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BEFORE THE HON'BLE SUPREME COURT OF INDIA

CIVIL APPEAL NO. 5634-5635 OF 2019

IN THE MATTER OF:

ICICI BANK LIMITED & ANR. ...APPELLANTS

VERSUS

STANDARD CHARTERED BANK & ORS. ...RESPONDENTS

A. WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS IN THE CIVIL APPEAL NO. 5634 - 5635 OF 2019 FILED BY THE APPELLANTS

1. The present appeal impugns the Final Common Order and Judgement dated 04.07.2019 (the **"Impugned Order"**) passed by the National Company Law Appellate Tribunal, New Delhi (**"NCLAT"**) in Comp. App. (AT) (Ins.) No. 242 of 2019 and Comp. App. (AT) (Ins.) No. 266 of 2019 in relation to the insolvency resolution process for Essar Steel India Limited ("**Corporate Debtor**") whereby *inter alia* the NCLAT has passed an order for equal distribution of resolution proceeds amongst all the creditors without appreciating the basis of the intelligible distinction between various classes of creditors, including between the secured creditors having security over project assets of the Corporate Debtor ("**Project Assets**") (referred to as the "**Project Assets Secured Lenders**") including the Appellants and the Respondent No. 1 herein, (**"Standard Chartered Bank"**).

2. The NCLAT *vide* the Impugned Order while disposing off various appeals filed against the common order dated 08.03.2019 passed by the National Company Law Tribunal ("**NCLT**"), Ahmedabad with respect to the approval of the resolution plan of ArcelorMittal India Private Limited ("**Arcelor**") ("**Resolution Plan**") in relation to the corporate insolvency resolution process ("**CIR Process**") of the Corporate Debtor, despite the fact that the Resolution Plan was fully compliant with the law and the distribution *inter se* the financial creditors was

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based on an equitable, cogent and rational basis in consonance with prevalent universal practices, in glaring error of law and facts, has under the Impugned Order:

(a) Virtually negated and exsanguinated the Insolvency & Bankruptcy Code, 2016 ("**Code**");

(b) Ignored the law as declared by this Hon'ble Court in ***K. Sashidhar vs. Indian Overseas Bank***, Civil Appeal No. 10673 of 2018 (hereinafter **"*K. Sashidhar*"**);

(c) Obliterated the well-recognized and necessary foundation of security interest in the matter of corporate insolvency resolution and distribution of the proceeds of resolution thereof among secured financial creditors based on well-established banking principles;

(d) Negated the legislatively recognized distinction between operational creditors and financial creditors in the matter of corporate insolvency resolution;

(e) Negated the legislatively recognized distinction between secured creditors and unsecured creditors in the matter of corporate insolvency resolution

(f) Usurped the exclusive preserve and domain of the committee of creditors to decide upon the commercial terms of allocation of proceeds of resolution;

(g) Unilaterally rewritten the terms of the Resolution Plan interfering with the foundation of the validity of a resolution

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plan, i.e. the consent of the requisite majority of the committee of creditors.

3. The Impugned Order holds that the financial and operational creditors deserve equal treatment under a resolution plan and accordingly, re-distributed the proceeds payable under the Resolution Plan so that all financial creditors (whether secured or unsecured) be paid 60.7% of their admitted claims and operational creditors with claim amounts equal to or above Rs. 1 crore be paid 60.26% of their admitted claims and operational creditors with admitted claim amounts under Rs. 1 crore be paid in full. The Impugned Order further holds that the financial creditors cannot be classified basis their security interest for the purpose of distribution of resolution proceeds and thereby directing that each financial creditor (whether secured or unsecured) with a claim equal to or more than Rs. 1 crore be paid 60.7% of its admitted claim. Effectively, the NCLAT has entirely altered the terms of the Resolution Plan without the consent of the Committee of Creditors of the Corporate Debtor ("**CoC**") and/or the resolution applicant, Arcelor and has effectively taken away the authority and power vested with the CoC under the Code to approve or reject a resolution plan as well the commercial judgment of the resolution applicant to determine the terms of the its offer. A chart demonstrating the changes made by the NCLAT in the commercial terms of the Resolution Plan is annexed hereto as **Annexure A.**

4. The Impugned Order, apart from being replete with incorrect factual presumptions, proceeds on inconceivable reasoning, having no

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foundation in the law and evidences gross failure on the part of the NCLAT to take note of even the documents on record and pleadings/submissions filed before it.

5. Some of the glaring mistakes and conclusions in the Impugned Order are as follows:

(i) The NCLAT has concluded that CoC *has discriminated between the financial creditors and operational creditors as well as amongst themselves on the basis of security interest and that all creditors have to be treated at par* in serious error of interpretation of law and misreading of judgements in ***Swiss Ribbons (P) Ltd. vs. Union of India***, (2019) 4 SCC 17 ("**Swiss Ribbons**") & K. Sashidhar (*Paras 149 at page 75-76 of Vol. 1 of the Appeal, read with Paras 196-198 at pages 100-107 of Vol. 1 of the Appeal*).

(ii) The financial creditors can neither be treated differentially on the basis of being secured or unsecured creditors nor can there be classification within the secured financial creditors on the basis of nature, quality, value and extent of security interest. (*Paras 164, 172, 173 at pages 84-85 & 89 of Vol. 1 of the Appeal*)

(iii) CoC cannot travel beyond examination of feasibility and viability. Distribution of proceeds under a plan is not an aspect of commercial wisdom. (*Paras 139 and 153 at pages 71 & 77 respectively of Vol. 1 of the Appeal*)

(iv) CoC has no role in distribution of proceeds under a resolution plan, it only needs to be specified by the resolution applicant, in complete departure from its own decision in ***Darshak Enterprise Private Limited vs. Chhaparia Industries Pvt. Ltd***, Company Appeal (AT) (Insolvency) No. 327 of 2017 ("**Darshak Enterprise**"). In the facts of the case, the NCLAT has erroneously held that after negotiation with the sub-committee, the authority to make distribution was vested by Arcelor with the CoC (*Paras 136, 139, 144, 150 at pages 70, 71, 73 & 76 respectively of Vol. 1 of the Appeal*)

(v) CoC cannot appoint sub-committees (*Para 130 at page 64 of Vol. 1 of the Appeal*)

(vi) CoC instead of going through the resolution plan for approval of vote, delegated the power to negotiate with Arcelor to the sub-committee. (*Para 114 at page 56 of Vol. 1 of the Appeal*)

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(vii) The sub-committee asked Arcelor to revise upfront payment to secured financial creditors from Rs. 42,000 crores to Rs. 39,500 crores and adjustment of Rs. 2,500 crores as working capital. *(Para 125 at page 62 of Vol. 1 of the Appeal)*

(viii) The sub-committee negotiated so that the Resolution Plan was amended for the proceeds in the Resolution Plan to be distributed by the CoC. *(Paras 142-144 at page 72-73 of Vol. 1 of the Appeal)*

(ix) The amount of Rs. 55,000 crores as being paid to the operational creditors is unsubstantiated. *(Para 201 at page 107 of Vol. 1 of the Appeal)*

(x) Section 53 of the Code has no relevance in resolution process or plan *(Paras 167, 168 and 170 at page 85 to 88 of Vol. 1 of the Appeal)*.

(xi) Profit generated during CIR Process is required to be distributed to all financial and operational creditors *pro rata.* (*Para 210 at page 110 of Vol. 1 of the Appeal*)

(xii) NCLAT has admitted a large number of claims aggregating to Rs. 14,628 crores without appreciating that these were disputed liabilities before various authorities, without appreciating and considering the underlying reasoning for non-admission of these claim amounts *(Paras 196, 43, 56, 64, 69 at pages 100, 36, 39, 41, 43 respectively of Vol. 1 of the Appeal)*.

(xiii) On Section 60(6) of the Code, the NCLAT holds that it is an enabling remedy which survives the approval of resolution plan. *(Paras 221, 81 and 85 at pages 115, 46, 47 respectively of Vol. 1 of the Appeal)*

(xiv) Upon receipt of payment of debt under a resolution plan (though not payment of entire debt), guarantors and other co-obligors also get discharged. *(Paras 31 and 221 at page 32 & 115, respectively of Vol. 1 of the Appeal)*

6. Therefore, the Impugned Order ought to be set aside *inter alia* on the following grounds, each of which are being raised without prejudice to one another.

I. BRIEF BACKGROUND

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7. Pursuant to the judgement dated 4.10.2018 of the Hon'ble Supreme Court in the matter of ***ArcelorMittal India Private Limited vs. Satish Kumar Gupta & Ors.***, (2018) 13 SCALE 381 ("**SC Judgement**"), the CoC evaluated the eligible resolution plans dated 02.04.2018 submitted to it by Arcelor and Vedanta Limited ("**Vedanta**").

8. Amongst the two eligible plans placed before the CoC in terms of the SC Judgement, the Resolution Plan submitted by Arcelor was evaluated as the best resolution plan, providing for, *inter alia*:

    (a) Upfront payment amount of Rs. 42,000 crores to secured financial creditors as against Rs. 49,046.34 crores of admitted secured financial claims;

    (b) Upfront payment of approximately Rs. 17.70 crores to unsecured financial creditors;

    (c) Full upfront payment of admitted claims of almost 90.67% of the operational creditors (in number) upon payment of Rs. 196 crores;

    (d) Complete and full upfront payment to all the employees and workmen;

    (e) Rs. 8,000 crores of upfront fresh capital infusion (in the form of equity or shareholder loans) towards capital expenditure and working capital for the Corporate Debtor.

    Therefore, the Resolution Plan proposed by Arcelor, in accordance with the provisions of the Code and its regulations, duly provides for treatment of various stakeholders under the Resolution Plan.

9. As per terms of the Resolution Plan, the distribution ratio amongst the secured financial creditors was to be determined by the CoC. Therefore, at the 21st meeting of the CoC held on 22.10.2018, the CoC *vide* an overwhelming majority of 91.12%, determined the ratio of distribution amongst the secured financial creditors provided under the Resolution Plan, in reference to *inter alia* the inter-se value of security amongst the secured financial creditors.

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II. <u>**THE IMPUGNED ORDER IS WITHOUT JURISDICTION AND IN COMPLETE CONTRAVENTION OF THE LAW LAID DOWN BY THIS HON'BLE COURT IN K. SASHIDHAR**</u>

10. The NCLAT is a creature of the Code and therefore, its power and scope of jurisdiction is bound within the four corners of the Code. Therefore, the Impugned Order modifying the Resolution Plan and nullifying the commercial decision of the CoC is beyond the jurisdiction prescribed under Section 61 of the Code.

11. It is submitted that a "resolution plan" is a commercial proposal with negotiated terms of restructuring of financial affairs of a corporate debtor and is within the commercial domain of the committee of creditors. The Code does not confer any jurisdiction on the NCLAT and / or the NCLT to examine the commercial and technical aspects/ decisions of the CoC such as the viability and feasibility of a resolution plan and the commercials therein (*including but not limited to the distribution of proceeds under a resolution plan*).

12. Respectfully, the provisions of the Code only prescribe limited jurisdiction of the NCLAT under Section 61(3) of the Code with respect to an appeal filed against an order approving a resolution plan i.e. such jurisdiction being restricted to (a) the approved resolution plan being in contravention of the provisions of any law for the time being in force; (b) there being a material irregularity in the exercise of powers by the resolution professional during the corporate insolvency resolution period; (c) the operational creditors not having been paid a minimum of the liquidation value due to them (*as prescribed under Section 30(2)(b) of the Code*); (d) the insolvency resolution process costs having not been provided for repayment in priority to all other debts; and (e) non-compliance of the criteria prescribed by the Insolvency and Bankruptcy Board of India ("**IBBI**").

13. Therefore, as long as a resolution plan provides / ensures that **(a)** the operational creditors are being paid a minimum of their liquidation value and **(b)** the insolvency resolution process costs having been

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provided for repayment in priority to all other debts, all other commercial and technical aspects are in the exclusive domain of the CoC in terms of the provisions of the Code and the Code does not confer any jurisdiction on the NCLT and/or NCLAT to examine the commercial or technical aspects of a plan including the amounts being proposed to be paid to one stakeholder or the other. Therefore, once a resolution plan passes the muster of the minimum prescriptions (*inter alia in the nature of safeguards for operational creditors*) in terms of Section 30(2) of the Code and the relevant related regulations issued thereunder, the same is binding on all stakeholders and cannot be judicially reviewed.

14. In this respect, reference may be had to the provisions of the Code wherein the conscious scheme of the legislation is to allow the committee of creditors to negotiate the best possible commercial solution to the problem of insolvency and limit the judicial role and supervision to the minimum during this process and that too in reference to limited and identifiable standards for judicial review. The first instance where the NCLT has been prescribed jurisdiction under the Code is with respect to admission of insolvency resolution applications. In terms of Sections 7, 9 and 10 of the Code the NCLT has been granted limited jurisdiction to determine whether there is debt and default within the meaning of the Code, and if it was to be so, without reference to the causes or circumstances which led to the default, or whether the corporate debtor is actually "unable to pay its debts", the NCLT is simply obliged to admit or reject the application for initiation of insolvency resolution on the basis of whether there exists debt or default.

15. Once an application for insolvency resolution is admitted, Sections 15 to 29 of the Code prescribe the division of role, responsibility and authority between resolution professional and committee of creditors, wherein the entire process is mostly taken forward by the resolution professional in consultation with the committee of creditors, without

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interference by the NCLT. In fact, in terms of Section 25(2)(h) of the Code, the entire process for invitation, evaluation and approval of a resolution plan is entirely left to the discretion of the resolution professional acting in consultation with the committee of creditors keeping in view the commercial nature, complexity and scale of operations of the corporate debtor. While, under Section 60(5) of the Code, the NCLT retains an over-all supervisory jurisdiction to entertain applications by or against the corporate debtor in relation to the insolvency resolution process, however, the day to day running of the process does not require any active involvement of the NCLT.

16. Finally, at the stage of approval of a resolution plan, Sections 30 and 31 of the Code read with Sections 60(5) and 61, limit the judicial review at the time of approval of the plan. As stated above, as long as the resolution plan presented before the NCLT is duly approved by the requisite voting majority of committee of creditors, and the resolution plan is in compliance with the conditions laid down under Section 30(2) of the Code, the NCLT is required to approve the resolution plan. Beyond the compliance with requirements of Section 30(2) and Section 30(4), NCLT does not have jurisdiction to judicially review commercial terms of a resolution plan.

17. The aforesaid deliberate scheme of the Code which limits the judicial review by the NCLT has been explained by this Hon'ble Court in *K. Sashidhar* wherein this Hon'ble Court has held as follows:

> *"33. **The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors**.*
>
> *…*
>
> *Besides, **the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.** There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough*

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examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. ***The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made nonjusticiable****.*

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

35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" *by the requisite percent of voting share of financial creditors. Even in that enquiry,* ***the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2)****, when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides : (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. ` 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.***

36. *For the same reason,* ***even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of Section 32 of the I&B Code****, which envisages that any appeal from an order approving the*

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resolution plan shall be in the manner and on the grounds specified in Section 61(3) of the I&B Code…

…

37. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. ***The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable.*** *This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31.*

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

[***Emphasis Supplied***]

[*See Tab 1 of the Judgement Compilation @ Paras 32-37 & 42*]

18. Additionally, even the framers of the Code have been emphatic in recommending that the role of the NCLT / NCLAT is limited to ensure process compliance especially during insolvency resolution and not judicially review matters of commercial prudence. In this respect, the Bankruptcy Law Reforms Committee Report ("**BLRC Report**") notes as follows:

"Role of the Adjudicator focused on matter*s of procedure: The Committee recommends that the role of the Adjudicator needs to be carefully laid out so as to both minimise undue burden on the judiciary while simultaneously ensure the fairness and efficiency of insolvency resolution. This is done through two sets of recommendations from the Committee.* ***The Committee recommends that the Adjudicator will focus on***

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ensuring that all parties adhere to the process of the Code. For matters of business, the Committee recommends that Adjudicator will delegate the task of assessing viability to a regulated Insolvency Professional *(Burman and Roy, 2015). The Adjudicator will be more directly involved in the resolution process once it is determined that the debt is unviable and that the entity or individual is bankrupt."*

[***Emphasis Supplied***]

[See Pg. 30-31 of Vol. 13 of the Convenience Compilation]

19. Therefore, the scheme of the Code, read by way of its *text, context and object,* evidently, requires the committee of creditors to take commercial decisions with respect to a resolution plan and limits judicial review by the NCLT / NCLAT to ensure only compliance with process and compliance with provisions of the Code.

Tribunal being a creature of a statute is bound within the four corners of the statute

20. It is a settled position of law that a tribunal being a creature of a statute (*such as the NCLT and the NCLAT under the Code*) is bound within the four corners of the said statute and cannot exercise its jurisdiction beyond / outside the scope prescribed under the statute as evident from the following judgements:

(a) In ***B. Himmatlal Agrawal vs. Competition Commission of India and Ors.,*** 2018 SCC OnLine SC 574, this Hon'ble Court while deciding an appeal against the order of the NCLAT with respect to the Competition Act, 2002 has observed:

"***The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision****. This provision nowhere stipulates that the Appellate Tribunal can direct the appellant to deposit a certain amount as a condition precedent for hearing the appeal. In fact, that was not even done in the instant case. It is stated at the cost of repetition that the condition of deposit of 10% of the penalty was imposed insofar as stay of penalty order passed by the CCI is concerned. Therefore, at the most, stay could have been*

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vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself.”

[***Emphasis Supplied***]

[*See Tab 3 of the Judgement Compilation @ Para 8*]

(b) Further, in the case of ***Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Private Limited and Ors***., (2017) 16 SCC 498, while dealing with the powers of a state electricity regulatory commission, this Hon’ble Court observed:

“37. ***The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.****”*

[***Emphasis Supplied***]

[*See Tab 4 of the Judgement Compilation @ Para 37*]

(c) Similarly, the Hon’ble High Court of Calcutta in the case of ***Peerless Inn vs. Fourth Industrial Tribunal and Ors.***, (2017) 2 CALLT 532 (HC) has held,

*“****The respondent Tribunal is a creature of statute i.e. the ID Act. Like any other statutory creature, the functions of the respondent-Tribunal are prescribed by the parent statute and its powers and jurisdiction are circumscribed by the ID Act.*** *It can adjudicate only upon those issues which have been statutorily prescribed.* ***If it entertains any matter beyond what the statute permits, it will be clearly acting without jurisdiction.*** *It has no inherent power to do justice like the Civil Courts.”*

[***Emphasis Supplied***]

[*See Tab 5 of the Judgement Compilation @ Para 20*]

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21. Therefore, the NCLT's jurisdiction having been expressly limited by the statute, as explained above, it is impermissible for the NCLT to traverse beyond the same.

22. Therefore, the interference of the NCLAT under Impugned Order reviewing the commercial terms of the Resolution Plan, outside the contours of limited judicial review under the Code, is clearly without jurisdiction and ought to be rejected out-rightly by this Hon'ble Court.

III. DELIBERATE LEGISLATIVE SCHEME TO LEAVE COMMERCIAL DECISIONS TO COC AND LIMITING THE ADJUDICATING AUTHORITY AS PROCESS SUPERVISORS

23. Corresponding to the principle of limited judicial review in the matters of insolvency resolution, the provisions of the Code grant full freedom to the committee of creditors to evolve a solution for the insolvency of a corporate debtor. Subject to compliance with *de-minimus* criteria under Section 30(2) of the Code, the commercial decisions with respect to a resolution plan are vested entirely with the committee of creditors and in deference to the same, the provisions of the Code do not make any prescription of any particular solution to insolvency unlike earlier legislations such as Sick Industrial Companies (Special Provisions) Act, 1985.

24. The policy reasons behind the afore-stated scheme of the Code are well captured in the BLRC Report, which deals with this aspect as follows:

> "***No prescriptions on solutions to resolve the insolvency***
>
> ***The choice of the solution to keep the entity as a going concern will be voted on by the creditors committee. There are no constraints on the proposals that the Resolution Professional can present to the creditors committee.*** *Other than the majority vote of the creditors committee, the Resolution Professional needs to confirm to the Adjudicator that the final solution complies with three additional requirements. The first is that the solution must explicitly require the repayment of any interim finance and costs of the insolvency resolution process will be paid in priority to other payments. Secondly, the plan must explicitly include payment to all creditors not on the creditors committee, within a reasonable period after the solution is implemented. Lastly, the plan should*

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comply with existing laws governing the actions of the entity while implementing the solutions."

"The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. ***In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee.*** *The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."*

[***Emphasis Supplied***]

[See Pg. 75 of Vol. 13 of the Convenience Compilation]

Section 5 of the BLRC Report further states as follows:

"Business decision by a creditor committee

All decisions on matters of business will be taken by the committee of the financial creditors*. This includes evaluating proposals to keep the entity as a going concern, including decision about sale of business or units, retiring or restructuring debt…"*

[See Pg. 74 of Vol. 13 of the Convenience Compilation]

Similarly, Section 5.5.3 of the BLRC Report states as follows:

"Obtaining the resolution to insolvency in the IRP: The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in which the insolvency becomes visible, it is expected to evolve over time, and with the development of the market. ***The Code will be open to all forms of solutions for keeping the entity going without prejudice, within the rest of the constraints of the IRP. Therefore, how the insolvency is to be resolved will not be prescribed in the Code. There will be no restriction in the Code on possible ways in which the business model of the entity, or its financial model, or both, can be changed so as to keep the entity as a going concern.*** *The Code will not state that the entity is to be revived, or the debt is to be restructured, or the entity is to be liquidated. This decision will come from the deliberations of the creditors committee in response to the solutions proposed by the market."*

[***Emphasis Supplied***]

[*See Pg. 89 of Vol. 13 of the Convenience Compilation*]

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25. Besides the prescriptive requirements referred above, which have been embodied under Section 30(2) of the Code, the manner in which a committee of creditors proposes to resolve the insolvency of the corporate debtor is a commercial decision of the committee and complete freedom has been provided to the committee by the framers of the Code, to decide on the manner in which it proposes to resolve such insolvency without the interference of the courts. The BLRC Report states as follows:

"The key economic question in the bankruptcy process

When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the Government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

[***Emphasis Supplied***]

[See Pg. 11 of Vol. 13 of the Convenience Compilation]

26. In fact, the principle of commercial decisions being left to the committee of creditors is stated to be one of the principles driving the design of the Code in the following manner in the BLRC Report in Section 3.4:

"Principles driving the design:

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

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

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

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

[***Emphasis Supplied***]

[See Pg. 28 of Vol. 13 of the Convenience Compilation]

27. The aforesaid scheme of the Code is in line with United Nations Commission on International Trade Law, Legislative Guide ("**UNCITRAL**") recommended legislative scheme, which states:

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

3. The purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved. Some creditors, such as major customers or suppliers, may prefer continued business with the debtor to rapid repayment of their debt. Some creditors may favour taking an equity stake in the business, while others will not. Typically, therefore, there is a range of options from which to select in a given case. ***If an insolvency law adopts a prescriptive approach to the range of options available or to the choice to be made in a particular case, it is likely to be too constrictive.*** *It is desirable that the law not restrict reorganization plans to those designed only to fully rehabilitate the debtor; prohibit debt from being written off; restrict the amount that must eventually be paid to creditors by specifying a minimum percentage; or prohibit exchange of debt for equity.* ***A non-intrusive approach that does not prescribe such limitations is likely to provide sufficient flexibility to allow the most suitable of a range of possibilities to be chosen for a particular debtor.***

20. Rather than specifying a wide range of detailed information to be included in a plan, it may be desirable for the insolvency law to identify the minimum content of a plan, focusing upon the key objectives of the plan and procedures for implementation*. For example, the insolvency law may require the plan to detail the classes of creditors and the treatment each is to be accorded in the plan; the terms*

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and conditions of the plan (such as treatment of contracts and the ongoing role of the debtor); and what is required for implementation of the plan (such as sale of assets or parts of the business, extension of maturity dates, changes to capital structure of the business and supervision of implementation).

[***Emphasis Supplied***]

[See Pg. 223 of Vol. 12 of the Convenience Compilation]

28. Therefore, it is evident from the afore-stated scheme of the Code as interpreted by this Hon'ble Court in *K. Sashidhar*, and explained in the BLRC Report, the committee of creditors has the full authority to evolve a commercial solution to the insolvency, subject to compliance with Section 30(2) of the Code. The jurisdiction of the NCLT/NCLAT has accordingly been limited to review the resolution plan in reference to the *de-minimus* criteria prescribed under Section 30(2) of the Code. In the facts of the present case, the NCLAT has clearly exceeded its jurisdiction by reviewing the terms of the Resolution Plan beyond the mandate of Section 30(2) of the Code.

IV. ERRONEOUS CONCLUSION REGARDING VIOLATION OF SECTION 30(2) AND REGULATION 38: DISTRIBUTION OF PROCEEDS UNDER A RESOLUTION PLAN IS WITHIN COC'S DOMAIN

29. The Impugned Order errs in concluding that Resolution Plan is violative of Section 30(2) of the Code and Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution of Corporate Persons) Regulations, 2016 ("**CIR Regulations**") in so far as it delegates the aspect of distribution of resolution proceeds to the CoC.

30. *First,* the Resolution Plan proposed by Arcelor duly provides for treatment of various stakeholders under the Resolution Plan in Section VIII (*Treatment of various stakeholders*) read with Section V *(Summary proposal of the resolution applicant*), whereby it clearly states the treatment of each class of stakeholders under the Resolution Plan *inter alia* proposed payment terms proposed towards financial creditors viz., secured and unsecured financial creditors; operational creditors

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including workmen and employees, government and trade creditors etc. Hence, the Resolution Plan is fully in compliance with Regulation 38(1A) of the CIR Regulations which requires a resolution plan to state as to how it proposes to deal with interest of all stakeholders.

31. *Second,* the Impugned Order has erred in proceeding on an assumption that the Resolution Plan left the entire aspect of distribution of proceeds under the Resolution Plan to the CoC or that such a term in the Resolution Plan was introduced post negotiations with the sub-committee of the CoC. The conclusion of the NCLAT is contrary to the record and the relevant extracts of Section VIII (*Treatment of Various Stakeholder*) of the Resolution Plan under the head 'Financial Creditors' quoted at paragraph 142, page 72 of the Impugned Order (*as annexed as part of the present Appeal*), which simply leaves the manner of *inter-se* distribution amongst the secured financial creditors to the CoC and otherwise payment terms for all categories of stakeholders were provided for in the Resolution Plan itself. The NCLAT has also failed to take into account the fact that the aforesaid term of the Resolution Plan leaving the question of *inter se* distribution amongst the secured financial creditors to the CoC, has all along been part of the Resolution Plan including the one which was submitted by Arcelor on 02.04.2018, and was not introduced as a consequence of the negotiations with the sub-committee of the CoC. [*Reference may be had to pages 98 to 285 of Volume II of the Convenience Compilation for resolution plan submitted by Arcelor on 02.04.2018 (relevant page @ 248) and for the Resolution Plan as approved by the CoC at pages 365 to 541 of Volume III of the Convenience Compilation (relevant page @ 514)*.]

32. *Third,* there is no infirmity whatsoever in the Resolution Plan in leaving the decision on *inter-se* distribution amongst the secured financial creditors when it otherwise clearly stipulates the treatment of various stakeholders under the same. There is no prescription under the Code or the regulations framed thereunder, requiring the resolution applicant alone to provide for the exact *inter-se* distribution of resolution proceeds within various classes of stakeholders. As long

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as the resolution applicant specifies as to how it proposes to deal with the interest of all stakeholders involved in a resolution plan (*thereby providing the resolution applicant the discretion to determine the measures for resolution of the corporate debtor*), there is no proscription on the committee of creditors from proposing and deciding a method of distribution of resolution proceeds within a category thereof constituted of its own members. For instance, a resolution applicant may into account following economic and commercial factors while commercially determining the amount to be paid to operational creditors and the same are duly considered by the Committee of Creditors while examining acceptability of treatment of operational creditors under a resolution plan by :

(a) total outstanding debt of the corporate debtor vis-à-vis claims of operational creditors;

(b) the debt liability of a corporate debtor vis-à-vis the availability of assets with the corporate debtor;

(c) the liquidation value of the corporate debtor to assess the current capacity / value of the assets of the corporate debtor to repay the existing liabilities;

(d) the satisfaction or substantial satisfaction of claims made by operational creditors in numbers (as against the total amounts);

(e) payments made to operational creditors during the CIR Process to ensure the running of a corporate debtor as a going concern; and

(f) the criticality of the nature of goods or services being provided by the operational creditors to ensure continued business existence of the corporate debtor.

33. *Fourth,* without prejudice to the afore-stated factual situation, in any case, a question of distribution of proceeds under a resolution plan, is purely a commercial decision within the negotiated domain of committee of creditors with the resolution applicant. Beyond the

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aspect of compliance with Section 30(2)(b) of the Code requiring minimum of payment of liquidation value due to the operational creditors, all decisions as to how each of the stakeholder in a resolution plan ought to be compensated in reference to its nature, extent of claim and accompanying security interest (*including its nature & quality*) is within the negotiated domain of the committee of creditors. The NCLAT has erred in holding that distribution of proceeds under a resolution plan is not purely a commercial decision and has acted outside its jurisdiction by sitting in judgement over the same. Not only has the NCLAT sat in appeal on commercial decision of the CoC but has infact proceeded to completely alter and substitute the terms of the Resolution Plan.

34. The NCLAT has erroneously and artificially sought to limit the role of the committee of creditors only to examine the aspects of feasibility and viability of a resolution plan. Respectfully, examining the feasibility and viability of a plan is a statutory duty cast upon the committee of creditors by the Code while approving a resolution plan, so as to ensure that the purpose of insolvency resolution is in fact served by ensuring that the corporate debtor survives in the future as a viable concern. But beyond the examination of feasibility and viability of a resolution plan, as well as ensuring compliance with Section 30(2) and Regulation 38 of CIR Regulations, the CoC has complete authority to examine, negotiate and decide all the commercial aspects of a resolution plan including but not limited to the projections made by the resolution applicant under a resolution plan; the value being ascribed by a resolution applicant to a corporate debtor basis the realisable value of the assets of the corporate debtor and the treatment of all stakeholders in reference to the priorities of the charges on such assets; the steps to be undertaken by a resolution applicant for the turnaround of a defaulting corporate as well as the distribution of the proceeds under a resolution plan.

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35. In fact, the NCLAT in the past itself had upheld the above position of law in *Darshak Enterprise*, holding that the committee of creditors has the power to decide the percentage of claim amount being payable to one or the other financial creditor or 'operational creditor' or 'secured creditor' or 'unsecured creditor' based on facts and circumstances of each case. However, in sudden departure from the law laid down by itself, without recording any reasoning and much in derogation of principles of continuity, certainty and predictability expected of a tribunal, and correspondingly the legitimate expectation on the part of litigants, the NCLAT has completely disregarded its own earlier decision without assigning any reason or justification whatsoever. Respectfully, the Impugned Order on this count is erroneous and liable to be set aside on the basis of principles laid down by this Hon'ble Court in ***Union of India (UOI) and Ors. vs. Paras Laminates (P) Limited***, (1990) 4 SCC 453, which holds that:

> *"9. It is true that a Bench of two members must not lightly disregard the decision of another Bench of the same Tribunal on an identical question. This is particularly true when the earlier decision is rendered by a larger Bench. The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice.* ***Persons affected by decisions of Tribunals or Courts have a right to expect that those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters****. Classification of particular goods adopted in earlier decisions must not be lightly disregarded in subsequent decisions, lest such judicial inconsistency should shake public confidence in the administration of justice."*

[***Emphasis Supplied***]

[*See Tab 7 of the Judgement Compilation @ Para 9*]

36. Respectfully, on account of each of the aforestated, the distribution of proceeds under a resolution plan, subject to compliance with the requirements under Section 30(2)(b) of the Code, is within the negotiated domain of the committee of creditors and is not subject to judicial review.

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37. Even the legislature, in view of the conflicting judgments of the NCLAT and having realized the need for clarity on this aspect, has introduced a clarificatory amendment to Section 30(4) of the Code (*vide the Insolvency and Bankruptcy Code (Amendment) Act, 2019 ("**Amendment Act**"), w.e.f. 16.08.2019*), to unequivocally clarify that the committee of creditors is authorized to take a decision with respect to distribution of proceeds under a resolution plan. The proposed amendment is merely clarificatory in nature and in continuation of the consistent legislative intent in this regard.

38. In view of each of the aforestated, it is respectfully stated that the decision of the CoC regarding ***inter-se*** **distribution amongst the secured financial creditors is purely commercial in nature and by no stretch of imagination, be treated as an "*adjudicatory function*"**, as held by the NCLAT. In fact, by no stretch of imagination, a decision on distribution of resolution plan proceeds can be treated as adjudicatory function, which has been expounded in this Hon'ble Court's decision in ***Jaswant Sugar Mills Ltd., Meerut vs. Lakshmichand & Ors***., AIR 1963 SC 677:

"11.…*Often the line of distinction between decisions judicial and administrative is thin : but the principles for ascertaining the true character of the decisions are well-settled. A judicial decision is not always the act of a judge or a tribunal invested with power to determine questions of law or fact : it must however be the act of a body or authority invested by law with authority to determine questions or disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objectors, and his decision may seriously affect the rights of citizens but unless in arriving at his decision he is required to act judicially, his decision will be executive or administrative.* ***Legal authority to determine questions affecting the rights of citizens,***

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does not make the determination judicial : it is the duty to act judicially which invests it with that character. What distinguishes an act judicial from administrative is therefore the duty imposed upon the authority to act judicially. *Mukherjea, J., in The Province of Bombay v. K. S. Advani MANU/SC/0034/1950 : [1950]1SCR621 observed at p. 670 "there cannot indeed be a judicial act which does not create or imposes obligations; but an act, x x x x x is not necessarily judicial because it affects the rights of subjects. Every judicial act presupposes the application of judicial process. There is well marked distinction between forming a personal or private opinion about a matter, and determining it judicially. In the performance of an executive act, the authority has certainly to apply his mind to the materials before him; but the opinion he forms is a purely subjective matter which depends entirely upon his state of mind. It is of course necessary that he must act in good faith, and if it is established that he was not influenced by any extraneous consideration, there is nothing further to be said about it. In a judicial proceeding, on the other hand, the process or method of application is different. "* ***The judicial process involves the application of a body of rules or principles by the technique of a particular psychological method", vide Robson's Justice and Administrative Law, p. 33. It involves a proposal and an opposition, and arriving at a decision upon the same on consideration of facts and circumstances according to the rules of reason and justice, vide R. v. London County Council [1931] 2 K.B. 215. It is not necessary that the strict rules of evidence should be followed : the procedure for investigation of facts or for reception of evidence may vary according to the requirements of a particular case. There need not be any hard and fast rule on such matters, but the decision which the authority arrives at, must not be his 'subjective', 'personal' or 'private' opinion. It must be something which conforms to an objective standard or criterion laid down or recognised by law, and the soundness or otherwise of the determination must be capable of being tested by the same external standard. This is the essence of a judicial function which differentiates it from an administrative function; and whether an***

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<u>authority is required to exercise one kind of function or the other depends entirely upon the provisions of the particular enactment. x x x x x x Generally speaking where the language of a statute indicates with sufficient clearness that the personal satisfaction of the authority on certain matters about which he has to form an opinion finds his jurisdiction to do certain acts or make certain orders, the function should be regarded as an executive function</u>."

[***<u>Emphasis Supplied</u>***]

[*See Tab 8 of the Judgement Compilation @ Para 11*]

39. In view of the afore-stated facts and established principles of law, it is clear that distribution of resolution proceeds is a commercial matter falling squarely in the domain of the CoC and its decision in that respect is non-justiciable.

V. <u>THE IMPUGNED ORDER ABROGATES THE CONSENT OF THE COC BY ALTERING/SUBSTITUTING THE COMMERCIAL TERMS OF THE RESOLUTION PLAN</u>

40. Under Section 31 and Section 61 of the Code, the NCLT and the NCLAT respectively, have limited jurisdiction to examine the resolution plan for compliance with the mandatory pre-requisites for validity of a resolution plan under Section 30(2) read with Regulation 38 of the CIR Regulations and if found to be non-compliant, its only power is to reject a resolution plan, and not modify or substitute it in any manner whatsoever.

41. The NCLAT has erred in donning the role of the CoC by re-distributing the proceeds payable under the Resolution Plan in a manner which it subjectively deemed appropriate, taking away the very basis of the consent of the CoC to the Resolution Plan. Respectfully, a resolution plan is consent based plan proposed by the resolution applicant for a corporate debtor. The counter party to such a resolution plan is the committee of creditors of such corporate debtor which legislatively is required to give a minimum consent of 66% voting share for consensus ad idem on behalf of all stakeholders.

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42. Consent by requisite majority of the committee of creditors is a pre-requisite for the NCLT (*and by necessary corollary the NCLAT*) to approve a resolution plan. In the absence of consent and approval of the committee of creditors by requisite majority, neither the NCLT, nor the NCLAT, has competence to approve a resolution plan. This position is borne out from a plain reading of Section 31 of the Code itself which provides that a resolution plan (*as consented to / approved by minimum of 66% majority of the committee of creditors*) once approved by the NCLT becomes binding on all stakeholders in terms of Section 31 of the Code. The constitutional validity of the Code has been upheld by this Hon'ble Court in *Swiss Ribbons*. The proposition that a resolution plan shall be binding on all stakeholders only upon being consented to by requisite majority of the committee of creditors and the resolution applicant, is no longer *res integra.*

43. The legislation vests no power in the NCLT/NCLAT to *suo muto* impose unilateral conditions/modification in a resolution plan, without the same being consented to either the resolution applicant or the committee of creditors. Any variation proposed by the NCLT/NCLAT which amounts to variation in the terms of the resolution plan (*as originally consented to by the committee of creditors*) which is not expressly consented to by the resolution applicant and/or the committee of creditors is completely bereft of legal authority and is *per se* void, such unilateral insertion itself being outside the powers of the NCLT/NCLAT.

44. A tribunal cannot displace the legislative mandate of consent of either of the two parties whose consent is statutory prerequisite, by introducing extraneous conditions not agreeable by either party.

45. Therefore, any modification of a plan by the NCLT and / or NCLAT without the consent of the committee of creditors and/or the resolution applicant is, without jurisdiction, illegal and bad in law.

VI. COMMITTEE OF CREDITORS IS NOT CONFLICTED TO TAKE DECISIONS ON DISTRIBUTION OF PROCEEDS UNDER A RESOLUTION PLAN

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46. The Impugned Order erroneously concludes that the committee of creditors is conflicted to take a decision with respect to distribution of proceeds under a resolution plan. Respectfully, the entire scheme of the Code is based on the assumption and presumption that any resolution to be undertaken under its provisions is to pass the muster of the commercial wisdom of the committee of creditors and the legislature has consciously bestowed upon the committee of creditors the responsibility and power to be the decision making authority with respect to the future of a defaulting debtor. Therefore, the legislature itself having granted this power to the committee of creditors, there cannot be any presumption of a purported "conflict of interest" as assumed by the NCLAT.

47. Furthermore, respectfully, the constitutionality of such authority / responsibility has been upheld by this Hon'ble Court in the judgement of *Swiss Ribbons* wherein this Hon'ble Court has upheld the provisions of the Code including the provisions which prescribe that only financial creditors constituting committee of creditors can vote on a resolution plan which binds all stakeholders of the corporate debtor and observed the following:

> *28. Most importantly,* ***financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do.*** *Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.*
>
> …
>
> *44.* ***Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess***

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viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. *On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.*

[***Emphasis Supplied***]

[*See Tab 12 of the Judgement Compilation @ Para 28 & 44*]

48. Hence, the findings of the NCLAT holding that that the CoC cannot decide upon the distribution of resolution proceeds as the CoC suffers from a conflict of interest *vis-à-vis* the other stakeholders such as operational creditors and other creditors, are *per incuriam*.

VII. THE FOUNDATION OF THE CODE IS BASED ON EQUITABLE TREATMENT WHICH REQUIRES DIFFERENTIAL TREATMENT TO DIFFERENTLY PLACED CREDITORS

49. Respectfully, the Code does not mandate that differently situated creditors should receive the same treatment under a resolution plan and the foundation of the Code is based on equitable treatment of different classes of creditors recognizing that different class of creditors deserve different treatment and not all creditors can be treated equally. In deference to the same, each class of creditor under the Code has been assigned different roles and responsibilities, unique to its own nature and status, which division of role, rights and authority has been duly upheld by this Hon'ble Court in *Swiss Ribbons*.

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50. In fact, differential treatment to different stakeholders is key to any just and fair bankruptcy regime. The principle of equitable treatment which recognises that different class of creditors deserve different treatment and not all creditors can be treated equally is expounded under the UNCITRAL (*referred to by the Hon'ble Supreme Court in Swiss Ribbons*) which records that:

"Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. *This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."*

[***Emphasis Supplied***]

[See Pg. 25 of Vol. 12 of the Convenience Compilation]

51. Similarly, a report by International Monetary Fund Report titled Orderly & Effective Insolvency Procedures – Key Issues ("**IMF Report**"), provides that all insolvency procedures must aim for equitable treatment. The report notes as follows:

"Equitable Treatment. A common feature of all insolvency proceedings is their collective nature. Unlike other laws (e.g., foreclosure laws), an insolvency

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*law is designed to address a situation in which a debtor is no longer able to pay its debts to its creditors generally (rather than individually) and, in that context, provides a mechanism that will provide for the equitable treatment of all creditors… **equitable treatment does not require equal treatment. On the contrary, to the extent that different creditors have struck fundamentally different commercial bargains with the debtor** (e.g., through the granting of security), **differential treatment of creditors that are not similarly situated may be necessary as a matter of equity**."*

[***Emphasis Supplied***]

[*See Pg. 157 of Vol. 13 of the Convenience Compilation*]

52. Thus, differently placed classes of creditors are bound to be given differential treatment for it to be equitable and fair amongst all the classes of creditors and mere initiation of a resolution process cannot completely override the differential bargains made by the creditors with the corporate debtor prior to the commencement of an insolvency.

53. The concept of differential treatment to different classes of creditors is ingrained in any principle of fairness and equitable and rather equal treatment of different classes of creditors as has been done by the NCLAT in the facts of the present case, is unfair and in-equitable.

54. It is pertinent to state that the differential bargains amongst the creditors are negotiated to provide for clear mutual rights and status in a situation of insolvency/financial distress and it would defeat the very purpose of creation of security, if such differential bargains are ignored during insolvency/insolvency resolution.

55. In fact, one of the primary purpose of a creditor negotiating a security from the debtor for disbursement of a loan at a much lesser interest rate is to mitigate risks, which risk may be low at the time of disbursement, the true usage and purpose of a security would arise at the time of a corporate debtor defaulting or undergoing a financially stressful period (*such as insolvency resolution*). Thus, ignoring

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differential rights of secured creditors, apart from being contrary to law, would have serious adverse consequences on the debt market (*like high interest rates being charged by creditors*) and increase the risk in lending (*a consequence apposite to the object and purpose of the Code, to promote lending and entrepreneurship*).

56. The following extract from Wood, Philip R, "*Principles of International Insolvency*", Sweet Maxwell (1995), would be of relevance in understanding the principles of security recognition during insolvency followed across the globe:

> "*Secured Creditors are super-priority creditors on insolvency.* ***<u>Security must stand up on insolvency which is when it is needed most</u>.*** *Security which is valid between the parties but not as against the creditors of the debtor is futile.* ***<u>Bankruptcy laws which freeze or delay or weaken or de-prioritise security on insolvency destroy what the law created.</u>*** *Hence, the end is more important than the beginning.*"

[*See Tab 13 of the Judgement Compilation*]

57. Respectfully, if an equitable approach recognizing the respective bargains and rights of different classes of creditors as a part of a resolution process are not adopted and the principles of the purported "equality" under the Impugned Order are upheld, the secured financial creditors with good security interest will always be incentivised to vote for liquidation rather than resolution, as they would have better rights and status if the corporate debtor was to be liquidated rather than a resolution plan being approved, which defeats the entire objective of the Code i.e. resolution of the distressed asset.

58. The NCLAT has failed to appreciate that at the time of voting each individual financial creditor being part of the committee of creditors at first instance, votes in its individual capacity where it is bound to take into consideration the treatment meted out to it under the resolution plan in reference to its existing rights, status and security interest (*as well as its ranking qua other creditors, value and extent of its security etc.*) as well as compare the treatment meted out to other

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creditors in reference to their rights, status and security interest and then decide whether to vote in favour of the resolution plan. Only if the resolution plan recognises its rights, status and interests as a creditor and is not unduly abrogating its rights and interest, that the creditor will be incentivised to vote in favour of the plan (*over liquidation*), where its rights to enforce security interest are fully protected. Such individual votes by the individual members of the committee of creditors in reference to *inter alia* their individual debts and other terms of the resolution plan forms a collective decision of the committee of creditors with a majority vote of 66% or more of voting share of committee of creditors in value. It is then that the cram down rule of 66% or more majority binding the remaining creditors is applied in terms of Section 31 of the Code to bind the minority creditors in the committee of creditors.

59. Therefore, as long as a rationale and legitimate basis exists for differentiation between different classes of creditors, such differentiation cannot be held to be unfair and prejudicial and rather is treated as integral to the very concept of fairness.

60. Respectfully, there is no basis in law or equity for the NCLAT's decision to treat the financial creditors and operational creditors with the same brush, and refusing to take into account the differentiation between the creditors basis the nature of debt, availability of security and relative seniority in a liquidation waterfall.

61. The absurdity of the Impugned Order further comes to fore from the fact that as per the Impugned Order, security interests would be recognised during the sale of the corporate debtor as a going concern during liquidation, the same security interests would stand abrogated for resolving the financial affairs of a corporate debtor as a going concern during insolvency resolution.

62. Therefore, evidently, the "**new**" scheme of the Code being laid down by the NCLAT would clearly incentivise the secured creditors to opt for a going concern liquidation and stifle this path breaking legislation

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at a nascent stage. Taking note of the effect of the Impugned Order and the potential disastrous impact of the same, an amendment has been proposed clarifying that the nature, extent and value of security interest and other attending factors differentiating different classes of creditors are relevant factors to be reckoned by the committee of creditors while arriving at a distribution mechanism in a resolution plan. The proposed text of the amendment to Section 30(4) reads as follows:

> *(b) in sub-section (4), after the words "feasibility and viability,", the words, brackets and figures "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" shall be inserted.*

63. Therefore, taking note of the interpretation afforded in the Impugned Order, even legislatively it is proposed to be clarified that while arriving at a distribution mechanism in a resolution plan *inter-se* seniority of debt in terms of Section 53 waterfall including the priority and value of security interest, shall be a relevant factor. Notably, the amendment is applicable to the present proceedings as well by virtue of second proviso to Section 30(2)(b).

VIII. INSOLVENCY RESOLUTION DOES NOT DISREGARD SECURITY – DIFFERENT BARGAINS BY DIFFERENT CREDITORS OUGHT TO BE GIVEN CREDENCE WHILE RESOLVING THE FINANCIAL AFFAIRS OF THE CORPORATE DEBTOR

64. As evident from above, the Code requires differential and equitable treatment to classes of creditors which are differently placed so as to ensure that unequals are not treated equally and cause unfairness. No provision of Code abrogates this universally acknowledged principle of law. On the contrary, the provisions of the Code, re-affirms it.

65. Further, the Code does not provide for abrogation or cancellation of security interest of secured creditors during insolvency resolution. While the moratorium imposed under Section 14 of the Code merely suspends the rights of the creditors to enforce the security interests

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created by the corporate debtor in respect of its property, however, at no juncture does the same abrogate or take away the security interest created in favour of secured creditors.

66. Similarly, Section 21 of the Code, which gives a right to unsecured financial creditors to have a seat on the committee of creditors and voting share in proportion to the admitted financial debt, merely gives that right to be on committee of creditors and voting share, and no more. It certainly does not mean that the distinction between secured and unsecured creditors and their respective differential status amongst themselves, is eliminated during insolvency resolution. The financial creditors continue to have differential rights and status, basis their respective differential bargains entered into by each of the creditor and the debtor.

67. While the Code is aimed at providing better rights to unsecured financial creditors to promote the bond / unsecured credit market by providing unsecured creditors with the right to participate and vote at the meetings of the committee of creditors as well as being provided with a preferred position in the waterfall under Section 53 (*above government / statutory dues as well as other unsecured operational debt*), however, at no juncture has the legislature diluted or in any manner modified or altered the sacrosant rights of the secured financial creditors and abrogated their security interests for a corporate undergoing insolvency resolution.

68. To the contrary and in fact, intrinsic in the Code is the recognition of security interest of the financial creditors and protection and preservation of the security interest of secured creditors as is evident from the following:

(a) Definition of term "creditor" under Section 3(10) specifically includes and recognizes secured and unsecured creditors in addition to the financial and operational creditors;

(b) Section 3(30) and 3(31) of the Code in turn defines the terms "secured creditor" and "secured debt";

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(c) Section 20(2)(c) prohibits the interim resolution professional from creating security interest on encumbered property to raise interim finance, without the prior consent of the secured creditors having security interest over such encumbered property;

(d) In fact, no security interest can be created on the assets of the corporate debtor, even by the resolution professional, without the approval of the committee of creditors under Section 28(1)(b) of the Code, requiring 66% of voting share to permit the same;

(e) At the time of filing of the claims to the interim resolution professional / resolution professional, as the case maybe, the prescribed formats under the CIR Regulations formulated under the mandate of Section 240 of the Code require creditors to disclose and describe the security interest (if any) and valuation thereof;

(f) The status and details of security interest in favour of secured creditors is required to be included as part of the information memorandum prepared under Section 29 of the Code, listing out the relevant information as regards the financial position of the corporate debtor. The forms prescribed under the CIR Regulations basis which a resolution professional is to accept and verify claims for the preparation of the information memorandum, mandatorily require for the information regarding the security interest to be disclosed. Notably, in terms of Section 30(1) of the Code, a resolution plan is to be prepared on the basis of information memorandum, which as stated above would include *inter alia* details of security interest.

69. In fact, Section 30 of the Code itself recognizes security and different classes of creditors being treated differently as under the Code, a secured creditor may also include a secured operational creditor, therefore, while proposing a resolution plan, a resolution applicant is

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required to comply with the mandatory payment prescription of liquidation value under Section 30(2)(b) of the Code, which liquidation value would be different for a secured operational creditor(s) in comparison to an unsecured operational creditor. Therefore, inherent within Section 30(2) of the Code is the recognition of the security interest.

70. Respectfully, the isolated reliance of the NCLAT on the definition of financial debt and financial creditor under Section 5(7) and 5(8) of the Code to ignore the distinction between secured and unsecured creditors is erroneous as the class of financial creditors by definition itself is not a homogeneous class as it clubs secured financial creditors and unsecured financial creditors (*defined under Section 3 of the Code and applicable to the entirety of the Code*) and this distinction has been recognized throughout the Code.

71. The Appellate Authority has also failed to appreciate that financial creditors in itself is not homogeneous class as it clubs both secured financial creditors and unsecured financial creditors. Respectfully, the Code recognises a clear distinction between secured financial creditors and unsecured financial creditors, for instance under Section 52 of the Code, a secured financial creditor at the time of liquidation of the corporate debtor has two options being **(a)** relinquishment of its security interest into the liquidation estate created by the liquidation and receive proceeds from liquidator in the manner as specified under Section 53 of the Code; or **(b)** realisation of its security interest in manner specified under Section 52 of the Code. It is axiomatic that the security survives the CIR Process and does not get extinguished or modified except by consent and novation by voting of requisite majority of 66% of the committee of creditors. (*Regulation 37 of the CIR Regulations read with Sections 30(4) & 31 of the Code*). Thus, secured creditors have a **right to stand outside liquidation** and enforce their security; as well as to relinquish their security and enjoy priority in distribution waterfall (*second after insolvency costs*), hence, **any**

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alternate to liquidation needs to recognise their superiority. Hence, naturally, secured creditors deserve differential treatment than unsecured creditors in a resolution plan in deference to their security interest and rights.

72. Apart from the fact that there is no provision of the Code which abrogates security interest during insolvency resolution, the field continues to be occupied by settled law protecting sanctity and *inter-se* priority rights amongst creditors on the basis of security interest *inter alia* under the Transfer of Property Act, 1882. These principles and provisions, not being in conflict with the provisions of the Code, are not overridden on account of Section 238 of the Code – the latter coming into play only in the event of conflict.

73. In fact, any security sharing arrangement *inter-se* creditors are valid contractual arrangements, based on viability studies and due diligence at the time of sanction of credit facilities whereby even the sharing of any security amongst various creditors and *inter-se* ranking and arrangements are already existing. Therefore, it would be an absurd interpretation of the Code, in the absence of specific provisions, to state that CIR Process overrides all such arrangements (*which have been entered into as a safeguard during insolvency*) and nullifies the same until any distribution under liquidation. Respectfully, an insolvency law must protect and preserve the pre-insolvency rights and differential bargains entered into by the creditors.

74. It is submitted that the Impugned Order is contrary to the entire law of security interest and its recognition, status and rights associated with charges of creditors over the assets of the corporate debtor as elucidated under Chapter 6 of the Companies Act, 2013, read with the Companies (Registration of Charges) Rules, 2014 which contains detailed provisions with respect to formal and proper record of charges including with the Registrar of Companies with public inspection (which details are also sought from the creditors at the time of collation of claim under the Code). Respectfully, the entire motive

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and purpose of such register of charges and public notice of charge is precisely to recognise and enforce the rights attached to such charges which determine *inter-se* creditor rights and become particularly relevant in the circumstances of insolvency or financial distress of the corporate debtor.

75. Respectfully, any suggestion for the abrogation of security interest during the CIR Process in fact goes against the commercial lending principles which have been prevalent for centuries and contrary to the provisions of existing laws of our country. Therefore, if the Impugned Order is not interfered with, the entire lending landscape of our country would change and there would be severe prejudice to the rights of those creditors who have lent based on security value.

IX. DISASTROUS IMPACT ON PENDING INSOLVENCY PROCESSES AS WELL AS BANKING INDUSTRY AND THE NATIONAL ECONOMY

76. Respectfully, the view taken by the NCLAT in proposing "equal treatment" is grossly myopic and completely overlooks the impact of the same on pending insolvency resolution processes by creating uncertainty and unpredictability with respect to the otherwise commercially acceptable norms of lending restructuring and priority in distribution in context of a distressed asset as well banking industry as a whole.

77. The Impugned Order proceeds on a completely erroneous premise of permissibility of collapsing the distinction between secured and unsecured creditors, without appreciating that economically the two types of creditors have inherently different risk profile and business model:

(a) Secured financial creditors by advancing **loans against security hedge their risks**, enabling them to lend on lower rates;

(b) **Unsecured financial creditors take higher risks** and compensate themselves by charging higher interests;

(c) Security is relevant and taken keeping in mind the insolvency risk and is aimed at hedging risks of recovery at the time of

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insolvency on account of better status and rights in any situation of distress;

(d) Even the **Reserve Bank of India's provisioning norms recognise the distinction** between secured and unsecured creditors based on inherent risk profile differentiation:

Asset classification	**Provisioning norms**
Sub-standard Asset *i.e. an asset that has remained non-performing for a period less than or equal to 12 months.*	15% on secured and 25% on ab initio unsecured account
Doubtful Asset *i.e. an asset that has remained in the substandard category for a period of 12 months.*	
- 1st year	25% on secured and 100% on unsecured
- 2nd year	40% on secured and 100% on unsecured
- 3rd year	40% on secured and 100% on unsecured
- 4th year	100%
Loss Asset *i.e. assets where loss has been identified by the bank or internal or external auditors or the Reserve Bank of India pursuant to inspection but the amount has not been written off wholly.*	100%

78. It is keeping in mind the afore-stated, that the banking norms as well as legal regime governing rights of the creditors recognize and enforce rights of secured creditors. If the security interests during insolvency resolution are to be abrogated, the entire banking and lending landscape in India (*based on centuries old principles*) would undergo a change as the above abrogation would lead to increase in the risk of capital, lending at higher interest rates, nullifying of the basis and rationale of Reserve Bank of India's provisioning norms. Hence, the

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above would result in unavailability and/or inaccessibility of low priced credit and thus, achieve an economic result exactly opposite to the object of the Code to promote entrepreneurship and availability of credit.

79. The above would also consequently result in the collapse of the established credit framework of the country which bases itself on a cost analysis basis contractual certainty which ensures priority in payment and ensure safeguarding of their rights. Respectfully, disregarding such contractual rights of secured lenders would result in a change in the entire assumption base on which business of banking has been performed for centuries and make banking un-viable and restrictive.

X. STANDARD CHARTERED BANK IS A SEPARATE CLASS WITHIN SECURED FINANCIAL CREDITORS

80. The NCLAT while passing the Impugned Order has failed to appreciate that Standard Chartered Bank and the Project Assets Secured Lenders, independently form two separate classes of secured financial creditors which are differently placed and treating them on an equal footing would be unfair, discriminatory, inequitable and in contradiction to the principles of "equitable treatment" which require differently placed to be treated differently.

81. The rationale behind such classification is as follows:

(a) *The nature, quality and value of security interest available to Standard Chartered Bank and the Project Assets Secured Lenders* –

(i) The Project Assets Secured Lenders are secured to the extent of 99.66% of their outstanding secured dues (*being Rs. 45,559.24 crores*), basis fair valuation of Rs. 45,407 crores of the said project assets (*as per valuation report of Duff & Phelps*).

(ii) The only security of Standard Chartered Bank is a pledge of the shares held by the Corporate Debtor in the offshore subsidiary, Essar Steel Offshore Limited ("**ESOL**" and

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"**ESOL Pledge Shares**") and the fair value of the ESOL Pledge Shares is only Rs. 24.86 crores against its total outstanding admitted secured dues of Rs. 3,487.10 crores (*being 0.7% of the total admitted debt of Standard Chartered Bank*). The reason for such low valuation of the ESOL Pledge Shares is that ESOL itself has a negative net worth and is a severely impaired investment in the books of the Corporate Debtor due to the bankruptcy of "Trinity Coal" (*which had declared bankruptcy in 2014, and again in March 2019, reinitiated bankruptcy by making regulatory filings under Chapter XI*). **Thus, Standard Chartered Bank, is an unsecured creditor to the extent of Rs. 3462.24 crores**.

(iii) The debt of Standard Chartered Bank being grossly under secured is evident from the following table setting out the security interest (*and its value*) of the two classes of secured financial creditors is provided below:

Class of secured financial creditors	**Nature of security**	**Liquidation Value (in Rs. crores) as per the report issued by Duff and Phelps as on 2 August 2017***	**Fair Value (in Rs. crores) as per the report issued by Duff and Phelps as on 2 August 2017***	**Distribution basis the sharing ratio of Liquidation Value (in Rs. crores) as per the financial proposal in the Resolution Plan of Arcelor**	**Distribution basis the sharing ratio of Liquidation Value (in Rs. crores) as per the financial proposal in the Resolution Plan of Arcelor read with the decision of the CoC pursuant to 22nd meeting of CoC**	**Percentage of realization (under the Resolution Plan of Arcelor read with the decision of the CoC pursuant to the 22nd meeting of the CoC) *vis-à-vis* Fair Value**

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Project Assets Secured Lenders (Admitted Claim being Rs.45,559.24 crores)	Charge on project assets of the Corporate Debtor	17,160.64	45,407.14	41, 909.29	40,910.74	Approx. 90%
Standard Chartered Bank (Admitted Secured Claim of Rs. 3487.10 crores)	No charge on project assets of the Corporate Debtor (Only pledge of ESOL Pledge Shares)	24.86	24.86	60.71	59.26	Approx. 238%
Total	-	17,185.5	45,432	41,970	**40,970	-

** between the values reported by Duff & Phelps and RBSA Valuation Advisors LLP (being the two registered valuers appointed by the resolution professional of the Corporate Debtor ("**Resolution Professional**")), the reports having the higher value have been considered.*

*** The CoC in deference to the non-binding "recommendations" of the NCLT, Ahmedabad (as set out in its order dated 08.03.2019) and the order dated 20.03.2019 of NCLAT, had pursuant to its 22nd meeting vide a resolution passed on 30.03.2019, ex-gratia apportioned payment of a capped amount of Rs. 1,000 crores, from the upfront payment amount of approximately Rs. 41,970 crores earmarked for secured financial creditors under the Resolution Plan, for payment to the operational creditors of the Corporate Debtor who have not been proposed any payment against their admitted claims under the Resolution Plan.*

(b) <u>Purpose of the Loan</u>

(i) The Project Asset Secured Lenders, loans were provided to the Corporate Debtor for the purpose of development of

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the projects of the Corporate Debtor and for the creation of the project assets of the Corporate Debtor.

(ii) On the other hand Standard Chartered Bank has provided a loan to a subsidiary of the Corporate Debtor to enable acquisition of shareholding of Essar Mineral Ltd. (a Mauritian company) such that post-investment ESOL would hold the entire shareholding in "Trinity Coal" which mines coal in West Virginia, USA through seven (7) step down subsidiaries i.e. loan provided for funding the acquisition of offshore assets. No project asset of Corporate Debtor was created through the funding of the subsidiary by Standard Chartered Bank and no proven benefit accrued to Corporate Debtor.

(c) *Beneficiary of the Loans*

(i) All the Project Asset Secured Lenders have in one capacity or another granted loans to the Corporate Debtor.

(ii) However, Standard Chartered Bank has *not* granted loans to the Corporate Debtor and has instead only granted loans to an offshore subsidiary of the Corporate Debtor i.e. ESOL for which a corporate guarantee has been executed by the Corporate Debtor in its favour, which guarantee has been extended by the Corporate Debtor without consent from all its existing lenders.

82. Therefore, it is evident that the Project Asset Secured Lenders and Standard Chartered Bank are two distinct classes of secured creditors and the CoC by taking into account the afore-stated facts and circumstances differentiating the two classes of creditors, has justifiably decided on a differential treatment of the Project Assets Secured Lenders and Standard Chartered Bank. [*Reference may be had to the discussions at the minutes of 21st meeting of the CoC on 22.10.2018 at pages 2109 to 2125 @ 2121 of Volume 10 of the Convenience Compilation as*

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well as the summary of the decision at page 596 – 606 of Volume IV of the Convenience Compilation]

83. Thereafter, even at the meeting held on 27.02.2019 held pursuant to the directions of the NCLAT to consider the suggestions made by the NCLT in its order dated 08.03.2019, the CoC once again re-visited its decision with respect to *inter-se* distribution amongst the secured financial creditors and for the reasons and circumstances summarized above (*and recognized and validated by the opinion of Retd. Justice Mr. B.N. Srikrishna*) re-affirmed its original decision with respect to treatment to Standard Chartered Bank under the Resolution Plan, especially considering the fact that neither has Standard Chartered Bank brought on record any fresh facts/material on record or cooperated with the CoC to provide it with underlying document supporting its claims. [*Reference may be had to the minutes of meeting dated 27.03.2019 at page 1 to 24 @ 14 of Volume 11 of the Convenience Compilation and to Justice B. N. Srikrishna's opinion at pages 1870 to 1888 of Volume 9 of the Convenience Compilation*]

84. In view of the aforestated, it is respectfully stated that differential treatment of the Project Asset Secured Lenders and Standard Chartered Bank is based on reasonable differentia and in fact, Impugned Order's identical treatment of these two distinct classes is "unfair" and "inequitable" and not otherwise.

85. Without prejudice to the above, the recent clarifications sought to be issued in the form of the Amendment Act, clarify that a resolution plan providing for a payment of not less than the amounts to be paid to such creditors in the event of liquidation for financial creditors who have not voted in favour of a plan (*such as Standard Chartered Bank in the present case*) as a fair and equitable treatment. The relevant extract of the Amendment Act is reproduced hereunder for ready reference,

"6. In section 30 of the principal Act,––

(a) in sub-section (2), for clause (b), the following shall be substituted, namely:

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(b) provides for the payment of debts of operational creditors in such anner 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 distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors."

[***Emphasis Supplied***]

86. Respectfully, in the facts of the present case, Standard Chartered Bank, despite having not voted in favour of the plan, is being paid an amount of Rs. 60.71 crores, as against the liquidation value of its security which is Rs. 24.86 crores (*i.e. being paid 238% of the its liquidation value*) and therefore, the above treatment of Standard Chartered Bank based on the nature, quality and value of its security is in line with the intention of the legislature and fair and equitable within the four corners of the Code.

XI. ILLEGITIMACY OF CLAIM OF STANDARD CHARTERED BANK AS A SECURED CREDITOR

87. As an established practice in banking and financial sector, Standard Chartered Bank was required to obtain advance consent of existing lenders of the Corporate Debtor before a charge could be created on the shares of ESOL (*which were held by the Corporate Debtor*). Despite being aware of this obligation and acting in a financially imprudent

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manner as well as in deliberate violation of the financial covenants, Standard Chartered Bank chose not to obtain such consent, thereby creating charge/pledge over the shares of ESOL which was and continues to remain imperfect. In such circumstances, Standard Chartered Bank cannot be treated at par with the Project Assets Secured Lenders, who have observed prudent lending norms and also cannot possibly be penalized for Standard Chartered Bank's lending against inadequate security.

88. Furthermore, it is notable that even at the time of filing of Section 7 against the Corporate Debtor and thereafter at the time of filing of their claim form, Standard Chartered Bank treated itself as an unsecured financial creditor and at no point of time claimed itself as a secured creditor. This can be seen from that fact that Standard Chartered Bank, in its original Form C, its application under Section 7 for commencement of CIR Process of the Corporate Debtor and its letter dated 11.05.2017 addressed to the Reserve Bank of India, had admitted to having "*NIL*" security and therefore the Resolution Professional in the list of creditors dated 29.08.2017 designated Standard Chartered Bank as an unsecured financial creditor of the Corporate Debtor. However, on 02.07.2018 Standard Chartered Bank filed a revised form for classifying itself as a secured financial creditor and the Resolution Professional (*post 344 days from the commencement of the CIR Process of the Corporate Debtor, 140 days from 12.02.2018 i.e. the date of receipt of the proposed resolution plans, including Arcelor's plan, and 71 days since opening of those plan at the 10th meeting of the CoC*). Clearly, this request to be classified as a secured financial creditor was clearly an afterthought driven by the terms of the original resolution plans placed before the CoC. *[See Pg. 332 of Vol. 2 of the Convenience Compilation]*

89. In fact, all through CIR Process (*including at the meeting held on 27.03.2019*), despite being sought for by various members of the CoC, Standard Chartered Bank failed to disclose the valuation of the security, the actions/litigations undertaken by Standard Chartered

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Bank to recover the money from ESOL, details of amount recovered, if any, from ESOL and the expected recovery of the debt by Standard Chartered Bank from ESOL. In fact, the only response of Standard Chartered Bank was that these issues were not relevant. Therefore, such steadfast refusal of Standard Chartered Bank to share relevant information ought to draw an adverse inference against it.

XII. THE RATIONALE OF DISTRIBUTION IS BASED ON COGENT AND SOUND RATIONALE

90. It is submitted that the CoC applied a rational intelligible differentia between the Project Assets Secured Lenders and Standard Chartered Bank and rightly treated the two as separate classes of creditors given that **(a)** there was inadequate disclosure; **(b)** the loan was not for the purpose of asset production of the Corporate Debtor; **(c)** the loan was given to an offshore subsidiary; **(d)** Standard Chartered Bank's loan being grossly under secured; **(e)** the legal opinion of Hon'ble Mr. Justice B.N. Srikrishna (Retd.) recognized that creditors having different classes of securities must be treated differently (*discussed at the CoC meeting of 27.03.2019*); and **(f)** the total fair value as well as the liquidation value of the claim of Standard Chartered Bank, namely, the security underlying the same, came to Rs. 24.86 crores in comparison to the fair value and the liquidation value of project assets of the Corporate Debtor being Rs. 45,417.14 crores and Rs. 17,160.64 crores.

91. As evidenced in table set out above, the sharing ratio of the fair value (*i.e. Rs.24.86 crores divided by 45,432.14 multiplied by 100 would equal to 0.05%*) would only enable realisation of Rs. 22.97 crores by Standard Chartered Bank (*i.e. below liquidation value attributable to Standard Chartered Bank*), however, if the ratio pro-rata on the application of liquidation value was ascertained (*i.e. Rs. 24.86 divided by 17,185.50 multiplied by 100 would equal to 0.14%*) would enable an equitable realization of Rs. 60.71 crores by Standard Chartered Bank.

92. Respectfully, while the rationale of distribution being a purely commercial decision of the committee of creditors, in view of the dicta

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in *K. Sashidhar* is not justiciable and thus, neither the NCLT in exercise of its jurisdiction under Section 31 read with Section 30(2), nor the NCLAT under Section 61 of the Code, can seek to question or interfere with such rationale. Be that as it may, as evident from above, in any case, the CoC has evidently applied its mind and for cogent reasons and grounds taken a decision with respect to *inter-se* distribution of proceeds payable to secured financial creditors amongst the Standard Chartered Bank and the Project Assets Secured Lenders.

XIII. THE SUB-COMMITTEE HAS BEEN VALIDLY CONSTITUTED WITH THE REQUISITE APPROVAL OF THE COC AND HAS ONLY FACILITATED THE DECISION MAKING AND IMPLEMENTATION OF THE DECISIONS TAKEN BY THE COC

1. The NCLAT has also erroneously held that the CoC did not have the power or authority to create a sub-committee. Respectfully, the Code or regulations thereunder at no juncture restrict the formation of the sub-committee within the committee of creditors for administrative convenience and smooth functioning of the CIR Process. In fact, it is a deliberate scheme of the Code, in as much as the Code does not prescribe any set process, and leaves the flexibility to the committee of creditors within minimal prescriptions to carry out its role and responsibility as required under the Code.

2. Respectfully, in terms of Section 21(8) of the Code, all decisions of the committee of creditors (*unless specifically provided otherwise in the Code*) can be taken by a majority vote of 51% of the voting share of the financial creditors constituting the committee of creditors. Hence, even a decision to create a sub-committee, supported by a positive vote of requisite majority is valid.

3. Further, it is an established principle of law that unless expressly barred by the statute, the authority vested with a power is always presumed to have the power to sub-delegate the same appropriately except the ultimate authority of decision making.

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4. Reliance in this regard is placed on the judgement in ***Pradyat Kumar Bose vs. The Hon'ble Chief Justice of the Calcutta High Court***, (1955) 2 SCR 1331 where this Hon'ble Court has held the following in paragraph 11 of the judgment:

> *"… But the exercise of the power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power. It is nonetheless so, by reason of the fact that an opportunity to show cause and an enquiry simulating judicial standards have to precede the exercise thereof.* ***It is well-recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides - is the ultimate responsibility for the exercise of such power****."*
>
> [***Emphasis Supplied***]

[*See Tab 10 of the Judgement Compilation @ Para 11*]

5. Further reliance is placed on the judgement of ***High Court of Judicature at Bombay through its Registrar vs. Shirish Kumar Rangrao Patil and Ors.***, 1997(6)SCC 339., where this Hon'ble Court has held as follows in paragraph 10 of the judgment:

> *"It would thus be settled law that the control of the subordinate judiciary under Article 235 is vested in the High Court. After the appointment of the judicial officers by the Governor, the power to transfer, maintain discipline and keep control over them vests in the High Court. The Chief Justice of the High Court is first among the judges of the High Court. The action taken is by the High Court and not by the Chief Justice in his individual capacity, nor by the Committee of Judges.* ***For the convenient transaction of administrative business in the Court, the Full Court of the Judges of the High Court generally passes a resolution authorising the Chief Justice to constitute various committees including the committee to deal with disciplinary matters to the subordinate judiciary or the ministerial staff working therein.*** *Article 235, therefore, relates to the power of taking a decision by the High Court against a member of the subordinate judiciary. Such a decision either to hold enquiry into conduct of a judicial officer, subordinate or higher judiciary, or to have the enquiry conducted through a District or Additional District Judge etc. and to consider the report of the Enquiry*

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Officer for taking further action is of the High Court. Equally, the decision to consider the report of the enquiry officer and to take follow up action and to make appropriate recommendation to the Disciplinary Committee or to the Governor, is entirely of the High Court which acts through the Committee of the Judges authorised by the Full Court. Once a resolution is passed by the Full Court of the High Court, there is no further necessity to refer the matter again to the Full Court while taking such procedural steps relating to control of the subordinate judiciary."

[***Emphasis Supplied***]

[*See Tab 11 of the Judgement Compilation @ Para 10*]

6. In view the afore-stated settled principles of law, respectfully, the formation of sub-committee, is valid as the same has been duly and validly constituted with the requisite approval of the CoC for administrative convenience, and has always acted as per the authority entrusted by the CoC.

7. Lastly, the finding in the Impugned Order that powers of the CoC were delegated upon the sub-committee and the "secret" negotiations by the sub-committee have resulted in the infirmity in the Resolution Plan is contrary to the facts on record for the following reasons:

   (a) The sub-committee was duly and **validly constituted with the requisite approval** of the CoC with overwhelming votes in its favour, much beyond the stipulated voting threshold.

   (b) The sub-committee's **constitution as well as scope of work/assignment was put to vote and/or approval by the CoC** on multiple occasions in validly constituted meetings of the CoC before any task was entrusted to or undertaken by the sub-committee.

   (c) **No decision making was delegated to the sub-committee**, the only tasks delegated to the sub-committee were either to execute CoC decisions (such as filing of pleadings etc.) or facilitating

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decision making being undertaken by the CoC in accordance with the provisions of the Code.

(d) **Sub-committee did not at any time, decide or even recommend on the distribution of amounts** payable to secured financial creditors under the Resolution Plan, and it was solely the decision of the CoC in consonance with the terms of the Resolution Plan.

XIV. <u>STANDARD CHARTERED BANK IS PRECLUDED FROM RAISING ANY CHALLENGE TO CONSTITUTION OF SUB-COMMITTEE OR ITS NON-INCLUSION</u>

8. Standard Chartered Bank at all times was aware of, and has participated in decision making for constitution of the sub-committee and thus, is precluded from raising any objections *qua*, constitution of the sub-committee, as is evident from the below:

of the CoC Meeting	Particulars of the decision	s in favour of the decision (Status of Standard Chartered Bank voting)
.2018 9th CoC Meeting	titution of the sub-committee for *inter alia* drafting and executing the pleadings / filings required to be made on behalf of the CoC with respect to the proceedings initiated by the resolution applicants before the NCLT, Ahmedabad. [*Refer to page no. 95 to 99 of Volume 1 of the Convenience Compilation*]	92.23% (Abstained)

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.2018 10th CoC Meeting	titution of the sub-committee for drafting the show cause notices to be issued to the resolution applicants by the CoC. [*Refer to page no. 288 to 291 of Volume 2 of the Convenience Compilation*]	92.36% Abstained)
.2018 12th CoC Meeting	titution of the sub-committee for drafting the decision(s) of the CoC with respect to the eligibility of the resolution applicants. [*Refer to page no. 292 to 295 of Volume 2 of the Convenience Compilation*]	91.24% In favour)
.2018 13th CoC Meeting	ised decisions (drafted by sub-committee and revised and finalised by CoC) on eligibility of resolution applicants placed for approval. [*Refer to page no. 296 to 300 of Volume 2 of the Convenience Compilation*]	ecision 1: % (In favour) ecision 2: % (In favour)
.2018 14th CoC Meeting	titution of the sub-committee for *inter alia* drafting and executing the pleadings / filings required to be made on behalf of the CoC with respect to the proceedings initiated by the resolution applicants before the NCLAT. [*Refer to page no. 301 of Volume 2 of the Convenience Compilation*]	Minutised o objection raised)
.2018 16th CoC Meeting	est by Standard Chartered Bank to be a member of the sub-committee. [*Refer to page nos. 302 to 319 of Volume 2 of the Convenience Compilation*]	- uest made to be a part of the sub-committee;

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		request later withdrawn)
.2018 18th CoC Meeting	orisation to the sub-committee to take further steps in relation to a letter received by Arcelor dated 10.09.2018 [*Refer to page nos. 320 - 321 of Volume 2 of the Convenience Compilation*]	Approval Minutised o objection raised)
.2018 CoC Meeting	orisation to the sub-committee to negotiate with Arcelor (highest evaluated resolution applicant) basis the terms of reference provided by the CoC [*Refer to page nos. 327 to 352 of Volume 2 and Volume 3 of the Convenience Compilation*]	Approval Minutised uest made by Standard Chartered Bank and Canara Bank for inclusion in sub-committee. However, as detailed above, Standard Chartered Bank did not agree to put the re-constitution of the sub-committee (for its inclusion) to vote by the CoC)

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.2018 21st CoC Meeting	titution of the sub-committee for *inter alia* drafting and executing the pleadings / filings required to be made on behalf of the CoC with respect to the legal proceedings before various judicial fora. [*Refer to page nos. 357 - 358 of Volume 3 of the Convenience Compilation*]	**92.24%** (Against)

9. In fact, particularly at the 20th CoC Meeting, Standard Chartered Bank requested for inclusion in the sub-committee but when the CoC (*in view of the fact that the constitution of the sub-committee was determined on the basis of voting by the CoC*) called upon Standard Chartered Bank to put up the issue of its inclusion for voting, Standard Chartered Bank did not agree to do so.

10. Therefore, respectfully, Standard Chartered Bank having so conducted itself and acquiesced to the validity of the decision of the CoC to constitute sub-committee, it cannot raise any legitimate challenge to the constitution of the sub-committee.

XV. NEGOTIATIONS ON THE RESOLUTION PLAN WERE UNDERTAKEN IN ACCORDANCE WITH THE MANDATE OF THE COC

1. It is most respectfully submitted that the negotiations undertaken by the sub-committee was in accordance with the mandate of the CoC and opportunity was granted to all constituents of the CoC to propose modifications / points of negotiations / terms of reference, to the sub-committee.

2. As evident from the record, at the 20th meeting of the CoC held on 19.10.2018, the resolution plans dated 02.04.2018 of eligible resolution applicants (*being Arcelor and Vedanta*) were considered and Arcelor was declared as the highest evaluated resolution applicant, basis a pre-approved evaluation matrix. Thereafter, the resolution plan of Arcelor

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was also uploaded on the virtual data room on the same day itself, for the perusal of the members of the CoC.

3. At this very 20th CoC meeting, the suggestion regarding sub-committee to negotiate with Arcelor was proposed and the CoC authorized sub-committee to hold the negotiations with Arcelor basis the terms of reference provided by the CoC members.

4. In this regard, it would be pertinent to note that in order to ensure transparency and collective process, all the CoC members were expressly asked to put forth their respective negotiation points/queries/terms of reference to the sub-committee who were to thereafter, discuss those during its negotiations with Arcelor. It may be noted that Standard Chartered Bank and various other creditors in fact did send their terms of reference to the sub-committee and thus what was negotiated was a proposal based on the above terms of reference and the negotiated proposal was placed for "consideration by the CoC" and it was the CoC who took a decision on the same.

5. In fact, keeping in view the specific apprehensions of Standard Chartered Bank, a suggestion was made and an opportunity was granted to Standard Chartered Bank to directly negotiate with Arcelor to discuss any specific concerns and queries that Standard Chartered Bank may have had relating to the Resolution Plan of Arcelor and despite having received a copy of the Resolution Plan of Arcelor on 19.10.2018 (*which contemplated distribution of the resolution proceeds qua secured financial creditors be carried out by the CoC*), Standard Chartered Bank never took up their concerns directly with Arcelor. [*Refer to page nos. 327 to 352 of Volume 2 and Volume 3 of the Convenience Compilation*]

6. Respectfully, at all times (*i.e. since the resolution plan of Arcelor dated 02.04.2018*), the Resolution Plan always proposed that distribution of the resolution proceeds qua secured financial creditors be carried out by the CoC and the same was neither a subject matter of negotiation nor was ever discussed between the sub-committee and Arcelor. Therefore, the suggestion/proposal regarding distribution of

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resolution proceeds qua secured financial creditors to be carried out by the CoC was not a matter of negotiation and the Impugned Order observing to the contrary and making an observation that the sub-committee has privately confabulated with Arcelor in a deliberate attempt to exclude Standard Chartered Bank is *ex facie* in contradiction to the facts and demonstrates lack of application of mind by the NCLAT. [*Reference may be had to pages 98 to 285 of Volume II of the Convenience Compilation for resolution plan submitted by Arcelor on 02.04.2018 (relevant page @ 248) and for the Resolution Plan as approved by the CoC at pages 365 to 541 of Volume III of the Convenience Compilation (relevant page @ 514)*.]

7. In fact, the financial proposal that emerged from such negotiations and the manner of distribution were separately and independently placed before the CoC at the 21st CoC meeting held on 22.10.2018, for its consideration and approval (*where Arcelor was also invited for discussion with the COC*). Thus, the negotiated proposal was placed for "consideration of the CoC" and it was the CoC who took a decision on the same.

XVI. <u>THE FINANCIAL PROPOSAL OF ARCELOR IS IN CONSONANCE WITH THE SC JUDGEMENT OF 04.10.2018</u>

11. A submission has been urged on behalf of Standard Chartered Bank (*and accepted by the NCLAT*) that the financial proposal of Arcelor was inconsistent with a proposal tendered before this Hon'ble Court of Rs. 42,000 crores and that post negotiations with the sub-committee, Arcelor has been asked to revise its plan in such a manner that financial creditors are offered Rs. 39,500 crores and Rs. 2,500 crores towards working capital amount.

12. Respectfully, while it is true that Arcelor did make an offer of Rs. 42,000 crores and an email as well as a note was reiterated before this Hon'ble Court and Ld. Senior Counsel for the CoC also urged this Hon'ble Court to consider the same, yet in the final judgment dated 04.10.2018/SC Judgement, the plan which was directed to be

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considered was the resolution plan as submitted on 02.04.2018 which contemplated payment of only Rs. 35,000 crores. Respectfully, though the above offers were made during the pendency of the matters before this Hon'ble Court, the SC Judgement does not take note of the same. [*See Tab 9 of the Judgement Compilation @ Para 74 read with Pg. 128 & 248 of Vol. 2 of the Convenience Compilation*]

13. By mandate of the SC Judgement, the CoC took up the plan dated 02.04.2018 for consideration in the first instance. On that basis, the CoC (*including Standard Chartered Bank*) unanimously found Arcelor as the highest evaluated resolution applicant basis the plan (*and financial proposal*) of 02.04.2018. It is thereafter, subsequent to terms of the said financial package being explained by Arcelor, that the final financial package was proposed which consists of upfront payment of Rs. 42,000 crores (Rs. 39,500 crores + Rs. 2,500 crores) and any working capital surplus over Rs. 2,500 crores is to be added to this in the manner prescribed in the Resolution Plan. [*See Pg. 394 & 514 of Vol. 3 of the Convenience Compilation*]

14. The financial proposal of Arcelor under the Resolution Plan as approved by the CoC on 25.10.2018 guarantees a payment of an upfront amount of Rs. 42,000 crores. This consists of upfront cash payment of Rs. 39,500 crores plus upfront payment of guaranteed working capital surplus of Rs. 2,500 crsores to the secured financial creditors. Apart from the upfront cash payment, the working capital surplus in the Corporate Debtor (*if any, which is over and above the upfront payment of guaranteed working capital surplus amount of Rs. 2,500 crores*) shall also be paid to the secured financial creditors in the manner contemplated under the approved resolution plan. Accordingly, this proposal is better than **(a)** its original offer of Rs. 35,000 crores along working capital surplus as provided under the resolution plan of 02.04.2018; and **(b)** offer under the approved plan even exceeds Arcelor's offer made before this Hon'ble Court/*vide* letter dated 10.09.2018. [*See Pg. 324-326 of Vol. 2 of the Convenience Compilation*]

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15. Without prejudice, Standard Chartered Bank's reliance on the 10.09.2018 letter is even otherwise misconceived. When Arcelor's letter of 10.09.2018 was sent (at 10:00am), Standard Chartered Bank had not been notified as a secured creditor by the resolution professional of the Corporate Debtor. This recognition / classification was done on 10.09.2018 (at 1.02 pm). Thus, clearly Standard Chartered Bank not being a secured financial creditor at the relevant time, was not within the ambit of the offer made by Arcelor in its letter dated 10.09.2018. [*See Pg. 322 of Vol. 2 of the Convenience Compilation*]

XVII. UTILISATION OF PROFITS OF THE CORPORATE DEBTOR DURING CIR PROCESS

16. It is submitted that the interference of the NCLAT as regards the distribution of the profits / excess monies available with the Corporate Debtor in contradiction to the express terms of the request for proposal issued in terms of Section 25(2)(h) of the Code and consented to between the CoC and Arcelor, is without jurisdiction and another instance of vitiation of the consent granted by the CoC.

17. Furthermore, it is matter of record that as part of the lending given by the members of the CoC to the Corporate Debtor, all present and future assets of the Corporate Debtor, including cash flows of the Corporate Debtor were charged in favour of the secured financial creditors. Therefore, directing distribution of the same amongst all creditors without the consent of the parties is in violation to the principle of consent and outside the jurisdiction of the NCLAT.

18. On account of each of the legal and factual submissions, it is respectfully submitted that the Impugned Order is liable to be set aside in entirety and the Resolution Plan as approved by the CoC (*with the modification approved by the CoC granting Rs. 1000 crores more towards the admitted dues of operational creditors)* deserves to be approved in terms of Section 31 of the Code and be directed to be implemented forthwith.

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B. <u>WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS TO THE WRIT PETITION NO. 1066 OF 2019 FILED BY STANDARD CHARTERED BANK</u>

19. Standard Chartered Bank *vide* the captioned writ petition has sought to challenge the vires of amendments to Section 30(2)(b) of the Code as introduced by the legislature by way of the Amendment Act. The constitutional challenge in the present writ petition to the amended Section 30(2) limits itself to the provision requiring minimum of liquidation value to financial creditors and the amendment to Section 30(4) of the Code to clarify that *inter se* priority on the basis of security and its value may be taken into account by the committee of creditors while deciding distribution under a resolution plan.

20. Before responding to the challenge raised by Standard Chartered Bank, it is relevant to note the context and object of the Amendment Act as seen from the statement of objects and reason, which provides that:

"*The Insolvency and Bankruptcy Code, 2016 (the Code) was enacted with a view 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 or priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.*

2. ***The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code.***

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> ***Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different pre-insolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.***
>
> *3.* ***In view of the aforesaid difficulties and in order to fill the critical gaps in the corporate insolvency framework****, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code…..”*

[***Emphasis Supplied***]

21. Accordingly, the Amendment Act was introduced with a view to clarify the legislative intent behind the enactment of the Code as evident from the following extract of the speech of the Hon'ble Minister of Finance while introducing the Insolvency and Bankruptcy (Amendment) Bill, 2019 before the Rajya Sabha:

> *"…So, as this was going on, we also, within two-and-a-half years of this Code,* ***realized that there are certain areas in which for want of clarity, the interpretation given by various courts or even by the NCLT led to a very vital question that if the legislative intent of the IBC was itself becoming weakened just for want of clarity****. So, today,* ***as we are coming here with an Amendment Bill, it is only to make sure that each of these amendments which are being brought in are brought in for greater clarity which is required so that no grey area prevails, no interpretations which are going against the original intent of the Act are still prevalent****. So, you find that in this particular Amendment, set of amendments that we are bringing in, of the seven -- you can say* ***eight amendments that we are bringing in -- four are explanatory in nature and any additional amendments that we are talking about are more to ensure that interpretation is given for time which is required and a particular time that has got to be laid before for the Resolution itself.****"*

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…

*So, it is a response to what was developing and, since, specifically, some of the Members have taken the name of the Resolution plan and **also the interpretation given by the NCLT in the ESSAR case, where I am glad that points were literally brought out like nuggets, where the interpretation was trying to treat secured creditors,** operational creditors, **and treating them at par, defeated the purpose and also the spirit of the Act. So, with such very serious interpretative problems coming up, it was only incumbent on the Government to come up with such amendments, the amendments which are, actually, clarificatory in nature.***

[***Emphasis Supplied***]

22. Keeping in view the above, the amendments to Section 30(2)(b) of the Code provides for two separate classes of creditors. The said amendment qua the operational creditors seeks to strengthen their rights by providing that a resolution plan should mandatorily ensure that it provides for atleast a minimum of (a) the amount to be paid to operational creditors in the event of a liquidation of the corporate debtor under Section 53; or (b) the amount that would have been paid to operational 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. In so far as the amendment relates to dissenting financial creditors, it only seeks provides a safeguard for such non-approving minority. The manner of payment to such creditors will be as specified by IBBI i.e. a specialized body tasked to frame regulations to prescribe additional standards inter alia for safeguarding the interests of stakeholders. Further, the amendment to Section 30(4) is only clarificatory as demonstrated in detail below. Most respectfully, the impugned amendments fall within the legislative domain of the Parliament of India and aimed at ensuring that the original objectives of the Code in its text, context and object are truly achieved.

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I. THE AMENDMENT TO SECTION 30(2) OF THE CODE AIMS AT ONLY PROTECTING THE INTERESTS OF THE DISSENTING FINANCIAL CREDITORS BY PROVIDING BETTER SAFEGUARD AND IS CONSTITUTIONALLY VALID

23. The challenge before this Hon'ble Court relates to the provision of Section 30(2)(b) of the Code in so far as it provides for payment to dissenting financial creditors which shall not be less than the amount to be paid to such financial creditor in accordance with Section 53(1) of the Code in the event of a liquidation of the corporate debtor i.e. minimum payment of liquidation value to those financial creditors who have not voted in favour of the resolution plan, for a resolution plan to be valid and capable of approval.

24. It is submitted that this amendment to Section 30(2)(b) is aimed at providing a safeguard to the financial creditors who do not assent to the provisions of a resolution plan being approved by the majority of the members of a committee of creditors in terms of the Code, so that the majority financial creditors do not force down a treatment of minority financial creditors in a resolution plan, which is even worse than what such dissenting financial creditors would have received in liquidation.

25. The said amendment, respectfully, only provides that a dissenting/non-approving minority financial creditor ought to be provided a "minimum" of the value such a creditor would have been entitled to in accordance with the waterfall under Section 53 of the Code assuming that the corporate debtor was being liquidated.

26. Therefore, while a resolution plan may propose the necessary payments to be made to each class of stakeholder and in negotiations/consultations with the committee of creditors, propose the necessary payout to each of the stakeholder including each of the financial creditor, however, in the event of non-acceptance of the terms of the resolution plan by any constituent of the committee of creditors and/or the said constituent realising that the liquidation value due to such a creditor is more than the amount proposed under a resolution

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plan, the said creditor upon voting against the resolution plan should not be forced to accept a payout/treatment lesser than its entitlement in case of the corporate debtor's liquidation.

27. The intent and thought behind keeping the amount to be paid to dissenting financial creditors in the event of a liquidation of the corporate debtor under Section 53 as the minimum prescription seems to be that the dissenting financial creditors at no juncture should be at a worse off position on account of the approval of a resolution plan as they would have been in case the corporate in question was being liquidated (*as resolution is an alternative to liquidation*).

28. Therefore, in order to ensure that no dissenting financial creditor irrespective of its voting share / security / pre-insolvency entitlements, is prejudiced, such a creditor has been provided with a statutory safeguard of minimum liquidation value.

29. It is submitted that the entire premise of the challenge to the said provision seems to be predicated on the wrong presumption that a payment to a financial creditor would be conditional upon the relevant financial creditor voting in favour or against a resolution plan. However, the actual intent of the legislature by way of introduction of a minimum safeguard for dissenting financial creditors is not to coerce a financial creditor to vote in favour of a resolution plan and only that if a particular financial creditor votes against a resolution plan, it should be at a minimum entitled for minimum liquidation value. In case, the resolution plan proposes a higher payment to such creditor, the same does not get reduced to liquidation value upon a financial creditor voting against the resolution plan, as minimum liquidation value is a minimum prescription and does not bar payment of a higher amount. Any resolution plan, which entitles a dissenting financial creditor only to liquidation value as against a higher payout to an assenting financial creditor, would be invalid, as such a term of a resolution plan takes away the freedom of a financial creditor to vote for or against the resolution plan. The statutory minimum payment

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prescription of liquidation value to dissenting financial creditors, does not in any manner take away the ability of a financial creditor to vote for or against a resolution plan.

30. In this context it is also relevant to state that in accordance with the provisions of the Code a resolution applicant is required to submit a resolution plan based on its own independent commercial assessment and judgement as regards the corporate debtor without being influenced by the liquidation value / fair value of a corporate debtor or the minimum entitlement of a stakeholder, as neither the fair value nor the liquidation value is informed to a resolution applicant before the submission of a resolution plan. The fair value and liquidation value is known to and in knowledge of the resolution professional and the committee of creditors and the adjudicating authority, to ensure that the resolution plan submitted by a resolution applicant based on its independent commercial assessment passes the muster of the mandatory requirements prescribed under Section 30(2) of the Code and the regulations thereunder.

31. Therefore, in order to ensure a fair, unbiased and non-arbitrary collective decision of the committee of creditors, the above amendment has been introduced to protect against any prejudice to the dissenting financial creditors for being minority.

II. LIQUIDATION VALUE ASCERTAINED IN ACCORDANCE WITH THE CODE IS AIMED AT FACILITATING THE DECISION MAKING FOR FINANCIAL CREDITORS

32. Respectfully, as rightly highlighted by Standard Chartered Bank itself in its writ petition, as per Regulation 35(2) of the CIR Regulations, the liquidation value is not disclosed to the resolution applicants, however Standard Chartered Bank's reliance on the same to highlight apprehension of misuse are unfounded. It is to be noted that the non-disclosure of liquidation value to the resolution applicants is done to ensure that the resolution applicants are unable to take an unfair advantage of such knowledge and the proposal (i.e. resolution plan)

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being made by such a resolution applicant, ought to be independent of the statutory entitlement of the stakeholders, based on the independent commercial judgement of the resolution applicant in furtherance of the objective of value maximisation.

33. Similarly, the members of the committee of creditors are also made aware of this information only subsequent to the receipt of the resolution plans for each member to make an informed decision regarding the commercial viability and feasibility of the resolution plans against the benchmark of liquidation value / fair value. Further, each of the financial creditors may have varying liquidation value, while for some it may be lesser than offer under the resolution plan (*which works as an incentive to vote for a plan*) and for some it may be higher than the offer under the resolution plan and accordingly, each financial creditor is only disclosed the liquidation value to ensure an informed decision.

34. Respectfully, any apprehension regarding the misuse of such information is baseless as the misuse has already been safeguarded by the IBBI, the expert regulator constituted under the provisions of the Code, within the text of the regulations by including necessary safeguards within the text of Regulation 35(2) of the CIR Regulations whereby the IBBI has in unequivocal terms laid down that the knowledge of the liquidation value and/or the fair value provided to each member of the committee of creditors shall not be used for the undue gain or undue loss of any person and a violation of the same could entail necessary action within the framework of Section 235A of the Code which reads as follows:

*"**235A. Punishment where no specific penalty or punishment is provided. -***

If any person contravenes any of the provisions of this Code or the rules or regulations made thereunder for which no penalty or punishment is provided in this Code, such person shall be punishable with fine which

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shall not be less than one lakh rupees but which may extend to two crore rupees."

35. Therefore, any apprehension of the Petitioner that the knowledge of a particular creditors' liquidation value can potentially be mis-used by a resolution applicant or the committee of creditors is mis-conceived and the statute already provides sufficient safeguards against the same, as elaborated above.

III. THE AMENDMENT ACT ONLY CLARIFIES THAT SECURITY IS NOT DISREGARDED IN INSOLVENCY RESOLUTION AND EQUITABLE TREATMENT RECOGNIZING DIFFERENT BARGAINS BY DIFFERENT CREDITORS OUGHT TO BE GIVEN CREDENCE WHILE RESOLVING THE FINANCIAL AFFAIRS OF THE CORPORATE DEBTOR

36. It is submitted that the legislature by clarifying that the value and priority of a security interest held by a creditor is a relevant consideration for the committee of creditors while taking a decision with respect to distribution terms under a resolution plan, has simply reiterated the intent of the Code that security interests are not abrogated on account of initiation of the CIR Process and thus, continue to be a relevant parameter while approving a resolution plan.

37. As detailed out in Part A of the submissions above, the Code does not provide for abrogation or cancellation of security interest of secured creditors during insolvency resolution. This intent of the Code is manifest from the provisions provided under Section 14 of the Code which suspends the rights of creditors to enforce security interest but does not abrogate the security interest itself and Section 21 of the Code which provides rights to unsecured creditors to have voting rights on the committee of creditors in proportion to their debt but does not take away the differential bargains entered into by each of the creditor and the debtor.

38. As explained in the preceding paragraphs herein, the recognition of security interest of the financial creditors and protection and preservation of the security interest of secured creditors is inherent in

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the Code and a perusal of the provisions of the Code clearly reflects the recognition of the security interest of the creditors and the fact that different classes of creditors are treated differently under the Code, especially Section 30(2)(b) of the Code which explicitly provides for mandatory payment prescription linked to the liquidation value of an operational creditor (*i.e. the liquidation value of secured operational creditor would be different from that of an unsecured operational creditor*).

39. Respectfully, the NCLT/NCLAT ignoring the distinction between secured and unsecured creditors and clubbing all financial creditors within a homogenous class irrespective of their security interest or the nature and value of their security, ignoring the distinction recognized throughout the Code has caused the legislature to introduce the clarification to Section 30(4) to clarify that *inter-se* priority on the basis of security and its value as a relevant consideration is only reiteration of the principles underlining any insolvency law across the globe.

40. Respectfully, financial creditors in itself is not a homogeneous class as it clubs both secured financial creditors and unsecured financial creditors and the said distinction is recognised under the Code under Section 52 which provides a secured financial creditor the option to either relinquish its security interest into the liquidation estate as per Section 53 of the Code or realise it under Section 52 of the Code.

41. Respectfully, a CIR Process cannot override the security sharing arrangement *inter-se* creditors in the absence of any specific provisions in the Code providing for such override. Any interpretation to the contrary would be divergent to the entire law of security interest and its recognition, status and rights associated with charges of creditors over the assets of the corporate debtor as elucidated under Chapter 6 of the Companies Act, 2013, read with the Companies (Registration of Charges) Rules, 2014 provides for registration of charges and public notice of charges so as to determine *inter-se* creditor rights.

42. Therefore, the principle of equitable treatment which recognizes that different class of creditors deserve different treatment is one of the

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foundational principles of the Code (*as recognized by this Hon'ble Court in Swiss Ribbons*) and is also universally recognized as evidenced from the UNICTRAL and IMF Report mentioned above as well as recognized by the World Bank in its report titled the World Bank – Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. Even under the framework of Article 14 enshrined in our Constitution, protecting equality, envisages equal treatment of those who equally circumstanced and therefore, creditors with different security interests of varied nature, value and kind cannot be painted with the same brush and be accorded the same treatment in complete ignorance of their respective bargains, based on their respective commercial judgements at the relevant time as regards the quality, nature and value of their security.

43. In this regard, the following observations of this Hon'ble Court in ***T.M.A. Pai Foundation and Ors. vs. State of Karnataka and Ors.***, (2002) 8 SCC 481 would be of relevance:

> *"346. 'Equality' which has been referred to in the Preamble is provided for in a group of Articles led by Article 14 of the Constitution which says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.* ***Although stated in absolute terms Article 14 proceeds on the premise that such equality of treatment is required to be given to persons who are equally circumstanced. Implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on par.***
>
> [***Emphasis Supplied***]

44. Attention of this Hon'ble Court is also drawn towards the following observations of this Hon'ble Court in ***M. Nagaraj and Ors. vs. Union of India and Ors.***, (2006) 8 SCC 212:

> *"70. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14.* ***Equality***

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of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances*…"*

[*Emphasis Supplied*]

45. Further, this Hon'ble Court has in ***Atyant Pichhara Barg Chhatra Sangh and Ors. vs. Jharkhand State Vaishya Federation and Ors.,*** (2006) 6 SCC 718 observed that:

"In our opinion, the amalgamation of two classes of people for reservation would be unreasonable as two different classes are treated similarly which is in violation of the mandate of Article 14 of the Constitution of India which is to "treat similar similarly and to treat different differently." ***It is well settled that to treat unequals as equals also violates Article 14 of the Constitution.****"*

[*Emphasis Supplied*]

46. Therefore, keeping in view the above principles, the nature, quality and value of security becomes a relevant consideration, as an under secured financial creditor being accorded the same treatment as a fully secured creditor would itself be a violation of Article 14 of treating equals – equally.

47. In view of each of the afore-stated, it is respectfully submitted that no cogent ground of constitutional invalidity of the impugned amendments has been raised by Standard Chartered Bank, and the challenge ought to be rejected accordingly.

FILED THROUGH:

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