



REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 1808 of 2020

KALYANI TRANSCO ... APPELLANT

VERSUS

**M/S.BHUSHAN POWER AND
STEEL LTD. & ORS. ... RESPONDENTS**

WITH

CIVIL APPEAL NOS. 2192-2193 OF 2020

CIVIL APPEAL NO. 3784 OF 2020

CIVIL APPEAL NO. 2225 OF 2020

CIVIL APPEAL NO. 3020 OF 2020

CIVIL APPEAL NO. 668 OF 2021

CIVIL APPEAL NO. 6390 OF 2021

J U D G M E N T

BELA M. TRIVEDI, J.

1. This batch of Appeals stems from the common impugned Judgment and Order dated 17.02.2020 passed by the

National Company Law Appellate Tribunal (For short NCLAT), New Delhi in the Company Appeals filed by the various parties.

(I) THE DETAILS AND CATEGORIES OF THE APPEALS: -

- (i)** Civil Appeal No. 1808 of 2020 has been filed by the Kalyani Transco, an operational creditor of the Corporate Debtor (For short CD) M/s. Bhushan Power and Steel Limited (For short BPSL) challenging the impugned Judgment and Order dated 17.02.2020 passed by the NCLAT in Company Appeal (AT) (Insolvency) No. 1035 of 2019.
- (ii)** Civil Appeal Nos. 2192-2193 of 2020 have been filed by Mr. Sanjay Singal & Another, the erstwhile promoters of CD challenging the impugned Judgment and Order in Company Appeal (AT) (Insolvency) No. 1034 of 2019 and the Company Appeal (AT) (Insolvency) No. 957 of 2019.
- (iii)** Civil Appeal No. 3784 of 2020 has been filed by the Government of Odisha & Others challenging the impugned Judgment and Order in Company Appeal (AT) (Insolvency) No. 1461 of 2019.
- (iv)** Civil Appeal No. 2225 of 2020 has been filed by the Jaldhi Overseas Pte. Limited, an Operational

Creditor of CD challenging the impugned Judgment and Order in Company Appeal (AT) (Insolvency) No. 1055 of 2019.

- (v) Civil Appeal No. 3020 of 2020 has been filed by M/s. Medi Carrier Private Limited, an operational creditor of CD challenging the impugned Judgment and Order in Company Appeal (AT) Insolvency No. 1074 of 2020.
- (vi) Civil Appeal No. 668 of 2021 has been filed by the State of Odisha (was not party before the NCLAT) challenging the impugned Judgment and Order in Company Appeal (AT) (Insolvency) No. 1035 of 2019.
- (vii) Civil Appeal No. 6390 of 2021 has been filed by CJ Darcl Logistics Limited, an operational creditor challenging the impugned Judgment and Order in Company Appeal (AT) Insolvency No. 1126 of 2019.

(II) FACTUAL BACKGROUND

- 2.** After the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), the Banking Regulation Act, 1949 was amended w.e.f. 04.05.2017, to enable the RBI to issue directions to the Indian Banks to mandatorily initiate the Corporate Insolvency Resolution Process (for short CIRP).

The RBI vide its Circular dated 13.06.2017, therefore identified 12 big accounts for resolution, infamously known as the “dirty dozen”, which included BPSL, constituting about 25% of total non-performing assets in the country, for immediate admission under the IBC. The Factual matrix of the CIRP proceedings against BPSL may be summarized as follows: -

- (i) The CIRP proceedings were triggered against BPSL at the instance of Punjab National Bank, which filed a Company Petition being C.A. (IB) No. 202 (PB) of 2017 before the NCLT under the provisions contained in the IBC. The said petition was admitted on 26.07.2017.
- (ii) As per Section 15 of IBC, the Interim Resolution Professional (IRP) invited claims on 28.07.2017 from all the stakeholders.
- (iii) The IRP received various claims, out of which the Resolution Professional admitted claims to the tune of INR 4,72,04,51,78,073.88 (Rupees Forty-Seven Thousand Two Hundred and Four Crores Fifty-One Lakhs Seventy-Eight Thousand and Seventy-Three and Eighty-Eight Paise) in respect of Financial Creditors, and admitted claims to the tune of INR 6,21,37,61,735 (Rupees Six Hundred and Twenty-

One Crores Thirty-Seven Lakhs Sixty-One Thousand Seven Hundred and Thirty-Five), in respect of Operational Creditors.

- (iv) The Committee of Creditors (CoC) in their first meeting held on 01.09.2017 confirmed the appointment of IRP as the Resolution Professional.
- (v) Pursuant to the Advertisement dated 21.09.2017, the Prospective Resolution Applicants – JSW, Tata Steel and Liberty House submitted their respective Resolution Plans.
- (vi) Thereafter, certain litigations - applications/ appeals came to be filed by the Liberty House and Tata Steels before the NCLT and NCLAT, wherein certain orders were passed, not very relevant to the issues we are dealing with.
- (vii) On account of the promulgation of IBC (Amendment) Ordinance, 2017, on 23.11.2017, the CoC required certain affidavits/ undertakings from the Prospective Resolution Applicants, particularly in terms of Section 29A.
- (viii) After multiple rounds of negotiations and deliberations, all the three Prospective Resolution Applicants had submitted their improved/ revised

Resolution Plans within the deadline stipulated by the NCLAT vide order dated 06.08.2018.

- (ix) In the 18th Meeting held on 14.08.2018 the plans submitted by the Liberty House, the Tata Steel and the JSW were evaluated by the CoC, as per the evaluation matrix formulated by it, and the JSW was found to have scored the highest in terms of the said evaluation matrix. However, the CoC did not declare H-1 and H-2.
- (x) It appears that pursuant to the further negotiations between the Core Committee comprising of small group of lenders, JSW submitted the Consolidated Resolution Plan on 03.10.2018. The said Consolidated Plan was circulated by the Resolution Professional to the members of CoC on 05.10.2018 and uploaded in the Virtual Data room.
- (xi) Thereafter, the Resolution Professional having received a requisition from some of the Banks, he called for a meeting of CoC on 10.10.2018 for consideration and approval of Consolidated Resolution Plan.
- (xii) Pursuant to the discussion held in the meeting on 10.10.2018, JSW submitted a letter dated 10.10.2018 (Addendum Letter) amending and

clarifying certain terms of the Consolidated Resolution Plan, in view of the Amendments made in the CIRP Regulations, vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Fourth Amendment Regulations, 2018.

- (xiii) According to the Resolution Professional, the consolidated Plan as amended by the Addendum letter, was circulated to the members of the CoC, and the same was considered by the CoC in its 19th Meeting held on 10.10.2018.
- (xiv) Pursuant to the discussion in 19th Meeting, the said Consolidated Plan with Addendum Letter for approval was put for e-voting between 15.10.2015, 5 PM and 16.10.2015, 5 PM on Central Depository Services (India) Limited.
- (xv) According to the Resolution Professional, the e-voting resulted in the approval of the Consolidated Resolution Plan, as amended by Addendum Letter of JSW by the requisite majority of CoC.
- (xvi) The Resolution Professional thereafter filed a Company Application being no. 254 (PB)/2019 on 14.02.2019 under Section 30(6) and 31(1) of the IBC, read with Regulation 39(4) of the Insolvency

and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, (hereinafter referred to as the Regulations, 2016), with a principal prayer of accepting the RP approved by the CoC, submitted by the JSW.

(xvii) Pending the said proceedings, the CBI on 05.04.2019 registered an FIR bearing No. RCBD1/2019/E/2002 against BPSL, its Directors and others under Section 120B read with Sections 420, 468, 471, 477A IBC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. On the basis of the said FIR, the Directorate of Enforcement, New Delhi, registered the case being ECIR/DLZO-I/02/2019 on 25.04.2019 for the offences under the Prevention of Money Laundering Act, 2002 (PMLA).

(xviii) There were other many Company Applications filed by the erstwhile Directors and by some operational Creditors before the NCLT in the said Company Petition.

(xix) The NCLT vide the common Judgment and Order dated 05.09.2019 dismissed the Company Applications filed by the erstwhile Directors, and

approved the Resolution Plan of JSW, subject to the condition nos. (a) to (k) contained in Para-128 of the said Judgment. The said Para-128 is reproduced as under:

“128. As a sequel of the above discussion, CA No. 254(PB)/2019 is allowed and the resolution plan of JSW-H1 Resolution Plan Applicant is accepted. The objections raised by the Ex-Directors cum Promoters of the Corporate Debtor and Operational Creditors are hereby over-ruled. However, the acceptance and approval of the resolution plan shall be subject to the following;

a) The amount due to the operational creditors under the resolution plan must be paid in accordance with the amended Section 30 (2) of the Code as the amendment expressly provides that it would be applicable to all applications pending for approval of the resolution plan like the one in hand.

b) C.A. No. 327(PB)/2019 with a prayer for placing the settlement proposal dated 20.02.2019 before the CoC is hereby rejected.

c) CA No. 286(PB)/2019 filed by the erstwhile directors Mr. Sanjay Singhal and Mrs. Aarti Singhal seeking copies of the resolution plan is dismissed with a cost of Rs. 1 /- lac to be paid personally by Mr. Sanjay Singal and Ms. Aarti Singal in equal share.

d) The resolution plan would be binding on the corporate debtor, its creditors, guarantors, members, employees and other stakeholders. The reduction of share capital of the corporate debtor as contemplated by the resolution plan would take effect without any further deed or act on the part of the corporate debtor and/ or its constitutes.

e) We also approve the appointment of Monitoring Agency from the date of this order

until the closing date. Accordingly, the CoC and the RP would continue as Monitoring Agency.

f) The power of the Board of Directors of the Corporate Debtor shall remain suspended until the closing date.

g) Various reliefs sought from the statutory authorities under the Income Tax Act, 1961, Ministry of Corporate Affairs, Department of Registration and Stamps, Reserve Bank of India and others are also disposed of. We do not feel persuaded to accept the prayer made in the resolution plan yet the resolution plan applicant may file appropriate applications before the competent authorities which would be considered in accordance with law because it would not be competent for the Adjudicating Authority-NCLT to enter into any such area for granting relaxation, concession or waiver which is wholly within the domain of competent authorities.

h) It is needless to clarify that Section 30(2)(f) of the Code mandates that the Resolution plan should not be against any provisions of the existing law. The resolution applicant, therefore, shall adhere to all the applicable laws for the time being in force.

i) The criminal proceedings initiated against the erstwhile Members of the Board of Directors and others shall not effect the JSW-H1 Resolution Plan Applicant or the implementation of the resolution plan by the Monitoring Agency comprising of CoC and RP. We leave it open to the Members of the CoC to file appropriate applications if criminal proceedings result in recovery of money which has been siphoned of or on account of tainted transactions or fabrication as contemplated under the various provisions of the Code or any other law. Those applications shall be considered in accordance with the prevalent law.

j) The RP is directed to redistribute the profits earned by running the Corporate Debtor during

the Corporate Insolvency Resolution Process in accordance with the judgment of the Hon'ble NCLAT rendered in the case of Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors., Company Appeal (AT) (Ins.) No. 242 of 2019 decided on 04.07.2019 and the action to be taken by the RP is evident from the reading of para 211 of the said judgment .

k) The cases in which the Adjudicating Authority or the Appellate Authority could not decide the claim on merit, all such Applicants may raise the issue before an appropriate forum in terms of Section 60(6) of the Code. The other 'Financial Creditors/Operational Creditors' would not be entitled any remedy under Section 60 (6) of the Code.”

- (xx)** The Successful Resolution Applicant-JSW, challenged some of the conditions mentioned in said order passed by NCLT approving its Resolution Plan, by filing the Appeal being Company Appeal No. 957 of 2019, under Section 61 of IBC.
- (xxi)** After the approval of the plan by the NCLT as aforesaid, the Directorate of Enforcement of Central Government (ED), passed an order (PAO) on 10.10.2019 provisionally attaching the assets of the CD-BPSL under Section 5 of the Prevention of Money Laundering Act, 2002 (PMLA).
- (xxii)** The said PAO having been challenged by JSW before NCLAT, in the Company Appeal No. 957 of 2019, the NCLAT stayed the PAO as well as the

Resolution Plan so far it related to the payment of creditors, vide the Order dated 14.10.2019.

(xxiii) The CoC also challenged the PAO in Supreme Court by filing SLP (C) Nos. 29327-29328 of 2019, wherein this Court vide the Order dated 18.12.2019 stayed the PAO dated 10.10.2019.

(xxiv) Several Company Appeals also came to be filed by various parties before the NCLAT challenging the order dated 05.09.2019 passed by NCLT.

(xxv) The NCLAT vide the impugned Judgment and Order dated 17.02.2020 approved the judgment and order dated 05.09.2020 passed by the NCLT, subject to the modifications/clarifications made by it in its impugned judgment. The NCLAT, thereby allowed the Company Appeal filed by the JSW, and dismissed the Company Appeals filed by 'Mr. Sanjay Singhal,' 'Kalyani Transco,' 'Jaldhi Overseas,' 'Medi Carrier,' 'CJ Darcl Logistics' and 'State of Odisha & Others.'

(xxvi) The relevant conditions imposed by the NCLT and modified by the NCLAT may be glanced in a tabulated form as under:

<u>ORIGINAL CONDITIONS BY NCLT</u>	<u>MODIFIED CONDITIONS BY NCLAT</u>
E- We also approve the appointment of Monitoring	1. Reference to the 'Monitoring Agency' in the

<p>Agency from the date of this order until the closing date. Accordingly, the CoC and the RP would continue as Monitoring Agency.</p>	<p>impugned order may be read as a reference to the Steering Committee and the Monitoring Professional as set out in Resolution plan and that the implementation of the Resolution Plan until the Effective Date would be by the 'Reconstituted Board', also in terms of the Resolution Plan.</p> <p>2. Actions taken by the 'Monitoring Agency' as constituted in the impugned order in interim to be deemed to have been valid, without requiring any further action/ratification from the 'Reconstituted Board'</p>
<p>F- The power of the Board of Directors of the Corporate Debtor shall remain suspended until the closing date.</p>	<p>1. Board of Directors shall remain suspended until the closing date only to ensure that the previous suspended board of directors does not stand revived on account of the completion of the CIR Process, and does not interfere with the interim management mechanism in the Resolution Plan.</p>
<p>G-Various reliefs sought from the statutory authorities under the Income Tax Act, 1961, Ministry of Corporate Affairs, Department of Registration and Stamps, Reserve Bank of India and others are also disposed of.</p>	<p>1. All penalties, interest, delayed payment charges, any other liabilities for any non-compliance with statutory obligations including taxes, including delays in filing returns or payment of tax dues, against the Company shall</p>

<p>We do not feel persuaded to accept the prayer made in the resolution plan yet the resolution plan applicant may file appropriate applications before the competent authorities which would be considered in accordance with law because it would not be competent for the Adjudicating Authority-NCLT to enter into any such area for granting relaxation, concession or waiver which is wholly within the domain of competent authorities.</p>	<p>stand settled in accordance with the provisions of this plan as approved by NCLT.</p>
<p>I The criminal proceedings initiated against the erstwhile Members of the Board of Directors and others shall not affect the JSW-HI Resolution Plan Applicant or the implementation of the resolution plan by the Monitoring Agency comprising of CoC and RP. We leave it open to the Members of the CoC to file appropriate applications if <i>criminal proceedings result in recovery of money which has been siphoned off or on account of tainted transactions or fabrication as contemplated under the various provisions of the Code or any other law.</i> Those applications shall be considered in accordance with the prevalent law.</p>	<p>we set aside the condition stipulated in second part of para 128(i) of the impugned order, regarding monies recovered from tainted and other such transactions, as being contrary to the agreed position in terms of para 13 of the Addendum Letter, which forms a part of the Resolution Plan.</p>

<p>J- The RP is directed to redistribute the profits earned by running the Corporate Debtor during the Corporate Insolvency Resolution Process in accordance with the judgment of the <i>Hon'ble NCLAT rendered in the case of Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors., Company Appeal (AT) (Ins.) No. 242 of 2019 decided on 04.07.2019</i> and the action to be taken by the RP is evident from the reading of para 211 of the said judgment</p>	<p>The Monitoring Committee with the help of the 'Resolution Professional' will now go through the RPF issued in terms of Section 25 of IBC and as consented to by the Resolution Applicant JSW will make distribution of profit accordingly.</p>
<p>K- The cases in which the Adjudicating Authority. or the Appellate Authority could not decide the claim on merit, all such Applicants may raise the issue before an appropriate forum in terms of Section 60(6) of the Code. The other Financial Creditors/Operational Creditors' would not be entitled any remedy under Section 60 (6) of the Code.</p>	<p>This condition requires consideration in view of decision of the Hon'ble Supreme Court in "Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. - 2019 SCC OnLine SC 1478. This condition being against the provision of law is set aside as <i>The Appellant being the 'Successful Resolution Applicant' cannot be asked to face with undecided claims after the Resolution Plan' submitted by him and accepted by the 'Committee of Creditors' as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a</i></p>

	<i>prospective resolution applicant who successfully takes over the business of the 'Corporate Debtor', as held by the Hon'ble Supreme Court.</i>
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3. Being aggrieved by the said impugned Judgment and Order of NCLAT, these appeals have been filed by the Appellants as stated hereinabove.
4. This Court while admitting the Civil Appeal No. 1808/2020 filed by Kalyani Transco, and other appeals filed by the other parties, had vide order dated 06.03.2020, recorded the statement of learned Senior Advocate Dr. A.M. Singhvi appearing for the CoC as under: -

“UPON hearing the counsel the court made the following

O R D E R

The appeals are admitted.

Dr. A.M. Singhvi, learned senior counsel appearing for the Committee of Creditors states that in case he receives money, he will return the said amount within two months, if the appeal succeeds.

List all the matters together on 15.04.2020.”

5. It appears that JSW, which was Respondent No. 2 in the SLP (C) No. 29327-29328 of 2019 filed by the CoC, filed an Application being I.A. No. 47947/2020 on 20.03.2020

seeking clarification of the order dated 06.03.2020 to the extent that JSW was not obligated to implement the Resolution Plan during pendency of the SLPs filed by the CoC, Kalyani Transco, Sanjay Singal and others against the Judgment dated 17.02.2020 passed by NCLAT. The said I.A. No. 47947/2020 was resisted by the CoC by filing a detailed reply contending *inter alia* that JSW was attempting to seek a stay on the implementation of the plan under the garb of clarification of the order dated 06.03.2020. The CoC in the said reply made some serious allegations of misuse of process of court against JSW and sought direction against JSW to implement the plan as per its statutory obligations under the IBC.

6. It further appears that an Application being No. 42114 of 2021 dated 01.06.2024 came to be filed in SLP (C) Nos. 29327-29328/ 2019 by the CoC for placing on record certain additional facts. The said Application was filed along with an affidavit filed by one Mr. Satishan, Assistant General Manager of SBI, under the purported authority granted to him vide the 13th Meeting of CoC of BPSL dated 29.05.2018. In the said Application, the Applicant after quoting the aforesaid Order dated 06.03.2020, further stated in Para No.5 to 10 as under: -

“5. Subsequently, during the hearing on June 10, 2020, on JSW's Application seeking clarification, this Hon'ble Court even categorically observed that there is no stay against the implementation of the Resolution Plan.

6. That while the Connected Appeals are pending adjudication, certain material developments have occurred in the insolvency of the Corporate Debtor which are required to be brought to the notice of this Hon'ble Court:

(a) Pursuant to the afore-stated March 06, 2020 order of this Hon'ble Court, the Petitioner CoC and JSW engaged in regular discussions and deliberations on the terms of the resolution plan and its unconditional nature requiring immediate implementation. All these correspondences have been brought on record earlier and are not being repeated herein for the sake of brevity;

(b) Vide letter dated February 26, 2021, JSW has expressed its desire to implement the Resolution Plan in furtherance of the Order dated March 6, 2020 of this Hon'ble Court and offered to deposit the amount of Rs. 19,350,00,00,000 (Rupees Nineteen Thousand Three Hundred and Fifty Crores) ("Upfront Payment Amount" as defined in the Resolution Plan) within 30 days of acceptance of this letter in writing by the Financial Creditors, in an escrow account.

(c) This letter has been accepted by CoC with 97.25% of the lenders (by value) confirming their acceptance (and no dissent), and the Resolution Plan is currently proposed to be implemented in accordance with the same.

(d) It is submitted that the said deposit of the Upfront Payment Amount in the escrow account by JS Wand implementation of the Resolution Plan is

in consonance of this Hon'ble Court order dated March 06, 2020, and would, in any manner, be subject to the order of this Hon'ble Court inasmuch as:

(i) In the event of any order of the Hon'ble Supreme Court allowing the appeals filed against the Hon'ble Appellate Tribunal judgment dated February 17, 2020 leading to setting aside of the approved Resolution Plan for any reason whatsoever, or denying the benefit under section 32A of the Code to the Corporate Debtor/ Resolution Applicant which would result in ED's claim against Corporate Debtor not being set aside or which would result in the attachment of the assets of the Corporate Debtor by the ED continuing, the Upfront Payment Amount shall be refunded by the CoC to the Resolution Applicant - JSW within the time period provided for in the March 06, 2020 Order, and that in case of such refund, the ownership, control and possession of Corporate Debtor will be handed over back by JSW to the Financial Creditors. The aforesaid is being further specified in an escrow agreement proposed to be signed inter alia between the financial creditor and the Resolution Applicant.

(ii) In the event this Hon'ble Court in the matter grants the benefit under section 32A of the Code to the Corporate Debtor/ Resolution Applicant, which would result in ED's claim against Corporate Debtor being set aside and which would result in the attachment of the assets of the Corporate Debtor by the ED being set aside, the CoC will have no obligation to refund the Upfront Payment Amount to the Resolution Applicant.

(iii) The implementation of the Resolution Plan would be without prejudice to the rights, claims, entitlements and contentions of the CoC as well as the Resolution Applicant, including in the matters pending before this Hon'ble Court.

7. That, thus, the implementation of the Resolution Plan is not prejudicial to any of the stakeholders of the Corporate Debtor and is fully subject to the proceedings before this Hon'ble Court.

8. It is submitted that the Resolution Plan of JSW was approved by the CoC in October 2018, by the Hon'ble Adjudicating Authority on September 5, 2019, and subsequently even by the Hon'ble Appellate Tribunal on February 17, 2020. Hence, it is imperative that the Resolution Plan be put to implementation without any further delay especially when this Hon'ble Court has observed during the hearing on June 10, 2020, on the Application of JSW, that there is no stay against implementation of the Resolution Plan.

9. It is submitted that the pursuant to the non-implementation of the Resolution Plan, the Corporate Debtor on and from the approval of the Resolution Plan by the Hon'ble NCLAT on February 17, 2020 has been operated and managed by a Monitoring Professional (the erstwhile Resolution Professional), who is supported by an O&M Agency which conducts the business operations of the Company, as per the Resolution Plan. An interim board of directors with a limited role has also been appointed by the steering committee of lenders as per the Resolution Plan. However, the provisions of the Resolution Plan in this respect were intended to operate for only a limited period of 30 days from the approval of the Resolution Plan by the relevant Tribunal after which the Resolution Applicant was supposed to take-over the Corporate

Debtor. The continuance of this ad-hoc mechanism of interim management for more than an entire year, while being in accordance with the Resolution Plan, is not in the interest of all stakeholders given the size and business of the Corporate Debtor. It is submitted therefore that it is in the interest of all stakeholders that the Resolution Plan is implemented in full at the earliest.

10. The Petitioner craves leave of this Hon'ble Court to refer to and rely on the averments, contents and documents annexed to the said SLP and the subsequent filings by the Petitioner thereunder as an integral part and parcel of the present application and the contents are not being repeated herein for the sake of brevity."

- 7.** The Civil Appeal Nos. 14503-14504 of 2024 arising out of SLP (C) Nos. 29327-29328 of 2019 filed by the Committee of Creditors against ED and Civil Appeal No. 3362 of 2020 filed by the ED against the JSW and Others, came to be disposed of in terms of the Order dated 11.12.2024, which is reproduced hereunder:

"1. The Civil Appeals arising out of SLP(C) Nos. 29327-29328/2019 have been filed by the Committee of Creditors against the Directorate of Enforcement and Others challenging the impugned order dated 10.10.2019 passed by the Directorate of Enforcement (hereinafter referred to as the E.D.) in exercise of the powers conferred under the Second proviso to sub-section(1) of Section 5 of the Prevention of Money Laundering Act 2002 (hereinafter referred to as the PMLA), ordering provisional attachment of the properties as detailed in the Table mentioned therein,

of the Corporate Debtor (Bhushan Power and Steel Ltd.), being the proceeds of crime as defined under Section 2(1)(u) of the PMLA, and challenging the impugned judgment dated 14.10.2019 passed by the National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as the NCLAT) in Company Appeal (AT)(Insolvency) No. 957/2019, staying the said order dated 10.10.2019 passed by the E.D. The Civil Appeal No. 3362 of 2020 has been filed by the E.D. against JSW Steel Ltd. and Others, challenging the impugned judgment dated 17.02.2020 passed by the NCLAT in the said Company Appeal (AT)(Insolvency) No.957/2019, approving the Resolution Plan submitted by the successful Resolution Applicant JSW Steel Ltd. with modification/clarification as mentioned therein.

2. These Civil Appeals were tagged along with the Civil Appeal No.1808/2020 filed by Kalyani Transco against Bhushan Power and Steel Ltd. and Others along with the other Civil Appeals.

3. The issue involved in the instant Appeals pertained to the jurisdiction of the E.D. to attach the properties of the Corporate Debtor, which was undergoing Corporate Insolvency Resolution Process, particularly in the light of Section 32A of the Insolvency and Bankruptcy Code, 2016 (IBC).

4. Today, the learned counsel Mr. Zoheb Hussain and learned S.G. Mr. Tushar Mehta appearing for the E.D. have submitted the Affidavit dated 11.12.2022 of Mr. Dipin Goel, Deputy Director, Directorate of Enforcement, New Delhi, and have prayed to dispose of these Appeals in the light of the said Affidavit. Mr. Zoheb Hussain also took the Court to the provisions contained in the sub-section(2) of Section 32A of the IBC and in sub-section(8) of Section 8 of the PMLA read with Rule 3A of the Prevention of Money Laundering(Restoration of Property) Rules, 2016 (hereinafter referred to as the said Rules) to submit that the NCLT had approved the Resolution Plan vide the order dated 05.09.2019 which was under challenge before the NCLAT in the Appeals filed by various

parties, and in the meantime the competent authority of the PMLA vide the order dated 10.10.2019 had provisionally attached the properties of the Corporate Debtor. He further submitted that Section 32A came to be inserted in the IBC with effect from 28.12.2019, which did not have the retrospective effect, and hence, in view of the peculiar facts and circumstances of the case and without prejudice to the rights and contentions of the E.D. with regard to the investigation of the case registered against the accused-Promoters of the Corporate Debtor-Bhushan Power and Steel Ltd. and Others, the successful Resolution Applicant be permitted to take control of the attached properties treating the same as the restitution under Section 8(8) of the PMLA read with Rule 3A of the said Rules.

5. The learned senior counsel Mr. Abhishek Manu Singhvi appearing for the CoC and learned senior advocate Mr. Neeraj Kishan Kaul appearing for the successful Resolution Applicant have also stated that they have no objection if these Appeals are disposed of as prayed for in the light of the said Affidavit filed on behalf of the E.D.

6. In view of the above submissions made by the learned counsel for the E.D. and the learned counsel for the CoC and for the successful Resolution Applicant JSW, following order is passed without expressing any opinion on the merits of the Appeals and without prejudice to the rights and contentions of the respective parties in the connected Appeals and other proceedings, including the right of the E.D. to investigate into the cases registered against the accused-Promoters of the Corporate Debtor, under the PMLA.

ORDER

(i) The Appellant-E.D. is directed to handover and the Respondent successful Resolution Applicant JSW is directed to take over the control of the properties of Corporate Debtor-Bhushan Power and Steel Ltd., provisionally attached vide the order dated 10.10.2019

passed by the E.D., immediately in view of Section 8(8) of the PMLA read with Rule 3A of the said Rules.

(ii) It is clarified that this order is passed with the consensus of the learned counsels appearing for the concerned parties, considering the peculiar facts and circumstances of the cases, more particularly the fact that the order of provisional attachment was passed by the E.D. after the Adjudicating Authority i.e., NCLT had approved the Resolution Plan submitted by the successful Resolution Applicant.

(iii) It is further clarified that the Court has not expressed any opinion on the interpretation of Section 32A (2) of IBC or on the powers of the E.D. to attach the property of the Corporate Debtor which is undergoing the Corporate Insolvency Resolution Process, or on any other legal issue involved in the other connected Appeals which are pending for consideration before this Court.

7. All the three Appeals stand disposed of in terms of the aforesaid order.

8. Pending application(s), if any, shall also disposed of.”

(III) PRELIMINARY OBJECTIONS

- 8.** The learned Senior Advocate Mr. Neeraj Kishan Kaul appearing for the SRA/JSW and the learned Senior Advocate Mr. Abhishek Manu Singhvi appearing for the CoC at the outset had raised the preliminary objections with regard to the maintainability of the Appeals filed at the instance of the Appellants who are the Ex-Promoters, Operational Creditors and the Government Authorities under Section 62 of IBC. According to them, an Appeal under Section 62 could be filed only by a “person

aggrieved” against an order passed by the NCLAT, and that too on a question of law arising out of such order. They further submitted that the Ex-Promoters have raised the issues in their Appeals with regard to implementation of the Resolution Plan which issues were not raised even before the NCLAT, and even otherwise the said issues are beyond the scope of Section 62. According to them, in any case the SRA-JSW has already implemented the Resolution Plan successfully by making payments to the Financial Creditors on 26.03.2021 and by making payments to the Operational Creditors in March 2022. They also submitted that the Appellant Kalyani Transco and other Operational Creditors could no longer be said to be the “person aggrieved,” once they have now accepted their payments under the said Resolution Plan. As regards the Appeals filed by the Appellant State of Odisha, it was sought to be submitted by them that the State of Odisha did not file its claim with respect to Entry tax dues before the Resolution Professional, did not approach the NCLT and had filed its Appeal against the Plan Approval Order before the NCLAT. Similarly, the State of Odisha had failed to raise its claim with regard to the Electricity dues before the Resolution Professional, did not file any proceeding before NCLT and NCLAT, and for the first time has filed

the present Appeal before this Court, which may not be entertained.

- 9.** Apropos the preliminary objections raised by the learned Senior Advocates appearing for the respondents-JSW and CoC, it may be noted that the issue of maintainability of the Appeals has to be decided by the Court considering the position of the parties at the time of the institution of the Appeals, as to whether the Appellants could be said to be the “persons aggrieved” as contemplated in Section 62 of the IBC. In our opinion, the recent decision of Three-judge Bench in case of ***Glas Trust Company LLC Vs. Byju Raveendran and Others***¹ clinches the issue as to who could be said to be an “aggrieved person” for filing an Appeal before the Supreme Court and before the NCLAT. It has been held: -

“75. The provision stipulates that “any person” who is aggrieved by the order of the National Company Law Appellate Tribunal may file an appeal before the Supreme Court within the prescribed limitation period. Similar language is used in section 61 of the Insolvency and Bankruptcy Code, which provides for appeals to the National Company Law Appellate Tribunal from orders of the National Company Law Tribunal. The use of the phrase “any person aggrieved” indicates that there is no rigid locus requirement to institute an appeal challenging an order of the National Company Law Tribunal, before the National Company Law Appellate Tribunal or an order of the National Company Law Appellate Tribunal, before this court. Any person who

¹ 2024 SCC OnLine SC 3032

is aggrieved by the order may institute an appeal, and nothing in the provision restricts the phrase to only the applicant creditor and the corporate debtor. As noted above, once the corporate insolvency resolution process is initiated, the proceedings are no longer restricted to the individual applicant creditor and the corporate debtor but rather become collective proceedings (in rem), where all creditors, such as the appellant, are necessary stakeholders.....”

- 10.** Thus, the use of the phrase “any person aggrieved” indicates that there is no rigid locus requirement to institute an Appeal challenging the order of NCLT before the NCLAT, or an order of NCLAT before this Court. Any person who is aggrieved by the order may institute an Appeal. Once the Corporate Insolvency Resolution Process is initiated, the proceedings are no longer restricted to any individual Applicant Creditor or to the Corporate Debtor, but rather they become collective proceedings in rem, where all the creditors and the Ex-Directors would be necessary stakeholders. Therefore, the Appellants who are the operational creditors, and the erstwhile Promoters, being important stakeholders, and whose Company Appeals have been dismissed by the NCLAT vide the impugned judgment, would certainly be the persons aggrieved entitled to file Appeals before this Court under Section 62 of the IBC. Moreover, they have also raised number of questions of law in the instant

appeals, which although will be considered in the later part of this judgment, nonetheless, they being the persons aggrieved, the Appeals at their instance are certainly maintainable.

- 11.** This is also most appropriate juncture to deal with the submissions made by the learned Advocates appearing for the Appellants in these Appeals with regard to the maintainability of the Company Appeal No.957 of 2019 filed by JSW before the NCLAT challenging some of the conditions imposed by the NCLT in the order dated 05.09.2019 while approving the Resolution Plan of JSW. According to them, the said Company Appeal of JSW was not maintainable, as none of the grounds mentioned in Section 61(3) of IBC existed. Since the Resolution Plan of JSW was approved, JSW could not be said to be the 'person aggrieved' for filing the Appeal under Section 61, and if it was against the order of NCLT approving the Plan, the grounds specified in sub-section (3) must exist.
- 12.** In order to appreciate the said submissions, the relevant part of Section 61 under which the respondent JSW had filed the Company Appeal before the NCLAT, is reproduced for ready reference:

“61. Appeals and Appellate Authority.

(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any

person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2).....

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

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

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

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

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

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

13. This Court in *K. Sashidhar Vs. Indian Overseas Bank and Others*², while considering the jurisdiction of NCLAT as an Appellate Authority under Section 61 held as under:

“57. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an “order passed by the adjudicating authority (NCLT)”, which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction

² (2019) 12 SCC 150

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

- 14.** In the instant case, indubitably, the NCLT vide the order dated 05.09.2019 had allowed the Application of the Resolution Professional, seeking approval of the Resolution Plan of JSW as approved by the CoC. Hence, JSW as such, could not be said to be the “person aggrieved” by the order of NCLT approving the Resolution Plan of JSW itself. It seems that JSW was aggrieved by some of the conditions imposed by the NCLT while approving its plan, however, for filing such an Appeal under Section 61, the grounds specified in sub-section (3)

thereof must exist. As deducible from the bare reading of sub-section (3) of Section 61, and as held by this Court in **Sashidhar** (supra) and many other cases, an Appeal against an order approving Resolution Plan under Section 31 could be filed only on the grounds mentioned therein namely (i) if the approved plan is in contravention with the provisions of any law for the time being in force; (ii) there has been material irregularity in exercise of the powers by the Resolution Professional during the corporate insolvency resolution period; (iii) the debts owed to operational creditors of the Corporate Debtor have not been provided for in the Resolution Plan in the manner specified by the Board; (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or (v) the Resolution Plan does not comply with any other criteria specified by the Board.

- 15.** In the Appeal being the Company Appeal No. 957 of 2019 filed by the JSW under Section 61 before the NCLAT, none of the grounds stated in the sub-section (3) of Section 61 were raised, as did not exist. When the Resolution Plan of JSW was approved by the Resolution Professional, it was binding to all the stakeholders including the SRA/JSW as per Section 31(1), and the respondent JSW could not have filed the Appeal before

the NCLAT, when none of the grounds stated in sub-section (3) existed. Interestingly, the NCLAT vide the impugned judgment dated 17.02.2020, not only entertained but also allowed the said Appeal of JSW which was not legally maintainable, modified the conditions which were not suitable to JSW, and dismissed all the other Appeals filed by the Operational Creditors, the Ex-Promoters and the State of Odisha.

- 16.** Further, it is also pertinent to note that the NCLAT also gave certain directions in Para 147 of the impugned judgment, with regard to an issue, which was neither the subject matter before the NCLT in the Application filed by the Resolution Professional seeking approval of the plan, nor the subject matter of the Company Appeal filed by the JSW before the NCLAT. The said Para 147 of the judgment of NCLAT reads as under:

“**147.** Whether 'Bhushan Power & Steel Limited'-'(Corporate Debtor)' has 25.6% shareholding in 'Nova Iron Steel' is a question of fact. However, if there is any such share of 'Bhushan Power & Steel Limited'-'(Corporate Debtor)' in 'Nova Iron Steel', after approval of the plan and on acquisition of 'Bhushan Power & Steel Limited' by 'JSW Steel Limited', we hold:

(a) The Company on approval of the 'Resolution Plan' stand declassified as a promoter/ part of promoter group of any company or entity, including any subsidiaries or joint ventures or Associate Companies in which the 'Corporate Debtor' has made an investment including 'Nova Iron Steel' and shall not be required to follow any separate procedure for

reclassification of the Company as 'public shareholders' of such companies.

(b) If the 'Corporate Debtor' has any right over 'subsidiary companies', 'associate companies', 'joint venture companies' of the 'Corporate Debtor', once 'Successful Resolution Applicant' ('JSW Steel Limited') takes over the 'Corporate Debtor', it will be open to the 'Corporate Debtor' to decide whether it will continue with such right of 'subsidiary companies', 'associate companies', joint venture companies' or any other companies in which 'Corporate Debtor' has share.

(c) It is further ordered that the company on approval of the 'Resolution Plan' shall stand declassified as promoter/ part of promoter/ group of promoter of any company or entity, including any 'subsidiaries companies', 'associate companies', joint venture companies' including 'Nova Iron Steel' in which 'Corporate Debtor' has made an investment and it is not required to follow any separate procedure for reclassification of the company as "shareholders of such companies".

- 17.** We fail to understand as to how the directions such as declassifying the Corporate Debtor company as a promoter of any other company or entity etc., could have been given by the NCLAT in the Appeal filed by the JSW under Section 61, which was filed challenging only the conditions imposed by the NCLT while approving the Resolution plan of JSW under Section 31.
- 18.** We are also stunned by the observations made and findings recorded by the NCLAT in the paragraphs 51 to 57 of the impugned judgment, whereby the NCLAT has virtually justified the non-disclosure and suppression of the

material fact in the Resolution Plan made by the JSW, with regard to the Joint Venture agreement dated 05.03.2008. The said Joint Venture Agreement was entered into by the JSW, BPSL and Jai Balaji on 05.03.2008 pursuant to an order of Government of India, in the matter of joint allocation of Rohne Coking Coal block. These facts suppressed by JSW in its Resolution Plan, had surfaced during the course of the investigation in the PMLA proceedings initiated against the Corporate Debtor and others. Based on the said material, an issue was raised before the NCLAT whether JSW was a 'related party' to BPSL, and therefore, ineligible under Section 29A. However, the NCLAT in its impugned judgment had sought to justify the suppression of facts made by JSW. Since, the issue of 'Related Party' was not pressed into service by the learned advocates appearing for the Appellants, during the course of hearing of these Appeals, we are not stretching the issue of "related party" any further.

(IV) MANDATORY REQUIREMENT UNDER SECTION 29A.

- 19.** However, we certainly deem it appropriate to highlight the statutory requirement of proper disclosure to be made by the Resolution Applicant with regard to its eligibility under Section 29A of the IBC. As per Section 29A, a person shall

not be eligible to submit a Resolution Plan, if such person or any other person acting jointly or in concert with such person, falls under any of the clauses contained in the said Section 29A. Further, Section 30(1) read with Regulation 39(1) of the Regulations, 2016 requires that a Resolution Applicant has to submit a Resolution Plan along with an affidavit stating that he is eligible under Section 29A to submit the Resolution Plan. As per Regulation 39(4), when the Resolution Plan as approved by the CoC, is submitted by the Resolution Professional, it has to be submitted by him along with a compliance certificate in Form No. H of the Schedule. The prescribed Form 'H', pertaining to the compliance certificate, contained in the Schedule, specifically requires the Resolution Professional to certify that the Resolution Plan complies with all the provisions of the IBC and the CIRP Regulations 2016, and that it does not contravene any of the provisions of law, for the time being in force. The Resolution Professional also has to certify that the Resolution Applicant has submitted an affidavit in compliance with Section 30(1) of the Code, confirming its eligibility under Section 29A to submit the plan and that the contents of the said affidavit are in order.

- 20.** In the instant case, as transpiring from the record, the Resolution Professional had not submitted the

Compliance Certificate in the prescribed Form 'H' of the Schedule, while submitting the Company Application being No. 254 of 2019 before the NCLT seeking approval of the Resolution Plan under Section 31(1) read with Section 30(6) of the IBC. In the said Company Application, the Resolution Professional had only reproduced the Clauses of the Resolution Plan, without submitting the Compliance Certificate as prescribed in Form 'H.' In the said Application, what has been stated by the Resolution Professional with regard to the compliance of the mandatory requirements under the Code, was in the form of a Table, which is reproduced hereinbelow: -

SECTION/ REGULATION	REQUIREMENT	CLAUSE OF THE RESOLUTION PLAN
Section 29A of the Code	The disqualification under Section 29A of the Code should not apply.	Annexure 12 of the Approved Resolution Plan
Section 30(2) (a) of the Code	The Resolution Plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;	Clause 1.2 of Part B of the Approved Resolution Plan
Section 30(2)(b) of the Code	The Resolution Plan provides for the repayment of the debts of operational	Clause 1.4, 1.5, 1.6 and 1.7 of Part B of the Approved Resolution Plan

	creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53.	
Section 30(2)(c) of the Code	The Resolution Plan provides for the management of the affairs of the Corporate Debtor after approval of the resolution plan;	Clause 1.13(iii) of Part B read with Clause 2(a) of Part A of the Approved Resolution Plan
Section 30(2) (d) of the Code	The Resolution Plan provides for the implementation and supervision of the resolution plan;	Clause 4 of Part A read with Schedule 2 of the Approved Resolution Plan
Section 30(2) (e) of the Code	The Resolution Plan does not contravene any of the provisions of the law for the time being in force;	Clause 1.13(vi) of Part B of the Approved Resolution Plan
Regulation 38(1A) of the CIR Regulations	The Resolution Plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors of the corporate debtor.	Clause 1.9 of Part B of the Approved Resolution Plan
Regulation 38(2) (a) of the CIR Regulations	The Resolution Plan shall provide the term of the plan and its	Schedule 2 of the Approved Resolution Plan

	implementation schedule	
Regulation 38(3)(a)	The Resolution Plan shall demonstrate that it addresses the cause of default	Section 3 of Part A of the Approved Resolution Plan under the head “Business Plan/Financial Projections”
Regulation 38(3)(b)	The Resolution Plan shall be feasible and viable	The CoC in its 18 th meeting dated 14 th August 2018 considered the resolution plan of JSW Steel and recorded that the resolution plan is feasible and viable.
Regulation 38(3)(c)	The Resolution Plan shall have provisions for its effective implementation	Schedule 2 of the Approved Resolution Plan providing for Steps for Implementation of Resolution Plan
Regulation 38(3)(d)	The Resolution Plan shall have provisions for approvals required and the timeline for the same	Section 13 of Part A of the Approved Resolution Plan
Regulation 38(3)(e)	The Resolution Plan shall provide that the resolution applicant has the capability to implement the resolution plan	Section 1 of Part A read with Schedule 3 and Annexure 1 of the Approved Resolution Plan and Net-Worth Certificate of the Successful Resolution Applicant

- 21.** Thus, as evinced from the record, there was neither a certificate given nor any statement made by the Resolution Professional in the said Application, to the effect that the contents of the Affidavit filed by the Resolution Applicant with regard to its eligibility to file the Resolution Plan, were in order. In the afore-stated Table, against the column of requirement that “the disqualification under Section 29A of the Code should not apply,” the Resolution Professional has merely referred to Annexure 12 of the Approved Resolution Plan of JSW. As elicited, the said Annexure 12 of the Approved Resolution Plan which allegedly pertained to the mandatory disclosures, only disclosed the identity of the Resolution Applicant and the connected persons. The said Annexure 12 nowhere had stated about the eligibility/ineligibility of the Resolution applicant as required under Section 29A.
- 22.** It is pertinent to note that in the 14th Meeting of the CoC, it was specifically brought to the notice of the CoC by the legal counsel of the Resolution Professional that the Resolution Plan of the JSW was subject to the compliance of Section 29A. However, in the later meetings there was no clarity made as to whether the JSW had subsequently complied with the said requirement or not. Even if it is believed that JSW had filed an affidavit with regard to its

eligibility to submit the Resolution Plan, there is nothing on record to show as to whether such affidavit was verified by the Resolution Professional as he was obliged to do so in terms of Form No. H to the Schedule annexed to the CIRP Regulations, 2016.

- 23.** Since, the eligibility/ineligibility of the Resolution Applicant to submit the Resolution Plan goes to the root of the matter, it was incumbent on the part of the Resolution Professional to verify and certify that the contents of the mandatory affidavit, filed by the Resolution Applicant-JSW in respect of Section 29A were in order. The same having not been stated in the Application filed by the Resolution Applicant before the NCLT, it has raised serious doubt in the mind of the Court with regard to the very eligibility of the JSW to submit the Resolution Plan. Our said doubt is further fortified by the observations made and justification given by the NCLAT for the non-disclosure and suppression made in the Resolution Plan by JSW, with regard to the Joint Venture Agreement dated 05.03.2008 entered into by and between the JSW, BPSL and Jai Balaji as discussed hereinabove.

(V) POWERS OF NCLAT TO REVIEW THE DECISION OF STATUTORY AUTHORITY UNDER THE PMLA: -

24. This takes us to the issue as to whether the NCLAT had any powers of Judicial Review over the decision taken by the Statutory Authority under the PMLA?

As per the chronology of events stated earlier, after the NCLT vide the Order dated 05.09.2019 approved the Resolution Plan of JSW, subject to the conditions mentioned in para 128 thereof, the Directorate of Enforcement of Central Government on 10.10.2019 had provisionally attached the assets of CD-BPSL under Section 5 of PMLA. The SRA-JSW challenged the powers of ED to pass Provisional Attachment Order by raising an issue in the Appeal being Company Appeal No. 957 of 2019 pending before the NCLAT. The NCLAT vide the Order dated 14.10.2019 stayed the said PAO dated 10.10.2019, in the said Company Appeal No.957 of 2019.

25. It appears that couple of months thereafter, Section 32A came to be inserted in the IBC by Act 1 of 2020 w.e.f. 28.12.2019, which pertained to the liability of a Corporate Debtor for an offence committed prior to the commencement of CIRP. The NCLAT therefore, while deciding the Company Appeal No. 957 of 2019 filed by the JSW along with other Company Appeals filed by the other

parties against the Order passed by the NCLT dated 05.09.2019, held in the impugned Judgment and Order dated 17.02.2020 that in view of Section 32A(1)(2), the Directorate of Enforcement/Investigating Agencies did not have the powers to attach assets of Corporate Debtor, once the Resolution Plan had stood approved, and that the criminal investigations against the Corporate Debtor also would stand abated. The NCLAT also declared in para 71 of the impugned Judgment that the attachment of assets of Corporate Debtor by the ED pursuant to the order dated 10.10.2019 was illegal or without jurisdiction.

- 26.** As stated hereinabove, the Civil Appeal Nos. 14503-14504 of 2024 arising out of the SLP(Civil) Nos. 29327-29328 of 2019 filed by the Committee of Creditors, challenging the PAO dated 10.10.2019 passed by the ED and the Order dated 14.10.2019 passed by the NCLAT in Company Appeal No.957 of 2019, and the Civil Appeal No.3362 of 2020 filed by the ED against the JSW & Others challenging the impugned Judgment dated 17.02.2020 passed by the NCLAT in Company Appeal No. 957 of 2019, came to be disposed of by this Court vide the Order dated 11.12.2024. While passing the said order, it was clarified by this Court that the said order was passed in the peculiar facts and circumstances of the case, more particularly, the fact that

the order of provisional attachment was passed by the ED after the Adjudicating Authority i.e. NCLT had approved the RP submitted by the SRA. It was also clarified and that the Court had not expressed any opinion on the interpretation of Section 32A (2) of IBC or on the powers of the ED to attach the property of the Corporate Debtor which was undergoing CIRP, or on any other legal issues involved in the other connected Appeals (i.e. the present Civil Appeals) pending before this Court.

- 27.** In this regard, it is pertinent to note that the NCLT and NCLAT are constituted under Section 408 and 410 of the Companies Act, 2013 and not under the IBC. The jurisdiction and powers of the NCLT and NCLAT are well circumscribed under Section 31 and Section 60 so far as NCLT is concerned, and under Section 61 of IBC so far as the NCLAT is concerned. Neither the NCLT nor the NCLAT is vested with the powers of judicial review over the decision taken by the Government or Statutory Authority in relation to a matter which is in the realm of Public Law. As held by a Three-judge Bench in case of ***Embassy Property Developments Private Limited vs. State of Karnataka & Ors.***³, the Section 60(5) speaks about any question of law or fact, arising out of or in

³ (2020) 13 SCC 308

relation to insolvency resolution, but a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of Public Law, cannot be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” appearing in Section 60(5)(C) IBC. It has been further held therein that in the light of the statutory scheme as culled out from the various provisions of the IBC, it is clear that wherever the Corporate Debtor has to exercise a right that falls outside the purview of the IBC, especially in the realm of the public law, they cannot take a bypass and go before NCLT for the enforcement of such a right.

- 28.** In view of the settled proposition of law, when the NCLT could not exercise the powers of judicial review falling outside the purview of the IBC, or falling within the purview of public law, the NCLAT also, being an Appellate Authority under Section 61 over the orders passed by the NCLT, could not exercise any power or jurisdiction beyond Section 61 of IBC.
- 29.** As held by us earlier, a person aggrieved by an order of the Adjudicating Authority can prefer an Appeal to the NCLAT under Section 61(1), and that an Appeal against the order approving a Resolution Plan under Section 31 could be filed only on the grounds mentioned in clauses (i)

to (v) of sub-section (3) of Section 61. Hence, for filing an Appeal under Section 61, there has to be an order passed by the NCLT so far as sub-section (1) is concerned, and if the Appeal is filed against the order of NCLT approving the Resolution Plan under Section 31, it could be filed only on the grounds mentioned in sub-section (3) of Section 61.

- 30.** In the instant case, after the approval of Resolution Plan of JSW by the NCLT on 05.09.2019, subject to the conditions mentioned therein, the PAO came to be passed by the ED on 10.10.2019 under Section 5 of the PMLA. The said PAO was challenged by SRA-JSW directly in the Company Appeal being No. 957 of 2019 filed by it before the NCLAT, and the NCLAT vide the *ex parte* order dated 14.10.2019 had stayed the PAO. It is pertinent to note that the said PAO dated 10.10.2019 was also the subject matter of challenge before this Court in the SLPs filed by the CoC and the same was stayed by this Court vide the Order dated 18.12.2019 in the said SLPs. Despite such position, the NCLAT while passing the impugned Judgment and Order dated 17.02.2020 recorded its findings on Section 32A of IBC to the effect that the assets of the Corporate Debtor of which JSW was a Successful Resolution Applicant, were immuned from attachment by Directorate of Enforcement. Such an Order of NCLAT is

clearly in teeth of the law laid down by this Court in ***Embassy Property Developments*** (supra). The PMLA being a Public Law, the NCLAT did not have any power or jurisdiction to review the decision of the Statutory Authority under the PMLA. In our opinion, apart from the fact that the said issue was pending before this Court in respect of the same PAO dated 10.10.2019 and therefore the NCLAT should not have decided the said issue, it was beyond the jurisdiction of the NCLAT to decide the said issue in the Company Appeal filed by JSW under Section 61 of IBC.

- 31.** In that view of the matter, it is held that the observations made and the findings recorded by the NCLAT in the impugned judgment with regard to the PAO dated 10.10.2019 passed by the Directorate of Enforcement under the PMLA, being without any authority of law and without jurisdiction, were *coram non judice*.

(VI) SUBMISSIONS ON NON-COMPLIANCE OF OTHER MANDATORY PROVISIONS AND ON EBITDA: -

- 32.** Adverting to the other issues on merits, the learned Senior Advocate Mr. Dhruv Mehta appearing for the Appellants Ex-Promoters/Guarantors of the Corporate Debtor-BPSL made the following submissions:

- (i) There were gross violations of mandatory provisions of IBC in the entire process of insolvency resolution proceedings at the instance of Resolution Professional, the CoC and SRA-JSW who were in collusion with each other.
- (ii) Regulation 38 of the CIRP Regulations, 2016 read with Section 30(2) of the Code mandate payment to the Operational Creditors to be paid in priority over the Financial Creditors, however, the Resolution Plan envisaged the Financial Creditors to be paid in priority over the Operational Creditors.
- (iii) The Resolution Plan was indeterminate and unpredictable. The clause which permitted the erstwhile lenders of CoC to enlarge the Effective date has been misused to the prejudice of all the stakeholders including the financial institutions, which had led to a deliberate delay of more than 540 days in partial implementation of the plan. The SRA-JSW made payment to the operational creditors only in March 2022 after a period of total default of 900 days.
- (iv) The SRA-JSW had secured the position of the highest bidder by wrongly assuring the upfront payments and infusion of funds, parameters, which

JSW had admittedly failed to comply with. There was willful breach and *malafide* conduct on the part of the SRA-JSW in causing great delay in the implementation of the Resolution Plan beyond the statutory time-limit, which is sufficient to set aside the Resolution Plan of defaulting SRA.

- (v) The Resolution Plan contravened the settled legal position, while treating the secured statutory dues of the Operational Creditors as unsecured dues, which is also in contravention of the law laid down by this Court in the ***State Tax Officer vs. Rainbow Papers Limited***.⁴
- (vi) However, on a demurrer, the Resolution Plan if it is sustained by this Court, the issue of Earnings Before Interest, Tax, Depreciation and Amortization (EBITDA) is required to be decided in favour of the Appellants and other stakeholders, and against JSW.
- (vii) Retention of EBITDA by SRA, despite not contributing in any manner to the operations of the Corporate Debtor from 26.7.2017 till the interim payment to the Financial Creditors on 26.03.2021, and also despite the delay in making payment to the

⁴ (2023) 9 SCC 545

other creditors of the Corporate Debtor, would be contrary to the scheme of the IBC.

(viii) Granting of EBITDA to the creditors, would reduce the liability of the appellants who are the personal guarantors.

(ix) There was no scope for negotiation between the CoC and the SRA-JSW after the approval of the Resolution Plan, in view of the law laid down by this Court in ***Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Limited and Another***⁵.

33. The Learned Senior Advocate Mr. Diwakar Maheshwari, Mr. Manu Beri and Mr. Arjun Asthana appearing for the Appellants Operational Creditors i.e. **Kalyani Transco, CJ Darcl Logistics Ltd. And Jaldhi Overseas PTE Ltd.** made further following submissions in addition to the submissions made by the learned Senior Counsel Mr. Dhruv Mehta.

(i) The re-classification of Appellant-Jaldhi Overseas claimed from “admitted operational creditor” to the “identified contingent creditor” by SRA was not permissible. The power to admit/reject the claim filed by the Creditors vests solely with the Resolution

⁵ (2022) 2 SCC 401

Professional and no such power is available with the SRA under the Code.

- (ii) The re-classification of Operational Creditors claims have resulted in *inter se* discrimination towards class of Creditors, not permissible under the Code.
- (iii) The NCLT had rightly directed the EBITDA/profit generated by the Corporate Debtor during CIRP to be distributed amongst the creditors in view of the judgment passed by the NCLAT in the matter of ***Standard Chartered Bank vs. Satish Kumar Gupta***, Company Appeal (AT) (INS) No. 242/2019 decided on 04.07.2019. Even the CoC had filed an affidavit before the NCLAT claiming EBITDA generated during the CIRP, however the NCLAT in the impugned judgment directed the Monitoring Committee along with the Resolution Professional to go through the RFP/RFRP and distribute the EBITDA accordingly.
- (iv) There was no provision either in the IBC or in RFRP published by the Resolution Professional or in the Resolution Plan submitted by the SRA, which permitted the Monitoring Committee or the Financial Creditors/CoC to enter into any negotiations with the SRA post the approval of the Resolution Plan. The

only provision which governed the conduct of CoC meetings under the IBC was Section 24 which included the representations on behalf of the operational creditors also. Admittedly, the Monitoring Committee did not have any representation on behalf of the Operational Creditors.

- (v) The IBC does not provide for constitution of a Monitoring Committee, and the Monitoring Committee being a creature of the Resolution Plan, its powers would be limited to the extent granted under the Resolution Plan.
- (vi) The grounds provided under Section 61(3) of the IBC are the only grounds available to the NCLAT for setting aside the approval of the Resolution Plan, however the NCLAT has set aside the directions of NCLT qua EBITDA, which does not fall within the four corners of Section 61(3).

34. The Learned ASG, Mr. Natraj appearing for the Appellant-State of Odisha made the following submissions: -

- (i) The Appellant-State had filed its claim before the Resolution Professional on 07.03.2018 for a total amount of Rs. 118,85,17,796 which included the Electricity duty along with interest till insolvency

commencement date, and the said claim though was recorded at Serial No. 1750 on the consolidated list of claims of Operational Creditors, there was drastic reduction in the claim amount to INR 13,75,32,894.

- (ii) In view of Section 18 read with the Regulations 10, 12, 13 and 14 of the CIRP Regulations, 2016, as also the legal position settled in ***Swiss Ribbons (P) Ltd. Vs. Union of India***⁶, the Resolution Professional does not possess any adjudicatory powers under the IBC, and that his role as a facilitator of the CIRP is only administrative in nature.
- (iii) The Resolution Plan contravened Sections 30(2) and 30(3) of the IBC and therefore was incapable of being enforced or implemented in view of ***Independent Sugar Corporation Ltd. Vs. Girish Sriram Juneja and Others***.⁷
- (iv) The Appellant State had, via multiple letters raised the demands for the pending Entry tax dues prior to the initiation of CIRP and prior to the approval of Resolution Plan by the CoC and therefore the Resolution Professional had adequate notice of such claim.

⁶ (2019) 4 SCC 17

⁷ 2025 SCC Online SC 181

35. The learned Senior Advocate Mr. Neeraj Kishan Kaul appearing for the Respondent SRA-JSW broadly made the following common submissions in response to the submissions made by the learned Advocates for the Appellants.

- (i) The comprehensive resolution process of BPSL has resulted in a payment of Rs.19,350 crores to Financial Creditors, along with payment to Operational Creditors of 50% recovery of their admitted claims (capped at Rs.350 crores) by March, 2022.
- (ii) The members forming part of the erstwhile CoC had vide its letter dated 05.03.2021 extended the Effective Date to on or before 31.03.2021 with 97.25% majority in terms of and in accordance with the provisions of approved Resolution Plan. The same was brought to the notice of this Court vide the affidavit dated 18.03.2021 filed by the members of the erstwhile CoC in I.A. No. 42114/2021 (filed in Civil Appeal Nos. 14503-14504 of 2024).
- (iii) The SRA-JSW had brought in the entire Equity commitment of Rs.8550 crores which is split as (a) Rs. 100 crore of Equity shares and (b) Rs.8,450 crore of Compulsorily Convertible Debentures,

which would be converted to Equity shares. The CCDs are regarded as Equity instruments as held by this Court in ***Narender Kumar Maheshwari vs. Union of India***⁸.

- (iv) The Ex-promoters had filed the Appeals as an attempt to derail the successful resolution of the Corporate Debtor BPSL.
- (v) The issues regarding the implementation of the Resolution Plan are beyond the scope of the Appeals filed under Section 62 of the IBC.
- (vi) The Resolution Plan or the RFRP of BPSL did not contemplate distribution of EBITDA/operating profit of BPSL generated during the CIRP period to either the creditors or SRA - JSW. Such amounts were to continue to remain with BPSL as it was sought to be taken over as a going concern.
- (vii) This Court while interpreting the RFRP of SRA in the case of ***Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Others***⁹, has held that the EBITDA generated during the CIRP period would not go the creditors.

⁸ 1990 Supp. SCC 440

⁹ (2020) 8 SCC 531

- (viii) There was no delay in implementing the Resolution Plan as the plan has been implemented by the Effective Date, as defined under the Resolution Plan.
- (ix) The Code or its Regulations do not require the implementation of Resolution Plan to be carried within the specific timeline, and the same is the subject matter of the agreed position in a Resolution Plan. In paragraph 4(iii) of Part A, the Effective Date has been defined to mean the date of implementation of the Resolution Plan, which shall not exceed 30 days from the NCLT approval date or such extended period which may be permitted by 66% majority of lenders forming part of the erstwhile CoC.
- (x) So far as payment to the operational creditors is concerned, the position under Regulation 38(1) has changed since the amendment w.e.f. 27.11.2019, which provided for the amount payable to an operational creditor to be paid in priority to the Financial Creditor. The said amendment having come into force post approval of the Resolution Plan vide the NCLT judgment on 05.09.2019, the same cannot be applied to the present case.

- (xi) The State of Odisha had failed to file its claim with regard to the Entry tax dues, before the Resolution Professional, did not approach NCLT, and had filed its Appeal against the Plan approval order directly before the NCLAT, beyond the period of limitation.
- (xii) As held in ***Ghanashyam Mishra and Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd.***¹⁰, ***and in case of Ruchi Soya Industries Ltd. vs. Union of India***¹¹, once the Resolution Plan is approved by the NCLT, the plan stands frozen and all such claims which are not a part of Resolution Plan as on that date stand extinguished.
- (xiii) So far as the claim of State of Odisha in respect of the Electricity dues is concerned, the Resolution Professional, after a thorough verification of documents and records submitted by the Appellant-State, had admitted only Rs.13,75,32,894 though its claim was for Rs.118,85,17,796.
- (xiv) As per Regulation 13 and 14 of CIRP Regulations, 2016, the Resolution Professional has the authority to verify the claims submitted by the creditors and to determine the amount claimed by the Creditors.

¹⁰ (2021) 9 SCC 657

¹¹ (2022) 6 SCC 343

(xv) So far as the Appellant Jaldhi Overseas is concerned, the Appellant has been rightly categorized as an Operational Creditor with a contingent claim, on the basis of the balance sheets of the Corporate Debtor and Section 49 of the Arbitration and Conciliation Act, 1996. The sub-classification of Operational Creditors into the contingent Operational Creditors and the Crystallized Operational Creditors under the Resolution Plan is permissible under the law.

36. The learned Senior Advocate Dr. Abhishek Manu Singhvi appearing for the CoC made the following submissions:

- (i) The erstwhile Promoters who had ceased to have any relationship with Corporate Debtor once the CIRP had commenced, could not be said to have been prejudiced with respect to the implementation of Resolution Plan.
- (ii) The issues raised by the erstwhile Promoters with respect to implementation of the Resolution Plan are nothing but a *malafide* attempt to scuttle a successfully implemented Resolution Plan. The issues raised by them did not fall within the ambit of Section 62 of IBC.

- (iii) Though CoC as a juristic body had become *functus officio* after approval of Resolution Plan by the NCLAT, in the facts of the case, the lenders of BPSL forming part of CoC were specifically empowered in terms of the Resolution Plan read with the impugned judgment of NCLAT to convene and take decisions that were necessary for successful implementation of the Resolution Plan.
- (iv) The lenders of BPSL forming part of the CoC in their commercial wisdom had taken steps to ensure implementation of Resolution Plan to the benefit of all stakeholders of the Corporate Debtor. Though there was a delay of about two years in the implementation of the Resolution Plan, the lenders of BPSL forming part of CoC have taken commercial call in prioritizing the implementation of the Resolution Plan.
- (v) As per the understanding of the lenders of BPSL, at the time of plan implementation, the SRA infused only Rs. 100 crores as share capital towards Equity contribution, and the delay of remaining Rs. 8,450 Crores by way of convertible debentures was due to the uncertainty created because of the attachment of assets of BPSL by the ED. The refund obligation

was created on the lenders in the event of Appeals before this Court succeed as recorded vide the 06.03.2021 order, and subsequently in the Escrow Agreement entered into with the SRA dated 19.03.2021.

(vi) During the meeting held on 26.03.2021 by the Reconstituted Board which was attended by the Steering Committee, the issuance of Compulsory Convertible Debentures to Piombino Steel Limited (group entity of SRA which was to be merged into BPSL as a part of the Resolution Plan) having a value Rs. 8,450 Crores was approved. Such issuance of CCD's cannot be said to be a departure from the requirement under the Resolution Plan of infusion of Rs. 8,550 Crores as Equity.

37. The learned Senior Advocate Mr. Shyam Diwan appearing for the erstwhile Resolution Professional Mr. Khandelwal, in his brief address to the Court submitted that the Resolution Plan having been implemented during the pendency of these Appeals, the Court may not interfere with the impugned judgment and order passed by the NCLAT, more particularly when no question of law had arisen out of the impugned judgment of NCLAT, as contemplated in Section 62 of IBC.

**(VII) NON-COMPLIANCE OF MANDATORY PROVISIONS
AND MISUSE OF PROCESS OF LAW: -**

- 38.** Having regard to the elaborate submissions made by the learned Senior Advocates appearing for the parties, having thoroughly gone through the voluminous record relied upon by them, as also having regard to the various judicial pronouncements made by this Court on the interpretation of various provisions of IBC, it appears that in the instant set of Appeals, the respondents-JSW, CoC and Resolution Professional have sought to sweep many seminal issues under the carpet to cover up gross violations of the provisions of the IBC and of the Regulations 2016, at every stage of the CIR proceedings initiated against the CD-BPSL. We therefore have examined the non-compliance rather violations of mandatory provisions of the IBC at their instance at the pre-approval and post-approval stages of Resolution Plan of JSW.
- 39.** We are quite conscious to the submissions made by the Learned Advocates appearing for the Respondents JSW, CoC and for the Resolution Professional that Resolution Plan in question has been implemented in part by making payments to the Financial Creditors in March, 2021 and in full by making payments to the Operational Creditors in

March, 2022. According to them, though JSW initially infused only Rs.100 Crores as share capital towards Equity contribution commitments, subsequently pending the present Appeals, the reconstituted Board in its meeting held on 26.03.2021 has approved the issuance of Compulsory Convertible Debentures to Piombino Steel Limited (group entity of SRA-JSW which was to be merged into BPSL) having value of Rs.8,450 Crores, and thus requirement of infusion of Rs.8,550 Crores was complied with. We are not impressed with the said submissions.

- 40.** In this regard, the relevant Clause 2.3 with regard to Equity Commitment and Clause 3.1 with regard to the stages of implementation of the Resolution Plan are reproduced-

“2.3 Equity Commitment

As part of the Resolution Plan, the Resolution Applicant also proposes to infuse equity into the Company, for an amount aggregating INR 8550 Crores which shall be infused by the Resolution Applicant upfront on the Effective Date, the uses of which are stated elsewhere in the resolution plan. The aforementioned amounts are collectively referred to as **"Equity Commitment"**. (see **Section 4(v) and (vi) of Part A of this Resolution Plan**).”

“3. RESOLUTION PLAN - STAGE OF IMPLEMENTATION

3.1 The Resolution Applicant proposes to:

- (a) undertake all efforts to procure the satisfaction of each Conditions Precedent within a period of 30 days from the date of issuance of LOI and in any case

prior to approval of the Resolution Plan by NCLT. The Resolution Applicant shall immediately after the NCLT Approval Date, notify the Monitoring Professional and the Steering Committee in writing ("**CP Satisfaction Notice**") the date(s) on which it proposes to complete the steps set out in Schedule 2 (**Steps for Implementation of the Resolution Plan**) and if such steps are to be implemented with receipt of the Specified Approval mentioned Paragraph 4(ii)(a) (II) or in the absence of the same (and in the manner specified in such paragraph) ("Effective Date"), which date shall in any event not exceed 30 (thirty) days from the NCLT Approval Date or such extended period which may be permitted by 66% majority of the lenders forming part of the erstwhile CoC; and

(b) implement the Resolution Plan through the SPV, which will merge with the Company in the manner as set out in Schedule 2 (**Steps for Implementation of the Resolution Plan**)."

- 41.** Except bare submissions made by the learned advocates during the course of hearing, there is no material or affidavit placed on record by the Respondent JSW to show that the Equity Commitment as contemplated in the aforestated clauses, which was condition precedent, was fulfilled by it. There is also no material placed on record by it to show that the Effective date as contemplated in its Resolution Plan was extended after the order of NCLT or NCLAT as per Clause 3.1 of the Resolution Plan. There is nothing on record to show as to how, when and by whom the Effective date as contemplated in the Resolution Plan was extended. If the Effective date was surreptitiously

extended by some lenders, claiming to be part of CoC which had become *functus officio* and which had no authority to do so, any payment made or Equity infused by JSW under the garb of such decision, cannot be vindicated by the Court. When the SRA-JSW, CoC and Resolution Professional are being represented by very eminent Advocates, non-production of such relevant material with regard to infusion of Equity and extension of Effective date, to substantiate their submissions, cannot be without any purpose. It therefore raises serious doubts about the legality of such actions and genuineness of the so-called compliance of Resolution Plan, pending these Appeals.

- 42.** Even it is assumed for the sake of arguments that pending the present Appeals, the terms of the Resolution Plan have been complied with, it may be noted that no party can be permitted to deliberately create a situation where the proceedings in the Court would be frustrated or the Court's decision would become irrelevant or ineffective. A situation of *fait accompli* cannot be permitted to be created in the Court to frustrate the proceedings, more particularly when the CIR proceedings had *ex facie* stood vitiated on account of non-compliance of the mandatory provisions of law and on account of the misuse of the process of law by the parties. Any action taken or any deal/any settlement

entered into by and between the parties in respect of the subject matter of the proceedings, have to pass the test of judicial scrutiny and would always be subject to the final outcome and adjudication of the proceedings.

- 43.** It has been reiterated time and again by this Court that one of the main objects for enacting the IBC is to complete the entire CIR Proceedings in a time bound manner, and that is the reason, a time-line is set out in the Code and its Resolutions for every stage of the proceedings. As well settled, time is a crucial factor of the scheme under IBC. To allow the proceedings to lapse into indefinite delay will frustrate the very object of the Code. The first and foremost time-limit set out for completion of Insolvency Resolution Process is in Section 12 which reads as under-

“12. Time-limit for completion of insolvency resolution process.

(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency

resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.”

- 44.** It may be noted that the last two provisos that is the second and third provisos to Section 12 have been inserted by the Act 26 of 2019, which came into force with effect from 16.08.2019. Therefore, prior to 16.08.2019, there was only one proviso to Section 12. In the instant case, since the CIRP had commenced on 26.07.2017, when the Company Petition filed by the Punjab National Bank for initiating the insolvency proceedings was admitted by the NCLT, we will have to consider the position of Section 12 as it stood prior to its amendment on 16.08.2019.

45. This Court in *Arcelormittal India Private Limited vs. Satish Kumar Gupta and Others*¹², had an occasion to deal with Section 12 as it stood prior to the said amendment, which came into force with effect from 16.08.2019. It has been held as under: -

“73. The time-limit for completion of the insolvency resolution process is laid down in Section 12. A period of 180 days from the date of admission of the application is given by Section 12(1). This is extendable by a maximum period of 90 days only if the Committee of Creditors, by a vote of 66% [It is pertinent to note that the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (26 of 2018), inter alia, amended the Code, with retrospective effect from 6-6-2018, insofar as the requirement in certain sections of approval of 75% of the Committee of Creditors for various decisions was reduced to 51% in Section 21(8) (i.e. the minimum percentage of votes required for any decision of the Committee, where not otherwise provided for in the Code), and to 66% in Sections 12(2) (i.e. extension of time for completion of the process by 90 days), 22(2) (i.e. appointment of resolution professional), 27(2) (i.e. replacement of resolution professional), 28(3) (i.e. approval for certain actions by the resolution professional), 30(4) (i.e. approval of resolution plan), and 33(2) (i.e. initiation of liquidation), votes to extend the said period, and only if the adjudicating authority is satisfied that such process cannot be completed within 180 days. The authority may then, by order, extend the duration of such process by a maximum period of 90 days [see Sections 12(2) and 12(3)]. What is also of importance is the proviso to Section 12(3) which states that any extension of the period under Section 12 cannot be granted more than once. This has to be read with the third proviso to Section 30(4), which states that the

¹² (2019) 2 SCC 1

maximum period of 30 days mentioned in the second proviso is allowable as the only exception to the extension of the aforesaid period not being granted more than once.

74. What is important to note is that a consequence is provided, in the event that the said period ends either without receipt of a resolution plan or after rejection of a resolution plan under Section 31. This consequence is provided by Section 33, which makes it clear that when either of these two contingencies occurs, the corporate debtor is required to be liquidated in the manner laid down in Chapter III. Section 12, construed in the light of the object sought to be achieved by the Code, and in the light of the consequence provided by Section 33, therefore, makes it clear that the periods previously mentioned are mandatory and cannot be extended.

75. In fact, even the literal language of Section 12(1) makes it clear that the provision must read as being mandatory. The expression “*shall* be completed” is used. Further, sub-section (3) makes it clear that the duration of 180 days may be extended further “but not exceeding 90 days”, making it clear that a maximum of 270 days is laid down statutorily. Also, the proviso to Section 12 makes it clear that the extension “shall not be granted more than once”.

- 46.** In view of the above, it is explicitly made clear that the provision contained in Section 12(1) is mandatory in nature as the expression “shall be completed” is used. Sub-section (3) further makes it clear that the duration of 180 days may be extended further “but not exceeding 90 days”, meaning thereby a maximum of 270 days’ time limit is statutorily laid down. The proviso to Section 12 also

further clarifies that the extension of period of CIRP under the said Section shall not be granted more than once. Therefore, there remains no shadow of doubt that prior to insertion of two provisos by way of amendment in Section 12 which came into force w.e.f 16.08.2018, the entire CIRP proceedings had to be completed within maximum period of 270 days from the date of admission of the Application to initiate such process.

- 47.** The Company Petition filed by the Punjab National Bank was admitted by the NCLT vide the Order dated 26.07.2017 on which date Mr. Khandelwal was appointed as an Interim Resolution Professional for the Corporate Debtor. Therefore, the date 26.07.2017 was the date of admission of the Application to initiate the CIRP against the Corporate Debtor BPSL. The appointment of Mr. Khandelwal as the Resolution Professional was confirmed by the CoC in its first meeting held on 01.09.2017. Thereafter the CIRP proceedings were conducted by him. The Company Application being No. 254 of 2019 was submitted by him to the NCLT on 14.02.2019 for the approval of the Resolution Plan of JSW as approved by CoC, stating *inter alia* that the Consolidated Resolution Plan along with the Addendum Letter was approved by the CoC in its 19th Meeting. Thereafter the members of CoC

had participated in the Scheduled e-voting Process and the Resolution Plan along with Addendum Letter was approved by the requisite majority of CoC. Thus, the process, which was required to be completed within a maximum period of 270 days from the date 26.07.2017 i.e. the date of the initiation of proceedings, the Resolution Plan of JSW was sought to be placed before the NCLT for the approval under Section 31 after almost one and a half year on 14.02.2019.

- 48.** As per sub-section (2) of Section 12 the Resolution Professional was required to file an application to the Adjudicating Authority i.e. NCLT to extend the period of the corporate insolvency resolution process beyond 180 days, if he was instructed to do so by a resolution passed at a meeting of CoC by a vote of 66% of voting shares. Meaning thereby it was incumbent on the part of the Resolution Professional to bring to the notice of the CoC about the expiry of 180 days and seek instructions in that regard from the CoC. However, no such application, appears to have been filed by the Resolution Professional, nor any order extending the said time limit appears to have been passed by the NCLT.
- 49.** It is also pertinent to note that there is a model time-line prescribed for the completion of CIRP proceedings in

Regulation 40A of the Regulations, 2016. As per Regulation 39(4) also the Resolution Professional is required to submit the Resolution Plan approved by the CoC to the Adjudicating Authority at least 15 days before the maximum period for completion of CIRP under Section 12. However, no such application was filed by the Resolution Professional as contemplated in sub-section (2) of Section 12 seeking extension of time before the expiry of 180 days nor he had submitted the Resolution Plan approved by the CoC before the maximum period for completion of CIRP prescribed under Section 12, as contemplated in Regulation 39(4) of the Regulations.

- 50.** The Resolution Professional had filed the Company Application No. 254 of 2019 on 14.02.2019 seeking approval of the NCLT under Section 31, stating *inter alia* that the Consolidated Resolution Plan along with the Addendum Letter was approved by the CoC in its 19th Meeting, and thereafter the members of CoC had approved the same by requisite majority, following the e-voting process. It appears that the 19th Meeting of CoC was held on 10.10.2018 and the e-voting had taken place on 15.10.2018, 5.00 p.m. and 16.10.2018, 5.00 p.m. on the Central Depository Services (India Limited). As stated in the said Application by the Resolution Professional, he

had received a *post facto* approval from the Indian Bank for the Consolidated Resolution Plan vide its e-mail dated 16.10.2018, and he had placed the result of voting in the sealed cover before the Appellate Authority i.e. NCLAT vide the affidavit dated 21.10.2018. He thereafter filed the said Application under Section 31 before the NCLT on 14.02.2019 clearly after the expiry of 270 days of the initiation of CIRP.

- 51.** The Resolution Professional appears to have justified the delay in filing the Application under Section 31 on the ground that the Appeal No. 198 of 2018 filed by Tata Steel, one of the Prospective Resolution Applicant, was pending before the NCLAT, and that NCLAT had reserved the judgment of the said Appeal on 28.12.2018, and pronounced on 04.02.2019. In this regard, it may be noted that the NCLAT in the said Appeal filed by the Tata Steel, had initially passed interim orders on 09.05.2018 and 24.05.2018, however it had modified the said orders by passing the following order on 12.07.2018: -

“In the meantime, it will be open to the Committee of Creditors to pass appropriate order in terms of Section 30(4) of IBC and if any plan has approved, the Resolution Professional may place it before the Adjudicating Authority for appropriate order under Section 31 of IBC and the Adjudicating Authority may pass appropriate order. Interim orders passed earlier stand modified to the extent above.”

- 52.** Therefore, in view of the said order dated 12.07.2018, the CoC was permitted to pass appropriate orders in terms of Section 30(4), and if the plan was approved, the Resolution Professional was also permitted to place the same before the NCLT for appropriate order under Section 31 of IBC, and the NCLT was also permitted to pass appropriate order thereon. Therefore, the CoC, Resolution Professional and the NCLT, all were permitted to proceed with the proceedings, in view of the Order dated 12.07.2018.
- 53.** It appears that though the e-voting process was conducted on 15.10.2018-16.10.2018, the so-called approved Plan was placed before the NCLT for its approval under Section 31 only on 14.02.2019. There is no justification whatsoever submitted by the Resolution Professional as to why the said Application for approval of the Plan was filed after almost four months. Such an Application filed by the Resolution Professional being *ex-facie* in contravention of Section 12 read with Regulation 39(4) of the Regulations 2016, should not even have been entertained by the NCLT.
- 54.** As stated earlier, the consequences of not receiving the Resolution Plan under sub-section (6) of Section 30 before the expiry of CIRP period or the maximum period

permitted for completion of the CIRP under Section 12, have been laid down in Section 33, according to which the NCLT had to pass an order requiring the Corporate Debtor to be liquidated in the manner laid down in Chapter III of IBC. In the instant case, the Resolution Professional had utterly disregarded the mandatory timeline contained in Section 12 setting out the time limit for completion of CIRP, had not even bothered to seek any extension from the NCLT before the expiry of 180 days from the commencement of the said process nor had bothered to explain in the Application under Section 31 as to how the entire CIRP proceedings were conducted in a time bound manner and particularly within time limits prescribed under Section 12 of IBC read with Regulation 39(4) and Regulation 40A of the Regulations, 2016. Even the NCLT also while passing the order dated 05.09.2019 approving the Resolution Plan of JSW under Section 31, had failed to verify as to whether the said Application of the Resolution Professional was within the time limit prescribed under Section 12 which was mandatory in nature as held by this Court in ***Arcelormittal India Private Limited*** (supra).

- 55.** At this juncture, it may be noted that this Court in a subsequent judgment in ***ESSAR Steel India Ltd.***

Committee of Creditors Vs. Satish Kumar Gupta¹³ had dealt with the two provisos subsequently inserted in Section 12 by the Act 26 of 2019, which came into effect from 16.08.2019, and had observed as under: -

“127.Thus, while leaving the provision otherwise intact, we strike down the word “mandatorily” as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that *ordinarily* the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the

¹³ 2020(8) SCC 531

aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation”.

- 56.** Apart from the fact that the two provisos subsequently inserted in Section 12 w.e.f. 16.08.2019 were not applicable to the facts of the present case, the CIRP against BPSL having been initiated on 26.07.2017 and the Resolution Professional having filed the Application under Section 31 on 14.02.2019, even the maximum period of 330 days including the time taken in legal proceedings had expired much prior to filing of the said Application under Section 31 on 14.02.019.
- 57.** In that view of the matter, we have no hesitation in holding that the Application submitted by the Resolution Professional seeking approval of the Resolution Plan of JSW under Section 31 being hit by Section 12 of IBC, the NCLT had committed grave error of law in approving the said plan vide its order dated 05.09.2019.
- 58.** Even if it is assumed that the Application filed by the Resolution Professional seeking approval of the Resolution Plan of JSW under Section 31 was not hit by Section 12, and that the CIR proceedings conducted by him was within the time limit prescribed under Section 12, in view of the

order dated 04.02.2019 passed by the NCLAT in the Company Appeal being No.198 of 2018 preferred by the Tata Steel Limited vs. Liberty House Group Private Limited, directing the period of pendency of the Appeal, that is the period from 07.05.2018 to 04.02.2019 to be excluded for the purpose of counting the period of 270 days, then also according to us for the reasons to follow, there has been gross non-compliance of the mandatory provisions of the IBC and its Regulations, vitiating the entire CIR proceedings.

- 59.** It cannot be gainsaid that as per the scheme of the Act, the role of the Resolution Professional while conducting the entire CIRP, is not only of an Administrator or Facilitator, but is also of an Invigilator, to ensure that the CIR proceedings are completed in a time bound manner, for maximisation of value of assets in order to balance the interest of the stakeholders and that there is compliance of all the mandatory provisions of the Code during the course of entire proceedings. As per Section 17, from the date of appointment of Interim Resolution Professional, the Management of the affairs of the Corporate Debtor vests in the Interim Resolution Professional, and he is responsible for complying with all the requirements under any law for the time being in force on behalf of the Corporate Debtor.

As per Section 20, the Interim Resolution Professional is required to make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern. The duties of Interim Resolution Professional are enumerated in Section 18, and the duties of Resolution Professional are enumerated in Section 25. A very significant duty which is cast upon the Resolution Professional under Section 30(2) after the receipt of the Resolution Plans from the Prospective Resolution Applicants, is to examine each of such Resolution Plans and confirm that each Resolution Plan provided for the payment of Insolvency Resolution Process costs in the manner specified by the Board in priority to the payment of other debts of the Corporate Debtor; and provided for the payment of debts of Operational Creditors in such manner as may be specified by the Board. The Resolution Professional is required to confirm that each Resolution Plan provides for the matters stated in Section 30(2), and also specifically confirm that the Resolution Plan does not contravene any of the provisions of the law for the time being in force, and conforms to such other requirements as may be specified by the Board. Sub-section (3) of Section 30 states that 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). It is therefore, incumbent on the part of Resolution Professional to examine each Resolution Plan received by him and to confirm that each plan provided for the matters stated in sub-section (2) of Section 30. He has to present to the CoC for its approval, only such Resolution Plans which confirm the conditions referred to in sub-section (2).

- 60.** It is also required to be noted that as per sub-section (1) of Section 31, the Adjudicating Authority is empowered to approve only such Resolution Plan approved by the Committee of Creditors under sub-section (4) of Section 30, which meets the requirements as referred to in sub-section (2) of Section 30. Meaning thereby, not only that the Resolution Professional has to confirm that the Resolution Plan presented before the CoC for its approval confirmed the conditions referred to in sub-section (2) of Section 30, the Adjudicating Authority is also required to satisfy itself that the Resolution Plan presented by the Resolution Professional and approved by the CoC under sub-section (4) of Section 30, met with the requirements as referred to in sub-section (2) of Section 30. The said requirements as per Section 30(2), (as it stood prior to its

amendment w.e.f. 16.08.2019) were to confirm that the Resolution Plan provided for the payment of Insolvency Resolution Process costs in priority to the payment of other debts of the Corporate Debtor; and also provided for the payment of the debts of Operational Creditors, which should not be less than the amount paid to the Operational Creditors, in the event of a liquidation of the Corporate Debtor under Section 53.

- 61.** At this juncture, it would be also relevant to refer to some of the CIRP Regulations, 2016, made by the Insolvency and Bankruptcy Board of India. The Regulation 37 of the said Regulations 2016 states that a Resolution Plan shall provide for the measures, as may be necessary for Insolvency Resolution of the Corporate Debtor for maximisation of value of its assets. Some of the measures required to be provided in the Resolution Plan have been stated in the Regulation 37 itself. Further Regulation 38 pertaining to the Mandatory contents of the Resolution Plan, as it stood prior at the relevant time, read as under: -

“38. Mandatory contents of the resolution plan. –

(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders,

including financial creditors and operational creditors, of the corporate debtor.

(1B)

(2) A resolution plan shall provide:

- (a)** the terms of the plan and its implementation schedule;
- (b)** the management and control of the business of the corporate debtor during its term; and
- (c)** adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that –

- (a)** it addresses the cause of default;
- (b)** it is feasible and viable;
- (c)** it has provisions for its effective implementation;
- (d)** it has provisions for approvals required and the timeline for the same; and
- (e)** the resolution applicant has the capability to implement the resolution plan.”

The said Regulation 38(1) was amended from time to time and lastly by Notification dated 27.11.2019, the relevant part thereof reads as under: -

“38(1) Mandatory contents of Resolution Plan:-

(1) The amount payable under a resolution plan –

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

62. Thus, the Regulation 38, whether it stood prior to or after the amendment required that the Resolution Plan

proposed by the Resolution Applicant must provide for the amount due to the Operational Creditors under the Resolution Plan by giving priority in payment over Financial Creditors. It must also provide the terms of the plan, its implementation schedule, the management and control of the business of the Corporate Debtor during its term, and adequate means for supervising its implementation. The Resolution Plan also must demonstrate that it addresses the cause of default; it is feasible and viable; it has provisions for its effective implementation; it has provisions for approvals required; and the Resolution Applicant has the capability to implement the Resolution Plan.

- 63.** The CIRP Regulations, 2016 have been made by the Insolvency and Bankruptcy Board of India in exercise of the powers conferred under Section 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 read with Section 240 of the IPC. The said Regulations being subordinate legislation having statutory force, have the same binding effect as the Code itself. Therefore, the mandates given in the said Regulations to carry out the provisions of the Code have to be strictly complied with by all the stakeholders as well as by the Authorities under the Code. However, in the instant case, the Resolution Applicant - JSW had submitted the

Resolution Plan in complete contravention of the mandates given in the Code as well as in the Regulations.

- 64.** As set out earlier, the Resolution Professional had utterly failed in discharging his duties under the Code, by not making Application for extension of time under Section 12 and by not certifying as to whether the Resolution Applicant-JSW was an “eligible” person under Section 29A to submit the plan. He also had failed to make any Applications for avoidance of transactions in accordance with Chapter-III of the Code. When the RBI had issued directions to the Indian Banks to mandatorily initiate CIRP against infamously known as “dirty dozen” companies, and when BPSL was one of them, it was obligatory on the part of the Resolution Professional to discharge his statutory duty cast upon him to file Applications for avoidance of transactions in accordance with Chapter-III of IBC.
- 65.** The Resolution Professional had also failed to confirm that the Resolution Plan of JSW met with the requirements under Section 30(2) more particularly with regard to non-contravention of any provision of law and with regard to the payment of debts to the Operational Creditors in priority. As per Sub-regulation (1) of Regulation 38 as it stood prior to its amendment in November, 2019, the amount due to the Operational Creditors under a Resolution Plan had to

be given priority in payment over the Financial Creditors. However, in the Resolution Plan, the said mandatory requirement was not complied with and the dues of Financial Creditors were given priority over the dues of the Operational Creditors.

- 66.** Despite such gross non-compliances of the mandatory provisions of IBC and the CIRP Regulations 2016, the Resolution Professional placed the Resolution Plan of JSW before the CoC. The CoC also without verifying the mandatory requirements of Regulation 38 particularly with regard to the feasibility and viability of the plan, effective implementation of the plan and the capability of Resolution Applicant to implement the plan, permitted the Resolution Applicant to submit the Consolidated Resolution Plan with Addendum Letter, which otherwise had many loose ends. Just as the Resolution Professional had failed to examine and confirm the compliance of mandatory provisions of the Code, to secure the interests of all the stakeholders involved in the process, the CoC also did not discharge its duty to carefully examine the feasibility and viability of the plan, and the capacity and resources of the Resolution Applicant-JSW for the implementation of the plan proposed by it.

67. As transpiring from the minutes of 18th and 19th Meetings held on 14.08.2024 and 10.10.2024 respectively, a very strange procedure was followed by the CoC. As recorded in the Minutes of 18th Meeting of CoC held on 14.08.2018, Resolution Applicant JSW had acquired highest score amongst the three Prospective Resolution Applicants, but there was no declaration made as to H1 and H2. It further appears from the Minutes of 19th Meeting that thereafter the negotiations had taken place between the Core Committee comprising of Small Group of Lenders and the Resolution Applicant JSW only, pursuant to which the Consolidated Resolution Plan was submitted by JSW on 03.10.2018. The said Consolidated Resolution Plan of JSW was circulated to the members of CoC on 05.10.2018. The said Consolidated Resolution Plan of JSW along with its Letter dated 10.10.2018 (Addendum Letter) was considered by the CoC at its 19th Meeting held on 10.10.2018. As transpiring from the Minutes of 19th Meeting, number of objections were raised by the representatives of the Financial Creditors and of the Operational Creditors as regards the manner in which the proceedings were being conducted, permitting JSW only to submit and amend the plan submitted earlier; as regards non-compliance of amended Regulation 38 for making

payment of amount due to the Operational Creditors in priority over the payment to the Financial Creditors; as regards the Resolution Professional having not checked the compliances of the revised Resolution Plan of JSW, though the CoC had pointed out that the plan of JSW reviewed by the Resolution Professional earlier was different from the Resolution Plan of JSW put forth subsequently for voting; as regards the consideration of the revised plan of JSW without the compliance certificate from the Resolution Professional; as regards the implication and legal obligations of the avoidance transactions and fraudulent trading by the Corporate Debtor etc.

- 68.** Despite such gross violation of mandatory provisions of IBC and the CIRP Regulations in the entire proceedings undertaken by the Resolution Professional, and by the CoC while considering the Consolidated Resolution Plan and Addendum Letter of JSW, the Resolution Professional without paying any heed to the said violation or non-compliance, submitted the said Resolution Plan of JSW for approval before the NCLT. The NCLT also without satisfying itself whether the Resolution Applicant-JSW was eligible to submit the plan or not, whether the Application for approval of plan was within the prescribed time limit under Section 12 or not, whether the Resolution Plan

submitted by JSW had met the requirements as referred to in sub-section (2) of Section 30 or not, and whether the Resolution Plan had the provisions for its effective implementation as required to be satisfied under proviso to sub-section (1) of Section 31, approved the said Plan of JSW.

- 69.** It is pertinent to note that as per the Resolution Plan, the Effective date for the purpose of the approved Resolution Plan was the date not exceeding 30 days from the approval by the NCLT of the Resolution Plan approved by the CoC, or such extended period which may be permitted by 66% majority of the lenders forming part of the erstwhile CoC. The JSW had proposed in its Resolution Plan to implement its obligation under the said plan by incorporating/ identifying a 100% wholly owned subsidiary company. It had also proposed to invest in equity (to the extent of Rs.8,550 Crores) of a special purpose vehicle which had to merge with the Corporate Debtor on the appointed date upon the approval of the Resolution Plan by the NCLT (Section I of Part A of the Resolution Plan). The indicative timelines for the implementation of the Resolution Plan were also given in Clause 4 (vi) of Part A of the Resolution Plan. The Resolution Plan provided for an upfront amount of Rs. 19,350 Crores to be paid to the Financial Creditors

against their total admitted claims of Rs.47,157.99 Crores, over and above the cost to be paid by the JSW. The JSW had also undertaken to procure the satisfaction of all the conditions precedent, as detailed in Section 4 (ii) of Part A of its Resolution Plan, within a period of 30 days or such other extended period approved by 66% lenders from the date of issuance of the Letter of Intent. It had also undertaken to immediately, after the approval of the Resolution Plan by NCLT, notify the Monitoring and Steering committee for taking steps for the implementation of the Resolution Plan.

- 70.** Despite, all these clauses and terms stated in the Resolution Plan, on which the CoC had approved its plan and the NCLT had also granted approval under Section 31 of IBC, the JSW instead of implementing the said Approved Resolution Plan, challenged the judgment and order of NCLT dated 05.09.2019 by filing an Appeal being Company Appeal No. 957 of 2019 before the NCLAT. As held by us in the earlier part of this judgment, such Appeal itself was not maintainable under Section 61 of IBC. The said terms of the Approved Resolution Plan remained unimplemented pending the Appeal before the NCLAT, and also during the pendency of the present Appeals before this Court. Under the circumstances, the upfront

payments which were to be made to the Creditors within 30 days of the NCLT passing the order approving the Resolution Plan, remained unpaid till March, 2022.

- 71.** Pertinently, the CoC in the reply to the Application filed by the Respondent JSW before this Court seeking clarification of the order dated 06.03.2020, had raised serious grievances on affidavit against the SRA - JSW for not implementing the Resolution Plan as approved by the CoC and further approved by NCLT. It was specifically stated therein that the failure on the part of the JSW to resolve one of the top 12 Corporate Insolvency cases, created a broader concern as to the sanctity of the process under IBC; that the conduct of JSW demonstrated ill-intent and malafides to mislead the Court and misuse the process of Court in order to delay and defer the implementation of the Resolution Plan which was in fact an unconditional plan; that though there was no stay granted by this Court on the implementation of the plan, there was willful breach of plan by not implementing the same; that the pendency of Appeal or any litigation would not mean a stay on an approved and binding Resolution Plan as per Section 31; that by way of its in action, it is bleeding dry the public sector banks to whom it owes Rs.19,350 Crores; that the JSW was under an obligation under the expressed terms

of the Resolution Plan to implement the same within 30 days of its approval by NCLT; that applicability of Section 32(A) to the benefit of JSW was not a pre-condition to the implementation of the Resolution Plan nor it would change the unconditional commitment of JSW to implement the plan in time bound manner; that the JSW had refuted the rightful claim of CoC of the upfront payments as committed in the Resolution Plan and also the compensation for not paying the same etc. The CoC had pointed out the defaults of JSW in not implementing the Plan and submitted that the CIRP proceedings were languishing for more than 35 months because of the non-implementation of the Resolution Plan at the instance of JSW. In spite of such allegations made and grievances raised by the CoC on affidavit before this Court, surprisingly, the CoC for the reasons best known to it, all of a sudden changed its stance, and accepted Rs. 19,350 Crores at a very belated stage, offered by JSW, without any demurrer.

- 72.** Having adumbrated the entire facts and circumstances, we find much substance in the submissions of the learned Senior Advocate Mr. Dhruv Mehta for the Ex-Promoters that apart from the fact that there was gross non-compliance of the mandatory provisions of the IBC and the Regulations, there was a dishonest and fraudulent attempt

made by JSW, misusing the process of the Court by not making the upfront payments as committed by it for about two and a half years and thereby enriching itself unjustly, and thereafter considering the rising prices of steel in the market, JSW sought to comply with the terms of Resolution Plan at a very belated stage, in collusion with the CoC and the Resolution Professional. The changing stance of CoC in the present proceedings also smacks of its *bona fides* and raises serious doubts about the exercise of its so-called commercial wisdom.

- 73.** The position of law, propounded by this Court is that commercial wisdom of CoC means a considered decision taken by the CoC with reference to the commercial interest, the interest of revival of Corporate Debtor and maximization of value of its assets. This wisdom is not a matter of rhetoric but is denoting a well-considered decision by the CoC as the protagonist of CIRP. The CoC therefore has to take into consideration the mandatory requirements of the Code as well as the Regulations framed by the Board, and to see that the Insolvency Resolution of the Corporate Debtor is completed in a time bound manner and for maximization of value of assets of the Corporate Debtor. The mandatory requirements under the Code are, the compliance of the time limit specified in

Section 12, the compliance of Section 29A to see whether the Resolution Applicant is an eligible applicant to submit the plan, the compliance of sub-section (2) of Section 30 of IBC etc. The mandatory requirements stated in Regulation 38 of the Regulations, 2016 are that the Resolution Plan must demonstrate that it addresses the cause of default, that it is feasible and viable, it has the provisions for its effective implementation and the Resolution Applicant has the capability to implement the Resolution Plan in a time bound manner. If the Resolution Plan does not comply with such mandatory requirements and such plan is approved by the CoC, it could not be said that the CoC had exercised its commercial wisdom while approving such Resolution Plan.

- 74.** In the instant case, though the CoC in its 18th and 19th Meetings had flagged all the issues with regard to non-compliance of various provisions of the IBC and the Regulations by JSW, surprisingly it approved Plan of JSW, without any deliberation on all the compliances. Further, in the present proceedings also after making serious allegations against JSW of misusing the process of law and not implementing the Resolution Plan in the time bound manner, accepted the amount of Rs. 19,350 Crores after about two years of the approval of Plan granted by the

NCLT, without raising any objection, and supporting the stand of JSW about the implementation of Plan during the course of arguments.

- 75.** Though the commercial wisdom of the CoC should have been given the primacy in any adjudicatory proceedings, the changing stance of CoC from time to time during the course of proceedings right from the holding of meetings for approving the Resolution Plan of JSW till the final hearing of the present Appeals, has led this Court to believe that the CoC also has played a very dubious role in the entire CIRP. It was stated by the CoC on affidavit before this Court that because of the delaying tactics adopted by JSW and deferring the implementation of the Resolution Plan, the CoC was entitled to the compensation and interest on the said amount of Rs.19,350 Crores for causing loss of crores of rupees per day. Though the CoC had written number of letters raising grievances with regard to non-payment of upfront amount of Rs.19,350 Crores to the Financial Creditors within 30 days of the approval of the plan, the CoC had changed its stance all of a sudden accepting the payment of Rs. 19350 crores without any demurer, and though the Effective date for implementation of the plan had already expired. As stated earlier, there is no material placed on record as to how, when and by whom

the Effective date as stated in the Resolution Plan was extended. During the course of arguments also Dr. Abhishek Manu Singhvi appearing for the CoC supported the submissions made by the learned Senior Counsel Mr. Neeraj Kishan Kaul for JSW to the effect that the Resolution Plan was implemented in part in March 2021 by making payment of Rs.19,350 Crores to Financial Creditors and making payment to the Operational Creditors in March 2022, and therefore the Appeals of the Appellants were required to be dismissed. Such a contradictory stands taken by the CoC at various stages of proceedings clearly proves that CoC had played foul and had not exercised its commercial wisdom in the interest of the Creditors.

- 76.** The SRA-JSW also made misrepresentations before the CoC, presenting a very rosy picture of Resolution Plan at the time of evaluation process conducted during the 18th Meeting and after securing the highest score as per the evaluation matrix, amended the said Plan, under the guise of compliance of the amended provisions of the Regulations, by submitting the Consolidated Resolution Plan with Addendum. Though the said plan was got approved from the NCLT by the Resolution Professional without confirming the compliance of Section 30(2) and the Regulations 38 and 39, JSW instead of complying with the

terms and clauses of the approved Resolution Plan filed the Company Appeal before the NCLAT, just to delay the implementation of the Plan.

- 77.** Even after the impugned judgment was passed by the NCLAT, allowing the said untenable Appeal of JSW and dismissing the other Appeals of the Operational Creditors and the Ex-Promoters, the Resolution Plan was not implemented by JSW under the guise of pendency of the present Appeals, though there was no stay granted by this Court against the implementation of the Resolution Plan. On the contrary a statement was made by Dr. Singhvi appearing for the CoC, as recorded in the order dated 06.03.2020, to the effect that “in case he receives money he will return the said amount within two months, if the appeal succeeds.” Again, pending these Appeals, with a view to delay the implementation of the Resolution Plan, JSW filed an IA being No. 47947/2020 in SLP(C) No. 29327-29328/2019 (Civil Appeal Nos.14503-14504 of 2004), which were tagged along with the present Appeals, attempting to seek a stay on the implementation of plan under the garb of seeking clarification of the court’s order dated 06.03.2020, stating *inter alia* that JSW was not obligated to implement the Resolution Plan during the pendency of the Appeals filed by the Appellants herein.

Thus, all throughout the proceedings, the plan was not implemented by JSW without any cogent reason or justification for about two and a half years after the approval granted by the NCLT and for about two years after the impugned order was passed by the NCLAT, leaving the creditors in lurch and leaving them high and dry.

- 78.** Now, a situation of *fait accompli* is sought to be presented before this Court by the learned Senior Advocate Mr. Neeraj Kishan Kaul appearing for JSW by submitting that pending the present Appeals, the Resolution Plan has been fully implemented. In our opinion, nobody should be permitted to misuse the Process of law nor should be permitted to take undue advantage of the pendency of any proceedings in any Court or Tribunal. Instituting vexatious and frivolous litigations in the NCLT or NCLAT and delaying the implementation of Resolution Plan under the garb of pendency of proceedings, has clearly proved the *mala fide* and dishonest intention on the part of JSW, in *firstly* securing highest score making misrepresentation before CoC and then not implementing the same under the garb of pendency of proceedings, though the Resolution Plan was supposed to be an unconditional one. Such acts of misuse and abuse of process of law cannot be vindicated by this Court, which otherwise would

tantamount to ratifying and pardoning the illegal acts committed by JSW and thereby giving them a clean chit.

- 79.** An illegality of any nature cannot be permitted to be perpetuated, and a plea of *fait accompli* cannot be permitted to be raised by any party to cover up their illegal acts, after achieving the ill motivated intentions circumventing the law. As demonstrated earlier, there was an entire spectrum of lacunas and flaws in the Resolution Plan of JSW with regard to non-compliance of the mandatory requirements under the IBC. The Resolution Plan as approved by the CoC was an unconditional plan, and JSW was supposed to implement the same regardless of any unprecedented challenges or circumstances. JSW cannot treat the plan as conditional or optional, nor can it abdicate its responsibilities on the ground of unforeseen obstacles. It is pertinent to note that though all throughout from the date of order passed by the NCLT till March, 2021, the stand of the JSW evidenced through an affidavit was that it was not obliged to implement the plan because of the pendency of these Appeals, however JSW played smart by making part payment to the Financial Creditors in March, 2021, realizing the beneficial market trend of the Steel. It also surreptitiously got the Effective date extended to 31.03.2021 from the so-called core group of CoC, which

had already become *functus officio* and which had no authority to extend the said Effective date. The net result is that the upfront payments as agreed to be made in the Resolution Plan within thirty days of the approval of the plan by NCLT was delayed by 540 days in respect of payment to the Financial Creditors and by 900 days in respect of payment to the Operational Creditors. The Equity commitment as per clause 2.3 of the Resolution Plan with regard to the infusion of Equity into the Company for an amount aggregating INR 8,550 crores, to be infused upfront on the Effective date, was also not complied with by JSW.

- 80.** It is very pertinent to note that the upfront payments and commitment with regard to infusion of Equity into the company was one of the main criteria on which JSW had scored the highest in the evaluation matrix determined by the CoC. Thus, after obtaining the approval of its Resolution Plan from CoC by presenting a rosy picture, misguiding the CoC, and defeating the rights of other Resolution Applicants, JSW did not respect and honor the said commitments, and on the contrary tried its level best to delay the implementation of the Resolution Plan without any cogent reason or justification. This is nothing but a

misuse of process of law and a fraud committed by JSW with the CoC and other stakeholders.

81. Recently, this Court in ***State Bank of India and Others Vs. Consortium of Murari Lal Jalan and Florian Fritsch and Another***¹⁴, has made very apt observations, with regard to the delaying tactics adopted by the Successful Resolution Applicant in implementing the Plan, and the NCLT and NCLAT adopting casual approach in exercising discretion in granting extension of the timelines fixed under the Code. The Court while directing the Corporate Debtor to be taken into liquidation, observed thus: -

“**173.** This litigation is an eye-opener also as regards the manner in which the implementation of plans are handled by the successful resolution applicant and the lenders involved in the process. Once a resolution plan is approved under the Insolvency and Bankruptcy Code, 2016 the successful resolution applicant undertakes a profound responsibility to implement the plan in both letter and spirit. This obligation is not merely an empty formality but an enduring commitment to restore the corporate debtor to viability and ensure a meaningful turnaround. The role of the successful resolution applicant is thus far more than a transactional duty towards the creditors or stakeholders; it embodies a pivotal responsibility to the distressed entity itself, which must be approached with utmost dedication and an earnest sense of duty. Regardless of the challenges that may arise, the successful resolution applicant cannot treat its obligations as optional or conditional, nor can it abdicate its responsibility in the face of unforeseen obstacles. Its efforts must reflect a determination to

¹⁴ (2024) SCC OnLine 3187

implement the plan fully and to rejuvenate the debtor company, as this is integral to the success of the Insolvency and Bankruptcy Code, 2016 framework and the spirit of economic revival it seeks to foster. The approach, therefore, must not be frugal or narrowly profit-driven, limited to viewing the transaction through a purely commercial lens. Instead, it must recognise that rescuing a distressed company is a responsibility of significant social and economic value, demanding a holistic and responsible strategy. This involves a dedication to long-term outcomes, where the successful resolution applicant adopts measures that genuinely support the debtor's rehabilitation, rather than making minimal or half-hearted attempts at implementation. The courts and Tribunals have consistently underscored that the successful resolution applicant's role transcends commercial interest and embodies a commitment to the larger purpose of corporate revival. Consequently, it must make thoughtful and sustained efforts, demonstrating adaptability and resilience even when faced with obstacles or operational impediments. Simply put, the successful resolution applicant cannot step back or dismiss its obligations by attributing delays or setbacks to the conduct of other stakeholders, as this would undermine the very purpose of insolvency resolution.

174-175.....

176. The Insolvency and Bankruptcy Code, 2016 is silent as regards the phase of implementation of the resolution plan by the successful resolution applicant. This is mostly due to the fact that each resolution plan might be unique and customized to the specific needs of the corporate debtor and an excessive amount of statutory control over the implementation of the plan may prove to be counterproductive to the cause of the corporate debtor. However, this has unfortunately led to the consequence of giving excessive leeway to the successful resolution applicants to act in flagrant violation of the terms of the resolution plan in a lackadaisical manner. The successful resolution applicants repeatedly approach the Adjudicating Authority or the National Company Law Appellate

Tribunal for the grant of reliefs in relation to relaxation of the strict compliance to the terms of the plan, including the timelines imposed therein. The National Company Law Tribunal and National Company Law Appellate Tribunal more often than not, accede to such requests in exercise of their inherent powers under rule 11 or their power to extend time under rule 15 of the National Company Law Tribunal and National Company Law Appellate Tribunal Rules, 2016 respectively. It is reiterated that the National Company Law Tribunal and National Company Law Appellate Tribunal must not entertain such repeated attempts at violating the integrity of a committee of creditors approved resolution plan by accommodating the incessant requests of the successful resolution applicants. The exercise of discretion as regards altering the binding terms of the resolution plan, including the timelines imposed, must be kept at a minimum, at best. The National Company Law Tribunals/National Company Law Appellate Tribunals need to be sensitized of not exercising their judicial discretion in extending the timelines fixed under the Insolvency and Bankruptcy Code, 2016 or the resolution plan, in such a way that it may make the Code lose its effectiveness thereby rendering it obsolete.”

- 82.** Thus, it is quite clear that merely because the Code is silent with regard to the phase of implementation of the Resolution Plan by the Successful Resolution Applicant, neither the Tribunal nor the Courts should give excessive leeway to the Successful Resolution Applicant to act in flagrant violation of the terms of the Resolution Plan or in a lackadaisical manner. In the instant case, SRA/JSW did not implement the Resolution Plan for about two years

since its approval by the NCLAT, though there was no legal impediment in implementing the same. Such flagrant violation of the terms of the Resolution Plan, has frustrated the very object and purpose of the Code. It is needless to say that the Resolution Plan, after its approval by the Adjudicating Authority i.e. NCLT under Section 31, is binding not only to the Corporate Debtor, its employees, members, creditors and the Government authorities but also to all the stakeholders including the successful Resolution Applicant itself. It may be noted that any contravention of the terms of the approved Resolution Plan, by any person on whom such plan is binding under Section 31, is liable to be prosecuted and punished under sub-section (3) of Section 74 of the IBC. It is also further required to be noted that in view of Section 33, where the Adjudicating Authority, before the expiry of the insolvency resolution process period or the maximum period permitted for completion of corporate insolvency resolution process under Section 12, does not receive a Resolution Plan under Sub-section (6) of Section 30; or rejects the Resolution Plan under Section 31 for the non-compliance of the requirements specified therein, it has to pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in Chapter III of the IBC.

- 83.** Having thoroughly examined the entire matter factually and legally, we arrive at the following irresistible conclusions: -
- (i) The Resolution Professional had utterly failed to discharge his statutory duties contemplated under the IBC and the CIRP Regulations during the course of entire CIR proceedings of the Corporate Debtor-BPSL.
 - (ii) The CoC had failed to exercise its commercial wisdom while approving the Resolution Plan of the JSW, which was in absolute contravention of the mandatory provisions of IBC and CIRP Regulations. The CoC also had failed to protect the interest of the Creditors by taking contradictory stands before this Court, and accepting the payments from JSW without any demurer, and supporting JSW to implement its ill-motivated plan against the interest of the creditors.
 - (iii) The SRA-JSW after securing the highest score in the Evaluation matrix in the 18th meeting of CoC, submitted the revised consolidated Resolution Plan with addendum under the garb of complying with the amendments made in the CIRP Regulations, 2016, and got the same approved from the CoC. However, JSW even after the approval of its Plan by the NCLAT, willfully contravened and not complied with

the terms of the said approved Resolution Plan for a period of about two years, which had frustrated the very object and purpose of the IBC, and consequently had vitiated the CIR proceedings of the Corporate Debtor-BPSL.

- (iv) The Resolution Plan of JSW as approved by the CoC did not confirm the requirements referred to in sub-section (2) of Section 30, the same being in flagrant violation and contravention of the expressed provisions of the IBC and the CIRP Regulations. The said Resolution Plan therefore was liable to be rejected by the NCLT under sub-section (2) of Section 31, at the very first instance.
- (v) The impugned judgment passed by the NCLAT in allowing the Company Appeal of JSW and issuing the directions without any authority of law and without jurisdiction is perverse, *coram non judice* and liable to be set aside.

84. In that view of the matter, following order is passed: -

- (i) The judgments and orders dated 05.09.2019 and 17.02.2020 passed by the NCLT and NCLAT respectively are quashed and set aside.
- (ii) The Resolution Plan of JSW as approved by the CoC stands rejected, being not in conformity with the

provisions contained in sub-section (2) of Section 30, read with sub-section (2) of Section 31.

- (iii) In view of the provisions contained in sub-section (1) of Section 33, and in exercise of the jurisdiction conferred under Article 142 of the Constitution of India, the Adjudicating Authority i.e. the NCLT is directed to initiate the Liquidation Proceedings against the Corporate Debtor-BPSL under Chapter III of the IBC and in accordance with law.
- (iv) The payments made by the JSW to the Financial Creditors and the Operational Creditors, as also the Equity contribution if any infused, under the garb of the implementation of the Resolution Plan, being subject to the outcome of the present set of Appeals, shall be dealt with by the parties as per the statement of Senior Advocate Dr. Abhishek Manu Singhvi appearing for the CoC, recorded in the order dated 06.03.2020.
- (v) Since, we have rejected the Resolution Plan of JSW, we have not dealt with the issue of the EBITDA though raised and argued by the Learned Advocates for the parties. The question of law with regard to EBITDA is kept open.

- 85.** The Civil Appeal No. 1808 of 2020 (Kalyani Transco vs. M/s. Bhushan Power and Steel Limited & Ors), Civil Appeal Nos. 2192-2193 of 2020 (Sanjay Singhal & Anr vs. Punjab National Bank & Ors, Etc.), Civil Appeal No. 2225 of 2020 (Jaldhi Overseas Pte. Ltd. vs. Mahender Kumar Khandelwal & Ors), Civil Appeal No. 3020 of 2020 (M/s. Medi Carrier Pvt. Ltd. vs. Mahendra Kumar Khandelwal & Anr) and Civil Appeal No. 6390 of 2021 (CJ Darcl Logistics Ltd. vs. Mahendra Kumar Khandelwal & Anr) stand allowed to the aforesaid extent.
- 86.** Since, we have rejected the Resolution Plan of JSW, we do not express any opinion on the merits of the claims of the State of Odisha in respect of its Electricity dues and Entry tax dues. The Civil Appeal No. 3784 of 2020 (Government of Odisha & Ors vs. M/s. Bhushan Power and Steel Limited & Ors) and 668 of 2021 (State of Odisha vs. M/s. Bhushan Power and Steel Limited & Ors) stand disposed of accordingly.
- 87.** Pending application(s), if any, shall also stand disposed of.

.....J
[BELA M. TRIVEDI]

.....J
[SATISH CHANDRA SHARMA]

NEW DELHI;
MAY 02nd, 2025