IN THE SUPREME COURT OF INDIA

Writ Petition No. 1066 of 2019

Standard Chartered Bank … Petitioner

Versus

Union of India and Anr. … Respondent

Civil Appeal (Diary) Nos. 24417 of 2019

Committee of Creditors … Appellant

Versus

Satish Kumar Gupta, The Resolution Professional of Essar Steel India Limited and anr.

… Respondents

And

Civil Appeal Nos. 5634 - 5635 of 2019

ICICI Bank Limited and anr … Appellant

Versus

Standard Chartered Bank and ors. … Respondents

And

Civil Appeal Nos. 5636 - 5637 of 2019

State Bank of India

… Appellant

Versus

Standard Chartered Bank and ors.

… Respondents

And

Civil Appeal Nos. 5716 - 5719 of 2019

ArcerlorMittal India Private Limited … Appellant

Versus

Standard Chartered Bank & ors … Respondents

Civil Appeal Nos. 5996 of 2019

Deutsche Bank AG … Appellant

Versus

Standard Chartered Bank & ors … Respondents

SUBMISSIONS ON BEHALF OF STANDARD CHARTERED BANK

1. The offer made by ArcelorMittal India Private Limited (AM India) was to make payment of Rs. 42,000 Crores as upfront amount in order to pay 100% principal outstanding of Secured Financial Creditors of the Corporate Debtor:

a) The Resolution Professional (**RP**) issued Request for Proposal (**RFP**) on 24.12.2017, which was amended on 8.2.2018 and 23.3.2018. The RFP forms the basis of the bids to be submitted by prospective resolution applicants. Clause 4.6.3(i) of RFP (**Paper book Vol. I - pg. 14**) mandated that a resolution applicant is to make an offer of payment of an Upfront amount payable within 90 days. The said clause also provides that Working Capital adjustment will be an additional consideration over and above upfront cash recovery and that negative adjustment will not be permitted (**Paper book Vol. I - pg. 14**). Under Clause 5.1.3(a) of RFP (**Paper book Vol. I - pg. 15**), a Letter of Commitment was required only for upfront cash recovery and upfront capital infusion and was not required for working capital adjustment.

b) The initial Resolution Plan dated 2.04.2018 **(Initial Resolution Plan)** of AM India offered an upfront payment of Rs. 35,000 crores to Financial Creditors, 5% of which was allocated to unsecured Financial Creditors on a *pro rata* basis **(Paper book Vol. I – pg. 19)**. This amount of Rs. 35,000 crores was said to be supported by a Letter of Commitment of Credit Agricole Corporate and Investment Bank. In the Initial Resolution Plan, working capital adjustment was shown to be additional consideration over and above the upfront payment of Rs. 35,000 Crores.

c) On 07.09.2018 (**Paper book – Vol. II – pg.359-426**), the matter as to the eligibility of the two bidders i.e. AM India and Numetal had been decided by the Hon'ble National Company Law Appellate Tribunal (**NCLAT**), wherein it is recorded that Numetal has made an offer to pay Rs. 37,000 Crores as upfront payment to Secured Financial Creditors in its Resolution Plan dated 29.03.2018. This fact is also evident from Email dated 11.7.2018 (**Paper book Vol. I – pg. 190-191**) written by the CoC Counsel to CoC members in respect of hearing before NCLAT in respect of eligibility of the resolution applicants.

d) On 10.09.2018, AM India, simultaneously with the reclassification of Standard Chartered Bank (**SCB**) as a Secured Financial Creditor of Essar Steel India Limited (**ESIL** or **Corporate Debtor**), informed the CoC that it has raised its offer in respect of the upfront cash recovery to Rs. 42,000 crores which reflects 100% of the principal outstanding dues of the Secured Financial Creditors. It was further stated that such proposal is supported by a Letter of Commitment from Credit Agricole and Investment Bank (**Paper book Vol. I – pg. 34**), in terms of Clause 5.1.3(a) of RFP (**Paper book Vol. I - pg. 15**). It would be pertinent to note that the fact that SCB had requested reclassification of its claim was within the public knowledge since the RP had updated the said fact in the list of Financial Creditors placed by it on the website of the Corporate Debtor. The said upfront offer clearly included the principal amount of SCB as without SCB's claim, the principal outstanding of the Secured Financial Creditors was not Rs. 42,000 crore, which is evident from the chart at **Paper book Vol. I – pg. 36**. Neither the majority members of the CoC nor AM India have disputed the chart at page no. 36 of Paper book Vol. I.

e) On 25.09.2018, during the hearing of Civil Appeal Nos. 9402-9405 of 2018 (**the Eligibility Litigation**) AM India reiterated the above commitment to this Hon'ble Court **(Paper book Vol. I – pg. 40)** pursuant to a specific query from this Hon'ble Court as recorded in email dated 18.09.2018 addressed by the CoC

counsel (**Paper book Vol. I – pg. 37**). The amount of Rs. 42,000/- crores was referred to as the "bid amount", supported by a Letter of Commitment (required in terms of clause 5.1.3(a) of RFP at **Paper book Vol. I – pg. 15**). In the hearing held on 25.9.2018, as per the email dated 26.9.2018 (**Paper book Vol. I – pg. 41-44 at 43**) it was intimated by the CoC counsels to this Hon'ble Court that the said offer made before this Hon'ble Court should be taken as an undertaking as a base value. It was further submitted before this Hon'ble Court by the CoC Counsel that the said offer of AM India could be minimum value with a scope for further negotiations. The CoC counsel also requested to this Hon'ble Court to use its power under Article 142 and allow AM India to repay the dues to become eligible.

f) In the 20th meeting of CoC held on 19.10.2018, AM India reiterated its commitment that was made before this Hon'ble Court (**Paper book Vol. I – pg. 56**). However, in the very meeting, the CoC decided to permit a Core Committee consisting of 4 lenders to negotiate with AM India and SCB's request for inclusion in the Core Committee was illegally and without any reasons, rejected as a part of their pre-planned strategy (**Paper book Vol. I – pg. 59-60**). SCB had cited reasons of conflict of interest of the Core Committee members in the said meeting. However, all of SCB's contentions were rejected **(Paper book Vol. I – pg. 64-67)**.

g) Having persuaded this Hon'ble Court to exercise powers under Article 142 of the Constitution of India, Core Committee illegally negotiated in private with AM India and did not reveal the final commercial offer till the last minute. The Final Resolution Plan ultimately offered a sum of Rs. 39,500 crores as upfront amount, which was lower than the commitment made to this Hon'ble Court. In a show of artificial compliance, a sum of Rs. 2,500 crores was added to the upfront amount of Rs. 39,500 crores as 'guaranteed working capital adjustment' to reach the figure of 'Rs. 42,000 crores'. The inclusion of the so called minimum guaranteed working capital adjustment is a complete eye wash since the working capital adjustment already accrued and payable was Rs. 2,980 crores as of 30.08.2018 and Rs. 3,650 crores as on 31.01.2019. As of June 2019, the working capital adjustment accrued and payable is Rs. 5,339 crores, which also is to be distributed to the creditors of Corporate Debtor in addition of the upfront cash, as per terms of the RFP. Core Committee ensured that AM India retains the clause wherein it had agreed that CoC will decide the manner of distribution of the financial package though AM India had already decided the distribution by making an offer for the payment of 100 % principal outstanding amount to each Secured Financial Creditor (**Paper book Vol. I – pg. 94**).

h) In the application (IA No. 439 of 2018) filed by SCB before the Adjudicating Authority, it is specifically contended by SCB, in paragraph no. 4.15 (**Paper book Vol. I – pg. 127-128**) that the amount offered by AM India of Rs. 42,000 Crores includes the 100% principal outstanding amount of SCB (**please also see Paper book Vol. I – pg. 36**).

i) It is pertinent to point out that AM India did not file any affidavit or reply to the IA 439 of 2018 filed by SCB before the Adjudicating Authority claiming that the upfront amount offered is Rs. 42,000 Crores and it was AM India's solemn offer that this amount covers 100% principal outstanding of all secured financial creditors. This contention was specifically taken by SCB in Company Appeal (AT) No. 242 of 2019 before NCLAT (the Appellant Authority) **(Paper book Vol. I – pg. 152-153)**. AM India once again did not file any affidavit in the appeal to controvert the said position but has simply put up its case in oral arguments and by filing notes.

j) The majority lenders filed their affidavit in reply. Paragraph no. 4.15 of the application filed by SCB has been dealt with at paragraph no. 4.15 of the affidavit in reply filed by the majority lenders (**Paper book Vol. I – pg. 130-132**). There is no denial by the majority lenders to the effect that Rs. 42,000 Crores offered by AM India does not include the outstanding principal amount of SCB.

k) Accordingly, AM India's stand before the NCLAT and before this Hon'ble Court that its offer of Rs. 39,500 Crores plus 2,500 Crores (as Guaranteed Working Capital Adjustment) is in in terms of its commitment made vide Note dated 25.9.2018 before this Hon'ble Court, is not tenable and does not deserve to be accepted. AM India has been rightly directed by NCLAT in the Impugned Judgment to pay upfront Rs. 42,000 Crores in addition to the actual Working Capital Adjustment and profit i.e., Earnings Before Interest, Tax Depreciation and Amortisation (EBITDA) earned by Corporate Debtor. Further, the contention that SCB cannot claim to be a beneficiary of such offer is an afterthought, since it is apparent that the figure of Rs. 42,000 Crores clearly and unambiguously included the principal outstanding of SCB. The effect of the reduction of the upfront amount has been explained by SCB in two charts (**Paper book Vol. I – pg. 197-202**) that were produced by SCB before NCLAT.

2. **Formation of Core Committee/ Sub Committee is against the provisions of the Code and was formed, *inter alia*, to affect the rights of SCB**:

a) There is no provision in the Code which permits constitution of a Core Committee/ Sub Committee or delegating the duties of the Committee of Creditors (**CoC**, for short) to such Core Committee/ Sub Committee. Assuming while denying that such Core Committee/ Sub Committee can be constituted, the same can be only for ministerial functions and with the consent of all the members of CoC.

b) The contention that the CoC members in the past did constitute the Core Committee/ Sub Committee with the vote of majority of the members of CoC is misleading and the same would be evident from the following:

i) It is submitted that in the 9th meeting of the CoC held on 21.03.2018 (**Paper book Vol. I – pg. 16-17 at 17**), the representative of SBI recommended formation of a Core Committee so as to facilitate representation before the Adjudicating Authority in view of the challenge to the ineligibility of Numetal and AM India under Section 29A of the Code. SCB did not vote in respect of the constitution of Core Committee/ Sub Committee. The function of Core Committee was for operational convenience, limited to facilitating representation before the Adjudicating Authority and did not encroach upon any statutory function of the CoC or conducting negotiations with the Resolution Applicant on the resolution plan which affects the rights of all stakeholders.

ii) In the 16th meeting of CoC held on 31.05.2018 (**Paper book Vol. I – pg. 26-28 at 27-28**), SCB requested to be a part of the Sub Committee. In the said meeting, it was stated that there was no immediate requirement *"considering that the limited purpose for which the sub-committee was formed, i.e. filing of application before NCLAT, has already been completed*...". Further, that "*if any issue comes up for consideration of the sub-committee, based on the decision of NCLAT, then at that stage, a request may be made by SCB to be a part of the sub-committee and the same can be voted on by the members of the CoC.*"

c) In the 20th meeting of CoC held on 19.10.2018 (**Paper book Vol. I – pg. 45-63 at 59-60**), the representative of SBI proposed that the Sub Committee would negotiate with the H1 Resolution Applicant viz. AM India. Such negotiations were required to be carried out as per clause 4.11.2(e) of the RFP (**Paper book Vol. I – pg. 12**) by the CoC to ***better*** the terms of the Resolution Plan. Negotiation with a resolution applicant on a resolution plan is a substantive function of the CoC and affects the rights of each / all Financial Creditors and other stakeholders. This is neither a ministerial function nor for operational convenience. SCB, therefore, requested that negotiations ought to be done by the CoC, failing which SCB would want to be a part of such Core Committee/ Sub Committee. The said request was rejected by the majority of the lenders. In fact, SCB pointed out the obvious conflict of interest of the Core Committee members as a reason for being part of the Core Committee. However, these objections were brushed aside.

c) SCB was deliberately excluded from the Sub Committee and from participation in the purported "*negotiations*" as it would have derailed the true purpose for such negotiations, which was to deny SCB its rights, more specifically the payment of 100% of its principal as per AM India's commitment to this Hon'ble Court.

d) The Sub Committee consisted of members who had opposed the admission of SCB's claim, SCB's inclusion as a Secured Financial Creditor and were obviously biased and opposed to the interest of SCB.

e) The bias against SCB is further evidenced by the refusal to give a copy of the Final Resolution Plan **(Paper book Vol. I – pg. 89)**, which was given only after the CoC meeting held on 22.10.2018 to discuss the resolution plan, in complete violation of Regulation 21(3) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulations**", for short). In fact, the Final Resolution Plan was shared on 23.10.2018 at 8:49 pm by the CoC counsel **(Paper book Vol. I – pg. 91)** and at 9:01 pm by the Resolution Professional ("**RP**", for short), i.e., after the scheduled time when e-voting was to commence and a full 22 hours after the claim that the Resolution Plan has been submitted by the Resolution Applicant in the 21st CoC meeting **(Paper book Vol. I – pg. 92)**.

f) The Core / Sub Committee acted against the provisions on the Code, in breach of the terms of the RFP, to the detriment of the body of creditors, and denied SCB its rightful share. This was done, when CoC and much less a Core Committee is not empowered to decide on distribution of financial package.

g) The contention on behalf of the majority lenders that SCB was permitted to carry out negotiation with AM India is misleading inasmuch as such email to meet AM India was addressed to SCB only after the Sub Committee had already negotiated the terms of the Resolution Plan with AM India (without disclosing the details of such negotiations) and the said email was completely an afterthought and an artificial attempt to show that SCB was given a chance (**Paper book Vol. I – pg. 70-71**). This attempt was refuted by SCB, pointing out that negotiations ought to be transparent and carried out by the CoC (**Paper book Vol. I – pg. 70**).

h) The contention on behalf of majority lenders that the Sub Committee was completely transparent or that there were no secret negotiations or that such Sub Committee was only a planning body is not borne out from any records. It is submitted that all the meetings of the CoC are video recorded and minutes in respect of the same are drawn by the RP. However, none of such Sub

Committee meetings held for negotiations are video recorded or any minutes in respect of the same are placed on record. To the best of the knowledge of SCB, even RP was not present during the Sub Committee meeting(s). The same would be evident from the minutes of the 20th meeting of CoC held on 19.10.2018 (**Paper book Vol. I – pg. 45-63 at 62**). No affidavit is filed giving details of the negotiations and that the contentions raised by the majority lenders are merely bald averments, an afterthought and without any evidence.

i) The contention on behalf of majority lenders that no decision making was delegated to the Sub-Committee is false and misleading. As can be noted from the minutes of the 21st meeting of the CoC held on 22.10.2018, *"…. the CoC Counsel apprised the members that given the strict timelines, the negotiations by the sub-committee have been concluded on a best effort basis within 48 hours …..*" (**Paper book Vol. I – pg. 72-88 at 80**). This clearly shows that the Core Committee/Sub-Committee had concluded the negotiations with the AM India and the only choice with the CoC was to accept or reject the result of such negotiations. So, while the negotiations were a core function of the CoC, the Core Committee/Sub-Committee concluded the said negotiations.

j) The contention on behalf of the majority lenders that SCB is precluded from raising any challenge to constitution of Sub-Committee/Core-Committee having acquiesced to the validity of decision of the CoC to constitute the Sub-Committee is misleading. It is admitted that SCB did raise objections regarding the constitution of the Sub-Committee, including at the 20th meeting of CoC held on 19.10.2018.

k) The contention of the majority lenders that the Sub-Committee did not at any time, decide or even recommend on the distribution of the amounts payable to the Secured Financial Creditors is misleading since the Sub-Committee did negotiate with the Resolution Applicant (**Paper book Vol. I – pg. 72-88 at 78-79**). As mentioned in the minutes of the 21st meeting of the CoC, representative of the Resolution Applicant thought it fit to highlight "*He further added that they had not provided how the upfront cash would be distributed and the same has been left at the discretion of the CoC*." It is also recorded that the CoC counsel while providing an update on the additional changes carried out as part of the Revised Plan mentioned that "*upon negotiation, interalia, a) AM India agreed that the CoC will decide the manner in which the financial package being offered by them to the financial creditors will be distributed to the secured financial creditor*".

l) Futher, the individual distribution to the lenders, the calculations under different methodology and explanation for distribution which were circulated along with the voting agenda were never placed on record during the CoC meeting. These were circulated only once the voting lines were opened and till date RP has not informed that who had supplied those material, if not the Core Committee.

3. The secret negotiations between the Core Committee and AM:

a) The upfront offer of AM India is contrary to its commitment to this Hon'ble Court (**Paper book Vol. I – pg. 40**) and clause 4.11.2(e) of the RFP (**Paper book Vol. I – pg. 12**), hence illegal. In any case, it defies logic as to how the Core Committee could have negotiated to the detriment of all creditors. From the appeals now filed before this Hon'ble Court by CoC, State Bank of India (**SBI**) and ICICI Bank Limited (**ICICI**) it is clear that the said parties have neither challenged the offer made by AM India before this Hon'ble Court nor challenged the decision of NCLAT whereby it directed AM India to pay Rs.

42,000 Crores upfront, which does not include the guaranteed working capital adjustment.

b) AM India in its letter dated 10.09.2018 and Note dated 25.09.2018, had already decided the manner of distribution amongst Secured Financial Creditors, namely payment of 100% principal outstanding. Thus, there was no reason whatsoever for insistence of Core Committee and agreement by AM India to delegate the decision on manner of distribution to the CoC.

c) The reduction in the upfront amount and the agreement to delegate the manner of distribution was evidently designed to **(a)** prejudice the right of SCB to be paid its 100% principal outstanding and **(b)** in doing so to secretly settle with the major lenders of Odisha Slurry Pipeline Infrastructure Limited (**OSPIL**) (such major lenders are the creditors constituting the Core Committee of ESIL's CIRP) whose outstanding debt in OSPIL constitutes 65% (approx.) of the total debt of OSPIL (**Paper book Vol. I – pg. 25**).

d) This was achieved as under:

i) Reduced SCB's entitlement by approx. Rs. 2585 crores (Rs. 2646 crores – Rs. 61 crores) corresponding to the reduction of Rs. 2,500 crores in the upfront amount (Rs. 42,000 crores – Rs. 39,500 crores);

ii) The amount reduced from SCB's share of 100% principal amount is utilized for payment to other Secured Financial Creditors and in the process the said other Secured Financial Creditors would not only receive 100% of the principal outstanding but would also recover 40% of the interest and has left SCB to take 1.74% of its admitted claim.

iii) The gain of Rs. 2,500 crores to AM India (pursuant to such secret negotiations) is to utilize the said amount to settle the dues of the OSPIL lenders (*as set out later in these submissions*). It is pertinent to mention that the creditors constituting the Core Committee are the major creditors to whom outstanding is due from OSPIL.

e) The contention of the majority of lenders is that though AM India had made an upfront cash recovery offer of Rs. 42,000 crores, the same did not form part of the directions of this Hon'ble Court by its Judgment dated 4.10.2018 in the Eligibility Litigation (*ArcelorMittal India Private Limited v/s Satish Kumar Gupta and Ors.*- (**Paper book Vol. III – pg. 427-529**). The said contention is completely an eye wash.

f) This Hon'ble Court held that both AM India and Numetal were ineligible under Section 29A of the Code and gave one more opportunity to AM India and other bidders to remove their ineligibility and if they remove such ineligibility their last plan being that of 2.04.2018 would be considered by the CoC. This Hon'ble Court had not directed that if the better terms are offered by the named resolution applicants including the offer made by AM India before this Hon'ble Court, the same would not be considered by CoC. In fact any improvement in the plan which is made by a Resolution Applicant should always be considered as part of the plan itself. Further, under the terms of the RFP, the CoC was mandated to accept or negotiate the better offer. There is nothing on the record to suggest that AM India backed out from its offer to pay Rs 42,000 crores as the upfront cash recovery. On the contrary, AM India in the meeting of CoC held on 19.10.2018, conceded that they were committed to the financial proposal made before the Hon'ble Supreme Court (**Paper book Vol. I – pg. 45-63 at 56**). In the process, the Core Committee failed to maximize the value and

further failed to take care of the interest of the stakeholders so as to enrich themselves at the cost of SCB.

g) Accordingly, the decision to entrust the Core Committee with negotiations with AM India, reduction of the upfront payment amount and insisting on delegation of the right to decide the manner of distribution was clearly a ploy to ensure that AM India does not implement its original offer of payment of 100% principal outstanding to Secured Financial Creditors and in particular, SCB.

4. The effect of secret negotiations between the Core Committee and AM India.

A) CoC prevailed over AM India for delegating the right to decide the manner of distribution:

i) AM India's offer vide letter 10.9.2018 and Note dated 25.9.2018 were clear and unequivocal that it proposes to pay an amount that represents 100% principal outstanding of Secured Financial Creditors. By virtue of the secret negotiations between AM India and Core Committee, AM India admittedly 'agreed' to delegate the right to decide the manner of distribution to the CoC, contradicting its earlier stand. Such delegation per se and in the facts of the present case is wholly unwarranted. It is also surprising to note that while distribution of all other components of the financial package, i.e., payment to unsecured financial creditors, unsecured financial creditors having admitted claims of less than Rs. 10 lakhs, the operational creditors having admitted claims of less than Rs. 1 crore, the workers, etc. was decided by AM India to be pro rata within each category, it was only for the secured financial creditors that it left the decision making on distribution to the CoC.

ii) Regulation 38(1)(a) of the Regulations requires that:

"*A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor*."

iii) The RFP issued by the RP on 24.12.2017 (**Paper book Vol. I – pg. 7-12 at 8-10**), contains further clauses in respect of the above.

"*4. RESOLUTION PLAN PROCESS*

4.1 …… It is hereby clarified that if <u>any resolution plan</u> (or the terms thereof) <u>which</u> is received by the Resolution Professional <u>is not pursuant to this Request for Proposal</u> document and/or such plan is not in accordance with the terms and conditions set out in this Request for Proposal document, then such resolution plan <u>shall not be considered eligible</u> for evaluation by the Committee of Creditors."

"4.6 Contents of the Resolution Plan

4.6.1 The Resolution Applicant shall mandatorily include the following in its Resolution Plan, as set out in Section 30(2) of the IB Code read with Regulation 38 of the CIRP Regulations:

.....

*(d) statement as to how it would deal with the interest of all stakeholders, including **<u>but not limited to break-up of amounts to be paid to secured Financial Creditors</u>**, unsecured Financial Creditors and Operational* Creditors, of the Company;"

iv) However, the Final Resolution Plan submitted by AM India on 22.10.2018 as modified pursuant to negotiations with the Sub Committee contains in Part V. A. I (**Paper book Vol. I – pg. 94**) only a general overview of the payment to the Secured Financial Creditors. Further, Part VIII (**Paper book Vol. I – pg. 98**), which deals with the treatment of various stakeholders, only states that AM India proposes to pay to the Secured Financial Creditors the upfront amount stated in Part V viz. Rs. 39,500 Crores, instead of Rs. 42,000 Crores.

v) The contention on behalf of majority lenders that there was no change in the condition regarding distribution of amounts to the Secured Financial Creditors from the Initial Resolution Plan dated 02.04.2018 and the Final Resolution Plan dated 22.10.2018 is an attempt to mislead this Hon'ble Court.

vi) Such delegation had become superfluous and unnecessary in light of AM India's letter dated 10.9.2018 and commitment to this Hon'ble Court vide Note dated 25.9.2018, whereby AM India offered an upfront payment of Rs. 42,000 Crores and also prescribed the manner of distribution as being '*100% principal outstanding amount of Secured Financial Creditors*'.

vii) In light of such offer, the only role left for the CoC was to ascertain the principal outstanding amount of each Secured Financial Creditor for the purpose of distribution. The question of any reworking of the amount to be distributed, as done in the present case, did not arise and is contrary to the revised offer of AM India made before this Hon'ble Court. The fact that such delegation was continued at the behest of the Sub Committee is evident from the statements made in part V of the Final Resolution Plan, which reads as under:

"*The Resolution Applicant has **agreed** the Committee of Creditors will decide the manner in which the financial package being offered by the Resolution Applicant to the Financial Creditors will be distributed to the Secured Financial Creditors. All such allocations to the Financial Creditors will be binding on all stakeholders*……"

viii) In the NCLAT proceedings, CoC filed a chart on 13.5.2019 (**Paper book Vol. I – pg. 170-173**) titled as "*Distribution as per the Successful Resolution Plan of ArcelorMittal India Private Limited as approved by the Committee of Creditors (CoC) of Essar Steel India Limited (Corporate Debtor) on 25th October 2018 and as placed before National Company Law Tribunal for approval in terms of the Code*". A reading of the chart would give an impression, albeit false, that the payment of Rs. 60.71 crores to SCB is an offer by AM India which is approved by the CoC. On the contrary, the Final Resolution Plan did not make any offer and the distribution was not only 'approved' by CoC but also 'decided' by CoC.

B. The real reason for the CoC to agree to reduced upfront payment is the interest of Core Committee lenders in securing payments for their debts in OSPIL.

i) ESIL, somewhere in the year 2013-14 commissioned a slurry pipeline between Dabuna and Paradeep of about 253 kms. The said pipeline is a critical asset which connects two major facilities of ESIL.

ii) Somewhere in January 2014, OSPIL was incorporated as a wholly owned subsidiary of ESIL.

iii) In or around February 2015, ESIL entered into a Business Transfer Agreement ("**BTA**", for short) with OSPIL for transfer of the slurry pipeline at a

consideration of about Rs. 4,000 Crores. The purchase consideration was to be raised by OSPIL through equity, compulsorily convertible loan and debt.

iv) OSPIL raised certain debt from SREI Infrastructure Finance Limited ("**SREI**", for short) and SREI also became an equity investor in OSPIL.

v) Certain debt was also raised by OSPIL from lenders, the majority of whom later became members of the Core Committee/ Sub Committee of ESIL, viz., IDBI Bank, SBI, ICICI and Edelweiss Asset Reconstruction Company Limited (in respect of debt acquired by it) **(Edelweiss)** in order to enable OSPIL to make payment of the purchase consideration.

vi) Somewhere in March 2015, ESIL and OSPIL executed Right to Use Agreement for the use of the slurry pipeline. The lenders to OSPIL enjoyed a lien on the lease rental paid/ to be paid by ESIL which was utilized/ to be utilized to repay the loan of OSPIL lenders.

vii) It appears that the complete consideration amount was not paid by OSPIL to ESIL.

viii) Somewhere in January 2016, Reserve Bank of India ("**RBI**", for short) issued clarification in respect of Sale and Lease Back transactions. The transaction between OSPIL and ESIL was squarely covered within the ambit of the said RBI clarification. As a consequence of this, the lenders of OSPIL could not consider fresh sanction nor further disbursements and accordingly OSPIL failed to pay the balance purchase consideration to ESIL.

ix) Thus, the Joint Lenders Forum ("**JLF**", for short) decided to reverse the transaction by proposing cancellation of BTA. Some of the lenders were not agreeable for the reversal of the transaction.

x) It appears that SREI and/or its group entities hold 70% of the paid-up equity share capital of OSPIL and the remaining 30% is held by ESIL.

xi) SREI objected to such cancellation of BTA. Pursuant to the Deed of Cancellation signed between ESIL and OSPIL without obtaining the consent of the equity shareholders of OSPIL, SREI filed a Title Suit in the courts of Sealdah, West Bengal, inter alia, questioning the legality and validity of the Deed of Cancellation. Since the Sealdah court did not grant interim relief, an appeal before Hon'ble Calcutta High Court was preferred. On 22.12.2016 Calcutta High Court granted status quo order. The Appeal is pending.

xii) ESIL is showing the slurry pipeline as an asset in its books while the liabilities in respect of the debts raised by OSPIL are shown in the books of OSPIL.

xiii) Pursuant to the commencement of the insolvency proceedings of ESIL, the lenders of OSPIL (which includes the Core Committee lenders) filed their claim before the RP of ESIL. These claims were not admitted by ESIL's RP.

xiv) Subsequently, RP filed an application before the Adjudicating Authority to declare the slurry pipeline as an asset of ESIL and that the proceedings pending before the High Court of Calcutta be disposed of and transferred to the Adjudicating Authority.

xv) The Adjudicating Authority by its Order dated 7.02.2018 rejected the aforesaid application filed by RP and, *inter alia*, held that the Title Suit in respect of the pipeline cannot be decided by the Adjudicating Authority. The said order has remained unchallenged.

xvi) Thereafter, on 2.04.2018, AM India submitted its resolution plan. In respect of OSPIL the following was mentioned (**page no. 20-21 of CC**):

"*The Resolution Applicant notes that SREI, the partner in OSPIL, is opposed to the reversal of the business transfer agreement, unless its exposure in OSPIL is repaid to it prior to reversal. SREI with a view to frustrate the Corporate Debtor's rights is also colluding with the Existing Promoter Group (and is proposing to sell its disputed interests in OSPIL to this group). In light of the criticality of this asset which connects two major facilities of the Corporate Debtor, the Resolution Applicant is seeking a direction from the Adjudicating Authority to the effect that the slurry pipeline is declared as an asset of the Corporate Debtor and unhindered usage of this asset be provided for the business of the Corporate Debtor*."

xvii) It appears that in terms of Section 18(1)(f)(vi) of the Code, the RP has taken control of the slurry pipeline.

xviii) During the said period, the issue of eligibility under Section 29A of the Code was pending consideration before NCLAT in respect of Numetal and AM India. At the hearing held on 11.07.2018 (**Paper book Vol. I – pg. 190-191**) by the NCLAT, though the second bid was not opened, the counsel for Numetal submitted that it has made an offer of Rs. 37,000 Crores in its second bid. The said fact has also been noted by the NCLAT in its Judgment dated 7.09.2018 at paragraph no. 24.

xix) It appears that based on the aforesaid submission made by the counsel for Numetal, AM India was prompted to send a letter dated 10.09.2018 to CoC members, thereby increasing the upfront cash recovery amount to Rs. 42,000 Crores, which is equivalent to 100% principal outstanding of the Secured Financial Creditors which included SCB.

xx) The issue of the slurry pipeline was further discussed on the same day (10.09.2018) in the 18th meeting of CoC (**Paper book Vol. I – pg. 192-196**). The relevant portion reads as under:

"*The representative of Canara inquired as to whether the claims of the lenders of Odisha Slurry Pipeline Infrastructure Limited (OSPIL) were admitted or rejected by RP. He drew the reference to Note 11 of the updated list of creditors circulated by the RP wherein with respect to the claims submitted by the OSPIL lenders, it is stated that "such claims totaling INR 16,712,547,966 are disputed and are subject to outcome of the pending High Court and civil suit". The representative of Canara Bank further inquired that how is the RP is proposing to deal with the claims of the OSPIL lenders given the CIRP Period is on the verge of completion and the High Court proceedings will not be concluded before the completion of the CIRP Period.*

The CAM representative responded that in terms of the proposed course of action, it is upto the CoC to put to the Resolution Applicants that there are certain disputes pending as regards this asset and such claims in relations to such assets have been filed and the resolution plan provide a proposal in relation to such claims. Accordingly, it is a matter to be discussed between the CoC members and the Resolution Applicants as and when the resolution plan(s) are put-up for discussion."

xxi) The offer made by AM India to the CoC by its letter dated 10.09.2018 was reiterated before the Hon'ble Supreme Court by way of Note, which was tendered before the Hon'ble Supreme Court on 25.09.2018 pursuant to the

inquiry made by the Hon'ble Supreme Court and as reflected in the email dated 18.09.2018 addressed by CoC counsel to the members of CoC (**Paper book Vol. I – pg. 37-38**).

xxii) Subsequently, the Hon'ble Supreme Court by its Judgment dated 4.10.2018 held both Numetal and AM India to be ineligible under Section 29A of the Code. However, the Hon'ble Supreme Court under Article 142 of the Constitution of India granted two weeks' time to both Numetal and AM India to remove their ineligibility and thereafter resubmit the bids dated 2.04.2018 to the CoC.

xxiii) AM India was aware that the slurry pipeline was a critical asset for the functioning of ESIL as a going concern basis. AM India was further aware about the Order dated 7.02.2018 passed by the Adjudicating Authority. AM India was aware that their claim for seeking ownership of the slurry pipeline within ESIL would not be granted by the Adjudicating Authority. On the other hand, the dues of OSPIL lenders (the so called Core Committee holds about 65% of the outstanding debt of OSPIL) were also required to be settled to ensure unhindered usage of such slurry pipeline. The same would be evident from the minutes of the 18th meeting of the CoC, the relevant extracts of which are mentioned above. Such majority lenders were also aware that SCB is a Secured Financial Creditor and would be entitled to 100% of its principal dues as offered by AM India.

xxiv) In order to achieve the goal as narrated hereinafter, as a part of pre-planned strategy, the majority lenders of ESIL took it upon themselves to expand the scope of the illegally constituted Core Committee to negotiate with the resolution applicant, which was objected to by SCB. The said expansion of the scope of the Core Committee was done on 19.10.2018.

xxv) Such Core Committee constituted in breach of the provisions of the Code, with undue haste (between 20.10.2018 and 22.10.2018, i.e., in 3 days) completed the secret negotiations with AM India, though the Hon'ble Supreme Court by its Judgment dated 4.10.2018 had granted in all 8 weeks to consider the plan. To ensure unhindered usage of the slurry pipeline, AM India agreed that it would acquire the debts of OSPIL. To achieve such acquisition of debts of OSPIL, the Core Committee of ESIL relieved AM India from the solemn offer made before the Hon'ble Supreme Court and reduced the offer amount by Rs. 2,500 Crores so as to enable AM India to settle such dues of OSPIL lenders outside the corporate insolvency resolution process of ESIL. Core Committee was aware that in the process the proportionate share of CoC members from Rs. 2,500 Crores would reduce. In order to nullify such reduction to their share, the Core Committee reduced the amount of approximately Rs. 2,500 Crores from the share of SCB (100 % principal outstanding, i.e., Rs. 2646.05 Crores minus Rs. 60.71 Crores = Rs. 2585.34 Crores) by constituting classes against the provisions of the Code and in the process achieved their objective, namely, (a) no loss to the creditors of ESIL except SCB; and (b) relieved AM India from its obligation to bring Rs. 42,000 Crores (and reduced it to Rs. 39,500 Crores) to enable AM India to discharge the debts of OSPIL lenders, outside the CIR process of ESIL, with a view to have unhindered usage of the slurry pipeline. It would be pertinent to note that (x) there is no video recording of such meetings of the Sub Committee with the Resolution Applicant; (y) RP did not attend such meetings of the Sub Committee with the Resolution Applicant; (z) a new concept of "Guaranteed Working Capital Adjustment" was introduced to optically comply with the Rs. 42,000 crore upfront cash amount committed before the Hon'ble Supreme Court, even though no such provision is there within the RFP and there was no need for the same as the Working Capital Adjustment on the date of negotiation was much in excess of Rs. 2,500 crore.

From the aforesaid, it would be clearly evident that though the Final Resolution Plan does not directly deal with slurry pipeline asset, a clause was added stating that AM India will acquire the debts of OSPIL lenders subsequent to the negotiations with the Core Committee and the same benefitted both AM India (by Rs. 2,500 Crores) and the Core Committee and other lenders of OSPIL (which would receive the money from AM India outside the resolution plan) and in the process created a huge loss to SCB.

xxvi) The contention of the majority lenders that apart from the common lenders of ESIL and OSPIL, financial creditors holding 24% (approx.) of voting share in ESIL have voted in favour of the Final Resolution Plan and therefore does not demonstrate lack of bona fide, is misleading and devoid of any merits. While raising such a contention, what has not been disclosed by the majority lenders is that even after the reduction of Rs. 2,500 Crores pursuant to the secret negotiations, no loss has been occasioned to any of the Secured Financial Creditors except SCB (either to the common lenders or to the 24% of the Secured Financial Creditors who are not common lenders to ESIL and OSPIL). In fact, they have gained significantly since they would be recovering interest apart from the 100% of principal. The same would be clear from the following table:

Secured Financial Creditors	**As per Note dated 25.09.2018 filed before the Hon'ble Supreme Court – 100% principal outstanding amount [Rs. In crores]**	**Pursuant to the secret negotiations by the Core Committee and discrimination against SCB [Rs. In crores]**
Secured Financial Creditors other than Standard Chartered Bank	39,353.95	39,439.29
Standard Chartered Bank	2,646.05	60.71
Total	42,000.00	39,500.00

5. Role of CoC in the matter of distribution:

A) CoC in law is not authorised to decide the manner of distribution:

i) Under the provisions of Section 30(4) of the Code, a Committee of Creditors may approve a Resolution Plan by a vote of not less than 66% of the voting share of the Financial Creditors. As a necessary corollary, the CoC may either reject a resolution plan or sanction the same. Such decision takes into account the feasibility and viability of the Resolution Plan and such requirements as are specified by the Board.

ii) The jurisdiction of the CoC is, therefore, limited to consider the feasibility and viability of the resolution plan and also to consider whether it is responsive to the Request for Proposal. (Clause 4.1 of the RFP **Paper book Vol. I – pg. 8-9** and Clause 4.11.1 of the RFP at **Paper book Vol. I – pg. 11**)

iii) Section 30(2) of the Code provides for certain mandatory requirements of a resolution plan submitted by a resolution applicant, which, *inter alia*, includes conformity with law. Under the provisions of Section 31 of the Code, where a plan is approved by the CoC, the same is placed before the Adjudicating Authority for approval and to ascertain that the plan meets the requirements

specified under Section 30(2) of the Code and to ascertain whether the Resolution Plan has provisions for its effective implementation.

iv) The Adjudicating Authority can, therefore, examine the legality and validity of a resolution plan approved by the CoC on the touchstone of Section 30(2) read with Section 60(5)(c) of the Code and can also therefore determine all questions incidental thereto or arising therefrom, including the aspect of discrimination in the matter of distribution of proceeds. (**Paper book Vol. IV – pg. 757-789 at 777 - *paragraph nos. 44 and 45 of K. Sashidhar judgment***). Distribution of the proceeds can never be said to be forming part of the feasibility or viability of the Resolution Plan or being part of the commercial decision of CoC.

v) Accordingly, the CoC does not enjoy any authority to delegate to itself the role of the Resolution Applicant including the manner of distribution and thereby taking judicial/ adjudicatory decisions, like distribution of proceeds and the same are exclusively within the domain of the Adjudicating Authority, if found discriminatory.

vi) In the facts of the present case, the Resolution Plan, insofar as it delegates the right to decide distribution of the upfront payment to the CoC is therefore illegal. The action of the CoC to decide the same is also without authority of law apart from being wrong and malafide on merits.

vii) If what is contended by the Appellants is true, gross injustice will get done to the minority financial creditors as there are no checks and balances in the Code to ensure a fair treatment to them. In addition, it is being claimed that since distribution is a commercial decision, it is not justiciable. Thus, the majority members of the CoC would have unfettered rights to trample over the rights of the minority creditors. This would negate one of the main objectives of the Code, i.e., to promote availability of credit of all types including unsecured credit.

B. CoC's decision on the manner of distribution, in the facts of the present case, is illegal and arbitrary:

i) CoC includes SCB by virtue of it being a Secured Financial Creditor of ESIL by virtue of Section 3(30) read with Section 3(31) of the Code.

ii) It is submitted that once a creditor is classified as a Financial Creditor, that creditor is entitled to be treated equally with all other Financial Creditors. This is clearly established by judicial dicta pronounced by NCLAT in the Judgment of *Binani Industries v/s Bank of Baroda and Anr.* (**paragraph nos. 10, 19, 21, 23, 29, 43 and 48**), as affirmed by this Hon'ble Court vide order dated 19.11.2018 in Civil Appeal No. 10998 of 2018, which reads as follows, "*Having perused the judgments of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) and after hearing learned counsels for all the parties, we are of the opinion that there is no infirmity in the order passed by NCLAT. The Appeal is accordingly dismissed……..*"; *SREI Equipment Finance Limited v/s Sree Metalliks Limited* (**paragraph nos. 2, 3, 6 to 10**); *Tata Steel Limited v/s Liberty House Group Pte Limited and Ors.* (**paragraph nos. 49 and 50**); *Mr. Sharad Sanghi v/s Ms. Vandana Garg and Ors.* (**paragraph nos. 19 to 22**); and *Central Bank of India v/s Resolution Professional of Sirpur Paper Mills Limited* (**paragraph nos. 4, 9 and 13**).

It is submitted that in respect of the judgment of Hon'ble Supreme Court in the matter of *Swiss Ribbons Private Limited and Anr. v/s Union of India and Ors.*, (**Paper Book Vol. IV – pg. 661 – 756**) where the distinction is made between

the Financial Creditors and Operational Creditors, but significantly does not make any distinction between the Financial Creditors.

iii) The fact that once a creditor is classified as a Financial Creditor, that creditor is entitled to be treated equally with all other Financial Creditors would also be evident from the following:

a) The UNCITRAL Legislative Guide on Insolvency Law is precisely that viz. a guide to the legislatures of various countries in the matter of framing insolvency laws.

b) It is the Code alone that determines the direction which the Indian Parliament has chosen in framing our insolvency legislation. The Code must be interpreted without any external aid.

c) The Parliament has in the Code made a classification between only two types of creditors – Financial and Operational.

d) The Code treats all Financial Creditors equally irrespective of whether the debt is secured or unsecured; the existence or the extent of security is irrelevant. The Code, insofar as insolvency resolution is concerned suspends the right of secured creditors arising from the security interest held by them and by virtue of a moratorium prohibits the enforcement of such rights. A moratorium comes to an end on the passing of an order of the Adjudicating Authority under Section 31(2) or Section 31(3) of the Code, approving or rejecting the plan. This being the position, the right of a creditor as to its security interest is suspended during CIRP. The Code, therefore, treats the quantum of debt as the basis for voting share.

e) Parliament has advisedly chosen not to create different classes of Financial or Operational Creditors; if it was intended to have different classes of Financial Creditors dependent on the purpose of the loan or the value of the security, the Code would have said so. If different classes were intended, provision would have been made for class meetings and voting to ensure that the interests of one class would not be overridden by the brute majority of another class.

f) Insolvency resolution is, therefore, a collective effort by all stakeholders for revival and restructuring of the Corporate Debtor. Such process cannot be converted into a right of recovery on the basis of security by a convoluted interpretation.

g) Under the resolution process, importance is given to the value of debt and in liquidation importance is given to the security.

h) Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency.

i) In the context “similarly situated” under the resolution process can only be the “Financial Creditors” and “Operational Creditors”. The concept of “bargain each creditor has made” is relevant factor for liquidation.

j) If the Code wanted to differentiate based on “bargain”, it could not have provided one class vote.

k) In the facts of the present case, the CoC members in its 17th meeting held on 9.08.2018, decided that the upfront payment shall be divided amongst the Financial Creditors on the basis of their voting shares (**Paper book Vol. I – pg. 29-32 at 31**).

iv) CoC could not have decided the manner of distribution for the following reasons:

- Manner of distribution is required to form a part of the resolution plan which is one of the factors for deciding whether or not to approve the plan by the CoC.

- CoC usually, as in the present case, consists of creditors with separate and distinct rights. If such a body decides the manner of distribution, it gives rise to serious conflict of interest as the majority may get together to ride roughshod over the minority.

- The members of the CoC are themselves the beneficiaries of the distribution and therefore cannot act as judges in their own cause.

- CoC is obligated to vote on the feasibility and viability of the resolution plan as a whole. The CoC acts in a fiduciary capacity and must ensure that all stakeholders are treated, as far as possible, in proportion of their stake. A fiduciary body, therefore, cannot act as an interested party.

- Distribution is clearly an adjudicatory function and can only be decided by the Adjudicating Authority under Section 30(4) of the Code.

v) Assuming while denying that classification is permissible, the CoC's basis is flawed and discriminatory:

The CoC's basis for distribution is flawed and discriminatory and is sought to be justified on the ground that un-equals cannot be treated equally and that SCB was an unequal and could not therefore be treated on par with all other secured Financial Creditors. The justification for such differentiation is based upon two criteria

a) That a creditor was required to have advanced financial assistance in respect of the project itself (as recorded in the Minutes of the 21st Meeting of the CoC on 22.10.2018 (**Paper book Vol. I – pg. 72-88 at 84**). It is submitted that SCB satisfies this criteria in as much as the moneys advanced by SCB to the subsidiary Essar Steel Offshore Limited ("ESOL") were directly for the financing of ESIL's critical raw material requirement viz. coal for the expansion of capacity envisaged by ESIL. SCB's loan to ESOL was to secure the long term coal requirements of ESIL itself (as confirmed by ESIL in its letter dated 16.08.2010, (**Paper book Vol. I – pg. 2-3**). Assuming whilst denying that this could not have been treated as an advance towards the project asset of ESIL, then it is submitted that other secured creditors viz. EXIM Bank and ICICI and lenders who have provided SBLC (Stand By Letter of Credit) limits viz. Corporation Bank, Edelweiss and SBI had also not advanced moneys towards project assets of ESIL, but were nevertheless considered for equal treatment with the other secured financial creditors (**Paper book Vol. I – pg. 114-125**).

b) The second criteria applied is based on the security of ESIL enjoyed by the secured financial creditors and that since SCB did not enjoy any such security on the project assets of ESIL, SCB was put in a separate class.

In other words, the contention is that since all financial creditors, other than SCB, enjoyed the same security, they were entitled to equal treatment. This too, it is submitted, is falsified by the facts relating to the securities enjoyed by the various financial creditors where no distinction is made between the nature and quality of the security. The securities enjoyed by the secured financial creditors vary from first charge holders to second charge holders to subservient charge holders and residual charge holders, and yet, all of them have been treated equally (**Paper book Vol. I – pg. 114-125**). This is borne out by the following instances which are illustrative and not exhaustive

- SREI Infrastructure Finance Ltd (which has a subservient charge for a term loan);

- ICICI Bank (which has a residual charge for a derivative facility); and

This belies the protestation made by the members of the Core Committee that un-equals cannot be treated equally and thereby attempting to justify the exclusion of SCB. Before NCLAT, SCB had tendered submissions on the manner of distribution (**Paper book Vol. I – pg. 156-159**) and a note showing equitable and fair distribution (**Paper book Vol. I – pg. 154-155**).

vi) Assuming whilst denying that classification amongst secured financial creditors is permissible, such classification it is submitted should be on the liquidation value of the security enjoyed by the creditor and the balance distributed to all secured financial creditors pro-rata. This methodology of distribution has been applied in *State Bank of India vs. Orissa Manganese and Minerals Ltd*., approved by the NCLT and not disturbed by the NCLAT. In the instant case, applying the aforesaid classification, the average liquidation value of the security as per the report of DUFF & Phelps and RBSA is in a sum of Rs. 15,838 crores. This is the amount required to be distributed to the secured financial creditors according to the value of their respective security (viz. first charge, second charge, subservient charge, residuary charge, etc.) and the balance to be distributed pro-rata amongst all financial creditors irrespective of their security. The sum of Rs. 42,000 crores offered by AM India would therefore be a sum of Rs. 15,838 crores be paid over to the secured financial creditors according to the value of their security and the balance amount of Rs. 26,162 crores would be distributed amongst all financial creditors on pro-rata basis. This principle of classification has also been violated in the instant case.

vii) Assuming whilst denying that the CoC was entitled to form classes amongst Secured Financial Creditors and that the contention of the Core Committee that nature and value of security held by SCB would be a relevant criteria for the purpose of distribution, it is submitted that on facts SCB was entitled to a much higher amount in light of the fact that the valuation report dated 30.06.2017 (which was belatedly furnished by RP to SCB by mail dated 27.4.2018) of M/s Keynote Corporate Services Limited in respect of Trinity Coal Inc. was not considered by the valuers. In the said valuation report the concluded equity value of New Trinity Coal was arrived at US$ 648 -762 million. On the contrary, the valuers have specifically mentioned that the valuation has been done on the basis of limited information as the management of ESIL failed to provide any information. Further, neither the RP nor the valuers appointed by the RP has separately provided the liquidation value of each creditors based on priority and based on the value of the security.

viii) It is submitted that the action of the Core Committee and/or other members of CoC of separately voting on the manner of distribution by way of voting resolution no. 5(ii) is grossly illegal inasmuch as (a) such action seeks to carve out an integral and mandatory feature of a plan and brings it within the fold of the CoC which is impermissible in law; and (b) by doing so, Core Committee/ other members of CoC and also the RP have avoided judicial scrutiny of such decision. The same has been done deliberately so that the arbitrariness and illegality of the distribution goes unquestioned.

C. The issues/objections of Core Committee/CoC to SCB's standing as a Secured Financial Creditor and its claim for equitable treatment are belated, unjustified and misconceived:

i) SCB is a Secured Financial Creditor of ESIL, which fact is recognized as under:

- Upon SCB's application under Section 7 of the Code (along with SBI), the CIRP of ESIL was commenced. No objection was raised to SCB's standing at the relevant time.

- No member of the CoC has challenged the decision of RP even after its claim was verified by RP, albeit as unsecured Financial Creditor, and despite the fact that certain lenders did raise the issue in CoC meeting. Failure of seeking adjudication amounts to waiver of the right.

- On 10.09.2018, SCB was reclassified as a Secured Financial Creditor of ESIL and the objections of other lenders were discussed in the 17th and 18th meeting of CoC. The lenders were advised that the said decision is within the domain of RP and if any lender is dissatisfied with such decision they may approach the Adjudicating Authority for the decision on the same. None of the lenders have taken any steps in that regard.

- Even in respect of the ultimate decision reached by the CoC on AM India's Resolution Plan, all members have proceeded to vote upon the Resolution Plan as well as the distribution mechanism treating SCB as a Secured Financial Creditor. Accordingly, the other members of CoC are estopped by their own conduct of raising the issue of SCB's standing.

- During the hearing before the Ld. Adjudicating Authority in respect of approval of the Final Resolution Plan, no objection as to SCB's standing was raised by any lender.

ii) It is contended that it is for the first time that SCB has urged that the valuation of security held by SCB qua ESIL is incorrect. This is a false statement as the same was contended earlier in the application filed before the Adjudicating Authority and the Written Submissions submitted and also at the time of hearing of the appeals before NCLAT.

iii) It is surprising that the majority lenders contend that while Trinity Coal is an asset of Essar Steel Offshore Limited ("**ESOL**", for short) through step down subsidiaries, it is not an asset of ESIL, while ESOL is a wholly owned subsidiary of ESIL.

iv) The letter forwarded by SBI to RBI belies the contention that that this acquisition was not done for securing the raw material of ESIL.

v) The value of Rs. 24.86 crore attributed by the valuers to the holding of equity shares of ESOL in ESIL is after considering all the liabilities of ESOL.

Accordingly, this number is after considering the liability of ESOL, i.e., SCB's claim. Since the value for SCB's security is being considered at ESIL, SCB's claim amount needs to be added to the value to arrive at the value of ESIL's shareholding in ESOL. SCB had continuously requested RP to share the valuation report of Trinity, which after much persistence was shared only once the valuation reports of ESIL were finalized. The valuers of ESIL clearly highlighted that they have valued the shares of ESOL on limited information (as adequate information has not been provided by the management) and on the basis that the mine is non-operating, which is not correct.

vi) Accordingly, the objections of the Core Committee members and other lenders to SCB's standing are thus impermissible as being barred by the principles of delay, laches, acquiescence and waiver and otherwise untenable.

6. Whether NCLAT in the Impugned Judgment can be said to have committed an error by altering the manner of distribution.

i) In the facts of the present case, AM India had vide communication dated 10.09.2018 and Note dated 25.09.2018 made an offer to pay 100% of the principal outstanding amount to secured financial creditors of the Corporate Debtor. For the reasons stated above, SCB has amply demonstrated that this offer/commitment came to be altered during the secret negotiations with the Core Committee and with a view to reduce the entitlement of SCB.

ii) Keeping in mind the scheme of the Code and the provisions of Regulation 38(1A) of the CIR Regulations, the CoC was required to assess and decide on the feasibility and viability of the Plan. Such decision, in order to be impartial, would have to be taken without being influenced by individual considerations. Such objective can be achieved when in law the distribution amongst financial creditors is on a *pro rata* basis.

iii) Contrary to its own proposal, AM India delegated the distribution to the CoC who in turn decided the same on the basis of extraneous considerations as to the value of security and nature of financial assistance. This resulted in payment of about 92% of the outstanding dues (i.e. 100% principal amount and 40% interest) to the majority lenders and reduction of SCB's entitlement from 3487.10 Crores to Rs. 60.71 Crores i.e. 1.74 % of its admitted claim. The said exercise by CoC clearly falls foul of the maxim that 'one cannot be a judge of one's own cause' and suffered from the vice of conflict of interest.

iv) The distribution made by CoC/Core Committee was done on the basis of flawed and outdated report and hence is devoid of merit for any consideration whatsoever.

v) In the 17th CoC meeting held on 09.08.2018, the CoC had already unanimously decided the manner of distribution that the upfront payment shall be divided amongst the Financial Creditors on the basis of their voting shares (**Paper book Vol. I – pg. 29-32 at 31**). Hence any modifications thereafter were only with the intent to deprive SCB of its rightful claim.

vi) SCB questioned the said decision before the Adjudicating Authority who in turn vide Order dated 8.03.2019 **(Paper book – Vol. 790-949)** concluded that the manner of distribution decided is arbitrary and deserved correction. On this basis, only a conditional approval to the Final Resolution Plan was granted.

vii) Since the distribution of the financial package under a resolution plan, in law would have to be pro rata or at least fair and equitable, the said decision is clearly outside the domain of being decided by CoC and is an adjudicatory/

judicial function inasmuch as the Adjudicating Authority or the Appellate Tribunal would be empowered in law to set at naught the arbitrariness in the manner of distribution so that financial creditors as a body and operational creditors as a body are not discriminated amongst themselves.

viii) Therefore, the decision of NCLAT to deliberate upon the legality and correctness of the distribution proposed was within it's the scope and ambit of its jurisdiction and it cannot be contended that it has abrogated to itself the right to re-write the resolution plan. It is pertinent to point out that the Final Resolution Plan itself, in the fact of the present case, did not propose any distribution. Further, the change in the distribution undertaken by NCLAT is not unilateral since AM India in its oral arguments as well as Written Submissions (**Paper book Vol. I – pg. 203-212 at 211**) has clearly stated that it is agnostic to the manner of distribution and authorized NCLAT to alter the distribution in the manner considered fit. The decision of NCLAT, therefore, is in keeping with the objective and the provisions of the Code and upon express permission of the Resolution Applicant, with which no infirmity can be found.

ix) The claim of ICICI Bank and Edelweiss in their appeal that the differentiation between the creditors on the basis of security and their inter-se priority and value, if abrogated, would only increase the risk of capital for secured financial lenders' lending in the Indian market and lead to significant increase in interest rates for lending is false and misleading. The Reserve Bank of India came out with various mechanisms, viz., Framework for revitalizing distressed assets in the Economy – Guidelines on Joint Lenders Forum, and Corrective Action Plan (February 26, 2014), Strategic Debt Restructuring (SDR – June 8, 2015), Scheme for Sustainable Structuring of Stressed Assets (S4A – June 13, 2016), etc. to address the issue of stressed assets in the Indian market. In all of these schemes, the Financial Creditors were expected to come together to formulate a resolution plan to ensure that the stress is identified at an early stage and steps are initiated to address the stress. In all of these mechanisms, there was no distinction to the treatment between the secured creditors, unsecured creditors, etc. If all of these mechanisms did not result in increasing the risk of capital for secured financial lenders', then it cannot be said that if security, inter-se priority and value is not considered during insolvency resolution (as against liquidation), the risk of capital for secured financial creditors and the interest rates will increase. In addition, it would be pertinent to note that in all earlier mechanisms, the realization on the basis of security was only by way of enforcement of security, in which case the realization was expected to be limited to the liquidation value. Hence, if it is understood that the cost of capital and the interest rates, etc. are/have been based on the security value and inter-se priority when the only way to realise that value was by way of enforcement and hence, limited to the liquidation value, the realization under the present case and as decided by the Appellate Authority is much higher than the liquidation value of the secured financial creditors. Hence, this argument is not a credible argument.

Place:
Date: Advocate for Standard Chartered Bank