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(**REPORTABLE**)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4242 OF 2019

MAHARASTHRA SEAMLESS LIMITED ...APPELLANT

VERSUS

PADMANABHAN VENKATESH & ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NOS. 4967-4968 OF 2019

J U D G M E N T

ANIRUDDHA BOSE, J.

These proceedings arise out of Corporate Insolvency Resolution Process (CIRP) involving United Seamless Tubulaar Private Limited, the corporate debtor. The successful Resolution Applicant, Maharashtra Seamless Ltd. (MSL) is the appellant in C.A. No. 4242 of 2019. The total debt of the corporate debtor was Rs. 1897 crores, out of which Rs.1652 crores comprised of term loans from two

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entities of Deutsche Bank. These are DB International (Asia) Limited and Deutsche Bank AG, Singapore Branch. There was also debt on account of working capital borrowing of Rs. 245 crores from another bank, being Indian Bank. Said Indian Bank is the initiator of the CIRP, who filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code). DB International (Asia Ltd.) is the appellant in C.A. No.4967-68 of 2019. A concern by the name of UMW had provided corporate guarantee to Deutsche Bank, Singapore as collateral to the said term loan. The Adjudicating Authority, the National Company Law Tribunal, Hyderabad Bench (NCLT) by an order passed on 21st January, 2019 approved the resolution plan submitted by MSL in an application filed by the Resolution Professional. This resolution plan included an upfront payment of Rs. 477 crores. Ancillary directions were issued by the Adjudicating Authority while giving approval to the said resolution plan with the finding that the said plan met all the requirements of Section 30(2) of the Code. This order was carried up in appeal before the National Company Law Appellate Tribunal (NCLAT), being the Appellate Authority under the Code by two persons who were parties before the

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NCLT. They were one of the promoters of the corporate debtor, Padmanabhan Venkatesh and the Indian Bank. These appeals were registered as Company Appeal (AT) (Insol.) Nos. 128 & 247 of 2019. The appellant in Company Law (AT) (Insol.) No. 128/2019 was said Padmanabhan Venkatesh. The appellant in Company Law (AT) (Insol.) No. 247 of 2019 was the Indian Bank. These two appeals were heard with another appeal filed by the successful Resolution Applicant (MSL) against an order of the Adjudicating Authority passed on 28th February 2019. The MSL's appeal was registered as Company Appeal (AT) (Insol.) No. 220 of 2019.

2. This appeal by MSL was in connection with I.A. No. 125 of 2019 filed by them in CP(IB) No. 49/7/HDB/2017. In that application, MSL sought directions upon the corporate debtor as also the police and administrative authorities for effective implementation of the resolution plan. Grievance of MSL in that proceeding was that they were not being given access to the assets of the corporate debtor. The Adjudicating Authority, while disposing of the application, directed, inter-alia:-

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> "20. Even though appeal is preferred by Respondent No.5 to the Hon'ble NCLAT, there is no stay and the appeal is coming up for hearing on 07.03.2019. The implementation of this Plan is subject to the outcome of the Appeal. Therefore, a direction can be given to the concerned to extend cooperation to the Applicant herein in implanting the Resolution Plan of the Corporate Debtor Company and it is only subject to the outcome of the Appeal which is pending before Hon'ble NCLAT.
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> 21. A direction cannot be given to the Superintendent of Police and Collector because by the date of Application, the Applicant has not deposited the bid amount. Therefore, at the first instance direction can be given to all concerned of the Corporate Debtor Company to extend all cooperation to the Applicant. It is always open to the Applicant to approach the Tribunal for suitable direction, if so required.
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> 22. In the result, Application is disposed of directing the concerned of the Corporate Debtor Company to extend all cooperation to the Applicant herein in implementing the Resolution Plan and it is open to Resolution Applicant to approach the Tribunal for necessary direction subsequent to this order, if so required." (quoted verbatim)

3. In the common order dated 8th April 2019 in the aforesaid appeals, the Appellate Tribunal, inter-alia, observed and held:-

> "45. 'M/s. Maharashtra Seamless Ltd.' ('Successful Resolution Applicant') has taken plea that out of verified claims of Rs.2,02,88,948/-, and is willing to pay the verified 'Operational Creditors' at

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the same percentage as that of the 'Financial Creditors' i.e. 25% which shall be paid within 30 days of the 'Successful Resolution Applicant' getting clear and unfettered possession of and rights to the 'Corporate Debtor'. The 25% of verified claim of Rs.2,02,88,948/- is Rs. 50,72,237/- approximately, therefore, even if such offer is accepted then it will be Rs.577,50,237/- i.e. Rs.578 Crores approximately, which is also much less than the liquidation value of Rs.597.54 Crores.

46. Taking into consideration the nature of the case, we are of the view that 'M/s. Maharashtra Seamless Ltd.' should increase upfront payment of Rs.477 Crores as proposed to the 'Financial Creditors', 'Operational Creditors' and other Creditors to Rs.597.54 Crores by paying additional Rs. 120.54 Crores approximately to make it at par with the average liquidation value of Rs.597.54 Crores. If the upfront amount is increased to Rs.597.54 Crores, the total amount should be distributed amongst the 'Financial Creditors' and the 'Operational Creditors' at same ratio as suggested. As per suggestion of the 'Resolution Applicant', the 'Operational Creditors' can be given same percentage of amount as allocated to the 'Financial Creditors'.

47. If the 'Resolution Applicant' fails to undertake the payment of additional amount of Rs.120.54 Crores in addition to Rs.477 Crores thereby raising it to Rs.597.54 Crores (total) and deposit the amount in the Escrow Account within 30 days in such case, the impugned order of approval of the 'Resolution Plan' be treated to be set aside. Thereafter, the Adjudicating Authority will pass

WWW.LIVELAW.IN

> appropriate order in accordance with law." (quoted verbatim)

4. So far as the appeal of MSL before the Appellate Authority is concerned, the same had direct correlation with the other two appeals. In this appeal, it was held and observed by the NCLAT:-

> "54. In the present case, we find that the 'Resolution Plan' is against the statement and object of the 'I&B Code' and, therefore, we have directed M/s. Maharashtra Seamless Limited' to modify the plan. Till the plan is modified, as ordered above, 'M/s. Maharashtra Seamless Limited' cannot take over the 'Corporate Debtor' without complying with the direction as given and recorded above.
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> 55. However, it does not mean that the Promoters/ Ex-Directors will create hindrance in the matter of taking over the premises and plant of the 'Corporate Debtor' which for the present should be taken over by the 'Resolution Professional'. The Adjudicating Authority will direct the 'Resolution Professional' to take over the possession of the plant and offices and other premises and assets of the 'Corporate Debtor' to ensure that the assets remain intact till the plan is improved by the 'Resolution Applicant' in a manner as directed above. For taking over such possession, the Adjudicating Authority will direct the concerned District Collector and the Superintendent of Police of the District to provide necessary force to enable the 'Resolution Professional' to take over the premises and plant of the 'Corporate Debtor' and all the moveable and immoveable assets.

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> 56. If the 'Resolution Applicant' modifies the 'Resolution Plan', as ordered above and deposits another sum of Rs.120.54 Crores within 30 days, by improving the plan, the Adjudicating Authority will allow 'M/s. Maharashtra Seamless Limited' to take over the possession of the 'Corporate Debtor' including its moveable and immoveable assets and the plant. On failure, the plan approved in favour of 'M/s. Maharashtra Seamless Ltd.' deemed to be set aside and the Adjudicating Authority will pass appropriate order in accordance with law."
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> (quoted verbatim)

5. There is an application registered as I.A. No. 115118 of 2019, taken out by MSL in connection with their own appeal before us. In this application, they have, in substance, sought refund of the sum deposited in terms of the resolution plan alongwith interest. In this application, MSL has also applied for withdrawal of the resolution plan. Their grievance is that in order to take over the corporate debtor, they had availed of substantial term loan facility and deposited the sum of Rs.477 crores for resolution of the corporate debtor in a designated escrow account on 19th February, 2019 but because of delay in implementation of the resolution plan, they were compelled to bear the interest burden. It is also their case that the export orders they had accepted in anticipation of successful implementation of the

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resolution plan were cancelled as a result of which takeover of the corporate debtor had become unworkable.

6. The application of the Indian Bank under Section 7 of the Code was filed on 12th June 2017. An Interim Resolution Professional was appointed initially, who was changed later in the proceeding. The Resolution Professional on 10th January, 2018, issued invitation calling applications from interested parties by 28th February, 2018. This timeline was subsequently extended from time to time, and altogether four resolution plans were placed before the Committee of Creditors (CoC). This Committee was constituted on 18th August 2017 by the Interim Resolution Professional. One of these plans was by MSL. The other Resolution Applicant whose offer was considered was M/s. Area Projects Consultants Private Limited. MSL had offered upfront payment of Rs.477 crores. The resolution plan of MSL was approved by the financial creditors having 87.10% of the voting shares. This voting block consisted of the two aforesaid Deutsche Bank entities. The Deutsche Bank International (Asia) Limited had 73.40% vote share and the Indian Bank had 12.90% voting share in CoC.

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7. Two registered valuers being K. Vijay Bhasker Reddy and P. Madhu were initially appointed for determining the value of the corporate debtor. Their valuations were to the tune of Rs.681 crores and Rs.513 crores respectively. On account of substantial difference in their valuations, the Committee appointed a third valuer, Duff and Phelps. They valued the Corporate debtor at Rs.352 crores. The Committee thereafter took into consideration the average of the two closest estimates of valuation by P. Madhu and Duff and Phelps and liquidation value was assessed to be Rs.432.92 crores.

8. Subsequently, an application was filed before the Adjudicating Authority by the Resolution Professional in which he sought approval of the resolution plan. That application was disposed of by the Adjudicating Authority by an order passed on 28th September, 2018, inter-alia, directing the Resolution Professional to re-determine the liquidation value of the corporate debtor by taking into consideration the first and second valuation of P. Madhu and K. Vijay Bhaskar. It was, inter alia, directed in this order of 28th September, 2018:-

> "(2) The Resolution Professional shall convene a meeting of CoC to place the qualified Resolution

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> Plans along with Resolution Plan of MSL before CoC for reconsideration, in the light of revised liquidation value of the Corporate Debtor Company.
> (3) 30 days' time is excluded from the CIRP period with effect from today for completing the above direction.
> (4) The Resolution Professional is directed to allow Directors / Suspended Board to participate in the CoC meetings and permit them to express their views and suggestions and record the same in the Minutes of the meeting of the CoC."

9. Revised valuation of the corporate debtor was made, enhancing the same to Rs.597.54 crores from Rs.432.92 crores. In its 9th meeting held on 16th October, 2018, the Committee took into consideration the revised valuation and on majority voting approved again the resolution plan of MSL. The directors of suspended Board were given opportunity to express their views and suggestions before the Committee.

10. The order of the Adjudicating Authority passed on 28th September 2018 was appealed against by MSL before NCLAT. This appeal was registered as Company Appeal (AT) (Insolvency) No.637 of 2018. That appeal was disposed of by the Tribunal on 12th November 2018 with the following observation and direction:-

WWW.LIVELAW.IN

> "Learned counsel appearing on behalf of the member of the 'Committee of Creditors' submits that during the pendency of this appeal in compliance of the order of the Adjudicating Authority, revised liquidation value was taken into consideration by the 'Committee of Creditors' whereinafter the 'resolution plan of the appellant' – 'Maharashtra Seamless Ltd.' has been approved. It is also accepted by the learned counsel appearing on behalf of the 'Resolution Professional' and the learned counsel appearing on behalf of the appellant. In view of the aforesaid position, we are not inclined to deliberate on the question as raised in the present appeal, which may be answered in some other case. The Adjudicating Authority is now required to pass order under Section 31 of the I&B Code without granting unnecessary adjournments to any of the party uninfluenced by its earlier order, which is under challenge. The appeal is disposed of with aforesaid observations and directions." (quoted verbatim)

11. Before disposal of Company Appeal (AT) (Insolvency) No.637 of 2018, on 25th October 2018 the resolution professional had filed an application (I.A.No.472/2018) before the Adjudicating Authority seeking approval of the resolution plan as per the decision in the 9th meeting of the committee held on 16th October 2018. We have referred to the outcome of the said meeting earlier in this judgment. The order of the Adjudicating Authority was issued on 21st January

WWW.LIVELAW.IN

2019 approving the resolution plan upon considering Section 31 of the 2016 Code. The Adjudicating Authority, inter-alia, held and observed:-

> "27. The Resolution Professional has filed the present Application enclosing the minutes of 9th CoC. The question whether the plan submitted by M/s MSL is in conformity with Section 30 (2) of the Code. If it is in conformity, then the plan is to be approved under Section 31 of the Code. The CoC has examined all eligible resolution plans again in the 9th CoC meeting held on 16.10.2018. The Resolution Plan submitted by M/s MSL is below the revised Liquidation Value. The difference is about Rs.120 crores. However, as per directions of the Hon'ble NCLAT, this Tribunal to decide the plan filed by M/s. MSL without being influenced by its previous order.
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> 28. The CoC has approved the Resolution Plan submitted by M/s MSL with a majority of voting share of Financial Creditors at 87.10%. The CoC in its wisdom has approved the Plan. No doubt Indian Bank, the other Financial Creditor having voting share at 12.90% opposed for approval of the Resolution Plan. The minimum required percentage of voting for approval of the Resolution Plan as per the latest amendment is 66%. In this case, the Resolution Plan with voting share of 87.10 of the Financial Creditors approved the plan.
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> 29. The other contention raised that upfront payment is below the revised liquidation value and therefore, the Plan could not be accepted. On the other hand, Hon'ble NCLAT has held in Company

WWW.LIVELAW.IN

Appeal No.637/2018 that this Tribunal to decide the Application under Section 31 of IBC without being influenced by the previous order. When such is the case, the revised Liquidation value has no role to pay while considering the Resolution Plan submitted by M/s MSL. The Tribunal has to test the Resolution Plan with reference to provisions of Section 30 (2) of IBC. The Resolution Professional certified that Plan of M/s MSL is in conformity with provisions of Section 30 (2) of the Code. So, the Liquidation Value prior to re-determination if taken into account, the upfront payment offered by M/s MSL is over and above the Liquidation Value. Therefore, the objection taken by the Director (Suspended Board) and also Indian Bank could not be taken into account in view of the direction of Hon'ble NCLAT.

30. The next contention raised that the Resolution Applicant has not obtained prior approval of the CCI as required under Section 31 (4) of the Code. The Counsel for Resolution Professional would contend that there is no need to obtain prior approval of CCI as the plan submitted by M/s MSL does not fall under the provisions of CCI. The Director (Suspended Board) has raised the same in the 9th CoC meeting and it is answered that such approval is not necessary. Even otherwise Section 31(4) provides that necessary approval required under any law for the time being in force is to be obtained by Resolution Applicant within a period of one year or within the prescribed period under such law. Therefore, Resolution Applicant can obtain necessary approvals in a period of one year if it is required. Thus, the Resolution Plan of M/s MSL filed by Resolution Professional is to be approved as it meets all the requirements of Section 30 (2) of IBC.

WWW.LIVELAW.IN

> 31. In the result, the Resolution plan submitted by M/s Maharashtra Seamless Limited is approved and that the same shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the Resolution Plan.
>
> 32. The revival plan of the company in accordance with the approved resolution plan shall come into force with immediate effect. The moratorium order passed by this Tribunal under Section 14 shall cease to have vacated.
>
> 33. The resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the IBBI to be recorded on its database.
>
> 34. CA No. 472/2018 in CP (IB) No.49/7HBD/2017 is disposed of in terms of the above." (quoted verbatim)

12. The complaint of Padmanabhan Venkatesh, one of the original promoters and the Bank before the NCLAT was primarily on the ground that the approval of resolution plan amounting to Rs.477 crores was giving the Resolution Applicant windfall as they would get assets valued at Rs.597.54 crores at much lower amount. The other ground urged by the Bank was that the Area Projects Consultants Private Limited, one of the Resolution Applicants had made revised

WWW.LIVELAW.IN

offer of Rs.490 crores, which was more than the amount offered by the MSL. In course of the hearing of the appeal, it appears that the successful Resolution Applicant had indicated infusion of more funds, which was taken into consideration by the NCLAT. This would appear from the following passage of the order of the NCLAT under appeal before us:-

> "24. It was submitted that actually the total exposure of the 'Successful Resolution Applicant' is around Rs.657.50 Crores although Rs. 477 Crores is upfront amount. In addition to that Rs. 180.50 Crores which would be infused directly in the 'Corporate Debtor' by 'M/s. Maharashtra Seamless Ltd.'- (4th Respondent). Further, Rs. 57 Crores would be infused towards 25% margin money of working capital expenditure. Moreover, in fact, the total working capital Rs. 224 Crores, the balance to be taken as loan from Bank(s), which would also require Corporate Guarantees of the 4th Respondent.
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> 25. It was further contended that the 'Corporate Debtor' plant has been lying closed for the last three years. Additionally, in all its operational life prior thereto, the 'Corporate Debtor' over a period of seven years could not produce even a total of 1,50,000 MT, which is supposed to be its production capacity of one year. Thus, it was only after due and in-depth consideration, including taking into account extensive further investments, which would mandatorily have to be made to get the Corporate Debtor' up and running, that the 'Successful Resolution Applicant' offered Rs. 477 Crores, which

WWW.LIVELAW.IN

> was payable within 30 days of the approval of the plan.
>
> 26. Therefore, according to counsel for 4th Respondent, the aforesaid infusion of funds by the 4th Respondent aggregating Rs.657.50 Crores is for the maximization of the assets of the 'Corporate Debtor'." (quoted verbatim)

13. The NCLAT, however, found the reasoning of the Adjudicating Authority flawed, inter-alia, for the following reasons:-

> "34. Therefore, it is clear that the 'Committee of Creditors' has also accepted the average of the liquidation value which comes to Rs. 597.54 Crores and on the basis of which the 'Resolution Plan' was considered. If the 'Resolution Plan' is considered, then it will be evident that 25% of the admitted dues of the 'Financial Creditors' have been allowed in the 'Resolution Plan'. On the other hand, the 'Operational Creditors' have been discriminated. The liquidation value being Rs.597.54 Crores, the upfront payment suggested by the 'Resolution Applicant' being less i.e., Rs. 477 Crores, the payment to the 'Operational Creditors' is lower than the proportionate liquidation value, therefore, the 'Resolution Plan', as approved by the Adjudicating Authority is against Section 30(2) (b) of the 'I&B Code'." (quoted verbatim)

We have reproduced the final finding and directions of the NCLAT earlier in this judgment.

WWW.LIVELAW.IN

14. The appeal of MSL argued by Mr. Kapil Sibal, learned senior counsel, is mainly on the ground that the NCLAT had exceeded its jurisdiction in directing matching of liquidation value in the resolution plan. MSL in the appeal have sought to sustain the resolution plan but their prayer in the interlocutory application is refund of the amount remitted coupled with the plea of withdrawal of resolution plan. However, their main case in the appeal is that final decision on resolution plan should be left to the commercial wisdom of the Committee of Creditors and there is no requirement that resolution plan should match the maximized asset value of the corporate debtors. On the other hand, Mr. Abhishek Manu Singhvi, learned senior counsel appearing for two main financial creditors, while supporting the main appeal of Mr. Sibal has resisted the plea for withdrawal of the resolution plan and refund of the sum already remitted by Mr. Sibal's clients. Mr. Singhvi has highlighted the fact that the exposure of his clients to the total debt of the corporate debtors is Rs.2060 crores and his clients being the primary creditors to the tune of 87.10% of the total dues, it was his clients who would have suffered

WWW.LIVELAW.IN

loss, if any, on account of resolution plan not matching the liquidation value.

15. On the aspect of withdrawal of the plan, Mr. Singhvi has referred to Section 12-A of the 2016 Code. His submission is that the only route through which a resolution applicant can travel back after admission of the resolution plan is the aforesaid provision. Section 12-A of the 2016 Code stipulates:-

> "**12A. Withdrawal of application admitted under section 7, 9 or 10.** – The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

16. It is admitted position that approximately Rs.472 crores have been remitted to the financial creditors which was received from Mr. Sibal's clients. The D.B. International Asia Limited, having 73.40% voting shares in the CoC has also assailed the impugned order on grounds similar to that taken by the MSL.

17. We shall address two issues in this appeal. The first one is whether the scheme of the Code contemplates that the sum forming

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part of the resolution plan should match the liquidation value or not. The second question we shall deal with is as to whether Section 12-A is the applicable route through which a successful Resolution Applicant can retreat. Before we proceed to answer these two questions, we must indicate that before the Appellate Authority substantial argument was advanced over failure on the part of the Adjudicating Authority to maintain parity between the financial creditors and operational creditors on the aspect of clearing dues.

18. Section 30 (2) (b) of the Code specifies the manner in which a resolution plan shall provide for payment to the operational creditors. The provisions of Section 30 of the Code is reproduced below:-

> "**30. Submission of resolution plan. –** (1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.
>
> (2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
>
> (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

WWW.LIVELAW.IN

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

> (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
> (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

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

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

Explanation 2. — For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;
(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

WWW.LIVELAW.IN

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

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
(d) the implementation and supervision of the resolution plan;
(e) does not contravene any of the provisions of the law for the time being in force;
(f) conforms to such other requirements as may be specified by the Board.

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

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

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

WWW.LIVELAW.IN

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

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

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

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

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

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

WWW.LIVELAW.IN

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

19. The manner in which the claims of the operational creditors shall be considered in a CIRP has been dealt with by a co-ordinate Bench of this Court (of which two of us, Nariman J. and Ramasubramanian J. were members) in the case of **Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta,** decided on 15th November, 2019 in **Civil Appeal Nos. 8766-8767 of 2019** (2019 SCC OnLine SC 1478). It has been held in paragraph 53 of this judgment in the said report:-

> "53. However, as has been correctly argued on behalf of the operational creditors, the preamble of the Code does speak of maximisation of the value of assets of corporate debtors and the balancing of the interests of all stakeholders. There is no doubt that a key objective of the Code is to ensure that the corporate debtor keeps operating as a going concern during the insolvency resolution process and must therefore make past and present payments to various operational creditors without which such operation as a going concern would become impossible. Sections 5(26), 14(2), 20(1), 20(2)(d) and (e) of the Code read with Regulations 37 and 38 of the 2016 Regulations all speak of the corporate debtor running as a going concern during the insolvency

WWW.LIVELAW.IN

resolution process. Workmen need to be paid, electricity dues need to be paid, purchase of raw materials need to be made, etc. This is in fact reflected in this court's judgment in **Swiss Ribbons** (supra) as follows:-

> **"26**. The Preamble of the Code states as follows:
>
> "An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."
>
> **27**. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate

WWW.LIVELAW.IN

debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme— workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1] at para 83, fn 3).” (emphasis supplied)

WWW.LIVELAW.IN

"54. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of

WWW.LIVELAW.IN

> the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

20. It has been further been held in the case of **Essar Steel (supra):-**

> "124. The other argument of Shri Sibal that Section 53 of the Code would be applicable only during liquidation and not at the stage of resolving insolvency is correct. Section 30(2)(b) of the Code refers to Section 53 not in the context of priority of payment of creditors, but

WWW.LIVELAW.IN

> only to provide for a minimum payment to operational creditors. However, this again does not in any manner limit the Committee of Creditors from classifying creditors as financial or operational and as secured or unsecured. Full freedom and discretion has been given, as has been seen hereinabove, to the Committee of Creditors to so classify creditors and to pay secured creditors amounts which can be based upon the value of their security, which they would otherwise be able to realise outside the process of the Code, thereby stymying the corporate resolution process itself.”

21. Submission of the respondents supporting the impugned order of NCLAT has been in reference to Section 30(2)(b) of the 2016 Code. We have taken note of submission made by Mr. Singhvi that the operational creditors of the corporate debtor come way down in the priority list for distribution of assets under Section 53 of the Code in forming our opinion over applicability of clause 38(1) of the 2016 Regulations expressed in the previous paragraph. But on this point, a clear guidance comes from the decision of co-ordinate Bench in the case of **Essar Steel (supra)** on the point of dealing with the claims of operational creditors. It has also been held in that judgment in paragraph 70 of the said report:-

WWW.LIVELAW.IN

"70. By reading paragraph 77 de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite

WWW.LIVELAW.IN

> majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."

22. But the controversy on there being no provision in the resolution plan for operational creditors is only academic now. Before the Appellate Authority itself the successful Resolution Applicant had agreed to clear the dues of the operational creditors in percentage at par with the financial creditors. Moreover, none of the operational creditors has come before us questioning the legality of the resolution plan. It would appear from para 29 of the order under appeal:

> "29. It was submitted that the claims received of the 'Operational Creditors' by the Respondent No.1 were to the tune of Rs.2,26,70,153/- whereas the claims verified were of Rs.2,02,88,948/-. However, it was submitted that the 4th Respondent is willing to pay the verified 'Operational Creditors' at the same percentage as that of the 'Financial Creditors', i.e. 25%, which shall be paid within 30 days of the 'Successful Resolution Applicant' getting clear and unfettered possession of and rights to the 'Corporate Debtor'."
> (quoted verbatim)

WWW.LIVELAW.IN

23. The Adjudicating Authority has primarily relied on Section 31 of the Code in approving the resolution plan. The said provision reads:

> "**31. Approval of resolution plan.** – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.
>
> Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.
>
> (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.
>
> (3) After the order of approval under sub-section (1),—
>
> > (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

WWW.LIVELAW.IN

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

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later.

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

24. On behalf of the Indian Bank and the said promoter of the corporate debtor, reliance was placed on Clause 35 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

"**35. Liquidation value.** (1) Liquidation value is the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date.

(2) Liquidation value shall be determined in the following manner:

WWW.LIVELAW.IN

> (a) the two registered valuers appointed under Regulation 27 shall submit to the interim resolution professional or the resolution professional, as the case may be, an estimate of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;
>
> (b) if in the opinion of the interim resolution professional or the resolution professional, as the case may be, the two estimates are significantly different, he may appoint another registered valuer who shall submit an estimate computed in the same manner; and
>
> (c) the average of the two closest estimates shall be considered the liquidation value.
>
> (3) The resolution professional shall provide the liquidation value to the committee in electronic form."

25. Now the question arises as to whether, while approving a resolution plan, the Adjudicating Authority could reassess a resolution plan approved by the Committee of Creditors, even if the same otherwise complies with the requirement of Section 31 of the Code. Learned counsel appearing for the Indian Bank and the said erstwhile promoter of the corporate debtor have emphasised that there could be no reason to release property valued at Rs.597.54 crores to MSL for Rs.477 crores. Learned counsel appearing for these two respondents

WWW.LIVELAW.IN

have sought to strengthen their submission on this point referring to the other Resolution Applicant whose bid was for Rs.490 crores which is more than that of the appellant MSL.

26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of **Essar Steel (supra).** We have quoted above the relevant passages from this judgment.

27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan.

WWW.LIVELAW.IN

28. The Appellate Authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of **Essar Steel (supra)**, the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order

WWW.LIVELAW.IN

of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.

29. So far as the IA taken out by the MSL is concerned, in our opinion they cannot withdraw from the proceeding in the manner they have approached this Court. The exit route prescribed in Section 12-A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code. In this case, having appealed against the NCLAT order with the object of implementing the resolution plan, MSL cannot be permitted to take a contrary stand in an application filed in connection with the very same appeal. Moreover, MSL has raised the funds upon mortgaging the assets of the corporate debtor only. In such circumstances, we are not engaging in the judicial exercise of determining the question as to whether after having been successful in a CIRP, an applicant altogether forfeits their right to withdraw from such process or not.

30. Certain allegations were made by the MSL over failure on the part of the Resolution Professional in taking possession of the assets

WWW.LIVELAW.IN

of the corporate debtor and subsequently in their failure in handing over the same to MSL. These issues are factual. Mr. Neeraj Kishan Kaul, learned senior counsel appearing for the Resolution Professional disputed such allegations. The order of the NCLAT does not deal with this aspect of the controversy and we do not think we, in exercise of our jurisdiction under Section 62 of the Code ought to engage ourselves in determining that question.

31. We, accordingly, allow the appeal of MSL and set aside the order of the NCLAT under appeal before us. The order of the Adjudicating Authority passed on 21st January 2019 is affirmed. MSL, however, shall remit additional sum of Rs.50,72,237/- to the Resolution Professional for further remittance to the operational creditors as per their dues. This sum has already been offered to the operational creditors, as recorded in the impugned order. We dismiss the I.A.No.115118 of 2019 taken out in connection with C.A.No.4242 of 2019. C.A.No.4967-68 of 2019 are also allowed on the same reasoning. In view of our aforesaid findings and these directions, we are not going into the question as to whether any illegality was

WWW.LIVELAW.IN

committed by MSL as regards change in composition of Board of Directors of the corporate debtor.

32. We, accordingly, direct the Resolution Professional to take physical possession of the assets of the corporate debtor and hand it over to the MSL (appellant in C.A.No.4242 of 2019) within a period of four weeks. The police and administrative authorities are directed to render assistance to the Resolution Professional to enable him to carry out these directions.

33. All interim orders stand dissolved and connected applications are disposed of.

34. There shall be no order as to costs.

……………………………. J.
(Rohinton Fali Nariman)

……………………………. J.
(Aniruddha Bose)

……………………………. J.
(V. Ramasubramanian)

New Delhi.
Dated: January 22, 2020.