

National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 417 of 2020

(Arising out of Order dated 20th January, 2020 passed by National Company Law Tribunal, Mumbai Bench, MA No. 3724/2019 in Company Petition (IB) No.- 82/MB/2018)

IN THE MATTER OF:

NEXT ORBIT VENTURES FUND

Having its Registered Office at:

**707, Omkar – The Summit Business Bay,
Off-Andheri Kurla Road,
Near Cinemax theatre, Andheri (E),
Mumbai – 400069**

.....Appellant

Versus

**1. Print House (India) Pvt. Ltd.
Through Resolution Professional
R – 847, 2, T.T.C, MIDC Rabale
Navi Mumbai 400701**

...Respondent No. 1

**2. Mr. Pramod Hendre
2203, Heritage, Hiranandani Gardens,
Adi Shankaracharya Marg,
Powar, Mumbai – 400076**

...Respondent No. 2

**3. Sify Technologies Limited
Plot No 847, 1/2, Techspace Data Center,
Rabale, Navi Mumbai – 400701,
Ttc Industrial Area, MIDC**

...Respondent No. 3

**Appellant: Mr. Kumar Anurag Singh, Mr. Zain A Khan,
Advocates.**

**Respondents: Mr. Dinakar Singh, for R-1/RP.
Mr. Arpan Behl, Mr. Dhrupad Vaghani, for R-2.**

WITH

COMPANY APPEAL (AT) (Insolvency) No. 744 of 2020

(Arising out of Order dated 23rd June, 2020 passed by National Company Law Tribunal, Mumbai Bench – II, MA No. 2972/2019 in Company Petition (IB) No.- 82/MB.II/2018)

IN THE MATTER OF:

NEXT ORBIT VENTURES FUND

Through Authorised Representative Abhishek

Having its Registered Office at:

707, Omkar – The Summit Business Bay,

Off-Andheri Kurla Road,

Near WEH Metro Station, Andheri (E),

Mumbai (MH)

.....Appellant

Versus

1. Print House (India) Pvt. Ltd.

Through Resolution Professional

R – 847, 2, T.T.C, MIDC Rabale

Navi Mumbai 400701

...Respondent No. 1

2. Committee of Creditors

Represented Through Pegasus Assets

Reconstruction Private Limited

55-56, 5th Floor, Free Press House, Nariman

Point, Mumbai, 400021

...Respondent No. 2

3. Sify Technologies Limited

Plot No 847, 1/2, Techspace Data Center,

Rabale, Navi Mumbai – 400701,

Ttc Industrial Area, Midc.

...Respondent No. 3

**Appellant: Mr. Kumar Anurag Singh, Mr. Zain A Khan,
Advocates.**

**Respondents: Mr. Krishnendu Datta, Sr. Advocate alongwith
Mr. Rahul Gupta, Mr. Rohaan R Sonawane, for R-1.
Mr. Dinkar Singh, for CoC, R-2.
Mr. Arpan Behl, Mr. Dhrupad Vaghani, for R-3.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in this *Company Appeal (AT) (Insolvency) No. 744 of 2020* by the unsuccessful Resolution Applicant is to the Common Impugned Order dated 23.06.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – II), in MA 2972/2019 in CP (IB)

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No. 82 of 2018 and MA 3137 of 2019 in MA 2972 of 2019 in CP (IB) No. 82 of 2018.

2. Aggrieved by the Impugned Order dated 20.01.2020 in MA 3724/2019 in CP (IB) No. 82/MB/2018, preferred by the Next Orbit Ventures Fund opposing the approval of the Resolution Plan submitted by another Resolution Applicant “Sify Technology Limited”, *Company Appeal (AT) (Insolvency) No. 417 of 2020* is filed by the Appellant herein.

3. MA 2972 of 2019 was filed by the Resolution Professional of Print House (India) Pvt. Ltd. (the ‘Corporate Debtor’) by invoking the provisions of Section 30(6) of the Insolvency and Bankruptcy Code, 2016 (‘in Short the **Code**’) read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India. (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, for approval of the Resolution Plan in respect of Print House (India) Pvt. Ltd., against whom Corporate Insolvency Resolution Proceedings (CIRP) has been initiated vide an Order dated 09.10.2018 in CP (IB) No. 82/MB.II/2018. MA 3137/2019 in MA 2972/2019 was filed by the Suspended Directors and Promoters of the Corporate Debtor seeking impleadment in MA 2972/2019. The Company Petition was filed by Print House (India) Pvt. Ltd. hereinafter referred to as the (“Corporate Debtor”) under Section 10 of the Code. The Learned Adjudicating Authority passed a Common Order observing as follows;

“49. We have considered the objections raised by the Applicants herein, to the Resolution Plan approved by the CoC. The main objection of the Applicants is that the Resolution Applicant intends to change the

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main business of the 'Corporate Debtor' from printing business to running Data Centers.

50. We are of the view that there is nothing the Code that inhibits a Resolution Applicant from pursuing a line of business that is different to the erstwhile business of the 'Corporate Debtor'. If this proposition is accepted, then it would mean that there can never be a situation where the successful Resolution Applicant can revive a 'Corporate Debtor' by pursuing a different line of business. We can easily conceive a situation where the business of the 'Corporate Debtor' is overtaken by technology - examples that come to mind are the pager business, fax business, telex business etc., which were consigned to the dustbin of history when technology overran them. Besides, the Code only contemplates that to the extent possible, the 'Corporate Debtor' shall be continued to be run as a going concern. That, by no means, is enough to bind the Resolution Applicant to the erstwhile business of the 'Corporate Debtor', especially when there is obsolescence of the business pursued by the 'Corporate Debtor'.

51. Therefore, having heard at length the submissions on behalf of the Applicants in MA 3137/2019, we are of the view that the same cannot be sustained. Moreover, we are bound by the Hon'ble Supreme Court in **K. Sashidhar v Overseas Bank & others¹, and Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & others,²** where the Hon'ble Supreme Court has laid down that the limited judicial review available to the Adjudicating Authority is to see that the Committee of Creditors has taken into account the fact that the 'Corporate Debtor' needs to keep going as a going concern during the Insolvency Resolution Process; that it needs to maximise the value of its assets; that the interests of all stakeholders including Operational Creditors has been taken care of. The commercial wisdom of the Committee of Creditors which has approved the Resolution Plan should be respected, subject to the limited judicial review that is available to us.

52. In this view of the matter and having evaluated the Resolution Plan through the limited window of

Section 30(2) of the Code available to us, we do not see any reason to interfere with the decision of the CoC taken after due consideration. This Adjudicating Authority does not exercise appellate jurisdiction over the decisions of the Committee of Creditors.”.....

“54. *For these reasons, the Application in MA 3137 fails, and hence the same is dismissed, but without costs. MA No. 2972/2019 is APPROVED as stated in para 42 supra.”*

Submissions of the Learned Counsel for the Appellant:

4. Learned Counsel for the Appellant vehemently contended that the Learned Adjudicating Authority has erred in approving a Resolution Plan which completely changed the nature of the business of the “Corporate Debtor” and is therefore in contravention to the objective of the Code, which is ‘Resolution’, maximization of the value of assets of the “Corporate Debtor”, ‘promoting entrepreneurship, availability of credit and balancing the interests of the Stakeholders’. The Learned Counsel submitted that the Resolution Plan is not compliant with the intent, object and purpose of the Code; that the Resolution Applicant (‘SIFY’) intended to expand its own business by creating Data Centers instead of continuing the ‘Printing Business’ of the ‘Corporate Debtor’; that the ‘Resolution’ is not a sale or an auction or a recovery or a liquidation, but the Resolution of the ‘Corporate Debtor’ as a going concern; that the Resolution Professional did not adhere to the duties mandated under Section 25 of the Code; that Regulation 39(3) mandates that the Committee of Creditors at the time of approval of Resolution Plan shall record its deliberations on the ‘feasibility and viability’ of the Resolution Plan, which was not done in the instant case; that in the

event the entire business of the 'Corporate Debtor' is allowed to be given a sharp U-turn from printing, then approximately 8 out of the 10 leading magazines, newspapers, books etc., the same would render the assets-in-trade of the 'Corporate Debtor' would be rendered a complete waste; that the Resolution Plan submitted by SIFY does not intend to continue the services offered by the said workman and therefore the interest of all the stakeholders was not protected; that the Adjudicating Authority has failed to consider that even though the commercial wisdom of the Committee of Creditors ought to be given paramount importance, however it is incumbent upon the Adjudicating Authority to approve a Resolution Plan under Section 31 of the Code only when it confirms to requirements of Section 30(2) of the Code.

5. Learned Appellant Counsel drew our attention to the letter dated 17.05.2019 addressed by SIFY to the Director of the 'Corporate Debtor' stating that they have recently visited the property at Navi Mumbai and intended to buy the Balance Leasehold Rights by way of assignment from the 'Corporate Debtor' subject to due diligence, approval and feasibility study. Learned Counsel submitted that it is the sole intention of the successful Resolution Applicant to purchase the land and use it for Data Center operations which is completely deviating from the core business of the 'Corporate Debtor'. He also drew our attention to exhibit A-5, which is the Minutes of the 15th CoC Meeting held on 16.08.2019, wherein the Committee of Creditors (CoC) had requested SIFY to resubmit the revised

Plan after carrying out necessary modifications/corrections in the Plan to make it compliant with the Code.

6. Learned Counsel for the Appellant further placed reliance on the 16th CoC Meeting deliberations which are observed as follows;

“With regard to observations made in previous meeting on Resolution Plan submitted by Sify about their intension not to continue with existing business of the ‘Corporate Debtor’ and start new business activity of developing Data Centers at the land of the ‘Corporate Debtor’, the representatives of Sify informed the meeting that they have relooked into this matter and will suitably change their Resolution Plan to provide for continuation of existing business of the ‘Corporate Debtor’.

After discussion, the Committee decided to give some more time to resubmit the revised Resolution Plan; accordingly, the Sify representatives were asked to resubmit their revised Resolution Plan by 5:00 p.m. on 21.08.2020.”

7. Learned Counsel contended that the Resolution Professional and the CoC approved the Plan despite the fact that the Plan did not provide for ‘continuation of existing business of the ‘Corporate Debtor’ nor maximization of the assets and did not take care of the interests of all stakeholders, despite the fact that there is a workforce of 2700 employees. Learned Counsel further contended that Regulation 38(3)(b) which provides for the ‘feasibility and viability of the Plan’ was not adhered to in the present case. Learned Counsel placed reliance on the Judgements of the Hon’ble Supreme Court in **‘Binani Industries’ V/s. ‘Bank of Baroda and Anr.’ Company Appeal (AT) (Insolvency) No. 82 of 2018** in support of his submission that the Resolution Plan is not a sale or an auction for being sold to a bidder who pays the higher price. He also relied on the Judgement

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of the Hon'ble Supreme Court in '**Arcelor Mittal India Private Limited**' **V/s. 'Satish Kumar Gupta & Ors.'** (2019) 2 SCC 1, wherein the Hon'ble Supreme Court has held that the 'Corporate Debtor' consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP and if a Resolution Applicant can continue to run the 'Corporate Debtor' as a going concern, every effort must be made to see that it is made possible.

8. The Learned Counsel strenuously argued that though the CoC had given another opportunity to the third Respondent to submit a revised Resolution Plan by 19.08.2019, curiously though the business Plan has not undergone any change, it was accepted, which is in complete violation of the provisions of the Code and hence sought for setting aside the Impugned Order passed by the Learned Adjudicating Authority.

Submissions of the Learned Counsel for the first Respondent/Resolution Professional:

9. The Learned Counsel for the first Respondent submitted that in the 13th CoC meeting held on 16.08.2019, the Resolution Professional tabled the sealed envelope containing the Resolution Plan of the Appellant and another Plan received on 5th August from the third Respondent; that the third Respondent had filed MA No. 2438 of 2019 seeking extension of time for filing the Resolution Plan, while the Appellant had filed an Intervention Application opposing the Resolution Plan filed by the third Respondent; that on 12.08.2019 the 4th CoC Meeting had taken place, in compliance of the Order of the Learned Adjudicating Authority and in the absence of any stay

by the Adjudicating Authority, the Resolution Professional opened the sealed envelope containing the Resolution Plan of both the Appellant and the third Respondent; that on 16.08.2019 in the 15th CoC Meeting, the Resolution Professional tabled his Compliance Report after examining both the Resolution Plans and it was suggested that the Resolution Applicant make certain corrections/modifications in their Plan to make it compliant with the Code and give a revised proposal by 19.08.2019; that in the 16th CoC Meeting held on 19.08.2019 the representative of SIFY informed that they were in process of finalizing the revised Resolution Plan and needed some time to submit the same; that the CoC unanimously agreed to discuss the Appellant's revised bid and convened a Meeting for 21.08.2019.

10. Learned Counsel submitted that on 21.08.2019 in the 17th CoC Meeting, though an opportunity was given to the Appellant to submit a revised Plan, the Appellant refrained from coming to the Meeting and requested additional time beyond 22.08.2019 which was denied by the CoC and it was requested that the same be submitted by 22.08.2019. On 26.08.2019 in the 18th CoC Meeting after going through various aspects of both the plans, submitted by the Appellant and SIFY, CoC approved the Resolution Plan of SIFY with a majority of 70.5%.

11. The Learned Counsel for the first Respondent submitted that both the Resolution Plans of the Appellant and SIFY were examined in accordance with Section 30(2) and Regulations 37 and 38 of the CIRP Regulations and only after having been satisfied that they had complied the requirements under the Code and CIRP Regulations together, the Resolution Plans were

submitted for approval. Learned Counsel placed reliance on the Judgement of the Hon'ble Supreme Court in '**K. Shashidhar' V/s. 'Indian Overseas Bank and Ors.'** **Civil Appeal No. 10673 of 2018** in which the Hon'ble Apex Court has observed that 'commercial decisions of the Committee of Creditors are not open to judicial review'. Learned Counsel for the first Respondent also submitted that the 'Corporate Debtor' was in the business of 'Printing and Leasing' and as the printing business was not viable, owing to several micro factors affecting the enterprise, substantial portion of the premises was not being utilized for printing business but was let out to generate Rent Revenue and therefore SIFY was considering transforming the existing infrastructure to a Data Center by investing additional capital and converting the vacant lands for these Data Centers resulting in employment opportunities for about 150 people and consequently resulting in 'maximization of value of the assets and stakeholders of the first Respondent'.

12. The Learned Counsel submitted that the Learned Adjudicating Authority has rightly observed that 'there is nothing in the Code that inhibits a Resolution Applicant from pursuing the line of business i.e. different to the erstwhile business of the 'Corporate Debtor'.

Submissions of Learned Counsel representing Committee of Creditors:

13. In brief, the submissions of the Learned Counsel appearing for the Committee of Creditors is summarized as hereunder:-

- There are no restrictions under the Code that the 'Successful Resolution Applicant' cannot change the line of business to keep the Company as a going concern.
- Learned Adjudicating Authority has rightly observed in Paras 49 and 50 of the Impugned Order that when a business of the 'Corporate Debtor' is overtaken by technology there is no inhibition for the Successful Resolution Applicant to revive the 'Corporate Debtor' by pursuing a different line of business.
- The Appellant herein is a 'fund' and neither a Company nor a trustee and therefore the Appeal preferred by them is not maintainable.

Submissions of the Learned Counsel appearing for the SIFY

14. The submissions of the Learned Counsel appearing for the SIFY, the Successful Resolution Applicant is as hereunder:-

- The Learned Counsel submitted that the plant and machinery used by the 'Corporate Debtor Company' and the printing technology employed by the Company had become obsolete on account of which the business suffered and revenues reduced from 32.2 Crs. (FY 2014) to 4.1 Cr. (FY 2018) and therefore 'SIFY' sought to invest large amounts of money to revive the 'Corporate Debtor' and integrate the obsolete printing business with the digital Data Centers.
- The business plan reproduced by the Adjudicating Authority envisages that the scope and intent of the Code has been met by 'SIFY'.

Assessment:

15. Heard all parties at length and perused the Written Submissions filed.

16. The main point for consideration in this Appeal is whether the Resolution Plan approved under Section 31 by the Learned Adjudicating Authority is in contravention with the scope and objective of the Code which is 'Resolution', 'maximization of value of assets of the 'Corporate Debtor' and 'promoting entrepreneurship', 'availability of credit and balancing interest of all stakeholders'.

17. It is not in dispute that the CoC shortlisted the final list of Resolution Applicants including;

(a) SIFY Technologies Limited

(b) Staple Pins Private Limited

(c) Next Orbit Ventures Fund.

18. At this juncture, it is relevant to refer to Sections 30 & 31 of the I&B Code which read as under;

"30. Submission of resolution plan. - (1) A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible Under Section 29-A to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as

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may be specified by the Board which shall not be less than –

(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor Under Section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sub-section (1) of Section 53,

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

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

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

- (i) where a resolution plan has not been approved or rejected by the Adjudicating Authority;*
- (ii) where an appeal has been preferred Under Section 61 or Section 62 or such an appeal is not time barred under any provision of law for the time being in force; or*
- (iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;]*

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

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

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

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

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

Provided further that where the resolution applicant referred to in the first proviso is ineligible under Clause (c) of Section 29-A, the resolution applicant shall be allowed by the committee of

creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to Clause (c) of Section 29- A:

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

Provided also that the eligibility criteria in Section 29-A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Ord. 6 of 2018) shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

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

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

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

31. Approval of resolution plan. – *(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors Under Sub-section (4) of Section 30 meets the requirements as referred to in Subsection (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:*

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this Sub-section, satisfy that the

resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in Sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval Under Sub-section (1), -

(a) the moratorium order passed by the Adjudicating Authority Under Section 14 shall cease to have effect; and

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

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

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.”

19. The other requirements are specified by the IBBI in Regulations 37, 38 and 39 of the CIRP Regulations;

“37. Resolution Plan. – A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following; -

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(a) transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

[(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;]

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

[(ca) cancellation or delisting of any shares of the corporate debtor, if applicable;]

(d) satisfaction or modification of any security interest;

(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;

(f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

(j) change in portfolio of goods or services produced or rendered by the corporate debtor;

(k) change in technology used by the corporate debtor;
and

(l) obtaining necessary approvals from the Central and State Governments and other authorities.]

38. Mandatory contents of the resolution plan. –

[(1) The amount payable under a resolution plan –

(a) to the operational creditors shall be paid in priority over financial creditors, and

(b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.]

[(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholder, including financial creditors and operational creditors, of the corporate debtor.]

[(1-B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.]

(2) A resolution plan shall provide: -

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

[(3) A resolution plan shall demonstrate that –

(a) it addresses the cause of default;

(b) it is feasible and viable;

(c) it has provisions for its effective implementation;

(d) it has provisions for approvals required and the timeline for the same; and

(e) the resolution applicant has the capability to implement the resolution plan.]

39. Approval of resolution plan. *–[(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution*

professional electronically within the time given in the request for resolution plans under regulation 36-B alongwith –

(a) an affidavit stating that it is eligible under section 29-A to submit resolution plans;

*[***]*

(c) an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

(1-A) A resolution plan which does not comply with the provisions of sub-regulation (1) shall be rejected.]

[(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of the following transactions, if any, observed, found or determined by him: -

(a) preferential transactions under section 43;

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66; and the orders, if any, of the adjudicating authority in respect of such transactions.]

[(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:

[Provided that the committee shall record its deliberations on the feasibility and viability of the resolution plans.].....”

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20. These provisions have been recently considered in the Judgement of the Hon'ble Supreme Court in '**Kalpraj Dharamshi & Anr.' V/s. 'Kotak Investment Advisors Ltd. & Anr.'** reported in 2021 SCC OnLine SC 204.

21. The Jurisdiction of NCLAT being in continuation of the proceedings envisages that any Appeal against an Order approving the Resolution Plan shall be in the manner and on the grounds specified in Section 61(3) of the IBC. Pertinently, the grounds, be it under Section 30(2) or under Section 61(3) are regarding testing the validity of the Resolution Plan approved by the CoC. The enquiry in such an Appeal would be limited to the power authorized to the RP under Section 30(2) of the IBC, or at best, by the Adjudicating Authority under Section 31(2) read with Section 31(1). This Tribunal can examine the challenge only in relation to the grounds specified in Section 61(3), which is limited.

22. An Appeal against an Order approving the Resolution plan can be made under Section 61(3) of the IBC on the following grounds;

61. Appeals and Appellate Authority. –

(3) *An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—*

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

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(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

23. We are of the view that the Resolution Plan approved by the CoC in the instant case has to be seen only in the limited Jurisdiction exercisable by this Tribunal. At this juncture, to ascertain if the Resolution Plan meets the provisions specified under Section 61(3) it is relevant to reproduce the 'executive strategy' and the Business Plan of the 'Resolution Applicant' the relevant portion of which is detailed as hereunder.

**SCHEDULE V
BUSINESS PLAN**

**B. Execution strategy of the Resolution
Applicant (SIFY)**

The strategy to turnaround the business by running Data Centers which will generate long-term value to all the stakeholders concerned will be based on following principles:

- 1. Adopt Strong Governance Practices*
- 2. To Support Make in India Policy*
- 3. To be relevant for Digital India*
- 4. Attract and invest in local talent pool*
- 5. Maximise value for the stakeholders*

1. Adopt Strong Governance Practices:

Sify is a company listed in NASDAQ (USA) for more than 19 years. Sify is governed by corporate governance practices of Securities Exchange Commission (SEC) of the USA. Sify has been awarded Golden Peacock Award in the year 2014, which is a recognition of strong corporate governance practices. Our governance structure and the effective management team will ensure

that the assets are put to the maximum and most relevant use thereby benefiting all the stakeholders involved.

2. To be Relevant in Digital India:

India is transforming into digital country with the Government of India encouraging Indian Companies to set up Data Centre to support the institutions and Industries. The Government and industries have gained hugely due to Digital growth in the Country over the last decade. The data privacy and data protection rights proposal by Government of India is likely to make more multi-national companies have their data residing in India, which will push for buoyant growth in Data Center services. Mumbai, being one of the primary Gateway for the Internet in the country, will largely benefit from this policy initiative. Sify, with its Data Center strategy in Navi Mumbai, will look to partner in this digital India campaign.

3. To support Make in India Policy:

Sify sources the inputs required for the construction, operation and maintenance of the Data Centers from local suppliers to the extent available. Further, the Data Center services are offered from India to both Domestic and International customers. The future expansion of capacity in relation to facility and power will be focused towards maximizing the philosophy of Make in India. Sify's Data Center investment will have multiplier effect on the local economy contributing to the national development.

4. Attract and invest in local talent pool:

Sify's investment in Data Center facilities will create and indirect employment for more than 150 people, which will be from the local talent pool. Any expansion of the facility and services will lead to more employment opportunities in the state.

5. Maximise value for stakeholders

Sify drives to create value for all the stakeholders involved. Sify has not defaulted on repayment of its borrowers and creditors. Sify believes in developing business models that benefits the local community with employment opportunities without damaging the environment, Government to increase revenues, customers to receive best in class services, suppliers to be sustainable and the providers of finance to generate return on the borrowings/investments made.

Resolution Applicant can take over 100% shareholding of the ‘Corporate Debtor’ and demerge printing business and continue with lease business. The Resolution Applicant has option to lease out the premise to its group companies.

The ‘Corporate Debtor’ was pursuing two business – printing and leasing. The Resolution Applicant evaluates that the printing business is not viable owing to moderation in growth in printing industry along with other macro factors affecting the enterprise. Further, substantial portion of the premises is not being utilized for printing business but was let out to generate rent revenue.

The Resolution Applicant proposes to demerge the non-viable printing business and continue the ‘Corporate Debtor’ as a going concern with the existing leasing business. Accordingly, the Resolution Applicant will enter into a long term, perpetual lease with its group company to run the Data Center business...

24. The ‘intent of the Code’ as expressed in Clause 5.3.3 of the Bankruptcy Law Reforms Committee (‘BLRC’) report of 2015;

“5.3.3. Obtaining the resolution to insolvency in the IRP

The Committee is of the opinion that there should be freedom permitted to the overall market to propose solutions on keeping the entity as a going concern. Since the manner and the type of possible solutions are specific to the time and environment in

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

(Emphasis Supplied)

25. It is seen from the aforementioned extract that the Committee has advocated that there should be freedom given to the market, to propose solutions on keeping the entity as a going concern. The decision as to how the Insolvency is to be resolved and the mode and manner in which the debt is to be restructured will only emanate from the deliberations of CoC in response to the current economic and market scenario.

26. The Hon'ble Supreme Court in '**K. Sashidhar**' (**Supra**) has laid down the role of the CoC in accepting or rejecting the Resolution Plan as well as the role of the Adjudicating Authority while considering the Application from approval or rejection of the Resolution Plan. There is an intrinsic assumption that the 'Financial Creditors' are fully informed about the viability of the 'Corporate Debtor' and the feasibility of the Resolution Plan. The opinion expressed after due deliberations in the CoC meeting through voting, is a collective business decision. The legislature, consciously, has

provided only limited grounds to challenge the commercial wisdom or their collective decision by the Adjudicating Authority.

27. The Hon'ble Supreme Court in '**Kalprij Dharamshi & Anr.**' (*Supra*) in Para 148 has referred to the observations of the Court in '**K. Sashidhar**' (*Supra*);

"57. ...Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in NCLT or NCLAT as noticed earlier, have not made the commercial decision exercised by CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" Under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds--be it Under Section 30(2) or Under Section 61(3) of the I&B Code--are regarding testing the validity of the "approved" resolution plan by CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by CoC in exercise of its business decision."

[Emphasis Supplied]

"149. It will therefore be clear, that this Court, in unequivocal terms, held, that the appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.

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150. The position is clarified by the following observations in paragraph 59 of the judgment in the case of **K. Sashidhar** (supra), which reads thus:

“59. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the 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.....”

151. This Court in **Committee of Creditors of Essar Steel India Limited through Authorised Signatory** (supra) after reproducing certain paragraphs in **K. Sashidhar** (supra) observed thus:

“Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in **K. Sashidhar**”

152. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.”

28. Discussing the legislative intent and the commercial wisdom of CoC the Hon’ble Apex Court in **‘Kalpraj Dharamshi & Anr.’ (Supra)** has laid down as follows;

“155. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this

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Court, is unambiguous. The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided Under Sections 30 and 31 of the I&B Code.

156. No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of Clause (ii) of Sub-section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last Form 'G' could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.

(Emphasis Supplied)

29. The argument of the Learned Counsel appearing for the Unsuccessful Resolution Applicant that it is not the commercial wisdom of CoC which is being challenged here but that the Resolution Professional did not take into consideration the feasibility and viability of the 'Resolution Plan' which was deliberated upon in the 15th and 16th CoC Meetings, wherein the 'Resolution Applicant' was asked to revise the Plan and the same was not adhered to and the same is in contravention of Regulation 38(3)(b), is untenable, for the

following reasons. In the 18th CoC Meeting held on 26.08.2019, the 'Resolution Plan' submitted by the Appellant herein was deliberated upon and the salient features of the Plan were compared with that of the revised 'Resolution Plan' submitted by 'SIFY'. It is pertinent to reproduce the Minutes of the Meeting wherein both the Plans were compared and a final decision was arrived that;

"The Committee went through the revised final Resolution Plan as received from Sify Technologies Limited and noted the following salient features of the Plan:

A. Summary of payments under the Plan:

<i>Sl. No.</i>	<i>Claimant</i>	<i>Amount of liability (in Rs.)</i>	<i>Settlement Amount (in Rs.)</i>	<i>% of liability</i>	<i>Upfront payment (in Rs.)</i>
1.	Financial Creditors	81,91,45,955	42,50,00,000	51.88	38,50,00,000
2.	Workmen & Employee	9,24,55,241	14,41,00,000	34.52	6,90,83,040
3.	Operational & other Creditors	32,50,29,235			
<i>Total</i>		123,66,30,431	56,91,00,0000		45,40,83,040

B. Payment schedule:

(a) Financial Creditors- within a period of two quarter beginning from 60 days from effective date.

(b) Others- Upon finalization of claim amount.

After going through various aspects of both the plans, the Committee evaluated plans as per evaluation Matrix determined.

As per evaluation matrix, the plans got total scores as follows:

<i>Sl. No.</i>	<i>Name of Applicant</i>	<i>Weighted Score as per quantitative parameters</i>	<i>Weighted Score as per qualitative parameters</i>	<i>Total Score</i>
1.	Next Orbit Ventures Fund	17.82	4.62	<u>22.44</u>
2.	Sify Technologies Limited.	72.60	21.25	<u>93.85</u>

After evaluation, the plans were put to vote.

At this junction, Mr. Subodh Gokhale, representing Sumitomo Mitsui Finance & Leasing Co. Ltd., informed the meeting that he needs some time to vote as he has to take instructions from his principal viz. Sumitomo Mitsui Finance & Leasing Co. Ltd. Upon this the Chairman drew his attention to the Circular No. IBBI/CIRP/061/2018 dated 10th August, 2018. Issued by Insolvency and Bankruptcy Board of India, that all financial creditors must be represented in the COC or in any meeting of the COC by such persons who are competent and are authorized to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditor.

After discussion, the Committee decided not to defer voting on resolution plans and accordingly voting was done as follows:

Sl. No.	Particulars	Vote by Pegasus Asset Reconstruction Pvt. Ltd. (voting share 70.05%)	Vote by Sumitomo Mitsui Finance & Leasing Co. Ltd. (voting share 29.95%)	Result
6.	Revised final Resolution Plan submitted by Next Orbit Ventures Fund	Voted against the plan	Abstained from voting	Rejected
7.	Revised final Resolution Plan submitted by Sify Technologies Ltd.	Voted for the Plan	Abstained from voting	Approved

Accordingly, the plan submitted by Sify Technologies Limited was approved with requisite majority.”

(Emphasis Supplied)

30. It is seen from the aforementioned Minutes of the CoC Meeting that the Plan submitted by ‘SIFY’ was approved with a majority of 70.05% with a weighted score of 93.85, whereas the Plan submitted by the Appellant herein scored only 22.44 Pts. Therefore, the submissions of the Learned Counsel that deliberations of the 15th and 16th CoC Meetings were not considered

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pales into insignificance, keeping in view the Minutes of the final CoC Meeting and further we are of the considered view that the issues raised in this Appeal need to be decided on the touchstone of the Principle laid down by the Hon'ble Supreme Court decided in '**K. Sashidhar' V/s. 'Indian Overseas Bank' 2019 SCC OnLine SC 257** and in '**Kalpraj Dharamshi & Anr.'** (Supra).

31. It was strenuously argued by the Counsel for the Appellant that the workman's dues were disregarded and therefore, the interests of all stakeholders were overlooked. The portion of the Plan dealing with the issue on hand, is detailed as hereunder;

"11. INTERESTS OF ALL STAKEHOLDERS

The Resolution Plan proposed by the Resolution Applicant adequately deals with the interests of all stakeholders, including Financial Creditors and Operational Creditors, of the Company, in the following manner:

- (a) Employees/ Workmen: The Current plan proposes to continue the services of approx. 70 active employees and workmen as on the rolls of the company on current date. The Resolution Applicant further undertakes to provide adequate training and upskilling opportunities to employees so that they may find suitable employment within the corporate debtor.*
- (b) Banks/ FIs: Financial Creditors shall be paid a sum of INR 42.5 cr. Towards full and final settlement of their claims in the manner set out in the Resolution Plan. However, it is hereby clarified that such payment shall not absolve or be treated as a waiver of the obligation of the existing promoters of corporate debtor or affect the rights of the Financial Creditors to*

initiate or continue the proceedings against the existing promoters of corporate debtor and the Financial Creditors shall have full discretion to take steps as they deem appropriate for recovery of such amounts from the existing promoters of corporate debtor.

(c) Operational creditors (Statutory dues):

(i) Admitted Statutory Dues claim: 100% of admitted Statutory Claim of INR 5,13,254 will be paid an upfront payment (within 30 days from the Effective Date)

(ii) EPF Claim: 100% of EPF Claim of INR 29,13,346 (based on email communication from RP dated 19th Aug' 19) will be paid an upfront payment (within 30 days from the Effective Date)

(iii) Admitted Statutory Dues claim All remaining claims from statutory authorities (whether admitted or not admitted) will be settled at 30% of the aggregate amount. RA understands (based on email communication from RP) that aggregate statutory dues are INR 21,88,54,800. RA therefore agrees to set aside a fund to cover all other statutory creditors (apart from admitted statutory claim and EPF claim). This amount of INR 6,56,56,440 in full and final settlement within 30 days from the Effective Date for all such outstanding claims”....

32. The submission of the Appellant that interest of all stakeholders is ignored, is not sustainable, keeping in view, the substantial amounts earmarked for workmen and employees in the aforementioned table and also what Schedule V of the Plan has envisaged to balance the interests of all stakeholders.

33. We address ourselves to the submissions of the Learned Counsel that *a 'Resolution Plan' under the 'IBC' is not an 'Auction' and 'feasibility and viability' of the 'Resolution Plan' are not amenable to bidding an auction.* He placed reliance on the ratio laid down in **'Binani Industries' (Supra)**.

Dictionary meaning of 'Feasibility' and 'Viability':

34. Black's Law Dictionary defines 'feasible' as being *'reasonably capable of being completed or accomplished'*.

'Viability' is defined as 'the ability to live, grow and develop; the ability to function adequately; the ability to succeed or being sustained.

35. 'Feasibility' means analyzing the strengths and weaknesses of an existing business or a proposed business venture, taking into consideration the opportunities offered and the risks present. 'Feasibility' can be economic feasibility, legal feasibility, market and real estate feasibility, resource feasibility, financial feasibility, etc. 'Viability' on the other hand is the study of the existing business or proposed venture's sustainability. Apart from determining whether the proposal should be approved or not, it involves dealing with strategies on how to make the business grow and last. Business growth and sustainability are the important aspects of viability. *In the instant case 'feasibility and viability' is to be viewed holistically.* The technical, market, economic, financial, model viability is to be taken into consideration as it is ultimately linked to the profitability of the business. Business sustainability is defined as managing the financial, social and

environmental risks, obligations and opportunities. An integration of all these factors is essential for sustainability and growth of a business.

36. It is significant to mention that while we agree with the submission of the Learned Counsel for the Appellant that Resolution Process under 'IBC' is 'not an auction or a recovery proceeding', we are of the considered view that the facts in the instant case read with the Minutes of the CoC Meetings and the 'Resolution Plan' filed before us does not construe to be an 'auction or a recovery proceeding'. The 'Resolution Plan' deals with the ability to turn around distressed Companies.

37. In today's scenario, in the Printing Industry, change is the biggest determiner. The amount and pace of change is unprecedented. Together, 'Printing' and 'Online' are greater than the sum of their parts. We are seeing a continuing movement towards automation and robotics, opening up a lot of new ideas and challenges. The Printing Industry is feeling the force of the digital age where new areas of innovation are being entered into for protecting the business and making products relevant in today's digital age. It is oft repeated that 'Companies rarely die from moving too fast, and they frequently die from moving too slowly'. Merely because the 'Resolution Plan' does not stick to the core printing business, in its truest sense, it cannot be said that the approved 'Resolution Plan' lacks the right vision and proposition specially in the light of the converging market forces and refocused business models. Further, it has been agreed by the 'Resolution Applicant' that the new management will upgrade the skills of the workmen and employees for this business cycle. In **'Arcelor Mittal**

India Private Limited' (Supra) it has been observed by the Hon'ble Apex Court that *'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 if this is possible'*. 'Going concern' does not mean that the nature of the business cannot be changed with an objective to 'add value' or 'create synergy'. If it is viewed in this perspective, it would be interpreting the word 'going concern' in a very narrow compass which is not the scope and objective of the Code.

38. The Hon'ble Supreme Court has observed that paramount importance is to be given to the decision of CoC, which is taken on the basis of commercial wisdom which cannot be interfered with excepting under the limited scope as provided under Sections 30 & 31 of the I&B Code. At the cost of repetition 'IBC' provides for restructuring of the 'Corporate Debtor' change in technology, change in portfolio of goods and services produced or rendered by the 'Corporate Debtor' as long as the scope and objective of the Code is not hampered and therefore we are of the considered view that if the Resolution Plan contemplates a change in the nature of business to another line when the existing business is obsolete or non-viable, it cannot be construed that the Resolution Plan is not 'feasible or viable'. It can be seen from the aforementioned Sections 30(2) & 31 and Regulations 37, 38 and 39 that there is nothing in the Code which prevents a 'Resolution Applicant' from changing the present line of business to adding value or creating 'Synergy' to the existing assets and converting an obsolete line of business to a more 'viable and feasible' option. Keeping in view the ratio laid down by the

Hon'ble Supreme Court in the recent Judgement '**Kalpraj Dharamshi & Anr.'** (**Supra**), and the fact that there is no 'material irregularity in the exercise of powers' by the Resolution Professional; and the approved 'Resolution Plan' is not in contravention of any law for the time being in force, we are of the view that there is no illegality or infirmity in the Impugned Order of the Learned Adjudicating Authority.

39. In the result, for all the aforementioned reasons, *Company Appeal (AT) (Insolvency) No. 417 of 2020* is rendered infructuous and *Company Appeal (AT) (Insolvency) No. 744 of 2020*, is dismissed accordingly. No order as to costs.

[Justice Bansi Lal Bhat]
The Acting Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
13th April, 2021

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