

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 202 of 2020

[Arising out of Order dated 16.01.2020 passed by the National Company Law Tribunal, New Delhi, Principal Bench in C.A. No. 2683(PB)/2019 in Company Petition No. (IB)-197(PB)/2017].

IN THE MATTER OF:

**Kridhan Infrastructure Pvt. Ltd.
(Now Known as Krish Steel And Trading Private Limited)
& Anr. ...Appellants**

Versus

Venkatesan Sankaranarayan & Anr. ...Respondents

Present:

For Appellant: Mr. Krishnendu Datta & Mr. Udit Chauhan, Advocates

**For Respondent: Mr. Ashwini Kumar Singh, Advocate for R-1
Ms. Misha, Ms. Charu Bansal, Advocates for EARC
Mr. Ashish Makhija, Advocate for Liquidator
Mr. Rupesh Gupta, Intervenor**

J U D G M E N T

Venugopal M. J

Preamble

The Appellant(s) / Resolution Applicant have preferred the instant Company Appeal (AT)(Ins.) No. 202/2020 being aggrieved as against the

order dated 16.01.2020 in C.A. No. 2683(PB)/2019 in Company Petition No. (IB)-197(PB)/2017 passed by the 'National Company Law Tribunal', Principal Bench, New Delhi in partly allowing the application by ordering liquidation of the 'Corporate Debtor', viz. 'Tecpro Systems Ltd.' in the manner laid down in Chapter III of part II of 'I&B' Code, 2016 and issuing necessary directions thereto.

2. Earlier, the Adjudicating Authority, 'National Company Law Tribunal', Principal Bench, New Delhi while passing the impugned order on 16.01.2020 at paragraph 3 to 12, and at paragraph 15 and 16 had observed the following:-

“3. Respondent No. 1 M/s Kridhan Infrastructure Private Limited had submitted an updated Resolution Plan in respect of Corporate Debtor, which was approved by the Committee of Creditors in their 15th CoC meeting held on 08.03.2019 with majority vote of 89.92%. Subsequently the Adjudicating Authority also approved the resolution Plan under

Section 31 of the Code vide order dated 15.05.2019.

4. *It has been alleged that there has been inordinate delay in implementation of the Resolution Plan, as the successful resolution applicant, M/s Kridhan Infrastructures Private Limited has miserably failed to infuse equity funds as per the terms of the Resolution Plan. Besides the successful resolution applicant has not taken over the control of management even after passage of long about 8 months from the date of approval of the resolution plan. It is alleged that the secretarial compliance documents/returns have not been filed with the RoC. There has been non-compliance and non-implementation of the approved resolution plan.*

5. It is submitted that after due deliberations and pursuant to its meeting held on 11th November 2019 and being satisfied of the non-compliance in relation to implementation of Resolution Plan by Resolution Applicant, the erstwhile CoC members have asked the Resolution Professional to put the following resolutions for vote which was passed with requisite majority of 99.28% voting shares.

“Resolution for Liquidation of Corporate Debtor”:

RESOLVED THAT due to inordinate delay in implementation of the Resolution Plan of Techpro Systems Limited (“Corporate Debtor”) by Kridhan Infrastructures Private Limited, the successful Resolution Applicant (“RA”) and non-compliance thereby, it is not feasible or viable to grant any further extensions or

expect implementation of the said Resolution Plan and consequently liquidation proceedings of the Corporate Debtor shall be initiated in terms of the applicable provisions of law.

RESOLVED FURTHER THAT pursuant to Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persona) Regulations, 2016 the Performance Guarantee of Rs. 5 Crores submitted by Kridhan Infrastructures Private Limited be forfeited and appropriated as per terms of the same.

RESOLVED FURTHER THAT the erstwhile Resolution Professional be and is hereby authorized to take necessary steps for filing application before the Adjudicating Authority for annulment of the successful Resolution Plan and for an application for liquidation of the Corporate Debtor under Section 33 of the Insolvency

and Bankruptcy Code, 2016 and for any other proceedings related or incidental to the matter.

Resolution for appointment of Liquidator:

“RESOLVED THAT subject to the order of the Adjudicating Authority under Section 34 of the Insolvency and Bankruptcy Code, 2016, Mr. Ramachandran Subramanian, Registration Number:- IBBI/IPA-001/IP-PO1440/2018-2019/12136 shall act as the liquidator during the liquidation of the Corporate Debtor.

RESOLVED FURTHER THAT pursuant to Section 34(8) of the Insolvency and Bankruptcy Code, 2016, Regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the fee payable

to the Liquidator and support team.

(Ey Restructuring LLP) shall be as

approved by the erstwhile CoC as

follows:

		Months	
Fees as a % of Receipts from	0-12	12-24	More than 24
Sale of Fixed Assets	1.00% of the amount realized	0.75% of the amount realized	0.50% of the amount realized
Return of live BGs	0.50% of the amount returned		

		Months	
Fees as a % of Receipts from	0-24	24-60	More than 60
Arbitration proceedings/claims/projects recovery	1.25 % of the amount realized	1.00% of the amount realized	

OPE, GST and other taxes as applicable, is not

included in the above fee proposal and will be

billed in addition to the above.

Fee also does not include cost of any External Advisors such as Legal, Valuation, Bid Process Advisory, etc. basis for the provisions of the Code.

Fee also does not include employee salaries (Corporate Office & Project Sites) which are required for maintaining Going Concern status of the Company.

Resolution for approval of liquidation costs:

RESOLVED THAT Regulation 2A of IBBI (Liquidation Process) Regulations, it is hereby approved to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated by the liquidator, in proportion to the financial debts owed to the lenders by the Corporate Debtor, and the contributions shall be deposited in a designate escrow account to be opened and maintained in a scheduled bank, within seven days of the passing of the liquidation order as given below:-

<i>Particulars (in INR)</i>	<i>Estimated for Liquidation Process</i>
<i>Liquidators & Support team</i>	<i>To be approved by CoC</i>

<i>OPE for Liquidator and team(against actuals)</i>	<i>13,00,000</i>
<i>RP's Legal Counsel</i>	<i>20,62,500</i>
<i>IT Services Provider</i>	<i>4,09,500</i>
<i>Statutory Audit Fees</i>	<i>12,00,000</i>
<i>Liquidation Process costs*</i>	<i>11,00,000</i>
<i>Others</i>	<i>1,50,000</i>
<i>Sub-total(A)</i>	<i>62,22,000</i>
<i>Salaries, admin overheads and statutory dues</i>	<i>59,06,394</i>
<i>Admin Overheads</i>	<i>34,64,000</i>
<i>Fees for continuing arbitration proceedings</i>	<i>1,00,00,000</i>
<i>Sub-Total(B)</i>	<i>1,93,70,364</i>
<i>Total (A+B)</i>	<i>2,55,92,394</i>

Liquidation Process costs includes fees for liquidation valuers, public announcements cost, EOI costs, MCA Filing fees etc.

Resolution for RP to continue till further order the Adjudicating Authority

RESOLVED THAT the erstwhile RP Mr. Venkatesan Sankaranarayan, to act as the Resolution Professional from the date of filing of the liquidation application with the Adjudicating Authority until further orders/directors, as may be, received from Adjudicating.”

6. During hearing on 18.12.2019 an opportunity was afforded to respondent No. 1 to 3 to file reply within one week thereof. However, neither any reply was filed nor it could be shown as to how the approved resolution plan could at all be implemented.

7. Admittedly the resolution applicant has failed to adhere to any of their timelines for equity infusion even after a period of about 8 months since approval of the resolution plan. There is force in the contention that the respondents have repeatedly failed to honour their own commitments and there was delay in infusion of equity, upfront payment and taking control of the management of the Corporate Debtor, which has threatened the going concern status of the corporate debtor severely.

8. In the facts the erstwhile CoC in its meeting held on 11.11.2019 has passed a resolution for liquidation of the Corporate Debtor with overwhelming majority of 99.28% voting share.

9. *It is pertinent to refer here the provisions of sub-section (3) of Section 33 of the Insolvency and Bankruptcy Code, 2016 which envisages as follows:*

“(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i),(ii)and (iii) of clause (b) of sub-section (1).”

10. *Hon’ble ‘NCLAT’ in the case of Yavar Dhala Vs JM Financial Asset Reconstruction Company Ltd. & Ors. in Company Appeal (AT)(Ins) No. 13 of 2019 decided on 08.03.2019 has observed that on failure of the Resolution Applicant to implement the terms of the resolution plan, liquidation has to follow. The relevant findings of the Hon’ble Appellate Tribunal runs as under:*

“3. In the situation where a Resolution Applicant succeeds as Corporate Debtor but it fails to comply

its assurances in terms of the resolution plan what step is to be taken has been already been laid down in Sub-Section (3) of Section 33 of the I&B Code, which reads as follows:-

“33. (3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).”

4. In view of the specific provision made under the I&B Code, we are of the view that the Adjudicating Authority had no option but to pass order of liquidation and could not have resorted to revival of the Corporate Debtor by taking fresh resolution plans.”

11. Adherence to statutory requirement has to be in toto. When the language of the Code is clear and explicit the Adjudicating Authority must give effect to it whatever may be the consequences.

12. *As a sequel to the aforesaid discussions and in view of non-implementation of the approved resolution plan by Resolution Applicant; Liquidation has to follow in terms of the provisions of Section 33(3) of the Code.*

15. *Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly provides that performance security shall stand forfeited if the resolution applicant fails to implement the approved resolution plan in accordance with the terms of the plan and its implementation schedule. Therefore, as the respondent resolution applicant has failed to implement the approved resolution plan in accordance with the terms of the plan and its implementation schedule. Therefore, as the respondent resolution applicant has failed to implement the approved resolution plan, the performance guarantee of Rs. 5 Crore furnished by the respondent resolution applicant stands forfeited in terms of Regulation 36B(4A) of CIRP Regulations.*

16. *There is an additional prayer for restraining the encashment of 'Bank Guarantees' executed by the*

‘Corporate Debtor’. However, the concerned Banks and the recipients of Performance Guarantees have not been made party. This prayer, therefore, cannot be considered at the back of the recipients of the bank guarantees without giving opportunity of hearing to them. The liquidator, however, is given the liberty to file proper application on the self-same issue, if so advised”.

and resultantly partly allowed the Company Application by ordering liquidation of the ‘Corporate Debtor’ viz. ‘Tecpro Systems’ in the manner laid down in Chapter III of part II of ‘I&B’ Code, 2016 by issuing necessary directions like appointing Mr. Ramachandran Subramanian as liquidator (proposed by COC) in terms of Section 34(1) of the Code.

Summary of Facts

3. According to the Appellant(s) one of the ‘Financial Creditors’, viz. ‘Edelweiss Asset Reconstruction Company Ltd.’ had filed an application u/s 7 of the ‘I&B’ Code for the initiation of ‘Corporate Insolvency Resolution Process’ against ‘Corporate Debtor’, viz. ‘Tecpro Systems Ltd.’ As a matter of fact, the said application came to be admitted on 07.08.2017, imposing a moratorium u/s 14 of the ‘I&B’ Code and the 1st Respondent/Mr. Venkatesan Sankaranarayan was appointed as an ‘Interim Resolution Professional’.

4. In fact, the 1st Meeting of 'Committee of Creditors' took place on 13.09.2017 wherein Mr. Venkatesan Sankaranarayan, the 'Interim Resolution Professional' was appointed as 'Resolution Professional' in accordance with Section 22(3)(a) of the Code. The 'Resolution Professional' had engaged two registered valuers as per Regulation 27 of the regulations to decide the 'Fair Value' and liquidation value of the 'Corporate Debtor' in accordance with Regulation, 35. The date of appointment of the registered valuers was on 17.08.2017 and as per 'Average Valuation' the 'Fair Value' was evaluated at Rs. 390.15 crores and the 'Liquidation Value' of the 'Corporate Debtor' was assessed at Rs. 347.28 crores.

5. Because of the delay in completion of the statutory audit of the financial statements of the 'Corporate Debtor' an extension was sought to extend the 'Corporate Insolvency Resolution Process' for a further period of 90 days which was allowed on 09.01.2018.

6. It comes to be known that the 1st Appellant/'Resolution Applicant'(now known as Krish Steel and Trading Pvt. Ltd.) had submitted an updated 'Resolution Plan' in respect of the 'Corporate Debtor' which was approved by the COC meeting on 08.03.2015 with majority vote of 89.92%. Resting on the approval of the 'Committee of Creditors', the Adjudicating Authority had also approved the 'Resolution Plan' u/s 31 of the Code as per order dated 15.05.2019.

7. As per the 'Resolution Plan', duly 'Approved' by the Adjudicating Authority, the 1st Appellant / 'Resolution Applicant' had formed a special purpose vehicle viz. 'Kridhan Projects Private Limited' to bid for the 'Corporate Debtor'. As per the said approved 'Resolution Plan' and after reduction of capital in terms of the plan as well as all regulatory approvals / execution of all definitive documents required to give effect to this 'Resolution Plan', the 'Corporate Debtor' will issue 15 crores Equity Shares to the 'Kridhan Projects Private Limited' (special purpose vehicle) at a price of INR 1 (Rupee one) per share, for an aggregate sum of INR 15 crores.

8. It is the stand of the Appellant(s) that the 'Resolution Plan' required the incorporation of 'Kridhan Projects Private Limited' (SPV) as well as the approval of the plan by the Adjudicating Authority pursuant to which the said 'Kridhan Projects Private Limited' shall perform and observe the terms of this 'Resolution Plan' and assume the performance obligations of the 'Resolution Applicant'.

9. It is brought to the fore that the **'Kridhan Projects Private Limited'(SPV)** was duly incorporated on 27.04.2018 with an authorised and paid up share capital of 10,00,000/- however, the operations of the special purpose vehicle' were to initiate only upon approval of the 'Resolution Plan', execution of all documentation and all regulatory approvals.

10. The version of the Appellant(s) is that by virtue of the order dated 15.05.2019 passed by the Adjudicating Authority, the approval of 'Resolution

Plan' would confer the change in the management and ownership of the 'Corporate Debtor' and the control of the 'Corporate Debtor' shall vest with the new Management. Further, the said order had directed the Appellant to submit a performance bank guarantee of an amount of Rs. 5/- crores within 30 days from the date of receipt of order. In due compliance of the order of the Adjudicating Authority ('NCLT'), Principal Bench, New Delhi an amount of Rs. 5/- crores was transferred by the Appellants in favour of the 'Corporate Debtor' which was deposited in an 'Escrow Account' of the 'Corporate Debtor' which is in control of the Financial Credit Edelweiss.

11. The specific case of the Appellant(s) is that they have duly complied with the conditions to be followed by them, as per order dated 15.05.2019, but the direction in the said order of the vesting of the ownership, control and management of the affairs of the 'Corporate Debtor' was never complied with the 1st Respondent thereby depriving the Appellant(s) from the vesting its control and management upon the 'Corporate Debtor' for its implementation of the 'Resolution Plan'.

12. It is the Appellant(s) plea that they never got an opportunity of being heard and project its grievances before the 'Adjudicating Authority', 'NCLT' Principal Bench, New Delhi which enlists the various violations of the 'Resolution Plan by the 1st Respondent. Moreover, before the Adjudicating Authority the Appellant(s) sought some more time to file a detailed reply which was not granted to them and instead, a liquidation order' was passed

based on the observation that a considerable time has elapsed and the 'Resolution Plan' had not been executed.

Appellant(s) Submissions

13. The Learned Counsel for the Appellant(s) submits that a pre-requisite to the infusion of the initial equity of Rs. 15/- crores, as per the approved plan was the reduction of the share capital which was to be done by the monitoring committee formed by the Adjudicating Authority' and **'Vesting of the Management'** is in the hands of 'Resolution Applicant'. In this connection, the contention of the Appellant(s) is that neither the formalities of the 'share capital reduction' was done by the **'Monitoring Committee'** nor was the 'Resolution Applicant' was given the management and control of the Company despite the 'Resolution Applicant' specifically informing that it would infuse the funds upon the 'Reduction of the Share Capital' .

14. The Learned Counsel for the Appellant(s) proceeds to point out that this Tribunal, on 03.02.2020, (at the time of admission date of the instant Appeal) had directed the Appellant(s) to file an additional affidavit by giving one opportunity by specifying the time frame for compliance of the approved 'Resolution Plan'.

15. The Learned Counsel for the Appellant(s) puts forward contention that preference is to be given to a 'Resolution' over a 'Liquidation' and further 'Liquidation' can only be seen as a last resort.

16. The Learned Counsel for the Appellant(s) cites the decision of **Hon'ble Supreme Court 'Arcelor Mittal India Pvt. Ltd.' V. 'Satish Kumar Gupta & Ors.'**, **AIR, 2018 at page 5646** wherein the scope of the words 'Adjudicating Authority' in Section 33 pertaining to approval of 'Resolution Plan' was interpreted to be wide enough to include 'National Company Law Appellate Tribunal' also and the Hon'ble Supreme Court had observed at paragraph 82 and 83 as under:-

"82. One thing that must be made clear at this stage is that one Section 33 speaks of the 'Adjudicating Authority' in sub-section (1) it is referring to both the Adjudicating Authority as well as the Appellate Authority. An Adjudicating Authority may decide in favour of a 'Resolution Plan' which order may then be set aside by the Appellate Authority. This order of the Appellate Authority, setting aside the order of the Adjudicating Authority, would then be the order which rejects the 'Resolution Plan' for the purposes of

*Section 33. The same would apply to an ultimate order of rejection by the Supreme Court under Section 62. This is on the principle, that, as stated in ‘**Lachmeshwar Prasad Shukul and Ors.’ V. ‘Keshwarlal Chaudhury and Ors.’ AIR, 1941 FC 5** and followed in our judgements, an appeal is a continuation of the original proceedings’.*

“83. It is also true that the time taken by a Tribunal should not set at naught the time limits within which the ‘Corporate Insolvency Resolution Process’ must take place. However, we cannot forget that the consequence of the chopper falling in a corporate death. The only a reasonable construction of the Code is the balance to be maintained between timely completion of the

‘Corporate Insolvency Resolution Process’ and the ‘Corporate Debtor’ otherwise being put into liquidation. We must not forget that the ‘Corporate Debtor’ consists of several employees and workmen whose daily bread is dependent on the outcome of the ‘Corporate Insolvency Resolution Process’. If there is a ‘Resolution Applicant’ who can continue to run the ‘Corporate Debtor’ as a going concern, every effort must be made to try and see that this is made possible. A reasonable and balanced construction of this statute would, therefore, lead to the result that, where a ‘Resolution Plan’ is upheld by the Appellate Authority either by way of allowing or dismissing an appeal before it, the time taken in litigation ought to be excluded. This is not to say that the ‘NCLT’ and

‘NCLAT’ will be tardy in decision making’.

17. The Learned Counsel for the Appellant(s) refers to the decision **‘Liberty House Group Pte. Ltd.’ V. ‘State Bank of India & Ors.’ reported in MANU/NL/0168/2020** wherein at paragraph 20 it is observed as under: -

“20. In the present case as we find that both the ‘Resolution Plan’ are now being implemented and ‘Liberty House Group Pte. Ltd.’ on our suggestion has paid additional amount of Rs. 10/- crores, we are inclined to interfere with the impugned order of liquidation. We, in exercise of powers conferred under Rule 11 of ‘NCLAT’ Rules, 2016 and to ensure that the ‘Corporate Insolvency Resolution Process’ of both the ‘Corporate Debtors’- ‘M/s. Adhunik Metalics Ltd.’ and ‘M/s Zion Steel Ltd.’ now reaches finality, the ‘Committee of Creditors’ other creditors etc.; now have no objection

and the liquidation will not be in the interest of both the ‘Corporate Debtors’ – ‘M/s. Adhunik Metallics Ltd.’ and ‘M/s Zion Steel Ltd.’ its employees etc. set aside the impugned order dated 9th July, 2019. Both the ‘Resolution Plans’ be implemented in its latter and spirit. The claim of all the creditors stand settled. Control and records of both the ‘Corporate Debtors’ - ‘M/s. Adhunik Metallics Ltd.’ and ‘M/s Zion Steel Ltd.’ have already been handed over to the ‘Successful Resolution Applicant’ by ‘Committee of Creditors’/’Monitoring Committee’/’Resolution Professional’. ‘Committee of Creditors’/’Monitoring Committee’/’Resolution Professional’ stand discharged.”

18. The Learned Counsel for the Appellant(s) contends that Rule 11 of ‘NCLAT’ Rules specifically provides wide powers to this Tribunal to pass orders

in upholding the principles laid down by the **‘Hon’ble Supreme Court’** in making all efforts to save the ‘Corporate Debtor’ from a corporate death of liquidation and in this regard refers to the decision **‘Vijaykumar vs. Gopalsamy Ganesh Babu and Ors.’ reported in (MANU/NL/0150/2020)** whereby and whereunder this Tribunal while invoking the powers under Rule 11 had observed the following: -

“7. Considering the object of IBC which is the resolution and that effort should be made to revive the ‘Corporate Debtor’ rather than to eliminate the same, we find that this is a fit case to revive the ‘Corporate Debtor’ rather than to eliminate the same, we find that this is a fit case for us to exercise inherent powers under Rule 11 of ‘National Company Law Appellate Tribunal Rules, 2016(‘NCLAT’, Rules, 2016-in short) to do justice. It is necessary to set aside the liquidation order as well as the CIRP proceedings”.

19. The Learned Counsel for the Appellant(s) refers to the decision **‘Amritsar Swadeshi Woollen Mills Private Limited’ V. ‘Vinod Krishan**

Khanna and Ors.’ reported in **MANU/NL/0127/2019** wherein it is observed that it is a settled law when a matter is before ‘NCLT’ or before this Appellate Tribunal arising u/s 241 and 242 of new Act read with Rule 11 irrespective of what the parties plead, say or do, the paramount consideration of the Tribunal is to keep in view as to what is in the interest of the Company. The interest of parties is subservient to the interest of the Company. It is necessary for the Tribunal to first consider interests of the Company. The health of the Company reflects on the health of economy and that is what it matters.

20. The Learned Counsel for the Appellant(s) cites the decision **‘Dhiraj Prabhu V. Rajeev Shetty and Ors.’ (MANU/NL/0088/2020)** wherein it is observed that “as we find that the parties have been negotiating and almost reached the final settlement and on merit the Appellant has also raised certain issues, taking into consideration that the ‘Corporate Debtor’ is an infrastructure Housing Company on which large number of allottees are dependent and if the ‘Corporate Debtor’ goes on ‘Corporate Insolvency Resolution Process’ then it may delay the completion, we in exercise of powers conferred under Rule 11 of the ‘National Company Law Appellate Tribunal Rules, 2016 accept the settlement reached between the parties and allow Mr. Rajiv Shetty to withdraw the application u/s 9”.

21. The Learned Counsel for the Appellant(s) points out that the ‘Lenders’ of the ‘Corporate Debtor’ as well as ‘Operational Creditors’ are pressing for,

as they are interested in resolution’ as against liquidation and further that ‘Edelweiss Asset Reconstruction Company Ltd.’, being the 85% ‘Financial Creditor’ of the ‘Corporate Debtor’ was present during the last hearing had requested for resolution of the ‘Corporate Debtor’ rather than its Liquidation. Apart from that, an ‘Operational Creditor’ had filed an ‘Impleadment Application’ in the instant Appeal and are claiming ‘Resolution’ over ‘Liquidation’ and in the best interest of all stakeholders, ‘Liquidation’ is to be avoided and a ‘Resolution Order’ is to be passed.

22. The Learned Counsel for the Appellant(s) submit that pursuant to the letter received by the erstwhile ‘Resolution Professional’ of the ‘Corporate Debtor’ (Tecpro Systems Ltd.) from one Mr. Gautam Joginderlal Suri claiming to be the authorized signatory of the ‘Kridhan Infrastructure Pvt. Ltd.’ (Resolution Applicant/RA) the meeting was called by the liquidator on 25.02.2020 at ‘Edelweiss House, Mumbai and discussions took place in the said meeting and that the representatives of the ‘Resolution Applicant’ inform the erstwhile COC members that they intend to implement the ‘Resolution Plan’, given a chance by the erstwhile COC members and the plan was presented was under:-

*“i. RA will infuse equity of
INR 15 crore within seven
working days from the date*

*of order passed by 'NCLAT'
in the appeal filed by RA;*

*ii. Upon infusion of this
equity, RA would like to
assume 100% control of the
operations of the Corporate
Debtor by appointing the new
Board of Directors;*

*iii. Upfront payment of INR 50
crore to the 'Financial
Creditors' will be paid within
three months from the date of
order passed by the 'NCLAT'
in the appeal filed by
'Resolution Applicant';*

*iv. INR 15 crore of equity
infusion will be kept in escrow
lien-marked to the
representative of erstwhile
COC till such time by which the
upfront payment of INR 50
crore is paid to the 'Financial*

Creditors’ by the ‘Resolution Applicant’;

v. INR 5 crore of performance security encashed to be kept in a escrow and shall not be used for payment of unpaid CIRP/MC period cost”.

23. The Learned Counsel for the Appellant(s) points out that the erstwhile ‘Committee of Creditors’ Members deliberated on the proposal placed by the representatives of the ‘Resolution Applicant’ on 25.02.2020 meeting held with the erstwhile ‘Committee of Creditors’(COC) and erstwhile ‘Resolution Applicant’ and held that the COC members after deliberations, the erstwhile ‘Committee of Creditors’ had informed the undermentioned views to the representatives of the ‘Resolution Applicant’ which run as under:-

“a. the ‘Resolution Applicant’ must show their commitment to implement the ‘Resolution Plan’ by showing proof of funds for INR 15 crore for infusion of the said funds in an account towards equity and source of funds for INR 50 crore upfront payment to

‘Financial Creditors’, in the additional affidavit to be filed before ‘NCLAT’, as there should not be another similar instance of non-implementation of ‘Resolution Plan’ by the ‘Resolution Applicant’.

b. once INR 15 crore of equity is infused and kept in an account marked under lien to the representative of erstwhile COC, the Resolution Applicant can assume control of operations of the Corporate Debtor by appointing the new Board of Directors as per the Resolution Plan approved by the NCLT’

c. INR 1,81,46,035/- or any other amount of debt to the ‘Financial Creditors shall be converted into equity shares of the Company (at a conversion price of INR 1/- per share) on the date of equity infusion to ensure

20% equity holding with 'Financial Creditors' as per the Resolution Plan approved by NCLT;

d. In the event of failure to make upfront payment of INR 50 crore to Financial Creditors, then INR 15 crore of equity infused and kept in an account marked under lien shall stand forfeited and no further opportunity shall be granted to the 'Resolution Applicant'. Financial Creditors can approach the Adjudicating Authority to take further steps in this matter;

e. Till balance INR 415 crores is paid to the Financial Creditors, the Resolution Applicant must strictly follow the cash sweep mechanism stipulated in Section 5.3 of the approved plan;

f. INR 5 crores performance security as per order dated 16.01.2020 of NCLT already was utilized by the

liquidator for the payment of unpaid CIRP / MC period costs (incurred prior to liquidation commencement date) which shall be recouped from the upfront funds infused (Rs. 15 crores + Rs. 50 crore) and held in fixed deposit as per order of NCLT;

g. All other terms of the approved Resolution Plan remain unchanged and the Resolution Applicant shall strictly adhere to and complied with all other terms and conditions of the approved Resolution Plan.”

24. The Learned Counsel for the Appellant(s) submits that the representatives of the ‘Resolution Applicant’ had confirmed the erstwhile ‘Committee of Creditors’ that there were no changes to the shareholding pattern, but there were some changes in the ‘Directorship’ and further that the representatives of the ‘Resolution Applicant’ had informed the COC members that there would not be any issues on the section 29A compliance check. Besides this, the representatives of the ‘Resolution Applicant’ had informed the erstwhile COC members that they had secured funding from a

High Net Worth Individual (HNI) and that erstwhile COC members had advised the representatives of the 'Resolution Applicant' to share this letter of confirmation of funding from the concerned HNI.

25. The Learned Counsel for the Appellant(s) points out that following were the list of participants as seen from the Minutes of Meeting with erstwhile 'Committee of Creditors' and erstwhile 'Resolution Applicant' that took place on 25.02.2020 and the same is as follows: -

<i>Name of Participants</i>	<i>Name of Representative</i>
<i>Liquidator of Tecpro Systems Limited (Chairperson)</i>	<i>Ramachandran Subramanian</i>
<i>Edelweiss Asset Reconstruction Company Ltd. (EARC)</i>	<i>Vineet Aggarwal, Vipul Gupta, Pranika Bhatia</i>
<i>Standard Chartered Bank (SCB)</i>	<i>Himanshu Tandon</i>
<i>DBS Bank</i>	<i>Nitin Parmar (through Audio Conference)</i>
<i>Vijaya Bank</i>	<i>Did not attend</i>
<i>Pegasus Asset Reconstruction Company Ltd. (PARC)</i>	<i>Did not attend</i>
<i>RIICO</i>	<i>Did not attend</i>
<i>Kridhan Infrastructures Private Limited (Erstwhile Resolution Applicant or RA)</i>	<i>Dinesh Agarwal, Mathew Antony</i>
<i>Erstwhile Resolution Professional (RP)</i>	<i>Did not attend</i>
<i>Liquidator's team (EY Restructuring LLP)</i>	<i>Aditya Vishwanathan, Vashist Sudarsan, Karthik V</i>
<i>Liquidator's Legal counsel (Indian Law LLP)</i>	<i>Shiju PV, Puja Agarwal (through Audio Conference)</i>

26. The Learned Counsel for the Appellant(s) contends that the Appellant had already taken the 1st step towards the capital infusion as per the approved 'Resolution Plan' under clause 5.1 of the Plan i.e. that deposit of an amount of Rs. 15 crores pursuant to which the capital reduction is to take place and the issuance of shares' is to be made in favour of the 'Resolution Applicant'. Besides this, the

sum of Rs. 15 crores, as deposited by the Appellant would be used for the infusion of the equity, upon the order reversing the liquidation order dated 16.01.2020.

1st Respondent's Contentions

27. In response, the Learned Counsel for the 1st Respondent submits that the instant appeal is filed arraying the erstwhile 'Resolution Professional' as a Respondent and that Mr. Ramachandran Subramanian, liquidator appointed by the Adjudicating Authority as per order dated 16.01.2020 has not been arrayed as a party to the present appeal.

28. The Learned Counsel for the 1st Respondent / Erstwhile 'Resolution Professional' submits that the modified 'Resolution Plan' was approved by the Adjudicating Authority on 15.05.2019 and the impugned order of liquidation was passed on 16.01.2020 but in the intervening period, the Appellant had miserably failed to comply with the approved 'Resolution Plan' by failing to infuse Rs. 15 crores of upfront equity within a week and a payment of Rs. 50 crores within three months thereafter.

29. The Learned Counsel for the 1st Respondent points out that numerous extensions to infuse capital were given and the last one was given on 19.10.2019, when a 5th extension seeking time till 15.11.2019 was sought by the Appellant and further the 1st Appellant or its Representative did not attend the 'Committee of Creditors' meetings or the 'Monitoring Committee's meeting' after 04.10.2019.

30. The Learned Counsel for the 1st Respondent contends that even if it is presumed that the Appellant has source of finances and is permitted by this Tribunal to comply with the terms of the 'Resolution Plan', thus, giving charge of the affairs of the 'Corporate Debtor' to the Appellant, then also, there is no guarantee that the Appellant would not be indulging in the same act that has brought the 'Corporate Debtor' to the current stage and again not fail to comply with the 'Resolution Plan'. Apart from that, the Appellant was part of the management through the representative in the Monitoring Committee whose lack of clarity in decision making has caused the 'Corporate Debtor' a sum of Rs. 5.51 crores due to (which force the client of the **'Corporate Debtor' 'Rashtriya Ispat Nigam Ltd.'** to invoke the Bank Guarantee for Rs. 5.51 crores).

31. In so far as the '*opportunity of being heard*' not granted to the Appellant, it is the submission of Learned Counsel for the 1st Respondent that the application for annulment of 'Resolution Plan' and for passing liquidation order was filed by the erstwhile 'Resolution Professional' u/s 65 read with Section 33(3) of IBC in second fortnight of November, 2019 which was 1st listed on 02.12.2020 before the Adjudicating Authority, Principal Bench and the Appellant was directed to file a reply and when the matter was later listed on 18.12.2019, the Appellant again sought time to file reply which was permitted and subsequently the matter was listed finally before the 'Adjudicating Authority' on 06.01.2020. In fact, the Appellant(s) had failed to file the reply and failed to answer the queries and reasons for not complying with the 'Resolution Plan' which perforced the 'Adjudicating

Authority' to '**Reserve orders**'. As such, the counter plea taken on behalf of the Appellant that no opportunity of being heard was not provided to them is an incorrect one.

32. The Learned Counsel for the 1st Respondent submits that there is no allegation of material irregularity or fraud and in the absence of such averment made in the appeal, the Order of Liquidation' is an '*irreversible one*' unless there has been some material irregularity or fraud, albeit, Section 230 of the Companies Act, 2013 permits for the scheme of arrangement between the 'Corporate Debtor' and its Creditors.

33. Continuing further, it is represented on behalf of the 1st Respondent that the application for liquidation of 'Corporate Debtor' u/s 33(3) r/w Section 60(5) was moved before the Adjudicating Authority, after resolution was passed by the erstwhile '*Committee of Creditors*' with an overwhelming majority of 99.28% voting share in the meeting that took place on 11.11.2019.

34. The Learned Counsel for the 1st Respondent adverts to the Reply Affidavit of the 1st Respondent (filed on 06.03.2020) wherein at paragraph 9 it is observed as under:-

"9. In the affidavit filed by the Appellant a letter (which is annexed as Annexure A/3) of the additional affidavit) provided by Candid Wealth

Management Pvt. Ltd.('Guarantor') committing to infuse equity of Rs. 15 crores along with its associates, towards the source of equity infusion of Rs. 15 crores has been submitted by the Appellant. However, the following points are noteworthy to point out:-

- *The Guarantor has reported turnover of Rs. 3,38,000/- and a net loss of Rs. 5,455/- for the year ended 31st March, 2019.*
- *The financial status of the guarantor for the last 5 years is as follows:-*

	For the YE				
Particulars (inINR)	31-Mar-19	31-Mar-18	31-Mar-17	31-Mar-16	31-Mar-15
Total Revenue	5,83,753	4,61,352	14,35,000	6,55,167	9,26,255
Total expenses	4,66,037	3,21,590	13,44,472	4,76,489	8,68,337
Tax expenses	1,23,171	970	23,774	55,213	17,797
Profit/(Loss) After tax	(5,455)	1,38,792	66,754	1,23,465	40,021
Total Assets	1,33,06,030	1,32,19,466	1,21,35,673	1,21,59,410	1,19,48,150
Total Liabilities	1,74,060	82,041	37,041	1,27,532	39,737
Equity	1,31,31,970	1,31,37,425	1,20,98,632	1,20,31,878	1,19,08,413

- *The Guarantor's highest revenue in its last 5 years is Rs. 14.35 lakhs and the Guarantor has no other source of revenue.*

- *The Guarantor has reserves of Rs. 1.31 crores and total assets of Rs. 1.33 crores.*

35. The Learned Counsel for the 1st Respondent submits that the instant Appeal is not maintainable since the Appellant(s) had miserably failed to demonstrate before this Tribunal any instance of material irregularity or fraud in the order of liquidation passed by the 'Adjudicating Authority' and an 'Appeal' is maintainable as per Section 61(4) of IBC, only on the ground of material irregularity or fraud.

Liquidator's Stand

36. The Learned Counsel for the Liquidator contends that an opportunity to submit reply was provided by the Adjudicating Authority to the Appellant / 'Resolution Applicant' and the 1st Appellant / 'Resolution Applicant' had failed to file the reply or prove its bonafide and correctly an order of liquidation was passed by the Adjudicating Authority resting upon an unanimous decision of the 'Monitoring Committee' and lenders.

37. The Learned Counsel for the Liquidator submits that the 'Resolution Applicant' in its communication dated 15.08.2019 addressed to Bombay Stock Exchange and National Stock Exchange had admitted that it has two Singapore based subsidiary companies viz. **'Ready-Made Steel Pte Ltd.'**, and its step-down subsidiary **'KG Foges Pvt. Ltd.'** and as per the knowledge of the Liquidator, the aforesaid subsidiaries, under the management of **'Mr. Anil Agarwal'** and **'Mr.**

Gautam Joginder Lal Suri'(common Directors) had defaulted to the tune of INR 750/- crores appox. to the '*Union Bank of India*', *Hongkong Branch*. Added further, both the Companies, because of financial '*Mis-management*' and '*Non-performing Asset*' are presently under '**compulsory winding up**' by the '*Singapore Authorities*', which is equivalent of creditors induce liquidation in our country. Moreover, the '**Accounts**' with the '*Union Bank of India*' reportedly continued to be '**Non-performing Asset**' which disqualify them to act as 'Resolution Applicant' and these facts having deliberately suppressed before this Tribunal, by the Appellant(s).

38. The Learned Counsel for the Liquidator contends that the eligibility of the 1st Appellant / 'Resolution Applicant' is to be tested as per Section 29A of the Code and further that, the act of financial default of subsidiary companies to the lenders disqualifies the 'Resolution Applicant' u/s 29A of the 'I&B' Code. That apart, it is the crystalline stand of the Appellant that decision of the lenders to liquidate the Company after the failure of the Appellant(s) to implement the 'Resolution Plan' despite several opportunities provided to them is an irreversible one. Moreover, the claim of Edelweiss Asset Reconstruction Pvt. Ltd. (one of the lenders) that the Appellant is financially viable is a malafide one and conveniently ignores the huge default of the subsidiaries of the Appellant.

39. The Learned Counsel for the Liquidator points out that the '**Lenders**' have no locus-standi before this Tribunal, at this stage, since there is no 'Committee of Creditors' and that the stakeholders 'Consultation Committee' under the Liquidation process, unlike 'Committee of Creditors' under resolution process does

not have any power to determine. In fact, such a Committee is formed for consultation only and none of the consultations is binding on the **'Liquidator'**.

40. The Learned Counsel for the Liquidator brings it to the notice of this Tribunal that as on 31.03.2020 (quarterly result) the 'Resolution Applicant' had reported a turnover of Rs. 21.17 crores and incurred a loss of Rs. 12.11 crores which indicates that the financial position of the 'Resolution Applicant' that it is not in a fit position to implement the plan. Also, that the 1st Appellant / 'Resolution Applicant' is incapable to bring in the required funds as seen from the documents available on public domain and one more Company controlled by the same group – **'Swee Hong Pvt. Ltd.'** which is under restructuring in Singapore which is equivalent to *'Corporate Insolvency Resolution Process'* under the code.

41. The Learned Counsel for the Liquidator submits that the 'Resolution Plan' is for Rs. 470/- crores and the affidavit dated 18.08.2020 filed by the Director of the 1st Appellant / 'Resolution Applicant' does not demonstrate that it is financially capable to implement the 'Resolution Plan' nor it is supported with solvency certificate from a competent professional and that the present endeavour of the Appellant(s) is merely a ruse to take over the Company's assets with an intention to sell and generate assets.

42. The Learned Counsel for the Liquidator refers to the judgement of the **Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' V. 'Shree Niwas Girni KK Samidi and Ors.'** (civil appeal No. 3179-3181 of 2005, decided on 24.8.2007) wherein it is observed as under:-

“when a Company is ordered to be wound up, the assets of it, are put in possession of the official liquidator. The assets become costodia legis”. Further, it is observed that”the court has to see the bonafide of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation” and in the instant case, the Appellant(s) are praying to quash the order of liquidation without any plan or scheme of arrangement and without exhibiting the existence of fraud or material irregularity in the order of liquidation.

43. The Learned Counsel for the Liquidator refers to the judgement of **Hon’ble Supreme Court in ‘Arcelor Mittal India Pvt. Ltd.’ V. ‘Satish Kumar Gupta’ (civil appeal no. 9402-9405 of 2018 decided on 01.04.2018)** wherein the Hon’ble Supreme Court had exercised its powers under Article 142 of the Constitution of India and allowed the ‘Resolution Applicants’ time to file resolution plans afresh,

but also mentioned that if none of the plans is accepted, the Company will automatically go into liquidation.

44. The Learned Counsel for the Liquidator points out that the BLRC committee in its report had noted this aspect in Chapter 5 which reads “the liquidation process is an irreversible process from within a fixed period after the liquidation order is passed. An appeal to stay the liquidation will not be considered by the Adjudicator”.

45. The Learned Counsel for the Liquidator submits that Rule 11 of ‘NCLAT’ Rules cannot be invoked for setting aside the liquidation order when there is a specific provision under Section 61(4) of the ‘I&B’ Code.

46. In this connection, the Learned Counsel for the Liquidator contends that ‘Inherent Powers’ cannot be invoked or utilised in violation of the statutory provisions of the Code and refers to the decision of **Hon’ble Supreme Court ‘Govt. of Andhra Pradesh’ V. ‘P. Laxmi Devi (Smt.) 2008 reported in 2008 4 SCC at page 720** wherein it is observed and held that Rules are delegated forms of legislation, hence, the invocation cannot be done in the face of statutory provisions.

47. The Learned Counsel for the Liquidator submits that the upfront payment’ which the ‘Resolution Applicant’ is offering to the Creditors is subjective in nature and, therefore, there is no certainty that the balance amount of 50 crores as promised by the 1st Appellant / ‘Resolution Applicant’ will be paid to the Creditors within the time specified.

48. The Learned Counsel for the '**Liquidator**' points out that the '**Cash Flow Details**' as per the failed '**Resolution Plan**' is as follows:-

Amount in Crores			
Qtr	Amount Infused Otherwise	Amount Infused through Sale of Assets	Total Amount
2	3.61	33.25	37.22
3	4.33	42.75	47.08
4	Nil	28.50	28.50
TOTAL	7.94	104.50	112.80

and takes a plea that from the aforesaid 'Cash Flow' that it is clear that the 'Resolution Applicant' in the 'Resolution Plan' is dependent upon the sale of assets and, therefore, the plan is subjective one.

49. The Learned Counsel for the Liquidator submits that the Appellant(s) had failed to provide an undertaking of meeting the unpaid 'Resolution Process Cost' and liquidation cost to the tune of Rs. 7.25 crores.

Reply Submissions of the Appellant(s)

50. The real grievance of the Appellant(s) is that they never got an opportunity of being heard and represent its grievance before the Adjudicating Authority and in fact the Appellant(s) sought more time to file a detailed reply which was not granted to them. However, the Adjudicating Authority without providing an opportunity to the Appellant(s) passed an order of liquidation resting on the observation that a consideration time has elapsed and the 'Resolution Plan' was not executed.

51. In the instant appeal, the Appellant(s) pray that the 1st Appellant/'Resolution Applicant' is willing to revive the Company / 'Corporate Debtor' and hence, this Tribunal may grant permission under 'inherent powers' an opportunity to revive, in terms of the 'Resolution Plan'.

52. It is the plea of the Appellant that the liquidator was not the part of the proceedings when the 'Resolution Plan' was approved and that the liquidator is not entitled to make any averments pertaining to the activities which took place prior to the passing of the liquidation order. Also, that the liquidator was never a part of the 'Monitoring Committee' and that he has no 'locus' to challenge if another opportunity is provided to the 1st Appellant/'Resolution Applicant' to revive the 'Corporate Debtor'. A Liquidator cannot have a motive, contrary to the scheme of 'I&B' Code which is to prefer revival over corporate death or liquidation of the 'Corporate Debtor'.

53. It is the case of the Appellant(s) that there is no question of going behind the commercial wisdom of the '**Approved Resolution Plan**' dissecting the present resolution plan by the liquidator or for that matter any authority. In this regard, the Learned Counsel for the Appellant(s) refers to the decision of **Hon'ble Supreme Court in Committee of Creditors of 'Essar Steel Ltd.' Vs. 'Satish Kumar Gupta and Others'** (reported in MANU/SC/1577/2019) while quoting '**K.Sashidhar**' V. '**Indian Overseas Bank and Ors.**'(MANU/SC/0189/2019) whereby and whereunder it is observed as follows:-

"46. In our view, neither the Adjudicating Authority (NCLT) nor the appellate authority (NCLAT) has been endowed with a jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that

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substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6.6.2018, 66% of voting share of the financial creditors. To put it differently the action of liquidation process postulated in chapter III of the 'I&B' Code is avoidable, only if approval of the resolution plan is by a vote of not less than 75%(as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of minority dissenting financial creditors. That must prevail, if is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 6.6.2018 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to disapprove the proposed the resolution plan, de jure, entails in its deemed rejection.

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49.....No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) all for that matter the appellate authority (NCLAT) to reverse the 'commercial decision' of the COC much less of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas from the legislative history there is contra indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.

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94. The NCLAT judgement which substitute its wisdom for the commercial wisdom of the committee of creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgement must therefore be set aside.”

54. The Learned Counsel for the Appellant(s) comes out with a plea that the role of Section 29A of 'I&B' Code comes in to play only for deciding the disqualification at

the time of submission of the bids and not after that. Further, the scope of Section 29A is limited to test the qualification or disqualification of a 'Resolution Applicant' at the time of submission of a bid and in the instant case all that was already done, the plan was approved and a test of Section 29A was cleared and nothing further was left to be determined. In short, the contention of the Appellant is that the issue of qualification / disqualification does not arise at this stage and cannot be legally entertained, especially not on behalf of a liquidator.

55. The Learned Counsel for the Appellant(s) advances an argument that the 'Resolution Applicant' is only holding 12% equity in '*Kridhan Infra Limited*' and further that the 'Resolution Applicant' does not have any holdings in the Singapore entities as mentioned. In fact, '*Kridhan Infra Limited*' is not a subsidiary of the resolution applicant.

Lenders' Pleas

56. The Learned Counsel for the Lenders contends that the Members of the erstwhile COC(in exercise of the commercial wisdom) in the meeting held on 25.02.20 and on 24.08.2020 had decided to give an opportunity to the Appellant(s) to implement the Resolution Plan with an object to achieve the value maximization of the assets of the 'Corporate Debtor' and to save it from the death knell of liquidation. In fact, the liquidation is to be only a last resort.

57. The Learned Counsel for the Lenders refers to the decision of '**Hon'ble Supreme Court' '*Swiss Ribbon*' Vs. '*Union of India*', 2019 (4SCC page 17)** wherein it is among other things observed that the code is thus a beneficial legislation which

puts the 'Corporate Debtor', back on its feet, not being a recovery legislation for creditors....

58. The Learned Counsel for the Lenders contends that the intent of the 'I&B' Code is clear to have lenders as a consultative body all through out liquidation process as they are better equipped to take decisions in respect of the 'Corporate Debtor' and/or the primary stakeholders to receive the payment from liquidation estate liquidated by the liquidator during liquidation. Therefore, the amendments to the liquidation regulations ensure that the stakeholders' consultation committee is constituted and advise of the 'SCC' is to be considered by the liquidator and if the liquidator decided differently from such majority decision of the '**SCC**', he has to record reasons in writing.

59. The Learned Counsel for the Lenders point out that during the pendency of the instant appeal, before this Tribunal, the Liquidator was directed not to take any action on confirmation of sale and that the liquidator went ahead and proceeded to put the property on sale for the second time even for the conclusion of the 1st option. Apart from that, through the advertisement, the stakeholders consultative committee became aware of the fact that the property was put on sale again and that the liquidator had reduced the reserve price by 25% during the second option a steep reduction without consulting or discussing or even informing the members of the SCC etc.

60. The Learned Counsel for the Lenders submits that a '**Scheme of Compromise**' or '**Scheme of Arrangement**' post Liquidation order is permissible during liquidation process, is, the 90 days period from the date of liquidation order, prescribed under

the Regulations had already expired. Even assuming that the same can still be undertaken, given that there is no maximum time limit prescribed under the Companies Act, 2013 for completion of the process and in the absence of any enabling provision under the Code or the Regulations for such compromise/arrangement there might be anomalies / gaps in implementation of the process.

61. The Learned Counsel for the Lenders takes a stand that it is the collective decision of the stakeholders consultation committee forming part of the erstwhile committee of creditors to approve and implement the resolution plan which was not only agreed upon during the meeting of the erstwhile COC members on 25.02.2020 but also stood re-affirmed in the meeting that took place on 24.08.2020.

62. The Learned Counsel for the Lenders contends that the 'Liquidator' is not acting in the interest of resolution of the 'Corporate Debtor' and there appears to be no bonafide reason for the 'Liquidator' to take a stand against the prospect of achieving resolution of the 'Corporate Debtor', when the members of the erstwhile 'Committee of Creditors' have decided to provide the Appellant an opportunity to implement the 'Resolution Plan'.

63. **Appraisal**

At the outset, it is pertinently pointed out by this Tribunal that the 'Corporate Debtor' 'Tecpro Systems Ltd.' was admitted on 07.08.2017 for initiation of 'Corporate Insolvency Resolution Process' based on the application (under Section 7 of the 'I&B' Code) filed by 'Edelweiss Asset Reconstruction Company Ltd.' – one of the 'Financial Creditors' and that the 1st Respondent was appointed as an 'Interim Resolution Professional'. It is

evident that the 'Resolution Professional' had received the 'Resolution Plan' from i) **'Kridhan Infrastructure Private Ltd.' (Now Known as Krish Steel and Trading Private Limited)** ii) **'Eight Finance Pvt. Ltd.' (EFPL)** iii) **Employees of the 'Corporate Debtor'**. In fact, the 'Resolution Professional' verified the 'Resolution Plan' as per Section 30(2) of the 'I&B' Code and presented the same before the 'Committee of Creditors' for their consideration. The 'Committee of Creditors' after deliberating and discussing the 'Resolution Plans' submitted by the aforesaid 'Resolution Applicants' in their 6th and 7th meetings and on 30.04.2018 the 'Committee of Creditors' in its 8th meeting dated 30.04.2018 approved the 'Resolution Plan' submitted by **'KIPL' (Now Known as Krish Steel and Trading Private Limited)** by a majority vote of 88.39%.

64. As a matter of fact, CA 368(PB)/2018 was filed on 3rd May, 2018 u/s 30(6) of the Code read with Regulation 39 of the 'Corporate Insolvency Resolution Process' Regulations seeking approval of the 'Resolution Plan'. On 10.03.2019, the modified 'Resolution Plan' was approved by a majority vote of 89.92% through e-voting conducted between 10.03.2019 (11 A.M.) to 12.03.2019 (11 A.M.). The 'National Company Law Tribunal' Principal Bench, New Delhi in CA 503(PB)/2019 on 15.03.2019 in Company Petition No. (IB)-197/(PB)/2017 filed by the 1st Respondent / Applicant / 'Resolution Professional' had approved the 'modified resolution plan' and observed that it shall come into effect from the date of passing of the order.

65. It is brought to the notice of this Tribunal that in the Impugned Order in C.A. No. 2683(PB)/2019 in Company Petition No. (IB)-197(PB)/2017 (filed by the 1st Respondent / Applicant / erstwhile 'Resolution Professional') the 'NCLT', Principal Bench, New Delhi had partly allowed the Company application by ordering 'Liquidation' of the 'Corporate Debtor'/ 'Tecpro Systems Ltd.' in the manner laid down in Chapter III of part II of the 'I&B' Code, 2016. Further, as proposed by the 'Committee of Creditors' Mr. Ramachandran Subramanian was appointed as 'Liquidator' as per Section 34(1) of the 'I&B' Code. Before this Tribunal, the primordial plea of the Appellant is that it was not provided with an opportunity of being heard and project its grievance before the Adjudicating Authority and since the Appellant is very much interested to implement the 'Resolution Plan' and hence this Tribunal may allow the appeal thereby preferring the aspect of 'Resolution' and avoiding 'Liquidation'. Moreover, the Appellant agrees to implement the 'Resolution Plan' and take all steps as mentioned in the 'Resolution Plan' immediately upon the order of reversal of liquidation. Further, the Appellant agrees for the forfeiture of sum of Rs. 15 crores in addition to the already forfeited sum of Rs. 5 crores, in case the 'Resolution Applicant' fails to deposit the sum of Rs. 50 crores within the period of three months from the date of reversal of liquidation order dated 16.01.2020. Also that on behalf of the Appellant(s) it is fairly submitted that one of the lands owned by the 'Corporate Debtor' which had a market value of INR 5 crore and valued by the registered valuer @ INR 4.25 crores was sold by the

Respondent for a consideration of INR 2.63 crores and in respect of the same the Appellant(s) are not claiming any relief.

66. Be it noted, that 'speed' is the essence of the 'I&B' Code. A timely resolution of insolvency can always be preferred and it is improper for a court to stand over a winding up petition presented by a 'Creditor' for a very long and indefinite period of time, as per decision '**Re Boston Timber Fabrication Ltd.**' (1984) BCLC 328(CA). In fact, the Legislature had made specific provisions in '*public interest*' and to facilitate good 'Corporate governance'. It cannot be forgotten that the '**Bankruptcy Law Reforms Committee**' elected certain principles within which 'I&B' Code would function and one such principle is that the 'I&B' code specifies the time bound process, which will not be extended, to better preserve the '*Economic Value of the Asset*'.

67. Time limit specified in 'I&B' Code is the essence of the triggering process and the Insolvency Resolution Process. This is the prime reason behind the enactment of the Code. If an Adjudicating Authority extends the Insolvency Resolution Process beyond the time line mentioned u/s 12(3) of the code, the same will be in negation of the underlying policy behind the court of ensuring timely resolution of Company Insolvency. **Per contra**, the exercise of this power, in violation of statutory provision may be desirable in an exceptional / extraordinary circumstance(s). In fact, a 'Resolution Applicant' has no vested right that his 'Resolution Plan' be considered.

68. Ordinarily, the 'Adjudicating Authority' is to follow the discipline of 'I&B' code enacted by the Parliament, especially to streamline the

‘Resolution’ of ‘Corporate Insolvency matters’ involving ‘Corporate Insolvency’ and the same require the experts’ decision. Of course, it is not open to an ‘Adjudicating Authority’ to take upon itself, the onus of supervising the intricacies of ‘Resolution Process’. Although, the resolution of ‘Corporate Insolvency’ to ensure the survival of a company / enterprise as a going concern is one of the key objectives of the ‘I&B’ code but the rider is this must not come at the cost of efficiency, as opined by this Tribunal. To put it succinctly, a ‘*Timely Liquidation*’ is preferred over endless ‘Resolution process’.

69. One cannot brush aside an important fact that longer the delay, more likely it is the ‘Liquidation’ will only be the sensible answer. No doubt, the ‘Liquidation value’ tends to go down with an efflux of time as many ‘Assets’ suffer from high economic depreciation value. Looking at from the point of view of creditors a good realisation can generally be secured if a company/firm is sold as a going concern. If one construes in the teeth of the object sought to be achieved by the ‘I&B’ Code and in the light of consequences provided by Section 33 of the Code, therefore, makes it unerringly clear that the periods mentioned in Section 12 are mandatory and cannot be extended. If time specified by statute is changed, then it will give room for wider complications/implications, in the considered opinion of this Tribunal.

70. Also, even in ‘Liquidation’, the realisation will be lower when there are delays and in fact, delays cause value destruction/reduction. Moreover, the

failure of some business plan is an integral part of the process of ‘market economy’.

71. It is to be pointed out that an administrator is in control of the affairs of the Company and is in a position to offer an independent and detached view of company affairs as per decision **‘Re Newport County Association Football Club Ltd.’ (1987) BCLC 582(ChD)**. It is to be remembered that the ‘Liquidation Proceedings’ cannot proceed incessantly, affecting / damaging the interests of ‘*stakeholders*’.

72. It is significant to point out that pre-occupation of ‘I&B’ Code with ‘*timely resolution of insolvency*’ is an important factor. In so far as ‘Liquidation’ is concerned it destroys the organisational capital etc. ‘I&B’ Code allows ‘Liquidation’ only on failure of ‘CIRP’ and it facilitates / encourages resolution in several manner. Undoubtedly, a liquidation order shall also be a ‘notice of discharge’ to the offices, employees and workmen of the ‘Corporate Debtor’ except when the business of the ‘Corporate Debtor’ is continued.

73. It is to be pointed out that Section 230 of the Companies Act, 2013 deals with Tribunal’s power to make an order on the application of the Company or of any creditor or member of the Company or in case of company which is being wound up, of the liquidator under this Act or under IBC as the case may be that a meeting may be called for the proposed compromise or arrangements including debt restructuring etc. between company, its creditors and members. In fact, the Company or any other person by whom

an application made shall disclose all material facts relating to Company such as latest financial position of the Company, latest Auditor's Report, 'Reduction of Share Capital' of the company included in the compromise or arrangement etc.

74. The Adjudicating Authority in the impugned order dated 16.01.2020 in C.A. No. 2683(PB)/2019 in Company Petition No. (IB)-197(PB)/2017 at paragraph 6 had clearly observed that 'During hearing on 18.12.2019 an opportunity was afforded to respondent no. 1 to 3 to file reply within one week thereof. However, neither any reply was filed nor it could be shown as to how the approved resolution plan could at all be implemented'. Further, at paragraph 7 of the impugned order, the Adjudicating Authority had clearly mentioned that even after period of eight months the 'Resolution Applicant' has failed to adhere to any of the timelines for equity infusion, since approval of the 'Resolution Plan'.

75. By diluting the speed specified in the code there is likelihood of adversely affecting the interests of both sides. If the same is delayed, maximization of value of assets of the 'Corporate Debtor' will weaken the realisation of potential creditors. Moreover, the Company promoters' rights or wrongs remain undischarged from the liability. A person who is to proceed against the Company is suspended from exercising his rights for 'moratorium' remains in force as long as the CIRP period continues.

76. In regard to the exercise of 'inherent powers' it is to be pointed out that inherent jurisdiction must be exercised subject to the rule that if the

code does contain specific provision that would meet the necessities of the case in question such provision should be followed and the inherent jurisdiction should not be invoked, as per decision '**Arumuga Chettiar**' V. '**K.R.S. Sevugan Chettiar**' AIR 1950 Madras page 779'.

77. It is well settled principle in Law that an '**inherent power**' cannot be resorted to when there are specific provisions in Law to deal with the situations. In this connection, this Tribunal worth recalls and recollects the decision of **Hon'ble Supreme Court in 'Durgesh Sharma' V. 'Jayshree'** reported in Air 2009 Supreme Court at page 285 wherein it is observed and held that the inherent power cannot be exercised in contravention or in conflict or ignoring express provision of Law, since law relating to transfer is contained in Section 22 to Section 25 of the Code and they are exhaustive in nature.

78. In the instant case, the 1st Appellant / 'Resolution Applicant' had deposited Rs. 15 crores in the 'Escrow account' was permitted as per order of this Tribunal on 29.07.2020 and further this Tribunal had directed that the said amount so deposited in '**Escrow Account**' shall not be appropriated without prior approval of this Tribunal. Also, that the 1st Appellant / 'Resolution Applicant' had averred in the Affidavit in compliance of order dated 18.08.2020 at paragraph 7 that it is agreeable for forfeiture of an amount of Rs. 15 crores in addition to the already forfeited amount of Rs. 5 crores, in case it fails to deposit an amount of Rs. 50 crores within the three months period, from the date of reversal of the liquidation order.

79. At this stage, it is to be relevantly pointed out that the Liquidator (although not arrayed as one of the parties to the present Appeal) was heard through his counsel and the forceful objection on the side of Liquidator is that the 'Resolution Applicant' through its subsidiaries had defaulted to the Union Bank of India, Hongkong Branch to the tune of INR 750 crores approx. and, therefore, is ineligible u/s 29A of the Code. In fact that after the failed 'Resolution Plan' the Appellant(s) want the period to recommence henceforth.

80. A perusal of Section 29A clause of the 'I&B' Code (i) indicates that it disqualifies a person if he has been subject to any of disabilities stated in clauses (a) to (h) of Section 29A in any jurisdiction outside India. In reality, Section 29A (i) will have to be read as a disability which corresponds to Section 29A(f) in view of the antecedent conduct on the part of a person applying as a 'Resolution Applicant' in a jurisdiction outside India.

81. Section 29A(f) and (i) of 'I&B' Code speaks of persons prohibited by foreign securities market regulator. It is seen from Section 29A(f) of the Code that if any of the individuals mentioned therein is prohibited by SEBI from either trading in securities or accessing the securities market, again ineligibility of an individual furnishing the plan attaches. In fact, as per sub-clause (i) if a person situate abroad is subject to any disability which correspond to sub-clause (a) of the code such person also is forbidden. Therefore, if a person is prohibited by a Regulator of the Securities market in a foreign market of trading in security and accessing the security market then the disability as per sub-clause (i) of section 29A would get attracted.

82. In so far as the '**Locus Standi**' of the 'Lenders' is concerned (before this Tribunal) at this stage, there is no 'Committee of Creditors', to be significantly borne in mind. However, in view of the fact that the 1st Appellant / 'Resolution Applicant' in this appeal prays for an opportunity to be provided to him to fulfill the obligations as per the approved Resolution Plan and hence, it cannot be said in '**stricto sense**' of the term that the 'Lenders' have no 'Locus' especially when the Appellants are endeavoring to project their case of opportunity being provided to them to implement the 'Resolution Plan', notwithstanding the fact that numerous opportunities were provided to them before the Adjudicating Authority.

83. In so far as the '**stakeholders**' consultation committee under the Liquidation process, unlike 'Committee of Creditors' under 'Resolution process' they do not have any power to determine and even their consultation is not binding on the liquidator, in the considered opinion of this Tribunal.

84. No wonder, timely Resolution of 'stressed Asset' is a key factor in the successful functioning of the 'I&B' Code. As regards, the 'Liquidator' he has to act in the interests of the 'collective Body of creditors' and there must be sufficient and adequate grounds must exist before he is removed by the Competent Authority. In so far as the conduct of 'Resolution Professional' is concerned, in terms of Section 27 of the 'I&B' Code, a 'stakeholder' aggrieved by the conduct of 'Resolution Professional' may file a complaint as per IBBI (grievance and complaint handling procedure) Regulation, 2017.

85. In the present Appeal, in an unnumbered interlocutory application (vide Diary No(s). 34419 and 20770 of 2020 dated 23.07.2020) an 'Intervenor' / 'Operational Creditor' (Skyline Engineering Contracts (India) Pvt. Limited has taken a stance that the continuation of liquidation proceedings is prima facie prejudicial to the interests of all the stakeholders and further that the revival / resolution of the 'Corporate Debtor' is indeed, the best possible option, during the ongoing times of COVID 19. In fact, the aforesaid interlocutory application is not entertained by this Tribunal.

86. Be that as it may, in the light of foregoing detailed discussions, this Tribunal, taking note of the entire conspectus of the attendant facts and circumstances of the instant case in an encircling manner and also keeping in mind of the plea taken on behalf of the liquidator that the 'Resolution Applicant(s)' cash flow mentioned in the failed 'Resolution Plan' is squarely dependent upon the 'sale of assets' and hence it is 'subjective in character', this Tribunal, bearing in mind that the 1st Appellant / 'Resolution Applicant' is only said to be holding 12% equity in '**Kridhan Infra Limited**' etc. and added further in view of the specific plea taken by the Liquidator that the 'Resolution Applicant' through its subsidiaries had defaulted to Union Bank of India, Hongkong Branch to an extent of INR 750 crores approx. and hence, ineligible u/s 29A of the 'I&B' Code(although the same has been denied by the Appellant(s) and as on 31.03.2020 the 'Resolution Applicant' had reported a turnover of 21.17 crores and suffered a loss of Rs. 12.11 crores and thereby the financial position of it is not in a favourable circumstance to

implement the 'Resolution Plan', this tribunal comes to an inevitable, irresistible and inescapable conclusion that an opportunity to revive the 'Corporate Debtor' as per terms of 'Resolution Plan' is not to be provided to the Appellant(s)/ 'Resolution Applicant' to prevent an aberration of justice and also to better preserve the 'economic value of assets' because of the reason that the instant case is not an exceptional or extraordinary one to invoke the ingredients of Rule 11 of 'NCLAT' Rules, besides the provisions of 'I&B' Code cannot be diluted in any manner whatsoever. (Based on the attendant facts and circumstances of the instant case which float on the surface). Also that, it cannot be said by any stretch of imagination that no adequate opportunity was granted to the 'Resolution Applicant' before the 'Adjudicating Authority' to bring equity infusion. As a matter of fact, the 'Resolution Applicant' even after eight months of the approval of 'Resolution Plan' had not followed the timelines for equity infusion and this was rightly observed by the Adjudicating Authority in the impugned order. Furthermore, even on merits, the impugned order passed by the Adjudicating Authority is free from any Legal flaw, especially in the absence of any fraud or material irregularity in the 'Liquidation Order' passed by the 'Adjudicating Authority'. Resultantly, the Appeal fails.

87. In fine, the instant Appeal is dismissed. No costs. I.A. 529/2020 and IA No. 1551/2020 are closed. The sum of Rs. 15 crores deposited by the 1st Appellant / 'Resolution Applicant' in 'Escrow Account' shall be taken back by it. I.A. No. 530/2020 seeking exemption from filing certified copies of

the orders is closed with a direction to the Appellant(s) to file the certified copy of the impugned order dated 16.01.2020 passed by the Adjudicating Authority within 10 days from today.

**[Justice Venugopal. M]
Member (Judicial)**

**[Balvinder Singh]
Member (Technical)**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

NEW DELHI

8th September, 2020

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