

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 871-872 of 2019

IN THE MATTER OF:

SANTOSH WASANTRAO WALOKAR

Aychit Mandir Road

Behind Bhosala Vedshala

Mahal, Nagpur

Maharashtra – 440 032

...Appellant

Versus

1.Vijay Kumar V.Iyer

Resolution Professional

Murli Industries Limited

Deloitte Toucher Tohmatsu

LLP, Indiabulls Finance Centre

Tower 3, 27th floor Senapati Bapat Marg

Elphinstone Road (West)

Mumbai – 400 013

...Respondent No.1

2.Dalmia Cement (Bharat) Limited

Dalmiapuram

Tiruchirappalli – 621 651

Tamil Nadu

...Respondent No.2

Present:

For Appellant : Mr. Mehul M. Gupta with Mr. Shivek Trehan, Advocates

For Respondents: Mr. Ishaan Chhaya with Ms. Aditi Helder, for R-1.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Ajay Bhargava, Ms. Wamika Trehan, Mr. Sylona Mohapatra, Ms. Varsha Sethi and Mr. Jayant Mehta for R-2.

Mr. Raju Ramachandranwith Ms. Sumesh Dhawan, Advocates for RP.

With

Company Appeal (AT) (Ins) No. 924 of 2019

**M/S Sneha Traders
Main Road, Itwari, Umrer,
District Nagpur – 441 203...Appellant**

Versus

**Vijay Kumar V.Iyer,
Resolution Professional for
Murli Industries Limited
Deloitte Toucher Tohmatsu
LLP, Indiabulls Finance Centre
Tower 3, 27th floor Senapati Bapat Marg
Elphinstone Road (West)
Mumbai – 400 013**

...Respondent

Present:

For Appellant :Mr. Amit R. Agarwal ,Advocate

For Respondents: Mr. Sumesh Dhawan, Advocate for RP

**Mr. R.P Agarwal and Mr Nitish Kumar,Advocate for
EARC**

With

Company Appeal (AT) (Ins) No. 925 of 2019

M/s Shamrao Baliram

.....Appellant

Versus

**Vijay Kumar V.Iyer
Resolution Professional
Murli Industries Limited
Deloitte Toucher Tohmatsu
LLP, Indiabulls Finance Centre
Tower 3, 27th floor Senapati Bapat Marg
Elphinstone Road (West)
Mumbai – 400 013**

.....Respondent

**For Appellants : Ms. Shruti Pandey with Ms. Arveena Sharma,
Advocates**

**For Respondents : Mr. Arun Kathpalia, Sr. Advocate, with Mr. R.P.
Agarwal , Ms.Bhumika.B Advocates for ARC. Mr.
Raju Ramachandran with Ms. Sumesh Dhawan,
Advocates of RP**

With

Company Appeal(AT) (Insolvency) No. 863 of 2019

**Mr.Nitin Murlidhar Suganchand Agrawal
'Mittal Villa', 222,
East Wardhaman Nagar,
Nagpur -440 008**

....Appellant

Versus

**1.Mr.Vijay Kumar V.Iyer
Resolution Prefessional
Deloitte Touche Tohmastsu India LLP,
Indiabulls Finance Centre, Tower 3,
27th Floor Senapati Bapat Marg,
Elphinstone Road (West)
Mumbai – 400 13**

2.M/s.Murali Industries Limited

**101 Jai Bhavani Society Wardhman Nagar
Nagpur MH 440008. ...Respondents**

For Appellants: Mr. Nitish Jain with Ms. Shruti Pandey, Advocates

**For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. R.P. Agarwal,
Mr. Nitish Kumar, Advocates for EARC**

With

Company Appeal (AT) (Insolvency.) No. 867 of 2019

**Mr. Murlidhar Suganchand Agrawal
'Mittal Villa', 222,
East Wardhaman Nagar,
Nagpur -440 008**

....Appellant

Versus

**1. Mr. Vijay Kumar V. Iyer
Resolution Professional
Deloitte Touche Tohmatsu India LLP,
Indiabulls Finance Centre, Tower 3,
27th Floor Senapati Bapat Marg,
Elphinstone Road (West)
Mumbai – 400 13**

**2. M/s. Murali Industries Limited
101 Jai Bhavani Society Wardhman Nagar
Nagpur MH 440008. ...Respondents**

For Appellants: Mr. Nitish Jain with Ms. Shruti Pandey, Advocates

**For Respondents: Mr. Arun Kathpalia, Sr. Advocate with Mr. R.P. Agarwal,
Mr. Nitish Kumar, Advocates for EARC**

With

Company Appeal(AT) (Insolvency) No. 880 -881 of 2019

**Mr. Lalchand Maloo
239, Radha House,
East Wardhaman Nagar
Nagpur – 400 008
Versus**

.....Appellant

**1.Vijay Kumar V.Iyer
Resolution Professional
Murli Industries Limited
Deloitte Toucher Tohmatsu
LLP, Indiabulls Finance Centre
Tower 3, 27th floor Senapati Bapat Marg
Elphinstone Road (West)
Mumbai – 400 013**

....Respondent no.1

**2.Dalmia Cement
Dalmia Cement, Dalmiapuram
Dist. Tiruchirappalli
Tamil Nadu 621 651**

...Respondent no.2

For Appellants: Mr. Nitish Jain with Ms. Shruti Pandey, Advocates

For Respondents: Mr.Ramji Srinivasan, Sr. Advocate with Mr. Ajay

Bhargava, Ms Wamika Trehan , Mr. Sylona Mohapatra

Ms. Varsha Sethi , for R-2. Mr. Arun Kathalia, Sr.

Advocate with Mr. R.P. Agarwal, Mr. Nitish Kr.

Advocates for EARC

Mr. Nitish Kumar, Advocates for EARC

With

Company Appeal(AT) (Insolvency) No. 892-893 of 2019

Ms. Prakriti Nigam
Deputy Commissioner
CGST, Central Excise & Service Tax
Division Chandrapur,
Jagannath Baba Ngar,
Chandrapur (M.S.) – 442 401

.... Appellant

Versus

Vijay Kumar V.Iyer
Resolution Professional for
Murli Industries Limited
Deloitte Toucher Tohmatsu
LLP, Indiabulls Finance Centre
Tower 3, 27th floor Senapati Bapat Marg
Elphinstone Road (West)
Mumbai – 400 013

....Respondent

For Appellants: Ms. Sangeeta Mishra, Advocate for Appellant

For Respondents: Mr.Sumesh Dhawan, Ms Varsala Kak, Ms Geetika
Sharma, Ms Aditi Halder

JUDGMENT

(24thJanuary, 2020)

Dr. Ashok Kumar Mishra, Technical Member

1. In all these appeals as common impugned order dated 22.07.2019 ('Impugned Order-1') read with 03.07.2019 ('Impugned Order-2') passed by Adjudicating Authority - National Company Law Tribunal, Mumbai Bench ('Adjudicating Authority') is under challenge and common question of law beinginvolved, these appeals were heard together and are being disposed of by this common judgment.

2. **Company Appeal(AT) (Insolvency) No. 871-872 of 2019** has been preferred by the workers of the paper unit and solvent extraction industrial units of Murli Industries Ltd.(Corporate Debtor).The brief case of the Appellant is that the Adjudicating Authority has erroneously approved the Resolution Plan submitted by the Successful Resolution Applicant – DalmiaCement (Bharat) Limited (R-2) vide the impugned order. The approved Resolution Plan has been alleged to be discriminatory and threatening the livelihood of 1184 workers of the paper unit and solvent extraction industrial units of Murli Industries Ltd. ('Corporate Debtor') by not paying outstanding wages and compensation for retrenchment as per the provisions of Industrial Disputes Act, 1947.
3. According to the Appellant, as per the Insolvency and Bankruptcy (Amendment) Act, 2019 ('Amendment Act, 2019'), their claims stand to be treated pari passu with the claims of the secured financial creditors of the Corporate Debtor in accordance with Section 53(1) of the I&B Code.
4. Further it has been submitted that the present initiation of CIRP is not tenable in view of the winding up petition pending before Hon'ble High Court of Bombay, Nagpur Bench, wherein a provisional Liquidator had been appointed vide order dated 21.03.2017.

The questions that arise for consideration in the present appeal are:-

- i. Whether the approval of Resolution Plan and the distribution/payment to various stakeholders therein was in accordance with the provisions of I&B Code.
- ii. Scope and ambit of jurisdiction of Adjudicating Authority and Appellate Tribunal while approving Resolution Plan Whether a conditional Resolution Plan can be approved?
- iii. Whether those claims that are not dealt under the resolution plan can be held to be extinguished under the provisions of the I&B Code?
- iv. Whether the Adjudicating Authority has power to modify its own order?
- v. Whether the initiation of CIRP was vitiated in view of the pendency of winding up petition before the Hon'ble High Court of Bombay, Nagpur Bench?

5. The Resolution Professional ('RP') has submitted that the present appeal is infructuous and not maintainable in view of the fact the Hon'ble High Court of Bombay had granted leave to the Respondents to initiate CIRP vide Order dated 02.11.2018 and put the matter to rest by retrospectively validating the CIRP. However, the RP also submitted that in view of Section 238 of I&B Code, overriding effect has been given to the I&B Code over any other law in force and therefore the Adjudicating Authority had rightly initiated insolvency proceedings by admitting application of Edelweiss Asset Reconstruction Company Ltd. under Section 7 of the I&B Code.
6. Furthermore, the RP submitted that the Adjudicating Authority had rightly applied the doctrine of commercial wisdom of Committee of Creditors ('CoC') as propounded by Hon'ble Supreme Court in '*K. Sashidhar Vs. Indian Overseas Bank, Civil Appeal No. 10673 of 2018*' and not interfered with the commercial decision of the CoC with regard to the resolution of the Corporate Debtor. Therefore, as per the RP the Adjudicating Authority was well within its jurisdiction while approving the resolution plan.
7. The Respondent-2 submits that the Appellant is neither aggrieved nor treated in an unfair manner or at all prejudiced under the Resolution Plan. It was submitted by Respondent -2 that the Resolution Plan never envisaged any retrenchment in contravention of the provisions of the Industrial Disputes Act, 1947 ('ID Act') and on the contrary under the plan the Corporate Debtor was required to obtain consent of the concerned statutory authorities under the ID Act. Further, it was submitted by the Respondent -2 that the Adjudicating Authority had expressed its observations and suggested certain modifications to the Resolution Plan with a direction to the RP seeking acceptance of the said plan from Respondent -2, which were duly complied with. It was submitted by Respondent - 2 that the conditions with regard to consents, reliefs and concessions contained in Schedule 2 of the Resolution Plan were essential and indispensable for revival of the Corporate Debtor and hence, Respondent - 2 had requested the Adjudicating Authority for clarification that the conditions mentioned in the said Schedule be considered by the relevant authorities on their own merits within a prescribed timeline.

8. Respondent -2 has also relied upon Hon'ble Supreme Court's judgment in '*K. Sashidhar Vs. Indian Overseas Bank*' (supra) in its submissions with regard to the Adjudicating Authority having rightly chosen not to interfere with matters that purely fall within the domain of commercial decisions of the CoC. [Paras 33, 48, 53] Further, it was submitted that the Resolution Plan is wholly compliant with the amended Section 30(2)(b) and Section 53 of the I&B Code inasmuch as the employees and workmen's admitted dues have been proposed to be paid in equal proportion to the admitted dues of the secured and unsecured financial creditors of the Corporate Debtor.

Modifications/Clarifications		
Issue	Order date 22.07.2019	Order dated 03.07.2019
Approvals from Statutory Authorities	Wider approval cannot be granted by this Adjudicating Authority, and the Resolution Applicant has to comply with the directions of Directorate of Geology Government of Maharashtra.	The relevant authority to consider the application of the Successful Resolution Applicant/Corporate Debtor, on its own merits within a reasonable time frame. The Successful Resolution Applicant will be required to comply with the applicable laws and directions of such relevant authorities
Management of Corporate Debtor	The resolution applicant has also proposed that the management and control of the Corporate Debtor will be through Deloitte Touche Tohmatsu India LLP which is not acceptable since this entity cannot exercise the powers of the board of the corporate debtor.	Managing Committee' comprising of the representative of the Committee of Creditors to control the Corporate Debtor till the time the Successful Resolution Plan is being implemented by the Successful Resolution Applicant, in consultation with and in trust for the Successful Resolution Applicant.
Conditions prior to Implementation of Plan	'Pre-effective Date Conditions and obligations', absolving the Resolution Applicant of any obligation if the conditions outlined in Schedule 2 (Conditions to implementation of the plan) are not met to the	The Resolution Plan shall be implemented immediately on receipt of the required permissions/licenses as specified under item 2 and 3 of the Schedule 2 of the resolution plan.

	satisfaction of the Resolution Applicant, cannot be accepted for being in contravention of IBC. The resolution plan is conditional to the fulfilment of various conditions, approvals from various authorities etc. and the same is provided in schedule 2 of the Resolution Plan. <u>The said reliefs and concessions are not granted.</u>	The Successful Resolution Applicant may apply to the relevant authority under the applicable law for the reliefs sought in the Schedule 2 and the relevant authority to consider the application of the Successful Resolution Applicant/Corporate Debtor, on its own merits. <u>The Successful Resolution Applicant shall comply with the applicable laws and directions of the relevant authority.</u>
Extinguishment of Claims	The Resolution Applicant has sought extinguishment of all claims. However, it is clarified that only crystallized liabilities of the Corporate Debtor shall stand extinguished on the approval of this resolution plan. The contingent liabilities shall exist, and no waiver can be provided for them.	All claims that were either not filed or not admitted during CIRP in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 shall stand extinguished. Further, claims admitted/verified by the Resolution Professional shall stand settled and extinguished as per the Resolution Plan.
	The Resolution Applicant has sought extinguishment of all claims along with abatement of any related legal proceeding including criminal proceedings; however, this Adjudicating Authority cannot grant any such reliefs. Such proceedings shall proceed by the law. Any undertaking relating to applicability of law will not be part of the Resolution Plan.	The Resolution Applicant has sought extinguishment of all claims along with abatement of any related legal proceeding including criminal proceedings. Such proceedings shall proceed by the law. Any undertaking relating to applicability of law will not be part of the Resolution Plan.

9. Company Appeal (AT) (Ins) No.924 - 925 of 2019 has been preferred by the Operational Creditor to the corporate debtor who filed its claim dated 5th May 2017 ("AS FIRSTCLAIM") and the following facts are necessary to be pointed out with regard to the present issue:

The Appellants here are engaged in the business of Trading and Brokerage of grains and pulses also appellant acts as an commission agent for other industries and enterprises. The corporate debtor approached the appellant to take services and subsequently the corporate debtor issued an authority letter Dated November 21, 2013 which gives authority to the appellant to act as commission agent for the corporate debtor, pursuant to the authority letter the appellant acting as an commission agent on the behalf of corporate debtor the appellant purchased soya beans on lieu of such purchase the appellant issued various debit notes on the corporate debtor which is an amount of Rs. 3,23,03,256 is due and payable by the corporate debtor till march 31,2017

It is submitted by the appellant that its claim has rejected by respondent, inadvertently on account of lack of knowledge and proper advice and the said claim was submitted in an incorrect form which was submitted by the appellant vide speed post. It is also submitted by the appellant that the claim he has submitted the claim through speed post and subsequently he was expecting reply from the Resolution Professional through the same mode of communication. The reason given by the appellant is that he resides in such a geographical location which is located in the interior region of Nagpur, Maharashtra where internet and email access is sparsely available. The grievance of the Appellants in these two appeals is with regard to non-consideration of their claims by the Resolution Professional ('RP') and the consequent non-inclusion in the Resolution Plan as well as the non-adjudication of their claims by the Adjudicating Authority.

The RP in response to the said claim form sent via email dated 13.05.2017 and 15.11.2017 to the appellant, whereby the RP directed the appellant to file its claim in a proper claim form. It is

submitted by the Resolution Professional that the appellant's averment that the Resolution Professional is bound to respond by postal services and not by mail is frivolous and respondent contented that the appellant had in its own proof of claim filed in the year 2017 i.e. initial claim and there the appellant had mentioned the email address wherein it can be contacted /communicated and hence the defense of the appellant that it did not have access to the email and computers is frivolous and devoid of any merit. It is also submitted by the respondent that appellant had at sub-paragraph 7.9 to the appeal clearly accepted that it had communicated with the respondent through email dated February 28, 2019 and the same is enough proof to depict that the appellant had overlooked the emails dated May 13,2017 and November 15,2017 sent by respondent and has as an afterthought filed this frivolous appeal. The Resolution Professional has submitted that the Appellants had not submitted their claims along with requisite documents and evidences as mandated by the I&B Code and Regulations framed there under within the stipulated timelines, despite numerous opportunities given.

10. **Company Appeal(AT) (Insolvency) No. 863 of 2019** has been filed by Shri Nitin Murlidhar Agarwal & and **Company Appeal (AT) (Insolvency.) No. 867 of 2019** has been filed by Shri. Murlidhar Sugachand Agarwal under section 32 Read with Section 61(3), IBC. Both the Appellants are unsecured financial creditors. Both the applications seek direction to set aside the Impugned orders dated 03.07.2019 passed by Ld. National Company Law Tribunal, Mumbai bench. The contention on behalf of the counsel for both the Appellants is that Ld. Adjudicating Authority in defiance of the provisions of the code rejected the application for considering claim filed by the Appellants as unsecured financial creditors. It is stated by them that the Ld. Adjudicating

Authority further failed to appreciate that that the Resolution Professional kept the Claim filed by the Appellants in “abeyance/pending verification” in disregard to the documents filed by the Applicant wherein the default on account of corporate debtor is clearly established. It is stated that in case of financial debt, the question of dispute does not arise and it is only the occurrence of default which has to be considered.

11. In reply the Resolution Professional for Murli Industries Limited submits that the existence of debt claimed by the both the applicants has been contested by the corporate debtor in Company Petition No.23 and Company Petition no. 24 of 2016 before the Hon’ble Bombay High Court, Nagpur Bench. The resolution professional is informed by the corporate debtor that the stand taken by the corporate debtor in the winding up proceedings is that corporate debtor has already repaid the debt of Rs. 1,00,00,000 and that of 250,00,000 owed to the Applicant to an entity viz. M/s Mittal Finance and Investment run by both the Appellants. Documents furnished by the Appellants were also insufficient to decide their claim as stated. It is also stated that the resolution professional is not empowered to adjudicate upon a disputed claim and that the purported debt of the Appellant herein could not be established from a prima facie perusal of documents hence it was not within the capacity of respondent no.1 as resolution professional of corporate debtor to either admit or reject the Appellants claim.

12. **Company Appeal(AT) (Insolvency) No. 880 -881 of 2019** has been preferred by Mr. Lalchand Maloo, Promoter/Director and Guarantor of Murli Industries and a member of the suspended board of director under section 32 read with section 61(3) , IBC against the order dated 03.07.2019 and 22.07.2019 passed by Ld. Adjudicating Authority whereby the Adjudicating Authority has approved the Resolution Plan submitted by Dalmia Cement(Bharat) i.e. Respondent No.2.

13. The Appellant submits that the Adjudicating Authority by its order dated 22.07.2019 erroneously, illegally and in excess of its jurisdiction has modified its order dated 03.07.2019 and has approved the Approved the Resolution Plan Submitted by Dalmia Cement. It is submitted that the Adjudicating Authority has exceeded its jurisdiction by reviewing and modifying its order as the same is not permissible, and is contrary to the provisions of IBC.
14. It is further submitted that the approved resolution plan is not in accordance with Section 30(2) of IBC and is in contravention to Contract Act, 1872 and Industrial Disputes Act as the Adjudication Authority failed to consider that terms of Regulation 38 of IBC requires source of fund to be mentioned in the Resolution plan which was absent in the resolution plan submitted by resolution applicant as duly observed by the Adjudicating Authority as well. The appellant submits that the Adjudicating Authority vide its order dated 22.07.2019 has approved the Conditional Resolution plan which is in contravention to its own order dated 03.07.2019 on application seeking modification of the latter order. The appellant further submits that the Adjudicating Authority has enabled a '*Managing Committee*' to be formed after the expiry of CIRP which comprises of member of COC to run the Corporate Debtor till the Resolution Plan is implemented, which is illegal as COC is empowered to run/operate the Corporate debtor only during the CIRP period. The OTS offer of the Appellant on behalf of suspended board of Directors which was more than what the Resolution Plan offers was not considered by the Coc.
15. In this regard the Appellant has relied on the decision of this Appellate Tribunal in the matter of Dinesh Goyal V. DCB Bank wherein it was held that the Adjudicating Authority has not been vested with power

to review and modify its own order. In *Mallina Bharathi Rao Vs Gowthami Solvent Oils Ltd. & Ors* the Appellant submits that it was held by this Appellant tribunal that the power of review is not an inherent power thus cannot be invoked.

16. The Appellant submits that such an approval which is conditional is outside the purview of IBC and should have been rejected. The Adjudicating authority observing that the resolution plan is conditional has approved the same. The Appellant further submits that the Adjudicating Authority has erroneously granted liberty to the Resolution Applicant to approach Directorate of Geology, Government of Maharashtra for seeking necessary approval for reinstatement of mining leases and related licenses of the corporate debtor that had lapsed, expired or cancelled during the moratorium period and has in effect modified its order dated 03.07.2019 to approve the resolution plan which is contravention to Section 30(2) (e) of IBC.

17. It is further submitted by the Appellant that in the year 2013 valuation of each of the business unit of the corporate debtor was carried out and the total distress value was valued at Rs. 1943,37,00,000 (Rupees Nineteen Hundred Forty-Three Crores and Thirty seven Lakhs). Whereas, the Liquidation value of the corporate debtor has been calculated to be Rs. 231,10,00,000 (Rupees Two Hundred and Thirty-one Crores and Ten Lakhs only) which is only 11.89% of the distress sale value arrived just 4 years earlier. Thus the Appellant submits that Adjudicating Authority has erroneously applying the principle of commercial wisdom approved the Resolution Plan which does not even maximize the value of the assets of Corporate Debtor.

18. The Respondent No.1 who is the Resolution professional submits that the order dated 22.07.2019 does not amount to recall or review of the order dated 03.07.2019. It is further submitted that there is no irregularity in the exercise of power by the resolution professional as

alleged. It is submitted by the respondent that the CoC has in its commercial wisdom has considered all the aspects in great depth and approved the Resolution Plan by a vote of 100% in this regard. The decision of Supreme Court in K. Shashidhar(supra) is quoted. It is also submitted that incorrect value of the Corporate Debtor was not done as registered valuers were appointed in accordance of Regulation 27 of the CIRP Regulations who determined the liquidation value of the company.

19. The Respondent No.2 who is the successful resolution applicant submits that the Adjudicating Authority has approved the resolution plan in consonance with section 30(2) of IBC as well as with the object of IBC and further that it is not in contravention with any of the law for the time being in force. It is submitted that revival of the Corporate Debtor pursuant to implementation of the successful Resolution plan would be a more beneficial prospect than liquidation of Corporate Debtor. **Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Ors** is quoted to point out that every attempt should be made to run the Corporate Debtor as a going concern and that liquidation should be avoided at all costs.

20. The Respondent No.2 further submits that it has only filed application for clarification/modification of the order and not review recall, hence the order dated 03.07.2017 was neither reviewed nor recalled by the 22.07.2019 order.. In Schedule 2 of the resolution plan conditions to the implementation of the plan is given below :-

Schedule 2

1. Not used

2. The Directorate of Geology and Mining, Government of Maharashtra having issued letters granting its in principle approval, without imposing any onerous conditions, for the reinstatement (together with the surface rights as applicable) of all Mining Leases (and related licenses) of the corporate debtor that have lapsed, expired, been cancelled, terminated or reposed after having compounded, rectified, waived or dispensed with all the Non-Compliance relating to such mining leases.

3. The directorate of industries, Government of Maharashtra (Maharashtra Directorate) having issued letters consenting to or providing its no objection to continuation of the benefit granted to the corporate debtor in respect to its cement undertaking under the PSI 2007 as set out in the letter dated 23 August 2017 sent by the Maharashtra Directorate to the resolution Professional and eligibility certificate granted to the corporate Debtor under the PSI 2007 after having waived the Non-Compliances of the corporate Debtor under the terms and conditions of the related eligibility certificate and disbursal agreement;

4. The Government of Maharashtra Industries, Energy and labour department to consider consenting to (i) the closure of the Paper Undertaking, Se undertaking and corporate office of the Corporate Debtor under Section 25(O) of the industrial dispute Act, 1947 with effect from their respective Production End Dates; and ii) Payment of only the priority workmen, as set out in schedule 8 (Financial Plan) towards full and final discharge of the requirement to pay closure or retrenchment compensation to relevant workmen in accordance with Industries Disputes, Act, 1947 without compliance with relevant procedures laid down for such closure and/or termination of employment and resultant compensation under the industrial and resultant compensation under the industrial disputes Act, 1947;

5. The NCLT order shall contain the conditions mentioned above and the (extinguishment of claims)

The respondent no.2 submits that it has accepted removal of conditions 1,4, and 5 under schedule 2 of the resolution plan. It is further submitted that that it is not seeking reinstatement of any of these leases from Adjudicating Authority and is merely seeking that it should be allowed to make this condition as a part of the Successful Resolution Plan. It is submitted that the permission of the adjudicating authority was sought to include condition No.2 and 3 in the resolution plan. The respondent in this regard requested the Adjudicating Authority to modify the order.

21.**Company Appeal(AT) (Insolvency) No. 892-893** has been preferred by Ms. Prakriti Nigam, Deputy Commissioner, CGST AND CENTRAL Excise Division, Chandrapur, who is the operational creditor of the corporate debtor and the Respondent is an Insolvency Resolution Professional (IRP) with M/s Deloitte Touche Tohmatsu, India, Indiabulls Finance Centre, Mumbai. The appellant submits that the corporate debtor defaulted in payment of Central Excise duty/Service Tax, and the same were confirmed against them under several Adjudication Orders against them under the erstwhile Central Excise Act,1944 and the Finance Act. Total outstanding dues as per the Appellant is 64,04,86,019. NCLT vide order dated 03.07.2019. The Appellant submits that the rejection of claim was only communicated to them by email and not by Post. It is also submitted that during the material period in the wake of introduction of **Goods and Services Tax**, the Appellant – Department was in transitional phase and a lot of transformation and re-organisation of the filed formation was underway and re-deployment of the staff was taking place. The Respondent submitted that the claim of the Appellant was rejected as it was not in prescribed format and hence could not be verified and is not in compliance with the IBC as well as the CIRP regulation. The respondent further submits that the reasons given by the Appellant for the delay in filing the claim after it was rejected first time are baseless and that there is no mandate under IBC and CIRP regulation to communicate by post as well when rejection of claim was communicated to the Appellants by email.

22. It is observed – In respect of CA(AT) (Insolvency) No. 863 of 2019 and 867 of 2019, the Appellant has given a loan in the form of a friendly loan to the Corporate Debtor in the year 2013. The Corporate Debtor on being demanded by the Appellant has issued cheques for the specified amount but later on the Corporate Debtor sought for additional time to arrange for funds and requested the Appellant to return the cheques as the Appellant was ready to pay the entire amount through RTGS. The Appellant has returned the cheques hoping that the Corporate Debtor will duly repay the amount through RTGS/NEFT at the earliest and they were in a very good relations and good understanding but unfortunately in the year 2016 when the Appellant did not get the payment then they have filed winding up Petition before the Hon'ble High Court of Bombay, Nagpur Bench. In the meantime, the Adjudicating Authority has initiated the Corporate Insolvency Resolution Process in April 2017 and thereafter the Appellant has submitted the claim alongwith related documents. The Resolution Professional was unable to determine the existence of the Appellants' claim on account of lack of adequate supporting documents as required by him, which has not been submitted to him by the Appellant in spite of correspondences in 2017. The claim was also challenged by the Corporate Debtor before the Hon'ble High Court of Bombay, Nagpur Bench and the Resolution Professional was unable to firm up the disputed claim. So far as Financial Creditors are concerned only two things "debt" and "default" requires to be proved for initiation of Corporate Insolvency Resolution Process but for firming up the dues, the establishment of claim is a must which he cannot do because of non-submission of the document in the relevant format as required under the Insolvency and Bankruptcy Code, 2016 and related Regulations. Hence, the claim has been rejected.

23. It is further observed in respect of Company Appeal(AT) (Insolvency) No. 892-893 of 2019 & Company Appeal (AT) (Ins) No. 924 - 925 of 2019 that various claims are collected by the Resolution Professional during the CIRP process by inviting the claim from individual, organisations etc. But there are

several micro claimant as also large claimants like Government claimants particularly Sales tax department, Income Tax Department etc., who generally are not filing claim, filing claim at a belated stage or filing not in appropriate format as a result of which Government dues are not considered although it may be reflected in the financial statements/books of Accounts of Corporate Debtor and similarly micro claims relating to Individual, MSME, and other small traders are also not considered by the Resolution Professional because of time constraint, belated receipt or non receipt of the claim even though the same may be provisioned for in the books of Accounts of Corporate Debtor hence in order to strengthen the system including the preparation of information memorandum as per regulation 36 of IBBI, it would be fair and proper if appropriate provision is incorporated under IBBI, (Insolvency Resolution Process for Corporate persons) Regulation 2016 for preparation of Balance Sheet as on date of initiation of CIRP process and the same gets audited from a regular Statutory Auditor of the Corporate Debtor certifying all schedules, including micro details of both Assets and Liabilities so that admitted liabilities in the Corporate Debtor records are not ignored even if such claims are not received in time etc. It will aid & smoothen the existing system of collection and consideration of claim and these small individuals, MSME, SME and Government Department will not be the sufferer. It will also avoid large number of cases being filed by such left out Creditors.

24. The Resolution Plan which is approved on 22.07.2019 is a conditional plan as stated supra at para 20 no doubt, but the same has been approved by Committee of Creditors in its 11th meeting held on December 20th, 2017 as per Affidavit of Resolution Professional dated 11th January, 2020. However in the clarification asked by the Bench on 8th January, 2020, the successful Resolution Applicant vide its affidavit dated 15th January, 2020 submits that the remaining conditions 2 and 3 have been approved in-principle by Ministry for Industries & Mining, Government of Maharashtra, vide order dated 19th September, 2019 and by the Industries, Energy and Labour Department vide

Letter dated 11th September, 2019 read with Letter dated 30th September, 2019 respectively.

25. Apparently it is perceived that Mining at Zutting (18.06 hectares) Tehsil Korpana, Chandrapur is not approved by Department of Mining and Industries. It is also envisaged that the requests of successful Resolution Applicant i.e. M/s. Dalmia Bharat Cement vide its letter dated 13th September, 2019 addressed to the Secretary (Industries) Industries, Energy and Labour Department, Govt. of Maharashtra has been responded by Development Commissioner (India) Directorate of Industries, New Administrative Building, Opp. Mantralaya, Mumbai – 400 032 vide its letter No. 2019/13-17905 dated 30th September, 2019. The same is depicted below for clarity:

“On Dalmia Cement (Bharat) Limited acquiring the majority shareholding of M/s. Murali Industries Ltd will be entitled to receive the incentives under PSI – 2007 for the extended period.”

26. As far as CA (AT) (Insolvency) No.871-872of 2019 is concerned, the workers are asking for revival of paper unit & solvent extraction units. The Resolution Applicant as per his submission that these two units are going to close down but the Committee of Creditors has accepted the Resolution Plan even on this understanding of closure of said units & also aware of the fact that workers are interested in providing a scheme of arrangement that can revive the said unit. The Adjudicating Authority per se will have to go by the Commercial wisdom of Committee of Creditors as has been held in *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Ors. Civil Appeal No. 8766-67 of 2019* and *Ors and K.Sashidhar Vs. K. Sashidhar v. Indian Overseas Bank and Ors.Civil Appeal No.10673 OF 2018*. However, if workers are interested to revive the said units which is also the purpose of Insolvency and Bankruptcy Code, 2016 and Section 230-232 of the Companies Act, 2013 provides for scheme of arrangement; the workers can always go ahead and discuss with the Resolution Applicant/New management and accordingly can

finalize the issue. Since presently workers have not submitted any scheme of arrangement so the Appellate Authority is not in a position to comment on the same. However, it will be open to the workers to bring the scheme of arrangement before the new management for appropriate consideration before the closure of unit and it will be in the public interest also as it involves a large number of workers and their families.

27. The issue raised by the learned Counsel for Appellant in Company Appeal(AT) (Insolvency) No. 880 -881 of 2019 is that Adjudicating Authority has passed two orders dated 03rd July, 2019 and 22nd July, 2019. They have also submitted that the Adjudicating Authority has rejected the proposal of Resolution Applicant vide order dated 03rd July, 2019 and thereafter has reviewed its order and approved the same vide order dated 22nd July, 2019. The Adjudicating Authority has no power to review its own order.

28. The Respondent has made a submission that order dated 03rd July, 2019 was not a final order giving finality of the Application for approval of Resolution Plan. The Adjudicating Authority has directed the answering Respondent to file additional affidavit regarding certain proposed modifications in the Resolution Plan by 12th July, 2019 and the same was complied by answering Respondent. The order of 3rd July, 2019 is reproduced below:

“118. Since we have proposed certain modifications to the Resolution Plan, it further requires the acceptance by the Resolution Applicant. Therefore, Resolution Professional is directed for seeking acceptance from the Resolution Applicant regarding proposed modifications.

119. The acceptance report of the Resolution Applicant is to be filed by 12.07.2019. If acceptance of the proposed modification in the resolution plan is not submitted, then we shall proceed with the liquidation.

120.List on 12.07.2019 for filing additional affidavit of Resolution Applicant regarding acceptance of the modifications in the Resolution Plan.

121.The Registry is directed to immediately communicate this order to the Resolution Professional and the Resolution Applicant.”

29.From the perusal of the above order it appears that the Resolution Applicant was asked to provide the acceptance report by 12th July, 2019 and if, they failed to provide the acceptance report with proposed modification then the Adjudicating Authority shall proceed with the liquidation. The Adjudicating Authority vide its order dated 22nd July, 2019 has approved the Resolution Plan as follows:

“12.Accordingly, the Resolution Plan submitted by the Resolution Professional of the Corporate Debtor for approval of this Tribunal under Section 31 of the Insolvency and Bankruptcy Code, 2016 is approved in terms of this order read with our order dated 03.07.2019 in MA 689/2017

13.The MA 2474/2019 and MA 689/2017 are at this moment allowed and disposed of in terms of this order read with order dated 03.07.2019 in this matter.

14.The Registry is directed to immediately communicate this order to the Resolution Professional and the Resolution Applicant.”

30. The issues raised in the present Appeal is accordingly answered below:

- i. Whether the approval of Resolution Plan and the distribution/payment to various stakeholders therein was in accordance with the provisions of I&B Code.

When 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, 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. Where the Adjudicating Authority is satisfied that the Resolution Plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the Resolution Plan. The Resolution Plan submitted by the Resolution Applicant is conditional and provides for the conditions for the implementation of the plan.

- ii. Scope and ambit of jurisdiction of Adjudicating Authority and Appellate Tribunal while approving Resolution Plan. Whether a conditional Resolution Plan can be approved?

The Adjudicating Authority and Appellate Authority cannot go into the feasibility and viability of the Resolution Plan which requires commercial wisdom of the Committee of Creditors. The Adjudicating Authority and Appellate Authority has to go by the various propositions of law stated above accordingly to which they have to go by the commercial wisdom of committee of creditors while approving the Resolution Plan. The given Resolution Plan is conditional but since according to the express directions given by Supreme Court in the various cases stated above. The Adjudicating Authority per se will have to go the Commercial wisdom of Committee of Creditors.

- iii. Whether those claims that are not dealt under the resolution plan can be held to be extinguished under the provisions of the I&B Code?

The Hon'ble Supreme Court in Essar Judgment has vividly dealt with this issue. A successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to an extra amount coming up for payment after the debts have been dealt by the Resolution Applicant and the Resolution Plan has been approved. This would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the Corporate Debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly who has to be paid in order that it may then take over and run the business of the Corporate Debtor. Therefore, claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such Resolution Plan submitted by the Resolution Professional is approved then those claims would stand extinguished.

- iv. Whether the Adjudicating Authority has power to modify its own order?

Section 420(2) of the Companies Act, 2013 provides as under:

The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

Rule 154 of the NCLT Rules, 2016 provides that:

- (1) Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on Application of any party by way of rectification.

According, the NCLT does not have power to modify its own order but can only correct mistake apparent from the record. The Hon'ble Supreme Court has held in "Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited" that a patent, manifest and self-evident error which does not require elaborate discussion of evidence

or argument to establish it, can be said to be an error apparent on the face of record and can be corrected. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. This does not include the power to modify any substantial part of the judgment which determines rights of one party or the other.

- v. Whether the initiation of CIRP was vitiated in view of the pendency of winding up petition before the Hon'ble High Court of Bombay, Nagpur Bench?

The Hon'ble High Court of Bombay had granted leave to the Respondents to initiate CIRP vide order dated 02.11.2018 and put the matter to rest by retrospectively validating the CIRP. Overriding effect has also been given to the I&B Code over any other law in force and therefore, the Adjudicating Authority had rightly initiated Insolvency proceedings by admitting application of Edelweiss Asset Reconstruction Company Ltd., under Section 7 of I&B Code.

31. In accordance with our appreciation based on the submission made by all the parties, we are of the view that the Resolution Plan as approved by the Adjudicating Authority is in accordance with Insolvency and Bankruptcy Code, 2016 and various propositions of law as laid down by the Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.* Civil Appeal No. 8766-67 of 2019 and *Ors and K.Sashidhar Vs. K. Sashidhar v. Indian Overseas Bank and Ors.* Civil Appeal No.10673 OF 2018.

32. Time and again, the Hon'ble Supreme Court has reiterated the issue on commercial wisdom of Committee of Creditors, hence the Adjudicating

Authority per se is not to be involved in the commercial wisdom area of the Committee of Creditors, particularly, in the approval of commercial side of Resolution Plan/Modified Resolution Plan.

33. We do not find any ground to interfere with the impugned order dated 22nd July, 2019 passed by the Adjudicating Authority and accordingly we uphold the order of National Company Law Tribunal, Mumbai Bench. No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

SS/rk

New Delhi