated 6th March 2020, this Court admitted the appeals and recorded the statement of the learned Senior Counsel appearing on behalf of the CoC that the CoC would return the amount received by it from the SRA – JSW in case the appeals succeed.

2.22. Vide order dated 11th December 2024, this Court disposed of Civil Appeal Nos. 14503 – 14504 of 2024 (arising out of SLP (C) Nos. 29327 – 29328 of 2019) filed by the CoC challenging the ED's PAO and Civil Appeal No. 3362 of 2020 filed by the ED based on the affidavit filed by Mr. Dipin Goel, Deputy Director, Directorate of Enforcement, New Delhi. It was stated in the affidavit that Section 32A of the IBC was inserted w.e.f. 28th December 2019 and it did not have retrospective effect and hence, in view of the peculiar facts and circumstances, the SRA – JSW be permitted to take control of the attached properties treating the same as restitution under

Section 8(8) of the PMLA read with Rule 3A of the Prevention of Money Laundering (Restoration of Property) Rules, 2016. This Court, therefore, directed the ED to handover the control of the properties of the Corporate Debtor – BPSL to the SRA – JSW. However, it was clarified that this Court had not expressed any opinion on the interpretation of Section 32A of the IBC or on the powers of the ED to attach the property of the Corporate Debtor – BPSL which is undergoing CIRP.

2.23. The remaining appeals, forming the present batch, were heard at length on various dates and this Court vide common final judgment and order dated 2nd May 2025 quashed and set aside the judgments and orders dated 5th September 2019 and 17th February 2020 passed by the NCLT and NCLAT respectively. This Court issued the following directions vide the said final judgment and order:

> "**84.** In that view of the matter, following order is passed:
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> (i) The judgments and orders dated 05.09.2019 and 17.02.2020 passed by the NCLT and NCLAT respectively are quashed and set aside.
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> (ii) The Resolution Plan of JSW as approved by the CoC stands rejected, being not in conformity with the provisions contained in

sub-section (2) of Section 30, read with sub-section (2) of Section 31.

(iii) In view of the provisions contained in sub-section (1) of Section 33, and in exercise of the jurisdiction conferred under Article 142 of the Constitution of India, the Adjudicating Authority i.e. the NCLT is directed to initiate the Liquidation Proceedings against the Corporate Debtor-BPSL under Chapter III of the IBC and in accordance with law.

(iv) The payments made by the JSW to the Financial Creditors and the Operational Creditors, as also the Equity contribution if any infused, under the garb of the implementation of the Resolution Plan, being subject to the outcome of the present set of Appeals, shall be dealt with by the parties as per the statement of Senior Advocate Dr. Abhishek Manu Singhvi appearing for the CoC, recorded in the order dated 06.03.2020.

(v) Since, we have rejected the Resolution Plan of JSW, we have not dealt with the issue of the EBITDA though raised and argued by the Learned Advocates for the parties. The question of law with regard to EBITDA is kept open.

85. The Civil Appeal No. 1808 of 2020 (Kalyani Transco vs. M/s. Bhushan Power and Steel Limited & Ors), Civil Appeal Nos. 2192-2193 of 2020 (Sanjay Singhal & Anr vs. Punjab National Bank & Ors, Etc.), Civil Appeal No. 2225 of 2020 (Jaldhi Overseas Pte. Ltd. vs. Mahender Kumar Khandelwal & Ors), Civil Appeal No. 3020 of 2020 (M/s. Medi Carrier Pvt. Ltd. vs. Mahendra Kumar

Khandelwal & Anr) and Civil Appeal No. 6390 of 2021 (CJ Darcl Logistics Ltd. vs. Mahendra Kumar Khandelwal & Anr) stand allowed to the aforesaid extent."

2.24. Being aggrieved, Review Petitions bearing RP (C) No. 1432 of 2025 and connected matters came to be filed by the aggrieved parties seeking recall of the final judgment and order dated 2nd May 2025.

2.25. Vide order dated 29th July 2025, notice was issued in the Review Petitions and the applications for hearing the review petitions in open court were allowed.

2.26. On the next date of hearing, i.e. 31st July 2025, the following order was passed:

"**3.** We are of the view that the common impugned judgment and order dated 02.05.2025 does not correctly consider the legal position as laid down by a catena of judgments, including the following:

.....

7. We, therefore, find that this is a fit case for recalling the judgment under review and reconsidering the matter afresh.

8. Having considered the submissions advanced by the learned senior counsel for the parties, we find that there is/are error(s) apparent on the face of the record warranting exercise of review jurisdiction vested in this Court.

9. Accordingly, the impugned judgment and order dated 02.05.2025 is recalled. The review petitions are allowed.

> **10.** Needless to state that though we are allowing these review petition(s), all questions of law shall remain open for both parties to argue at the stage of final hearing.
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> ……."

2.27. While allowing the Review Petitions, all the questions of law were kept open, as a result of which this batch of appeals were listed for final hearing on 7th August 2025. On 11th August 2025, this Court upon conclusion of the arguments reserved judgment.

III. SUBMISSIONS

3. We have extensively heard Shri Dhruv Mehta and Shri Balbir Singh, learned Senior Counsel, Shri Arjun Asthana and Shri Manu Beri, learned Counsel appearing for the appellants. We have heard Shri Navin Pahwa, learned Senior Counsel appearing for the Resolution Professional. We have heard Shri Pinaki Misra, learned Senior Counsel appearing for the Resolved Entity, i.e. BPSL. We have heard Shri Tushar Mehta, learned Solicitor General appearing on behalf of the CoC. We have also heard Shri Neeraj Kishan Kaul and Shri Gopal Jain, learned Senior Counsel appearing for the SRA – JSW.

i. Appellants in Civil Appeal Nos. 2192 – 2193 of 2020 (erstwhile promoters)

4. Before we proceed to record the submissions of the learned counsel for the parties on merits, it will be relevant to note that Shri Tushar Mehta, learned Solicitor General appearing on behalf of the CoC and Shri Kaul, learned Senior Counsel appearing on behalf of the SRA – JSW have raised objections with regard to the very tenability of the appeals at the behest of the erstwhile promoters-cum-directors.

5. Shri Dhruv Mehta, learned Senior Counsel for the Appellants – erstwhile promoters, submitted that the promoters were personal guarantors of the Corporate Debtor and hence fall within the ambit of "persons aggrieved" under Section 61 of the IBC. It is submitted that personal insolvency proceedings have been initiated against them, which gives them a clear *locus* to file the present appeals.

6. It was further submitted by Shri Dhruv Mehta that the question of *locus* is no longer *res integra*. Reliance was placed on paragraph 19.4 of ***Vijay Kumar Jain v. Standard Chartered Bank and Others***[20]**,** to submit that personal

[20] **(2019) 20 SCC 455**

guarantors were held by this Court to be persons interested in the Resolution Plan and were therefore included in the "persons aggrieved" as per the IBC. Reference was also made to paragraph 21 of the said judgment regarding the rights of the erstwhile Board of Directors. He further relied on paragraphs 74 and 75 of ***Glas Trust Company LLC v. Byju Raveendran and Others***[21] to contend that the term "persons aggrieved" must be given a broad and purposive interpretation under Sections 61 and 62 of the IBC and any narrow construction would frustrate the objective of the Code.

7. It was lastly submitted by Shri Dhruv Mehta on the issue of *locus* that the appeals raise pure questions of law based on undisputed facts and fall squarely within the ambit of Section 61(3) of the IBC.

8. Shri Dhruv Mehta next raised the issue of contravention of law by the SRA–JSW, submitting that Clause 3.1 of its Resolution Plan, which allows for an effective change in the date of implementation, rendered the Plan imprecise and indeterminate. It was contended that such an open-ended clause is contrary to the IBC framework and ought not to have

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[21] **2024 SCC OnLine SC 3032**

been approved by the Adjudicating Authority. It was submitted that if such open-ended Resolution Plans are permitted, it would allow creditors to effect post-approval modifications, thereby undermining the CIRP process.

9. It was further submitted by Shri Dhruv Mehta that the concept of an "erstwhile CoC" finds no place within the statutory scheme of the IBC. The Code mandates a strict, time-bound resolution process, and permitting the CoC to renegotiate or modify the Plan at the appellate stage would defeat the legislative intent, unsettle vested rights under the approved Plan, and delay its implementation.

10. Shri Dhruv Mehta placed reliance on the judgments of this Court in ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Another***[22] and ***Deccan Value Investors L.P. and Another v. Dinkar Venkatasubramanian and Another***[23] to submit that the CoC's powers are confined to assessing the viability and feasibility of the Resolution Plan, and cease upon its approval.

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[22] **(2022) 2 SCC 401**
[23] **2024 SCC OnLine SC 4075**

11. It is further submitted by Shri Dhruv Mehta that the SRA–JSW violated Section 30(2) of the IBC read with Regulation 38 of the IBBI (CIRP) Regulations by paying the FCs before the OCs. The FCs were paid on 26th March 2021, whereas payments to the OCs were made only thereafter, in March 2022.

12. Shri Mehta also raised the issue of delay in implementation of the plan, submitting that though the Resolution Plan was approved on 5th September 2019 and was to be implemented within 30 days, it was only partially implemented after 540 days, and the OCs were paid after a huge delay which exceeded 900 days.

13. Shri Dhruv Mehta submitted that the delay in implementation of the Resolution Plan by SRA–JSW was unjustified, as the provisional attachment by the ED was merely on paper, with no actual possession taken. It is contended that the SRA–JSW had full control of the assets throughout since the PAO only referred to land, buildings, and machinery valued at Rs. 4,025 crore, without any specific attachment or notice of possession. Reliance is placed on paragraph 199 of ***Ebix Singapore Private Limited*** (supra), to

submit that a similar contention of prejudice due to ED proceedings had already been rejected by this Court.

14. Reliance has also been placed by Shri Dhruv Mehta on the judgment of this Court in ***State Bank of India and Others v. Consortium of Murari Lal Jalan and Florian Fritsch and Another***[24] to submit that it has been held by this Court that the timely implementation of the Resolution Plan is necessary.

15. It is further submitted by Shri Dhruv Mehta that the real cause for delay was the fluctuation in steel prices. Shri Mehta pointed out that steel prices fell from Rs. 46,000/- per metric ton in October 2018 to Rs. 35,000/- in September 2019, but rose sharply thereafter, reaching Rs. 55,000/- by March 2021. It is contended that the SRA–JSW rushed to implement the plan only when the prices rose and hence the delay in implementation was not due to the ED proceedings but was driven by market opportunism, as the timing of implementation closely tracked steel price trends. It was

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[24] **2024 SCC OnLine SC 3187**

submitted that the SRA – JSW must pay interest for each day's delay in the implementation of the Resolution Plan.

16. Shri Dhruv Mehta then raised the issue of distribution of Earnings Before Interest, Taxes, Depreciation, and Amortisation[25]. It was submitted that EBITDA represents the operating profits of the company and is widely recognised as a key indicator of operational performance. It was submitted that since the EBITDA is generated from the use of pre-CIRP funds of the Corporate Debtor and creditor funds, it forms a part of the company's assets.

17. It is further submitted by Shri Dhruv Mehta that the CoC, both before the NCLT and the NCLAT, consistently maintained that the EBITDA earned during the CIRP was to be distributed amongst the creditors or the stakeholders that had infused capital before the infusion of funds by the SRA – JSW. Thus, in its commercial wisdom, prior to approval of the Resolution Plan, the CoC had clearly decided against the EBITDA being retained in the company or being handed over to the SRA – JSW.

[25] **"EBITDA" for short.**

18. Shri Dhruv Mehta further submits that the NCLAT erred in reversing the NCLT's direction on the treatment of EBITDA. It was submitted that the NCLAT failed to appreciate that, unlike ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others***[26] (hereinafter referred to as "***Supreme Court Essar***"), the present Resolution Plan contains no provision on the treatment or distribution of EBITDA, making the two cases clearly distinguishable.

19. It was submitted by Shri Dhruv Mehta that the SRA failed to infuse the committed amount of Rs. 26,550 crore, having infused only Rs. 19,350 crore. This shortfall, particularly in the Rs. 7,200 crore working capital infusion, affects the scoring and renders the Plan only partially implemented. It was further submitted that the SRA – JSW contends that it issued Compulsorily Convertible Debentures[27] to satisfy the commitment of infusion. However, neither the CoC nor the SRA – JSW have brought any documentary evidence on record to show that any actual

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[26] **(2020) 8 SCC 531**
[27] **"CCD" for short.**

infusion of funds was undertaken by the SRA – JSW. It was further submitted that the CoC itself had specified that the infusion must be in the form of pure equity and hence, the CCDs issued by the SRA – JSW would not be as per the requirements set by the CoC.

ii. Appellants in Civil Appeal No. 2225 of 2020 (Jaldhi Overseas Pte. Limited)

20. Shri Balbir Singh, learned Senior Counsel for Appellant–Jaldhi, submitted that Jaldhi's claims, based on international arbitral awards, were initially admitted as Operational Debts but were later reclassified as contingent debts by the SRA–JSW. He contended that such reclassification is arbitrary and unjust. Citing various judgments including ***Swiss Ribbons Private Limited and Another v. Union of India and Others***[28], ***India Resurgence ARC Private Limited v. Amit Metaliks Limited and Another***[29] and ***Supreme Court Essar***, it was argued that Jaldhi must be treated at par with other OCs and paid interest for the inordinate delay.

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[28] **(2019) 4 SCC 17**
[29] **(2021) 19 SCC 672**

iii. Appellants in Civil Appeal No. 3020 of 2020 (M/s. Medi Carrier Private Limited) and Civil Appeal No. 6390 of 2021 (CJ Darcl Logistics Limited)

21. Shri Arjun Asthana, counsel for the Appellant – Medi submitted that the appeal arises due to the non-payment of pre-CIRP dues promised by the RP to incentivize Medi to continue providing its services during CIRP. Medi, engaged since 2012 for transport services, raised a claim of Rs. 9.51 crore after the CIRP was initiated. It was further submitted that initially, the Appellant had refused to provide services during the CIRP period. However, an agreement was entered into with the RP, whereby Medi was promised 100% of its pre – CIRP dues so as to incentivise it to provide services during the CIRP.

22. It was submitted by Shri Asthana that Medi was duly paid against its pre – CIRP due for about 10 months. However, in August 2018, it claimed Rs. 7.76 crore for its services provided during the CIRP. With no response from the RP, Medi approached the NCLT. It is submitted that thereafter, a corrigendum dated 1st October 2018 stated earlier payments were wrongly classified by the accounting clerk as pre-CIRP

dues and the same were actually to be made against CIRP services.

23. Shri Asthana further submitted that no bar exists under the IBC to pay pre-CIRP dues if necessary to keep the Corporate Debtor a going concern. Sections 14, 20(1), 23(1), and 25(1) of the IBC impose a duty on the RP to manage operations and Section 28(1)(k) of the IBC empowers the RP to transfer operational debts, validating such payments. He further submitted that barring all pre-CIRP payments would render the CIRP being marred with irregularities, as many such payments were admitted by the RP.

24. Shri Manu Beri, counsel for Appellant – Darcl is in a similar position as the Appellant – Medi and has supported the submission raised by it.

iv. Resolved Entity – BPSL

25. Shri Pinaki Misra, learned Senior Counsel for the Resolved Entity (Bhushan Power and Steel Ltd.), submitted that the company has been successfully revived post-resolution and supported the submissions of the SRA – JSW.

v. Resolution Professional

26. Shri Navin Pahwa, learned Senior Counsel for the Resolution Professional (RP), submitted that the Resolution Plan, was in compliance with the IBC and the IBBI (CIRP) Regulations. Since the liquidation value was *nil*, payments to OCs, though *ex gratia*, were not required to be made in priority over FCs. He submitted that the relevant amendment to Regulation 38 of the IBBI (CIRP) Regulations mandating such priority came into force only on 27th November 2019, i.e., after the NCLT had approved the Resolution Plan, and hence the Plan remained compliant with the law as it stood then.

27. As regards issues of delay in implementation, equity infusion, and EBITDA, Shri Pahwa submitted that these were not pressed against the RP and require no reply.

28. Responding to the contentions raised by Appellant – Jaldhi, Shri Pahwa submitted that the RP had admitted Jaldhi's claim of Rs. 1,51,90,87,933/- as an OC, which was duly reflected in the list. However, the SRA–JSW reclassified it as a "Contingent Creditor" due to the pendency of the proceedings regarding the international arbitral awards before the Calcutta High Court. He submitted that the RP had no role

in this reclassification and was only required to ensure the Plan's completeness before placing it before the CoC.

29. Responding to the contentions raised in Appellants – Medi and Darcl, Shri Pahwa submitted that no pre-CIRP dues were disbursed by the RP. Payments of Rs. 40.77 crore were made solely to honour post-dated cheques issued by the erstwhile management to avoid criminal liability under the Negotiable Instruments Act, 1881 as the IBC does not protect against the same. An inadvertent mistake by an accounting clerk led to the payments being reflected as pre – CIRP payments, which was later rectified, with revised payment advisories issued and adjustments made against the CIRP-period dues. It was submitted that the Appellants – Medi and Darcl – had provided services during the CIRP period amounting to ₹1,54,82,86,309/- and ₹99,99,24,471/- respectively, against which ₹1,54,82,86,309/- and ₹96,11,44,066/- had been paid, with the balance payable under the Resolution Plan.

vi. Committee of Creditors

30. Shri Tushar Mehta, learned Solicitor General appearing for the CoC, submitted that the erstwhile promoters

lacked *locus* under Sections 61 and 62 of the IBC, having ceased to have any relationship with the Corporate Debtor upon initiation of CIRP. He submitted that the grounds raised by them do not fall within the scope of Section 61(3) of the IBC, nor do they involve any question of law under Section 62 of the IBC. He relied on the cases of ***K. Sashidhar v. Indian Overseas Bank and Others***[30]***, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another***[31]***, Ghanshyam Mishra and Sons Private Limited through the Authorised Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director and Others***[32] and ***Ngaitlang Dhar v. Panna Pragati Infrastructure Private Limited and Another***[33] to emphasize that the "Commercial Wisdom" of the CoC is not subject to judicial review.

31. It was submitted by Shri Tushar Mehta that the CoC does not become *functus officio* upon NCLT's approval of the Plan. It continues to operate until the Plan is fully implemented or any challenge to its approval attains finality.

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[30] (2019) 12 SCC 150
[31] (2021) 1 SCC 401
[32] (2021) 9 SCC 657
[33] (2022) 6 SCC 172

Sections 21, 23, and 28 of the IBC, read with Regulation 38 of the IBBI (CIRP) Regulations, support the continued existence of the CoC and the authority of the Monitoring Committee.

32. It was submitted by Shri Tushar Mehta that the CoC remains empowered to act from time to time. Based on a proposal submitted in proceedings under Section 95 of the IBC by the ex-promoters, the CoC held a meeting on 6th August 2025 and passed a resolution to allocate the EBITDA and interest for delayed implementation to FCs. It was submitted that since the SRA–JSW did not contribute to the EBITDA earned during CIRP, and benefited from it after the implementation of the Resolution Plan, it has no rightful claim over the same.

33. Regarding the contentions raised against Clause 3.1 being in contravention of law, it was submitted by Shri Tushar Mehta that this clause permitted the CoC, with 66% approval, to extend the implementation period. It was submitted that this was done to ensure successful implementation of the Resolution Plan and was a valid exercise of commercial wisdom, not open to judicial interference. He further submitted that Clause 3.1(a) read with Clause 4 (iii) of the

Resolution Plan was inserted in compliance with Section 30(2)(d) of the IBC to provide for implementation and supervision.

vii. Successful Resolution Applicant – JSW

34. Shri Neeraj Kishan Kaul, learned Senior Counsel for the SRA–JSW, opened his submissions by questioning the *locus standi* of the erstwhile promoters, contending that they are not "persons aggrieved" within the meaning of the IBC. It was submitted that the appeals raise frivolous objections concerning the timeline of implementation, payments to OCs and equity infusion, and are in fact attempts to interfere with and derail the Resolution Process. Reliance was placed on ***Arun Kumar Jagatramka v. Jindal Steel and Power Limited and Another***[34] and ***Phoenix ARC Private Limited v. Spade Financial Services Limited and Others***[35] to submit that related parties such as erstwhile promoters must be kept out of the CIRP to avoid the process from being sabotaged.

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[34] **(2021) 7 SCC 474**
[35] **(2021) 3 SCC 475**

35. Shri Kaul further submitted that the issues raised by the Appellants do not fall within the exhaustive scope of Section 61(3) of the IBC, and no substantial question of law has been raised as per the mandate of Section 62 of the IBC. It was submitted that the arguments concerning EBITDA do not arise from any legal or regulatory mandate and were not contemplated under the Request for Resolution Plan[36] or the Resolution Plan and that the Appellants have raised several new grounds for the first time before this Court, including those relating to implementation delays, equity infusion, and payments to OCs.

36. It was submitted by Shri Kaul that the erstwhile promoters, were responsible for the Corporate Debtor's insolvency and had acted in a *mala fide* and obstructive manner during the CIRP. The NCLT, in its order dated 5th September 2019, recorded findings of deliberate attempts to delay the process by the erstwhile promoters and imposed costs for the said conduct.

37. Regarding the contentions raised against Clauses 3.1(a) and 4(iii) of the Resolution Plan, Shri Kaul submitted

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[36] "RfRP" for short.

that the said Clauses merely permit the CoC to extend the implementation timeline, which falls within its commercial wisdom and complies with Regulation 38(2) of the IBBI (CIRP) Regulations and that a challenge to the said Clauses has been raised for the first time at the stage of oral arguments before this Court, which cannot be permitted.

38. Regarding the issue of priority payments to OCs, it was submitted by Shri Kaul that even though the liquidation value payable to the OCs was *nil*, the SRA – JSW offered an *ex gratia* payment to the OCs. It was submitted that as per the law in force during the approval of the Resolution Plan by the Adjudicating Authority, the OCs were to be paid only the "amount due" as per the Resolution Plan in priority over the FCs. Since, no amount was due to the OCs, they were not paid in priority and the Resolution Plan was compliant with the law as it stood. It was further submitted that the amendment to Regulation 38(1) of the IBBI (CIRP) Regulations dated 27th November 2019, is not applicable to the present case as the same was brought into effect after the approval of the Resolution Plan by the NCLT.

39. Regarding the contention of delay in implementation of the Resolution Plan, Shri Kaul submitted that such delay was caused by external factors not in control of the SRA – JSW. He submitted that the NCLT's modifications to the Plan vide its order dated 5th September 2019 were unilateral in nature and could not be brought in force without approval of the CoC. It was further submitted that thereafter, a PAO dated 10th October 2019 was issued by the ED attaching assets of the Corporate Debtor. He submitted that in the appeal filed by the SRA – JSW against the unilateral modifications of the NCLT, the NCLAT stayed the implementation of the Plan until 17th February 2020.

40. It was further submitted by Shri Kaul that with the insertion of Section 32A in the IBC through an ordinance dated 28th December 2019, the SRA was entitled to protection from criminal prosecution for acts of the erstwhile management of the Corporate Debtor. It is submitted that based on the PAO and the other criminal proceedings, the CoC extended the implementation timeline, and the Plan was implemented on 26th March 2021 with the payment of Rs.

19,350 crore made by the SRA – JSW to the FCs of the Corporate Debtor.

41. Shri Kaul submitted that repeated clarifications were sought by the SRA–JSW and the CoC from this Court regarding the handover of the unencumbered assets of the Corporate Debtor. He submitted that this Court, ultimately, vide order dated 11th December 2024, directed that the Corporate Debtor's assets be handed over to the SRA – JSW by the ED. He also submitted that in separate proceedings, the Delhi High Court set aside criminal proceedings against the resolved entity – BPSL, holding that no prosecution could lie against it post – resolution. It was therefore submitted that the entire period of delay could not be attributable to the SRA – JSW as it required the possession of unencumbered assets of the Corporate Debtor before it could implement the Resolution Plan.

42. Shri Kaul submitted that the interest for delay cannot be claimed by the CoC, as it had, itself, unconditionally extended the timeline. It was submitted that the CoC had admitted that the delay was attributable to the ED's actions and not to the SRA – JSW.

43. It was further submitted by Shri Kaul that the SRA–JSW has fulfilled all its obligations under the Plan. An amount of Rs. 100 crore was infused as equity, with the balance infused via CCDs, which qualify as equity as per the judgment of this Court in the case of ***IFCI Limited v. Sutanu Sinha and Others***[37]. It was therefore submitted that the CoC itself confirmed full compliance and supported the SRA – JSW's position.

44. Regarding the issue of distribution of EBITDA, Shri Kaul submitted that it is only an "accounting term" and does not reflect actual profitability. After accounting for taxes, interest, depreciation, and amortization, the Corporate Debtor had incurred losses of Rs. 16,616 crore in total during the CIRP period. He further submitted that neither the RfRP nor the Resolution Plan provides for EBITDA distribution. The Resolution Plan binds all stakeholders under Section 31(1) of the IBC and no upward or downward movement of claims is permissible unless expressly provided for by the Resolution Plan. It was submitted that accepting such a novel claim for distribution of EBITDA would be in contravention of the

[37] **2023 SCC OnLine SC 1529**

judgment of this Court in the case of ***Ghanshyam Mishra*** (supra).

45. It was further submitted by Shri Kaul that the CoC resolution dated 6th August 2025 claiming entitlement to EBITDA is *ultra vires*. He submitted that the CoC was aware of the erstwhile promoters' defences in the personal insolvency proceedings since 2020, and the CIRP is entirely distinct from personal insolvency proceedings under Section 95 of the IBC. It was submitted that the NCLT, in its order dated 7th October 2024, has also recognized this distinction. He submitted that no appeal was filed by the CoC against the NCLAT's findings on distribution of EBITDA, and hence, the CoC cannot challenge the same at this stage.

46. Shri Kaul further submitted that the CoC, during NCLAT proceedings, had acknowledged that there was no provision for EBITDA distribution. In its resolution dated 4th July 2020, it decided that the EBITDA would remain with the Corporate Debtor. It was submitted that this constitutes a judicial admission and the CoC cannot be permitted to change its stand at this stage of the proceedings before this Court.

47. Regarding the contentions of Appellant – Jaldhi, Shri Kaul submitted that it was correctly classified as a contingent creditor. It was further submitted that the NCLT found that it had initially presented itself as such and that the IBC permits sub-classification of OCs as contingent and crystallized claims, where justified and the same has been affirmed by this Court in the case of ***Supreme Court Essar***.

48. It is submitted that Jaldhi treated itself as a contingent creditor as it was under the impression that contingent claims cannot be settled under a Resolution Plan. It was only later that it changed its stance on a wrong understanding that no distinction in the treatment of claims amongst a class of OCs was permissible. It is therefore submitted that the objectives of the IBC cannot be stretched so far as to treat unequals as equals and the sub – classification of OCs is permissible in law.

49. Shri Kaul submitted that Jaldhi had filed its claim on the basis of certain international arbitral awards which were passed in its favour. He submitted that as on the date of the commencement of the CIRP, the appellant had not been successful in the enforcement of the award and therefore the

claims remained contingent as foreign awards are not automatically binding under Indian law. Pertinently, the appellant had also withdrawn the enforcement proceedings which were pending before the Calcutta High Court and the same has been reflected in the orders dated 4th January 2022 and 22nd August 2023 passed by the High Court. It is therefore submitted that once the enforcement petitions filed before the Calcutta High Court were withdrawn, the foreign award could not be enforced and was not binding under Indian law.

viii. Submissions in Rejoinder

50. *In rejoinder*, Shri Dhruv Mehta, learned Senior Counsel for the erstwhile promoters submitted that EBITDA represents the operating profit of the Corporate Debtor and is not merely an accounting figure, as contended by the SRA–JSW. It was submitted that the NCLAT, in the impugned judgment, has also used the terms "profits" and "EBITDA" interchangeably, reinforcing this interpretation. It was further submitted that SRA–JSW, having not challenged the impugned judgment, is precluded from now contesting the NCLAT's understanding of EBITDA.

51. Shri Dhruv Mehta lastly submitted that the assertion by SRA – JSW that there were no profits during the CIRP period is contrary to the record. The RP, in his affidavit, confirmed the existence of EBITDA valued at Rs. 1,813 crores for the relevant period. It was submitted that the deduction of interest, taxes, depreciation, and amortization to claim the absence of profit was stated to be misleading, as these deductions do not involve actual cash outflow and hence do not affect the liquidity available for distribution to the FCs.

IV. ANALYSIS

52. With the assistance of the learned Senior Counsel/counsel for the parties, we have perused the entire material placed on record.

a. Locus standi of the erstwhile promoters

53. At the outset, the SRA – JSW as well as the CoC have heavily challenged the *locus* of the erstwhile promoters of the Corporate Debtor. To support their argument, reliance has been placed on Section 62 of the IBC, which reads thus:

> "**62. Appeal to Supreme Court**.—(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of

such order under this Code within forty-five days from the date of receipt of such order.

(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days."

54. On a bare perusal of Section 62 of the IBC, it is clear that the interpretation of the term "person aggrieved" is not limited or defined. However, the objectives of the IBC itself must be kept in mind while interpreting the said term. To ascertain the objectives of the IBC, it will be apposite to examine its preamble, which reads thus:

"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

55. On a perusal of the said preamble, it can be seen that the IBC was brought in to consolidate the laws related to the reorganization and insolvency resolution of corporate persons in a time – bound manner which would result in the promotion

of entrepreneurship and the balancing of the interests of all shareholders. The main purpose of the enactment therefore is to ensure that the company undergoing insolvency proceedings is revived or liquidated expeditiously within a stipulated timeframe.

56. The said objective of expeditious resolution can be further found in the IBC under Section 12, which reads thus:

> "**12. Time-limit for completion of insolvency resolution process**.—(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
> (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.
> (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:
> Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once:
> Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days

from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:
Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."

57. A bare perusal of Section 12 of the IBC reveals that precise timelines have been provided for all the different steps that have to be taken during the CIRP of a company. The *proviso* to Section 12 of the IBC states that any extension to the fixed timelines may not be granted more than once. This further shows that the IBC does not allow any undue delays in the completion of the CIRP of a company.

58. It is thus clear that the IBC proposes to carry out the Resolution Process of a Company expeditiously in a time – bound fashion.

59. It was submitted by the SRA – JSW as well as the CoC that after the CIRP is triggered, the erstwhile promoters' relationship with the Corporate Debtor – BPSL ceases to exist and they cannot be included in the definition of "person

aggrieved". It was also submitted that the conduct of the Appellants – erstwhile promoters in the CoC meetings, before the NCLT, NCLAT and this Court would reveal that these appeals are an attempt to interfere with the task of reviving the Corporate Debtor undertaken by the SRA – JSW.

60. This Court, in the case of ***Arun Kumar Jagatramka*** (supra), observed thus:

> **"41.** The enactment of the IBC has marked a quantum change in corporate governance and the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, **the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at reorganisation and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be**

achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems."

(Emphasis supplied)

61. It can thus be seen that this Court has observed that one of the integral objectives of the IBC is to ensure that the interests of the company undergoing CIRP are not influenced by the interests of the erstwhile management and that this can only be achieved by applying a purposive interpretation to the provisions of the Code by not permitting the problems of the earlier regime to enter the resolved/revived entity through the backdoor.

62. The Appellants – erstwhile promoters have heavily relied on the judgment of this Court in ***Vijay Kumar Jain*** (supra), wherein this Court held thus:

"**19.5.** Further, under Regulation 37(1)(*f*), **a resolution plan may provide for reduction in the amount payable to the creditors, which again vitally impacts the rights of a guarantor. Last but not the least, a resolution plan which has been approved or rejected by an order of the adjudicating authority, has to be sent to "participants" which would include members of the erstwhile Board of Directors — vide Regulation 39(5) of the CIRP Regulations.**

> **Obviously, such copy can only be sent to participants because they are vitally interested in the outcome of such resolution plan, and may, as persons aggrieved, file an appeal from the adjudicating authority's order to the Appellate Tribunal under Section 61 of the Code.** Quite apart from this, Section 60(5)(*c*) is also very wide, and a member of the erstwhile Board of Directors also has an independent right to approach the adjudicating authority, which must then hear such person before it is satisfied that such resolution plan can pass muster under Section 31 of the Code."
>
> (Emphasis supplied)

63. In view of the aforesaid judgment of this Court, since the Resolution Plan also affects the rights of the guarantors, we find that the SRA – JSW and the CoC are not right in submitting that the appeals at the instance of the appellants would not be maintainable. In any case, rather than non-suiting the appellants on the ground of *locus*, we propose to decide the appeals on merits after considering the submissions made on behalf of all the parties. However, while doing so, it will also be apposite to consider the conduct of the erstwhile promoters during the CIRP.

b. Conduct of Erstwhile Promoters

64. It is submitted by the SRA – JSW that Mr. Sanjay Singal (erstwhile Promoter), had attended just one meeting of

the CoC himself and had attended just two meetings through his authorized representatives. Furthermore, Mrs. Aarti Singal, according to the SRA – JSW, had not attended even a single meeting of the CoC. In this respect, it will also be relevant to refer to the observations made by NCLT in its Judgment and Order dated 5th September 2019 while approving the Resolution Plan. The NCLT, after reproducing the entire table showing the attendance of the erstwhile management and exhibiting the lackluster participation of the Appellants, observed thus:

> "**126.** It appears to us that the Ex-Management and Promoters were moving places to delay the conclusion of proceedings before us. Accordingly, another set of written submissions was filed by Mr. Virendra Ganda, learned Senior Counsel by urging that the judgment of the Hon'ble Appellate Tribunal rendered in the case of Standard Chartered Bank v. Satish Kumar Gupta, R.P. concerning Essar Steel Limited in C.A. No. 287 /2019, 288/2019, 289/ 19 and 295/2019 decided on 04.07.2019 was placed before us. Numerous other applications have been filed after the order was reserved which have delayed and interrupted the pronouncement of the order and those applications are as under:

S. No.	CA No.	Filed By	Date of filing
1.	CA 1297(PB) /2019	Becquerel Industries Pvt. Ltd.	03.05.2019
2.	CA 973(PB) /2019	Sanjay Singal	21.05.2019
3.	CA 1055(PB)/2019	Resolution Professional	30.05.2019

4.	CA 1056(PB)/2019	Sanjay Singal	30.05.2019
5.	CA 1296(PB)/2019	PNB	11.06.2019
6.	CA 1295(PB)/2019	JSW	10.07.2019

127. However, the Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 198 of 2018 has issued directions on 04.02.2019 that Adjudicating Authority-NCLT may proceed with the pronouncement of the order. **We have added this unusual para to this order with the object of showing how desperate and frustrated the Ex-Management/Promoters are and how they are making efforts to cause delay. We do not say any further on this aspect**.

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

a) …….

b) …….

c) CA No. 286(PB) /2019 filed by the erstwhile directors Mr. Sanjay Singhal and Mrs. Aarti Singhal seeking copies of the resolution plan is dismissed with a cost of Rs. 1 /- lac to be paid personally by Mr. Sanjay Singal and Ms. Aarti Singal in equal share;

……..”

(Emphasis supplied)

65. It can thus be seen that after the NCLT had heard the matter in detail, various applications had been filed by the erstwhile management, including Mr. Sanjay Singal before

various forums. This had led to a delay in the pronouncement of the approval order by the NCLT. A specific observation has been made by the NCLT that the erstwhile promoters were making efforts to cause delays which indicated how desperate and frustrated they were. The NCLT also imposed a cost of Rs. 1 Lakh on the Appellants – erstwhile promoters as it concluded that the application seeking copies of the Resolution Plan filed by them was frivolous.

66. It can thus clearly be seen that the entire attempt of the appellants has been to thwart the CIRP and to not permit the same to be taken to a logical end. Having observed the conduct of the Appellants, we shall now proceed to deal with their contentions on merit.

c. Existence of the CoC after approval of the Resolution Plan by the Adjudicating Authority

67. It is submitted by Shri Dhruv Mehta appearing on behalf of the Appellants – erstwhile promoters that the CoC becomes *functus officio* after the approval of the Resolution Plan by the Adjudicating Authority. He submitted that the IBC does not recognize the concept of an "erstwhile CoC" and the CoC is to work with the RP. He submitted that since the role

of the RP ends after the approval of the Resolution Plan, the CoC cannot exercise its authority independently. *Per contra*, Shri Tushar Mehta, appearing on behalf of the CoC submitted that the CoC does not lose its authority after the approval of the Resolution Plan. He submitted that the CoC remains in existence until the Resolution Plan is fully implemented or a challenge to the approval order passed by the Adjudicating Authority attains finality, whichever comes later. It is submitted that the provisions of the IBC and the IBBI (CIRP) Regulations enable the CoC to set up a monitoring committee to oversee the implementation of the Resolution Plan and thus on a conjoint reading of the said provisions, it is clear that the CoC remains in existence till the Resolution Plan is implemented or the appeal is finally decided by this Court.

68. In this respect, it would be relevant to refer to Sections 20, 21, 24, 28 and 30 of the IBC, which read thus:

> "**20. Management of operations of corporate debtor as going concern**.—(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
>
> (2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

(*a*) to appoint accountants, legal or other professionals as may be necessary;

(*b*) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(*c*) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:

Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(*d*) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(*e*) to take all such actions as are necessary to keep the corporate debtor as a going concern.

21. Committee of creditors.—(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

(3) Subject to sub-sections (6) and (6-A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,—

(*a*) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(*b*) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(*a*) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(*b*) represent himself in the committee of creditors to the extent of his voting share;

(*c*) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(*d*) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6-A) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

x x x x

24. Meeting of committee of creditors.—(1) The members of the committee of creditors may meet in

person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(*a*) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6-A) of Section 21 and sub-section (5);

(*b*) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(*c*) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) Subject to sub-sections (6), (6-A) and (6-B) of Section 21, any creditor] who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.

x x x x

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 sub-section (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. Approval of committee of creditors for certain actions.

x x x x

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

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(*a*) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(*b*) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—

(*i*) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or

(*ii*) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.—For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.—For the purposes of this clause, it is hereby declared that on and

from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor—

(*i*) where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(*ii*) where an appeal has been preferred under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(*iii*) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]

(*c*) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(*d*) the implementation and supervision of the resolution plan;

(*e*) does not contravene any of the provisions of the law for the time being in force;

(*f*) conforms to such other requirements as may be specified by the Board.

Explanation.—For the purposes of clause (*e*), if any approval of shareholders is required under the Companies Act, 2013 (18 of 2013) or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(3) The resolution professional shall present to the committee of creditors for its approval such

resolution plans which confirm the conditions referred to in sub-section (2).

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

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under Section 29-A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

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

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority."

69. It can be seen that as per Section 20 of the IBC, the IRP is required to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. It will further be relevant to note that, under Section 21 of the IBC, the IRP, after collation of all claims received against the Corporate Debtor and determination of the financial position of the Corporate Debtor, is required to constitute a CoC. Under Section 21 of the IBC, the CoC must be comprised of all FCs of the Corporate Debtor. However, *proviso* to sub-section (2) of Section 21 of the IBC provides that if a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) or sub-section (5) of Section 24 of the IBC is a related party of the corporate debtor, he shall not have any right of

representation, participation or voting in a meeting of the CoC. No doubt that the second *proviso* thereof excludes certain related parties of a corporate debtor from the applicability of the first *proviso*. However, the same would not be relevant for the purpose of the present matter.

70. Section 24 of the IBC deals with the meeting of the creditors. Sub-section (1) of Section 28 of the IBC, which begins with a non-obstante clause, requires that the RP, during the CIRP, shall not take any of the actions therein without the prior approval of the CoC. Such decisions are required to be taken by the CoC after putting the matters enumerated in sub-section (1) thereof to vote. Under sub-section (4) of Section 30 of the IBC, the CoC considers approval of resolution plan by a vote of not less than 66% of voting share of the financial creditors.

71. For considering the submissions in this regard, it will also be relevant to refer to certain provisions of the IBBI (CIRP) Regulations. Clause (d) of Regulation 2 of the IBBI (CIRP) Regulations, defines "committee" as *a committee of creditors established under Section 21 of the IBC*.

72. Regulation 18 of the IBBI (CIRP) Regulations reads thus:

> **"18. Meetings of the committee**.—(1) A resolution professional shall convene a meeting of the committee before lapse of thirty days from the last meeting:
>
> Provided that the committee may decide to extend the interval between such meetings subject to the condition that there shall be at least one meeting in each quarter.
>
> (2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty three per cent of the voting rights:
>
> *Explanation*: For the purposes of sub-regulation (2) it is clarified that meeting(s) may be convened under this sub-regulation till the resolution plan is approved under sub-section (1) of Section 31 or order for liquidation is passed under Section 33 and decide on matters which do not affect the resolution plan submitted before the Adjudicating Authority.
>
> ……."

73. It is to be noted that *Explanation* to clause (2) of Regulation 18 of the IBBI (CIRP) Regulations came to be added by Notification No. IBBI/2022-23/GN/REG093 dated 16th September 2022. The said *Explanation* would reveal that it clarified that for the purposes of clause (2) thereof the meeting(s) may be convened under the said clause till the Resolution Plan is approved under sub-section (1) of Section

31 of the IBC or an order for liquidation is passed under Section 33 of the IBC. However, the only rider is that it shall not decide on matters which do not affect the Resolution Plan submitted before the Adjudicating Authority.

74. It will also be relevant to note that by Notification No. IBBI/2023-24/GN/REG113 dated 15th February 2024 clauses (4) and (5) of Regulation 38 were brought on the statute book, which read thus:

> "**38. Mandatory contents of the resolution plan**.—
> …….
> (4) The committee may consider the requirement of a monitoring committee for the implementation of the resolution plan.
> (5) Where the committee considers that a monitoring committee for the implementation of the resolution plan is required, it may, while approving the resolution plan, decide to constitute the same with the resolution professional or propose another insolvency professional, or any other person as its members:
> Provided that where the resolution professional is proposed to be part of the monitoring committee, the monthly fee payable to him shall not exceed the monthly fee received by him during the corporate insolvency resolution process."

75. However, by way of Notification No. F.No. IBBI/2024-25/GN/REG122 dated 3rd February 2025 with effect from 3rd

February 2025, clauses (4) and (5) of Regulation 38 of the IBBI (CIRP) Regulations were substituted with Regulation 4 (a), (b) and (c) which read thus:

> "**38. Mandatory contents of the resolution plan**.—
> .....
> (4)(*a*) The committee shall consider setting up a monitoring committee for monitoring and supervising the implementation of the resolution plan.
> (*b*) The monitoring committee may consist of the resolution professional or any other insolvency professional, or any other person, including representatives of the committee and representatives of resolution applicant(s), as its members:
> Provided that where the resolution professional is proposed to be part of the monitoring committee, the monthly fee payable to him shall not exceed the monthly fee received by him during the corporate insolvency resolution process.
> ....."

76. It can thus be seen that though under the old Regulations, the CoC had an option to constitute the monitoring committee, under the Regulations which are now in effect, it has been made mandatory for the CoC to consider setting up the monitoring committee for monitoring and supervising the implementation of the Resolution Plan.

77. It can further be seen that the CoC is also empowered to nominate either the RP or any other insolvency professional or any other person including the representatives of the committee and the representatives of resolution applicant(s), as its members. It can thus be seen that the legislative intent is to empower the CoC to monitor and supervise the implementation of the resolution plan through the monitoring committee.

78. We are of the view that if the contention of the appellants that the CoC becomes *functus officio* is accepted, then it would lead to an anomalous situation.

79. As per the IBC and as is the common experience, after the Resolution Plan is accepted under Section 31 of the IBC by the Adjudicating Authority, the same does not achieve finality unless the appeals under Section 61 of the IBC by the appellate authority and by this Court under Section 62 of the IBC are decided. It also cannot be ignored that in certain cases, the Resolution Plan may not be implemented and the matter may lead to liquidation proceedings.

80. In the present matter itself, it can be seen that when the matter was first decided by this Court by judgment and

order dated 2nd May 2025, this Court had directed the liquidation proceedings to be initiated against the Corporate Debtor. However, as has already been discussed hereinabove, the dominant purpose of the IBC is to resort to the liquidation proceedings as the last option. If the contention of the erstwhile promoters-cum-directors that the CoC ceases to exist after the Resolution Plan is accepted, then as already discussed hereinabove, it will lead to an anomalous situation.

81. It may lead to a situation wherein though the Resolution Plan is approved by the Adjudicating Authority, however it is not implemented for 'a' reason or 'b' reason thereby leaving the creditors *high and dry*. If the contention is accepted, the creditors would not be in a position to take any steps that are found necessary for realizing its dues from the Corporate Debtor. The said situation may lead to a state of *limbo*. Such cannot be the intention of the legislature which has enacted the law with the dual purpose of making the Corporate Debtor an on-going concern and realizing the dues of the Corporate Debtor.

82. We are of the view that the *Explanation* to clause 2 of Regulation 18 of the IBBI (CIRP) Regulations clarifies the

position. It empowers the CoC to hold meetings till either the Resolution Plan is approved under Section 31(1) of the IBC or an order for liquidation is passed under Section 33 of the IBC. It is empowered to decide all the matters except the matters which do not affect the Resolution Plan submitted before the Adjudicating Authority.

83. It may not be out of place to mention that the CoC has a vital interest in the Resolution Plan and that such an interest would continue till the Resolution Plan is actually implemented. It is only after the implementation of the Resolution Plan that payment can be made to the creditors, of their dues, in accordance with the Resolution Plan, which has been approved by the Adjudicating Authority.

84. If the contention of the appellants is accepted, then in a case like the present one wherein on account of variety of reasons the Resolution Plan could not be implemented and the creditors could not be paid their dues as per the Resolution Plan, it would lead to an anomalous situation which could not have been the intention of the legislature.

85. We are therefore of the view that in view of *Explanation* to clause 2 of Regulation 18 of the IBBI (CIRP)

Regulations, the CoC continues to exist till the Resolution Plan is implemented or an order of liquidation is passed under Section 33 of the IBC. It will not be out of place to mention that the cloud of uncertainty exists till a finality is given by this Court in the proceedings under Section 62 of the IBC.

86. In the present case, it will be relevant to see that though the Resolution Plan was implemented on 26th March 2021, there was a statement made by the learned Senior Counsel for the CoC to the effect that in the event the appeals succeed, the creditors would refund the amount. As such, till the present appeals are decided, the CoC had a vital interest in the proceedings. We are therefore unable to accept the contention raised by the appellants (erstwhile promoters-cum-directors of the Corporate Debtor) in that regard and the same are liable to be rejected.

d. Grounds of Appeal

87. It is submitted by the SRA – JSW that the present appeals basically arise out of the concurrent findings of fact. It is not in dispute that the Resolution Plan submitted by the SRA – JSW, which was submitted after following the entire procedure prescribed under the IBC and IBBI (CIRP)

Regulations was duly approved by the CoC and was approved by the Adjudicating Authority vide its Judgment and Order dated 5th September 2019 with certain conditions. However, while dismissing the appeals thereagainst preferred by Mr. Sanjay Singal, Kalyani Transco, Jaldhi, Medi, Darcl, the State of Odisha and others, the NCLAT allowed the appeal of the SRA – JSW and clarified/modified some of the conditions laid down by the NCLT. It is relevant to note that the NCLT vide its Judgment and Order dated 5th September 2019, relying on the judgment of NCLAT in ***Standard Chartered Bank v. Satish Kumar Gupta, Resolution Professional of Essar Steel Limited and Others***[38] (hereinafter referred to as "***NCLAT Essar***"), while approving the Resolution Plan submitted by SRA, had directed distribution of EBITDA generated during the CIRP amongst the creditors of the Corporate Debtor. However, since the judgment of the NCLAT in ***NCLAT Essar*** was reversed by this Court in ***Supreme Court Essar***, the NCLAT, while disposing of the appeal filed by SRA – JSW, relied on the ***Supreme Court Essar*** and directed the Monitoring Committee to examine the RfRP and decide on

[38] **2019 SCC OnLine NCLAT 388**

distribution of EBITDA. As such, the conditions made in paragraph 128(j) of the judgment and order dated 5th September 2019 passed by the Adjudicating Authority were set aside and the Monitoring Committee with the help of RP was directed to go through the RfRP issued in terms of Section 25 of the IBC.

88. It can thus be seen that except the finding on distribution of EBITDA present appeals arise out of the concurrent findings by the NCLT and the NCLAT.

89. It is to be noted that an appeal to this Court under Section 62 of the IBC is available only on a question of law.

90. The appeal provided under Section 61 of the IBC before the appellate authority is available only on the following five grounds:

(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.

91. It can thus be seen that an appeal against an order approving a Resolution Plan would be available before the NCLAT only when it is found that the approved resolution plan is in contravention of the provisions of any law for the time being in force or there has been any material irregularity in exercise of powers by the resolution professional during the corporate insolvency resolution period or that the debts owed to OCs of the Corporate Debtor have not been provided for in the resolution plan in the manner specified by the Board or that the insolvency resolution process costs have not been provided for repayment in priority to all other debts or the resolution plan does not comply with any other criteria specified by the Board.

92. A perusal of the material placed on record in the present matter would reveal that the appeal before the NCLAT in this matter does not fit in any of the aforesaid criteria. Having said that, since an appeal before the NCLAT itself was not made out, we find that the appeals before this Court on a conjoint reading of Sections 61 and 62 are not tenable since no question of law pertaining to any of the five grounds specified in Section 61 of the IBC arises for consideration in the present case.

93. Not only that, as we have already observed hereinbefore, this is a case arising out of concurrent findings. In this regard, we may gainfully refer to the recent judgment of this Court in the case of ***Uttar Haryana Bijli Vitran Nigam Limited and Another v. Adani Power (Mundra) Limited and Another***[39] to which one of us (Gavai, J. as he then was) was a party, wherein this Court while considering an almost similar provision in the *Electricity Act, 2003* (Section 125), providing for an appeal before this Court only on a question of law and where a case arose out of concurrent findings of fact, has observed thus:

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[39] **(2023) 14 SCC 731**

"**11.** It will further be relevant to note that the present appeal arises out of concurrent findings of fact arrived at by both the authorities.

12. This Court, in *Maharashtra State Electricity Distribution Co. Ltd.* v. *Adani Power Maharashtra Ltd.*, (2023) 7 SCC 401], after considering the relevant provisions under the Electricity Act, 2003 with regard to appointment, qualifications and Members of the CEA, CERC and the learned APTEL, held that these bodies are bodies consisting of experts in the field. After considering various judgments on the issue, this Court observed thus : (SCC p. 452, para 121)

> "*121*. Recently, the Constitution Bench of this Court in *Vivek Narayan Sharma (Demonetisation Case-5 J.)* v. *Union of India*, (2023) 3 SCC 1] has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are ex facie arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."

13. In our opinion, the concurrent view taken by CERC and APTEL cannot be said to be a view taken in ignorance of the mandatory statutory provisions nor can it be said that it is based on extraneous consideration. The view also cannot be said to be ex facie arbitrary or illegal. As such, no interference would be warranted in the present appeal."

94. It can thus be seen that this Court has taken a view that when a concurrent view has been taken by two

adjudicating authorities provided under the special statute, unless it is found that such a view was in ignorance of the mandatory statutory provisions or was based on extraneous consideration or was *ex-facie* arbitrary or illegal, an interference would not be warranted.

95. In the present matter also the findings on all the issues are concurrent. It is only insofar as the issue with regard to distribution of EBITDA wherein the NCLAT has set aside the directions of the NCLT. However, in order to avoid repetition, we will not deal with the said issue here since in the foregoing paragraphs, we have elaborately dealt with the contentions *qua* the issue of distribution of EBITDA.

96. We are therefore of the view that the appellants could have been non-suited on the short ground of concurrent findings of the NCLT and the NCLAT alone. However, we propose to deal with the other contentions raised by the Appellants – erstwhile promoters on merits as well.

e. Legality of clause permitting CoC to extend the period for implementation of the Resolution Plan

97. The next issue which is pressed into service by the learned Senior Counsel on behalf of the erstwhile promoters is

with regard to delay in implementation of the Resolution Plan. Insofar as the clause in the Resolution Plan which empowered the CoC to extend the date of implementation of the Resolution Plan by 66% of the majority of the lenders forming part of the erstwhile CoC is concerned, it is submitted that such an open-ended clause is liable to be set aside in view of the judgment of this Court in the case of ***Ebix Singapore Private Limited*** (supra). The learned Senior Counsel for the erstwhile promoters has also relied on ***Committee of Creditors of AMTEK Auto Limited through Corporation Bank v. Dinkar T. Venkatasubramanian and Others***[40]**.**

98. This Court in the said case has held that once the Resolution Plan has been submitted by an applicant and the same has been accepted by the CoC, there cannot be any alterations, amendments or modifications in the Resolution Plan. However, we find that such is not the case here.

99. For appreciating the rival contentions, it will be relevant to refer to clause 3 of the Resolution Plan which deals with the stage of implementation and which reads thus:

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[40] **(2021) 4 SCC 457**

"**3. Resolution Plan – Stage of Implementation**

3.1 The Resolution Applicant proposes to:

(a) undertake all efforts to procure the satisfaction of each Conditions Precedent within a period of 30 days from the date of issuance of LOI and in any case prior to approval of the Resolution Plan by NCLT. The Resolution Applicant shall immediately after the NCLT Approval Date, notify the Monitoring Professional and the Steering Committee in writing ("**CP Satisfaction Notice**") the date(s) on which it proposes to complete the steps set out in **Schedule 2** (***Steps for Implementation of the Resolution Plan***) and if such steps are to be implemented with receipt of the Specified Approval mentioned in Paragraph 4(ii)(a)(II) or in the absence of the same (and in the manner specified in such paragraph) ("**Effective Date**"), which date shall in any event not exceed 30 (thirty) days from the NCLT Approval Date or such extended period which may be permitted by 66% majority of the lenders forming part of the erstwhile CoC; and"

100. It can thus be seen that clause 3 of the Resolution Plan provided that steps for implementation of the Resolution Plan are to be taken within 30 days from the NCLT approval date or such extended period which may be permitted by 66% majority of the lenders forming part of the erstwhile CoC. However, our experience in matters like the present case, shows that on account of various exigencies, it may not be possible to implement the Resolution Plan within the prescribed period. What has therefore been sought to be done

by the aforesaid clause is to reserve certain discretion in the CoC to extend the period for implementation of the Resolution Plan, provided that such an extension is approved by 66% majority of the lenders forming part of the erstwhile CoC.

101. The aforesaid clause provides for the effective date which shall not exceed 30 days from the NCLT approval date or such extended period which may be permitted by 66% majority of the lenders forming part of the erstwhile CoC. It can thus be seen that clause (3) of the Resolution Plan neither provided modification nor withdrawal from the Resolution Plan. The said cannot therefore be stated to be an open ended or indeterminate plan solely at the discretion of the resolution applicant. Under the said clause, there is neither a provision for withdrawal nor modification of the Resolution Plan nor are there any negotiations envisaged under the said clause of the Resolution Plan submitted by the SRA – JSW in the present matter.

102. Insofar as the judgment in the case of ***Amtek Auto*** (supra) is concerned, the SRA therein had sought to renegotiate the clauses of its Resolution Plan in view of the Covid-19 pandemic which was held by this Court to be

impermissible under the scheme of IBC. We find that such is not the case here. Neither the SRA – JSW nor the CoC in the present matter are renegotiating the terms of the Resolution Plan. Hence the submission in this regard is liable to be rejected.

f. Delay in implementation of the Resolution Plan

103. The next submission on behalf of the Appellants – erstwhile promoters is with regard to the inordinate delay in implementation of the Resolution Plan by the SRA – JSW. It is submitted by the learned Senior Counsel that though the Resolution Plan was approved by the Adjudicating Authority on 5th September 2019, it was implemented on 26th March 2021 and was thus, delayed by a period of one and half years. It is therefore submitted that on this ground alone, the appeals deserve to be allowed and the Resolution Plan be set aside.

104. To consider the rival submissions in this regard, we would have to trace the history of the present matter.

105. As can be seen from the documents placed on record, there have been several impediments in the implementation of the Resolution Plan by the SRA – JSW. After the Resolution

Plan was approved by the CoC on 15th October 2018 and an application was filed by RP for approval of Resolution Plan on 14th February 2019. Thereafter, the CBI filed an FIR on 5th April 2019 against the Corporate Debtor – BPSL and its erstwhile management for large scale siphoning and diversion of funds. Immediately thereafter, the SRA - JSW filed an additional affidavit before the NCLT on 15th April 2019 seeking protection from acts/omissions of the erstwhile management of the Corporate Debtor for alleged breach under the applicable laws including under IPC, PC Act and PMLA. Based on the CBI's FIR, the ED registered an ECIR bearing DLZO-1/02/2019 against the Corporate Debtor – BPSL and its erstwhile management.

106. The NCLT approved the Resolution Plan on 5th September 2019 with certain modifications. It is pertinent to note that the NCLT had not granted any relief *qua* the protections sought by the SRA – JSW in respect of the prosecution sought to be carried out against the erstwhile management. Being aggrieved thereby, the SRA – JSW filed an appeal before the NCLAT contending that it was not liable to

share the EBITDA with FCs and OCs and also that it should be protected against criminal proceedings and attachments.

107. It can therefore be seen that unless the issue with regard to sharing of EBITDA with FCs was finally decided by the NCLAT, the Resolution Plan could not have been implemented inasmuch as the direction of the NCLT had, in effect, modified the Resolution Plan submitted by the SRA – JSW.

108. It is further to be noted that in the meantime, on 10th October 2019, the ED issued the PAO whereby it attached the assets of the Corporate Debtor – BPSL at its Odisha Plant worth over Rs.4,025 crore under the PMLA. On 14th October 2019, the NCLAT by an interim order stayed the implementation of the Resolution Plan which stay remained in operation until 17th February 2020. The NCLAT also stayed the PAO issued by the ED. It is further to be noted that, despite the stay of the PAO by the NCLAT, the ED continued with the PMLA proceedings by filing Original Complaint under Section 8(1) of PMLA before the Adjudicating Authority under PMLA. It is further to be noted that the CoC had filed an SLP before this Court seeking interim stay on the PAO and this Court, vide

order dated 18th December 2019, had issued notice and stayed the PAO. In the meantime, the ED had filed a Prosecution Complaint against the Corporate Debtor – BPSL under PMLA for the offences alleged to have been committed by the erstwhile management. In the said proceedings, ED had specifically contended that the Corporate Debtor – BPSL or the SRA – JSW was not entitled to benefit of Section 32A of IBC.

109. On 17th February 2020, vide the Impugned Judgment and Order, the NCLAT approved the Resolution Plan of the SRA – JSW by modifying/clarifying some of the conditions imposed by the NCLT. The NCLAT *inter alia* also clarified that BPSL and its assets were entitled to protection from criminal prosecution under Section 32A of IBC.

110. Being aggrieved by the order passed by the NCLAT, Mr. Sanjay Singal (erstwhile promoter) filed an appeal before this Court on 24th February 2020. The OCs of the Corporate Debtor (Kalyani Transco, Jaldhi, Medi and Darcl) also filed separate appeals before this Court. On 29th February 2020, the CoC filed a separate IA in the pending appeal filed by it praying for release of the attachment and quashing of consequential proceedings under PMLA by ED in view of

Section 32A of IBC. On 5th March 2020, the SRA – JSW filed an additional affidavit before this Court pointing out that it was essential to handover unencumbered and clean assets of the Corporate Debtor to it. It was also submitted that handing over of unencumbered assets was integral to the Resolution Plan and such control over the assets of the Corporate Debtor by SRA – JSW could not be subject to any conditions. In the present appeals filed by erstwhile promoters of Corporate Debtors – BPSL and its OCs, this Court recorded the following observations on 6th March 2020:

> "…..Dr. A.M. Singhvi, learned senior counsel appearing for the Committee of Creditors states that in case he receives money, he will return the said amount within two months, if the appeal succeeds."

111. On 19th March 2020, the CoC issued a notice to the SRA – JSW demanding implementation of the Resolution Plan within 7 days. The SRA – JSW replied to the said notice requesting to handover unencumbered and clean assets of the Corporate Debtor which were free from ED attachment and criminal prosecution. It appears that in the meantime there were negotiations between the CoC and the SRA – JSW. It was the stand of the SRA – JSW that though it was willing to go

ahead with the implementation of the Resolution Plan, it was not obligated to implement the Resolution Plan until there was clarity in respect of handover of clean and unencumbered assets of the Corporate Debtor.

112. It is apparent from the record that the CoC filed an application on 30th May 2020 in the appeal pending before this Court seeking certain directions. Apart from seeking implementation of the Resolution Plan, the CoC also sought for a declaration for setting aside of the PAO and any consequential proceedings, including ED's prosecution. In the meantime, it appears that, there was an exchange of communication between the SRA – JSW and the CoC with regard to distribution of EBITDA amongst the creditors. It is also to be noted that the NCLT had on 5th September 2019 directed the EBITDA to be shared by the SRA – JSW with the FCs and OCs and though the said direction was set aside by the NCLAT vide impugned judgment, the present matter was still pending before this Court till 2nd May 2025 when it was finally decided by this Court in the earlier round.

113. In the earlier proceedings before this Court, it was the consistent stand of the SRA – JSW that the RfRP issued by

the RP for the CIRP did not provide for the distribution of EBITDA amongst the creditors. It was therefore their stand that it was not liable to share the EBITDA with the Creditors. However, the setting aside of the direction *qua* distribution of EBITDA by NCLAT was also challenged by the erstwhile promoters of the Corporate Debtor – BPSL in the proceedings before this Court. It is also relevant to note that there was a lack of clarity in the stand taken by the CoC before the NCLAT in this regard.

114. It, however, appears from the material placed on record that during the pendency of the proceedings before this Court, there was an exchange of communications between the SRA – JSW and the CoC with regard to extension of the effective date of implementation of the Resolution Plan. It further appears that there were discussions between the SRA – JSW and the members of the CoC which culminated into a resolution of the CoC passed on 26th February 2021 by a majority of 97.25% voters by which it was provided that the SRA – JSW was to implement the Resolution Plan on or before 31st March 2021. On 19th March 2021, the CoC filed an affidavit before this Court to bring on record the said

development. On 26th March 2021, the SRA – JSW implemented the Resolution Plan by paying Rs.19,350 crore to the FCs of the Corporate Debtor.

115. It can thus be seen that the delay in implementation of the Resolution Plan is on account of various reasons. Initially, the NCLAT, vide interim order dated 14th October 2019, stayed the approval order of the NCLT dated 5th September 2019 till 17th February 2020 insofar as it relates to payment to the creditors. On account of pendency of the proceedings before the NCLAT, the CoC was not in a position to handover unencumbered assets to the SRA – JSW as required under the Resolution Plan. It is further to be noted that during the pendency of the said proceedings, an Ordinance came to be promulgated on 28th December 2019 which brought in certain amendments to the IBC.

116. As can be seen from the preamble of the said Ordinance, it has been brought for three purposes. Firstly, to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency in case the company goes into CIRP or liquidation. The second purpose was to provide immunity against prosecution of the Corporate Debtor

to prevent action against the property of such Corporate Debtor and the SRA subject to the fulfilment of certain conditions. The third one was to fill the critical gaps in the corporate insolvency framework. By way of the said amendment, Section 32A of the IBC came to be added, which reads thus:

> "**32A. Liability for prior offences, etc**.—(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under Section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—
>
> (*a*) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
>
> (*b*) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:
>
> Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution

plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (*j*) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

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

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

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

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

(*i*) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(*ii*) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

117. It can thus be seen that Section 32A of the IBC which begins with a non-obstante clause provides that the liability of the Corporate Debtor for an offence committed prior to the commencement of the CIRP shall cease, and the Corporate Debtor shall not be prosecuted for such an offence from the

date the Resolution Plan has been approved by the Adjudicating Authority under Section 31 of the IBC, if the Resolution Plan results in the change in the management or control of the Corporate Debtor or if the erstwhile promoter or any other person who has been retained has not been found to have abetted or conspired in the commission of the offence. It further provides that no action shall be taken against the properties of the Corporate Debtor in relation to an offence committed prior to the commencement of the CIRP of the Corporate Debtor, where such property is covered under a Resolution Plan approved by the Adjudicating Authority under Section 31 of the IBC.

118. It is to be noted that in the present case, even after the IBC was amended and Section 32A of the IBC was brought into the statute, the ED was proceeding further with its prosecution of the Corporate Debtor. On account of the pendency of such proceedings, the CoC was not in a position to hand over the unencumbered assets as required under the Resolution Plan.

119. It is further to be noted that only on 11th December 2024 when the appeals of the ED came to be disposed of by

this Court, there was some clarity with regard to the properties of the Corporate Debtor. However, in the meantime, in view of the resolution passed by the CoC dated 26th February 2021 by a majority of 97.25% voters, the Resolution Plan was already implemented by the SRA – JSW.

120. It will be relevant to note that the CoC and the SRA – JSW were on same page, and were of the view that unless the assets of the Corporate Debtor – BPSL were not released and the issue with regard to criminal proceedings were not clarified, the implementation of the Resolution Plan would not have been possible. It will be relevant to refer to a joint letter dated 28th February 2020 submitted before this Court by both the CoC and the SRA – JSW. Relevant extract of which reads thus:

> "5. This is a matter involving implementation of a Resolution Plan for recovery of an amount of INR 19,350 crores. The plan is approved by 100% of the lenders. The implementation is presently underway (new Board has already been appointed) and would require a period of at least 20 days for implementation after the decision of this Hon'ble Supreme Court. In view of the actions of ED after the NCLAT's judgment. If the issue concerning the release of assets of BPSL and criminal proceedings against BPSL by the ED is not urgently clarified by the Hon'ble Supreme Court, the implementation of the Resolution Plan would be affected."

121. A perusal of the communications exchanged between the parties would reveal that the negotiations were not with regard to the terms and conditions of the Resolution Plan but to ensure the immediate implementation of the Resolution Plan. It can thus be seen that the negotiations took place due to the consistent efforts made by the lenders of the Corporate Debtor forming part of the CoC for ensuring implementation of the Resolution Plan. As already discussed hereinabove, the CoC in its meeting held on 26th February 2021 passed a resolution to extend the date of implementation of the Resolution Plan to 31st March 2021. The said decision of the CoC was communicated to SRA – JSW vide letter dated 5th March 2021. The CoC also brought this fact to the notice of this Court by placing on record an affidavit. The CoC had categorically affirmed in its note of submissions dated 19th April 2024 that the SRA – JSW had in fact implemented the Resolution Plan in entirety and that the amounts had been distributed amongst all creditors of the Corporate Debtor as per the Resolution Plan.

122. The appeal filed by the ED was disposed of by this Court vide Order dated 11th December 2024 and the ED was

directed to handover the unencumbered assets of the Corporate Debtor to the SRA – JSW.

123. It can thus be seen that the contention of the appellants that there was inordinate and deliberate delay in implementing the Resolution Plan by the SRA – JSW is without substance.

124. It can also be seen that on account of various factors like the NCLT directing the EBITDA to be shared with the creditors, the NCLAT in an appeal staying the order of the NCLT, after the decision of the NCLAT the pendency of the proceedings before this Court, and the PAO being passed by the ED with regard to properties of the Corporate Debtor, the implementation of the Resolution Plan was jeopardized. Only after this Court disposed of the appeal filed by the ED on 11th December 2024, there was a clarity with regard to various issues.

125. No doubt that while admitting the appeals on 6th March 2021, this Court had recorded the submission of the CoC that it would return the amount received from the SRA – JSW in case the appeals succeed. However, even after that, for a period of more than one year, the situation was ambiguous

and there were parallel negotiations between the CoC and the SRA – JSW. Only after 26th February 2021 when the CoC resolved by a majority of 97.25% voters to extend the time to implement the Resolution Plan till 31st March 2021 and after 26th March 2021 when the Resolution Plan was implemented, the SRA – JSW started running the concern. However, with regard to the proceedings initiated by ED, the situation, in spite of Section 32A of the IBC being brought in the statute book, remained uncertain till 11th December 2024.

126. It can thus be seen that the delay is neither attributable to the CoC nor to the SRA – JSW. As a matter of fact, both the SRA – JSW and the CoC were making consistent efforts to get the matter sorted out before this Court so as to ensure the expeditious implementation of the Resolution Plan.

127. Insofar as the reliance placed by the Appellants – erstwhile – promoters on the judgment of this Court in the case of ***Murari Lal Jalan*** (supra) is concerned, it can be seen that in the said case, the Resolution Plan had not been implemented for a period of almost 5 years after being approved. Not only that, various directions given by various forums, including the directions given by this Court were not

implemented. In the said case, this Court, vide order dated 18th January 2024, had directed the Resolution Applicant to infuse an amount of Rs.150 crore in cash on or before 31st January 2024. It is to be noted that this was the fourth extension granted by this Court in the said matter. The aforesaid direction issued by this Court was also not implemented. Again, an application for extension of period was made before this Court. The same was also rejected vide order dated 2nd February 2024. In this factual background, this Court found that the order of the NCLAT upholding the order of the NCLT was not sustainable.

128. In the facts of the present matter, both the CoC and the SRA – JSW found it difficult to implement the Resolution Plan on account of various issues including the PMLA proceedings initiated against the Corporate Debtor - BPSL and its management, the provisional attachment of properties and the unilateral directions of NCLT to distribute EBITDA etc. It is further to be noted that both the CoC and the SRA - JSW were jointly making efforts before this Court for implementation of the Resolution Plan which was in fact implemented on 26th March 2021.

129. In that view of the matter, we find that the facts in the case of ***Consortium of Murai Lal Jalan and Florian Fritsch and Another*** (supra) are clearly different from the present case as the delay in implementation of the Resolution Plan in that case was clearly attributed towards the SRA therein.

g. Contravention of law

130. It is pertinent to note that the Appellants – erstwhile promoters have raised the contention that the Resolution Plan submitted by the SRA – JSW was not in compliance with the provisions of the IBC and the IBBI (CIRP) Regulations as it did not envisage the payment to the OCs before the FCs. *Per contra,* the SRA – JSW has submitted that the Resolution Plan was compliant with the law as it stood at the time of submission of the Resolution Plan and that any subsequent changes in law shall not affect the validity of the Resolution Plan.

131. In order to test the contention on this ground, we must, parallelly, go through the timeline of the approval of the Resolution Plan by the CoC, and the amendments to the IBBI (CIRP) Regulations.

132. In this regard, it will be relevant to refer to Regulation 38(1)(b) of the said Regulations as it stood before the amendments, and at the time of submission of the Resolution Plan by the SRA – JSW, which reads thus:

> **"38. Mandatory contents of the resolution plan**.
>
> 1. .....
>
> (a)...
>
> (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and
>
> (c)....."

133. The original Regulation thus mandated that the Resolution Plan must contain provisions to pay the ***liquidation value*** due to the OCs in priority over the FCs. The SRA – JSW had formulated the Resolution Plan as per this original Regulation and had submitted it to the CoC for consideration.

134. Only thereafter, the amendment dated 5th October 2018 was brought in, which amended Regulation 38(1). The amended Regulation reads thus:

"**38. Mandatory contents of the resolution plan.**

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

……."

135. The amended Regulation mandated that any ***amount due*** to the OCs under a Resolution Plan would be given priority over the FCs. The term "liquidation value" was done away with by way of the aforesaid amendment.

136. When this amendment was brought in, the Resolution Plan was yet to be approved by the CoC. Considering this amendment, the SRA – JSW issued an addendum dated 10th October 2018 which amended Clause 1.4(ii) of the Resolution Plan. It was stated that other than the liquidation value due to the workmen of Rs. 9.86 crore, the liquidation value due to the OCs is *nil.* It was further stated that the SRA – JSW is proposing to make an additional payment to the OCs despite they having no entitlement as per the IBC. It was lastly stated that the SRA – JSW was ready to make further payments to the OCs under the Resolution Plan, if the NCLT directs so.

137. After considering the addendum to the Resolution Plan, the CoC approved the amended Resolution Plan. The RP then submitted the Resolution Plan to the NCLT, and the Resolution Plan was duly approved on 5th September 2019.

138. After approval by the NCLT, Regulation 38(1) of the IBBI (CIRP) Regulations was again amended on 27th November 2019. This amended form of the Regulation, which still stands reads thus:

> "**38. Mandatory contents of the resolution plan.**
> (1) The amount payable under a resolution plan -
> (a)to the operational creditors shall be paid in priority over financial creditors; and
> ....."

139. It can thus be seen that the Regulation after its latest amendment states that ***any amount payable*** under the Resolution Plan shall be paid to the OCs in priority to the FCs.

140. We are of the considered view that the latest amendment dated 27th November 2019 can have no bearing on the present matter as the same has been enacted after approval of the Resolution Plan by the NCLT on 5th September 2019. Furthermore, it is trite law that unless an amendment

explicitly provides for retrospective application, the same cannot be applied retrospectively.

141. Regarding the contention of the Appellant – erstwhile promoters that the OCs were paid after the FCs in contravention of the Regulations, we must examine the amendment dated 5th October 2018. This amendment clearly stated that the OCs are to be paid the ***amount due*** as per the Resolution Plan in priority over the FCs.

142. As per the Resolution Plan including the addendum issued by the SRA – JSW, the amount due to the OCs was *nil,* as the claims raised by the FCs were far in excess of the liquidation value of the Corporate Debtor. However, the SRA – JSW had proposed an *ex – gratia* payment to the OCs to the tune of 50% of their claims (Rs. 350 crore). The SRA – JSW had further stated that it would pay additional amounts, if so directed by the NCLT. In that view of the matter, we find that the payments that were made by the SRA – JSW to the OCs after the FCs in the present matter is not in contravention of law. The payments made to the OCs in the present matter are not ***amounts due*** as per the Resolution Plan and are *ex – gratia* payments. We do not wish to go into the question as to

whether the latest amendment dated 27th November 2019 would mandate even such *ex – gratia* payments to the OCs being made before the payments to the FCs as we have categorically held that the latest amendment would have no effect on the Resolution Plan in the present case inasmuch as the same was approved by the NCLT on 5th September 2019 i.e. before the amendment dated 27th November 2019 came into effect.

143. It is also to be noted that the said issue has not been raised by any of the OCs of the Corporate Debtor either before the NCLT or before the NCLAT. It is only sought to be raised by the erstwhile promoters-cum-directors. We therefore find that the erstwhile promoters-cum-directors are not directly concerned with the said issue and a contention in that regard on their behalf, in our view, is not merited and liable to be rejected.

h. Upfront infusion of funds by the SRA – JSW

144. The Appellants – erstwhile promoters have also raised the contention that the SRA – JSW has not honoured its commitment of "upfront infusion of funds" as per the Resolution Plan submitted by it. It is submitted by the

appellants that a total upfront commitment of Rs. 8,550 crore as equity was made by the SRA – JSW as per Schedule 3 of the Resolution Plan. It is submitted that however only Rs. 100 crore out of the said Rs. 8,550 crore was infused by the SRA – JSW. It is submitted that on the basis of this upfront infusion of funds, the SRA – JSW got additional marks and crossed the score of the next highest bidder (Tata Steel) and since this infusion has not been made, the Resolution Plan has not been fully implemented. *Per contra*, the SRA – JSW submitted that the entire amount of the remaining commitment was brought in by way of CCDs. It is further submitted that the CCDs are to be treated the same as equity instruments and therefore, the obligation for the upfront infusion of funds has been complied with as per the Resolution Plan. It is also submitted by the SRA – JSW that this Court need not go into the issue of the scoring matrix/marking system as that is the exclusive domain of the CoC and the "commercial wisdom" of the CoC cannot be challenged by the erstwhile management.

145. We find that the issue regarding CCDs being construed as equity instruments or not is no more *res integra*.

This Court, in ***Narendra Kumar Maheshwari v. Union of India and Others***[41]**,** has observed thus:

> "**98.** Our attention was drawn to Section 2(12) of the Companies Act under which a debenture need not be secured at all. In that light the guidelines should be interpreted. Therefore, it was submitted, guideline 10, reasonably interpreted, means that such security should be provided as is customarily adopted in corporate practice in the matter of issuing debentures. **It has to be borne in mind that the debentures issued in the present case are compulsorily convertible. Therefore, no repayment of principal is really involved. The question of security becomes relevant for the purpose of payment of interest on these debentures and the payment of principal only in the unlikely event of winding up.** The debentures need not necessarily be secured. Guidelines do not provide for quantum and nature of the security. A debenture has been defined to mean essentially as an acknowledgement of debt, with a commitment to repay the principal with interest (Palmer's *Company Law*, p. 672, 24th edn.). Reference, in this connection, may be made to *British India Steam Navigation Co.* v. *IRC* [(1881) 7 QBD 165, 172 and 173 : 44 LT 378] . A debenture may contain charge only on a part of the assets of the company *(Re Colonial Trusts Corporation* [(1879) 15 Ch 465]) or it may not contain any charge on any of its assets (See *Speyer Brothers* v. *IRC* [(1907) 1 KB 246] ; and *Lemon* v. *Austin Friars Investment Trust Ltd.* [(1926) 1 Ch 15] A debenture may, therefore, be secured or unsecured (Palmer's *Company Law*, p. 675, 24th edn.). An ordinary debenture has to be distinguished from a 'mortgage debenture' which necessarily creates a mortgage on the assets of a company (See Palmer's *Company Law*, p. 706).

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[41] **1990 Supp SCC 440**

A compulsorily convertible debenture does not postulate any repayment of the principal. Therefore, it does not constitute a 'debenture' in its classic sense. Even a debenture, which is only convertible at option has been regarded as a 'hybrid' debenture by Palmer's *Company Law* (para 44.07 at page 676). **In this connection, reference may be made to the "*Guidelines for the Protection of Debenture Holders*" issued on January 14, 1987 which have recognised the basic distinction between a convertible and a non-convertible debenture. It is apparent that these were issued for the purpose of ensuring the serviceability and repayment of debentures on time. It has been asserted before us that the compulsorily convertible debentures in corporate practice was adopted in India some time after the year 1984. Wherever the concept of compulsorily convertible debentures is involved, the guidelines treat these as "equity". This is clear from guideline IV(*i*) read with IV(*iii*) of the *Guidelines for Issue of Cumulative Convertible Preference Shares* and guidelines 8 and 11 of the Employees Stock Option Guidelines. These two sets of guidelines clearly indicate that any instrument which is compulsorily convertible into shares, is regarded as a "equity" and not as a loan or debt.** Even a non-convertible debenture need not be always secured. In fact, modern tendency is to raise loan by unsecured stock, which does not create any charge on the assets of the company (*The Encyclopaedia of Forms and Precedents*, 4th edn. Vol. 6 para 17 at pages 1094, 1095 and para 22 at pages 1097-1098). Whenever, however, a security is created, it is invariably in the form of a floating charge (See *The Encyclopaedia of Forms and Precedents*, 4th edn. Vol. 6 para 25 at page 1099). It follows, therefore, that the secured debenture almost invariably contains a floating charge. In addition to the floating charge, debentures are frequently secured by trust deed

> also as had happened in the present case where specific property, land, etc. has been mortgaged to trustees."
>
> (Emphasis supplied)

146. It can be seen that this Court has, in unambiguous terms, held that "Convertible Debentures" stand on a different footing than other types of debentures. It has been held that since CCDs do not involve any repayment and have to be mandatorily converted into equity shares at the time of maturity, they must be treated as Equity Instruments.

147. This Court, recently, in ***IFCI Limited*** (supra), has placed reliance on ***Narendra Kumar Maheshwari*** (supra) and observed thus:

> "**24.** A reading of the impugned judgment, specifically the rationale from paragraph 19 onwards shows that the issue has been correctly crystallised as to whether compulsorily convertible debentures could be treated as a debt instead of an equity instrument. **In that sense, it was observed that treating them as a debt would tantamount to breach of the concessional agreement and the common loan agreement. The investment was clearly in the nature of debentures which were compulsorily convertible into equity and nowhere is it stipulated that these compulsorily convertible debentures would partake the character of financial debt on the happening of a particular event."**
>
> (Emphasis supplied)

148. It can thus be seen that this Court has reaffirmed its view that if a CCD is to be compulsorily converted at the time of maturity, without any obligation of repayment of a debt. It has been held that it must be treated the same as an equity instrument. We are therefore of the view that the CCDs infused by the SRA – JSW are to be treated the same as an equity infusion.

149. To examine as to whether the commitment for the upfront infusion was actually satisfied by the SRA – JSW through the CCDs, we must also consider the stand of the CoC. It is submitted by the CoC that the reconstituted Board of the resolved entity – BPSL held a meeting on 26th March 2021 attended by the Steering Committee, i.e., the three largest FCs of the Corporate Debtor. In the said meeting, the issuance of CCDs valued at Rs. 8,450 crore to a company named Piombino Steel Limited, which is a part of the group of the SRA – JSW was approved. The CCDs issued have a term of five years after which they are to be mandatorily converted into equity shareholding. Furthermore, the holders of the CCDs also have the right to convert the debentures to equity even during the five – year term. It is submitted by the CoC

that in light of this factor, the commitment of upfront infusion of equity has been duly complied with by the SRA – JSW.

150. Such a stand of the CoC in our view, categorically depicts the compliance of the SRA – JSW with its commitment of upfront infusion as per the Resolution Plan. The CCDs issued satisfy the test of compulsory conversion as laid down by this Court in the case of ***Narendra Kumar Maheshwari*** (supra) and therefore have to be treated as equity instruments.

151. Not only that but it has been the consistent view of this Court in a catena of judgments including ***K. Shashidhar*** (supra) that the commercial wisdom of the CoC cannot be interfered with either by the Adjudicating Authority, the Appellate Authority or this Court.

152. Therefore, in view of the factual position as well as the law laid down by this Court with regard to the CCDs being equivalent to equity instruments and the specific stand of the CoC, we do not find that there is any merit in the contention of the appellants in this regard and the same is liable to be rejected.

i. Distribution of EBITDA

153. The next question is with regard to the entitlement of the lenders to EBITDA.

154. It is to be noted that, for the first time, after the review petitions were allowed by this Court on 31st July 2025, an additional affidavit has been filed by the CoC dated 7th August 2025 contending that the lenders are entitled to EBITDA under the Resolution Plan.

155. In this respect, it will be relevant to note that when the NCLT held that the lenders were entitled to EBITDA, the same was on the basis of the judgment of the NCLAT in ***NCLAT Essar***. However, by the time the NCLAT decided the proceedings in this matter, this Court had delivered its judgment in ***Supreme Court Essar***.

156. At this stage, it will be apposite to refer to paragraphs 107-108 of the judgment of this Court in ***Supreme Court Essar***, which read thus:

> "**107.** For the same reason, the impugned NCLAT judgment [*Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating

> Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count.
>
> ***Utilisation of profits of the corporate debtor during CIRP to pay off creditors***
>
> **108.** The RFP issued in terms of Section 25 of the Code and consented to by ArcelorMittal and the Committee of Creditors had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor — *see* Clause 7 of the first addendum to the RFP dated 8-2-2018. On this short ground, this part of the judgment of NCLAT is also incorrect."

157. From the aforesaid, it can be seen that this Court has, in unequivocal terms, held that a Successful Resolution Applicant cannot be faced with "undecided" claims after the Resolution Plan submitted by it has been accepted as that

would amount to "hydra heads popping up" which would throw into uncertainty the amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. This Court has, in unambiguous terms, held that the RfRP issued in terms of Section 25 of the IBC and considered by the CoC had provided that distribution of profits made during the CIRP would not go towards payment of debts of any creditor. This Court therefore set aside the judgment of the NCLAT in ***NCLAT Essar*** in that regard.

158. Relying on the judgment of this Court in the case of ***Supreme Court Essar***, the NCLAT, vide the impugned judgment and order, held thus:

> "**126.** The aforesaid decision having been reversed by the Hon'ble Supreme Court, we hold that the distribution on the profit made during the 'Corporate Insolvency Resolution Process' should be made in terms of addendum to the RFP as held by the Hon'ble Supreme Court.
>
> **127.** We accordingly, set aside the part of the conditions as made in Paragraph 128 (j) of the impugned order dated 5th September 2019 which relates to distribution of profit during the 'Corporate Insolvency Resolution Process'. The Monitoring Committee with the help of the 'Resolution Professional' will now go through the RPF issued in terms of Section 25 of the 'I&B Code' and as consented to by the 'Resolution Applicant'

('JSW Steel Limited') will make distribution of profit accordingly. The condition imposed at paragraph 128(j) stands substituted with the aforesaid observations."

159. It is to be noted that the said judgment was not assailed by the CoC before this Court. Not only that, when the appeals field by the promoters were first heard and the appellants sought to raise the ground *qua* correctness with regard to treatment of EBITDA by NCLAT, a specific stand opposing the same was taken by the CoC.

160. It will be relevant to refer to the submissions filed by the CoC of BPSL before this Court on an affidavit, which read thus:

"**II.** ***The distribution of EBITDA can only be in accordance with the law settled by this Hon'ble Court in the SC Essar Steel Judgment***

41. It has been contended by the Appellants that the EBITDA should be distributed to the creditors of BPSL as,

(a) The SC Essar Steel Judgment was passed in the facts of the said case wherein a specific clause for distribution of EBTIDA existed in the process document and hence the said judgment cannot be made applicable to the present case, and

(b) The CoC in giving up on the EBITDA generated had directly impacted the Appellants.

42. Brief background in this regard, is as follows:

(a) **Directions by the Hon'ble NCLT:** The NCLT Plan Approval Order dated 05.09.2019 directed the RP to redistribute the profits earned by the Corporate Debtor in accordance with judgment passed by the Hon'ble NCLAT in the matter of *Standard Charted Bank v. Satish Kumar Gupta, RP of Essar Steel Ltd. and Ors. Company Appeal (AT) (Insolvency) No. 242 of 2019* ("**NCLAT Essar Judgment**") dated 04.07.2019 (Para 211) which directed distribution of profits on a pro-rata basis between the Financial Creditors and the Operational Creditors *[Para 128 (j) @ Pg. 1026, C.C. Vol 3]*

(b) **Impugned Judgment dated 17.02.2020 :** The Hon'ble NCLAT overruled the NCLT Plan Approval Order by placing reliance on the judgment of the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors., 2019 SCC OnLine SC 1478 dated 15.11.2019 i.e. the SC Essar Steel Judgment, which overturned the NCLAT Essar Judgment in respect of the direction on distribution of profits, and directed the monitoring committee with the help of the Resolution Professional to go through the RFRP and make distribution of EBITDA accordingly. *[Para 126, 127 @ Pg. 457, C.C. Vol. 2].*

43. In light of the directions contained in the Impugned Judgment, the lenders of BPSL convened a meeting on July 04, 2020 to discuss treatment of EBITDA. Upon consideration of the terms of the RFRP, it was noted that there is no provision under the RFRP which required the

EBITDA generated in the company during the CIRP Period, to be distributed amongst the lenders and therefore, such EBITDA may remain in the company.

The CoC undertakes to place the minutes of the meeting of the lenders dated July 4, 2020 on record in a sealed cover, if called upon / directed by this Hon'ble Court.

44. In addition to the RFRP issued for BPSL being silent on distribution of profits during CIRP, it is relevant to note that the Resolution Plan contemplates for the SRA to take over the assets and liabilities of the Corporate Debtor as a 'going concern', which would include the profits or losses that may be generated by the company during CIRP. *[C.C. Vol. 2 @ Pg. 517 (iv)]*

45. To conclude, in view of the fact that,

(a) RFRP was silent on distribution of EBITDA generated during CIRP, and

(b) the Resolution Plan contemplated the SRA taking over the assets and liabilities of BPSL as a 'going concern',

the lenders of BPSL forming part of the Coc, in compliance of the Impugned Judgment and in accordance with the law settled under the SC Essar Steel Judgment, noted that the EBITDA generated during CIRP may remain with the company. To this extent, the distribution of EBITDA generated during CIRP was in accordance with law.

46. It is also relevant to note that no contrary stand has been taken by the CoC with respect to treatment of EBITDA. In this regard, it is stated that,

(i) the reply affidavit filed by the CoC in October 2019 before the Hon'ble NCLAT stating that EBITDA generated during CIRP should accrue to the

benefit of the lenders, was filed at a time when the NCLAT Essar Steel Judgment dated 04.07.2019 held the field of law with respect to distribution of EBITDA i.e. it should be distributed to the creditors.

(ii) Pertinently, in the facts of the said case, there was a specific provision for appropriation of a portion of the EBITDA by the CoC in the process document.

(iii) Subsequently, the SC Essar Steel Judgment dated 15.11.2019 overturned the NCLAT Essar case, and held that for distribution of profits, provisions in the process document have to be followed.

(iv) In view of the aforesaid judgment, the Impugned Judgment dated 17.02.2020 reversed the findings of the NCLT Plan Approval Order that relied on the NCLAT Essar Steel Judgment with respect to distribution of EBITDA, and directed for the SC Essar Steel Judgment to be followed. Accordingly, the monitoring committee with the help of the Resolution Professional was directed to go through the RFRP and make distribution of EBITDA.

(v) Accordingly, in compliance of the Impugned Judgment, lenders which comprised the erstwhile CoC convened on 04.07.2020 to deliberate on the issue of EBITDA. It was concluded that since (i) RFRP is silent on the treatment of EBITDA; and (ii) in view of the SC Essar Steel Judgment, EBITDA may be retained with the Corporate Debtor.

> As such, it is submitted that the stand of the lenders comprising the erstwhile CoC with respect to EBITDA has been in conformity to law and cannot be said to be contrary to its earlier stand.
>
> 47. In view of the aforesaid, it is stated that distribution of EBTIDA was in accordance with law."

161. It can clearly be seen that the CoC had taken a specific stand that the directions by the NCLT were issued when the ***NCLAT Essar*** was holding the field. It has also taken a stand that the NCLAT overruled the NCLT directions with regard to distribution of profit during the CIRP and directed the Monitoring Committee with the help of the RP to go through the RfRP and make distribution of EBITDA accordingly on the basis of the judgment of this Court in ***Supreme Court Essar***. It has also been specifically stated that after the impugned Judgment and Order of NCLAT dated 17th February 2020 was passed, the lenders of the Corporate Debtor – BPSL had convened a meeting on 4th July 2020 to discuss the treatment of EBITDA. It has been stated that, upon consideration of the terms of the RfRP in the said meeting, it was noted that there was no provision under the RfRP which required the EBITDA generated in the company during the CIRP period to be distributed amongst the lenders

and therefore it was decided that such EBITDA be retained in the company. The submissions also show that a specific stand has been taken that the Resolution Plan contemplates for the SRA – JSW to take over the assets and liabilities of the Corporate Debtor as a "going concern", which would include the profits and losses that may be generated by the company during CIRP. The submissions would further show that a specific stand has been taken that the lenders of the Corporate Debtor – BPSL forming part of the erstwhile CoC in accordance with the law settled in the case of ***Supreme Court Essar*** had decided that the EBITDA generated during the CIRP would remain within the company. As such, the CoC has accepted the position as laid down by the NCLAT in ***Supreme Court Essar***.

162. The submissions would clearly show that the stand taken by the CoC before the NCLAT in this matter with regard to EBITDA treatment was on the basis of the judgment of the NCLAT in ***NCLAT Essar***. It has also been specifically stated that subsequently the ***Supreme Court Essar*** overruled the ***NCLAT Essar*** and held that for distribution of profits, provisions in the process document have to be followed. It has

been reiterated on more than one occasion that since the RfRP was silent on the treatment of EBITDA generated during CIRP and in view of ***Supreme Court Essar***, EBITDA may be retained with the Corporate Debtor.

163. When the CoC had taken a specific stand before this Court in the present appeals and also reiterated the very same stand when the review petitions were pressed into service, in our view, it would not be permissible for the CoC to make a *volte face* and take a stand which is totally contrary to the one taken by it before this Court when the appeal was earlier heard and decided by this Court on 2nd May 2025 and when the review petitions were heard and decided on 31st July 2025.

164. It will also be relevant to refer to the following observations of this Court in the case of ***Ghanshyam Mishra and Sons Private Limited*** (supra) to which one of us (Gavai, J., as he then was), which read thus:

> "**102.1.** That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the

adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."

165. The law laid down by this Court in the case of ***Ghanshyam Mishra and Sons Private Limited*** (supra) has been laid down after considering the earlier judgments in the cases of ***Supreme Court Essar*** (supra), ***Kalpraj Dharamshi and Another*** (supra), ***Innoventive Industries Limited v. ICICI Bank and Another***[42] ***and Karad Urban Cooperative Bank Limited v. Swwapnil Bhingardevay and Others***[43].

166. It is pertinent to note that the view taken by this Court in the case of ***Ghanshyam Mishra and Sons Private Limited*** (supra) has been followed by this Court in the cases of ***K.N. Rajakumar v. V. Nagarajan and Others***[44]***, Ruchi Soya Industries Limited and Others v. Union of India and Others***[45]***, Greater Noida Industrial Development Authority v. Prabhjit Singh Soni and Another***[46]***, Vaibhav Goel and***

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[42] **(2018) 1 SCC 407**
[43] **(2020) 9 SCC 729**
[44] **(2022) 4 SCC 617**
[45] **(2022) 6 SCC 343**
[46] **(2024) 6 SCC 767**

Another v. Deputy Commissioner of Income Tax and Another[47] ***and Electrosteel Steel Ltd. (now ESL Steel Ltd.) v. Ispat Carrier P. Ltd.***[48]***.***

167. If the stand of the CoC, which is sought to be taken at this stage, is to be accepted, it will unsettle the position which has been accepted by this Court that once a Resolution Plan is duly approved by the Adjudicating Authority under sub-section (1) of Section 31 of the IBC, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor, its employees, members, creditors including the Central Government etc.

168. We are of the considered view that unless there is a specific provision with regard to distribution of EBITDA in the RfRP, permitting the CoC to raise a new stand at this stage will be totally inconsistent with the avowed object for which the IBC was incorporated.

169. Though it is sought to be urged on behalf of the SRA-JSW that the Corporate Debtor was running into losses till the Resolution Plan was implemented, we do not propose to go into

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[47] **2025 SCC OnLine SC 592**
[48] **2025 SCC OnLine SC 829**

that issue. As already held by us, the scope of interference against the concurrent findings of fact in the present appeals would be very limited. No doubt that insofar as EBITDA is concerned, the findings are not concurrent. It has already been discussed hereinabove that the directions of the NCLT with regard to EBITDA treatment were on the basis of ***NCLAT Essar*** whereas the findings of the NCLAT were on the basis of ***Supreme Court Essar***. We, therefore, do not propose to dwell into the question as to whether the Corporate Debtor was running into losses or not. Be that as it may, when a Resolution Plan is approved, the SRA takes over the management of the Corporate Debtor with the possibilities of turning a loss-making concern into a profit earning concern or the risk of the Corporate Debtor running into further losses. These decisions fall under the umbrella of "commercial wisdom" of the CoC. Once the Resolution Plan has been approved by the CoC and the Adjudicating Authority under Section 31(2), permitting any claims to be reopened which were not a part of the RfRP or Resolution Plan, in our view, will be doing violence to the provisions of IBC. In that view of the

matter, the arguments of the CoC as well as the original promoters in this regard are liable to be rejected.

170. Insofar as the contention of the learned Solicitor General, appearing on behalf of the CoC with regard to the additional affidavit being filed by the erstwhile promoter Mr. Sanjay Singal for adjustment of EBITDA against his personal guarantees would be giving a cause of action to raise a claim for EBITDA at this stage is concerned, we find the same also to be without substance.

171. It is to be noted that the proceedings against the erstwhile promoters/guarantors under Section 95 of the IBC have been pending since 2021 and the lenders have been parties to the said proceedings. The NCLT vide its order dated 7th October 2024 has categorically held that the CIRP of the Corporate Debtor – BPSL and Section 95 proceedings in this matter were completely independent proceedings. On perusal of the material on record, it is revealed that this issue was never raised by the CoC either before this Court in the present appeal in the first round or during the hearing of the review petitions. In that view of the matter, permitting the CoC to raise this issue at this stage of the appeals by way of an

additional affidavit dated 7th August 2025 would be totally unjust.

j. Contingent claim of Jaldhi

172. We now examine the contentions raised by the Appellant – Jaldhi. It is submitted that the Appellant was the largest OC of the Corporate Debtor – BPSL and has been wrongly classified as a "contingent creditor". It is submitted that the Appellant holds four international arbitral awards in its favour and the RP has admitted its claims to the tune of Rs.1,51,37,57,761.65/-. It is submitted that such a re-classification of the appellant is against settled law is hugely detrimental to it as OCs were eligible to 50% of their crystallized claims whereas contingent creditors were to be paid only 10% as per the Resolution Plan. *Per contra*, the SRA – JSW submitted that Jaldhi has been rightly classified as a contingent creditor as it has treated itself as a contingent creditor before the NCLT and had later changed its stance. It is further submitted that the appellant withdrew various proceedings filed for enforcement by it before the Calcutta High Court in order to pursue an alternative remedy and

therefore, the foreign awards could not be deemed to be binding under Indian law.

173. We must firstly examine the stand taken by the Appellant – Jaldhi before the NCLT from the approval order passed by the NCLT on 5th September 2019.

> "106. The contentions raised by Mr. A.S Chadha, learned senior counsel appointed by the Adjudicating Authority-NCLT to represent the cause of Operational Creditors, have been that the resolution plan has illegally classified 'Jaldhi' as contingent creditor entitling to be paid only 10 °/o of its claim subject to a cap of Rs. 35 crores, if it crystalized within two years from the date of approval of the resolution plan by the CoC. It is evident that Jaldhi is an operational creditor and its claim has been admitted by Resolution Professional to the extent of Rs. 151.3 crores. Jaldhi has been maintaining that it has made a claim of Rs. 151.9 crores on the basis of 3 Arbitration Awards in its favour and against the corporate debtor and that it has initiated execution proceeding by filing 3 execution petitions before Hon'ble High Court of Calcutta. Those proceedings were pending when the· CIR Process was initiated on 26.07.2017. Later on, different submissions were made and it was claimed that its claim is contingent liability but not an operational debt and that contingent liability can never be resolved under a resolution plan. It was thus argued that the resolution applicant has to assume a risk to contingent .liability devolving on the corporate debtor in future. In a separate application filed, Jaldhi again shifted which is stand by arguing that although its claim had been admitted by the RP but the resolution plan categorises its claim has an identified contingent liability. It was contended that it is operational creditor and its claim as a

contingent liability then it cannot be dealt with 1n the resolution plan."

174. It can thus be seen that the stance adopted by the appellant is varying and inconsistent. On one hand, the Appellant – Jaldhi had claimed to be a contingent creditor and raised the contention that its dues could not have been settled under the Resolution Plan and that SRA – JSW would have to assume the risk in case the contingent liability crystallizes in the future. On the other hand, subsequently, the Appellant shifted its stand and claimed itself to be an OC which was entitled to equal treatment with other OCs under the Resolution Plan.

175. Before we examine whether the international arbitral awards would be treated as contingent or crystallized debts, we must first examine the status of foreign awards in light of the provisions of the *Arbitration and Conciliation Act, 1996*[49]. Section 49 of the Arbitration Act reads thus:

"**Section 49: Enforcement of foreign awards.**

Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court"

[49] **"Arbitration Act" for short.**

176. It can thus be seen that the foreign award will be deemed to be a decree of the court only when the court is satisfied that the foreign award is enforceable under Part-II Chapter-I of the Arbitration Act. Therefore, a foreign award would not be automatically enforceable in India. For it to be enforceable in India, the court is required to be satisfied that such an award is enforceable under Part-II Chapter-I of the Arbitration Act.

177. It is relevant to note that though the appellants had initiated proceedings for the execution of international arbitral award in its favour before the Calcutta High Court, the appellants did not prosecute the said proceedings, and the said proceedings were dismissed as withdrawn. Had the appellants pursued the said proceedings before the Calcutta High Court, the SRA – JSW would have had an opportunity of contesting the said proceedings. Not permitting the said proceedings to proceed in accordance with law, in our view, would not permit the appellants to contend that their claims had crystalised and settled as OCs entitling them to claim under the Resolution Plan.

178. It is further to be noted that the provisions of the IBC only differentiate between the OCs and the FCs. This was the reason that the RP in the present case admitted the claim raised by the Appellant – Jaldhi as an OC of the Corporate Debtor. However, after the admission of a claim, the SRA – JSW had classified the Appellant as a contingent creditor. Even though such a classification was made by the SRA – JSW, the same had been duly approved by the CoC who has the power to sanction the Resolution Plan or enter into negotiations to modify it prior to its approval. Such a decision squarely falls under the protected umbrella of the "commercial wisdom" of the CoC which has been given paramount status by this Court in the case of ***K. Sashidhar*** (supra). It will be relevant to take note of the relevant paragraphs of the said judgment which read thus:

> "**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. .....

54. .....

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. .....

57. .....

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.

60. .....

61. .....

62. The argument, though attractive at the first blush, but if accepted, would require us to rewrite 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 corporate debtor concerned 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 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 CoC much less 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.**"

(Emphasis supplied)

179. It can thus be seen that this Court has held that the legislature purposefully did not include a means to challenge the commercial wisdom exercised by the CoC. This makes a challenge to the same non – justiciable. It has been further held that a challenge cannot be raised against the decision making of the CoC unless and until the grounds for challenge as given in the Code are satisfied. Any interference in the paramount objective of the CoC of exercising its commercial wisdom would amount to the Court rewriting the law and going against the very objectives of the IBC.

180. We are therefore of the opinion that in the present matter as well, the CoC exercised its commercial wisdom while approving the Resolution Plan whereby the Appellant – Jaldhi was classified as a contingent creditor and such a decision is deemed to be non – justiciable by this Court in view of ***K. Sashidhar*** (supra) which has been subsequently followed in a catena of judgments. The NCLT, and the NCLAT have also approved the Resolution Plan, and in light of the settled principle of law, we find no question of law being raised by the Appellant – Jaldhi and therefore, the appeal filed by it is liable to be dismissed.

k. Pre-CIRP dues of Medi and Darcl

181. Two OCs of the Corporate Debtor namely Medi and Darcl have raised contentions regarding their claims by filing appeals before this Court against the impugned judgment. Since the contentions raised by these two OCs are similar in nature, we are dealing with their appeals together.

182. It was submitted by the Appellants that they were promised their payments of pre – CIRP dues by the RP as an incentive for continuing to do business with the Corporate Debtor during the CIRP period in order to keep it a 'going concern'. It was stated by the learned counsel that after payments for the pre – CIRP dues were received for 10 months during the CIRP period, the RP issued a corrigendum and stated that the payments for the pre – CIRP dues were given due to a "mistake" committed by the accounting clerk and that the same would be adjusted towards the services of the Appellants during the CIRP period. In the said corrigendum, it was also stated by the RP that the pre – CIRP dues paid to the Appellants would be treated as per the Resolution Plan. *Per Contra*, the RP submitted that the payments made to the Appellants were nothing, but a mistake made by an

accounting clerk and that no pre – CIRP payments were actually made by the RP. The Appellants have been paid the amounts for the services rendered by them during the CIRP and their pre – CIRP dues were to be paid as per the Resolution Plan. It was submitted that once the NCLT and the NCLAT have given a similar finding on the issues, no interference by this Court would be warranted.

183. On perusal of the record, we find that there is nothing produced by the appellants to show any agreement with the RP after the CIRP commenced. Even though the RP admits that payments towards pre – CIRP dues were in fact made, it is also candidly accepted by the RP that the same was a mistake on the part of an accounting clerk. Upon discovering this mistake, the RP had quickly taken steps to mitigate the same and the payments were adjusted towards the services rendered by the Appellants during the CIRP period.

184. We further find that there is nothing on record that shows that the CoC had approved such pre – CIRP payments and such payments to the appellants find no mention anywhere in the Resolution Plan. This Court has, time and again, held through a catena of judgments that any and all

payments made to creditors relating to the pre – CIRP dues must be done only in accordance with the Resolution Plan and with the express agreement of the CoC. Therefore, we do not find any new question of law being raised through the present appeals and thus, they are liable to be dismissed.

V. CONCLUSION

185. Before we conclude the present matter, we may just point out the disastrous results which may have ensued in the event the contentions raised in the present appeals of the promoters-cum-directors of the Corporate Debtor were accepted or if the stand of the CoC with regard to EBITDA was accepted.

186. On the basis of the details given in RfRP, the resolution applicants submitted their bids. The RfRP does not provide for treatment of EBITDA. After a prolonged delay on account of variety of reasons enumerated hereinabove, the Resolution Plan was implemented. The Corporate Debtor in the present case was running into substantial losses which has now become a profit – making entity earning substantial profits. The SRA – JSW invested huge amounts in modernization and expansion of the entity (Corporate Debtor).

Not only that but thousands of employees have been earning their livelihood on account of the Corporate Debtor running as an on-going concern due to the Resolution Plan being implemented by the SRA – JSW.

187. As such, the very purpose for which the IBC was enacted—namely, to ensure that the Corporate Debtor continues as a going concern—has not only been achieved, but the Corporate Debtor has been transformed from a loss-making to a profit-making entity. If, after the implementation of the Resolution Plan, the SRA – JSW has converted a loss-making entity into the one making profits, can it be penalised for that? Suppose if instead of the Corporate Debtor being converted into a profit-making entity, the losses would have increased, can the Corporate Debtor claim refund of the amount paid? If we permit the claim not to be part of the Resolution Plan which has been approved by the CoC and the NCLT to be raised at such a belated stage, it could open a *Pandora's Box* and the very purpose of the IBC providing sanctity to the finality of the Resolution Plan duly approved would stand vitiated.

188. In any case, the issue is no more *res integra*. This Court, in the case of ***Supreme Court Essar*** has clearly held that such could not have been the intention of the legislature as this would amount to hydra heads popping up after the approval of the Resolution Plan. It has been categorically held that the SRA cannot be forced to deal with claims that are not a part of the RfRP issued in terms of Section 25 of the IBC or a part of its Resolution Plan.

189. No doubt that if RfRP had specifically dealt with the manner in which the EBITDA would be distributed, it would have been a different matter. Admittedly, in the present case, neither the RfRP nor the Resolution Plan dealt with it. Permitting the erstwhile promoters or the CoC to raise an argument in that regard at such a belated stage would amount to doing violence to the very intention with which the IBC was enacted.

190. We therefore do not find any merit in the contention of either the ex-promoters-cum-directors of the Corporate Debtor or the CoC in that regard. If such a contention is accepted, it will frustrate the very purpose for which the IBC came to be enacted.

191. In that view of the matter, we do not find any merit in the appeals. The appeals are therefore dismissed. The Impugned Judgment dated 17th February 2020 passed by the NCLAT is upheld.

192. Pending application(s), if any, shall stand disposed of in the above terms.

.....CJI
(B.R. GAVAI)

.....J
(SATISH CHANDRA SHARMA)

.....J
(K. VINOD CHANDRAN)

NEW DELHI;
SEPTEMBER 26, 2025.