

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH: NEW DELHI
Company Appeal (AT)(Insolvency) No. 233 of 2021**

In the matter of:

Dwarkadhish Sakhar Karkhana Ltd.

Registered Office At:

**19, Garden Homes Society, Lokmanya Nagar,
Gangapur Road, Nashik – 422003**

State – Maharashtra

....Appellant

Vs.

1.Pankaj Joshi,

RP of KGS Sugar & Infra

Corporation Ltd.,

Having Office At:

Unit 12, Kakad Industrial Estate

Lady Jamshedji Cross Road No. 3,

Mahim (West) Mumbai – 400016

2. Gangamai Industries & Construction Ltd.

Having Office At:

Tapadia Terraces, 2nd Floor,

Adalat Road,

Aurangabad, Maharashtra - 431001

...Respondents

Present

For Appellant:

Mr. Arun Kathpalia, Sr. Advocate with Mr. Shiv Kumar Suri, Mr. Shikhil Suri, Ms. Nikita Thapar, Ms. Prerana Wagh and Ms. Shilpa Saini, Advocates.

For Respondents:

Mr. Manish Desai, Mr. Utsav Mukherjee, Ms. Supriya Majumdar, Ms. Tasneem Zariwala, Ms. Megha Tyagi and Mr. Jaiveer Kant, Advocates for R-1.

Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Geetika Sharma and Ms. Vaishnavi Mungekar, Advocates for R-2.

With

Company Appeal (AT)(Insolvency) No. 333 of 2021

In the matter of:

Company Appeal (AT)(Insolvency) Nos. 233 & 333 of 2021

**Pankaj Joshi,
 RP of KGS Sugar & Infra
 Corporation Ltd.,
 Having Office At:
 9, Sudarshan CHSL,
 Mahant Road, Vile Parle (East),
 Mumbai.**

....Appellant

Vs.

**Gangamai Industries & Construction Ltd.
 Having Office At:
 Tapadia Terraces, 2nd Floor,
 Adalat Road,
 Aurangabad, Maharashtra - 431001**

...Respondent

Present

For Appellant: Mr. Manish Desai, Mr. Utsav Mukherjee, Ms. Supriya Majumdar, Ms. Tasneem Zariwala, Ms. Megha Tyagi and Mr. Jaiveer Kant, Advocates.
For Respondents: Mr. Sumesh Dhawan, Ms. Vatsala Kak, Ms. Geetika Sharma and Ms. Vaishnavi Mungekar, Advocates.

**Coram : Mr. Jarat Kumar Jain, (Judicial)
 Mr. Kanthi Narahari, (Technical)**

J U D G M E N T

Jarat Kumar Jain: J.

1. The Adjudicating Authority (National Company Law Tribunal, Special Bench, Mumbai) by the impugned order dated 01.03.2021 allowed the Application of Gangamai Industries and Constructions Ltd. (GIACL) I.A. No. 1029 of 2020 in CP (IB) 2056/MB/2019, whereby the decision of CoC accepting the Expression of Interest (EOI) of Dwarkadhish Sakhar Karkhana Ltd. (DSKL) after due date, was set aside and deprecated the conduct of Resolution Professional (RP) Pankaj Joshi. Therefore, they have filed these

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Appeals assailing the order. Both the Appeals are disposed of by this common Judgment.

2. Brief facts of the case are that, on 10.10.2019 the Adjudicating Authority passed an order in CP (IB) 2156/MB/2019 filed by Canara Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC), thereby initiated CIRP of the Corporate Debtor 'KGS Sugar and Infra Corporation Ltd'. Accordingly, by the admission order, moratorium in terms of Section 14 of the IBC was declared and one Mr. Balady S. Shetty was appointed as the Interim Resolution Professional (IRP). The CoC in its first meeting, appointed Mr. Balady S Shetty as Resolution Professional. Mr. Shetty published the invitation of expression on 18.01.2020, wherein the last date for submission of EOI was 10.02.2020 and for submission of Resolution Plan, it was 05.04.2020.

3. Pursuant to the EOI, the RP Mr. Shetty received EOIs from 14 Prospective Resolution Applicants, out of which only four including GIACL met the eligibility criteria. Subsequently, by email dated 12.03.2020, DSKL submitted its EOI to Mr. Shetty. On the same day, Mr. Shetty informed DSKL that EOI was received after last date of submissions, therefore, it cannot be considered. Thereafter, on 23.03.2020, DSKL sent an email to the CoC Members to allow DSKL to submit EOI. On 02.04.2020, DSKL sent email to Mr. Shetty requesting to make necessary information available for submissions of Resolution Plan. On 03.04.2020, Mr. Shetty placed the request of submitting EOI by DSKL before the 07thCoC Meeting. After deliberation, the CoC passed the Resolution unanimously and thereby

rejected the request of DSKL for submitting EOI. Mr. Shetty has communicated the decision to DSKL on 09.04.2020.

4. The Adjudicating Authority, on 27.05.2020, at the recommendation of the CoC, replaced Mr. B S Shetty to Mr. Pankaj Joshi (RP) and Pankaj Joshi has taken charge on the same day. Aggrieved by the decision of CoC, on 05.06.2020 at 10:43 AM, Advocate of DSKL sent email enclosed with an Application to Mr. Shetty who thereby forwarded the same to the RP 'Pankaj Joshi' at 12: 20 PM. On the same day i.e. 05.06.2020 RP Pankaj Joshi at 12:43 PM sent an email to DSKL requesting to submit EOI within 10 days from the date of receipt of the communication. Thereafter, again on the same day, RP 'Pankaj Joshi' has sent another email to DSKL at 15:13 PM with the same request to submit EOI. The 9th CoC meeting convened on 13.06.2020, wherein Mr. Pankaj Joshi has placed EOI submitted by DSKL and canvassed before the CoC that, for maximization of value of asset of the Corporate Debtor, it is appropriate to permit DSKL to file EOI. Thus, after deliberation, CoC permitted DSKL to submit EOI. Thereafter, GIACL who has already filed EOI and was in the list of Prospective Resolution Applicant, being aggrieved with the decision of the CoC, which is taken in favour of DSKL, has filed an Application (I.A No. 1029 of 2020) against the RP 'Mr. Pankaj Joshi' before the Adjudicating Authority.

5. On 09.07.2020, the matter was taken up by the Adjudicating Authority and they heard all the Ld. Counsels at length on the Application in the presence of Mr. Amit Jaste, Counsel for DSKL and matter was reserved for orders. Ld. Adjudicating Authority, vide impugned order dated 01.03.2021, allowed the Application and resultantly the CoC decision in accepting the EOI

of DSKL after due date and including it in the list of Prospective Resolution Applicants is set aside and the list of Prospective Resolution Applicants prepared by Mr. Shetty (RP) on 06.03.2020 is held to be valid. In the impugned order, Ld. Adjudicating Authority has strongly deprecated the conduct of RP 'Mr. Panakj Joshi'.

6. Being aggrieved with this order, DSKL and Mr. Pankaj Joshi have filed these Appeals.

7. Ld. Counsel appearing on behalf of Pankaj Joshi (R-1, in CA (AT) (Ins) No. 233 of 2021 and the Appellant in CA (AT) (Ins) No. 333 of 2021) submitted that Section 60(5) of the IBC is a residuary provision, conferring exclusive jurisdiction upon Adjudicating Authority to entertain or dispose of any Application on proceedings by or against the Corporate Debtor or Corporate persons. It does not invest the Adjudicating Authority with jurisdiction to interfere before the quasi-judicial determination is made, under Section 31 of the IBC. The Supreme Court in the decision of *Arcellor Mittal India Pvt. Ltd. Vs. Satish Kr. Gupta* (2019) 2 SCC 1 Para 82-84 has in express terms so held. Thus, the Adjudicating Authority has no jurisdiction to entertain and decide I.A. No. 1029 of 2020 filed by GIACL. He submitted that GIACL did not have the locus standi to challenge the inclusion of DSKL in the CIRP. It has been held in *Arcellor Mittal* (Supra) and in *Arcellor Mittal India Pvt. Ltd. Vs. Abhijit Guhathakurta* (2019 SCC Online NCLAT 920 – Para 9 & 10) that there is no vested right of Prospective Resolution Applicant. It is submitted that a person, who has been allowed to participate in Resolution Process, cannot contest it on the ground that it obviates competition. The argument is that, the people at large were not given any opportunity to participate in the

CIRP by not issuing a fresh Form 'G'. This argument is not sustainable, as such argument can only be available to a person who has been denied participation in the CIRP. He also submitted that, the judicial precedents permitted the CoC to depart from Regulation 36-A (6) to achieve the object of the IBC. The Regulation 36-A (6) is not mandatory. The Hon'ble Supreme Court in the case of Kalpraj (supra) held that the CoC has the right to take a commercial decision of accepting the Resolution Plan after due date and it is not open to judicial intervention. He submitted that, the decision to allow DSKL to participate was a well deliberated decision, taken up by 100% majority in the 9th CoC meeting. GIACL is one of the beneficiaries of the decision and cannot question the same. He submitted that, the allegations are factually incorrect that Pankaj Joshi received information of filing Application at 12:20 PM on 05.06.2020 and allowed DSKL to submit EOI at 15:13 PM. DSKL was allowed to submit Resolution Plan, such decision was taken in the 09th CoC meeting held on 13.06.2020. Thereafter, DSKL submitted its Resolution Plan. In view of the above, the Appeal be allowed and adverse remarks in Para 54 of the impugned order made against Mr. Pankaj Joshi be quashed and expunged.

8. Ld. Sr. Counsel appearing on behalf of DSKL raised the preliminary contention that, in favour of GIACL no right or interest had accrued with respect to CIRP. Therefore, they had no locus to file I.A. No. 1029 of 2020 before the Adjudicating Authority, he placed reliance on the Judgment of this Appellate Tribunal in the case of Arcelor Mittal India Pvt. Ltd. Vs. Abhijit Guhathakurta (2019 SCC Online NCLAT 920 Para 10). He submitted that, I.A. No. 1029 of 2020 was filed without impleading DSKL and without affording

an opportunity of being heard, the impugned order has been passed. The Ld. Adjudicating Authority erroneously held that DSKL is not a necessary party to the Application for the reason that, GIACL has not sought any relief against DSKL. However, there is direct impact on DSKL while allowing the relief prayed in the Application. Therefore, a reasonable opportunity of hearing is necessary without giving such opportunity, the impugned order passed, which is bad in law. He submitted that in the 9th meeting of CoC Mr. Pankaj Joshi had tabled the agenda for allowing DSKL to submit its Resolution Plan. In the said meeting, Mr. Pankaj Joshi made full disclosure of facts, as well as the previous Resolution passed by the CoC which rejected the request of DSKL to submit EOI. The CoC after considering all facts and factors unanimously decided in the interest of maximization of asset value. The Ld. Adjudicating Authority erred in holding that the action of Mr. Pankaj Joshi and the decision of CoC are contrary to law. Once the CoC allowed the DSKL to submit its resolution plan, the commercial decision exercised in the interest of maximization of asset of value would take precedence. The Adjudicating Authority cannot interfere with the commercial decision taken by the CoC. For this proposition of law, he cited the Judgment of Hon'ble Supreme Court in the case of Kalpraj Dharamshi Vs. Kotak Investment Advisors (2021 SCC Online 204- para 157). He submitted that Ld. Adjudicating Authority has placed reliance on the decision of this Appellate Tribunal in the Kotak Investment Advisors Ltd. Vs. Krishna Chamadia (CA(AT) (Ins) NO. 344 - 345 of 2020) to hold that RP and CoC could not have accepted any Resolution Plan after expiry of the deadline prescribed by the Regulation and that the RP ought to have republished Form - G in compliance with the Regulations. Hon'ble

Supreme Court has overturned the decision in Kalpraj Dharamshi Case (supra). He submitted that, it is a settled law that the Regulation 36 –A (6) is not mandatory in nature. The word ‘shall’ has to be read as ‘may’, since no consequence of non-compliance is provided. For this purpose, cited the Judgment of Hon’ble Supreme Court in the case of State of Bihar Vs. Bihar Rajya [(2018) 9 SCC 472- Para 24]. He submitted that, while passing the impugned order, Ld. Adjudicating Authority has fallen in a grave error and arrived at that, the RP has accepted the plan of DSKL after opening the bids of other Prospective Applicants and DSKL has submitted its plan after the expiry of timelines. Ld. Sr. Counsel in rebuttal submitted that on 9th July, 2020 Counsel for DSKL appeared before the Adjudicating Authority for the first time and made submissions for allowing the impleadment Application as it was a necessary party. But the Adjudicating Authority has only recorded presence of the counsel of DSKL and on the same day reserved for order on I.A. No. 1029 of 2020. In the order dated 09.07.2020, there is no finding against DSKL, therefore, DSKL had no occasion to challenge such an order. Hence, the present Appeal is maintainable against the impugned order. He also submitted that in the 9thCoC meeting after discussion all actions of Mr. Pankaj Joshi had been rectified by the CoC. No prejudice has been caused to GIACL. The CoC has merely decided to permit DSKL to submit its plan for consideration. Thus, the impugned order is liable to be set aside.

9. *Per contra*, Ld. Counsel appearing on behalf of GIACL raised a preliminary objection that DSKL has suppressed the material facts that on 09.07.2020 Mr. Amit Jaste Counsel for DSKL was present and heard at length by the Adjudicating Authority, as mentioned in the order sheet dated

09.07.2020. However, DSKL has not challenged that order. Therefore, DSKL now cannot plead that it was not heard and no opportunity had been given, whatever written in the order sheet dated 09.07.2020 cannot be questioned. It is settled principle that the statement of facts transpires at the hearing recorded in the Judgment of the court are conclusive of the fact so stated and no one can contradict such statements. For this proposition, he cited the Judgment of Hon'ble Supreme Court in the case of State of Maharashtra Vs. Ramdas Srinivas Nayak 1982 (2) SCC 463.

10. Ld. Counsel for GIACL submitted that in 7th CoC Meeting held on 03.04.2020 unanimously resolved to reject the request of DSKL for submitting EOI after the expiry of deadline as it is contrary to Regulation 36-A (6) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (in brief Regulations 2016). 'Pankaj Joshi' was also present in the same meeting as an invitee and he had consented that the decision is aligned with the Regulations (Annexure B, Pg. 18, minutes of 7thCoC Meeting annexed with Reply Affidavit.)

11. Ld. Counsel for GIACL pointed out that, in this matter before the CoC has permitted RP 'Mr. Pankaj Joshi' to accept DSKL's EOI, Pankaj Joshi vide email dated 05.06.2020 at 12:43 PM on his own accord approached DSKL to submit the EOI within 10 days from the receipt of the communication which clearly shows the bias of Pankaj Joshi. Pankaj Joshi again sent a detailed email on the same day i.e. 05.06.2020 at 15:13 PM. The promptness by Pankaj Joshi in reading the entire application served and preparing such a lengthy email containing reasoning and opinion shows only one thing that, it is premeditated in order to create record and justify the acts and put into

action immediately to meet the ulterior objectives. Furthermore, on 09.06.2020 Pankaj Joshi after accepting the EOI of DSKL, felt the need to ask for the CoC's permission on 13.06.2020 i.e. a week after his email to DSKL and accepting its EOI.

12. Ld. Counsel for GIACL also submitted that, it is evident from the minutes of 9thCoC meeting that Pankaj Joshi has clearly misguided the CoC Members by stating that the RP under law is not required to take express permission from the CoC to issue a request for Resolution Plan to an eligible Prospective Resolution Applicants even when DSKL's request for submitting EOI after due date was rejected by the same Members in the 7thCoC Meeting.

13. Ld. Counsel for GIACL further submitted that, the bias of RP is clearly evident from the record and facts in minutes of the 9thCoC Meeting, held on 13.06.2020 wherein one of the Financial Creditor cautiously pointed out the Regulation 36-A (6) and also expressed their concern that many more possible number of individuals or entities would have been interested in submitting the Resolution Plans for the Corporate Debtor but having missed the deadlines, such persons or entities should also be given a fair opportunity to their EOI's and not just favour one company i.e. DSKL.

14. Ld. Counsel for GIACL also submitted that, RP Pankaj Joshi does not specify the reason as to why he did not wait for the outcome of the Application filed by DSKL and immediately on receipt of email from the Advocates of DSKL proceeded to give an opportunity that within one hour and twenty minutes.

15. It is also submitted that, DSKL has relied upon the Judgment of Hon'ble Supreme Court in the case of Kalpraj (supra). This Judgment is distinguishable inasmuch as in the present case CoC and RP in its earlier

decision rejected the EOI of DSKL in the 7thCoC meeting dated 03.04.2020. Moreover, the commercial wisdom of the CoC is only limited to the decision of selection of Resolution Plan and not the procedural aspect laid down in the Code and Regulations. The CoC and RP cannot, under the blanket of commercial wisdom, ignore Regulation 36-A (6) of Regulations, 2016 which provides that EOI received after time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected. This is a mandatory provision and cannot be ignored.

16. Lastly, it is submitted that the Resolution Plans of two Resolution Applicants have already been open in the 14thCoC Meeting held on 26.03.2021 before the CoC Members and respective Applicant as the Resolution Plans are already open, allowing DSKL's application will reopen whole process of submissions of Resolution Plans and will deviate the whole process of CIRP as submitted Resolution Plan has already been exposed. The Resolution Applicants are now apprehensive, for the fate of their Resolution Plans and are anxious that the sensitive information like the bad value of GIACL will be shared with DSKL considering the prima facie bias of Pankaj Joshi towards DSKL. In such circumstances, there is no merit in these Appeals and are liable to be dismissed.

17. Having heard Ld. Counsels for the parties, we have gone through the record.

18. Following issues arose in these Appeals.

(i) Whether the Adjudicating Authority does not invest with the Jurisdiction to interfere before the quasi-judicial determination is made, under S. 31 of IBC?

(ii) Whether GIACL did not have locus standi to challenge the inclusion of DSKL in the CIRP?

(iii) Whether 'DSKL' was a necessary party to the Application I.A. No. 1029 of 2020?

(iv) Whether to allow DSKL after due date to file EOI is a commercial decision?

(v) Whether the adverse remarks in Para 54 of the impugned order are baseless and uncalled for?

Issue No. (i)

Whether the Adjudicating Authority does not invest with the Jurisdiction to interfere before the quasi-judicial determination is made, under S. 31 of IBC?

19. Ld. Counsel for Appellant Pankaj Joshi raised a preliminary objection that before the quasi-judicial determination is made, under Section 31 of the IBC, the Adjudicating Authority has no jurisdiction to entertain and decide the Application of GIACL. For this purpose, he cited Para 84 of the Judgment of Hon'ble Supreme Court in the case of Arecellor Mittal India Pvt. Ltd. (supra), which reads as under:

84. If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Ad-judicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Ad-judicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

20. In the aforesaid Para, Hon'ble Supreme Court clarified the scope and purpose of Section 60(5) of the IBC and held that the NCLT alone has jurisdiction to entertain or dispose of the Applications and proceedings by or against a Corporate Debtor covered by the IBC. In the present case, Adjudicating Authority, while deciding the Application I.A No. 1029 of 2020, has exercised the jurisdiction under Section 60 (5) (c), which empowers to decide "any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or Corporate Person under this Code". Thus, before approval of the Resolution Plan the Adjudicating Authority can entertain or dispose of the question of priorities or any question of law or facts, arising out of or in relation to CIRP or Liquidation proceedings. Therefore, we are unable to agree with the argument of Ld. Counsel for Pankaj Joshi that the Adjudicating Authority has no jurisdiction to entertain and decide the Application I.A. No. 1029 of 2020.

Issue No. (ii)

Whether GIACL did not have locus standi to challenge the inclusion of DSKL in the CIRP?

21. Admittedly, DSKL requested to submit EOI after one month of due date and the same was rejected in the 7th CoC meeting held on 03.04.2020 and the decision was communicated to the DSKL on 09.04.2020. After lapse of two months DSKL again made attempt to become a part of CIRP before that four eligible Applicants including GIACL were short listed as Prospective Resolution Applicants. Therefore, there was a competition between these four Prospective Resolution Applicants but the RP has tried to induct DSKL in the CIRP in

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violation of the provisions of Regulation 36-A (6) of the Regulations 2016. Regulation 36-A of Regulations 2016 provides the procedure how to deal with EOI, which reads as under: -

“36-A Invitation for Expression of Interest-(1)

.....

(6) The Expression of Interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.

.....

(10) The RP shall issue a provisional list of eligible Prospective Resolution Applicants within 10 days of the last date for submission of EOI to the Committee and to all Prospective Resolution Applicants who submitted the expression of interest.

(11) An Objection to inclusion or exclusion of a Prospective Resolution Applicant in the provisional list referred to sub-regulation (10) may be made with supporting documents within five days from the date of issue of provisional list.

(12) On considering the objections received under sub-regulation (11), the Resolution Professional shall issue the final list of Prospective Resolution Applicants within 10 days from the last date for receipt of objections, to the Committee.”

22. In view of Regulation 36-A (11) of Regulations 2016 GIACL has a vested right to object inclusion of DSKL. Ld. Sr. Counsel cited Para 10 of the Judgment of this Appellate Tribunal in the case of Arecellor Mittal India Pvt. Ltd. Vs. Abhijit Guhathakurta (Supra) in this case Arecellor Mittal (Appellant) was one of the Resolution Applicant whose Resolution Plan was not voted in its favour by the CoC. The CoC, by majority vote, approved the Resolution Plan submitted by third Respondent Royale Partners Investment Fund Ltd. The Appellant preferred Miscellaneous Application challenging the decision of CoC, which has been rejected by Adjudicating Authority. Against that rejection order, Appellant has filed Appeal before this Tribunal. This Tribunal in the light of the proposition laid down by the Hon’ble Supreme Court in the case of Arecellor Mittal India Pvt. Ltd. Vs. Satish Kumar (2019) 2 SCC 1, held that the

Appellant has no vested right to challenge the decision of the CoC which rejected its Resolution Plan and approved another Resolution Plan. In the present matter, the facts are quite different as we have already discussed above. Therefore, this Judgment does not support the case of DSKL.

23. We are unable to convince with the Ld. Counsel for DSKL and Pankaj Joshi that GIACL did not have the locus standi to challenge the inclusion of DSKL in the CIRP. Ld. Adjudicating Authority has rightly entertained the Application I.A No. 1029 of 2020 and decided the same.

Issue No. (iii)

Whether 'DSKL' was a necessary party to the Application I.A. No. 1029 of 2020?

24. Ld. Adjudicating Authority in the impugned order held that as no relief has been sought against DSKL and actions of RP and CoC are allegedly in violation of the Code and Regulations, therefore, the Application can be decided in the absence of DSKL.

25. It is admitted fact that, DSKL has submitted EOI on 12.03.2020 whereas due date was 10.02.2020 and after due deliberation in the 7th CoC Meeting held on 03.04.2020, the request of DSKL for submitting EOI after due date was rejected and the decision was communicated to DSKL on 09.04.2020.

26. DSKL has no vested right because, the right has already been extinguished when DSKL has failed to submit EOI till last date and subsequently, the request for submitting EOI after due date was also rejected by the CoC in view of Regulation 36-A of Regulations 2016. Therefore, DSKL has no right to contest the Application as in the Application the actions of

RP& CoC are questioned. In such a situation, we are in agreement with the Ld. Adjudicating Authority that DSKL was not a necessary party to the Application I.A. No. 1029 of 2020. The question for the consideration before Adjudicating Authority was that, whether the actions of RP and CoC are justifiable in the present facts of this case.

27. Therefore, we are not convinced with the argument of Ld. Counsel for DSKL that the Ld. Adjudicating Authority has not given reasonable opportunity of hearing and thereby violated the principle of natural justice.

Issue No. (iv)

Whether to allow DSKL after due date to file EOI is a commercial decision?

28. As per sub-section 30 of the IBC, when the CoC approved a Resolution Plan by a vote of not less than 66 % of voting share of the Financial Creditors after considering its feasibility and viability, such decision of CoC is a commercial decision. Thus, the decision taken by the CoC in the 09th CoC meeting to allow DSKL after due date to file EOI is not a commercial decision.

29. Now we have considered whether the CoC can review its own decision at any point of time in contravention of Regulation 36-A (6) of the Regulations 2016.

30. Ld. Sr. Counsel for DSKL submitted that Regulation 36-A cannot override the mandate of Code i.e. maximization of value and commercial wisdom of CoC and for this contention, cited the Judgment of Hon'ble Supreme Court in the Case of Brilliant Alloys Vs. S. Rajagopal 2018 SCC Online SC 3154 in which Hon'ble Supreme Court while dealing with Regulation 30-A has explicitly held that seemingly mandatory language of Regulation has to be read along with provision of the Code. Thus, Hon'ble

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Supreme Court held that Regulation 30A would be directory. Additionally, Regulation 36 is not mandatory in nature. The word “shall” has to be read as “may” since no consequence of non-compliance are provided.

31. We have considered the argument in the case of Brilliant Alloys, Corporate Debtor as well as Financial Creditor and Operational Creditor were agreed to withdrawal of the Application. However, in view of Regulation 30A, withdrawal was not permitted. In that context, Hon’ble Supreme Court held that this Regulation has to be read along with the main provision of Section 12A which contains no such stipulation. Therefore, it held that this stipulation can only be construed as directory depending on the facts of each case. It is not ruled, that Regulation 36-A is not in consonance with any of the provision of the IBC or Regulation 36-A is not mandatory in nature. Thus, this Judgment also does not support the case of DSKL. The second limb of argument, that the word “shall” has to be read as “may” since no consequence of non-compliance are provided, is not acceptable as Regulation 36-A (6) itself provides that EOI received after the time specified shall be rejected.

32. Ld. Sr. Counsel for DSKL and Ld. Counsel for Mr. Pankaj Joshi heavily placed reliance on Para 156 of the Judgment of Hon’ble Supreme Court in the case of Kalpraj (supra), which reads as under: -

“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%."

33. In the case of Kalpraj (Supra), Hon'ble Supreme Court examining an appeal against the order u/s 61(3) of IBC, whereby this Appellate Tribunal allowed the Appeal on the ground of material irregularity where we are examining this appeal u/s 61(1) of IBC. The scope of Appeal u/s 61(3) is limited to the grounds as specified in sub section 3. However, there is no such limit for the Appeal u/s 61(1) of IBC. In the case of Kalpraj, Hon'ble Supreme Court held that all the actions of RP, including acceptance of Resolution Plan of Kalpraj after due date, albeit before the expiry of time line specified by the IBC for completion of the process, have been consciously approved by the CoC. In the present case, as we have already discussed, in the 7th CoC meeting with the consultation of Mr. Pankaj Joshi, the request for submitting EOI after due date was rejected. After two months, when Mr Pankaj Joshi appointed RP, he in contravention of Regulation 36A in his own accord overturned the decision of 07th CoC and permitted DSKL to submit EOI. However, DSKL has not requested the CoC to re-visit their earlier decision. Mr Pankaj Joshi by suppressing material facts and misguiding the CoC procured the desired decision and inducted DSKL in the list of prospective Resolution applicant. In the case of Kalpraj, RP's actions are bonafide, impartial and fair and, therefore,

the CoC has approved all his actions including the acceptance of Resolution Plans of Kalpraj after due date. Thus, the facts of the present case are quite distinguishable from the case of Kalpraj. Therefore, we are of the considered view that the ratio of the judgement of Kalpraj's case does not support the case of DSKL.

34. With the aforesaid discussion, we are of the considered view that, to allow DSKL after due date at the instance of Pankaj Joshi to file EOI is not a commercial decision.

35. The CoC, while reviewing its earlier decision, has not assigned any good reason for revisiting their earlier decision. It seems that the CoC have taken the decision in the influence and misguidance of Pankaj Joshi.

36. The 07thCoC meeting was convened on 03.04.2020 and after two months, the 09thCoC meeting was convened on 13.06.2020 and when the CoC reviewed its earlier Resolution these same challenges were there too, there is no change in circumstances which compel them to review/revisit their earlier decision. They have not assigned any good reason for revisiting their earlier decision. The CoC, in the shelter of maximisation of value of asset, cannot be permitted to take any decision at any point of time in the name of commercial wisdom. In the present case the Resolution Plan of DSKL is yet to be examined with the comparison of other PRAs. Therefore, at this stage, how one can say that the decision taken in the favour of DSKL was for maximization of value of asset.

37. Now, we have considered whether the decision taken by the CoC in 09th CoC meeting was an independent decision or was it procured by Pankaj Joshi by suppressing material facts.

38. At the time of 9th CoC meeting, Pankaj Joshi has suppressed the fact that he was served with the Application of DSKL and that they are going to file Application before the Adjudicating Authority against the decision of 7th CoC. If such fact was disclosed by Pankaj Joshi at the time of convening 9thCoC then they might be precluded from revisiting their earlier decision on the ground that the Adjudicating Authority is seized of the matter. On the other hand, being RP, he should have advised the CoC to wait till the decision of the Adjudicating Authority.

39. Pankaj Joshi has suppressed the fact that he himself has overturned the decision of 7thCoC meeting and permitted DSKL to submit its EOI. Pankaj Joshi also misguided the CoC that 'he is not required to take express permission from the CoC to issue a request for Resolution Plan to an eligible Prospective Resolution Applicant'. This is not the position in this case the request for submission of EOI after due date was rejected by the CoC then there is no question to issue a request for resolution plan to DSKL.

40. Pankaj Joshi in 09th CoC meeting canvassed the case of DSKL and when one of the CoC Members proposed to publish fresh Form 'G' then he suggested that this is impracticable and delayed the CIRP.

41. With the above discussion, we are of the view that the decision taken in 09th Meeting of the CoC was not transparent, fair and was under the influence of Pankaj Joshi.

Issue No. (v)

Whether the adverse remarks in Para 54 of the impugned order are baseless and uncalled for?

42. Ld. Counsel appearing for Mr. Pankaj Joshi submitted that the adverse remarks in Para 54 of the impugned order are baseless, uncalled for and are factually incorrect.

43. Para 54 of the Impugned order is as under: -

“we failed to understand as to why the current RP Mr. Pankaj Joshi had deviated from the earlier procedure of notice for the invitation of the EOI with the approval of the CoC. Per contra, the RP has accepted the resolution plan of DSKL after the expiry of the deadline for submission of Resolution plan without following the due process. The Act of RP to accept the resolution plan after opening the other bids, which were all submitted within the deadline cannot justified by any means and is a blatant misuse, misconduct on the part of RP. We also note that CoC in its 7th meeting rejected the EOI of DSKL but in 9th meeting approved with 100% vote share. The action of RP and the CoC is in violation of express provision of the Code and Regulations made thereunder. However, if the CoC wanted to extent the timeline, it should have done so within the procedure prescribed there for. By providing a special treatment, backdoor entry for accepting the resolution plan of the DSKL’s the RP and the CoC have deviated from the norms prescribed under the Code and Regulations framed thereunder, which vitiates the Corporate Insolvency Resolution Process and cause prejudice to the other PRAs. Such a practice has been strongly deprecated by the Hon’ble NCLAT cited above.”

44. We are in agreement with the Learned Counsel for Mr. Pankaj Joshi that in the aforesaid Para, Learned Adjudicating Authority has incorrectly mentioned “Per contraon the part of RP”. This fact is factually incorrect that RP Mr.Pankaj Joshi has accepted the plan after the expiry of the deadline for submission of Resolution Plan. Actually Mr. Pankaj Joshi has overturned the decision of 7th CoC meeting and permitted DSKL to submit EOI and DSKL submitted EOI on 09.06.2020 (last date for submission EOI was 10.02.2020). It seems that inadvertently incorrect facts have been mentioned by the Adjudicating Authority in aforesaid Para 54. However, it does not

absolve Mr. Pankaj Joshi from the malafide actions during CIRP which we will be discussing in subsequent paras.

45. For examining the conduct of Pankaj Joshi, it is useful to consider the date wise events which are as under: -

Date	Particulars
18.01.2020	RP Mr. Shetty published the invitation of expression.
10.02.2020	Last date for submission of EOI
12.03.2020	DSKL sent an email to RP Mr. Shetty for submitting EOI after due date
12.03.2020	RP Mr. Shetty inform the DSKL that after last date request for submission of EOI cannot be considered.
18.03.2020	DSKL sent a letter to Members of CoC to permit for submitting EOI.
23.03.2020	DSKL sent an email to RP and CoC Members to permit for submitting EOI.
02.04.2020	DSKL sent an email to RP Mr. Shetty to permit for submitting EOI.
03.04.2020	07 th CoC meeting rejected the request of DSKL for submitting EOI.
09.04.2020	Mr. Shetty communicated the decision of CoC to DSKL.
27.05.2020	At the recommendation of CoC, Adjudicating Authority appointed Pankaj Joshi as RP in place of Mr. Shetty.
05.06.2020 10:43 AM	Advocate of DSKL sent the copy of Application to Mr. Shetty.
05.06.2020 12:20 PM	Mr. Shetty inform the Advocate of DSKL that in his Place Mr. Pankaj Joshi has been appointed as RP and copy of this email sent to Pankaj Joshi.
05.06.2020 12:43PM	Pankaj Joshi same day sent a detailed email to DSKL that he is inclined to grant an opportunity to resubmit the EOI within 10 days.
05.06.2020 15:13PM	Pankaj Joshi again sent a detailed email to DSKL to resubmit EOI within 10 days.
09.06.2020	Pankaj Joshi received EOI to DSKL
13.06.2020	At the instance of Pankaj Joshi 9 th CoC meeting permitted DSKL to submit EOI.

46. From the aforesaid date and events, it is apparent that on 09.04.2020 DSKL communicated the request for submitting EOI after due date has been rejected by the CoC. Following events show that, for inclusion of DSKL in the

list of prospective Resolution Applicants, how Mr. Pankaj Joshi manipulated the things.

(i) After receiving the communication of rejection on 09.04.2020, for about two months, DSKL has not taken any action and has not filed any Application before Adjudicating Authority.

(ii) After two months, when, on 27.05.2020, Pankaj Joshi was appointed as RP, then they intended to file Application before the Adjudicating Authority against the rejection order of 7th CoC meeting.

(iii) Mr. Shetty sent a reply to Advocate of DSKL on 05.06.2020 12:20PM and informed that in his place Mr. Pankaj Joshi has been appointed as RP and copy of this email was sent to Pankaj Joshi, who, within twenty three minutes, prepared a detailed email (see Annexure-I Appeal CA(AT)(Ins)233of 2021) and overturned the decision of 7thCoCmeeting and sent an email to DSKL with an assertion that “I am inclined to grant you an opportunity to resubmit your expression of interest in the format as laid down in the Process Flow Document, Attached hereto and marked as Annexure-B is the Process Flow Document in word format.” He also requested to submit EOI in appropriate format within 10 days on receipt of this communication.

(iv).Pankaj Joshi has not received any email from the advocate of DSKL but no sooner he has received the email of Mr. Shetty on 05.06.2020 at 12.20 p.m where he has not waited for the email of DSKL’s advocate and he has directly sent an email to DSKL. That is why in his email dated 05.06.2020 at 12.43 p.m there is no reference of any email of DSKL’s advocate.

(v). DSKL’s Advocate letter which was forwarded by Mr. Shetty to Pankaj Joshi reads as under:

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“Dear Sir, we are concerned for our client- M/s Dwarkadish Sakhar Karkhana Ltd. under their instruction and authority given to us, we are inclosing herewith an I.A. in the matter of KGS Sugar & Infra Corporation Ltd., which we are filing with the Hon’ble NCLT. Please find enclosed herewith a letter of service and full set of the I.A., as and by way of service upon you.

Thank and regards
Amit Jaste.”

In the aforesaid letter there is no request for reconsideration of the earlier rejection decision. However, surprisingly Mr. Pankaj Joshi, in his own accord, informed DSKL that he is inclined to grant an opportunity to resubmit EOI in the Format as laid down in process flow document and requested to submit the EOI within 10 days.

(vi). Mr.Pankaj Joshi, when received the copy of application which DSKL intended to file before the Adjudicating Authority then, instead of taking any decision, he should have waited for the outcome of the application.

(vii). Mr. Pankaj Joshi in 9th CoC meeting has not disclosed that he has received a copy of application which DSKL intended to file before Adjudicating Authority against the decision of 7th CoC meeting.

(viii). Mr. Pankaj Joshi before the CoC meeting did not disclose the fact that he has on his own accord permitted DSKL to submit EOI.

(ix).Mr.Pankaj Joshi in his pleadings and written submissions has not explained as to how he overturned the decision of 7th CoC meeting and directed DSKL to submit its EOI.

(x).Mr.Pankaj Joshi in 9th CoC meeting, misguided the CoC that under the law RP is not required to take any express permission from the CoC to issue a request for Resolution Plan to an eligible PRA. However, DSKL was not in the list of eligible PRA.

47. In the light of the aforesaid facts and circumstances, we are of the considered view that Mr. Pankaj Joshi has failed to explain that his actions are bonafide. It is expected from a Resolution Professional that he must act in a fair and balanced manner without getting influenced by the conflicting interest of the parties. In the present case, Mr. Pankaj Joshi suppressed material facts and misguided the members of CoC to achieve the desired decision in favour of DSKL. Therefore, we are of the considered view that the adverse remarks and observations made in the Para 54 of the impugned order are not baseless and uncalled for and on the other hand, for appreciating the materials on record and to decide the matter, such observations are necessary.

48. With the aforesaid discussion, we are of the view that there is no merit in these appeals and, therefore, the appeals are dismissed, however, no order as to Costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

The Appeal is heard by the Bench comprising Justice Mr. Jarat Kumar Jain Member (Judicial) and Mr. Kanthi Narahari Member (Technical). Mr. K. Narahari is not readily available today, however, he requested to pronounce the Judgment on behalf of the Bench, therefore, as per Rule 92 of NCLAT Rules, 2016. The Judgment is pronounced for and on behalf of the Bench.

[Justice Jarat Kumar Jain]
Member (Judicial)

New Delhi
28th June, 2021

SC

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