January 06, 2022

To,

BSE Limited
25th Floor, New Trading Ring,
Rotunda Building, P.J. Towers,
Dalal Street, Fort Mumbai: 400001

Scrip Code: 511389

National Stock Exchange of India Limited
"Exchange Plaza", Fifth Floor, Plot No. C/1,
G Block, Bandra Kurla Complex,
Bandra (East), Mumbai 400051

Scrip Code: VIDEOIND

Subject: Intimation in relation to setting aside of the order dated 08th June, 2021 passed by National Company Law Tribunal (NCLT), Mumbai Bench, Court No. II at Mumbai approving the Resolution Plan submitted by Resolution Applicant - 'Twin Star Technologies Limited'.

Reference:
i. Intimation dated 08 June 2021 under Regulation 30 of the SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 regarding the oral pronouncement of the Plan Approval Order

ii. Intimation dated 15 June 2021 under Regulation 30 of the SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 regarding, *inter-alia*, the publication of the Plan Approval Order

iii. Intimation dated 19 July 2021 pertaining to Imposition of stay by the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT") on the order dated 08 June 2021 ("Plan Approval Order").

Dear Ma'am/ Sir,

With reference to the provisions of Regulation 30 of the SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 ("**SEBI LODR**") and in furtherance to our letter dated 19 July 2021, in relation to order passed by the Hon'ble NCLAT *inter-alia which* stayed the operation of the Plan Approval Order till the next date of hearing and ordered the maintenance of status quo ante as before passing of the Plan Approval Order.

In connection to the same, we would like to inform you that on 05 January 2022, the Hon'ble NCLAT has set aside the order of the Hon'ble NCLT passed under section 31 of the Insolvency and Bankruptcy Code, 2016 ("**IBC Code**") on 08 June 2021 ("Order") approving the Resolution Plan of the Company submitted by Twin Star Technologies Limited ("Resolution Applicant"). Accordingly, the matter is remitted back to Committee of Creditors for completion of the process relating to CIRP in accordance with the provisions of the IBC Code.

The Copy of the said aforesaid Order dated 05 January, 2022 is appended for your record and reference.

The aforementioned is for your information and record.

Thanking You,
Yours faithfully,
For VIDEOCON INDUSTRIES LIMITED

Samridhi Kumari
Digitally signed by Samridhi Kumari
Date: 2022.01.06 12:44:55 +05'30'

SAMRIDHI KUMARI
COMPANY SECRETARY
Membership No.: A54714

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 503 of 2021

IN THE MATTER OF:

Bank of Maharashtra
Stressed Asset Management Branch
Janmangal 4th Floor,
45/47, Mumbai Samachar Marg,
Opposite to Stock Exchange, Fort,
Mumbai – 400 001
Through its General Manager,
Mrs. Chitra Datar
Zonal Manager Delhi **...Appellant**

Vs.

1.Videocon Industries Ltd. **...Respondent No.1**

2.Videocon Telecommunications Limited **...Respondent No.2**

3.Evans Fraser & Company (India) Limited **...Respondent No.3**

4.Millennium Appliances (India) Limited **...Respondent No.4**

5.Applicomp India Limited **...Respondent No.5**

6.Electroworld Digital Solutions Limited **...Respondent No.6**

7.Techno Kart India **...Respondent No.7**

8.Century Appliances Limited **...Respondent No.8**

9.Techno Electronics Limited **...Respondent No.9**

10.Value Industries Ltd. **...Respondent No.10**

11. PE Electronics Ltd **...Respondent No.11**

12. CE India Ltd. **...Respondent No.12**

13.Sky Appliances Ltd. ...Respondent No.13
All aforesaid Respondent Nos. 1-13
Through their Resolution Professional,
Mr. Abhijit Guhathakurta,
Flat No.701, A Wing, Satyam Springs,
CTS No. 272A/2/1, Off BSD marg,
Deonar, Mumbai,
City, Maharashtra – 400 088
And having his CIRP Correspondence address at
Deloitte Touche Tohmatsu India LLP
Indiabulls Finance Centre, Tower 3,
27th Floor, Senapti Bapat Marg,
Elphinstone Road (West),
Maharashtra 400 013

14. Committee of Creditors of the
Consolidated CIRP of
Resolution Process of
Videocon Group Companies as
Consolidated by order dated
08th August, 2019
Through State Bank of India being
The Lead Member of the CoC; ...Respondent No.14

15.Twinstar Technologies Limited
3rd Floor, IFFCO Tower,
Pl No.3, Sector 39,
Gurugram, Gurgaon,
Haryana – 122 002, India ...Respondent No.15

Present:

For Appellant:	**Mr. Vikas Singh, Sr. Advocate, Ms. Garima Prashad, Sr. Advocate Mr. Chaitanya B. Nikte, Mr. Ayush Negi, Mr. Rajiv K. Virmani, Mr. Abhinav Agrawal, Mr. Prakash Singh, Mr. Prasad Sarvankar, Mr. Sumedh Ruikar, Mr. Gaurav Jain, Mr. Atul Malhotra, Mr. Karan Valecha, Ms. Sneha Bhange, Advocates for Appellant Bank of Maharashtra**
For Respondents:	**Mr. Abhinav Vasisht, Senior Advocate with Mr. Anoop Rawat, Ms. Meghna Rajadhyaksha, Mr.**

Zeeshan Khan, Mr. Vaijayant Paliwal, Ms. Radhika Indapurkar, Ms. Mohana Nijhawan, Mr. Chaitanya Safaya, Mr. Bryan Pillai, Ms. Moulshree Shukla, Ms. Ishani Mookherjee, Ms. Priya Singh, Mr. Ameya Gokhale, Advocates for R1 to 13

Mr. Tushar Mehta, Solicitor General of India with Mr. Bishwajit Dubey, Mr. Madhav Kanoria, Ms. Surabhi Khattar, Mr. Kanu Agarwal, Mr. Prafful Goyal, Advocates for R-14, COC.

Mr. Harish Salve, Sr. Advocate, Mr Gopal Jain, Senior Advocate, Mr Diwakar Maheshwari, Advocate and Mr Shreyas Edupuganti, Advocate for R-15.

With

Company Appeal (AT) (Ins.) No. 505 of 2021

IN THE MATTER OF:

IFCI Ltd.
Financial Creditor,
(A Government of India Undertaking)
A Company registered under the
Companies act, 1956 having its registered
Office at:
IFCI Tower, 61, Nehru Place, New Delhi ...Appellant

Vs.

1.Videocon Industries Ltd. ...Respondent No.1

2.Videocon Telecommunications Limited ...Respondent No.2

3.Electroworld Digital Solutions Limited ...Respondent No.3

4.Value Industries Limited ...Respondent No.4

5.Techno Kart India Limited ...Respondent No.5

6.Applicomp India Limited **...Respondent No.6**

7.Sky Appliances Limited **...Respondent No.7**

8. Techno Electronics Limited **...Respondent No.8**

9. Millennium Appliances(India) Ltd **...Respondent No.9**

10.Century Appliances Ltd. **...Respondent No.10**

11. Evans Fraser & Company(India) Ltd. **...Respondent No.11**

12. PE Electronics Ltd. **...Respondent No.12**

13.CE India Ltd. **...Respondent No.13**
All aforesaid Respondent Nos. 1-13
Through their Resolution Professional,
Mr. Abhijit Guhathakurta,
Deloitte Touche Tohmatsu India LLP
Indiabulls Finance Centre, Tower 3,
27th Floor, Senapti Bapat Marg,
Elphinstone Road (West),
Maharashtra 400 013

14. Committee of Creditors of the
Consolidated CIRP of
Resolution Process of
Videocon Group Companies as
Consolidated by order dated
08th August, 2019
Through State Bank of India being
The Lead Member of the CoC; **...Respondent No.14**

15.Twinstar Technologies Limited
3rd Floor, IFFCO Tower,
Pl No.3, Sector 39,
Gurugram, Gurgaon,
Haryana – 122 002, India **...Respondent No.15**

Present:

For Appellant:	**Mr. Vikas Singh, Sr. Advocate, Mr. Tanuj Sud, Mr. Ajay Kumar, Ms. Harshita Ahluwalia, Advocates**
For Respondents:	**Mr. Abhinav Vasisht, Senior Advocate with Mr. Anoop Rawat, Ms. Meghna Rajadhyaksha, Mr. Zeeshan Khan, Mr. Vaijayant Paliwal, Ms. Radhika Indapurkar, Ms. Mohana Nijhawan, Mr. Chaitanya Safaya, Mr. Bryan Pillai, Ms. Moulshree Shukla, Ms. Ishani Mookherjee, Ms. Priya Singh, Mr. Ameya Gokhale, Advocates for R1 to 13**
	Mr. Tushar Mehta, Solicitor General of India with Mr. Bishwajit Dubey, Mr. Madhav Kanoria, Ms. Surabhi Khattar, Mr. Kanu Agarwal, Mr. Prafful Goyal, Advocates for R-14, COC.
	Mr. Harish Salve, Sr. Advocate Mr Gopal Jain, Senior Advocate, Mr Diwakar Maheshwari, Advocate and Mr Shreyas Edupuganti, Advocate for R-15.

With

Company Appeal (AT) (Ins.) No. 529 of 2021

IN THE MATTER OF:

Small Industries Development Bank of India
SIDBI Towers, 15, Ashok Marg,
Lucknow – 226 001
Through its Assistant General Manager,
Mr. Mukesh Kumar **...Appellant**

Vs.

1.Videocon Industries Ltd. **...Respondent No.1**

2.Videocon Telecommunications Limited **...Respondent No.2**

3.Evans Fraser & Company (India) Limited **...Respondent No.3**

4.Millennium Appliances (India) Limited **...Respondent No.4**

5.Applicomp India Limited **...Respondent No.5**

6.Electroworld Digital Solutions Limited ...Respondent No.6

7.Techno Kart India ...Respondent No.7

8.Century Appliances Limited ...Respondent No.8

9.Techno Electronics Limited ...Respondent No.9

10.Value Industries Ltd. ...Respondent No.10

11. PE Electronics Ltd ...Respondent No.11

12. CE India Ltd. ...Respondent No.12

13.Sky Appliances Ltd. ...Respondent No.13
All aforesaid Respondent Nos. 1-13
Through their Resolution Professional,
Mr. Abhijit Guhathakurta,
Flat No.701, A Wing, Satyam Springs,
CTS No. 272A/2/1, Off BSD marg,
Deonar, Mumbai,
City, Maharashtra – 400 088
And having his CIRP Correspondence address at
Deloitte Touche Tohmatsu India LLP
Indiabulls Finance Centre, Tower 3,
27th Floor, Senapti Bapat Marg,
Elphinstone Road (West),
Maharashtra 400 013

14. Committee of Creditors of the
Consolidated CIRP of
Resolution Process of
Videocon Group Companies as
Consolidated by order dated
08th August, 2019
Through State Bank of India being
The Lead Member of the CoC; ...Respondent No.14

15.Twinstar Technologies Limited
3rd Floor, IFFCO Tower,
Pl No.3, Sector 39,
Gurugram, Gurgaon,

Haryana – 122 002, India ...Respondent No.15

Present:

For Appellant:	**Mr. Vikas Singh, Sr. Advocate, Mr. Chaitanya B. Nikte, Mr. Ayush Negi, Mr. Prasad Sarvankar, Mr. Sumedh Ruikar & Ms. Sneha Bhange, Advocates for appellants**
For Respondents:	**Mr. Abhinav Vasisht, Senior Advocate with Mr. Anoop Rawat, Ms. Meghna Rajadhyaksha, Mr. Zeeshan Khan, Mr. Vaijayant Paliwal, Ms. Radhika Indapurkar, Ms. Mohana Nijhawan, Mr. Chaitanya Safaya, Mr. Bryan Pillai, Ms. Moulshree Shukla, Ms. Ishani Mookherjee, Ms. Priya Singh, Mr. Ameya Gokhale, Advocates for R1 to 13**
	Mr. Tushar Mehta, Solicitor General of India with Mr. Bishwajit Dubey, Mr. Madhav Kanoria, Ms. Surabhi Khattar, Mr. Kanu Agarwal, Mr. Prafful Goyal, Advocates for R-14, COC.
	Mr. Harish Salve, Sr. Advocate Mr Gopal Jain, Senior Advocate, Mr Diwakar Maheshwari, Advocate and Mr Shreyas Edupuganti, Advocate for R-15.

With

Company Appeal (AT)(Insolvency) No. 545 of 2021

In the matter of:

Electrolux Home Products Inc.
1, Fusionopolis Place, #07-10,
Galaxis, Singapore - 138522 ....Appellant

Vs.

1. Videocon Industries Ltd.
Through its Resolution Professional
Centre, Off Mahakali Caves Road,
MIDC, Marol Bus Depot,
Andheri (E), Mumbai – 400 093 ...Respondent No.1

2. Twin Star Technologies Limited,

3rd Floor, IFFCO Tower, Plot No.3,
Sector 29 Gurugram,
Harayana – 122 002 **...Respondent No.2**

Present:

For Appellants: **Mr. Nakul Dewan, Sr. Advocate with Mr. Rajendra Barot Ms. Neerja Balakrishnan, and Ms. Apoorva Gupta, Advocates.**

For Respondent: **Mr. Abhinav Vasisht, Sr. Advocate Ms. Meghna Rajadhyaksha with Ms. Radhika Indapurkar, Mr. Vaijayant Paliwal, Mr. Bryan Pillai, Mr. Anoop Rawat, Mr. Zeeshan Khan, Ms. Moulshree Shukla, Ms. Priya singh, Ms. Ishani Mookherjee Advocates for RP, R-1.**

Mr. Gopal Jain, Sr. Advocate with Mr. Diwakar Maheshwari, Mr. Karan Mehta and Ms. Shreyas Edupuganti, Advocates for R-2.

Mr. Tushar Mehta, Solicitor General, with Biswajit Dubey, Ms. Surabhi Khattar and Mr. Madhav Kanoria Mr. Kanu Agarwal and Mr. Prafful Goyal Advocates for COC.

With

Company Appeal (AT) (Ins.) No. 650 of 2021

IN THE MATTER OF:

Venugopal Dhoot
R/o Dhoot Bungalow
Station Road,
Aurangabad – 431 001 **...Appellant**

Vs.

1. **Abhijit Guhathakurta**
   Resolution Professional of
   Videocon Industries Ltd

Videocon Telecommunications Ltd
Evans Fraser & Co. (India) Ltd.
Millennium Appliances (India) Ltd.
Applicomp (India) Ltd.
Electroworld Digital Solutions Ltd.
Techno Kart India Ltd.
Century Appliances Ltd.
Techno Electronics Ltd.
Value Industries Ltd.
PE Electronics Ltd.
CE India Ltd.
Sky Appliances Ltd
Address:
Unit No.502, kaatyayni Business Centre
Off Mahakali Caves Road, MIDC,
Marol Bus Depot
Andheri (E), Mumbai, 400 093 **...Respondent No.1**

2.Committee of Creditors Videocon Industries Ltd
Videocon Telecommunications Ltd
Evans Fraser & Co. (India) Ltd.
Millennium Appliances (India) Ltd.
Applicomp (India) Ltd.
Electroworld Digital Solutions Ltd.
Techno Kart India Ltd.
Century Appliances Ltd.
Techno Electronics Ltd.
Value Industries Ltd.
PE Electronics Ltd.
CE India Ltd.
Sky Appliances Ltd.
Through their counsel
Cyril Amarchand Mangaldas
...Respondent No.2

3.Twinstar Technologies Limited
Resolution Applicant
3rd Floor, IFFCO Tower,
Pl No.3, Sector 39,
Gurugram, Gurgaon,
Haryana – 122 002, India **...Respondent No.3**

Present:

For Appellant: **Mr. Arun Kathpalia, Sr. Adv. & Mr. Krishnendu Datta, Sr. Adv. with Mr. Sandeep S Ladda, Advocate & Mr. Yashvardhan, Advocate for the Appellant**

For Respondents: **Mr. Abhinav Vasisht, Senior Advocate with Mr. Anoop Rawat, Ms. Meghna Rajadhyaksha, Mr. Zeeshan Khan, Mr. Vaijayant Paliwal, Ms. Radhika Indapurkar, Ms. Mohana Nijhawan, Mr. Chaitanya Safaya, Mr. Bryan Pillai, Ms. Moulshree Shukla, Ms. Ishani Mookherjee, Ms. Priya Singh, Mr. Ameya Gokhale, Advocates for R1**

Mr. Tushar Mehta, Solicitor General of India with Mr. Bishwajit Dubey, Mr. Madhav Kanoria, Ms. Surabhi Khattar, Mr. Kanu Agarwal, Mr. Prafful Goyal, Advocates for R-2

Mr Gopal Jain, Senior Advocate, Mr Diwakar Maheshwari, Advocate and Mr Shreyas Edupuganti, Advocate for R-3

J U D G M E N T

DR. ASHOK KUMAR MISRHA, TECHNICAL MEMEBR

Contents:

1. All these appeals have been filed by the 'Appellants' under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 08.06.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench, Court No.II at Mumbai) in IA No. 196/2021 in CP (IB) No. 02/MB/C-II/2018 and CP (IB) 01/MB/C-II/2018 and CP (IB) 508/MB/C-II/2018 and CP (IB) 509/MB/C-II/2018 and CP (IB) 507/MB/C-II/2018 and CP (IB) 511/MB/C-II/2018 and CP (IB) 510/MB/C-II/2018 and CP (IB) 562/MB/C-II/2018 and CP (IB) 512/MB/C-II/2018 and CP (IB) 560/MB/C-II/2018 and CP (IB) 528/MB/C-II/2018 and CP (IB) 564/MB/C-II/2018 and CP (IB) 563/MB/C-II/2018 wherein the 'Adjudicating Authority' has approved the 'Resolution Plan' submitted by 'Resolution Applicant' - 'Twin Star Technologies Limited'.
2. Since all these appeals have sought basically to quash and set aside the impugned order dated 08.06.2021 of the Adjudicating Authority, it was thought fit and proper to be heard together and disposed off by a common judgment. Accordingly, we are proceedings in the matter.
3. Vide order dated 19.07.2021, this Tribunal has stayed the impugned order and directed *status quo ante* as before passing of the impugned order to be maintained. Resolution Professional will continue to manage the Corporate Debtor as per provisions of the Code.

A. Brief background

4. The available record reveals that 'Videocon Group' was founded in the year 1984 and commenced its business from Marathwada region which expanded across India and worldwide. In the initial stage, this group was involved in local television manufacturing. The same was diversified in multiple business portfolio in oil and gas, retail, telecom, insurance and real estate sector. The 'Videocon Industries Limited' (VIL) is a listed company on the 'National Stock Exchange' (NSE) and the 'Bombay Stock Exchange' (BSE) with its promoter group holding 62.27% share. A 'consortium of bankers' led by 'State Bank of India' (SBI) has rendered its financial debt facilities to the Videocon group. It is also observed that the Videocon's telecom business obtained 21, 2G telecom licenses from the then prevailing government which was cancelled at a later date and this impacted the Videocon's Telecom business. They were repaying the agreed instalments to the consortium of lenders till 2015. VIL and 'Bharat Petroleum Corporation Limited' jointly bought oil and gas assets through "joint venture". It also reflects that from May, 2016, the VIL alongwith 13 others companies of Videocon groups were classified as 'SMA – 2' due to late payment of instalments in the year 2016 onwards.

5. **It is also reflected from the 'Appeal Paper book' that VIL and its other group companies (12 domestic subsidiary) and their lenders entered into a 'Syndicated Rupee Term Loan Agreement' dated 08.08.2012 as-obligor - co-obligator on the one hand and the banks and financial institutions as the group of lenders with SBI as**

Facility Agent and SBICaps Trustee Company Limited as the onshore Security Trustee. Entities of Videocon group with respective orders were under CIRP and the action taken by the lead bank i.e. SBI under Section 7 of the Code and few companies who are also part of the group, certain 'Operational Creditors' (OC) had filed insolvency petition. List of 13 Videocon group companies taken from Form- H- Compliance Certificate given by RP at 70 of the Appeal paper book in CA(AT) (Ins) No. 505 of 2021.

Table - 1

Sl No.	Name of the Videocon group company	Insolvency commencement date	Date of appointment of the IRP	Date of appointment of RP
1.	Videocon Telecommunications limited	11.06.2018	11.06.2018	10.07.2018
2.	Electroworld Digital Solutions Ltd	30.08.2018	30.08.2018	10.10.2018
3.	Value Industries Ltd	30.08.2018	30.08.2018	06.10.2018
4.	Evans fraser & Co. (India) Ltd.	30.08.2018	30.08.2018	10.10.2018
5.	CE India Ltd	14.09.2018	14.09.2018	20.10.2018
6.	Videocon Industries Limited	06.06.2018	06.06.2018	10.07.2018
7.	Millennium Appliances (India) Ltd	31.08.2018	31.08.2018	10.10.2018
8.	Sky Appliances Ltd.	31.08.2018	31.08.2018	11.10.2018
9.	PE Electronics Ltd.	31.08.2018	31.08.2018	09.10.2018
10.	Techno Electronics Ltd.	31.08.2018	31.08.2018	09.10.2018
11.	Applicomp India Ltd	25.09.2018	25.09.2018	31.10.2018
12.	Techno Kart India Ltd	25.09.2018	25.09.2018	30.10.2018
13.	Century Appliances Ltd.	25.09.2018	25.09.2018	30.10.2018

It also reveals from Form -H that Mr. Abhijit Guhathakurta was appointed as the RP for the Corporate Debtor(CD) from 25.09.2019 by the Adjudicating Authority. SBI had filed an application for substantive

consolidation (being Miscellaneous Application No.1306 of 2018 before the Adjudicating Authority). Mr. Venugopal Dhoot, who is the guarantor, shareholder/former Managing Director and Chairman of VIL also filed an application for substantive consolidation (being MA No.1416 of 2018 before the Adjudicating Authority).

The Adjudicating Authority vide its order dated 08.08.2019 passed the consolidation order and partially allowed SBI's Application and directed consolidation of the CDs (Corporate Debtors) (as per Table No.1) out of the 15 Videocon Group companies. CIRP of two companies i.e 'KAIL Limited' and 'Trend Electronics Limited' to run independently.

6. As per information available in CA(AT) (Ins) No. 503/2021, page 14 of the Appeal paper book, total claims of Rs.72,078.5 Crore has been filed out of which claims of Rs.64,637.6 Crore had been verified and accepted for the purpose of CIRP by the RP. It was stated that the plan provides for a meagre amount of Rs.2962.02 Crore against an admitted liability of approx. Rs.65,000 Crore. The said waiver is almost Rs.62,000 Crore of admitted claims & Rs.69,000 crore of total claims whereby this public money is lost, haircut is approx. over 95%. Even the claims of the Financial Creditors have been settled below 5% while that of OC (Operational Creditor) is hardly 0.72%.

7. It is also revealed that the Resolution Plan of 'Successful Resolution Applicant' (SRA) was approved by the CoC by 95.09 % voting share. However, the **'Assenting Financial Creditors' (AFC)** constituting 94.98%, who have approved the Resolution Plan submitted by the SRA

has filed an affidavit stating that they feel duty bound to reconsider their decision in larger public interest resulting from unprecedent haircut of 95% & observations of the Adjudicating Authority as also this Appellate Tribunal while granting interim stay on the impugned order dated 08.06.2021 at the hearing on 19.07.2021 observing the followings stated hereafter.

> *"14. Considering the observations of the Adjudicating Authority and the submissions made by the Learned Sr. Counsel for Appellants in both these Appeals and the grounds raised in these Appeals, and considering the exceptional facts of present matter the Impugned Order is stayed till the next date and status quo ante as before passing of the Impugned Order is directed to be maintained. Resolution Professional will continue to manage the Corporate Debtors as per provisions of IBC till the next date".*

8. AFC have accepted that proceedings with the implementation of the Resolution Plan is not feasible in the light of above stated positions. No law debars review of decision in the executive branch as also in commercial company law matters to review its own decisions if at a later stage reveals that either in the interest of the organization or in the public interest or observations of the concerned Adjudicating Authority/Appellate Authority. AFC are of the view that power to approve includes power to vary, modify and reconsider. While the SRA

has stated that after approval of resolution plan, CoC is *functus officio* and cannot review the same.

B. Submission by the parties.

Company Appeal (AT) (Ins) No. 503 of 2021:

9. **Submission of the Appellant Bank**

i. Ld. Sr. Counsel for the Appellant (Dissenting Financial Creditor) has elaborately submitted that the 'Resolution Plan' provides towards the Appellant bank less than the liquidation value which the bank will receive otherwise and accordingly, it is against the provisions of the Code, specifically Section 30 of the Code. A figure was provided by 'SBI Caps' **('Process Advisor')** for the Appellant bank, in case of liquidation value was Rs. 41.85 Crore and if it dissents then the 'Financial Creditor' will have to bear the loss of Rs.17.42 Crore. The 'Resolution Professional' (RP) in 21st meeting of 'Committee of Creditor' (CoC) has confirmed the Appellant Bank that there is no change in distribution calculation as provided by SBI Caps *(page 196 &197 of the Appeal paper book).* However, there is a discrepancy in the 'Form-H' *(Resolution Plan provisions page 51 of the Appeal Paper Book)* and total amount payable to dissenting 'Financial Creditor' is Rs.105.23 Crore whereas as per 'Distribution Sheet', it was Rs.114.21 Crore *(page 196 & 197 of the Appeal Paper Book).*

ii. It was also submitted by the Ld. Sr. Counsel for the Appellant bank that Section 30(2)(b) of the Code requires Resolution Professional to confirm that the 'Dissenting Financial Creditor' will get an amount, which shall not be less than the amount to be paid to such creditors in the event of liquidation under Section 53 of the Code. From the above stated details, it is very much clear that they are being paid less than the liquidation value. So there is a non-compliance of the provisions of Section 30(2)(b) of the Code. These inputs are provided by the 'Resolution Professional' for decision making of CoC. However, this has been belatedly violated in this case.

iii. It was also stated by the Ld. Sr. Counsel for the Appellant that the 'Adjudicating Authority' has made observations and directions to the CoC to make payments as per liquidation value to all 'Dissenting Financial Creditors' in cash up-front. **While the Resolution Plan also envisages payment through 'Non-Convertible Debenture' (NCD). These changes the nature of the plan which requires reconsideration by the CoC independently**. They have also cited the judgment of Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Associations & Ors. Vs. NBCC (India) Ltd. & Ors. in Civil Appeal No.3395 of 2020 at para 126 to 130. The ld. Sr. Counsel also stated that the said judgment of Hon'ble Apex Court has specifically held that 'modification in payment is a commercial

aspect and falls within the exclusive domain and commercial wisdom of the CoC and cannot be interfered. Such modification is not permissible'.

iv. Clause 3.5 of the 'Resolution Plan' (appearing at page 237-238 of the Appeal Paper Book) clearly reflects that the payment will also be made by way of NCD and 'there is no whisper of cash'. The Adjudicating Authority has no power to change the plan, it can only be reviewed by the CoC.

v. It has also been submitted by the Ld. Sr. counsel for the Appellant that there is **no priority payment to 'Dissenting Creditors' as these NCD are getting redeemed one day prior to the NCD redemption of 'Assenting Financial Creditor'**. This is in violation of the scheme and the Code.

vi. The Ld. Sr. Counsel for the Appellant bank has also submitted that the bid has come close to liquidation value and hence, apparently "confidentiality clause" not maintained by the RP and such large hair cut is result of this. It is unprecedented hair cut for such a large organization comprising of 'Videocon Industries Ltd.' and its 'other group companies' (12 Domestic Subsidiary) with a very high claim amount of Rs.72078.5 Crore and admitted claim amount of Rs.64637.6 Crore (appearing at page no.15 of the Appeal paper book) whereas amount provided in the plan is meagre Rs.2962.02 Crore. At page 52 of the paper book it reflects that the amount provided to **the amount claimed under the**

Resolution Plan on an overall basis is 4.15%. It means the haircut is approximately 96%. Finally, it has submitted to quash and set aside the said impugned order.

10. **Submissions of the Respondent No.1 to 13 [Resolution Professional (RP)]:**

i. The RP has briefly submitted that he has preserved and protected the priority status to 'Dissenting Financial Creditor'. He has also submitted that NCD issued to 'Dissenting Financial Creditor' shall be redeemed before NCD issued to 'Assenting Financial Creditor'. He has also stated that the Resolution Applicant provides for the purpose of computation of liquidation value only the upfront amount and the NCD proposed to be issued. The 'Dissenting Financial Creditors' are not being issued equity shares. At the relevant time, NCD were proposed to be issued to the Dissenting Financial Creditor and the same was found to be in compliance to the Code and the CIRP regulation as per law as applicable at that time. He has also stated that the Resolution Plan will be in accordance with 'Jaypee Kensington' as stated supra as the same was not available at that time. It is a settled law that commercial wisdom of the CoC is paramount and cannot be assailed. He has also stated that he is not responsible for compliance for SBI Caps suggestions for a particular modalities of distributions as they are the 'Process Advisor' of the CoC. He has also done valuation through two valuers registered with

'IBBI'. The distribution mechanism is said to have been done assuming that all 'Financial Creditors' will vote in favour of the 'Resolution Plan' and done prior to completion of voting. The distribution suggested by SBI Caps was not put vote to the CoC. What is to be paid to 'Dissenting Financial Creditors' is in 'Form –H' which has been submitted alongwith the plan and the same can only be paid on the approval of the CoC.

ii. It is also stated by the RP that he was not in a position to determine the exact amount payable to the Appellant prior to the date of actual payment in view of eventualities that could arise. *(Para 11 of Written Submission of the RP dated 17.09.2021 vide diary no.29811).*

iii. It is also stated by the RP that 'Dissenting Financial Creditors' can be paid in cash (para IV page 13 of the RP reply). He has also stated that the Resolution Plan was in compliance with the applicable provisions of the Code and the CIRP Regulations and there was no reason or occasion that the same should be sent back for reconsideration to the CoC.

11. **Submissions of the Respondent No.15/Successful Resolution Applicant (SRA):**

i. The 'Successful Resolution Applicant' (SRA) has briefly submitted that they are making upfront payment of Rs.200 Crore to 'Financial Creditors', Rs.2700 Crore NCD to Financial Creditor carrying an annual interest coupon of 6.65% etc., redeemable in

five instalments next six years from closing date in instalments (page 212 of the Appeal Paper Book).

ii. It has also stated that the CoC has approved the Resolution Plan of SRA (dated 07.11.2020) on 12.12.2020 with a vote of 95.09 %. They have also submitted the following Financial Creditors have dissented against the Resolution Plan:

- Bank of Maharashtra (BOM) being the Appellant herein, holding 1.97% voting share in CoC;
- IFCI Limited (IFCI), holding 1.03% voting share in CoC;
- Small industries Development Bank of India (SIDBI), holding 0.053% voting share in CoC;
- ABG Shipyard Limited, holding 0.024% voting share in CoC.

iii. It has also stated that the SRA has filed an application for approval of Resolution Plan on 15.12.2020 and the same has been decided by the Adjudicating Authority on 08.06.2021. While the judgment of Hon'ble Supreme Court in 'Jaypee Kensington' as stated supra has been pronounced on 24.03.2021. In the meantime, the Appellant has filed IA No. 982 of 2021 in CP (IB) No. 02/MB/C-II/2018 before the Adjudicating Authority alleging that 'Resolution Plan' contravenes Section 30(2) of the Code. The matter has gone to 'Hon'ble Supreme Court' by filing 'Civil Appeal No. 4626 of 2021' by 'Resolution Applicant' which has directed to

this 'Appellate Tribunal' to decide the Appeal on the next date of hearing i.e. 07.09.2021.

iv. The SRA has stated that the amount in Form –H is an estimated amount and the final amount be determined at the time of payout which is T+ 44th day, with T being the date of approval of plan by the Adjudicating Authority. It is the commercial wisdom of the CoC to provide the hair cut of 95.05% and it is not available to judicial review. Citied multiple judgments as are enunciated below:

- K.Sashidhar Vs. Indian Overseas Bank 2019) 12 SCC 150;
- Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta (2020) SCC 531;
- Jaypee (Supra);
- Kalpraj Dharamshi Vs. Kotak Investment Advisors CA No. 2943 of 2020 and
- Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp Solutions Limited CA No. 3224 of 2020

v. It has also stated that equitable considerations cannot influence the approval of the Resolution Plan, once the same has been approved by the CoC. It has also stated that the Resolution Plans and liquidation value relationship is relevant in view of the data available on the IBBI Website as on 30.06.2021.

- Till date (upto 30th June 2021) only 393 CIRP processes yielded resolution plans;

- 177 resolution plans out of 393 i.e.45% resolutions have had a realization which is 1.25 times the liquidation value or less; (Twin Star Resolution Plan was at a valuation of 1.25 times the liquidation value for 100% equity (92% stake of RA extrapolated to 100% as 8% equity is offer to Financial Creditors under the plan)
- 82 resolution plans out of 393 resolutions i.e. 21% resolutions have had a realization below the liquidation value;
- There are 11 approved resolution plans (out of 393) where the resolution value is between 99% and 101% of the Liquidation value;
- There are 74 approved resolution plans (out of 393) where the resolution value is between 90% and 110% of the Liquidation value.

vi. The Appellant is comparing admitted claim to the resolution plan value whereas it is to be compared with reference to liquidation value.

vii. It was also pointed out by the SRA that CoC becomes functus-officio once it approves the 'Resolution Plan' and hence once they approve the 'Resolution Plan' then it cannot be sent back to them for their review.

12. **Submissions of the Committee of Creditors of Consolidated Videocon Group of Companies. 'The Ld. Solicitor General' (SG) on**

behalf of certain Assenting Financial Creditors(AFC) constituting 94.98% (out of 95.09% of the CoC who assented the proposed) of the CoC of the Consolidated Videocon Group of Companies have made the following submissions:

i. It was submitted by the Ld. SG that the 'Assenting Financial Creditors' has filed an 'Affidavit' on behalf of 'Assenting Financial Creditors' stating the followings:

a. The Assenting Financial Creditors on whose behalf the Affidavit is filed carry a voting percentage of 94.98% of the CoC, who have approved the Resolution Plan submitted by Twin Star Technologies Limited- R14 in accordance with the provisions of the Code and the same was approved by the Adjudicating Authority vide its impugned order.

b. Under the scheme of the Code and the Regulations framed thereunder, the RP is required to appoint two valuers to determine the fair value and liquidation value of the Corporate Debtor. The RP is required to disclose the same to the CoC after receipt of Resolution Plan.

c. The RP have originally received 11 Resolution Plans for the CD and out of that he has certified two Resolution Plan as compliance under the Code and accordingly, the same was put to vote and the Resolution Plan under challenge of 'Twin Star(R15) was approved by the CoC by 95.09% voting share.

d. The Adjudicating Authority has also made certain observations regarding low value of the Resolution Pan and the hair cut being suffered by various classes of 'stakeholders' as stated in para 5 & 6 of the impugned order dated 08.06.2021 and the same is also depicted below:

"OBSERVATIONS OF THE ADJUDICATING AUTHORITY

Para -5. ***As per the CoC approved Resolution Plan, Assenting Secured Financial Creditors would get only 4.89%, Dissenting Secured Financial Creditors would get only 4.56%, Assenting Unsecured Financial Creditors would get only very meagre amount of 0.62%, Dissenting Unsecured Financial Creditors would get "NIL/ ZERO" amount and Operational Creditors would also get a very meagre amount of only 0.72%.*** *Out of total claim amount of Rupees 71,433.75 Crore, claims admitted are for Rs 64,838.63 Cores and the plan is approved for an amount of only Rs 2962.02 Crore which is only 4.15% of the total outstanding claim amount and the total hair cut to all the creditors is 95.85%. Therefore, the Successful Resolution Applicant is paying almost nothing and 99.28% hair cut is provided for Operational Creditors (Hair cut or Tonsure, Total Shave). During the Course of hearing it is also submitted that voluminous number of Operational Creditors are also MSME and if they are paid only 0.72 % of their admitted claim*

amount, in the near future many of these Operational Creditors may have to face Insolvency Proceedings which may be inevitable, therefore this Adjudicating Authority suggests, requests both CoC and the Successful Resolution Applicant to increase the pay-out amount to these Operational Creditors especially MSMEs as this is the First Group Consolidation Resolution Plan of 13 companies having large number of MSMEs.

Para - 6. Further it is also observed that by just paying only Rs. 262 Cores (8.84% of total plan value) (Cash balance available with the Corporate Debtors is approx. Rs. 200 Crore) the Successful Resolution Applicant will get possession of all the 13 Corporate Debtors to run these units and the first payment of Rs. 200 Crore as part redemption amount of NCDs will be paid within 25 months from the closing date and the balance amount of Rs.6,25,00,00,000/ each is spread over in 4 instalments starting from 3rd year onwards up to sixth year from the closing date and the interest rate for the NCDs is also a nominal of only 6.65% p.a payable annually. It may also be noted that at the time of granting loan, restructuring, approving the resolution plan with such a huge hair cut also the financial institutions, Committee of Creditors consisting 35 members exercised their Commercial Wisdom. Since this is the Commercial Wisdom of the COC and as per the various

judgements of the Hon'ble Supreme Court and by following the judicial precedents, discipline the Adjudicating Authority approves the resolution plan of the Successful Resolution Applicant with a suggestion, request to both CoC and the Successful Resolution Applicant to increase the pay-out amount to these Operational Creditors especially MSMEs."

e. This Tribunal while granting interim stay on the impugned order on 19.07.2021 made the following observations:

"14. Considering the observations of the Adjudicating Authority and the submissions made by the Learned Sr. Counsel for Appellants in both these Appeals and the grounds raised in these Appeals, and considering the exceptional facts of present matter the Impugned Order is stayed till the next date and status quo ante as before passing of the Impugned Order is directed to be maintained. Resolution Professional will continue to manage the Corporate Debtors as per provisions of IBC till the next date".

f. In the present appeal, assertions have been made by the 'Dissenting Financial Creditors' about Non-Discloser of their respective share of the liquidation value which has resulted in them not being able to take a proper and prudent decision had they been knowing so they could have persuaded the Assenting Financial Creditors not to accept the Resolution Plan with such **unprecedented huge haircut**. This has

necessitated a reconsideration by the CoC of the decision to accept the haircut of 95%. Considering the observations of the Adjudicating Authority and this Appellate Tribunal, Assenting Financial Creditor (AFC) majority of which are public sector banks and Financial institutions dealing with public money have to give serious consideration and weightage to the observations. Accordingly, in the fitness of thing, AFC has proposed to reconsider its decision in larger public interest so as to ensure that the public money is secured and maximized in the best possible manner. This is a peculiar fact of this case and requires reconsideration by certain AFC, particular, public sector banks and financial institutions. **They have requested this Appellate Tribunal to remand the matter back to the CoC for its reconsideration including authorization after the reconsideration by the CoC to inter alia allow the CoC and the RP after the reconsideration of the CoC to conduct a fresh process of the inviting fresh 'Expression of Interest' (EoI) and 'Fresh Resolution Plan'** from all interested Resolution Applicants or to take appropriate decisions including liquidation of the corporate debtors, if approved, by the CoC as per provisions of Code.

g. The AFCs have further submitted that proceedings with the implementation of the current Resolution Plan seems not

feasible and they are accepting that the same is not consistent with the observations made by the Adjudicating Authority and this Appellate Tribunal and also considering the various issues presented in the current appeals. **All this has made them to believe that the AFC is duty bound to reconsider their decision in larger public interest.**

ii. **The AFCs have significantly gone through the observation made in the appeal paper book, observations of Adjudicating Authority and this Appellate Tribunal and, particularly, are concerned with no value of Resolution Plan and the unprecedented haircut being suffered various classes of the stakeholders including the MSME (which is the backbone of the economy) and other operational creditors under the Resolution Plan. The Assenting Financial Creditors wants this to be placed before the full CoC to reconsider its decision in larger public interest and to ensure that public money and interest of stake holders are properly protected and secured and maximized in the best possible manner. They accept that there is a merit in reconsideration inasmuch as Non-disclosure of their respective share of the liquidation value may have resulted in not substantiating their issue appropriately to take a proper and prudent while approving the Resolution Plan.** All this have persuaded the AFC (which constituted 94.98% of

95.09% approving the plan) to accept the resolution plan with such haircut. Let all the issues placed before the CoC to take a balance view on such unprecedented haircut including certain deficiencies in approving the Resolution Plan as observed by the Adjudicating Authority and the Appellate Tribunal while granting interim stay.

iii. They have further submitted that this Appellate Tribunal has power to allow reconsideration of CoC's decision to approve a resolution plan. **In this regard, the Hon'ble Supreme Court in the case of Jaypee Kensignton Boulevard Apartment Welfare Association and others Vs. NBCC (India) limited and Ors., 2021 SCC Online SC 253 has recently held that in case a resolution plan requires modification, the Adjudicating Authority (which would include this Appellate Tribunal by virtue of the scheme of the Code) must send back the resolution plan to the CoC to consider the modifications,** as so to afford an opportunity to the resolution applicant to modify the plan, and CoC may then re-consider the plan and vote upon the same. Relevant observations of the Hon'ble Supreme Court in this regard is reproduced below:

"The submissions made on behalf of the IRP in this regard are correct that if the Adjudicating Authority was of the view that the plan did not meet with any particular requirement, it could have only sent it back to the CoC to consider the proposed

modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same."

iv. Thus, it has been made amply clear that the Adjudicating Authority (and this Appellate Tribunal) has powers to send the matter back to CoC for reconsideration. Thus, in the larger public interest, and in light of the observations made by the Adjudicating Authority and this Appellate Tribunal, the most appropriate course of action would be to remand the matter back to CoC for reconsideration. In any case, it has been time and again affirmed that the CoC's commercial wisdom is paramount by the Indian courts [K.Sashidhar Vs. Indian Overseas bank & Ors., (2019) 12 SCC 150; Committee of Creditors of Essar Steel India Ltd Vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531; Kalpraj Dharmashi & Anr. Vs. Kotak Investment Advisors Ltd., & Anr., 2021 SCC Online SC 204]

K.Sashidhar Vs. Indian Overseas bank & Ors., (2019) 12 SCC 150

> *"Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors*

are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non justiciable."

Committee of Creditors of Essar Steel India Ltd Vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531

"It is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no

doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub- class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution

process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

Kalpraj Dharmashi & Anr. Vs. Kotak Investment Advisors Ltd., & Anr., 2021 SCC Online SC 204

It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. This Court thus, in unequivocal terms, held, that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It has been held,

that the opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' is made non justiciable."

… This Court held that what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to

determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

The report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design (November 2015) too had observed that the business decision regarding appropriate disposition of a defaulting company should be made solely by the CoC. The said observation has even been relied upon by the Hon'ble Supreme Court in the case of Kalpraj Dharamshi & Anr. Vs. Kotak Investment Advisors Ltd. & Anr., 2021 SCC OnLine SC 204, BlRC's relevant portion is reproduced below:

"The Committee believes that there is only one correct forum for evaluation such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. This appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

v. It is also submitted that, similarly, in the Insolvency Law Committee Report, 2018, it was re-emphasized that "*the objective of the Code is to respect the commercial wisdom of the CoC."* The Hon'ble Supreme Court in K.Sashidhar referred to the Report of 2018 and further affirmed that the CoC's

commercial wisdom is paramount. Thus, if the CoC in its commercial wisdom considers it appropriate to have a reconsideration of its decision, this Appellate Tribunal may consider the same and remand the matter back to it in the larger interest of all stakeholders and public money.

vi. Ld. SG has also stated that without prejudice CoC has the power to approve or to reconsider a plan. It is trite that the power to do also includes power to undo. It has been time and again observed by the Courts in Indian that the power to make an order includes power to add to, amend, vary or rescind the said order as well. (see Dhikpathy Vs. Chairman Chennai Port Trust, 2001 SCC OnLine Mad 154, Para 19). Recognizing the inherent right, the Hon'ble Supreme Court too in the case of Kamleshkumar Ishwardas patel Vs. Union of India, (1995) 4 SCc 51 (page 55) had observed that the authority making the decision can also revoke it. Relevant paragraph is reproduced below:

"Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order."

vii. The contention that the resolution plan once approved cannot be reconsidered is untenable. Further, reference to the Hon'ble Supreme Court judgement in Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta and Ors., 2021 SCC OnLine SC 194, to avert that the Adjudicating Authority cannot do what the Code consciously did not provide it the power to do, is also incorrect and untenable.

viii. It is also submitted that the power to revoke the approval is inherent within the power to approve to the CoC as well as the Adjudicating Authority. The Code need not expressly state powers, by way of separate provisions, which are understood to be implied in the powers expressly provided under the Code. Thus, the Adjudicating Authority and this Appellate Tribunal is fully empowered under the Code to send the matter back to CoC for reconsideration of its decision and the CoC is fully empowered to reconsider its decision.

ix. It has also been stated by the Ld. SG the power to approve includes power to vary, modify and reconsider. It is also a well-settled principle of law that the power to take a decision, also encompasses within it the power to modify, review and reconsider such decision [see Duli Chand Vs. State of Uttar Pradesh and Ors. Writ-C No. 45851 of 2011 (Allahabad High Court; Kamal Kumar Vs. State of H.P. CWP No. 3443 of 2020

(HP High Court); and District Collector Vs. Bhaskara, Writ Appeal No. 615 of 1982 (Kerala High Court)].

x. In this regard, observation of the Hon'ble Bombay High Court in the case of Rajesh Hansraj Chopra Vs. the Competent Authority & Ors., 2001 SCC OnLine Bom 1145 is very pertinent. Its states:

"Section 21 of the General Clauses Act is a general provision how to interpret provision of an enactment or regulation or rules where certain powers are conferred on certain authority to issue an order and the extent to which such power could be exercised. In doing so, such authority is conferred with power to modify, amend or to alter it."

xi. It is stated that the Hon'ble Supreme court judgment in the case of Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions limited & Ors. in Civil AppealNo. 3224 of 2020 to avert that the Resolution plan once approved, cannot be withdrawn is not applicable to the instant fact situation. It is submitted that the Ebix judgment decided the question of whether a successful resolution applicant can withdraw/ seek modification of in a CoC approved resolution plan, while an application for approval is pending before the Adjudicating Authority. Ebix does not consider CoC's power to reconsider a resolution plan, once approved by it. Thus, the reliance on Ebix is misplaced and ought to be rejected. Similar, reliance on Amtek Auto Limited

Vs. Dinkar T.Venkatsubramanian (2021) 4 SCC 457, is incorrect as the said judgment pertains to withdrawal from the resolution plan being sought by the resolution applicant. Therefore, it is submitted that on a con-joint reading of the established principle of law that power to do something also includes the power to undo and the recognition of power to remand the matter back to CoC for reconsideration in Jaypee, it is prayed to remand the matter back to the CoC for its reconsideration. This would enable CoC to take account of the observations of the Adjudicating Authority and this Appellate Tribunal positively and provide it with an opportunity to safeguard interest of all stakeholders in the best possible manner.

13. **Company Appeal (AT) (Ins) No. 505 of 2021:**

A.Submissions of the Appellant- IFCI Limited

I. The Ld. Counsel for the Appellant has stated that the Resolution Plan is contrary to the provisions of the Code and the IBBI (CIRP for Corporate Persons) Regulations, 2016 with respect to the treatment provided to Appellant being a 'Dissenting Financial creditors' (DFC). The payment to DFCs in the form of NCD is not prescribed under law laid down as also the Resolution Plan lacks non-payment of upfront as required under Section 30 R/w Section 53 of Code.

II. It is stated that Videocon Industries Limited (VIL) and its other group companies and their lenders entered into a syndicated Rupee Term Loan Agreement dated 08.08.2012 between VIL and its 12 domestic subsidiaries as Obligor-Co-obligor on one hand and the Banks and Financial Institutions as the group of lenders, with the SBI as Facility Agent and SBICAP as the Onshore Security Trustee. It is stated that vide letter dated 13.09.2013 the Appellant granted in principle agreement to participate in the syndicated RTL Facility to provide loan not exceeding Rs. 400 Crore to VIL. It is stated that the Appellant became party to the RTL by Deed of Accession Dated 23.09.2013. the Appellant craves leave to produce the Rupee Term Loan Agreement if required.

III. It is also stated that apart from the assets covered under the Rupee Term Loan Agreement, the Appellant separately enjoys an exclusive charge over a property. It is stated that the property is specifically the land and buildings at the factory at SP-1 Vigyan Nagar Industrial Area, Opp. RIICO Office, Shahjahanpur, Dist:Alwar – 301706, Rajasthan, admeasuring approx.. 81554.60 sq. mtr. It is stated that the Appellant had granted Gran Electronics Limited (GREL), a subsidiary of VIL not covered under the consolidation, a term loan of Rs. 200 crore. It is stated that the term loan was granted on one of the secured of exclusive mortgage of the Shahjahanour property owned by VIL, in favour

of the Appellant. The Appellant craves leave to produce the Corporate Loan Agreement dated 10.09.2015 and the Undertaking dated 10.09.2015 of constructive delivery of the Shahjahanpur property to the Appellant, if required. However, it is an admitted position that the Appellant enjoys exclusive charge over the referred property at Shahjahanpur. Therefore, the Appellant enjoys a pari passu charge with other lenders, over all properties of the Videocon Group and also enjoys a separate exclusive charge over the Shahjahanpur property, owned by VIL.

IV. The Videocon Companies are all undergoing CIRP pursuant to different orders of the Adjudicating Authority. These proceedings have however, been consolidated by an order dated 08.08.2019.

V. It is also stated by the Appellant that the Appellant is one of the members of the CoC. It is stated that the Appellant was made part of the CoCs pursuant to the Appellant filing its claim and the same being admitted by the RP. It is stated that the RP has admitted the Appellant's claim under the Rupee Terms Loan agreement and also the Term Loan granted to GREL against the security over the Shahjahanpur property owned by VIL. There are 35 members being financial creditors in the CoCs. The Appellant and IDBI Bank are the only two financial creditors who have a separate and exclusive charge over certain properties, over and above the parri passu charge under the Rupee Term Loan Agreement, of the Videocon Companies as a

security towards their debts. It may be noted that the total debt admitted towards the Appellant by the RP of the Videocon Companies is Rs. 637.41 Crore. It may be noted that the liquidation value of the Videocon Companies was recorded by the CoC as in the 15th MoM held on 02.09.2020. It is stated that the **Liquidation Report summary was shared with the CoC at the 15th Meeting is actually an incorrect value as per the Appellant and such issues were raised by the Appella**nt. It is stated that it is pertinent to note that the CoC has not given explicit consent and approval to the liquidation value, however, it is just that no member except the Appellant has raised an objection to the same. The valuation reports themselves were made available to the CoC member through the Virtual Data Room. It is stated that as per the Appellant, the liquidation value that has been used by the CoC in its subsequent calculations, suffers from an arithmetic error in terms of (i) simplicitor transcription error in terms of the liquidation value of the Shahjahanpur property, (ii) double jeopardy to the liquidation value due to again deducting the values for VTL Cash Balances, after it has already been accounted for in the liquidation value calculation, (VTL cash balances refer to certain amounts of VTL which may be subject to the outcome of legal proceedings) and (iii)error in transcription between the values for secured and unsecured creditors' admitted claims, as given by the RP and as

used by the SBICaps for the calculation of the distribution mechanism.

VI. It is also stated that pursuant to the notices inviting EOI, 11 proposals were received by the CoCs of the Videocon Companies, out of these proposals, the legal advisors of the R-14 disqualified 9 proposals. Hence, the only proposals which were put before the CoC were the proposals of R-15 and V-Shape Investment Management Limited. The above referred two plans were therefore, tabled before the CoC for further consideration by the CoC members. It is stated that at the 19th meeting of the CoC, a discussion on distribution of resolution amount for each financial creditor was held. The RP had informed the CoC that the two plans i.e. plans of R-15 and V-Shape Investment Management Limited were in accordance with the Code and the Regulations thereunder. It was informed to the CoC that provisions had also been made to take care of dissenting financial creditors including priority of payment and the proposed plans and distribution mechanisms were in compliance with the law. It is stated that thereafter, through e-voting carried our between 14.11.2020 to 11.12.2020 in furtherance of the 19th meeting of the CoC, the CoC voted on, inter alia, the following:-

a. To approve the resolution plan submitted by TWIN Star, found to be compliant with Section 30(2) of the Code under

Section 30(4) of the Code and to authorise the RP to issue a letter to intent to Twin star and to file an application with the Adjudicating Authority for approval of the Resolution plan submitted by Twin star as per section 30(6) of the Code; and

b. To approve the Distribution Mechanism laid down in Annexure II of the Minutes of the 19th Meetings of the CoC of the Videocon Group companies.

VII. As per the Voting report, the R-15 was elected to be SRA having received approval of 95.09% approval of the CoC. It is also stated that the 20th Meeting of the CoC took place on 05.01.2021 wherein the Appellant raised its issue regarding the meaning of 'priority' of payment to dissenting FCs. **However, it was reiterated by the RP that the Resolution Plan is already declared complaint under the relevant provisions of the Code and therefore no further response was needed to be provided on the particular query of 'priority'. It is stated that the Appellant had again reiterated its query regarding the error in valuation and treatment of valuation of VTL cash balance on the distribution amounts. It has been recorded in the said meeting that the RP asked his team to discuss this issue with the present Applicant separately and try and address them at an early stage, however, no proper discussion or resolution was granted to the Applicant whatsoever.**

VIII. It is stated that in the 21st Meeting of the CoC as well, the concerns of the Appellant were similarly treated, in that it was reiterated by the RP that the Resolution Plan was complaint with the provisions of the Section 30(2) of the Code and Regulation 38(1)(b) of the Regulations. Reference may be had to the below paragraphs reproduced from the minutes of the 21st Meeting of the CoC.

"2.IFCI query: IFCI raised their pending queries to the Chair, which was also e-mailed by IFCI to RP before the CoC meeting:

VTL Cash Balance :IFCI raised that VTL cash balance is part of the liquidation value and accordingly should not be deducted for computing share of dissenting FCs. On the contrary, SBI caps has deducted INR 120.30 Crore towards VTL cash balance from submitted average LV. The RP responded that firstly, the distribution mechanism and the supporting calculations were finalized by the lenders alongwith SBI caps and the same was approved by the CoC members by majority. He further continued that the mention VTL cash balance is subject to certain litigations and currently there is a lien on the subject cash balance of VTL. IFCI further added that in spite of the litigations and lien, the CoC has accepted the valuation reports of 2 external valuation agencies who have given some liquidation value to these cash balance/FDs. Accordingly, IFCI insisted that the VTL cash liquidation value should be consistent with the

valuation of these external agencies or the CoC/ RP needs to record reasons for not accepting their valuation of the VTL cash balance. The RP reiterated that he updated CoC about the litigation of VTL cash balance only for the information of the CoC and does not in any manner links the litigation to the treatment of VTL cash balance at the time of arriving the liquidation value (LV) in the distribution mechanism. He maintained that the litigation matter is sub-judice and would not be in a position to comment on the same.

(Revised lender-wise distribution: IFCI kept on insisting that the distribution of amounts under the resolution plan should be rectified by the RP and submitted to the entire CoC by the RP. The RP clearly responded that the distribution mechanism was tabled before CoC and approved by the CoC in the CoC meeting held on 11.11.2020 and the supporting distribution calculations arrived at by the lenders alongwith SBicaps is already been submitted to the Adjudicating Authority for the approval of the Resolution Plan. Accordingly, the RP made it abundantly clear that he or his team is not carrying out any revisions / rectifications to the distribution mechanism/amount that was already approved by the CoC and submitted to the Adjudicating Authority for approval). The matter is sub-judice and no further discussion/ amendments is warranted at this stage.

IX. It is stated that from a perusal of the issue regarding VTL Cash Balance, the RP has failed and unable to take it up with the majority CoC. On one hand, the RP has allowed the double deduction of the consideration of the VTL Cash balances from the liquidation value calculation, however on the other hand he stated that he updated the CoC about the litigation of VTL cash balance only for the information of the CoC and does not in any manner links the litigation to the treatment of VTL cash balance at the time of arriving the liquidation value in the distribution mechanism. He maintained that the litigation matter is sub-judice and would not be in a position to comment on the same.

X. It is stated that the Appellant had filed the captioned IA No. 762 of 2021 before the Adjudicating Authority for essentially two prayers, which are summarized as under:

a. Prayer for the payment of the liquidation value as per Section 30(2) of the Code payable to the Appellant as a dissenting financial Creditor and quantified at Rs. 70.31 crore, be paid in cash and upfront i.e. in priority to assenting financial creditors.

b. Prayer to consider the correct value of the Videocon Telecommunications limited cash balance for the purpose of calculation of the liquidation value.

XI. However, the Adjudicating Authority by its impugned order dated 08.06.2021 was pleased to approve the plan submitted by TSTL and was further pleased to dispose of the all the pending IA's including that of the Appellant with certain directions.

XII. It is submitted that a bare perusal of the said Resolution Plan would evince that the same is not in conformity with, inter alia, the provisions of Section 30 of the Code to the extent of the liquidation value and the priority of payment contemplated to dissenting financial creditors. It is trite and evident on a bare perusal of the Code and the Regulations framed thereunder, including the CIRP Regulations that a Resolution Plan must meet certain mandatory criteria and failure to meet such mandatory requirements would result in the Resolution Plan being illegal and bad in law and contrary to the settled provision of the Code and the regulations framed thereunder. The Resolution plan submitted by the R-15 TSTL has provided a haircut of almost 90 to 95%. The plan provides meagre amount of Rs. 2900 crore for an admitted liability of Rs. 65000 Crore. The said waiver is almost of Rs. 62100/- Crore whereby public money is lost. The main objective and the spirit of the Code is to maximize the assets of the Corporate Debtor(CD), however the Code has been used as a tool to do the exact contrary and devaluate the CD assets. The Adjudicating Authority failed to raise questions as to whether correct information has been

provided to the CoC for applying their commercial wisdom. The Adjudicating Authority has in fact should have satisfied and enquired the methodology for coming to a liquidation value and whether the said value in itself portrays true and correct picture of the CD.

XIII. It is also stated that the Adjudicating Authority has taken a judicial note of the fact that secured financial creditor would get less than 5% and other creditors will almost get nil amount. The Adjudicating Authority ought to have consider that whether CoC while applying its commercial wisdom has considered the parameters u/s.30 of the Code R/w the provisions made thereunder. The approval of the resolution plan is an order 'in rem' and is binding on not only creditors, stake holders but is ultimately binding on the public exchequer whose moneys has been lend by the financial creditors. Therefore, the Adjudicating Authority should have exercised its power U/s. 31 to record the reasons for such a huge public loss and the impugned order should reflect such application of mind by the Authority. The impugned order is completely silent about the reason for such vast difference in the amount so offered to the creditors and in fact merely talks about the restricted role of the Adjudicating Authority while exercising its jurisdiction under the Code. By the way of the impugned order the Adjudicating Authority and recorded its restrictions in exercising jurisdiction over the

commercial wisdom, but the impugned order does not even record the efforts on the part of the Adjudicating Authority to verify as to whether true and correct information has been provided to the CoC, whether the RP has completed his duty to maximize the valuation of the CD in the letter and spirit of the Code.

XIV. It is also submitted that Section 30(2) contemplates treating the dissenting financial creditors as per the treatment they would have received under a liquidation scenario, in the very least. It is submitted that in the present resolution plan under consideration, the plan will put the application, **as a dissenting financial creditor in a position even worse than in a liquidation scenario**. It is submitted that the payment envisaged towards dissenting financial creditors is not less than the amount to be paid in accordance with sub-section (1) of Section 53 in the event of a liquidation of the CD. However, this computation has to take into account not just the component of the quantum of money but also when the Applicant receives the money, as time value has a great impact on money.

XV. Further, in terms of the Resolution Plan, the financial creditors who vote in favour of the resolution plan are to also be provided a total of 8% equity shareholding in VIL on a post money fully diluted basis and financial creditors such as the Appellant non-convertible debentures to be issued which will remain

outstanding and shall carry a coupon of 6.65% p.a payable annually. In this regard, it is submitted that the Code does not provide for such methods as payment towards the debt of financial creditor. In any case, even in case of liquidator of a CD in case of liquidation is to entitled or empowered to issue non-convertible debentures or such instruments, how could such modalities be provided during CIRP as payout and discharge of debts of the Appellant. It is pertinent that as per the provisions of the Code, the dissenting Financial creditor are entitled to payout of minimum amount of liquidation value that too in priority manner as prescribed under Section 30 of the Code r/w section 53 of the Code. **However, if the Code does not provide for modality for issuance of non-convertible debentures, how could the same be treated as payouts/payment in compliance with the provisions of the Code. In any case, it is noteworthy that there is no upfront payment or cash receipt by the Appellant and thus, the requirements of Section 30(2) r/w Section 53 of the Code cannot be construed to have been met by the present resolution plan approved by the impugned order.**

XVI. **Further, issuance of NCDs cannot be considered valid payment under the provisions of the Code inasmuch as the same does not meet the essentials of the Code when the test prescribed under Section 30 is for dissenting financial**

creditor (DFC) to be paid in accordance with what is possible and mandated in terms of Section 53 of the Code. Also, in this regard, issuance of NCD cannot be correlated to payment of DFC when issuance of same is not provided or permitted under the Code. Pursuant to the approval of the resolution plan by the Adjudicating Authority, the Appellant by email dated 21.06.2021 and 29.06.2021, requested for certain information, however, till date there is no response from the RP, CoC's legal counsel and SBICaps. Inspite of the said emails no response has been received.

XVII. It is submitted that the said resolution plan does not seek to take payment of the admitted amount due as on liquidation i.e. Rs. 70,31,00,000/- to the appellant nor does it seek to do so in priority as is mandated under the Code and the Regulations framed thereunder. With regard to the issue of incorrect double deduction of the VTL cash balance, reference may be had to the Distribution Mechanism that is annexed to the minutes of the 19th meeting of the CoC. Part (ii) of the Component II talks about the available cash balancing being subject to the vacation of lien by the Hon'ble Delhi High Court. Thereafter, in the further explanation, it is stated that the Contingent Cash balance and Contingent Recoveries shall be distributed in the Distribution Ratio of 95:5 amongst the financial creditors towards their secured and unsecured admitted Financial debts. However,

such a scenario is assuming all members of the CoC have assented to the Plan. In the case of any DFC, like the Appellant, it is stated that the distribution mechanism provides that such dissenting creditors would be paid in accordance with the proposal under the resolution plan(s) for the DFC. **It is trite to note that the resolution plan under consideration does not provide for the deduction of the VTL cash balance at all, contrary to what is being considered by the CoC in its calculation.** Therefore, for this reason the errors as pointed out by the Appellant regarding the calculation need to be properly addressed by the RP and resolved. Also, Appellant separately enjoys an exclusive charge over a property being the land and buildings at the factory at SP-1 Vigyan Nagar Industrial Area, Opp. RIICO Office, shahjahanpur, Dist, Alwar – 301706, Rajasthan, admeasuring approx..81554.60 sq. mtr owned by VIL to secure the debt of Rs.200 Crore advances to Gran Electronics limited (GREL), (a subsidiary of VIL not covered under the consolidation) by the appellant. Since the said debt of GREL is not being resolved in the CIRP of VIL and other group of companies, the said exclusive security in favour of the appellant ought to be excluded from the purview of the resolution approved by way of the impugned order dated 08.06.2021 and shall remain intact and unaffected until the debt advanced to GREL is paid off or settled. Since by virtue of

being secured creditor to the extent the Shahjahanpur property is concerned, there is exclusive rights/security of the Appellant on such property, the debt advanced to GREL cannot be considered or resolved as part of the resolution plan approved by the impugned order, thus, the said property/security needs to be excluded from the purview of the CIRP of the Respondents and, in no manner, the financing documents/security documents/contracts entered into in relation to the debt advanced to GREL be affected / repudiated/ modified/ terminated. Further, without prejudice to the above or any other ground/relief whatsoever claimed herein and as an alternative, the appellant states that this Appellate Tribunal be pleased to direct the RP to put on record the liquidation value which the Appellant will receive under the Resolution Plan, upfront and in cash. Also, by way of the impugned order, the Adjudicating Authority has essentially modified the resolution plan in order to approve the same. It is pertinent that the Adjudicating Authority has approved the resolution plan of the SRA with suggestion, request to both CoC and the SRA to increase the pay-out amount to these operational creditors especially MSMEs.

XVIII. **It is also submitted that the Adjudicating Authority exercises limited jurisdiction while approving the Resolution plan and the limited jurisdiction exercised by**

the Adjudicating Authority does not grant its right to modify the resolution plan approved by the CoC. Once the Adjudicating Authority determines that the resolution plan is in contravention to provisions of the Code then such Resolution Plan has to be sent back to CoC for reconsideration in terms of the judgment passed by the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited (Supra), the relevant para is reproduced herein below:

"If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

XIX. **Further, it is categorically clear that the Adjudicating Authority is not empowered to modify the Resolution plan while exercising the limited jurisdiction. It is submitted that once the Adjudicating Authority made a determination that the resolution plan is not in compliance to the**

provisions of the Code then the only recourse available with the Adjudicating Authority was to either reject the Resolution plan or sent it back to CoC for reconsideration. Thus, the impugned order passed by the Adjudicating Authority modifying the Resolution plan is in excess of jurisdiction vested with the Adjudicating authority and ought to be set aside by this Appellate Tribunal as it is settled principle of law that an order passed without jurisdiction is nullity. Therefore, the impugned order deserves to be quashed and set aside for failure of the adjudicating Authority to effectively exercise its supervisory power under the Code.

14. **Submissions of the Respondent No.1 to 13 [(Resolution Professional(RP)]:**

I. The Ld. Sr. Counsel on behalf of the RP of Respondent No.1 to 13 (Videocon Group Companies under CIRP) have stated the following:

a. What Resolution Plan he has presented in compliance with the Code and CIRP Regulations and were placed before the CoC who has approved the same with 95.09% majority of the voting share in accordance with the Section 30(4) of the Code. It is the CoC, who has voted upon and approved the Resolution Plan and distribution mechanism as per their wisdom. It was

his duty to place the same before the Adjudicating Authority and the Adjudicating Authority has approved the same.

b. He has also stated that the Resolution Applicant vide email dated 11.11.2020 addressed to the Respondent clarified that payment to the DFC shall be limited to the Upfront Amount and the NCDs issued pursuant to the Resolution Plan. It is also pertinent to mention that under the Implementation schedule of the Resolution Plan, the DFC are proposed to be paid the upfront amount on the 44th day of implementation of the resolution plan (T+44). In view of the foregoing clauses of the Resolution plan, it is apparent that DFC are accorded priority under the resolution plan on at least on the following three accounts.

   i.The DFC (including the Appellant herein) shall be paid at least the amount payable to its under Section 53(1) in the event of liquidation of the Corporate Debtors under the Code, therefore, priority as regard the amount to be paid to the DFC is respected and preserved under the Resolution Plan.

   ii.The upfront payment due to any DFC shall be made prior to the upfront payment due to any Consenting/AFC.

   iii.The NCDs issued to any DFC shall be redeemed prior to the redemption of NCDs issued to the Consenting/AFC.

c. Clause 3.4.5(b) of the resolution plan is set out herein below:

"(b) In lieu of and as consideration of the said assignment, transfer and conveyance of the part debt and the VTL debt, an amount of INR 200 Crore ("Upfront Payment") shall be paid to the Financial Creditors towards assignment of Part Debt. This Upfront payment shall be deposited as per the timelines specified in Clause 7.2 in such bank account as may be specified by the Financial Creditors. The Upfront payment shall be subject to adjustments on account of payments to DFC."

d. In view of the aforesaid, it is submitted that the Appellant's contention that, being a DFC, it is in a worse position than it would be in the event the CDs were liquidated under Section 53 of the Code is misplaced and without any merit.

e. Without prejudice to the aforesaid, it is submitted that there was no reason or occasion for the resolution plan to be sent back to the CoC for reconsideration.

i.After filing of the said application and before its disposal by the Adjudicating Authority, on or around 15.03.2021, the Appellant filed its application before the Adjudicating Authority inter alia challenging the resolution plan.

ii.On 24.03.2021, the Hon'ble Supreme Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association & Ors., Vs. NBCC (India) Ltd. & Ors. made some observations in respect of payment to DFC under resolution plans.

iii.The Application for approval of the resolution plan and the Appellant's application were heard together by the Adjudicating Authority and during the said hearing the judgment of the Supreme court in Jaypee as stated supra was duly brought to the attention of the Adjudicating Authority. The Adjudicating Authority enquired its impact of the said judgment on the present resolution plan, and particularly whether "upfront" payment to the DFC shall be made under the Resolution Plan.

iv. Attention of the Adjudicating Authority was invited to the clauses of the resolution plan i.e. clause 3.4.5,3.5.1, 3.5.2 and 3.6.7 whereby priority status was ensured and the DFCs were to be paid prior to the AFCs. Further, on behalf of the CoC, it was submitted during the hearing of the application before the Adjudicating Authority, that entire amount due to the appellant as a DFC shall be paid upfront in the form of cash and that no amounts due will be paid to the Appellant in the form of NCDs, in line with the decision of Jaypee.

f. That by way of this Appeal, the appellant has sought to assail the commercial wisdom of the CoC and the Appeal deserves to be dismissed on this ground alone.

i.The CoC has voted upon a Distribution Mechanism alongwith the Resolution Plan. As per the distribution mechanism, wherein that the Appellant shall be paid

additional amounts, to the extent of difference between (i) the amount allotted to the Appellant from the 'net cash component' after applying the approved distribution formulate and (iii) the amount payable to the Appellant in accordance with Section 53(1) of the Code in the event of liquidation. Therefore, as regards the amount payable to the Appellant, the resolution plan is in compliance with the provisions of the Code and CIRP regulations as at the relevant time of submission of the Application before the Adjudicating Authority. The Answering respondent craves leave to refer to and rely upon the Distribution mechanism approve by the CoC as and when produced. The decision on the distribution of proceeds, so long as the same is complaint with the Code, is within the domain of the CoC and ought not to be interfered with by the Adjudicating Authority in view of Section 30(4) of the Code.

ii.It is therefore, submitted that all contentions of the Appellant on the basis that the Appellant or the other creditor have received a purportedly small amount as an outcome of the insolvency resolution process of the CDs are misconceived and against the letter and spirit of the Code and the Regulations framed thereunder. It is settled position of law that the Adjudicating Authority as also this Tribunal do not exercise jurisdiction over the commercial wisdom of the CoCs

who are obligated to take a decision after consideration inter alia the viability and feasibility of the plan, the manner of distribution and the order of priority of payments within their commercial wisdom so long as their decisions are complaint with the applicable provisions of law.

iii.It is also submitted that this Tribunal in the matter of India Resurgence ARC Pvt. Ltd. Vs. M/s. Amit metaliks Limited CA(AT) (Ins) no. 1601 of 2020 dated 02.03.2021 had observed as under in the context of section 30(4) of the Code:

"6. ….. On a plain reading of this provision it is manifestly clear that the considerations regarding feasibility and viability of the Resolution Plan, distribution proposed with reference to the order of priority amongst creditors as per statutory distribution mechanism including priority and value of security interest of Secured Creditor are matters which fall within the exclusive domain of Committee of Creditors for consideration. These considerations must be present to the mind of the Committee of Creditors while taking a decision in regard to approval of a Resolution Plan with vote share of requisite majority.

…

7. It abundantly clear that the considerations including priority in scheme of distribution and the value of security are matters falling within the realm of Committee of Creditors. Such

considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the Committee of Creditors, cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of I&B Code…"

It is clear from the aforesaid decision of this Tribunal that matters which are sought to be assailed by the Appellant are solely within the domain of the CoC.

g. The Appellant's contention that the property of R-1 exclusively mortgaged to the appellant should remain unaffected or "untouched" by the resolution plan is devoid of any merit or logic.

i.The appellant contends that it has exclusive charge over a property being held at Shahajanpur, Alwar, Rajasthan which are given as security by R1, VIL, for the debt of Rs. 200 Crore, advanced to one Gran Electronics Limited. The Appellant contends that since the said loan is not being resolved as part of the present CIRP, the said security ought to be excluded from the purview of the resolution plan and ought to be unaffected until the debt advanced to said Gran Electronics Limited is resolved and that the documents entered into in relation to the said debt should remain unaffected.

ii.It is also submitted that the contention of the Appellant is fundamentally flawed for the following reasons. R-1 has advanced a corporate guarantee to secure the debt advanced

to Gran Electronics Limited, and the Appellant heroin has filed a claim for the amount owed to the Appellant in respect of the said debts. Admittedly, the Appellant's claim to the extent of Rs. 200 Crore pertaining to the Corporate guarantee provided by R1 in favour of appellant to secure the aforesaid facility to Gran Electronics Limited is also admitted by the RP. The Appellant has filed a claim with the Respondent seeking to recover its dues from the present CIRP, it cannot at the same time contend that the mortgage given to secure the said debt should remain unaffected by the present proceedings. It is also stated that the said property belongs to the CD and ought to be part of the CIRP proceedings in any event, and the limited right that is available with the secured creditor is to vote against the resolution plan if it so chooses. Under Section 18(f) r/w Section 23(2) of the Code, the Answering Respondent is duty bound to take custody and control of all assets over which the CD has ownership rights. The said property at Shahajanpur being a property of the CD i.e. R-1, could not be left untouched or unaffected in the ongoing CIRP of R-1.

h. The Appellant's contention that the valuation of the CD is incorrect is misconceived and deserves to be dismissed.

I.The Appellant has sought direction to the RP to place on record the liquidation value which the appellant will receive under the Resolution plans. It is submitted that there is no

obligation on the Respondent to place the valuation of each stakeholder before them under the Code and/or in the Resolution Plan. As regards valuation, the only obligation that is cast upon the RP is the appointment of the valuers for determination of the liquidation value of the CDs. Accordingly, the liquidation value was determined and communicated to the CoC (of which the Appellant is a part). Further, there is no provision in the Code or the Regulations, for the CoC to consent or approve upon the liquidation value. This is because the Code contemplates independent and recognized bodies i.e. registered valuers, to undertake this exercise and there is no question of any approval on the same. Under Regulation 35 of the CIRP regulations, the only option available with the RP is to (i) appoint a third registered valuer if in the opinion of the RP, there is significant difference in the two estimates of value and (ii) consider the average of the closest estimates of value. Beyond this, there is no scope for the RP to assess the methodology of valuation, etc., as employed by the registered valuers.

II.It is stated that the amounts provided to the DFC under the resolution plan as stated under the form-H are categorically stated to be "estimated amount basis the liquidation value derived on the insolvency commencement date, and the amount shall be determined at the time of payout in

accordance with the Section 30(2) and Section 30(4) of the Code". Therefore, it is submitted that the appellant cannot question the action undertaken by the Respondent in this regard and cannot call upon the Respondent to disclose the amount assigned to the Appellant at this stage since the same is to be decided at the time of payout/distribution as per the resolution plan. The Respondent has stated the estimated amounts provided to the DFC basis the liquidation value to be Rs. 105.23 crore. SBI Caps was advisor appointed by the CoC for its own commercial reason and for purpose of compliance with the Code and the CIRP Regulations, and the RP has no role in such appointment. Accordingly, calculations and values arrived by the SBIcaps and communicated to the CoC for their commercial assessment cannot be made the basis of a viable challenge to the Resolution plan before this Tribunal. In any event, it is submitted that as stated above, the Appellant shall be paid its dues amounts on the basis of the liquidation value arrived by the valuation undertaken by the registered valuers at the time of distribution. It is therefore, submitted that the contentions of the appellant on valuation are without any merit and deserve to be dismissed. In view of the above there is no reason why the Appellant should not be satisfied as regards the valuation exercise undertaken by the Answering Respondent in respect of the CDs.

i. It is also stated that there arises no question of sending the Resolution plan back to the CoC for reconsideration as the only aspect of the plan that was not allegedly not in line with the Jaypee decision was also addressed by the direction of the adjudicating Authority that upfront payment in cash shall be made to the DFCs. Since the primary grievance of the DFCs was that they should be paid in cash up front and in priority, and it has been addressed as per the existing position of law, the present appeal deserves to be dismissed. In any event, the Resolution plan is already approved by over 95% of the CoC, approval from the CoC in respect of the resolution plan is already in place and there is no reason for sending the resolution plan for reconsideration before the CoC.

15. **Company Appeal (AT) (Ins) No. 529 of 2021:**

A.Submissions of the Appellant- Small Industries Development Bank of India.

I. The Ld. Counsel Appellant has submitted that the list of dates and events as stated in the Memo as enumerated below:

LIST OF DATES AND EVENTS

DATE	EVENT
06/06/2018 to 25/09/2018	All the respondent entities of Videocon group were under CIRP under the action taken by the Lead bank i.e. State Bank of India u/s 7 of the IB Code, 2016 and in case of few companies who are also part of the Group, certain operational creditors had filed insolvency petitions.
26/06/2018	Appellant bank submitted its claim under Form C to the RP.
24/10/2018	The Hon'ble Principal Bench vide its Order has transferred all matters where CIRP commenced of the Corporate Debtors to a common Bench as it will, *inter alia*, serve the basic purpose of tagging of all matters to avoid conflicting orders, if any, in the connected matters.
08/08/2019	The NCLT, Mumbai Bench passed an order for the consolidation of the CIRP of the Corporate Debtors and appointed Mr. Mahender Kumar Khandelwal as the resolution professional of the Corporate Debtors replacing the Erstwhile Resolution Professionals.
11/10/2019	pursuant to the notice inviting expression of interest, which was re-published on 1st November 2019, there were in all 11 proposals which were received by COC out of which 9 were disqualified.

11/11/2020	19th meeting of COC was held and there was a discussion on the aspect of Dissenting Creditors. In said meeting few creditors also raised doubts on the actual amounts which will be receivable under the distribution mechanism. It was informed that the SBI CAPS (process advisors) will share distribution working as per the distribution mechanism which will be approved by the lenders. In the said COC meeting the distribution mechanism was presented to all the lenders.
13/11/2020	The process advisor SBI CAPS provided Appellant bank and other creditors the distribution mechanism presentation and the excel calculation (including the liquidation value calculation) for perusal of all the members.
11/12/2020	The e-voting results of 19th COC meeting were declared and the resolution plan dated 21st August 2020 and amended on 7th November 2020 r/w e-mail clarification submitted by TSTL was approved and the distribution mechanism, as laid out in Annexure 2 of the 19th COC meeting was also approved. The Appellant bank dissented the resolution plan submitted by TSTL and also abstained from voting under distribution mechanism, making the Appellant a dissenting financial creditor
15/12/2020	Post approval of resolution plans by COC, the RP issued Letter of Intent dated 12.12.2020 to the successful Resolution Appellant TSTL on behalf of COC which was accepted unconditionally by on_TSTL
05/01/2021 And 11/02/2021	20th meeting and 21st meeting of COC were conducted, in both meetings the issue of priority payment to dissenting creditors was raised. However, again the RP dismissed the said query. Dissenting Financial Creditors specifically raised the query as to whether there is any change to the distribution amounts provided by SBI CAPS to which the RP responded that there is no change.
08/06/2021	The Hon'ble NCLT by its impugned Order dated 08.06.2021 was pleased to Approve the Plan submitted by TSTL
	Hence, this Company Appeal.

II. The Plan provides amounts to the Appellant bank less than the liquidation value which the bank will receive otherwise and therefore contrary to section 30 of Code.

1. In 19th COC meeting, it was recorded that SBI Caps 'process advisors' shall send detail workings on the distribution amount receivable to each financial creditor including 'dissenting creditors'. On 13 November 2020, the process advisor SBI CAPS sent an email stating 'distribution mechanism presentation and the excel calculation (including the liquidation value calculation)' for perusal of all the members. As per the same the total liquidation value amount payable to the Appellant bank is 2.06 crore. The said excel sheet categorically provided that in the event the Appellant financial creditor dissents, there is a difference of 0.42 crore which the financial creditor will have to bear. The RP in 21st COC, to query categorically raised by one of the financial creditors Bank of Maharashtra, confirmed that there is no change in the Distribution Calculation as calculated and shared by SBI Caps.

2. However there is a discrepancy in the FORM H and the total amount payable to the Dissenting creditor which shows that the same is 105.23 crore. However, as per the Distribution calculation shared by SBI CAP's, the total amount payable to the Appellant Bank is 2.06 crore and amount payable to Bank of Maharashtra is 41.85 crore and amount payable to IFCI (another dissenting creditor) is around 70 crore thus far exceeding the amount of 105 crore mentioned in Form H.

B. The entire contention that the amounts will be determined "at the time of payout" in itself is misconceived:-

1. Section 30(2)(b) mandates the Resolution Professional to examine each plan and confirm that the same provides for payment of debt to the financial creditor 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 Liquidation.

2. The statutory duty cast upon the RP is to ensure that the amounts payable to the dissenting creditor shall be not less than the liquidation value. Thus, the said Section presupposes that the RP and the Creditors are aware about the liquidation value payable to the Financial Creditors in the event they dissent. The contention the said amounts will be calculated 'at the time of pay out' shows that there is a complete non-compliance of Section 30(2)(b) that is to say that if the amounts were never calculated.

3. Section 30(4) provides that the COC may approve after considering its feasibility and viability including '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 Security Interest of a secured Creditor', and such other requirements as may be specified by the Board.

4. Thus, even the said section pre-supposes 3 aspects (i) manner of distribution is already determined, (ii) liquidation value is calculated as

per Section 53, (iii) and the COC is aware of the values of security interest of secured creditors.

5. Infact, the very decision making of COC is vitiated for not determining the said liquidation value payable to the financial creditors.

C. The direction by the Adjudicating Authority to the SRA to pay the dissenting financial creditors by cash instead of NCD's (without sending the plan back to the COC for reconsideration) amounts to modification of plan which is impermissible.

1. While considering the feasibility of the Plan, the aspect of 'legality' of the plan was also considered by the Appellant Bank and the same contributed to the decision of the bank of dissenting the plan. Similarly, other creditors, must have also considered the said aspect and voted on the plan.

2. However, replacing of the method of payment from debentures to Cash, amounts to modification. The entire tenor of the plan and financial model of plan is based on the payment by way of NCD's. This changes the nature of the plan and must be considered by the COC independently.

3. The Jaypee Kensington matter, identical facts were dealt by the Hon'ble Supreme Court, whereby the dissenting financial creditor (ICICI bank) was offered security and alternate lands instead of payments. This Appellate Tribunal while holding that the payment other than cash is not permissible to dissenting creditors, also went on to modify the plan to negate the said illegality and directed payments to DFC in cash.

The Hon'ble Supreme Court specifically held that the same is not permissible as the modification in payment is a commercial aspect and in exclusive domain and Commercial Wisdom of the COC and cannot be interfered. The Hon'ble Supreme court held that such modification is not permissible. (Paragraphs 126- 130).

4. The adjudicating authority has committed the same error which was committed in the case of Jaypee Kensington.

5. The reliance on clause 3.5.7 of the plan is also misplaced. The same is a generic statement and cannot be read in isolation from the entire tenor and the financial model of the plan.

6. Reading the clause 3.5.7 in isolation will amount to reading the distribution mechanism/amounts in isolation to the plan which should be infact an integral part of the plan.

7. Clause 3.5 entirely deals with payments to be made to the DFCs and states that the same would be paid by way of NCDs. There is no whisper of "cash".

8. Even otherwise by way of an affidavit the Respondents cannot justify the Impugned Order and supplement reasons. The impugned Order doesn't state that in view of clause 3.5.7, the said plan is not required to be sent back to the COC.

<u>D. Plan does not provide for 'upfront' payment in 'priority' to the Dissenting Financial creditor as provided in Section 30 of IBC code 2016 r/w IBBI regulation 38</u>

1. It is submitted that to show compliance of 'priority' payment to dissenting creditors, the plan is engineered in such a fashion so as to show that the NCDs available with the dissenting financial creditors would be redeemable one day prior to the assenting financial creditors. This is no priority at all and merely an eye wash. The same violates the scheme and the spirit of the code.

2. A priority is a situation where the money is being paid over and above other creditors. Akin to CIRP cost. Regulation 38 provides that operational creditors will have priority over financial creditors and thereafter dissenting financial creditors will have priority over assenting financial creditors. Thus, conjoint reading of Section 30 with Regulation 38, reflect the distribution pattern of priority in the event if the resolution plan is approved.

In the above circumstances, the Appellant humbly prays that the appeal should be allowed.

B. Submissions of the Respondent No.1 to 13 [Resolution Professional (RP)]:

I. The Ld. Sr. Counsel on behalf of the RP of Respondent No.1 to 13 have stated the followings:

a. The Resolution Professional has examined the Resolution Plan in the context of treatment being accorded to the Dissenting Financial Creditors and has found the same to be in compliance with the law.

i.It is submitted that under Clause 3.4.5, 3.5.1, 3.5.2 and 3.5.7 of the Resolution Plan, as reproduced in the Affidavit in

Reply dated 29th August, 2021, filed by the Resolution Professional ("RP's Reply"), the Resolution Plan preserves and protects the priority status to the Dissenting Financial Creditors (DFC).

ii. The aforesaid clauses in the Resolution Plan ensure priority to the Dissenting Financial Creditors at least on three accounts, which are as under:

- The Dissenting Financial Creditors are to be paid at least the amount payable to them in the event of liquidation under Section 53(1) of the Insolvency and Bankruptcy Code, 2016 ("Code");
- Upfront payment to Dissenting Financial Creditors shall be made before upfront payment to Assenting Financial Creditors is made;
- Non-convertible debentures ("NCDs") issued to Dissenting Financial Creditors shall be redeemed before NCDs issued to Assenting Financial Creditors are redeemed. [Ref para 4 III e), pg. 11-12 and i), pg. 13 of RP Reply]

iii.Basis the aforesaid Clauses in the Resolution Plan relating to treatment of Dissenting Financial Creditors interests, it is clear that the Resolution Plan was compliant as per Section 30(2)(b) of the Code read with Regulation 38(1)(b) of IBBI (Corporate Insolvency Resolution Process) Regulations, 2016 ("CIRP

Regulations"). [Ref para 4 III c), pg. 10-11, f), pg. 12 and g), pg. 12-13 of RP Reply]

iv.The Resolution Plan read with email dated 11th November, 2020 received from the Resolution Applicant provides that for the purpose of computation of the liquidation value, only the Upfront Amount and the NCDs proposed to be issued will be taken into consideration as equity shares are not being issued to the Dissenting Financial Creditors. At the relevant time, NCDs were proposed to be issued to the Dissenting Financial Creditors and the same was found to be in compliance with the Code and the CIRP Regulations as per the law as applicable at that time. [Ref para 4 III d) at pg. 11 of RP Reply]

v.The decision of the Hon'ble Supreme Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd ("Jaypee") was passed only on 24th March, 2021, which was after the filing of the Application for approval of the Resolution Plan ("Plan Approval Application") before the National Company Law Tribunal, Mumbai ("Adjudicating Authority") on 15th December, 2020, for approval of the Resolution Plan. Therefore, the RP could not have checked the Resolution Plan for compliance in accordance with Jaypee. In any event, as submitted hereinabove, the Resolution Plan by way of the aforesaid clauses, in particular Clause 3.5.7, clearly provides that in all circumstances and in any event, the payment proposed

to be made and the manner of making the said payment to the Dissenting Financial Creditors shall be strictly as per Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations. Further, pursuant to the position in Jaypee and the Impugned Order dated 8th June, 2021, the grievance of the Appellant that they should be paid in cash and in priority has also been addressed. Therefore, the present Appeal deserves to be dismissed for being devoid of merit. [Ref para 4 II e), pg. 9, para 4 IV e) and f), pg. 15 of RP Reply].

b. Commercial wisdom of the Committee of Creditors ("CoC") is paramount and cannot be assailed.

i. It is submitted that the commercial wisdom of the CoC is paramount. Eleven resolution plans were received for the Corporate Debtors, of which two were found to be compliant with the applicable provisions of the Code and the CIRP Regulations. The two compliant plans were placed before the CoC for voting. The CoC approved Respondent No. 15's Resolution Plan with over 95% majority. [Ref para V, pg. 16-18 of RP Reply].

ii.It is a settled position of law that commercial wisdom of CoC in accepting or rejecting the Resolution Plan is paramount and that there should be no interference to an approved resolution plan, unless the same contravenes Section 30(2) of the Code.

[K. Sashidhar v. Indian Overseas Bank ; Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta ; Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd4 and Kalpraj Dharamshi v. Kotak Investment Advisors 5].

iii.The Adjudicating Authority has found the Resolution Plan compliant with the said provisions, therefore the present Appeal which seeks to assail the commercial wisdom of the CoC deserves to be dismissed.

c. The Appellant's contention that the determination of the liquidation value and distribution of monies under the Resolution Plan is not compliant with the Code and the CIRP Regulations, is without any merit.

i. The Appellant has placed sole reliance on an email dated 13th November, 2020 received by it from SBI Caps to allege that the distribution of monies under the Resolution Plan is not in accordance with the Code and the CIRP Regulations. SBI Caps is the process advisor appointed by the CoC, and the RP is not responsible as to the correctness or otherwise of any distribution working arrived at by the CoC process advisor. [Ref para VI c), pg. 21-22 of RP Reply] The RP has not received the said email from SBI Caps.

ii.For valuation, the RP appointed two reputed valuers that are registered with IBBI namely RBSA Advisors and Rakesh

Narula. Valuation reports were obtained from them on a confidential basis over email on 2nd September, 2020. [Ref para VI b), pg. 20-21 of RP Reply].

iii.The liquidation value and fair value in accordance with the valuation reports prepared by the registered valuers have been stated in Form H submitted along with the Plan Approval Application filed before the Adjudicating Authority for approval of the Resolution Plan. [Ref para VI b) iii), pg. 21 of RP Reply].

iv.Along with the Resolution Plans, the "distribution mechanism" was put to the vote and was placed before the Adjudicating Authority; the "distribution mechanism" stated that the Dissenting Financial Creditors will be paid the amount payable to them as per law. The "distribution working" as mentioned by the Appellant, which was arrived at by SBI Caps, was not put to vote before the CoC and neither did the RP confirm that the "distribution working" is final nor was the same placed before the Adjudicating Authority. [Ref para VI c), pg. 21-22 of RP Reply].

v.The "distribution mechanism" is said to have been prepared assuming that all financial creditors will vote in favour of the Resolution Plan and was prepared prior to voting. After completion of the voting, the RP has arrived at the amounts owed to the Dissenting Financial Creditors, the security

interest mapped to them, the value of asset over which such security is created, he cash / NCDs being brought in by Respondent No. 15 and the distribution ratio approved by the CoC. Such amount is an estimated amount and can only be decided at the time of distribution as stated in Form H.

vi. The calculations by SBI Caps, which is process advisor appointed by the COC for its own commercial reasons, cannot be the sole basis of challenge to the Resolution Plan. The RP has not commented on the individual figures but has only arrived at the estimated amount to be paid to the Dissenting Financial Creditors as per the Code and the CIRP Regulations. [Ref para VI c), pg. 21-22 of RP Reply]. In any event, as stated above, under the Resolution Plan, the Dissenting Financial Creditors shall be paid at least the amount payable to them in the event of liquidation under Section 53(1) of the Code.

vii.In the Minutes of the 21st Meeting of the CoC, the RP only clarified that there was no change in the distribution mechanism/ list as approved in 19th Meeting of the CoC. The RP never stated that individual lender wise distribution calculation arrived at by SBI Caps was submitted to the Adjudicating Authority for approval. Only the distribution mechanism was placed before the Adjudicating Authority after it was also voted upon and approved by the CoC along with the Resolution Plan.

viii.In compliance with the Code and the CIRP Regulations, the RP has stated the estimated amount payable to the Dissenting Financial Creditors in Form H submitted along with the Plan Approval Application and that the actual amount shall be determined at the time of pay-out. [Para 5 g), pg. 24-25 of RP Reply].

ix.It is categorically stated in the Resolution Plan that the exact amount payable to the Dissenting Financial Creditors shall be arrived at, at the time of payment, which is on T+44 day, T being date of approval of the Resolution Plan. Before such day has even arrived, the Appellant filed its application before the Adjudicating Authority and also the present Appeal, prematurely assuming that it shall not receive the amount due and payable to it as per law. [Ref para 4 III d) at pg. 11 of RP Reply]

x.The RP is not in a position to determine the exact amount payable to the Appellant prior to the date of actual payment in view of the eventualities that could arise. Therefore, the RP has provided an estimated number in Form H. The RP has not contravened the requirements of the Code and the CIRP Regulations.

d. The Resolution Plan does not need to be sent back to the CoC for reconsideration

i. The only aspect of the Resolution Plan that was allegedly not compliant with the Jaypee decision was also addressed by the direction of the Adjudicating Authority that upfront payment in cash shall be made to the Dissenting Financial Creditors. The primary grievance of the Dissenting Financial Creditors that were before the Adjudicating Authority has been addressed by the Impugned Order.

ii.This Appellant never approached the Adjudicating Authority challenging the Resolution Plan, therefore, it cannot be permitted to raise these concerns at such a belated stage for the first time. [Ref para IV, pg. 14-16 of RP Reply].

16. **Submissions of the Respondent No.15/Successful Resolution Applicant (SRA):**

I. The Resolution Plan does not provide DFC with Liquidation Value.

a. Clause 3.4.5 and Clause 3.5.1 clearly provide that the DFC shall not be paid less than at least the amount payable to them in accordance with sub-section (1) of section 53 of the IBC in the event of a liquidation of the Corporate Debtors.
b. Further, Clause 3.5.1 of the Resolution Plan categorically states that the DFC shall be paid their portion of Upfront Payment before the consenting financial creditors and Clause 3.5.5 of the Resolution Plan provides that all cash disbursements to the DFC

will be made one day prior to cash disbursements to the consenting financial creditors

c. Hence, the requirement to pay the liquidation value and the aspect of priority which are mentioned at Section 30(2)(b) of the Code and Regulation 38(1)(b) of CIRP Regulations is complied with by the Resolution Plan.

d. However, the Appellant in the present Appeal relied on the email dated 13.11.2020 of SBI Caps to allege that the Resolution Plan does not provided it with the liquidation value. The basis for such allegation as stated by the Appellant is as follows:

> (i). That as per email dated 13.11.2020 the liquidation value share of Appellant will be INR 70.31 crore and that of Bank of Maharashtra and SIDBI (other DFCs) is INR 41.85 crore and INR 2.06 crore respectively (which in turn total to around INR 114.21 crore)
>
> (ii) The Appellant compares the above figure of INR 114.21 crore with the figure of INR 105.23 crore which is disclosed in the Form H to be the amount payable under the Resolution Plan to DFC. On this basis, the Appellant alleges that it is receiving amounts less than the liquidation value.

e. In response to above, it is submitted that the above figures pertain to the distribution mechanism only and not to the entitlement of liquidation value to the DFCs under the Resolution

Plan. In any event, the grievance of the Appellant is premature and misconceived since Form H categorically mentions against the sum of INR 105.23 crore that "These are the estimated amounts basis the liquidation value derived as on the insolvency commencement date, and the amounts shall be determined at the time of payout in accordance with Section 30(2) and Section 30(4) of the Code."

f. In view of the above declaration in Form H, the Respondent No. 15 submits as follows:

(i) The liquidation value mentioned as payable to DFC in Form H is an estimated amount only.

(ii) The final figures payable to DFC are yet to be determined by the CoC.

(iii) The stage for determination of final figures shall arises only at "the time of payout".

(iv) As per Clause 7.2 of the Resolution Plan, the time of payout to the DFC is on the T+44th day, with T being the date of approval of the Resolution Plan by the Hon'ble Adjudicating Authority.

(v) Even before such a stage could have been reached, the Appellant has filed the present Appeal.

(vi) Hence, the present Appeal is premature.

g. In addition to above and in any event it has been clarified by the Resolution Plan and the Form H that the amount payable to the DFC shall not be less than the liquidation value. Therefore, it is submitted that the present Appeal, apart from being premature, is misleading and without any basis.

II. The Approval Order modifies the Resolution Plan

a. It is submitted that the decision of the Hon'ble Supreme Court in the case of Jaypee (supra) (passed on 24.03.2021) directing that DFCs should be paid in cash was not in existence on the date when the Resolution Plan was submitted i.e., 07.11.2020 or the date when the Resolution Plan was approved by the CoC i.e., 11.12.2020.

b. Nevertheless, Clause 3.5.7 of the Resolution Plan clarifies that in all circumstances and in any event, the payment proposed to be made and the manner of making the said payment to the DFC shall be made strictly as per Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations. Further, Clause 3.4.5 of the Resolution Plan states that all Admitted Financial Debt of the Financial Creditors of the Corporate Debtors will be settled after taking into account order of priority amongst creditors as laid down under Section 53(1) read with Section 30(2)(b)(ii) and 30(4) of the IBC.

c. A conjoint reading of the above provisions of the Resolution Plan clearly shows that the Resolution Plan had already clarified that the payment to the DFC shall be made in accordance with Section 30(2) of the Code. Pursuant to the decision of the Hon'ble Supreme Court in Jaypee (supra) such payment under Section 30(2) can be made only in cash. As such, the Respondent No. 15 would make payment to the DFC in cash as provided for in the Resolution Plan.

d. In view of the above, it is submitted that the Resolution Plan is in compliance with Section 30(2) of the Code and the settled parameters laid down by the Hon'ble Supreme Court. It is for this reason, that the Hon'ble Adjudicating Authority approved the Resolution Plan by observing at paragraph 24 of the Approval Order that the payments to DFC shall be made in cash.

e. It is submitted that the observation made by the Hon'ble Adjudicating Authority at paragraph 24 of the Approval Order does not amount to modification of the Resolution Plan since the Resolution Plan has already clarified at Clause 3.5.7 that the manner of making payment to DFC shall strictly be in accordance with Section 30(2) of the Code and Regulation 38(1)(b) of the CIRP Regulations.

f. Hence, it is submitted that the observation in the Approval Order is a mere reiteration of what is contained at Clause 3.5.7 of the

Resolution Plan. No part of the Resolution Plan, let alone its basic structure, has been modified by the Approval Order.

III. The Appellant's challenge to the Resolution Plan on equitable considerations is irrelevant and baseless

a. The Appellant has also alleged in its Appeal that the haircut provided in the Resolution Plan are vast and this fact has not been looked into by the Hon'ble Adjudicating Authority.

b. In this regard, it is submitted that the commercial wisdom of CoC in approving the Resolution Plan is paramount and there can be no interference in the same unless the Resolution Plan contravenes a mandatory provision of the Code. In this regard, the Respondent No. 15 relies on the following decisions of the Hon'ble Supreme Court:

- K. Sashidhar v. Indian Overseas Bank (2019) 12 SCC 150;
- Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta (2020) 8 SCC 531;
- Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd 2021 SCC Online SC 253, and;
- Kalpraj Dharamshi v. Kotak Investment Advisors Civil Appeal Nos. 2943-2944 of 2020].

17. **Company Appeal (AT) (Ins) No. 545 of 2021:**

A. Submissions of the Appellant- Electrolux Home Products INC.

I. The Ld. Sr. Counsel for the Appellant has submitted that it is a market leader in the business of manufacturing and distributing electrical appliances including refrigerators, dishwashers, washing machines, vacuum cleaner, cookers, which, through its globally established brands, sells over 60 million household and professional products in more than 150 markets every year.

II. The Appellant is the Registered Proprietor in India of, inter alia, the following trademarks:

SL No.	Class	Number	Mark
1.	7.	456948	KELVINATOR
2.	7.	2750132	KELVINATOR THE COLLEST ONE
3.	9	529690	KELVINATOR
4.	9	1906547	KELVINATOR
5.	9	2434796	KELVINATOR
6.	9	2503025	KELVINATOR
7.	9	2540643	KELVINATOR
8.	11	113327	KELVINATOR
9.	11	502337	KELVINATOR
10.	11	2268975	KELVINATOR
11.	11	2434796	KELVINATOR
12.	11	2750132	KELVINATOR THE COLLEST ONE

III. Originally, the Appellant's parent company, AB Electrolux ("ABE"), controlled and held 91.85% of the equity share capital in one Electrolux Kelvinator Limited ("EKL"). EKL therefore belonged to and/or formed part of the Electrolux Group. Under a Share Purchase Agreement ("SPA") dated July 7, 2005, ABE transferred all of its equity shares and a portion of its preferential shares in EKL to Mr. Venugopal Dhoot. By this SPA, Mr. Dhoot became the primary shareholder in EKL. Upon and by reason of the transfer EKL ceased

to be a part of the Electro lux Group. Simultaneously with the SPA, a Trademark License Agreement ("TLA") dated July 7, 2005 was executed between the Appellant and EKL inter alia for licensing the aforesaid Trademark to EKL. EKL then merged into the Corporate Debtor under a scheme of merger and amalgamation. This scheme was sanctioned by the Bombay High Court by its order dated June 30, 2006. As a result, thereof, all the assets and liabilities of EKL, including the TLA, stood transferred to the CD. The CD, therefore, became the licensee of the said Trademark.

IV. The TLA dealt with the manner in which and also set out *in extenso* the terms and conditions on which the Licensee would be entitled to use the said Trademark. By the TLA, the Appellant granted the licensee an exclusive right and license to use the Trademark on or in connection with the manufacture, packaging, sale, marketing, distribution and services of the Trademark Products (as described below) in India, Bangladesh, Bhutan, Nepal, Pakistan and Sri Lanka ("Sales Area"). Trademark Products were defined to mean products of different models and sizes in the categories of refrigerators, freezers, washing machines, microwaves, dishwashers, dish sterilizers, dish dryers, microwave ovens, air conditioners, cooker hoods and hobs (all for consumer use) whose specifications, quality, packaging, advertising and promotional literature conformed to the standards imposed by the TLA in respect of which the licensee was

entitled to use the Trademark. Some of the key terms of the TLA are set out below, for ease of reference:

Clause 3.1- " "Licensee shall not voluntarily or by operation of law assign or transfer this Agreement or any of Licensee's rights or duties hereunder or any interest of Licensee herein ... Any assignment, transfer or sub-license without Licensor's written consent shall be null and void ... "

Clause 6.9: "Licensee shall warrant Trademark Products as the applicable laws in the Sales Area may require, furnish a locally competitive warranty to the user of every Trademarked Products, and arrange to provide, at no cost to Licensor prompt and adequate warranty service for all Trademarked Products sold by Licensee throughout the Sales Area for the duration of the warranty period, even after the termination of this Agreement ... "

Clause 16.2: "Notwithstanding anything to the contrary in this Agreement, Licensor may terminate this Agreement with immediate effect, by written notice to Licensee, if any of the following events occur:

a. Licensee files for bankruptcy, goes into liquidation other than a voluntary liquidation for the purpose of a bona fide reorganisation or any winding up, restructuring or any other proceedings to a similar effect have been filed and admitted against the Licensee (except for an ex-parte admission) and has not been withdrawn, dismissed or disposed of within 90 days from the date of such admission

(d) Licensee ... takes any action or undergoes any event, any or all of which results in the Dhoot family no longer being in control of the Licensee ...

Clause 17.1: "In the event this Agreement is terminated in accordance with its terms, Licensee shall assign, transfer and transmit to Licensor any and all rights of Licensee in the Trademark (if any) including associated goodwill, and shall not thereafter manufacture or sell any Trademark Product or use the Trademark in any manner; provided that, Licensee may however, dispose of its stock of Trademarked Product on hand within two hundred seventy (270) days after expiry of this Agreement; provided, however, any sums due to Licensor have first been paid; and further provided, that Licensee shall, prior to the effective date of said expiry or termination, deliver to Licensor a detailed schedule of all inventory of Trademarked Product in Licensee's possession..."

Clause 17.4: "Except for the right to use the Trademark as specifically provided for in this Agreement, (i) Licensee shall have no right, title, or interest in or to the Trademark, and (ii) upon and after the termination of this Agreement, all rights granted to Licensee hereunder, together with any interest in and to the Trademark that Licensee may acquire, shall forthwith and without further act or instrument be assigned to and automatically revert to the Licensor ... "

Termination of the TLA:

V. **The subject petition seeking to admit the Corporate Debtor into CIRP was filed on January 1, 2018. On June 5, 2018, the Appellant addressed a letter ("June Letter") to the Corporate Debtor, recording that upon the Petition being admitted, the powers of the Corporate Debtor's Board of Directors would vest in the interim resolution professional**. This would mean that the Dhoot family would no longer be in control of the Corporate Debtor. The TLA specified that the Appellant was entitled to terminate the TLA if the Corporate Debtor underwent any event that resulted in the Dhoot family no longer being in control. Accordingly, in terms of its rights under Clause 16.2(d)(iii) of the TLA, the Appellant stated that the TLA would stand terminated from the date on which the Petition would be admitted. The relevant portions of the June Letter are extracted below:

"Clause 16.2(d)(iii) of the TLA provides that Licensor is entitled to terminate the agreement with immediate effect in the case the Licensee undertakes any action or undergoes any event, which results in the Dhoot family no longer being in control of the Licensee. In the present case, admission of the CIRP application by the NCLT will have (inter alia) the following consequences by necessary operation of law: (i) under Section 17(l)(a) of the IBC, management of the affairs of the Licensee will vest with the interim resolution professional; and (ii) under Section 17(l)(b) of the IBC, the powers of

the board of directors of the Licensee shall stand suspended and be exercised by the interim resolution professional.

Therefore on admission of the CIRP by the NCLT, the Dhoot family will no longer be in control of the Licensee. Accordingly, the Licensor hereby terminates the TLA pursuant to Clause 16.2(d)(iii} of the TLA. Such termination shall become effective on the date on which the application for CIRP is admitted by the NCLT ("Effective Date") without the requirement for any further notice, communication, application or any other action on part of the Licensor. In accordance with Clause 17.1 .... of the TLA, on Effective Date... the Licensee shall not thereafter manufacture or sell any Trademarked Product ... the Licensor directs that the Licensee forthwith ... deliver to the Licensor a detailed schedule of all inventory of Trademarked Product in Licensee's possession ... "

VI. On June 8, 2018, the Adjudicating Authority passed an order admitting the Petition and appointing Mr. Anuj Jain as the Interim Resolution Professional ("IRP"). As a consequence of this order, the powers of the Board of Directors of the Corporate Debtor, together with those members of the Dhoot family who were on the Board, stood suspended and such powers became exercisable by the IRP. The Dhoot family therefore ceased to be in control of the Corporate Debtor. Thereafter, in terms of the TLA and June Letter, the termination became effective and inter alia all rights in the Trademark reverted back to the Appellant. Respondent No. 1, as the

RP, therefore became obligated to comply with its post termination contractual obligations, as specified in the TLA. Immediately after the appointment of Mr. Jain as the IRP, the Appellant addressed an email dated June 8, 2018 to the IRP, requiring the IRP to confirm receipt of the June Letter. The IRP replied by way of an email dated June 9, 2018, confirmed receipt of the June Letter. Again, on September, 21, 2018, the Appellant addressed a letter to R-1 (September Letter), calling the Trademark products, and to provide an exhaustive schedule of all inventory of trademark products currently in the Corporate Debtor's possession. On October, 18, 2018, the Appellant received a letter dated October 15, 2018 (RP I Letter) and a letter dated October 18, 2018 ("RP II Letter"), addressed on behalf of the RP. The aforesaid letters belatedly questioned/ challenged the termination of the TLA. By the RP I Letter:

a.The Appellant's termination of the TLA was invalid;

b. The termination of contracts pursuant to initiation of insolvency proceedings would frustrate the objectives of the Code; and

c. The Corporate Debtor was entitled to continue to operate as per the TLA.

VII. It is also stated that On October 19, 2018, the Appellant replied to the RP I Letter and RP II Letter ("October Letter"). In this October Letter, the Appellant:

a. Reiterated that the termination of the TLA was valid and lawful;

b. noted that the RP's challenge of the termination was belated;

c. pointed out that the RP's conduct in not denying the termination in earlier correspondence estopped the RP from challenging the termination at this stage;

d. without prejudice to the valid termination of the TLA by the June Letter, it also invoked its rights under Clause 16.2 (a) of the TLA. Clause 16.2(a) entitled the Appellant to terminate the TLA in case Videocon "files for bankruptcy, goes into liquidation other than a voluntary liquidation for the purpose of a bonafide reorganization or any winding up, restructuring or any other proceedings to a similar effect have been filed and admitted against [Videocon] and has not been withdrawn, dismissed or disposed of within 90 days from the date of such admission";

e. Stated that the RP had, in effect, admitted to being in breach of its post termination obligations under the TLA by continuing to use the Trademark even after termination of the TLA; and

f. repeated its request that the RP cease unauthorisedly manufacturing and selling the Trademark Products and deliver up an inventory of all Trademark Products in his possession.

VIII. Again, in correspondence on November 23, 2018 (Exhibit K to MA 527/2019), the Appellant reiterated its requests that the RP intimate all prospective bidders that the TLA was terminated and that the Corporate Debtor was no longer entitled to use the Trademark. The Appellant also called upon the RP to ensure that obligations under the TLA with respect to providing warranty services are fulfilled.

IX. On December, 24, 2018 the Appellant received a letter addressed on behalf of the RP ("RP III Letter"). Through this letter, the RP came up with an altogether new ground to challenge the termination of the TLA. The RP inter alia challenged the termination of the TLA as being invalid on account of the moratorium imposed by Section 14 of the Code; and the RP requested that the Appellant therefore should withdraw the June Letter. The Appellant replied to the RP III Letter by its letter of December 24, 2018 ("December Letter"), pointing out that the termination of the TLA was valid and lawful, and inter alia reiterating its requests that the Respondent abide by its obligations in law and contract. Given the RP's wanton disregard of contractual obligations, the Appellant was constrained to file MA 527/2019 before the Adjudicating Authority on February 5, 2019, seeking inter alia a declaration that the termination of the TLA was valid and directions that the RP be prohibited from using the Trademark in any manner.

X. It is also stated that the judgment of the Hon'ble Supreme Court in Gujarat Urja (supra), the Adjudicating Authority had jurisdiction to and was required to adjudicate questions in MA 527/2019 as they related directly to the CIRP of the Corporate Debtor, since the termination of the TLA was inter alia on grounds of commencement of CIRP proceedings against the Corporate Debtor. The TLA entitled the Appellant to terminate the TLA in case *Videocon "files for bankruptcy, goes into liquidation other than a voluntary liquidation for*

the purpose of a bonafide reorganisation or any winding up, restructuring or any other proceedings to a similar effect have been filed and admitted against [Videocon] and has not been withdrawn, dismissed or disposed of within 90 days from the date of such admission".

XI. It is also stated that Respondent No. 1 had placed no material on record as to why or how the TLA is essential to the CIRP of thirteen group companies, twelve of whom never manufactured the Trademark Product. Further, Respondent No. 1 admitted at the hearing before the NCL T that the Corporate Debtor has stopped manufacturing products under the Trademark since sometime in 2018 - which further bears out the fact that the TLA is not relevant to the going concern status of the Corporate Debtor, let alone something that goes to the root of the same. The Code did not entitle the RP to take possession of assets belonging to a third party. The license under the TLA was a mere right (that too determinable in the circumstances set out in the TLA) to use the Trademark, which, at all times, remained the asset of the Appellant. The termination of the TLA was not in violation of the moratorium imposed by Section 14 of the Code and the RP had grossly erred in failing to respect and recognize the termination of the TLA.

XII. On June 8, 2021, the NCL T pronounced the Impugned Order merely stating that MA 527/2019 was disposed of, and that Respondent No. 2 would be entitled to use the Trademark for a period of one year

from the date of the order. Thereafter, the Impugned Order was made available on the website of the Adjudicating Authority on June 14, 2021 and a certified copy of the Impugned Order was issued on June 16, 2021. In this regard, it may be noted that the sum total of the discussion in the Impugned Order with respect to MA 527/2019 is as follows:

"As far IA 527 of 2019, praying for use of Brand name "Kelvinator" is concerned, we are of the considered view that the Agreement should continue for at least a year from the date of approval of the Plan as per the existing Terms and Conditions as a transitional arrangement and subsequently it is upto both the parties to decide on the same as per their mutual understanding".

XIII. It is stated that, as far as MA 527/2019 is concerned, in the Impugned Order the Adjudicating Authority has totally failed to even record the contentions of the respective parties, let alone deal with the said contentions. In this context, it is pertinent to note that both sides made oral submissions at the hearing on May 7, 2021 and thereafter, filed written submissions of their respective contentions. Despite this, there is not even a whisper in the Impugned Order of the contentions raised by the respective parties. Instead, in paragraph 11, the Adjudicating Authority proceeds to dispose of MA 527/2019 in a totally unreasoned, arbitrary and non-speaking manner which fails to even give a glimpse of what weighed with the Adjudicating Authority or what formed the basis of its decision. It is

respectfully submitted that the Impugned Order is ex facie unsustainable, perverse and deserves to be set aside on this ground alone. That the Impugned Order dealing with precious civil rights of parties is required to be a speaking and reasoned order. If parties' rights are being affected, the Adjudicating Authority reasons for the same are required to be recorded. Despite the Appellant canvassing extensive submissions and arguments on why the termination of the TLA was valid, and why the Corporate Debtor and/or entities claiming under it could not utilize the Trademark, the Adjudicating Authority passed the Impugned Order granting Respondent No. 2 the right to use the Trademark for one year. It recorded no reasons for its arbitrary order on this front. On this ground alone, the Impugned Order requires to be set aside.

XIV. That the Impugned Order is arbitrary and has been passed without application of mind, insofar as it concerns MA 527/2019. The question before the Adjudicating Authority was whether the termination of the TLA was valid. If the termination was valid, there is no question of any right to use the same continuing to vest in Respondent No. 2. If the termination was found to be invalid, there is no requirement for the right to be limited to one year. In recording an extra-legal 'transitional arrangement', with respect, the Adjudicating Authority has overstepped its role as Adjudicating Authority and attempted to step into the shoes of contracting parties, forcing parties to extend bargains/ vary the terms of the

same, and that too without any reasons whatsoever being recorded for the same. That the Impugned Order has been passed without considering any of the detailed arguments canvassed by the parties. Despite MA 527/2019 having been filed in February 2019, despite the same being heard by the adjudicating Authority and written submissions filed not once but twice, the questions of law and fact have been disposed of without recording, let alone dealing with, any of the arguments raised by the Appellant. The Impugned Order deserves to be set aside on this ground alone. That the Impugned Order has been passed in complete disregard of the Hon'ble Supreme Court's decision in Gujarat Urja (supra) that termination of contracts on grounds of insolvency are liable to be interfered with by the Adjudicating Authority only in cases where such termination would result in the legs of the CIRP being cut off. This is clearly not so in the present case. In the present case, the Appellant pointed out that there were no facts on record to support the case that continuation of the TLA was essential to the Corporate Debtor, especially in light of Respondent No. 1's admission before the Adjudicating Authority that the Trademark had not been used since 2018. The Adjudicating Authority, in passing the Impugned Order, ignored the following findings that are dispositive of the issues raised in the subject proceedings:-

"J Validity of ipso facto clause

88. Before we proceed to analyse the validity of the termination of the PPA by the appellant under Articles 9.2.J(e) and 9.3.1 in the present case, it is important to contextualize it within the larger debate on this issue. Globally, ipso facto clauses arise in a variety of contracts. Ipso facto clauses are contractual provisions which allow a party ("terminating party") to terminate the contract with its counterparty ("debtor") due to the occurrence of an 'event of default'. In the context of insolvency law, in some of these ipso facto clauses, the 'event of default' include applying for insolvency, commencement of insolvency proceedings, appointment of insolvency representative, et al. The United Nations Commission on International Trade Law released its Legislative Guide on Insolvency Law in 2004. This guide defines ipso facto clauses in the following terms:

> *"114. Many contracts include a clause that defines events of default giving the counterparty an unconditional right, for example, of termination or acceleration of the contract (sometimes referred to as "ipso facto" clauses). These events of default commonly include the making of an application for commencement, or commencement, of insolvency*

proceedings; the appointment of an insolvency representative; the fact that the debtor satisfies the criteria for commencement of insolvency proceedings; and even indications that the debtor is in a weakened financial position ... "

The validity of such ipso facto clauses has been considered in a global perspective by international organizations and in the domestic jurisdictions of nation-states in their national insolvency laws. In order for us to assess their validity in India, we must first understand the global trends in contemporary jurisprudence. We can attempt to extrapolate our experiential learning from comparative law. As India develops into a responsive member of the international community, our laws cannot afford to be inward looking.

...

J.3 Position in India

129 Before we consider the extent to which the lessons of other jurisdictions should be applied to India, it is important to advert to the discussion on the invalidation of ipso facto clauses in India.

130 In 2005, the Report of the Expert Committee on Company Law headed by J.J. Irani 120 noted the requirement of reforms in the Indian insolvency regime,

specifically citing the lessons from the recently published UNCITRAL Guide. In relation to the moratorium period, it made the following observations:

"Moratorium and suspension of proceedings 13.1 A limited standstill period is essential to provide an opportunity to genuine business to explore re-structuring.

13.4 The law should provide for treatment of unperformed contracts. Where the contracts provide for automatic termination on filing of insolvency, its enforcement should be stayed on commencement of insolvency.

13.5 There should be enabling provisions to interfere with the contractual obligations which are not fulfilled completely. Such interference or overriding powers would assist in achieving the objectives of the insolvency process. The power is necessary to facilitate taking appropriate business and other decisions including those directed at containing rise in liabilities and enhancing value of assets.

13.6 Exceptions of such powers are also essential to be insured in the law where there is a compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract. "

131 The Committee noted the need to invalidate ipso facto clauses so as to prevent the value of a Corporate

Debtor's assets from becoming diluted during the insolvency process. However, this invalidation was to be subject to exceptions, keeping in mind the "compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract".

132 However, as is evident, this recommendation was never directly embodied legislatively since the current Code contains no clear-cut provision which invalidates ipso facto clauses. In fact, the issue of the invalidation of ipso facto clauses was noted in a December 2018 report titled 'Insolvency and Bankruptcy Code: The journey so far and the road ahead' issued by Vidhi Centre for Legal Policy. The report notes ***that the Code "does not per se prohibited the operation of ipso facto clauses during insolvency proceedings. However, Section 14 provides for a limited exception prohibiting the termination, suspension or interruption of specified "essential goods or services" (i.e. water, electricity, telecommunication services and information technology services to the extent they are not direct inputs to the output produced or supplied by the corporate debtor), and also provides relief to the corporate debtor from the recovery of any property by an owner or lessor during the moratorium".*** *As a*

solution, the report recommends a conditional stay on the operation of ipso facto clauses, beginning from the insolvency commencement date, since "a complete stay on the operation of ipso facto clauses would constitute a serious restraint on the freedom of contract and would effectively compel suppliers to perform contracts even when such an action is against their commercial interests". In relation to the implementation of this solution, the report suggests the insertion of a new provision to the Code.

133 More recently, however, the IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 which, inter alia, introduced an Explanation to Section 14(1). The Explanation to Section 14(1) reads thus: "14. Moratorium.-

Explanation.-For the purposes of this subsection, it is hereby clarified that notwithstanding anything contained in any other law (or the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds o(insolvency, subject to the condition that there is no default in payment of current dues arising (or

the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period".

134 The legislative intent behind this amendment was discussed in the Report of the Insolvency Law Committee dated 20 February 2020. The Report noted the importance of keeping the Corporate Debtor as a 'going concern' during the moratorium period imposed under Section I4, and how it was being affected by the termination of certain Government licenses, permits, et al, based on ipso facto clauses which allowed termination upon commencement of insolvency. Noting that the legislative intent underlying Section I4 would be to invalidate such terminations, the Report recommended the addition of the Explanation to Section 14(1) of the IBC. The relevant portion, in relation to the Explanation to Section 14(1), reads thus:

Prohibition on Termination on Grounds of Insolvency

8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as "grants") to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: one, by relying on ipso facto clauses, by virtue of which these

grants may be terminated on the advent of insolvency proceedings themselves, and second, by initiating termination on account of non-payment of dues.

8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys from the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.

8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the "property" of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes "money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising

out to: or incidental to, property." This definition is substantially the same as the definition of "property" under Section 436 of the Insolvency Act, 1986 (UK), which has been considered the widest possible definition of property. In India too, it is accepted that certain licenses and concessions can convey permission to use property, or may embody a lease, permit, etc. granting rights in the property. Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any person.

8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority" (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing

recovery by stock exchanges and regulators, as well as the de-registration of aircrafts.

8. 7. Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1)".

…

152 As the above excerpts indicate, but (or the subsistence of the PPA. the Corporate Debtor would no longer remain as a 'going concern'. Differently stated. by virtue of the PPA with the appellant being the sheet-anchor of the Corporate Debtor's business and consequently of the CIRP, its continuation assumes enormous significance (or the successful completion of the CIRP. The termination of the PPA will have the consequence of cutting the legs out from under the CIRP.

K.2 Validity of the termination of PPA

153 As discussed in Section "J.3 " of this judgement, the broader question of the validity of ipso facto clauses has been the subject matter of sustained legislative intervention in many jurisdictions. This is an intricate

policy determination, for it raises a series of questions about striking the appropriate balance between contractual freedom on the one hand and corporate rescue on the other. We are cognizant that any rule that we might craft, howsoever narrow, could have a series of unintended second order effects, in terms of opening the floodgates for intervention from the NCLT that might impinge upon contractual freedom of the terminating party. Further, the comparative experience also teaches us that, given that the invalidation of ipso facto clauses can unsettle the interests that contractual relationships are founded upon, some jurisdictions that have invalidated such clauses have done so in a cautious, prospective fashion. This ensures that while the policy of the insolvency law is brought into tandem with the global regimes, it does not affect the contractual rights of those parties who could not have reasonably accounted for this change in position while negotiating their contractual terms. Such an approach is an evidence and recognition of the harmful effects on commercial stability that such encroachment into contractual freedom can generate, even when done legislatively after careful deliberation.

154 The question of the validity/invalidity of ipso facto clauses has been discussed in a variety of documents over

the years, such as: (a) UNCITRAL Guide of 2004; (b) J.J. Irani Committee Report of 2005: (c) Vidhi 's Report of 2018 critiquing the IBC; and (d) IBBI's Report of 2020, which acknowledges the issue of ipso facto clauses in relation to government grants. All these materials were available to the members of the various committees which discussed the IBC. Further, suspension of contracts during insolvency was specifically allowed under Section 22(3) of SICA, which was the erstwhile statutory regime. Section 22 of the SICA provided for the suspension of legal proceedings and contracts, of which sub-Section (3) was in the

"(3) Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall

remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board: Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate. "

Parliament would have been conscious of the provision which was adopted in the SICA. Yet, no concrete position has been adopted in relation to the termination of ipso facto clauses by the legislature under the IBC. In the absence of an express prohibition by the legislature, it can be argued that there is no general embargo on the operation of such clauses if they are part of a valid contract under the Contract Act.

155 At the same time, we cannot lose sight of the fact that this Court is apprised with a novel situation where the 'going concern' status of a corporate debtor will be negated by a termination of its sole contract, on the basis of an ipso facto clause. It is pertinent to note that the IBC has been in effect from 5 August 2016, and has also been amended multiple times. Hence, if the 'going concern' status of

corporate debtors was being affected on a regular basis due to ipso facto clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have proceeded to legislate on an explicit position with regard to the operation of ipso facto clauses. However, this Court in the present case is not required to resolve the broad question of whether the invalidation/stay of ipso facto clauses in India, generally, is legally permissible. This is a matter which raises complex issues of legal policy and a balancing between distinct and conflicting values. Reform will have to take place through the legislative process. The stages through which legislative reform must take place - absolute or incremental - is a matter for legislative change. Our task is limited to the issue of deciding whether the Adjudicating Authority correctly exercised the jurisdiction vested in it, in the facts of this case, to stay the termination of the PPA. In the absence of an explicit stand taken by the legislature, this Court's intervention in this matter would be guided by ascertaining the legislative intention from the provisions of the IBC. 163 Although various provisions of the IBC indicate that the objective of the statute is to ensure that the corporate debtor remains a 'going concern', there must be a specific textual hook for the Adjudicating

Authority to exercise its jurisdiction. The Adjudicating Authority cannot derive its powers from the 'spirit' or 'object' of the IBC. Section 60(5)(c) of the IBC vests the Adjudicating Authority with wide powers since it can entertain and dispose of any question of tact or law arising out or in relation to the insolvency resolution process. We hasten to add, however, that the Adjudicating Authority's residuary jurisdiction, though wide, is nonetheless defined by the text of the Code. Specifically, the Adjudicating Authority cannot do what the IBC consciously did not provide it the power to do.

164 In this case, the PPA has been terminated solely on the ground of insolvency, which gives the Adjudicating Authority jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the Adjudicating Authority residuary jurisdiction which comports with the broader goals of the IBC. Sir P.B. Maxwell in his commentary, On Interpretation of Statutes 129, has emphasized that a

provision should be given a harmonious interpretation which comports with the intention of the Legislature. The commentary provides:

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy."

165 Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the

appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix o(this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of (the Adjudicating Authority under Section 60(5)(c) of (the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.l(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of(the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique.

166 The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile

ground for the revival of the regime under section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of the PPA which is the sole contract of the Corporate Debtor, governing the supply of electricity which it generates, it will pull the rug out from under the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.

173 In conclusion, we hold that:

(i) The NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) of the IBC to stay the termination of the PPA by the appellant, since the appellant sought to terminate the PPA under Article 9.2.1 (e) only on account of the CIRP being initiated against the Corporate Debtor;

(ii) The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract: and

(iii) We leave open the broader question of the validity/invalidity of ipso facto clauses in contracts

for legislative intervention. Consequently, for the above reasons we find no merit in this appeal and it is accordingly dismissed . ... "

XV. Analysed in the above framework, it becomes clear that Impugned Order, so far as it relates to MA 527/2019, requires to be set aside. There was no pleading let alone material placed on record by Respondent No. l, nor does the Impugned Order note, that the Trademark which was licensed to Corporate Debtor is the sheet anchor of the Corporate Debtor or that termination of the license would cut the legs out from under the CIRP of the Corporate Debtor - which are crucial tests framed by the Hon'ble Supreme Court in Gujarat Urja (supra). In fact it is clear from the Respondent No.1's admission that the Trademark has not been used since 2018. That the Respondents clearly failed to make out any case to satisfy the test laid down by the Hon'ble Supreme Court in Gujarat Urja (supra) and was therefore, precluded from questioning the termination of the TLA on the ground that it was precluded or not permitted under the Code. That the Impugned Order fails to consider that the Trademark is not an asset of the Corporate Debtor. The NCL T failed to consider in this regard that under the TLA:

a. The Trademark IS the exclusive property of the Appellant.

b. The Corporate Debtor was simply granted a license to use the Trademark in a defined manner.

c. The TLA specifically provides that "Except for the right to use the Trademark as specifically provided for in this Agreement, ***(i) Licensee shall have no right, title or interest in or to the Trademark****, and (ii) upon and after the termination of this Agreement, all rights granted to Licensee hereunder, together with any interest in and to the Trademark that Licensee may acquire, shall forthwith and without further act or instrument be assigned to and automatically revert to the Licensor ... ".*

d. The TLA provided the Respondent/ Corporate Debtor a determinable license to use the Trademark in accordance with certain defined terms, for the term of the agreement.

e. Clause 3.1 of the TLA states that the TLA and the Licensee (Corporate Debtor's) rights under the TLA cannot be assigned! transferred either voluntarily or by operation of law to any third party without the Appellant's written consent.

That the Impugned Order failed to consider that:

a. Since the Trademark does not belong to the Corporate Debtor, and/or is not its asset, it cannot be handed over to a third party as a part of the "Corporate Debtor's basket of assets".

b. The TLA is not an "asset" or "property" of the Corporate Debtor that can be monetised during the insolvency

resolution process. The RP cannot attempt to stake claim over assets belonging to a third party merely because it would add value to the Corporate Debtor's estate.

XVI. The TLA does not fall within the scope of essential goods and services set out under Section 14 of the Code. By way of an amendment brought in with effect from December 28, 2019, the IBC clearly specifies that:

> *"" ... a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period".*

The TLA does not fall within the categories of licenses that may not be terminated as set out in the

explanation extracted above. There is therefore no basis in the law to suggest that the termination of the TLA by the Appellant is impermissible in law. Notwithstanding the aforesaid, assuming (without admitting) that the TLA is considered to fall in the category of 'essential good or services' and could not have been terminated during the moratorium, then under the provisions of Section 14 of the IBC read with Regulation 13 of the IBBI (Insolvency Regulation Process for Corporate Persons) Regulation, 2016, any losses owed to the Appellant during the continued refusal to recognize the termination of the TLA would be payable as Insolvency Resolution Process Costs, which the resolution plan admittedly fails to do. Further any such moratorium on terminating essential services also ceases to operate on completion of the CIRP period. Accordingly, in any event, there is no circumstance under which the TLA can be said to transfer to the successful resolution applicant.

XVII. That the Impugned Order has been passed in violation of settled principles of law, natural justice, without noting or dealing with the Appellant's submissions, and without providing any reasons.

XVIII. What the ld. Sr. Counsel for the Appellant has tried to conveyed by the elaborate submissions is the followings:

I. The Appellant relationship with Corporate Debtor arises from a trade mark license agreement from July, 07, 2005. The Appellant is entitled to terminate the Trademark License Agreement (TLA), if the there is a bankruptcy or the Corporate Debtor under goes any event that leads to the Dhoot family no longer in control. Once the insolvency petition was filed on **05.06.2018** terminated the agreements accordance with, they have TLA dated 07.07.2005, the termination is valid in the eye of law and Resolution Professional has no authority to use the trade mark and show the Adjudicating Authority cannot direct the Appellant for even allowing TLA valid for next one year. While as per the own submissions of the RP the Trade mark was not even being used since 2018.

II. As far as legal submissions were concerned, the order of the Adjudicating Authority dated 08.06.2021 is totally unreasoned and non- speaking order by citing multiple judgments as enunciated below:

- *Raj Kishore Jha v. State of Bihar ((2003) 11 SCC 519; paras. 7,8,15,19);*
- *Rangi International Ltd. v. Nova Scotia Bank ((2013) 7 SCC 160, para. 3);*
- *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr (AIR 1976 SC 1785, para. 6);*

- *State of Orissa v. Dhaniram Luhar ((2004) 5 SCC 568, paras. 6 to 8);*
- *Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity ((2010) 3 SCC 732 9, paras. 40, 41)]*

III. Termination of the TLA was valid in the eye of law and in accordance with Hon'ble Supreme Court Judgment in Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta & Ors. (Civil Appeal No. 9241 of 2019, decided on march 8, 2021

IV. It was also stated by ld. Sr. Counsel for the Appellant that the transitional arrangement has no basis in law. If termination of the TLA was lawful and the underlying application allowed, there would be no question of continuing for one year. However, if termination was unlawful- there no requirement to restrict it to one year. The transitional arrangement has no basis in law or contract.

V. It was also stated that the Resolution Plan could only provide for subsisting contracts for the purpose of carrying on the business of the Corporate Debtor and which were subsisting or having effect immediately before the Impugned Order, be deemed to continue and to be valid and subsisting. The Resolution Plan is binding on all stakeholders including the Appellant and the TLA is deemed to be valid and subsisting. The Appellant is not aware about the contents of the Resolution Plan. Notwithstanding the same, the aforesaid argument is misconceived primarily for the reason that the TLA was already terminated by the Appellant on June 5, 2018, and therefore

the Resolution Plan could not have provided for validity and subsistence of a contract which was already terminated. (Appellant's Affidavit in Rejoinder to the Affidavit in Reply of Respondent No. 2, paras 7-8). Additionally, it is settled law that a resolution plan cannot operate to unilaterally modify contractual rights of an entity that is a third party and entirely unrelated to the Corporate Debtor. (Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Limited & Ors., 2021 SCC OnLine SC 253, para. 265; MCGM v. Abhilash Lal & Ors., (2020) 13 SCC 234; para. 47)

VI. It has also been emphatically conveyed the validity of ipso facto clauses and alleged that clause 16.2 of the TLA is in contravention of the Code, more specifically section 14 (d) of the Code.

Clause -17. However, the validity of ipso facto clauses vis-à-vis Section 14 of the Code, has been dealt with in detail by the Hon'ble Supreme Court in Gujarat Urja (supra), and the Supreme Court has conclusively decided that ipso facto clauses are not contrary to the Code. The Supreme Court observed in this case that "Even more crucially, [the Adjudicating Authority's jurisdiction] cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, Adjudicating Authority would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate

debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix)."

18. The Supreme Court also noted in Gujara Urja (supra) in respect of ipso facto clauses that "In the absence of an express prohibition by the legislature, it can be argued that there is no general embargo on the operation of such clauses if they are part of a valid contract under the Contract Act."

19. Additionally, Section 14 of the Code specifically sets out the kinds of licenses that may not be terminated on grounds of insolvency, i.e., a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force. The TLA does not fall under any of those categories. (Appeal, page no. 55).

21. The Hon'ble Supreme Court has clearly laid down in Gujarat Urja (supra) that termination of licenses may be interfered with only if the license in question is the "sheet anchor" of the Corporate Debtor and that termination would have the consequence of "cutting the legs out from under the CIRP" (para 152).

B. Submissions of the Respondent No.1

I. It was stated by the Ld. Sr. Counsel for the RP that the Appellant ("Electrolux"), a company incorporated in US, is the registered

proprietor of the trademark "Kelvinator" ("Trademark") which was licensed to the Corporate Debtor via a Trademark License Agreement dated 7th July, 2005 ("TLA"). The TLA was terminated by Electrolux vide a letter dated 1 st September, 2018 ("Termination Letter") on account of the initiation of insolvency and change of control of the Corporate Debtor from the Promoters (defined as Dhoot Family in the TLA) to the Resolution Professional ("RP"). The RP objected to the said termination, specifically on the grounds of moratorium under Section 14 of the Code. Electrolux preferred an application (M.A. 527/ 2019) before the Adjudicating Authority seeking a permanent injunction against the Respondent from manufacturing the goods under the Trademark and upholding the termination of the TLA.

II. It is Electrolux' case that the Adjudicating Authority Order is in violation of principles of natural justice as it fails to record and deal with the contentions and written submissions with regard to M.A. 527 of 2021, thereby disposing off the application in an unreasoned and arbitrary manner. It is submitted that the Adjudicating Authority Order was passed by Adjudicating Authority after hearing in detail and considering the submissions of Electrolux, the RP and the Resolution Applicant. The transitional arrangement provided by the Adjudicating Authority is aimed towards the successful resolution of the Corporate Debtor and in effect an opportunity to the Resolution Applicant

to manage the operations of the Corporate Debtor. The Adjudicating Authority has provided a practical approach towards the preservation of the assets of the Corporate Debtor and has also further granted a liberty to the parties to reconsider the terms and conditions of the TLA and decide upon the same in due course. The intent and purpose behind the Adjudicating Authority Order is evidently an attempt to resolve the disputes between the parties and assist the Corporate Debtor towards a successful resolution. [Para 8 – 10, RP's Reply].

III. It is submitted by Electrolux that the Adjudicating Authority Order is contrary to the Supreme Court's decision in Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors. 1 ("Gujarat Urja"), wherein it was held that termination of contracts on ground of insolvency are liable to be interfered with only if it results in the legs of the CIRP being cut off. It is submitted that the interpretation provided by Electrolux to the judgment in Gujarat Urja is unilateral and incorrect. The Supreme Court specifically recognises the duties of the RP under Section 14 of the Code which mandates preservation of assets, critical to preserve the value of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern and the same does not in any manner affect the RP's duties to preserve and protect the value of the assets of the Corporate Debtor. Further, the judgment in Gujarat Urja does not deal with a situation as in the

present case as the judgment only deals with cases regarding validity of ipso facto clauses in relation to agreements forming a "sheet anchor" of the Corporate Debtor and not with such clauses in relation to residuary contracts providing licenses to the Corporate Debtor adding value to the assets of the Corporate Debtor – termination of which is specifically prohibited under Section 14 of the Code. It is submitted that the judgement only deals with contractual arrangements which are otherwise not covered within Section 14 of the Code. [Para 20(l) and 20(m), RP's Reply]. The termination of the TLA by Electrolux is contrary to Section 14(1) of Code which specifically prohibits alienation or disposing of the Corporate Debtor's assets or any legal right or beneficial interest in such asset. As the purpose of the moratorium includes preserving the Corporate Debtor's assets during the CIRP, maximising their value and facilitating orderly completion of the CIR process, the termination of license or any such adverse action to the detriment of the Corporate Debtor is in direct contradiction with the purpose and intent of the moratorium under Section 14 of the Code. [Para 14 -16, RP's Reply].

IV. It is submitted that the TLA adds value to the goods produced by the Corporate Debtor and in effect is of value for the Corporate Debtor. The RP has carried out his duties effectively and protected the assets of the Corporate Debtor in the interest of

maximisation of value of the Corporate Debtor. Also, while inviting the resolution plans, the RP had categorically mentioned in the Information Memorandum the said termination of the TLA by Electrolux. In any event, the implementation of the Resolution Plan is not contingent upon the decision in the Application/ present Appeal preferred by Electrolux. It may be noted that it is solely upto Respondent No. 2, if it intends to continue with the production of goods pertaining to the TLA after the implementation of the Resolution Plan, and the Resolution Professional has no say on the same.

C. <u>Submissions of the Respondent No.2/Successful Resolution Applicant (SRA):</u>

I. The Ld. Counsel for the SRA (Respondent No.2) has submitted that the Resolution Plan was approved by the consolidated CoC of the CDs by a vote of 95.09 %. It is also submitted that the Adjudicating Authority has disposed the MA No. 527 of 2019 and observed as follows:

"11. As far IA 527 of 2019, praying for use of Brand name "Kelvinator" is concerned, we are of the considered view that the Agreement should continue for at least a year from the date of approval of the Plan as per the existing Terms and Conditions as a transitional arrangement and subsequently it is upto the

parties to decide on the same as per their mutual understanding."

II. Clause 11.3 of the Resolution Plan (appearing at page 3 para 9 of the Respondent No.2 reply) states that "All contracts including....licenses...which the CDs may be eligible and which are subsisting or having effect immediately before the order was passed by the Adjudicating Authority, shall be endorsement, delivery or recording of or by operation of Applicable Law pursuant to the order of the Adjudicating Authority sanctioning the Resolution Plan, and on this Resolution Plan becoming effective be deemed to and continue to be valid and subsisting contracts."

III. It is submitted that the Appellant had made a misplaced argument that Clause 11.3 of the Resolution Plan is applicable only to subsisting contracts and that the Appellant has terminated the TLA prior to order of the Adjudicating Authority admitting the section 7 petition against the CD. The said argument of Appellant is factually incorrect because as per Appellant's own letter of termination dated 05.06.2018 (appearing age page 230 of the Appeal paper Book), the termination of TLA "shall become effective on the date on which the application for CIRP is admitted by the Adjudicating Authority". Hence,

the TLA was subsisting on the date of the order of the Adjudicating Authority admitting the Section 7 application and also immediately before it. Therefore, as per Clause 11.3 of the approved Resolution Plan, the TLA continues to be valid and subsisting.

IV. It is also submitted that the Appellant has allegedly terminate the TLA vide its letter dated 05.06.2018 by invoking clause 16.2(d)(iii) of the TLA. The Appellant has thereafter issued a Letter dated 19.10.2018 (appearing at page No.240 of the Appeal Paper Book), whereby, as an afterthought, the Appellant has also included Clause 16.2(a) of the TLA as a ground for termination. It is submitted that the events of termination mentioned in Clause 16.2(a) and 16.2(d)(iii) are inconsistent with the provisions of Section 14 of the Code, especially clause (d) of subsection (1) thereof, which prohibits the recovery of "any property" (in this case the trademark) by an owner (in this case the Appellant) where such property is occupied by or in the possession of the CD (in this case the R-1).

V. In view of the above, it is submitted that Clause 16.2(a) and 16.2(d) (iii) of the TLA are null and void upon the enactment of the Code and the Appellant cannot rely on the said clause to terminate the TLA. Rely on the decision in Gujarat Urja (supra), the Appellant argues that all agreements,

other than those which are the sheet anchor of CD, can be terminated on mere initiation of CIRP. It is submitted that such interpretation of the decision in Gujarat Urja (supra) by the Appellant is wholly incorrect and without basis. It is submitted that if the interpretation of the Appellant is accepted, it would lead to an abysmal situation where most (if not all) contracts of a CD will be terminated on mere initiation of CIRP, which in turn would gravely impact the going concern status of CIRP, apart from also degrading the asset value of the CD. It is submitted that the Hon'ble Supreme Court in Gujarat Urja (surpa) has recognized the importance of maintaining the going concern status of the CD and has specifically left open the broader issue of validity of ipso facto clause for the legislature to look into. Hence, the argument made by the Appellant is wholly unsubstantiated and misleading. Further, the argument of Appellant is plainly contrary to Section 14 of the Code.

VI. It is also submitted that the Applicant has relied on the Reply of RP to state that the Information Memorandum has disclosed that the TLA was terminated. The said fact does not further the case of Appellant in any manner because the RP has merely stated a fact that the TLA was terminated by Appellant and, such mere statement, does not make the termination valid in law. In fact, had the

termination become valid in view of what is stated in the Information Memorandum, the Appellant would have had no occasion to file the MA seeking declaration that the termination was valid. Hence, the case set out by the Appellant is without basis and untenable. Lastly, it is submitted that the argument of Appellant that the trademark was not in use for a period of last two years is wholly irrelevant as the CD was in CIRP during such time and mere allege non-usage of the trademark during CIRP would not ipso facto make an otherwise illegal termination a valid one.

18. **Company Appeal (AT) (Ins) No. 650 of 2021:**

A. Submissions of the Appellant- Venugopal Dhoot.

I. The Ld. Sr. Counsel for the Appellant has submitted that the Appellant is the guarantor shareholder and ex-managing Director/Chairman of Videocon Industries Limited and is interested entity of the CD and its stakeholders. What has been stated by the Appellant is that all assets owned by Videocon Group, particularly, foreign oil and gas assets are not included in the 'Information Memorandum' as also no valuation thereof has been considered while the claim of lenders of foreign oil and gas assets of Rs. 23,120.90 Crore being considered as claimed upon CD.

II. It was also stated by Ld. Sr. Counsel, the reason for considering consolidated group insolvency resolution with main thrust on foreign oil and gas assets not to be treated separately so that all the creditors should get maximum value. The RP and CoC have committed material irregularity of high magnitude in ignoring to include foreign oil and gas assets of VIL as assets of VIL. They have also raised the issue that just by paying only Rs.262 Crore (out of which cash balance available with CD is Rs. 200 Crore) & approximately Rs. 2700 Crore through NCD carrying 6.65% p.a. payable annual interest rate, the Resolution Applicant will get possession of all 13 CDs to run these units against the property for which claim has been raised for over Rs.71,000/- Crore. Although the Appellant is not privy to CoC minutes, however, in the impugned order makes it clear that RP has not maintained confidentiality clause in its true letter and spirit and thereby violated Regulation 35 (3) of the IBBI (Insolvency Resolution Process or Corporate Persons) Regulation, 2016, copy of Resolution Plan was not provided to the Appellant being Ex-Managing Director of the Chairman of VIL apart from being guarantor. As per the valuation reports, the fair value of CD was Rs.4069.65 Crore, whereas the liquidation value was Rs.2568.13 Crore. Therefore, it is evident that the interest of

the CDs has been compromised and no attempt has been made to maximize the wealth of the CDs.

III. They have also pointed out that Adjudicating Authority at para 10 of the impugned order further observed that such a large number of Authorized Representative for the RP at the meeting of CoC indicates either he was not fully prepared or the same was designed to fetch monetary benefit (fees) to these Representatives. Hence, the RP and his team never attempted to achieve the maximization of value of the 13 CDs. Rather, the RP and their appointed agencies discharged their duties negligently and contributed in eroding the net worth of the entire Group by not maintaining the companies as a going concern. Therefore, after observing material irregularity in exercise of powers by Respondent No.1 and CoC, the Adjudicating Authority ought not to have approved the Resolution Plan of R-3 in the CIRP of Corporate Debtor. The SBI is attempting to include the foreign oil and gas assets of VIL as assets of VOVL in the CIRP of VOVL. However, the same will be contrary and contradictory to the stand taken by SBI in the case of VIL as VOVL also holds the said foreign oil and gas assets through the foreign companies incorporated for that purpose. The said fact is clear from the IM of VOVL issued by the RP of VOVL.

IV. It is stated that Minutes of meeting of SBLC lenders in respect of VOVL on 26.03.2018 (page No.76 of rejoinder to R-1) clearly records that SBI being already aware that CIRP will be initiated against VIL and that the shareholding of VIL in VOVL shall be taken under control by the RP, deliberately took active steps to keep the said foreign oil and gas assets outside the purview of the CIRP of VIL. Similarly, a bare perusal of the minutes of meeting of MD and CEO of SBLC Lenders on 13.06.2018 (appearing at page no.84-85 of the rejoinder to R1) indicated that SBI deliberately transferred the shares of VIL in VOVL and VHHL in favour of SBICAP Trustee Company Limited so as to sequester the foreign oil and gas assets from the CIRP of VIL. Valuation of standalone foreign oil and gas assets was at 4.29 billion USD in 2017, the value was projected at 5.08 Billion USD in 2019, 5.61 Billion USD in 2020 and 7.02 Billion USD in 2023 (appearing at page no.101 of rejoinder to the reply of R1). Therefore, it is evident that if the said assets would have been included in the CIRP of the CDs then the same would have resulted in maximization of wealth of the CDs. However, SBI, in order to have an edge over the other creditors and to have benefit of such valuable foreign oil and gas assets, in collusion with the RP, made sure that the said foreign oil and gas assets are excluded from this CIRP. All the assets and liabilities of VHHL, VINI, VEBL and other

subsidiaries of VOVL have been specifically included in the IM VOVL. However, in VIL's IM and the consequent resolution plan, the assets of its subsidiaries i.e. VOVL have not been included despite admittedly VIL being the ultimate beneficiary. Commercial wisdom exercised by CoC is arbitrary and irrational and does not reflect any application of mind. 'Stakeholders' under the Resolution Plan submitted a claim of Rs. 71,433.75 crore, the amount admitted by the RP is Rs. 64,938.63 Crore and the amount provided under the plan to the Stakeholders is Rs.2,962.02 Crore i.e. the amount provided to amount claimed percentage is 4.15%, the reflects that the stakeholders have a loss of 96% i.e. the haircut is approx.96% (Page No.76 of the Appeal Paper Book). CoC did not consider the proposal of Appeal to the tune of Rs. 41,334 Crore which was 10 times higher than the resolution plan of R-3 and provided for payment of entire debt and submitted at an early stage of the process. But CoC accepted resolution plan of R-3, which provides payment of Rs.2,962 Crore against the total debt of 31,789 Crore. Therefore, the CoC under the guise of commercial wisdom cannot do an illegality and approve a resolution plan detrimental to the interests of the CDs and their stakeholders.

V. It is submitted that resolution plan as approved by the Adjudicating Authority discriminates amongst the Secured

Financial Creditors of same class. **The Secured Financial Creditors who cast vote in favour of Resolution plan are being offered 4.89% repayment whereas Secured Financial creditors who did cast vote in favour of resolution plan are being offered 4.56% repayment**. In terms of Resolution plan, one set of OC i.e. workmen and employees are being offered 29.73% repayment of their admitted dues whereas other set of OCs i.e. Government and other OCs are being offered only 0.12% repayment of their admitted dues. The Adjudicating Authority after coming to conclusion that interest of OCs has not been taken care of in the Resolution Plan instead of sending it back to CoC for reconsideration has approved the same and requested CoC to increase the payout to CoC. Thus, the Resolution plan as approved by the Adjudicating Authority is discriminatory and violative of the provisions of the Code itself as it discriminates between same class of creditors. **The Resolution plan of R-3 provides for a massive 99.28% haircut to OCs and 95.85% haircut to all its creditors as was also observed by the Adjudicating Authority in the impugned order itself at para 5.**

VI. It is stated that the SBI is blowing hot and cold under the same breath as at one stage i.e. for the purpose of consolidation, SBI requested for consolidation order in order to have common pool of assets for maximization of value of CDs whereas on the

other hand SBI invited interest for sale of foreign oil and gas assets and is contesting upon inclusion of same is common pool of assets. The RP failed to examine whether the resolution plan is in compliance of section 30(2) of the Code and a non-complaint resolution plan was placed by the RP before the CoC for their deliberation/approval. The RP ought to have taken active steps to have the appeals dealing with inclusion of foreign oil and gas assets pending before this Appellate Tribunal adjudicating at the earliest.

VII. **It is also stated that it needs to be considered if Resolution Professional and their appointed agencies were concerned only with drawing their remuneration to the extent of Rs. 1.5 crore per month, without discharging the duties to maintain the Corporate Debtors as going concern and prevent eroding value of assets of Corporate Debtors?** It needs to be considered as to what are the reasons of arriving at such low liquidation value when for the same assets for restructuring the same lenders and experts were agreeing on much higher valuation and particularly the Appellant was ready and willing to take the company back without any hair cut?

B. Submissions of the Respondent No.1 - RP

I. It is stated by the Ld. Sr. Counsel for the RP that captioned Appeal deserves to be dismissed on grounds that (a) the

appellant has no locus in his capacity as a guarantor, shareholder and former Managing Director/Chairman of VIL to maintain the captioned appeal as rejection of the Appellants' proposal under Section 12A of the Code is not challenged and binding on the Appellant, (b) the RP has duly examined the resolution plan and determined that it confirms to requirements under Section 30 of the Code and Regulations thereunder, (d) the Appellant has sought to assail the commercial wisdom of the CoCs, (e) the RP has not committed any material irregularity in not treating the foreign oil and gas assets as assets of VIL, (f) it is settled by this Appellate Authority that the RP has not breach any confidentiality clause, (g) there is no discrepancy regarding actual value, fair value and liquidation value of the CDs, and (h) the generic/cryptic allegations of fraud/collusion by the Resolution Professional are baseless. The captioned appeal deserves to be dismissed in limine on account of being preferred by the Appellant without any locus as he has failed to show how is aggrieved by the impugned order in his capacity of a guarantor, shareholder and former Managing Director / Chairman of VIL. In the garb of challenging the impugned order, the Appellant has prayed for reconsideration of his 12A proposal which is not permissible either in law or facts. The Appellant's 12A proposal was duly considered by

the CoC in its 19th meeting and was rejected by an overwhelming majority of 98.14%. considering that the Appellant neither challenged such rejection nor raised any objections to the Resolution plan before the Adjudicating authority, the Appellant has no locus to seek re-consideration of 12A proposal before this Appellate Tribunal. As recognized by this Appellate Tribunal in Vishal Vijay Kalantri Vs. Shailen Sbab in CA(AT) (Ins) No. 466 of 2020, in para 9, 11 and 12, an ex-promoter has no locus to challenge approval granted to a resolution plan, even if he seeks reconsideration of his rejected 12A proposal on the basis that the settlement proposal is superior to the approved resolution plan. It is submitted that the Appellant has failed to demonstrate any provision of the Code and /or the Regulations thereunder, which would entitle the Appellant to seek acceptance of his 12A proposal by the CoC as a matter of right. As recognized by the Hon'ble Supreme Court in Swiss Ribbions Pvt. Ltd & Ors. Vs. Union of India & Ors. AIR 2019 SC 739 (para 38, 121), the requirement of seeking approval for majority of the CoC implies that those proposing the settlement cannot claim it as a matter of right. Since Section 12A proposal is a "settlement/withdrawal" mechanism, the Appellant cannot seek re-consideration of the proposal on the same lines as a resolution plan. The RP has acted in accordance with the Code and had no occasion to

treat the foreign oil and gas assets as part of VIL's assets in view of the stay order. At the outset, it is important to highlight that the RP only acted within the ambit of duties/powers conferred upon it by the Code and its CIRP Regulations. Pertinently, under Section 18(f) of the Code r/w Section 23(2) of the code, a RP is under the mandate to take control and custody of any asset over which the CD has ownership rights as recorded in the balance sheet of the CD. However, Explanation (b) to Section 18 of the Code specifically excludes the assets of any Indian or foreign subsidiary of the CD from the purview of the terms 'assets' as mentioned in Section 18. Accordingly, the RP took control and custody of such assets over which VIL has ownership rights as record in the standalone balance sheet of VIL in compliance with Section 18(f) R/w Explanation (b), and Section 23(2) of the Code, excluding assets of any Indian or foreign subsidiary of VIL.

II. It is also stated that the RP has not committed any material irregularity and he is not guilty of incompliance with the Consolidation order passed by the Adjudicating Authority for the following reasons:

a. While the RP was in the process of analyzing the implications of the Consolidation order passed on 12.02.2020, it was stayed vide order dated 19.02.2020 passed by this Appellate Tribunal in CA(AT) (Ins) No. 299

of 2020 and no further steps could be taken by the RP in pursuance of the Consolidation order. Therefore, Appellant cannot assert that the RP ought to have treated the foreign oil and gas assets as VIL's assets as this would have led to contempt of the stay order passed by this Appellate Tribunal.

b. Pertinently, the Appellant can't take benefit of the direction in the stay order which continues the interim order dated 22.08.2020 passed by the adjudicating Authority, since the interim order was continued only to the limited extent that it prohibited SBI from proceeding with the sale of upstream foreign oil and gas assets with passing of the Consolidation order, all findings relied upon by the Appellant have been merged into the consolidation order, which continues to be stayed by this Appellate Tribunal.

c. The facts stated in the limited reply filed by the RP to CA(AT) (Ins) No. 299 of 2020 highlighted the reasoning and factors on account of which the RP couldn't have treated the assets of its wholly owned Indian subsidiary, VOVL, and other foreign entities, VHHL, VEBL and VINI, which have not been reflected in standalone financial statements of VIL as its assets, as VIL's assets for the purpose of VIL's CIRP in view of Explanation (b) to Section 18 of the Code and the subsistence of the stay order.

III. Further, the relief sought by the Appellant seeking issuance of fresh information memorandum and call for fresh EOI/Resolution Plan for all assets of Videocon group including all foreign oil and gas assets of Videocon Group is subject matter of CA(AT) (Ins) No. 299, 467, 639, 640 of 2020, pending before this Appellate Tribunal, and thus cannot be entertained in the present appeal. Additionally, the allegation that the RP inflated the liabilities of the CD is misconceived. The RP has admitted those claims of other entities creditors filed with him and to such extent that they relate to security interests created in favour of these creditors by the CDs being cross-collateralized and corporate guarantee claims in accordance with the Code and Regulations thereunder. The Appellant has provided no substantiation to his bald allegations, the Respondent reserves its rights and would be happy to provide a detailed explanation for each admitted claim if deemed necessary by this Tribunal.

IV. It is also stated that the Appellant's contention that the RP has failed to examine whether the Resolution Plan is compliant or not is totally devoid of merit and untenable both in law and facts. It is submitted that the resolution plan is complaint with Section 30(2) of the Code and the IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In this regard it is submitted that (a) the RP found the resolution plan

to be complaint with the Code and regulations, as captured in Form-H and the Plan Approval application, (b) the Resolution Plan and the Distribution Mechanism has been approved by the CoC by an overwhelming majority of 95.09% in exercise of their commercial wisdom and (c) the adjudicating authority correctly relying upon K Sashidhar Vs. Indian Overseas Bank & Ors. and Essar Steel India Ltd. Committee of Creditors Vs. Satish Kumar Gupta has categorically found the resolution plan to be compliant with the Code and CIRP Regulations and upheld the commercial wisdom of the CoC. As regards, the allegations in respect to differential payments being meted out to different classes and sub-classes of creditors, it is important to highlight that the Appellant has no locus to espouse the cause of creditors of VIL specifically when the Appellant has failed to demonstrate how is his rights are adversely affected by it.

V. It is also stated that the RP, in accordance with the Code and CIRP Regulations, appointed two reputed valuers, who were glistered with the IBBI and didn't have any vested interest in the property being valued, for the purpose of valuation of the CDs. The resolution plans were received on a confidential basis in electronics encrypted from on 31.08.2020. The index pages of the resolution plans were opened on 02.09.2020. The valuation reports, received by the RP on a confidential basis

over email on 02.09.2020 were directly uploaded in the Virtual Data room on the night of 02.09.2020. Hence, there was no occasion for anyone to know about the liquidation value, since the liquidation value was received on 02.09.2020, after receipt of the resolution plan on 31.08.2020. The liquidation value of was also mentioned in the Form-H submitted before the Adjudicating Authority alongwith the plan approval application. Thus, there is no discrepancy regarding actual value, fair value and liquidation value of the CDs. The generic, vague and cryptic allegations of material irregularity and fraud/collusion by the RP are baseless and denied in seriatim. With regard to applications filed under Section 43, 45 & 46 of the Code, the RP filed these applications, in exercise of its statutory duty under Section 25(2)(j) of the Code R/w Regulation 35A of the CIRP Regulations. The Appellant's allegations disputing its evidentiary value are baseless and extraneous to the present appeal.

B. Submissions of the Committee Creditors of Consolidated Videocon Group of Companies:-

I. It is stated by the Ld. SG that the instant appeal has filed by the Appellant is a part of a long-drawn strategy of the Appellant herein to disrupt the successful and smooth functioning of the CIR Process

of Consolidated Corporate Debtors. It is submitted that Videocon Industries Limited and Videocon Telecommunications Limited were 2 (two) of the largest accounts that were classified as non-performing assets by banks on account of the defaults and in respect of whom, the Reserve Bank of India ("RBI") had provided specific instructions for initiating insolvency proceedings pursuant to the provisions of Section 35AA of the Banking Regulation Act, 1949, as amended. It is submitted that RBI had sent a letter to SBI in its capacity as Lead Bank ("RBI Letter"), directing to provide the companies classified as 'Non-performing assets' as per the data maintained by the Central Repository of Information on Large Credits (as listed in the annexure to the RBI Letter, which included inter alia VIL and VTL), time till December 13, 2017 to resolve their debts outside the scheme of the IBC, failing which insolvency proceedings under the IBC are to be initiated against the companies before December 31, 2017. Since the accounts of VIL and VTL could not be resolved pursuant to the RBI Letter and on account of the continuing default, the application to initiate CIR Process was filed on 1st January, 2018 against VIL and VTL. It is submitted that the Appellant raised various frivolous contention resisting the admission of applications against VIL and VTL on account of which it took a considerable time of more than 5 months before the admission of the application against VIL and VTL. This delay in the admission process itself, caused on account of the litigation by the Appellant, was the starting point which has caused

tremendous delay in the CIRP of the Consolidated Corporate Debtors and resulted in deterioration of value of the assets of the Consolidated Corporate Debtors and which has resultantly caused tremendous loss in recovery by the various stakeholders of the Consolidated Corporate Debtors. The conduct of the Appellant, as shown hereinafter, adequately demonstrates the Appellant's ill-intent and mala fide not only to mislead this Hon'ble Tribunal but also to misuse the judicial process in its attempt to continuously frustrate the CIR Process of the Consolidated Corporate Debtors.

II. It is submitted that the Appellant, Mr. Venugopal Dhoot, who is admittedly the ex-promoter cum chairman of Videocon Industries Limited ("VIL"), the parent company of the Videocon Group of Companies, is directly responsible for the insolvency of the Videocon group companies on account of, inter alia, his poor management. It is pertinent to bring to the attention of this Hon'ble Tribunal that State Bank of India had initiated personal insolvency proceedings against the Appellant herein by filing an application under Section 95 of the Code on 1st September 2020. The application for initiation of personal insolvency against the Appellant herein in his capacity as a personal guarantor to the debts owed by VIL has been allowed by the Hon'ble Adjudicating Authority vide its order dated 1 st September 2021. It is stated that filing of the instant Appeal by Mr. VN Dhoot, therefore, is without any basis and is non-maintainable under the Code on account of the initiation of personal insolvency

proceedings against him and since it is preferred merely to scuttle the CIR Process of the Consolidated Corporate Debtor and misuse the same to create hindrances in the personal insolvency proceedings before the Hon'ble Adjudicating Authority. The Respondent No. 2 respectfully submits that the instant Appeal contains several false, unfounded, bald, vague and inaccurate statements/ averments which are in the form of allegations against the lenders. Such allegations are totally devoid of any merit.

III. It is submitted that the present Appeal deserves to be dismissed in limine and ought to be dismissed on, inter alia, the following grounds:

a. The Appellant lacks the locus standi to file the present Appeal as the Appellant cannot be considered to be an aggrieved person under Section 61 of the Code. The Appellant after having made all attempts to frustrate the successful resolution of Consolidated Corporate Debtors is merely attempting to further derail and disrupt the CIR Process of the Consolidated Corporate Debtors in gross abuse of the process and in complete contravention of the object of the Code.

b. The Appellant's conduct in initiating various litigations before various forums from time to

time belies his assertion that he has co-operated in the initiation of insolvency proceedings of the Consolidated Corporate Debtors, when, in fact, it was the Appellant's incessant litigation that has caused tremendous delay in the conclusion of the CIR Process which has consequently led to value deterioration;

c. The Respondent No. 2 has conducted the CIR Process strictly in accordance with the provisions of the Code and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, as amended ("CIRP Regulations";

d. The rejection of the Appellant's proposal for Restructuring of Domestic Assets of Videocon Industries Limited and other Co-Obligors ("Appellant's Withdrawal Proposal") by the Respondent No. 2 was in its commercial wisdom and taken after due consideration of the Appellant's Withdrawal Proposal by the Respondent No. 2;

e. The Appellant is belatedly trying to challenge the rejection of his Appellant's Withdrawal Proposal with an ulterior motive only known to him;

f. The Appellant has no locus to champion the issues on behalf of the dissenting financial creditors or other creditors after being the reason for the mismanagement and the instant insolvency of the Consolidated Corporate Debtors .

IV. It is submitted before this Tribunal that the Appellant lacks the locus standi to file the instant Appeal. As per Section 61 of the Code, only an "aggrieved person" can file an appeal assailing the order of the Adjudicating Authority. The Appellant cannot in any way be considered to an "aggrieved person" qua the Impugned Order. It is submitted that an individual whose own actions and inactions have contributed and continue to contribute to the financial illness of the Consolidated Corporate Debtors and whose actions and inactions run contrary to his claims of value maximisation in the interest of creditors and best intention for the resolution of the Consolidated Corporate Debtors, ought not to be allowed to now challenge the CIR Process throughout the CIR process of the Consolidated Corporate Debtors, the Appellant has made all possible endeavors to frustrate and derail the CIR Process and thwart all attempts of a successful

resolution of the Consolidated Corporate Debtors thereby jeopardizing the interest of all stakeholders and defeating the very objects of the Code. The Appellant has filed numerous litigations in a gross abuse of the process with the sole intention to disrupt the CIR Process and frustrate smooth conclusion of the CIR Process. It is a matter of record that the Appellant's acts of commission and omission while in control of the Consolidated Corporate Debtors are being investigated by several investigating agencies. Furthermore, Appellant's instant challenge to the Impugned Order is unmerited inasmuch it is squarely covered by this Hon'ble Tribunal judgment in Mr. Vishal Vijay Kalantri vs. Mr. Shailen Shah (Resolution Professional of Dighi Port Limited) & Ors., CA-AT (Ins) No. 466 of 2020 ("Vijay Kalantri"). In Vijay Kalantri, this Hon'ble Tribunal was faced with similar fact situation as there as well the 12A settlement proposal of the promoter was rejected by the CoC with 99.68% vote while the resolution plan of one resolution applicant was approved by 99.68% vote. While dismissing the promoter's challenge to the approval of the resolution plan and rejection of its 12A proposal, this Tribunal observed that the averment that 12A proposal is better as regards maximisation of the value of the assets of the Corporate Debtor and subserves the interest of all stakeholders, is not to be accepted. Therefore, the Appeal does not merit any consideration of this Hon'ble Appellate Tribunal and ought not to be allowed and should be dismissed with exemplary costs. The Appellant's conduct

in initiating various litigations before various forums from time to time belies his assertion that he has cooperated in the initiation of insolvency proceedings of the Consolidated Corporate Debtors, when, in fact, it was the Appellant's incessant litigation that has caused tremendous delay in the conclusion of the CIR Process which has consequently led to value deterioration.

V. The Appellant's attempts of disrupting and derailing the CIR Process of the Consolidated Corporate Debtors are evident from the below mentioned list of proceedings initiated by it:

a. Resisting the Section 7 Applications for initiation of CIR Process against VIL and VTL: The Appellant, on behalf of the Corporate Debtor, had raised several grounds opposing the initiation of the CIR Process against VIL and VTL. The objections of the Appellant are evident and referred in the Adjudicating Authority Order dated 06.06.2018 and 11.06.2018 whereby the insolvency was admitted against VIL and VTL respectively. The Appellant is deliberately attempting to mislead this Tribunal by stating that he had co-operated and supported the insolvency proceedings of Consolidated Corporate Debtors;

b. Stay on the EOI process of VIL: the erstwhile Resolution Professional of VIL, namely Anuj Jain, had invited expression of interest ("EOIs") from prospective resolution applicants. However, the Appellant filed an application before the Adjudicating Authority seeking transfer of insolvency proceedings against

Videocon Group of Companies to a single bench of Adjudicating Authority. Due to this, the Adjudicating Authority had directed the then Resolution Professional of VIL, namely Mr. Anuj Jain, to temporarily defer the CIR Process of VIL and wait for the decision of the Adjudicating Authority;

c. Seeking inclusion of foreign oil and gas assets held by foreign subsidiaries of VIL in the CIR Process of VIL: More than a year after initiation of CIR Process against VIL and 12 group companies, Appellant filed two separate applications seeking similar reliefs, bearing MA No. 2385 of 2019 and MA No. 2620 of 2019, for inclusion of the foreign oil & gas assets held by the foreign incorporated subsidiaries of VIL in the CIR Process of VIL. It is pertinent to note that even during the consolidation proceedings leading upto the Order dated 8 August 2019, the Appellant did not raise any averment about inclusion of foreign oil and gas assets in the CIRP of Consolidated Corporate Debtors. These MAs came to be filed only after almost a year after initiation of CIR Process against VIL and 12 group companies, with the sole intention to delay and derail the CIRP of Consolidated Corporate Debtors. The said MAs were contested by the lenders, inter alia, on the ground of it being ultra vires the provisions of the Code inasmuch as the Code has no extra-territorial application over such foreign incorporated subsidiaries and the assets held in subsidiaries of Videocon Industries Limited. Despite this, the

Adjudicating Authority vide 12.02.2020 Adjudicating Authority Order (defined below) directed inclusion of the foreign oil and gas assets in the CIR Process of VIL. However, the said 12.02.2020 Adjudicating Authority Order was appealed against and was stayed by this Tribunal vide Order dated 19.02.2020;

d. Seeking consolidation of CIR Process of VIL with the CIR Process of VOVL: Appellant also filed an application being MA No 3944 of 2019 ("MA 3944") for consolidation of the CIR Process of VOVL with the CIR Process of the Consolidated Corporate Debtors, and as an interim measure, sought for a stay on the CIR Process of VOVL and the CIR Process of Consolidated Corporate Debtors.

e. Seeking withdrawal of the CIR Process of Consolidated Corporate Debtors: The Appellant had also submitted a Form FA dated August 31, 2020 to the Resolution Professional of Consolidated Corporate Debtors seeking withdrawal of the CIR Process of Consolidated Corporate Debtors. It was clarified to the Appellant at the 16 th meeting of the CoC held on 7 th September, 2020 that the Appellant's Form FA cannot be accepted since he was not an 'applicant' within the meaning of Section 12A of the IBC and Regulation 30A of the CIRP Regulations. Whilst the legal position was amply clear, the Appellant nevertheless filed an application before the Adjudicating Authority seeking directions to the Resolution Professional to consider its Form FA. It is submitted that eventually since the Respondent No. 2, to

maintain fairness and transparency in the process and keeping in mind the larger interest of all the stakeholders, decided to consider the Appellant's Withdrawal Proposal of the Appellant, this particular application was later withdrawn.

VI. The Respondent No. 2 contested the litigations initiated by the Appellant in good faith and on merits to ensure that the CIR Process of the Consolidated Corporate Debtors is not affected. Further, it is submitted that the financial creditors have also initiated recovery proceedings against the promoters, namely the Appellant herein and his brothers namely Mr. Pradeepkumar N. Dhoot ("Mr PN Dhoot") and Mr. Rajkumar N. Dhoot ("Mr. RN Dhoot"), who are also the ex-promoters of Videocon group companies and personal guarantors to the debts of the Consolidated Corporate Debtors, before the Debt Recovery Tribunals. SBI has also initiated personal insolvency proceedings against these promoters, and the insolvency petition filed by State Bank of India has been admitted against Mr. VN Dhoot vide order dated 01.09.2021. Even under these proceedings, the Appellant and his brothers, instead of clearing off the dues owed to the financial creditors, have employed all possible tactics to delay and frustrate the judicial process, including but not limited to:

A. Appellant and other related promoters, namely Mr. RN Dhoot and Mr. PN Dhoot, have been constantly delaying and frustrating the DRT recovery proceedings initiated against them by, inter alia, evading service;

B. Similarly, before the Adjudicating Authority in the personal insolvency proceedings, Mr. RN Dhoot attempted to evade service of the insolvency petition. Three separate personal insolvency proceedings were filed against three personal guarantors namely Mr. RN Dhoot, Mr. VN Dhoot and Mr. PN Dhoot before Adjudicating Authority Mumbai, which were pending before different benches Inspite of there being no correlation between the three personal insolvency proceedings, with the sole intention to cause further delay, Mr. RN Dhoot had also filed a transfer petition seeking transfer of all the personal insolvency applications before a single bench of the Mumbai Bench of the Adjudicating Authority that has been dealing with the CIR Process of Consolidated Corporate Debtors, on baseless and untenable grounds.

C. The Appellant herein has also attempted to evade service of the letter prepared by the Resolution Professional in accordance with Section 99 of the Code. Further, prior to that, on Adjudicating Authority reserving the order on the insolvency petition against the Appellant, the Appellant filed the petition before the Adjudicating Authority and sought unreserving of the order on the insolvency petition, but the insolvency petition stood allowed vide order dated 01.09.2021.

D. Furthermore, while the insolvency petitions were pending adjudication before the Adjudicating Authority, the Appellant,

Mr. RN Dhoot and Mr. PN Dhoot filed separate and independent Writ Petitions before the Hon'ble Supreme Court challenging the constitutionality of Personal Guarantor Insolvency Process under the Code. The said challenge was dismissed and the Personal Guarantor Insolvency Process was upheld.

VII. Further, it is interesting to note that in several of these pleadings as well as in their communications, the Appellant has made sweeping and inconsistent factual and legal statements/ averments. For instance, VOVL Limited (which is not part of the Consolidated Corporate Debtors) had approached the Hon'ble Supreme Court by filing a Writ Petition (bearing number Writ Petition(s) (Civil) No(s). 1138/2018) under Article 32 of the Constitution of India on September 17, 2018 ("Writ Petition"), seeking to ensure that CIR Process was not initiated against VOVL pursuant to the mandatory directions of the RBI in terms of its circular dated 12th February 2018. The Writ Petition was affirmed and executed by the Appellant herein on behalf of VOVL. It is submitted that the Writ Petition, inter alia, mentioned that the Oil & Gas Assets belonged to VOVL and further that initiating CIR Process pursuant to the 12th February, 2018 circular of RBI will erode the value of the assets of VOVL and would in turn be detrimental to the lenders of VOVL. It is pertinent to note that nowhere in the Writ Petition did VOVL take the ground that Oil & Gas Assets could not be proceeded against since they were the assets of VIL, and hence, covered under the moratorium declared

under Section 14 of the Code. Further, interestingly, the resolution professional of VIL was not involved by VOVL, the Appellant, Mr. P. N. Dhoot and Mr. R. N. Dhoot at any point in time in relation to the foreign Oil & Gas Assets. In the Writ Petition, VOVL did not raise any contention that the Oil & Gas Assets belong to VIL and hence should be resolved under the ongoing CIR Process of VIL (which had commenced on 6th June 2018) at the time of filing the Writ Petition. However, in July 2019, viz., after a lapse of almost 10 months from the date of filing of the Writ Petition, the Appellant filed MA 2385 of 2019 before the Adjudicating Authority praying that the foreign oil & gas assets belong to VIL.

VIII. The Resolution Professional placed 2 compliant resolution plans before the Respondent No. 2 for approval, out of which the Respondent No. 2 approved the resolution plan of Respondent No. 3 with 95.09% voting share. It is submitted that extensive discussions and deliberations were held with all resolution applicants.

IX. It is submitted that the Appellant cannot claim consideration of its 12A proposal as a matter of right. In fact, the very person who is directly responsible for the present condition of the Consolidated Corporate Debtors and the extensive losses being suffered by all the stakeholders of the Consolidated Corporate Debtors does not have any vested or fundamental right for this Appellant's Withdrawal Proposal or any settlement proposal being considered. The consideration of any proposal for withdrawal is solely and entirely

subject to the discretion of the Committee of Creditors under the scheme of the Code.

X. Despite the Appellant having no locus standi whatsoever to submit a proposal for withdrawal under Section 12A of the Code, the Respondent No. 2, with a view to ensure fairness and transparency in the process and to ensure that any decision of the Respondent No. 2 is not challenged as being arbitrary and also to avoid any further litigations in the CIR Process which could have resulted in further delay in the conclusion of the process, decided to consider the proposal of the Appellant. The Appellant's Withdrawal Proposal was discussed and deliberated at the 17th meeting of the CoC held on 23rd September, 2020. The Appellant herein and his brother, Mr. P.N. Dhoot (collectively referred to as the "Promoters") were requested to make a brief presentation to apprise the Respondent No. 2 briefly on the contents of the Appellant's Withdrawal Proposal. Several clarifications and queries were raised by few of the CoC members at the said 17th meeting of the CoC held on 23rd September, 2020. The queries were shared subsequently shared with the Promoters vide e-mail dated 24th September, 2020 by the Applicant and the Promoters provided their responses to the same vide an email dated 24th September, 2020. In this manner, the Appellant's Withdrawal Proposal was considered and deliberated upon by the CoC at various CoC meetings and was also assessed and examined for commercial feasibility and viability by the CoC

advisors. It is respectfully submitted that Dunn & Bradstreet in its Techno Economic Viability study of the Appellant's Withdrawal Proposal, after an in depth analysis of the economic viability of the proposal of the Appellant inter alia concluded *"Based on the above assessment carried out and its impact on the envisaged cash flows there may be a shortfall in the debt serviceability proposed under the restructuring scheme".*

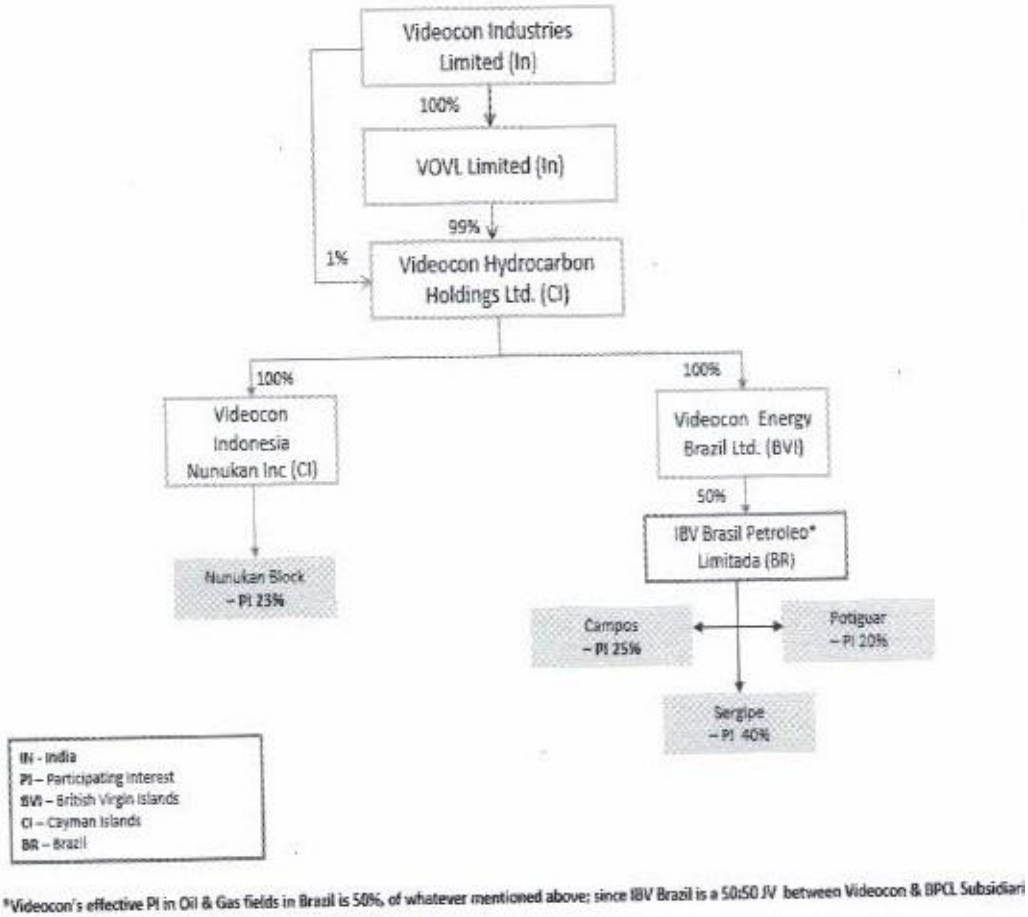
XI. It is submitted that the Respondent No. 2, after considering the Appellant's Withdrawal Proposal (including its commercial viability basis the documents and clarifications provided by the Promoters and the reports by the advisors of the CoC) rejected the Appellant's Withdrawal Proposal by an overwhelming majority of 98.14% voting share. It is respectfully submitted that except one financial creditor (namely ABG Shipyard Limited, which itself is a company undergoing liquidation currently), all the financial creditors who cast their vote rejected the Appellant's Withdrawal Proposal (including the dissenting financial creditors namely Bank of Maharashtra, IFCI Limited and SIDBI who have filed separate appeals against the Impugned Order). The Appellant is belatedly trying to challenge the rejection of his Appellant's Withdrawal Proposal with an ulterior motive only known to him.

XII. The Appellant has incorrectly, and in any case belatedly, sought to challenge the rejection of its 12A proposal by the CoC of the Consolidated Corporate Debtors vide the instant Appeal. It is

submitted that the Appellant in the instant Appeal has sought to indirectly bring into life a dead issue inasmuch as the Appellant's Withdrawal Proposal was rejected way back on 11.12.2020, while the present Appeal is filed on 31.07.2021, i.e., after lapse of more than 7 months. It is respectfully submitted that the background circumstances under which the Appeal has been filed by the Appellant cannot be lost sight of. The personal insolvency proceedings were pending at the time of the Appeal and the challenge before the Hon'ble Supreme Court had been dismissed. Therefore, it was a matter of time before the personal insolvency proceedings were initiated against the Appellant. Further, the government investigating agencies are investigating the acts of commission and omission by the Appellant in the affairs of the Consolidated Corporate Debtors. It is a matter of record that the Union of India, through Ministry of Corporate Affairs, has also initiated proceedings against the Appellant and other directors, promoters and key managerial personnel of the Consolidated Corporate Debtors under Sections 241 and 242 of the Companies Act, 2013 and orders have been passed by the Adjudicating Authority. Copy of the Order dated August 31, 2021 passed by the Adjudicating Authority Mumbai in the petition under Section 241-242 of the companies Act, 2013 granting interim reliefs. The Appellant who has failed to pay under the guarantees given by him, despite demands having been made against him, and has various cases of impropriety pending against

him and whose mismanagement can be attributed to have resulted in the CIRP of the Consolidated Corporate Debtor cannot be trusted with large claims of full repayment and maximisation of value of the Consolidated Corporate Debtors.

XIII. The holding structure chart of the foreign oil & gas assets of the Videocon group is as follows:



XIV. Initially, VIL and VOVL had availed of the financial assistance from Lenders as "obligor/ co-obligor". However, subsequently, since the Oil & Gas Assets were primarily held by the subsidiaries and VIL only had interest by virtue of its shareholding, VIL had itself

requested to be released from its obligation as a co-obligor. The letter dated 21 November 2016 has been signed by the Appellant himself. In its request, one of the reasons cited by VIL was that it was not in a good financial position and its precarious financial position may not yield the best returns from the asset monetization of the Oil & Gas Assets. In lieu, VIL executed corporate guarantee to secure the financial assistance granted to VOVL and VHHL. A follow up letter dated January 17, 2017 on the same lines was also written by VIL to IDBI Bank Limited which further strengthens this understanding of the parties. VOVL even responded to SBI Letter dated December 18, 2018 and requested SBI to initiate the process of assessing the valuation of Oil & Gas Assets and undertake monetisation, and VOVL is ready and willing to do necessary things in this regard. Thereafter, Deed of Undertaking dated January 9, 2019 from VOVL, VHHL, VEBL and VINI was also executed in SBI's favour in relation to mutual decision taken to initiate process of valuation and monetisation of certain Oil & Gas Assets.

XV. It is submitted that the 12.02.2020 Adjudicating Authority Order came to be passed on the MA 2385 filed by the Appellant more than a year after the initiation of the CIR Process against Consolidated Corporate Debtors. Appellant mischievously filed the MA 2385 seeking inclusion of foreign oil and gas assets held by the foreign incorporated subsidiaries of Videocon Group. The said application was vehemently opposed by SBI for the CoC before the Adjudicating

Authority. However, despite the strong objections to the inclusion of these assets, Adjudicating Authority vide Order dated 12.02.2020 directed the Resolution Professional of VIL to:

a. to consider and treat all assets, properties, rights, claims, benefits of VOVL, VHHL, VEBL and VINI, which are all separate and distinct legal entities and are direct and indirect subsidiaries of VIL, as assets and properties of VIL for the purpose of CIR Process; and

b. to include the assets, liabilities, claims of VOVL, VHHL, VEBL and VINI in the Information Memorandum ("IM") of VIL, and declared the moratorium imposed in relation to VIL under IBC to be applicable to the foreign oil & gas assets ("Foreign Oil & Gas Assets") and all the other rights and benefits held by or through VOVL, VHHL, VEBL and VINI.

XVI. On 19.02.2020, this Hon'ble Tribunal having found merit in the SBI appeal was pleased to stay the 12.02.2020 Adjudicating Authority Order and noted that:

> *"We have seen Explanation (b) below Section 18 of Insolvency and Bankruptcy Code, 2016 (IBC – in short). The Impugned Order dated 12.02.2020 is stayed till the next date."*

XVII. The claims filed by the creditors of VOVL and VHHL in the CIR Process of VIL are on account of corporate guarantees issued by VIL

and are separate and distinct from the claims of such creditors against the principal borrowers namely VOVL and VHHL. The consolidation order dated 8th August, 2019 passed by the Adjudicating Authority did not deal with the foreign Oil & Gas Assets. The Appellant is falsely contending that the order dated 8th August 2019 passed by the Adjudicating Authority proposed the consolidation of the foreign oil & gas assets. In fact, nowhere was the contention raised either by the financial creditors or the Appellant in the consolidation application for consolidation of the foreign Oil & Gas Assets. The order dated 8 th August, 2019 only considers the Ravva oil & gas field in which VIL directly holds a participating interest as being pooled together in the assets and liabilities for the purposes of consolidation.

> *"81. …….. The argument was that the assets of each companies are validly charged to secure the loans, and the secured creditors will be protected even if the companies go into liquidation, however, the liquidation route may affect the rights of the other stakeholders. Thus, the consolidation route is going to be more beneficial to all the stakeholders, comparing the liquidation route. At this juncture it is worth to devote few more*

lines that group companies have been created within the parameters of law as a 'special purpose vehicle' hardly holding independent valuable assets but burdened with liability, Which may cause disadvantage if segregated. But after consolidation all the liabilities pooled together can be satisfied up to large extent against the value of common pooled assets, which are otherwise in control of a single entity. In this group Licenses, Good-will, Permits, Trade-marks etc. are valuable but scattered all over the group entities. One more valuable asset is 'Oil & Gas field' acquired through joint venture and duly taken as a valuable property by the banks while granting loan. So all are to be consolidate which shall create a high value cumulative asset, going attract an equally high value Resolution Plan. Singly it is a far sight. Therefore apart from all other reasons inter-alia, the existence of Reeva oil-field in the common

pool of assets is a good reason for propounding 'Consolidation'."

XVIII. It is also stated that the Appellant has no locus standi to espouse issues purportedly at the behest of creditors of the Consolidated Corporate Debtors. The proceedings initiated against the Appellant and the personal guarantors are bona fide and in accordance with applicable laws.

C. <u>Submissions of the Respondent No.3/Successful Resolution Applicant (SRA):</u>

I. It is submitted that in view of the financial indiscipline shown by the appellant in repaying the debt owned by the CDs. SBI has filed a petition der section 7 of the Code against the CD/VIL being CP(IB) – 02 (MB)/2018 before the Adjudicating authority. It is an admitted fact that the appellant did not oppose the committing of default, consequently resulting the said petition being admitted by the Adjudicating Authority vide order dated 06.06.2018 and the CD/VIL entered CIRP. Further, it is also an admitted fact that SBI has filed an application being CP(IB) 1197 /MB/2020 under Section 95 of the Code against the Appellant (in his capacity as a personal guarantor) and that such application was allowed by the Adjudicating Authority vide order darted 01.09.2021. Thus, the Appellant has singly handedly driven the CDs into CIRP. Therefore, it is submitted that the present appeal smacks of

malafide and is liable to be dismissed at the threshold. In response to this baseless allegation, at the outset, the R-3 would like to place on record its financial proposal in the approved resolution plan:

a. Upfront payment of INR 200 crore to Financial creditors;
b. Upfront payment of INR 52 Crore towards the entire admitted workmen/employee dues.
c. Upfront payment of INR 10 Crore towards the admitted OCs. Payment of INR 2700 crore to FCs in the form of NCD carrying an annual interest coupon of 6.65%.
d. Equity holding at 8% in VIL to all FCs.
e. Cash reserves of VIL to accrue to the FCs.

II. Thereafter, the Adjudicating Authority passed approval order thereby approving the Resolution Plan. Pertinently, at no stage did the Appellant challenge the approval of the resolution plan before the Adjudicating Authority.

III. It is also submitted that the Appellant no standing to argue that the resolution plan is violative to Section 30(2) of the Code because the Appellant is neither an OC nor a FC of the CDs. Therefore, all the averments made by the Appellant in its appeal regarding the Resolution plan being discriminatory inter se the OCs and FCs is not tenable, baseless and liable to be rejected at the threshold. In any event, the resolution plan has adequate provisions adhering to the mandatory requirements of Section

30(2) and it is only upon examination of such provisions that the adjudicating Authority has approved the Resolution plan. In this regard it would not be out of place to mention that not even a single OC has challenged the resolution plan. Hence, the present appeal alleging that the resolution plan discriminates OCs is ex-facie meritless.

IV. Similarly, in so far as the allegations of the Appellant regarding the haricuts provided in the resolution plan to the OCs and the FCs is concerned, it is submitted that:

a. The Appellant has no locus to make such averment;
b. The commercial wisdom of CoC in accepting a particular haricut is not amenable to judicial review as settled by the Hon'ble Supreme Corut in a catena of decisions, and;
c. The Appellant never raised its objection on haircut provided in the Resolution plan before the Adjudicating Authority.

V. It is also submitted that the Appellant has never filed any application before the Adjudicating Authority opposing the approval of the Resolution plan of R-3 on the ground that the consolidated CIRPs ought to have included the foreign oil and gas assets. Hence, without prejudice to the below, it is submitted that the plea of Appellant on inclusion of foreign oil and gas assets is only an afterthought action and is liable to be rejected on this ground only. It is submitted that pursuant to the order dated

06.06.2018 admitting the VIL into CIRP, the Adjudicating Authority passed an order dated 08.08.2019 consolidating the CIRP of the CDs (Comprising of 13 companies) ("Consolidation order"). Pertinently, the following four entities and their assets were not included by the Adjudicating Authority in consolidated CIRPs:

a. VOVL Limited;

b. Videocon Hydrocarbon Holdings Limited;

c. Videocon Energy Brazil Limited, and;

d. Videocon Indonesia Nunakan Inc.

The above entities are collectively referred to as "four entities".

VI. The Adjudicating authority passed order dated 22.08.2019 in that MA No. 2385of 2019 in CP 2 of 2018 directing the status quo and prohibiting SBI from selling the foreign oil and gas assets until final disposal of the MA. Thereafter, vide order dated 12.02.2020, the Adjudicating Authority disposed the MA with a find that the foreign oil and gas assets held by the Four entities cannot be treated separately and must be seen as the property of VIL for the purpose of the consolidated CIRP. SBI challenged the final order by filing CA(AT) (Ins) No. 299 of 2020 before this Appellate Tribunal. The said CA was listed on 19.02.2020, on which date this Appellate Tribunal was pleased to say the final order and restored the interim order. In view of the above, the consolidated CIRP proceeded without inclusion of the four

entities or their assets. After passing of the order dated 19.02.2020, the Appellant took no steps whatsoever to vacate the stay on the final order. In fact, it is evident from the order dated 08.09.2020 passed in CA(AT) (Ins) No. 299 of 2020 stay was passed by this Appellate Tribunal that the pleadings were not completed. In the meanwhile, the consolidated CIRPs concluded by way of approval of the Resolution plan of R-3 in terms of the approval order. Most pertinently, while CA(AT) (Ins) No. 299 of 2020 was pending, the Appellant continued to participate in the consolidated CIRPs and has also filed his proposal under Section 12A of the Code (which admittedly also does not include the four entities or their assets – a fact that has been suppressed in the present appeal). Hence, the Appellant by way of his conduct, acquiesced to the consolidated CIRPs and is now estopped from arguing that such consolidated CIRPs sought to have included the foreign oil and gas assets of the four entities.

VII. It is also submitted that the Appellant is merely raising the aforesaid issue to sabotage and derail the CIRP upon approval of the resolution plan. Hence, the appellant's averment that foreign assets of four entities ought to have been considered in the consolidated CIRPs is plainly meritless and liable to be dismissed.

VIII. The Section 12A proposal of the Appellant was placed for voting during the 19th meeting of the CoC 11.11.2020 along with the Resolution plan of the Respondent No.3 and the one other

resolution plan filed by the V-shape investment management limited. Upon consideration, the CoC has rejected the section 12A proposal. Admittedly the above decision of CoC has not been impugned by the Appellant before the adjudicating Authority, a fact which has been suppressed in the present appeal. Hence, the appellant has no standing and case of action to seek the prayer for reconsideration of the 12A proposal by CoC when, in fact, such prayer was never made before the Adjudicating Authority. This apart, it is settled law that the decision of CoC to approve or reject a Section 12A proposal is part of its commercial wisdom, which is not amenable to judicial review. Hence, all the grounds raised by the Appellant in the present appeal regarding non-consideration of its Section 12A proposal are liable to be rejected.

C. Analysis of facts, law and reasons:

CA(AT) (Ins) No. 545 of 2021

19. This is a case of 'Trademark License Agreement' (TLA) dated 07.07.2005 executed between the Appellant i.e Electrolux Home Products INC, Singapore and Electolux Kelvitor Limited which was merged into the Corporate Debtor under the scheme of merger and amalgamation. This case relates to the aforesaid agreement, the TLA specified that the Appellant was entitled to terminate the TLA, if the CD underwent any event that resulted in the Dhoot family no longer being

in control and the Appellants were entitled to terminate the TLA once CD is admitted to CIRP as Dhoot family does not remain in control of CD. The Petition seeking to admit the CD into CIRP, was filed on 01.01.2018 and CIRP was initiated from 11.06.2018 *(page 55 of the Appeal Paper book) in CA(AT) (Ins) No. 529 of 2021.* There were exchanged of letters between the Appellant and the RP on the validity and lawfulness of the termination of the TLA. It is also observed that the Appellant is pursuing with the CD from 05.06.2018 for termination of the contract in terms of TLA continuously and filed MA No.527 of 2019 before the Adjudicating Authority on 05.02.2019 seeking inter alia a declaration that the termination of the TLA was valid and direction that RP be prohibited from using the trademark in any manner. Moreover, it appears from elaborate submissions of both the parties that CD has stopped the manufacturing of this product from 2018 itself.

However, the Adjudicating Authority in IA No. 527/2019 has adjudged the **agreement dispute** in its impugned order and the same is stated below vide para 11 appearing in appeal paper book in CA(AT)(Ins) No.503 of 2021:

"11. As far as IA 527 2019, praying for use of Brand name "Kelvinator" is concerned, we are of the considered view that the Agreement should continue for at least a year from the date of approval of the plan as per the existing Terms and Conditions as a transitional arrangement and subsequently it is upto both the parties to decide on the same as per their mutual understanding".

20. However, the Hon'ble Supreme Court in *Civil Appeal No. 3045 of 2020 in Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd.* has held vide para 27 that NCLT does not have any residuary jurisdiction to entertain the contractual dispute and the same is stated below**:**

> "Para 27. - *It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT."*

All this reflects that the Adjudicating Authority has made an error of judgment by permitting Agreement during transitional arrangement for a year or so & thereafter parties to decide as per their mutual understanding. Hence, it is prudent to remand the matter back to CoC for a review in accordance with the law.

Hence, this alone is the ground which requires setting aside of the impugned order of the Adjudicating Authority.

CA(AT) (Ins) No. 650 of 2021

21. What is revealed from the submission of the Appellant that all assets owned by Videocon group, particularly, foreign oil and gas assets are not included in the information memorandum as also no valuation thereof has been considered while the claim of lenders of foreign oil and gas assets of Rs.23,120.90 Crore being considered as claims without considering the corresponding assets- foreign oil and gas assets for which the borrowings were used. This has resulted into lower valuation and the secured creditors are getting less than 5% of their claimed amount and there is a haircut of 95.85% to all its creditors as per para 5 of the impugned order. The RP should have included these foreign oil and gas assets appropriately. He has also stated that the RP and their appointed agency were concerned only with drawing their remuneration to the extent of Rs.1.5Crore per month without discharging their duties. The RP has summarily rejected his stand and has cited explanation – b to Section 18 of the Code specifically which excludes the assets of any

Indian and foreign subsidiary of the CD from the purview of the terms Assets as mentioned in the section 18 of the Code.

22. The SRA through its ld. SR. counsel has unambiguously submitted that the Appellant has not opposed the committing of default when the application was filed by the Bank for initiation of CIRP. The Appellant has no locus standi to file the appeal at this stage and challenge the haircut. The Hon'ble Apex has repeatedly viewed that the commercial wisdom of the CoC is not amenable to judicial review. He has no authority to challenge the haircut.

23. However, the CoCs has categorically stated that Videocon Industries limited (VIL) and Videocon telecommunication ltd (VTL) were two largest accounts that were classified as NPA by banks on account of defaults and in respect of whom RBI had provided specific instructions as per Banking Regulations Act, 1949 for initiating insolvency proceedings. The RBI has sent a letter to SBI in its capacity as lead bank to resolve their debts outside the scheme of the Code till December, 13,2017 failing with insolvency proceedings under the Code are to be initiated against the companies before 31.12.2017. As a result of non-resolving the continuing default, the CIRP petition was filed on 01.01.2018 against VIL and VTL ; they are blaming the poor management of the appellant leading to such situation who is obstructing to frustrate and derail the CIRP and thwart all attempts of a Successful Resolution of a consolidated CD. It has also been stated by the CoCs that it is a matter of record the applicants act of

commission and omission while in control of the consolidated CDs are being investigated by several investigating agencies and the proposal under Section 12A of the Code was already rejected by the CoCs. The Appellants are challenging the impugned order just for reviving its Section 12A (of IBC) proposal. It has also been stated by them that it is the commercial wisdom of the CoCs to manage the CIRP the way they think fit and proper. The Appellant's Section 12A proposal was rejected by CoCs by a majority of 98.14% voting share. The Ld. Sr. Counsel further stated that their existed no legal or statutory requirements to trade the foreign oil and gas assets as part of the Consolidated CIRP process. However, in 'finance and accounts' there is a matching concept of liability and its corresponding assets wherever liability is considered, the corresponding assets is suppose to exist in the form of the assets or the liability / borrowings which have been used to finance the losses. In any case, commercial wisdom of CoC is non-justifiable as already laid down by multiple judgments of Hon'ble Supreme Court. Hence, this appeal deserves to be dismissed and is dismissed.

CA(AT) (Ins) No. 503 of 2021
With
CA(AT) (Ins) No. 505 of 2021
With
CA(AT) (Ins) No. 529 of 2021

24. There are several issues as enunciated in the submissions that whether CoCs got correct fact and other related inputs to apply commercial wisdom? The related issue is that commercial decisions are based on the input which it gets from the professionals. In other words,

it is based on GIGO (Garbage in Garbage out) system. It has also been brought to the notice of the Bench that the concerns raised by Dissenting Financial Creditors in CA(AT) (Ins) No. 503, 505 & 529 of 2021 regarding nondisclosure of their respective share of the liquidation value may have resulted in them not being able to take a proper and prudent decision on the resolution plan. In addition, had they been known , the correct share of the liquidation value, they should have persuaded the Assenting Financial Creditors not to accept the resolution plan with such huge haircut which is in the nature of unprecedented haircut resulting in loss to the banks/financial institutions handling public money. What has revealed from the 3 banks/ financial institutions that the resolution plan provide the amounts to the appellant banks is less than the liquidation value which the bank will receive otherwise and therefore, contrary to Section 30 of the Code. Some discrepancies exist between Form-H and distribution excel sheet shared by SBI Caps. As it looks to us that nobody has disputed this aspect of difference in figure except that the RP has stated that these are estimated amount to be paid to the DFC as per Code and the CIRP Regulations. The RP has washed off his hands that he is not responsible for the figure provided by SBI Caps, while he himself has given estimated figure and has undertaken to provide correct figure at a later date. This does not seem to be appealing.

25. It is also revealed that the amounts to be paid to the banks will be determined at the time of payout in itself, is misconceived. Simply

stating everywhere that it shall not be less than the amount to be paid to such creditors in accordance with Section 53 of the Code in the event of liquidation is just washing off his hands. It is also a fact that the direction by the Adjudicating Authority to the SRA to pay the DFC by cash instead of NCD amounts to modification of the Resolution Plan. This is a domain of the CoC & not Adjudicating Authority. Resolution Plan does not provide for 'upfront' payment in priority to the DFC as provided in Section 30 of the Code R/w IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) Regulations 38. Para 3.5 of the resolution plan proposes that NCD will be issued to the DFC redeemable after a significant period of time around five years which does not qualify as 'payment' in terms of Section 30 (2)(b) of the Code. Perception of breach of confidentiality in relation to liquidation value is not ruled out.

26. All of them have suggested either for setting aside the impugned order or remitting back the resolution plan for reconsideration and compliances by CoC.

27. While the RP has submitted that in any case the Adjudicating Authority has already directed upfront payment in cash to DFCs so why should the plan send back to the CoC. He has also stated that SBICaps was the process advisor appointed by the CoC and hence, RP is not responsible. The distribution mechanism is set to have been done assuming that all Financial creditor will vote in favour of the Resolution plan.

28. The SRA has not disputed the haircut of over 95% to the creditors but has submitted that the Financial Creditors dissenting the resolution plan are constituting less than 5% voting share in the CoC and has thus no value to derail the CIRP. It has also stated that Form-H filed by the RP mentioned that the DFC will get Rs.105.23 Crore whereas as per SBICAPs details the DFCs were entitled to Rs.114.21 Crore. It has stated that the SBI Caps is not the registered valuer appointed under the Code, hence, their figures cannot be relied upon. They have also stated that the modification of the resolution plan is not changing the commercials of the plan and has also stated that the commercial wisdom of CoC is non-justifiable as per the law establish now.

29. what the SRA believes that haircut has no relevance , only relevance is liquidation value and resolution plan value.

30. While the AFCs constituting 94.98% of the CoCs of consolidated Videocon group of companies (Consolidated CDs), out of 95.09% who voted in favour of the Resolution plan, has mentioned several reasons to remand the matter back to the CoC for its reconsideration and even gone ahead to state that the CoC and the RP to conduct a fresh process of inviting fresh expression of interest and resolution plan from all interested Resolution Applicants etc., to safeguard the interest of all stakeholders and the public money. It has accepted the fact that the significant observations regarding the low value of the resolution plan and the haircut of such a high magnitude being suffered by various

classes of stakeholders including the MSME, backbone of the Indian economy and other operational creditors under the Resolution plan requires to be reviewed by the CoC. It has also been stated in an unambiguous terms that they wish to give due consideration of observations in the impugned order and the stay order passed by this Tribunal on 19.07.2021. The CoC, majority of which are public sector banks and financial institutions dealing with public money is acting as the custodian of public trust and discharging statutory role. The CoC is vested with a duty of trust and care. The CoC power is not without responsibility and even Hon'ble Apex Court has made the CoCs decision on commercial matters as non-justiciable. Keeping in view these factors in mind, the public sector banks and financial institutions etc., constituting approx.95% of the CoC (out of 95.09% voted in favour) have resolved to request this Tribunal to remand the matter back to the CoC for its reconsideration through an affidavit. We agree that the CoC, if it has power to approve the plan, has also power to reconsider and review its own decisions on Resolution Plan. Power to approve, no doubt, carries with it power to reconsider. As stated supra, the 'Board of Directors' of the Companies who approves the proposal also at a later date review and even annulles the approvals in the course of the implementations, if observed and pointed out by the implementers ,the difficulty and its economic or otherwise impact. What to say of the 'Board of Directors' in corporate management even the shareholders sometimes review its own approvals ,based on Board Of Directors

recommendations and if required , passes by appropriate majority under the relevant Act, the same approval is revoked.

31. Generally, in the Executive Management has a different perception as it is being seen in the Executive Management. It is the prevalent practice that in service law, whoever is the Appointing Authority can normally also be Disciplinary Authority unless delegated to a lower level by the same Appointing Authority. Appointment committee of the cabinet, if, approves a particular appointment then resignation is also accepted normally by the same authority or to a delegated authority and that delegation is also given by the same Appointment Committee of the Cabinet.

32. The same 'Board of Directors' of the Company registered under the Companies Act, 1956/2013 approves a particular proposal based on input available at that point of time but reverses its decision/ approval at a subsequent board meeting may be due to getting additional input to the proposal which were not available at that point of time, or it may be due to certain changes in the economic policy of the government or due to certain changes in the market environment in which the industry/ organization operates.

33. Be that as it may, at a later stage when projects approvals go to implementing authority then if observed certain practical problems which has not been perceived by the Board of Director at that point of time also involves a reversal of the approval of the original board resolution. As we all understand that Board of Directors are the

management of the Company and are the key managerial personnel for the management of the Company.

34. There are instances when a particular proposal is disapproved initially by the Board of Directors of the Company, may be placed again before the Board and because of new material contained it may be reconsidered and approved by the Board. So it cannot be held that Board of Directors are not empowered to review their proposals whether approved or disapproved at a particular point of time. Shareholders are the owners of the Company and generally they are the appointing authority of the Director either in the Annual general meeting of the Company or in the Extra ordinary general meeting of the Company. Based on Board approved resolution as per the requirement of the Companies Act, whether it is of Companies Act, 1956 or Companies Act, 2013. Certain resolutions require approval of the shareholders as per provisions of the Companies Act. These shareholders based on the wisdom approves a particular proposal or disapproves a particular proposal at a particular point of time. They also can change their approval based on input provided at a later stage by a majority votes or otherwise or may be if it is proposed by requisite majority as per provisions of the Companies Act by convening Extraordinary General Meeting or placing it before the Annual General Meeting.

35. We all talk of going concern concepts under the Code and this concept is meant for giving a life to the company under a resolution. With the initiation of CIRP, the management changes instead of Board

of Directors, it is the CoC who takes over the management of the Company. The role of RP has already been prescribed under the Code and the Regulations and for specific actions where the approval of the management is required, he has to go to the CoC alongwith these proposals for approval. It is the CoC who has got the final decision making authority. The Hon'ble Apex Court has already held in CoC of Essar Steel (supra) that the commercial wisdom of the CoC cannot be adjudicated by the Adjudicating Authority. As far as commercial decisions are concerned, they are the supreme authority, they have the full power to decide one way or other any resolution based on input provided to them or otherwise. It is a settled law that commercial wisdom is non-justifiable and that's why the commercial decisions are beyond the purview of the judicial wisdom in case falling under the Code. Needless to mention that the CoCs is to decide the fate of the Corporate Debtor as they are the one who are going to bear the loss of insolvency and who has sufficient expertise in dealing with revival and rehabilitation of the Corporate Debtor.

36. It is a settled law that under the Code commercial wisdom is separated from judicial wisdom and certain acts of CoC are non-justiciable. The Adjudicating Authority does not have power to modify and change the plan as held by Hon'ble Apex Court in the case of *K. Shasidhar (supra) and CoC of Essar Steel (supra).*

37. What is being perceived repeatedly by the Apex Court that commercial wisdom are totally in the domain of CoC and these business

decisions taken by CoCs are non-justiciable by the Adjudicating Authority or this Tribunal. The Code under Section 31 (1) r/w Section 30 (2) has clearly and specifically provided that the Adjudicating Authority is to see that the resolution plan as approved by the CoC meets the requirements as referred to in sub-Section 2 of Section 30 of the Code and if the Adjudicating Authority is satisfied that the laid down criteria are complied with in the resolution plan then they can approve the plan. So, the Adjudicating Authority was supposed to see whether the DFCs have been paid not less than the amount to be paid to such creditors in accordance with Section 53(1) in the event of a liquidation of the CD. He was not supposed to suggest any modification on the plan which it has been done in the impugned order dated 08.06.2021 in para 24, 5 & 6. These suggestions are falling in the domain of CoCs and the Adjudicating Authority should have considered to send back for re-consideration to the CoC. For brevity and clarity Section 30 & 31 of the Code is reproduced below for ready reference:

Section 30: Submission of resolution plan.

> *(1) A resolution applicant may submit a resolution plan 1 [along with an affidavit stating that he is eligible1A under section 29A] to the resolution professional prepared on the basis of the information memorandum.*

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

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

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

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

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

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be

paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor. Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Explanation — For the purpose 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 56 [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 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

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

committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A: Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]

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

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

Provided that the resolution applicant shall not have a right to vote at the meeting of the

committee of creditors unless such resolution applicant is also a financial creditor.

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

Section 31: Approval of resolution plan.

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

[Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this subsection, 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 sub-section (1) or within such

period as provided for in such law, whichever is later.

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

38. The CoCs are the best judge to analyze, pick up and take prudent commercial decision for the business but they are also subjected to test of prudence in order to ensure fairness and transparency.

39. The level of haircut being unprecedented and involving large public interest involving thousands of crore of public money requires perhaps deep thinking and cool calculation by the CoC and as a result of which perhaps, they have taken cognizance of certain judicial wisdom in a true spirit and accordingly wishes to review their own decision. In any case, when they are reviewing their own decisions the same has to go through the deliberation, public grudge, loss of public money and perhaps revaluation.

40. The magic concepts of accounting that for every liability there may be some assets because Balance Sheet is nothing but reflects the financial health of the company and in an ordinary language they can

say, it is a Sources & Application of Funds as on a particular date. It has been pointed out that they have considered huge liability on account of oil and gas assets at a foreign land but without considering their investment value in the form of Shares existing the Balance Sheet.

41. In the judicial forum once an order is passed by a particular authority for, an example, by the Adjudicating Authority, it cannot review its order or judgment except as permitted under Section 420(2) of the companies Act, 2013 r/w Rule 154 of the NCLT, Rules 2016. The same judicial authority can only rectify any mistake apparent from record either its own motion or brought to its notice by the parties. So the power of review under judicial arena lies with the higher judiciary. While in case of commercial decision of the 'Board of Director', the same approving authority can review its own decision within the frame work or boundary of the law laid down.

42. The Adjudicating Authority failed to consider the contentions of the Appellants as a result of which the impugned order is ex facie illegal, bad in law and contrary to the settled provisions of the Code and the Regulations framed thereunder. The Adjudicating Authority having a pivotal role in the scheme of Code. Whether the Adjudicating Authority has approved the resolution plan mechanically and failed to exercise its jurisdiction under Section 31 of the Code? The Resolution Plan has provided a haircut of almost 95%, i.e. a meagre amount of Rs.2,900 Crore for an admitted liability of Rs.65,000 Crore against amount claimed as per para 51 of the Appeal Paper Book / Form – H Rs. 71,433

Crore. The said waiver is over Rs.62,000 Crore, even the claim of the financial creditors have been settled merely 5%. The Adjudicating Authority has no doubt raised a question whether there has been a leak of liquidation value in the resolution process. Concerns raised by the lenders regarding distribution mechanism provided to the Dissenting Financial Creditors in the resolution plan and the contentious issue of distribution amount. All these are not complied with in accordance with Section 31(1) which is a requirement for satisfaction of Adjudicating Authority. Section 30(2) of the Code has also not been complied with. The said plan provides for payment to the Dissenting Financial Creditors by way of NCD and Equities which is impermissible as per the Code. Paras 3.5.4, & 3.5.2 of the Resolution Plan (at page 237 -239 of the Appeal paper book) are not in accordance with the directions given by the Hon'ble Supreme Court in **the case of Jaypee Kensington Boulevard Apartment Welfare Association and Ors. Vs. NBCC (India) Ltd. Ors., (Civil Appeal No. 339 of 2020 decided on 24.03.2021) which are as follows:**

> *"124. To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of clause (b) of sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of sub-clause(ii) of*

clause (b) of sub-section (2) of Section 30 (read with Section 53), in our view, the expression "payment" only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution."

43. The impugned order of the Adjudicating Authority dated 08.06.2021 as stated below:

"OBSERVATIONS OF THE ADJUDICATING AUTHORITY

1. *As per the CoC approved Resolution Plan, Assenting Secured Financial Creditors would get only 4.89%, Dissenting Secured Financial Creditors would get only 4.56%, Assenting Unsecured Financial Creditors would get only very meagre amount of 0.62%, Dissenting Unsecured Financial Creditors would get "NIL/ ZERO" amount and Operational Creditors would also get a very meagre amount of only 0.72%. Out of total claim amount of Rupees 71,433.75 Crore, claims admitted are for Rs 64,838.63 Cores and the plan is approved for an amount of only Rs 2962.02 Crore which is only 4.15% of the total outstanding claim amount and the*

total hair cut to all the creditors is 95.85%. Therefore, the Successful Resolution Applicant is paying almost nothing and 99.28% hair cut is provided for Operational Creditors (Hair cut or Tonsure, Total Shave). During the Course of hearing it is also submitted that voluminous number of Operational Creditors are also MSME and if they are paid only 0.72 % of their admitted claim amount, in the near future many of these Operational Creditors may have to face Insolvency Proceedings which may be inevitable, therefore this Adjudicating Authority suggests, requests both CoC and the Successful Resolution Applicant to increase the pay-out amount to these Operational Creditors especially MSMEs as this is the First Group Consolidation Resolution Plan of 13 companies having large number of MSMEs.

2. *Further it is also observed that by just paying only Rs. 262 Cores (8.84% of total plan value) (Cash balance available with the Corporate Debtors is approx.. Rs. 200 Crore) the*

Successful Resolution Applicant will get possession of all the 13 Corporate Debtors to run these units and the first payment of Rs. 200 Crore as part redemption amount of NCDs will be paid within 25 months from the closing date and the balance amount of Rs.6,25,00,00,000/ each is spread over in 4 instalments starting from 3rd year onwards up to sixth year from the closing date and the interest rate for the NCDs is also a nominal of only 6.65% P.A payable annually. It may also be noted that at the time of granting loan, restructuring, approving the resolution plan with such a huge hair cut also the financial institutions, Committee of Creditors consisting 35 members exercised their Commercial Wisdom. Since this is the Commercial Wisdom of the COC and as per the various judgements of the Hon'ble Supreme Court and by following the judicial precedents, discipline the Adjudicating Authority approves the resolution plan of the Successful Resolution Applicant with a suggestion, request to both CoC and the

Successful Resolution Applicant to increase the pay-out amount to these Operational Creditors especially MSMEs.

9. The registered valuers have valued the assets of the 13 companies situated throughout the country and the 13 companies have varied business interests, products, segments viz oil and gas assets, Consumer Electronics and Home Appliances such as manufacturing Air Conditioners, Refrigerators, LED/ LCD TVs, Washing Machines, Air Coolers, providing Telecom Services, digital solutions, Real Estate, Electronic Retail Chain, Owner of Two Premium Brands etc. Surprisingly the Resolution Applicant also valued all the assets and liabilities of all the 13 companies and arrived at almost the same value of the registered valuers. As per the CIRP Regulations the Liquidation Value and Fair Market Value is kept as confidential and informed to the COC members only at the time of finalising the resolution plan and even in the present case the resolution bids are opened in the 15th CoC meeting held on 02.09.2020

wherein Liquidation Value and Fair Market Value was informed to the members of CoC. Therefore, even if the confidentiality clause is in existence, in view of the facts and circumstances as discussed above a doubt arises upon the confidentiality clause being in real time use therefore, we request IBBI to examine this issue in depth so as to ensure the confidentiality clause is followed unscruplessley, without any compromise in letter and spirit by all the concerned parties, entities connected in the CIRP. If not IBBI can frame appropriate regulations, safeguards there by the maximisation of value of the assets of the Corporate Debtor(s) would further increase which in turn will benefit all the stakeholders. Since IBC is a nascent code we feel "this type of input may be useful to the IBBI as well as to the Government to frame appropriate Regulations, Rules, etc.

10. It is also observed as a sample from the 10, 11, 12 CoC minutes, Members of CoC attended is 26, 26 & 28 respectively whereas the Applicant as Chair and the Applicant's

Authorised Representative from Deloitte Touche Tohmastsu India LLP were 22, 20 & 20 representatives respectively in addition to the Applicant's Legal Counsel. Such a large number of Authorised Representative for the Applicant indicates either he is not fully prepared or monitory benefit (fees) to these Representatives. Therefore, we request IBBI to examine this issue as well and appropriate guidelines may be issued.

24. In the light of above stated discussions and the law has been settled, we find that the proposed Resolution Plan meets the requirements of Section 30(2) of the Code and Regulations 37, 38, 38(1A) and 39 (4) of the Regulations. The Resolution Plan is not found in contravention of any of the provisions of Section 29A of the Code and is in accordance with Law. Hence the same deserves approval with following observation and direction to the CoC to make payments as per liquidation value to all the dissenting Financial Creditors in cash upfront before any payment is made to assenting Financial Creditors as per the

judgment of the Hon'ble Supreme Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs NBCC (India) Ltd. & Ors. matter.

The above para of the impugned order reflects that the Adjudicating Authority has made certain observations and require reconsideration by the CoC so the resolution plan should have gone for a review to the CoC as it fails to meet the criteria of Section 30(2)(b) r/w Section 31 of the Code.

44. The Hon'ble Supreme Court in Sakri Vasu s. State of UP & Ors. (2008) 2 SCC 409, case compilation Vol.I, Page 10-18, para 18, 21 @ pg. 15) has even affirmed this understanding and held as under:

"It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

21.An express grant of statutory powers carries with it by necessary implication the authority to use all reasonable means to make such grant effective."

It is well settled principle that an authority who has the power to take a decision, has equally the power to review the said decision. (see Dhikpathy Vs. Chairman Chennai Port Trust, 2001 SCC OnLine Mad 154 (case compilation, VI, Page 19-28, para 19@ page.26-27). Similarly, the Hon'ble Allahabad High Court in Duli Chand Vs. State of Uttar Pradesh and Ors., Writ C- No. 45851 of 2011 (case Compilation, V-I, page 29-30, relevant para @pg.30) has held that "it is a trite law that power to do also includes the power to undo". Similar, the Hon'ble Bombay High Court in Rajesh Hansraj Chopra Vs. the Competent Authority & Ors., 2001 SCC Online Bom 1145, (Case Compilation, V.I Page 68-72, 13@ pg. 71-72) had held that *"Section 21 of the General Clauses Act is a general provision how to interpret provisions of an enactment regulation or rules where certain powers are conferred on certain authority to issue an order and the extent to which such power could be exercised. In doing so, such authority is conferred with power to modify, amend or to alter it".*

Relying on the same principle of S.21, Hon'ble Bombay High Court in Sunil Gayaprasad Mishra Vs. Rashtra Sant, 2012 (5) AllMR 581 (case compilation, Vol-I, page 73-97, para 61-62 @pg. 93-94) (SLP dismissed by Supreme Court), wherein the approval once granted to the recommendations of the selection committee to appoint a teacher, was considered to be capable of being reviewed and even withdrawn. Relevant portion of the judgment is quoted below:

"61. By the very nature of the power that is conferred in these authorities, it is apparent that it coupled with a duty i.e. to maintain discipline and order of highest nature in the academic field. If that is the obligation to the society as a

whole that these authorities have to discharge, then, to hold that they will be powerless or that they do not possess any implied or incidental power to withdraw or cancel the approval, would make the M.U.Act unworkable and its provisions meaningless. In several cases of this nature, the Hon'ble Supreme Cot has applied doctrine and principle of implied power. That principle is founded on the premises that conferment of a statutory power would necessarily take within its import he authority to use all means to make effective and meaningful.(…)"

45. All these reflect that power to reconsider any decision is within the domain of CoC and even Hon'ble Apex Court in Catena of judgment held that the commercial wisdom of the CoCs is non justifiable and hence, it is in the domain of CoC, particularly, if at a later stage, it finds in public interest and the amount of loss which the public exchequer is to bear with such unprecedented haircut in such a large fund employment, it is in the fitness of thing that the proposal can be remanded back to the CoC, particularly, in view of their own affidavit to review their decision. **The CoC is not functus –officio on the approval of the Resolution plan and accordingly, the judicial precedents clearly established that the Adjudicating Authority and this Tribunal is competent to send back the Resolution plan to the CoC for reconsideration.**

To supplement this the following judicial precedents are cited below:

"The Hon'ble Supreme Court in the case of Jaypee Kensingon Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Limited and Ors., 2021 SCC OnLine SC 253 has held that in case a resolution plan requires modification, the Adjudicating Authority (which would include this Tribunal by virtue of the scheme of the Code) must send back the resolution plan to the CoC to consider the modifications, so as to afford an opportunity to resolution applicant to modify the plan, and CoC may then re-consider the plan and vote upon the same.

> *"127. The submissions made on behalf of the IRP in this regard are correct that if the Adjudicating Authority was of the view that the plan did not meet with any particular requirement it could have only sent it back to CoC to consider the proposed modifications, so as to afford an opportunity to the resolution applicant to modify the plan and to the CoC to reconsider and vote upon the same".*
>
> *…129. The upshot of the discussion foregoing is that though the Adjudicating Authority has not erred in disapproving the treatment of dissenting financial creditor like ICICI Bank in the resolution plan but, has erred in modifying the terms of the resolution*

plan and in not sending the matter back to the Committee of Creditors for reconsideration while extending an opportunity to the resolution applicant to make the necessary modifications."

Similarly understanding reflects even from the Hon'ble Supreme Court decision in Committee of Creditors of Essar Steel India Ltd, Through authorized signatory Vs. Satish Kumar Gupta & Ors. (2020) 8 SCC 53 wherein it had referred and affirmed this power to remand back as under:

"….Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the

Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

46. Hence, we are of the considered view that the resolution plan is not complying with Section 30(2)(b) of the Code r/w Section 31 of the Code. Hence, it can be remanded back to the CoC.

47. **Incidentally, we have also observed that Section 31(4) of the Code states as follows:**

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

48. Section 5 of the Competition Act, 2002 states as follows:

> ***"Section 5 in the Competition Act, 2002***
>
> *5. Combination.—**The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—***
>
> *(a) any acquisition where—*

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

(A) either, in India, the assets of the value of more than rupees one thousand crore or turnover more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover of more than fifteen hundred million US dollars; or

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars; or

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—

(A) either in India, the assets of the value of more than rupees one thousand crore or turnover of more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or

(ii) the group, to which enterprise whose control has been acquired, or is being acquired would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars; or

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thousand crore or turnover of more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover of more than fifteen hundred million US dollars; or

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars. Explanation.—For the purposes of this section,—

(a) "control" includes controlling the affairs or management by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to—

(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3."

49. Vide para 4 of the Resolution Plan on overview of the implementing entity / resolution applicant, it reveals that the resolution applicants group turnover is Rs.84,447 crore in the year 2019-2020 (para 4.2.2 of the Resolution Plan- page 253 of CA(AT) (Ins) No. 503 of 2021). Vide para 7.1.2 of the Resolution Plan, the Resolution Applicant has accepted the requirement of approval / permission of CCI in accordance with the Code prior to the approval of CoC. In the 19th CoC meeting held on 11.11.2020, the CoC were apprised of acknowledgment copy of the applications filed with the CCI seeking CCI approval of the resolution under the present case. BOB enquired for such requirements also. However, we could not find even in 20th & 21st CoC meeting (page 199-322 of the Appeal paper book) whether such approval from CCI has been obtained or not, while the Resolution Plan was approved by the CoC in the 19th CoC meeting. Hence, it is very much clear that prior approval of the CCI has not been obtained as per proviso to section 31(4) of the Code. This reflects that the approved Resolution Plan requires review and reconsideration for the legal compliances. Statutory compliances does not fall under the commercial wisdom of the CoC.

Hence, the statutory compliances as mandated by proviso to Section 31 (4), have to be ensured before the Resolution Plan is approved by CoC.

D. Conclusion

50. In view of the above stated analysis of facts and law, we have come to the conclusion that Section 30 (2)(b) of the Code has not been complied with and hence, the approval of the Resolution Plan is not in accordance with Section 31 of the Code. Accordingly, the approval of Resolution Plan by the CoC as well as Adjudicating Authority is set aside and the matter is remitted back to CoC for completion of the process relating to CIRP in accordance with the provisions of the Code. All IAs stands disposed of.

Appeal CA(AT) (Ins) No. 650 of 2021 dismissed whereas Appeal CA(AT) (Ins) No. 503, 505, 529, & 545 of 2021 allowed as indicated above.

No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

05th January, 2022
New Delhi,
Raushan.K