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IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I, KOLKATA

IA (IB) No.538/KB/2021
IA (IB) No.628/KB/2021 &
IA (IB) No.635/KB/2021
in
CP (IB) No.349/KB/2017

In the matter of:
An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.

CP (IB) No.349/KB/2017

In the matter of:
Ramsarup Industries Limited [CIN: L65993WB1979PLC032113**],** having its registered office at 7C, Kiran Shankar Roy Road, Hastings Chambers, 2nd Floor, Room No.-1 Kolkata - 700 001.

... Corporate Applicant

IA (IB) No.538/KB/2021

In the matter of:
CFM Asset Reconstruction Private Limited, in its capacity as Trustee of CFMARC Trust, having its registered office at A/3, Safal Profitaire, Near Prahlad Nagar Garden, Ahmadabad - 380001 and Corporate Office at 1st Floor, Wakefield House, Sprott Road, Ballard Estate, Fort, Mumbai - 400 038.

...Applicant

Versus

1. **S S Natural Resources Private Limited [**CIN: U10300WB2015PTC204962**],** having its registered office at SS Chambers, 5 CR Avenue, 2nd Floor, Kolkata - 700072.
2. **Monitoring Agency to Ramsarup Industries Limited**, represented by its Chairman, Mr Kshitiz Chhawchharia [IBBI/IPA-001/IP-P00358/2017-18/10616].

...Respondents

IA (IB) No.628/KB/2021

In the matter of:
CFM Asset Reconstruction Private Limited, in its capacity as Trustee of CFMARC Trust, having its registered office at A/3, Safal Profitaire, Near Prahlad Nagar Garden, Ahmadabad – 380001 and Corporate Office at 1st Floor, Wakefield House, Sprott Road, Ballard Estate, Fort, Mumbai - 400038.

... Applicant

Versus

1. **S S Natural Resources Private Limited** [CIN: U10300WB2015PTC204962]**,** having its registered office at SS Chambers, 5 CR Avenue, 2nd Floor, Kolkata - 700072.
2. **Monitoring Agency to Ramsarup Industries Limited**, represented by its chairman, Mr Kshitiz Chhawchharia [IBBI/IPA-001/IP-P00358/2017-18/10616].

...Respondents

IA (IB) No.635/KB/2021

In the matter of:

S S Natural Resources Private Limited [CIN: U10300WB2015PTC204962]**,** having its registered office at SS Chambers, 5 CR Avenue, 2nd Floor, Kolkata - 700072.

...Applicant

Versus

1. **Kshitiz Chhawchharia** [IBBI/IPA-001/IP-P00358/2017-18/10616]**,** erstwhile Resolution Professional and chairman of the Monitoring Agency of Ramsarup Industries Limited**.**
2. **CFM Asset Reconstruction Private Limited,** in its capacity as Trustee of CFMARC Trust, having its registered office at A/3, Safal Profitaire, Near Prahlad Nagar Garden, Ahmadabad – 380001 and Corporate Office at 1st Floor, Wakefield House, Sprott Road, Ballard Estate, Fort, Mumbai - 400038

...Respondents

Date of hearing: 09 February 2022

Date of pronouncement: 06 April 2022

Coram:

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (via video conferencing):

On behalf of CFM Asset Reconstruction Private Limited:

1. Mr SN Mookherjee, Ld. Advocate General & Senior Advocate
2. Mr Ratnanko Banerji, Sr. Advocate
3. Mr Deepanjan Dutta Roy, Advocate
4. Mr Siddharth Dutta, Advocate
5. Ms Suhaani Dwivedi, Advocate

On behalf of the erstwhile Resolution Professional & Chairman-Monitoring Agency:

1. Mr Deep Roy, Advocate

2. Ms Srishti Agnihotri, Advocate
3. Mr Kshitiz Chhawchcharia, RP in person

On behalf of the Successful Resolution Applicant (S S Natural Resources Pvt Ltd):
1. Mr Sudipto Sarkar, Sr. Advocate
2. Mr Sumant Batra, Advocate
3. Mr Shounak Mitra, Advocate
4. Mr Saptarshi Mandal, Advocate

On behalf of Punjab National Bank, member of the Monitoring Agency:
1. Mr Debasish Chakrabarti, Advocate
2. Ms Trisha Mukherjee, Advocate

On behalf of Kotak Mahindra Bank
1. Ms Manju Bhuteria, Advocate
2. Mr Varun Kedia, Advocate

On behalf of the workers
1. Ms Amrita Pandey, Advocate

COMMON ORDER

*(Disposing of IA (IB) No.538/KB/2021, IA (IB) No.628/KB/2021
& IA (IB) No.635/KB/2021 in CP (IB) No.349/KB/2017)*

Rajasekhar V.K., Member (Judicial):

1. *The backdrop to the three interlocutory applications*

1.1. *Vide* order dated 08 January 2018, Ramsarup Industries Limited ***('Corporate Applicant' or 'Corporate Debtor')*** was admitted into Corporate Insolvency Resolution Process (***'CIRP')*** under section 10 of the Insolvency and Bankruptcy Code ***('the Code').***

1.2. Subsequently, the Resolution Plan submitted by S S Natural Resources Private Limited ***('Successful Resolution Applicant'*** or ***'SRA')*** was approved by the Committee of Creditors ***('CoC')*** with 74.41% voting share. The Resolution Plan was also approved by this Adjudicating Authority on 04 September 2019. The Monitoring Agency overseeing the implementation of the Resolution Plan consists of six members, being the erstwhile RP, two members of the SRA and three representatives of the CoC, *i.e.*, CFM Asset Reconstruction Private

Limited ***('CFM-ARC')***, Punjab National Bank ***('PNB')*** and Axis Bank Limited ***('Axis Bank').***

1.3. Upon approval of the Resolution Plan, nine appeals were preferred before the Hon'ble NCLAT. One of the appeals was preferred by the SRA on the grounds that the Adjudicating Authority has materially changed and altered the plan by imposing additional financial obligations on the SRA.

1.4. The Hon'ble NCLAT *vide* its common order dated 04 March 2021[1] dismissed the appeal. The Hon'ble NCLAT expressed its displeasure with respect to the conduct of the SRA for not attending the Monitoring Agency Meeting after the approval of the Plan by the Adjudicating Authority. The Hon'ble NCLAT also directed the Monitoring Agency to start taking action to implement the Resolution Plan. In case of the failure by the SRA to implement the Resolution Plan, an application for liquidation of the Corporate Applicant should be moved before the Adjudicating Authority, without any further delay, it directed (***emphasis on para nos.195, 196, 197 & 201 of the NCLAT Order*)**.

1.5. Notwithstanding the observations made by the Hon'ble NCLAT in its order dated 04 March 2021, the SRA preferred Civil Appeal No.1142/2021 before the Hon'ble Supreme Court. However, this was dismissed by the Supreme Court *vide* its order dated 04 May 2021,[2] on grounds of lack of substantial question of law.

1.6. For the purpose of this order, there was another appeal of interest, the one filed by Vanguard Credit & Holdings Private Limited ***("Vanguard"),*** being Civil Appeal No.1688/2021 before the Hon'ble Supreme Court ***("Vanguard Appeal"*** or ***"Vanguard's Appeal")***. The importance of this appeal in the scheme of things will be noticed later on in this order. Therefore, the SRA decided to wait for the decision of the Hon'ble Supreme Court in Vanguard's Appeal, even

[1] Annexure C of the IA (IB) No.538/KB/2021

[2] Annexure D of the IA (IB) No.538/KB/2021

though its own appeal was dismissed on 04 May 2021. As things turned out, the Hon'ble Apex Court, *vide* its order dated 02 July 2021, dismissed Vanguard's Appeal.

1.7. Pursuant to the Hon'ble NCLAT's order dated 04 March 2021 dismissing the SRA's appeal, the Chairman of the Monitoring Agency issued a notice dated 17 May 2021, calling for the 7th meeting of the Monitoring Agency on 20 May 2021.[3] In that meeting, the SRA expressed its willingness to implement the Resolution Plan subject to some conditions. Further, the SRA was unwilling to release the upfront payment to the Monitoring Agency to meet the CIRP costs and also objected to utilisation of the performance security until the Vanguard Appeal was decided by the Hon'ble Supreme Court. On their part, the members of the Monitoring Agency told the SRA about the need for unconditional implementation of the Resolution Plan.

1.8. Subsequently, the SRA in its mail dated 23 May 2021 drew attention to the 7th meeting of the Monitoring Agency and highlighted that the demand by the Monitoring Committee to compensate the Financial Creditors on account of delay in implementation of the Resolution Plan is unjustified. Further, the SRA in its mail also contended that it should be permitted to deposit the CIRP costs in an escrow account and its disbursement be kept on hold. The disbursement of the Performance Security and the interest earned thereon should also be kept on hold till the disposal of the Vanguard Appeal that was pending before the Hon'ble Supreme Court.

1.9. It is in this conspectus of facts that the present interlocutory applications have been filed and will have to be decided. We now notice briefly the three applications and the prayers made therein.

[3] Annexure G of IA (IB) No.538/KB/2021

IA (IB) No.538/KB/2021

1.10. This application was filed on 08 June 2021 by CFM-ARC, an assignee[4] of Asset Reconstruction Company (India) Limited, a financial creditor of the corporate debtor by assignment, against the SRA and the Monitoring Agency ***('Monitoring Agency')*** under section 33(3), 33(4) and 60(5) of the Code, *inter alia* seeking the following reliefs: -

(a) For liquidation of the Corporate Debtor;

(b) To direct the Monitoring Agency to forfeit the Performance Security amount deposited by the SRA under regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and to utilise the same towards CIRP costs and other outstanding expenses; and

(c) To appoint Mr Aditya Kumar Tibrewal as the liquidator.

IA (IB) No.635/KB/2021

1.11. This is an Application filed by the SRA against Mr Kshitiz Chhawchharia, erstwhile Resolution Professional ***('erstwhile RP')*** and CFM-ARC, a Financial Creditor and an assignee of Asset Reconstruction Company (India) Limited under section 60(5) of the Code *inter alia* seeking directions to the respondents to cooperate in the implementation of the approved Resolution Plan.

IA (IB) No.628/KB/2021

1.12. This Application has been filed by CFM-ARC against the SRA and the Monitoring Agency under section 60(5) of the Code *inter alia* seeking payment of interest by the SRA from the date of approval of the Resolution Plan, *i.e.,* 04 September 2019 till the implementation of the Resolution Plan by the SRA.

1.13. It is alleged that the SRA has miserably delayed implementation of the Plan. Such delay has significantly depleted the time value of money and resulted in

[4] Annexure E of the IA (IB) No.538/KB/2021, Deed of Assignment dated 23 April 2021

loss of business opportunity for the creditors and other stakeholders. Therefore, the creditors and stakeholders should be compensated adequately for such loss.

2. ***Disposal by common order***

2.1. Since the three interlocutory applications are intertwined and interconnected, we propose to dispose of all three applications by means of this common order, with references to the pleadings wherever they are indicated. For convenience, the parties are referred to by their names.

3. ***Submissions of Mr SN Mookherjee, Ld AG appearing for CFM-ARC***

3.1. Mr SN Mookherjee, Ld AG and Senior Advocate appearing for CFM-ARC, began his submissions by stating that the Adjudicating Authority approved the Resolution Plan on 04 September 2019. Despite this, the SRA went up in appeal challenging this approval. Ultimately, the NCLAT dismissed the appeal on 04 March 2021. While dismissing the appeal, the NCLAT also observed that the SRA had done nothing towards implementation of the Resolution Plan from 04 September 2019.[5] It also confirmed the order of the Adjudicating Authority. Many appeals were preferred before the Hon'ble Supreme Court against the Hon'ble NCLAT's order. But the important fact is that on 04 May 2021, it dismissed the SRA's appeal and affirmed the order of the NCLAT. Therefore, in so far as the SRA was concerned, the approved Resolution Plan had become final and binding.

3.2. Straight after the order of the SC, there were several meetings of the Monitoring Committee. All members of the Monitoring Agency other than the RA, are unanimous that the Resolution Plan must be implemented. No steps have been taken. However, the RA put in a condition that whatever money it puts in must remain in escrow. Whatever money it puts in for day-to-day operation is subject to the monies being refunded to the RA in the event of an appeal preferred by

[5] Para 197 of the Hon'ble NCLAT's order notices as follows – *"It is clear that there was no stay for implementation of the Resolution Plan, but after 1½ period after the date of approval of the Resolution Plan, appellant has not taken any steps towards the implementation of the plan."*

Vanguard, relates to inclusion of factory as part of the assets of the CD, succeeds. This condition has been imposed after the Resolution Plan had been challenged right up to the Hon'ble Supreme Court and the SRA failed. Therefore, the SRA does not appear to be interested in implementation, which is why CFM-ARC has now applied for liquidation.

3.3. Mr Mookherjee submitted that the Resolution Plan was approved with 74.41% of the votes on 16 March 2019. The Adjudicating Authority approved the Resolution Plan on 04 September 2019. From this order, an appeal was carried before the Hon'ble NCLAT. Initially, an order was passed staying the order approving the Resolution Plan in so far as it related to payment in excess of ₹400 crore. So, upto ₹400 crore, it had to be complied with, and this was not done. Thereafter, on 04 March 2021, the appeals were all disposed of by a detailed judgment.

3.4. Mr Mookherjee submitted that as a matter of interest and as a matter of principle as well, he would rely on the order dated 04 March 2021 for two reasons –

(1) one has to see whether there is a breach after 04 March 2021. This is the starting point, and we need not look behind it for any breach.

(2) It shows the conduct of the SRA and its intent to actually try and make the Resolution Plan conditional, which is not permitted in law.

3.5. Mr Mookherjee drew specific attention to the following observations of the Hon'ble NCLAT:

(a) In para 194 of the *juris* copy of the Hon'ble NCLAT's judgment dated 04 March 2021, on the intent aspect, the Hon'ble Appellate Tribunal has found that the SRA has not implemented the Resolution Plan despite its approval by the Adjudicating Authority on 04 September 2019. The pandemic and its after-effects started in India from 15 March 2020 onwards, but the SRA filed an application (when ?) seeking to withdrawal from the implementation invoking *force majeure* circumstances.

(b) In para 195, it is specifically observed that the SRA has already committed default in not implementing the Resolution Plan, and that the appeal has been filed simply to avoid anticipated action on refusal to implement the approved plan.

(c) In para 196, the Hon'ble Appellate Tribunal has noticed that the SRA has filed its appeal on an erroneous assumption and made arbitrary calculations with the sole aim of evading its obligations under the approved Resolution Plan and has not paid a single penny on the pretext of the order dated 25 September 2019 without there being any stay on payments upto ₹400 crore. The Hon'ble NCLAT further notes that this clearly shows failure of the SRA to implement the approved Resolution Plan.

(d) In para 198, the Hon'ble Appellate Tribunal has observed the conduct of the SRA to protract the matter, and that if this kind of approach is not prevented, it would send a wrong message.

(e) Finally, in para 201, the Hon'ble Appellate Tribunal has directed the Monitoring Agency to start taking steps for implementation of the Resolution Plan immediately, and in case the SRA fails to implement the approved Resolution Plan, appropriate action should be taken immediately, and without waiting further, the application should be moved before the Adjudicating Authority for liquidation of the corporate debtor.

All these observations show that the real intent of the SRA was to wriggle out from implementation of the approved Resolution Plan. In spite of this, the Hon'ble NCLAT gave the SRA a second lease of life to implement the plan, with a condition that if they fail, the corporate debtor should be sent into liquidation, Mr Mookherjee submitted.

3.6. The SRA preferred an appeal from this order before the Hon'ble Supreme Court. The other aggrieved parties also preferred appeals. On 04 May 2021, the Hon'ble Supreme Court dismissed the appeal filed by the SRA summarily.[6] There was no implementation even after this dismissal of the appeal. Then, a

[6] Page 232 of the IA, @ page 233, para 3

request was made at the meeting of the Monitoring Agency to implement the Resolution Plan.[7]

3.7. On 23 May 2021,[8] a mail was sent by the SRA, which was squarely in breach of the approved Resolution Plan. Three conditions were sought to be brought in apropos the implementation of the Resolution Plan –

(1) Payment of CIRP costs and day-to-day expenses;

(2) Performance Security Amount of ₹35 crore, which was encashed by the CoC in January 2020, be not disbursed; and

(3) The entire implementation of the Resolution Plan was now made conditional on the result of the Vanguard Appeal.

According to Mr Mookherjee, this shows that the SRA has acted in breach of the Resolution Plan, and that it sought to impose conditions on implementation of the Resolution Plan after its approval by the Adjudicating Authority, the Appellate Tribunal and the Supreme Court, which is not permitted in law.

3.8. One of the agenda items of the 8th meeting of the Monitoring Agency held on 27 May 2021,[9] was to discuss the next steps for implementation of the Resolution Plan. The discussions are recorded under clause (e),[10] where Axis Bank, PNB and the erstwhile RP – all objected to the conditions being imposed. The email of 31 May 2021[11] from the SRA makes everything conditional on the result of the Vanguard Appeal. A further condition was imposed *vide* email dated 03 June 2021,[12] wherein the Zero Date was attempted to be shifted, Mr

7 Page 365 of the IA, @ page 370

8 Page 374 of the IA

9 Minutes at page 381 of the IA

10 Page 385 of the IA

11 Page 399 of the IA

12 Page 406 of the IA, @ page 407, para 2

Mookherjee submitted. This led to the consent of an insolvency professional being obtained to act as the liquidator and filing of the present application.

3.9. Mr Mookherjee then turned his attention to the subsequent events. IA No.538/KB/2021 was filed on 08 June 2021 for liquidation of the corporate debtor in view of non-implementation of the Resolution Plan by the SRA. On 02 July 2021, the Hon'ble Supreme Court dismissed all the remaining appeals, including the Vanguard Appeal. Mr Mookherjee submitted that the breach having been committed, the corporate debtor should now be sent into liquidation.

3.10. Mr Mookherjee submitted that the SRA had made incorrect statements in its reply affidavit. The SRA had averred that to demonstrate its *bona fide* intention, payments towards workmen's dues had been made.[13] Mr Mookherjee submitted that three of the items stated therein cannot be treated as payments. When the breaches occurred, they were accepted as breaches by the SRA, and the Performance Security Amount was encashed, so it cannot be treated as payments under the Resolution Plan. The benefit of the breach cannot inure to the benefit of the SRA in the sense of permitting the RA to contend that the proceeds of the encashment are payments under the Resolution Plan. That amount is ₹35 crore. This was in terms of clause 14.6 of the process memorandum, which stipulated that there shall be a right to invoke the Performance Security Amount in case any of the conditions under the letter of intent or Resolution Plan are breached; and in case of failure of the SRA to implement the Resolution Plan to the satisfaction of the CoC.[14] In so far as the claim of payment of CIRP costs are concerned, the sum of ₹12.9 crore has been parked in an escrow account on 20 May 2021 and is not available for utilisation. They were never disbursed.

[13] Page 22, para 46 of the SRA's reply in IA (IB) No.538/KB/2021

[14] Clause 14.6 of the Process Memorandum (referred to, but copy thereof not placed on record)

3.11. The SRA has delayed the implementation of the approved Resolution Plan by about twenty-one months, and now the SRA is unwilling to implement the Resolution Plan unconditionally. The liquidation value in terms of the approved Resolution Plan is ₹614 crore, which is far more than the enterprise value for which the Resolution Plan of the SRA has been approved. Since the SRA has frustrated the entire exercise of the CIRP and the assets of the corporate debtor are depleting with time, this would leave all the stakeholders in a state of devastation. Mr Mookherjee drew attention to the 7th meeting of the Monitoring Agency, from where it is apparent that the SRA, instead of unconditionally implementing the Resolution Plan, has frustrated all possibilities of its implementations. The SRA is in violation of the judicial orders.

3.12. Mr Mookherjee also placed the 8th Meeting of the Monitoring Committee held on 27 May 2021.[15] He pointed out the agenda of the Meeting[16] and to clause (c)[17] and (h)[18] of the minutes, where the SRA is attempting to introduce a condition on the implementation of the Plan. The SRA also sought for a separate undertaking from the Financial Creditors stating that the money transferred or disbursed to the Financial Creditors would be refunded to the SRA, to the extent of their share, in case the Vanguard Appeal goes against the SRA. Further, as per mail dated 03 June 2021, the SRA again brought a new condition by shifting the Zero Date.[19]

3.13. The SRA missed the bus, since it has not implemented the Resolution Plan even after the Vanguard Appeal was dismissed on 02 July 2021, Mr Mookherjee submitted.

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[15] Page 381 of the IA (IB) No.538/KB/2021

[16] Page 384 of the IA (IB) No.538/KB/2021

[17] Page 385 of the IA (IB) No.538/KB/2021

[18] Page 386 of the IA (IB) No.538/KB/2021

[19] Page 406 of the IA (IB) No.538/KB/2021

3.14. Mr Mookherjee also relied on the following authorities in support of his contentions regarding time being a pivotal facet under IBC:

(a) Judgment of the Hon'ble Supreme Court in ***Kridhan Infrastructure Private Limited v. Venkatesan Sankaranarayan,***[20] where the Hon'ble Court held that time is a crucial facet of the scheme under IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute, the Hon'ble Court observed.

(b) Judgment of the Hon'ble Supreme Court in ***Ebix Singapore Private Limited v. CoC of Educomp Solutions Limited & another,***[21] for the following propositions –

1. The Resolution Plan after its approval is not a contract between the parties. It is not even a statutory contract, and the limited role of the Contract Act is only with regard to interpretation of the clauses.

2. The object of the IBC is to avoid unpredictability and delay. The SRA's stand introduces unpredictability and delay, which is not something that should be encouraged in an insolvency process.

3. No conditions can be imposed either in the Resolution Plan or by the Adjudicating Authority either when putting forward a Resolution Plan or when the Resolution Plan is being approved by the Adjudicating Authority. Renegotiation of the Resolution Plan would not be permissible, since it would make the resolution process indeterminate and unpredictable.

4. If the conditions of section 33[22] of the Code are fulfilled, then liquidation has to ensue, and no discretion is vested in the Adjudicating Authority.

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[20] (2021) 6 SCC 94 decided on 01 March 2021

[21] 2021 SCC Online SC 707 decided on 13 September 2021

[22] (3) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Mr Mookherjee relied on paras 165, 166, 167 to 187, 170, 179, 185 and 187 of the judgment in ***Ebix (supra)*** in support of his contentions.

3.15. Mr Ratnanko Banerji, Ld. Sr. Counsel who also appears for CFM-ARC, supplemented the submissions of Mr SN Mookherjee, by stating that the Resolution Plan was approved in 2019 based on the valuation for the year 2018. Successive appeals by the SRA should not be a ground for condonation of delay in implementation of the Resolution Plan. The SRA had no reason to wait for the Vanguard Appeal to be decided by the Hon'ble Supreme Court.

3.16. Mr Banerji further submitted that one of the objectives of the Code is maximisation of assets. If such maximisation lies in liquidation, then no advantage is to be gained by allowing implementation of a resolution plan after more than two years.

4. ***Submissions of Mr Sudipto Sarkar, Ld. Sr. Counsel appearing for SRA***
IBC meant for insolvency resolution first and foremost, not for recovery

4.1. Mr Sudipto Sarkar, Ld Sr Counsel appearing for the SRA, submitted that CFM-ARC, the Applicant in IA (IB) No.538/KB/2021, purchased the debt on 23 April 2021 from some of the creditors. Therefore, it came in with the full knowledge of the 04 March 2021 order of the Hon'ble NCLAT, which went against the SRA. Aggrieved by this order, the SRA filed a civil appeal before the Hon'ble Supreme Court, which was disposed of on 04 May 2021. Vanguard also filed an appeal against the NCLAT order of 04 March 2021, since it was the owner of the land in which the factory of the Corporate Debtor was situated. The Resolution Plan provided that the land will come to the Corporate Debtor. This was a key feature of the Resolution Plan. Vanguard's Appeal was dismissed on 02 July 2021. As a matter of fact, it was on account of the SRA mentioning the

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

matter before the Hon'ble Supreme Court on 28 June 2021, which prompted the Hon'ble Supreme Court to place the matter on 02 July 2021.

4.2. After the 02 July 2021 order of the Hon'ble Supreme Court, CFM-ARC filed another application bearing IA (IB) No.628/KB/2021 before this Adjudicating Authority, where the applicant asked for interest @ 12% per annum on grounds of default. The SRA also filed an application bearing IA (IB) No.635/KB/2021 before this Adjudicating Authority, seeking a direction for implementation of the approved Resolution Plan.

4.3. In so far as IA (IB) No.538/KB/2021 is concerned, Mr Sudipto Sarkar drew our attention to the motive behind CFM-ARC's application seeking liquidation of the Corporate Debtor. In the synopsis, CFM-ARC has mentioned that the liquidation value of the Corporate Debtor is far more or exceeds the enterprise value provided under the approved Resolution Plan.[23]

4.4. Mr Sarkar urged us to examine this motive in the context of the IBC and the Supreme Court judgments in ***Swiss Ribbons Private Limited v Union of India,***[24] where the Hon'ble Supreme Court noticed para 29.1 of the Insolvency Law Committee Report of March 2018 that the intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

4.5. Similarly, in ***Babulal Vardharji Gurjar vs Veer Gurjar Aluminium Industries Private Limited & another,***[25] the Hon'ble Supreme Court held in para 21 of its judgment that the primary focus of the Code is to ensure revival and continuation of the Corporate Debtor and, as far as feasible, to save it from

[23] Page 15 (synopsis) of IA (IB) No.538/KB/2021

[24] (2019) 4 SCC 17 : 2019 SCC OnLine SC 73 decided on 25 January 2019

[25] (2020) 15 SCC 1 : 2020 SCC OnLine SC 647 decided on 14 August 2020

liquidation. The Hon'ble Court had reiterated that the Code is not a mere recovery legislation for creditors.

4.6. If that is the principle of the Code, Mr Sarkar continued, then a creditor who files an application for commencing liquidation proceeding after the Resolution Plan has been approved, and that too only for the purpose of realising a higher value, should be discouraged and such application ought not to be entertained by the Adjudicating Authority.

On liquidation being more beneficial to the Corporate Debtor than resolution

4.7. Mr Sudipto Sarkar said that in the judgment of the Hon'ble Supreme Court in ***Maharashtra Seamless Limited v Padmanabhan Venkatesh & others*,**[26] it has been held that even if the liquidation value is more than the value of the plan, the plan should be accepted since the liquidation value is of no relevance (para 28). Therefore, the prayer for liquidation should not be accepted at this stage, when the SRA was ready and willing to honour its commitment under the Resolution Plan, after the appeals process has culminated.

The nature of the difficulty in implementation of the approved Resolution Plan

4.8. Mr Sarkar submitted that the Vanguard land is recognised at para 171 of the Hon'ble NCLAT's order. Therefore, the Vanguard Appeal becomes important and central to the Resolution Plan, without which the implementation was in jeopardy. If Vanguard was allowed to pull out, then the Resolution Plan would have failed, since there would be no Resolution Plan to be implemented at all. Naturally, the SRA waited for the Vanguard Appeal to be decided.

On the conduct of the SRA

4.9. Mr Sudipto Sarkar submitted that when an appeal is filed from an order and the appeal is disposed of, the original order is no longer enforceable. Therefore, the enforceable order is only of 04 March 2021, since the order of the

[26] (2020) 11 SCC 467 : 2020 SCC OnLine SC 67 decided on 22 January 2020

Adjudicating Authority had now merged in the order of the Hon'ble Appellate Tribunal. He submitted that the adjudicating authority cannot now look into the conduct of the SRA. The same principle will apply once the statutory appeal is filed before the Hon'ble Supreme Court against the NCLAT order. Automatically, the order of NCLAT will merge into the order of the Hon'ble Supreme Court.

4.10. Mr Sarkar relied on the following judgments in support of this contention:

(a) ***Gojer Bros (Pvt) Ltd v Ratan Lal Singh:***[27] In para 11 at page 458 of the judgment, the Hon'ble Supreme Court held that the juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

(b) ***Kunhayammed & others v State of Kerala & another:***[28] In para 7 @ page 369 of the judgment, the Hon'ble Supreme Court observed that the doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. The Hon'ble Court relied on ***Gojer Bros (supra)*** in para 10 and noticed the decision in ***SS Rathore v State of MP,***[29] where a seven-member Bench of the Hon'ble Supreme Court, having reviewed the available decisions on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of the doctrine of merger is without any legal justification (para 11). The Hon'ble Court explained the logic underlying the doctrine of merger, stating that once a decree or order is subjected to a challenge by statutory appeal, then the finality of that order is put in jeopardy. Once the

[27] (1974) 2 SCC 453 decided on 01 May 1974

[28] (2000) 6 SCC 359 : 2000 SCC OnLine SC 1008 decided on 19 July 2000

[29] (1989) 4 SCC 582 decided on 06 September 1989

superior court has disposed of the *lis* either way, the decree or order of the superior court merges the decree or order passed by the court, tribunal or authority below (para 12).

4.11. Mr Sarkar submitted that if a statutory remedy is available, then the order of the appellate forum will hold the field. In the present case, appeal under section 62 is a statutory right. So, at least before the 04 May 2021 judgment of the Hon'ble Supreme Court in the SRA's appeal, nothing survives. At this point, at best, the order of 02 July 2021 dismissing Vanguard's Appeal survives.

4.12. Mr Sarkar then submitted that once an appeal is filed, the matter is no longer enforceable. For this proposition, he relied on ***Canara Bank v NG Subbaraya Setty & another***.[30] Para 24 is worth reproducing in its entirety:

"24. If the period of limitation for filing an appeal has not yet expired or has just expired, the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as res judicata. No hard-and-fast rule can be applied. The entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding. Many factors have to be considered before exercising this discretion – for example, the fact that the appeal against the first judgment is grossly belated; or that the said appeal would, in the ordinary course, be heard after many years in the first proceeding; or, the fact that third-party rights have intervened, thereby making it unlikely that delay would be condoned in the appeal in the first proceeding. As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again

[30] (2018) 16 SCC 228 : 2018 SCC OnLine SC 427 decided on 20 April 2018

because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case."

4.13. On 02 July 2021, the Hon'ble Supreme Court dismissed Vanguard's Appeal. It addressed an email on the same day to the Monitoring Agency. On 07 July 2021,[31] the SRA offered to implement the entire Resolution Plan. Therefore, after 07 July 2021, all delay in implementation is attributable to CFM-ARC, which prevented the Monitoring Agency and the SRA from implementing the plan.

4.14. Mr Sudipto Sarkar submitted that the conduct of the SRA is an indicator of its *bona fides*. The SRA has made a substantial payment of ₹59.85 crore, as follows:

Remarks	**Amount paid**
Earnest Money Deposit	₹5,00,00,000.00
Deposited with Monitoring Agency which was encashed by ARCIL and is presently kept with ARCIL in an interest-bearing account	₹35,00,00,000.00
Workmen dues paid on 18 June 2021	₹7,00,00,000.00
CIRP Cost paid on 18 June 2021	₹12,49,00,000.00
For the purposes of meeting the day-to-day expenses of the Corporate Debtor for the month of May 2021, which is over and above the Resolution Plan, paid on 28 May 2021	₹18,00,000.00
For the purposes of meeting the day-to-day expenses of the Corporate Debtor for the month of June 2021, which	₹18,00,000.00

[31] Page 495 of the IA

Remarks	**Amount paid**
is over and above the Resolution Plan, paid on 15 June 2021	
Total	**₹59,85,00,000.00**

4.15. The SRA has all along offered to deposit the entire amount in an escrow account, but with the only request not to distribute the amount till the disposal of Vanguard's Appeal before the Hon'ble Supreme Court.[32]

On the question of interest

4.16. Mr Sudipto Sarkar submitted that, while IA (IB) No.538/KB/2021 was pending consideration, a meeting of the Monitoring Agency was held on 07 July 2021, at which CFM-ARC stated that unless interest was paid, it would oppose implementation of the approved Resolution Plan. PNB stated that the plan should be implemented.

4.17. On 12 July 2021, the SRA filed its application bearing IA (IB) No.635/KB/2021 seeking implementation of the Plan. On the same day, CFM-ARC filed another application, numbered as IA (IB) No.628/KB/2021 seeking payment of interest @ 12% per annum on and from 04 October 2019 until payment of the upfront amount promised under the approved Resolution Plan. While on the one hand, CFM-ARC wanted liquidation, on the other, an alternative prayer seeking interest for delayed payment is sought from the SRA. Having made this application seeking interest for delay, CFM-ARC can no longer maintain IA (IB) No.538/KB/2021 for liquidation, Mr Sarkar argued.

4.18. Mr Sudipto Sarkar urged the Adjudicating Authority to take a holistic picture. The Adjudicating Authority is not a forum for creditors to come up and ask for interest for delay. The Adjudicating Authority must look at the conduct of the

[32] Page 39 of IA (IB) No 635/KB/2021

creditor, just as it must look at the conduct of the SRA also. He pointed out that only one creditor - CFM-ARC - is asking for interest, and that too after preventing the Monitoring Agency and the SRA from implementing the Resolution Plan.

4.19. Therefore, the creditor cannot use the forum of the Adjudicating Authority to arm-twist the SRA to part with additional interest, especially when seen in the light of the fact that the SRA has not asked for any additional time. That might amount to altering the plan itself, Mr Sarkar submitted.

5. *Submissions of Mr Sumant Batra, Ld Counsel assisting Mr Sudipto Sarkar for the SRA*

5.1. Mr Sumant Batra, Ld Counsel assisting Mr Sudipto Sarkar, supplemented that the legislature, in its own wisdom, had chosen not to provide any substantive provision either in the Code or in the CIRP Regulations, prescribing or specifying any penal provision in the form of interest, while it chose to do so in liquidation proceedings.[33] The larger purpose of the Code is to ensure resolution and a turnaround of the Corporate Debtor, so that all stakeholders benefit. If the CoC so wished, it could have said that in case there is a failure to implement the approved Resolution Plan, then there would be consequences in the form of interest etc. it did not do so.

5.2. The second point that Mr Batra made concerned the *bona fides* of the SRA. He submitted that even before the Apex Court order of 02 July 2021 dismissing the Vanguard Appeal, and right from 04 March 2021 when the Appellate Tribunal directed implementation, the SRA had repeatedly offered to deposit the entire amount in an escrow account.[34] The only request was not to distribute the amount till the Hon'ble Supreme Court delivered its verdict, since it would be

[33] Schedule I, clause 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

[34] Page 39 of IA (IB) No.635/KB/2021, letter dated 23 May 2021

nearly impossible to get the money back in case the Hon'ble Supreme Court upheld the appeal.

6. *Submissions by Punjab National Bank, member of the Monitoring Agency*

6.1. Punjab National Bank ***('PNB')*** is one of the members of the Monitoring Committee having a voting share of 8.99%. In the 7th Monitoring Agency meeting held on 20 May 2021, PNB expressed its opinion that the first step for implementation of the Resolution Plan is the payment of the CIRP cost.

6.2. Subsequently, on 08 June 2021 the SRA paid the CIRP cost of ₹12,49,74,587/- and a sum of ₹7,00,00,000/- towards payment of workmen dues. Further, for meeting the day-to-day expenses of the Corporate Debtor for the months of May and June 2021, a sum of ₹18,00,000/- each was paid on 28 May 2021 and on 15 June 2021. Both these payments are over and above the payments due under the Resolution Plan.

6.3. In view of the abovementioned payments by the SRA, PNB was of the view that one more chance should be given to the SRA without any pre-condition. PNB also suggested that the date of the 7th Monitoring Agency meeting might be taken as the effective date of the implementation of the Resolution Plan and the same has been approved by Axis Bank, another member of the Monitoring Agency.

7. *Submissions by Ms Amrita Pandey, Ld Counsel representing the workers*

7.1. Ms Amrita Pandey, Ld Counsel representing the workers, submitted that the workers see a ray of hope in **<u>not</u>** sending the Corporate Debtor into liquidation, and that the SRA may be given an opportunity to implement the Resolution Plan.

8. *Rejoinder submissions of Mr SN Mookherjee, Ld AG and Sr Counsel for CFM-ARC*

On the SRA's conduct

8.1. Mr SN Mookherjee, Ld AG & Sr Counsel appearing for CFM-ARC, submitted that section 33(4)[35] of the Code enjoins the Adjudicating Authority to pass an order of liquidation. So, the issue is to determine whether there is a default or not. The mandate of the statute is that if there is a default, the liquidation order must follow.

8.2. What is important is that the Resolution Plan was approved on 04 September 2019. The Plan required several steps to be taken. However, the SRA filed an appeal. There was an interim order in the appeal, and on 04 March 2021, the Hon'ble NCLAT dismissed all the appeals including the one filed by the SRA. The Hon'ble NCLAT found that the SRA was in default of not only the Resolution Plan but also the interim directions given. It also noted that the SRA had an intention of complying with the Resolution Plan. So, an opportunity was given in this regard.

8.3. Now, it is an accepted fact that after 04 March 2021, the SRA did not comply with the timelines of the order passed by the Hon'ble NCLAT or what was provided for in the Resolution Plan. In fact, right from 04 March 2021 to 04 May 2021, when the SRA's appeal to the Hon'ble Supreme Court got dismissed, there was no step taken under the Resolution Plan.

8.4. The next cut-off date is 04 May 2021, when the Hon'ble Supreme Court dismissed the SRA's appeal. Again, there was no step taken to act in terms of the Resolution Plan. In fact, the first and foremost stand taken was that the SRA was not going to act till such time Vanguard's appeal is disposed of, except that

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[35] (4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

the SRA offered to pay the CIRP costs and the Resolution Plan amount into an escrow.

On the doctrine of merger

8.5. Mr Mookherjee submitted that a very interesting argument was made on the doctrine of merger. The argument advanced was that there is no finality in the matter because of the pendency of the appeals, and therefore, till 02 July 2021, there was no requirement to act in terms of the approved Resolution Plan. That is not the position in law, he submitted.

8.6. Mr Mookherjee then proceeded to distinguish the judgments relied upon by Mr Sudipto Sarkar:

(a) In ***Kunhayammed (supra),***[36] a distinction was made between summary dismissal and non-summary dismissal of appeals. The judgment re-emphasised the decision in *Shankar Ramchandra Abhyankar v Krishnaji Dattatreya Bapat,*[37] that there are three pre-conditions attracting the applicability of the doctrine of merger – (1) the jurisdiction exercise should be appellate or revisional; (2) the jurisdiction should have been exercised after issue of notice; and (3) after a full hearing in the presence of both the parties.

In the present case, the appeals faced summary dismissals *vide* orders dated 04 May 2021 and 02 July 2021.

(b) In ***Gojer Bros (supra),***[38] it was held in para 13 that the Hon'ble Supreme Court was not concerned to determine whether the decree passed by a trial court can merge in an unspeaking order passed by the higher court while summarily dismissing the proceeding, because the high court had given a considered judgment after a contested hearing.

[36] (2000) 6 SCC 362 decided on 19 July 2000

[37] Page 370, para 28 of the judgment *ibid*

[38] (1974) 2 SCC 453 decided on 01 May 1974

8.7. Mr Mookherjee submitted that even if the doctrine of merger applied, the orders passed by the appellate authorities and the order approving the Resolution Plan both remain binding. This issue was not addressed.

8.8. In reply to IA (IB) No.538/2021, the SRA claimed that it had made payment of a substantial amount of ₹59.85 crore,[39] to demonstrate its intent. This was incorrect, and was not dealt with in the arguments. The Request for Resolution Plans (RFRP) document provided that Performance Security Amount (₹35 crore) was to be made by the successful resolution applicant, which would be invoked in case of non-implementation. Therefore, the invocation of the Performance Security Amount was a consequence of default. The next five crore rupees was the Earnest Money Deposit (EMD) for participating in the process. ₹12.49 crore was due and payable towards CIRP costs. Instead, the SRA proposed that this money be parked in escrow pending disposal of the Vanguard Appeal. This is not fair conduct on the part of the SRA so as to warrant exercise of discretion in favour of the SRA, Mr Mookherjee submitted.

8.9. The SRA has further relied on two other judgments of the Hon'ble Supreme Court in ***Maharashtra Seamless (supra)*** and ***Swiss Ribbons (supra).*** It was said that the Code is concerned with resolution and not liquidation, on the basis that the Preamble does not speak of liquidation. Mr Mookherjee conceded that this was true, but liquidation is the consequence of failure of resolution. Mr Mookherjee submitted that neither of these two cases concerned default in the form of non-implementation of the Resolution Plan.

8.10. A submission was made that at the hearing on 09 February 2022 that the entire resolution amount of approximately ₹322 crore has been put into the account of the Corporate Debtor. However, the payment has actually been made into a

[39] Para 25 of the reply

separate account in the name of the SRA and not that of the Corporate Debtor. This is not compliance with the provisions of the Resolution Plan.

8.11. Mr Mookherjee submitted that the fundamental issue is whether the Resolution Plan and its implementation was resisted after the NCLAT's order of 04 March 2021. If the determination was that it was so, then that is the end of the matter. Even if the term ***"shall"*** occurring in section 33(4) of the Code was to be read as ***"may,"*** no discretion should be exercised in favour of the SRA, because they did not comply with their obligations even though an appeal remained pending. Not only that, but they also tried to mislead the Adjudicating Authority by saying that they had made a payment of ₹59.85 crore under the Resolution Plan, when it clearly included the EMD and the Performance Security Amount, which cannot be termed "payments" under the Resolution Plan, Mr Mookherjee argued.

8.12. Continuing his submissions on the conduct of the SRA, Mr Mookherjee alleged that the Vanguard Appeal was to try and get away from implementation of the Resolution Plan. He drew attention to the clause 12[40] of the Resolution Plan. It reads, *"Upon approval of the plan by the Adjudicating Authority, the Durgapur land shall stand transferred to the Corporate Debtor such that the Corporate Debtor shall be vested to be in possession and have absolute and good and marketable title, rights and interest …."* This plan was successfully piloted through the CoC. So, the clause was introduced by the SRA, and then they sought to back out because Vanguard preferred an appeal. The risk of a Vanguard Appeal did not lie in the mouth of the SRA, because it was included in the Resolution Plan formulated by the SRA itself, Mr Mookherjee stated.

8.13. Mr Mookherjee pointed out that in para 201 of its order dated 04 March 2021, the Hon'ble NCLAT had directed the Monitoring Agency to start taking steps for implementation of the Resolution Plan immediately, and in case the SRA

[40] Page 231 of the SRA's reply to IA (IB) No.538/KB/2021, @ page 248 is clause 12.

fails to implement the approved Resolution Plan, appropriate action should be taken immediately, and without waiting further, the application should be moved before the Adjudicating Authority for liquidation of the Corporate Debtor. If this is the mandate of the appellate authority, then it should be given effect to, Mr Mookherjee submitted.

9. ***Analysis***

Conduct of the SRA post the 04 March 2021 NCLAT order

9.1. It is absolutely clear that the land standing in the name of Vanguard Credit & Holdings Pvt Ltd was the centrepiece of the entire Resolution Plan. This land measures about 52.49 acres and is situated at Banskopa Inn Road, Gopalpur Mouza, JL No.65, Durgapur, Paschim Bardhaman District. Vanguard is a corporate guarantor of the Corporate Debtor, and it is a company wholly owned by the promoter of the Corporate Debtor, Mr Ashish Jhunjhunwala (99.99%).

9.2. Para 153 of the Hon'ble NCLAT's order dated 04 March 2021 records that Vanguard had provided right of use of the land to the Corporate Debtor since September 2006, which enabled the Corporate Debtor to construct a plant and factory thereon for its wire business. Para 154 records that Deed of Guarantee was executed on 27 May 2009. Para 155 records that in terms of para 10 of the said Deed of Guarantee, the guarantor had permitted the bank to sell the security without giving notice to the guarantor, and that the guarantor shall not question the sale or sale price in any manner or on any ground whatsoever.

9.3. The circumstances in which the transfer of land was contemplated is noticed in para 158 of the Hon'ble NCLAT's order. It records that if there is no consensual transfer of Vanguard's land, then the secured creditor shall proceed to enforce its security under Sarfaesi Act, 2002 and transfer the land to the Corporate Debtor.

9.4. From the minutes of the 7th Monitoring Agency meeting, it is noticed that Mr Deep Roy, representative of EQUILEX (a law firm) has clarified that the

Resolution Plan provides a clear mechanism for transfer of security interest in Vanguard's land by assignment of certain amount of debts to the NBFC along with the security interest. There being no stay on the implementation, the said assignment may be facilitated (***Para 5 of PNB's reply***).

9.5. Subsequent to the dismissal of the Vanguard Appeal by the Hon'ble Supreme Court on 02 July 2021, the Monitoring Agency met on 07 July 2021.[41] In the said meeting, the erstwhile RP, who is the present chairman of the Monitoring Agency, proposed a schedule of implementation of the Resolution Plan and the steps to be taken by the SRA, the Monitoring Agency and the Financial Creditors. As per the schedule of payment,[42] the SRA was supposed to make payment of the balance amount within thirty days from the date of the meeting.

9.6. The schedule was approved by all the members of the Monitoring Agency (except CFM-ARC) and the SRA. CFM-ARC objected to the schedule of implementation of the Resolution Plan on the ground that since the SRA had delayed the implementation of the Resolution Plan, it should pay compensation for such delay. However, since the said schedule of implementation was approved by the majority of the members *i.e.,* five out of six members, the schedule stood approved.

9.7. Thereafter, a draft of Escrow Agreement and a draft of Assignment Agreement the implementation steps were circulated by the SRA. Further, the SRA has taken a number of steps to implement the Resolution Plan and has also made a total payment of ₹59.85 crore, including EMD and Performance Security Amount.

9.8. The SRA relies on clause 11 (ii), Step (5) (g) of Clause, Step (2) (e) of Clause 4, Clause 5, Clause 9 of the Resolution Plan. As explained in the reply to IA (IB) No.538/KB/2021, the provisions of the Resolution Plan unequivocally

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[41] 9th Meeting of the members of the Monitoring Agency

[42] Annexure A-1 of IA (IB) No.635/KB/2021

provide that in the event of any variation in the terms of the Resolution Plan in any proceedings by any court or tribunal, the SRA reserves the right not to implement the Resolution Plan.

9.9. Therefore, in line with the above provisions, the SRA had requested that the payment made by the SRA to be kept in an escrow account and not to be distributed to the creditors because such distribution will cause irretrievable harm to the SRA. We do not consider this to be an unreasonable request, or one that reflects any *mala fide* conduct on the part of the SRA.

9.10. As judicially noticed by the Hon'ble Supreme Court in ***Swiss Ribbons (supra)*** **and *Babulal Gurjar (supra),*** the Preamble of the Code lays a lot of emphasis on insolvency resolution within the timelines prescribed. Liquidation should be the last resort, when everything else has been attempted and failed. In the present case, we have a successful resolution applicant who is ready and willing to implement the approved resolution plan as it is. Although there were some delays in the insolvency resolution process of the corporate debtor, attributable to the fact that many appeals came to be filed right upto the Supreme Court, we now have a situation where the SRA which has parked the entire resolution amount in an account separately earmarked for this purpose. This amount is now ready and available for utilisation by various stakeholders.

9.11. CFM-ARC is admittedly pursuing its application for liquidation because the liquidation value is more than the enterprise value. But that cannot be a ground for sustaining this application, nor is it in line with the objects of the Code. Sending the Corporate Debtor into liquidation just because the liquidation value is more than the enterprise value, would not be in keeping with the objectives of the Code. The Code is not about maximising value at all costs even if it means corporate death, which will inevitably ensue if the company is sent into liquidation. The challenge in IA (IB) No.538/ KB/2021 to the implementation of the approved Resolution Plan must, therefore, fail on this touchstone.

9.12. The SRA was certainly at fault in not taking steps for implementation of the approved Resolution Plan after the 04 March 2021 order of the Hon'ble NCLAT, coming up with the condition that until the Vanguard Appeal is decided, it is not in a position to implement the Resolution Plan. However, this intransigence is offset by the equally obdurate attitude of CFM-ARC to seek interest from the SRA {in IA (IB) No.628/KB/2021}, as an alternative prayer to liquidation, even while the other members of the Monitoring Agency were ready and willing to give a chance to the SRA to implement the Plan. This prompted another application from the SRA in IA No.635/KB/2021 for directions to implement the Plan. The end result was a further and unnecessary delay in implementation until the three applications could be heard and decided by this Adjudicating Authority.

9.13. Mr Ratnanko Banerji's submission that the SRA must not be allowed to walk away with 2018 valuation of the Corporate Debtor might be attractive at first blush. But it does not take into account the misplaced zeal of CFM-ARC to get the Corporate Debtor into liquidation just so that the realisable value can be higher. The reluctance of the SRA came in very handy for this purpose.

9.14. To us, the problems mentioned by the SRA in not coming forward for implementation do not seem to be intractable issues. This could have been solved easily with a little bit of sagacity on the part of all concerned and ensuring that their actions were consistent with the objects sought to be achieved by the Code. Sadly, this expectation has been belied by the stakeholders, primarily by CFM-ARC and the SRA.

9.15. In so far as the use of the term "*shall*" in section 33(4) is concerned, we are convinced that this will have to be construed in the conspectus of facts that each case presents itself with. A mechanical interpretation that once a default is established, then liquidation should be the result, would not subserve the purposes of the Code. Therefore, a purposive interpretation is called for when

it comes to construction of the terms used in various provisions of the Insolvency & Bankruptcy Code.

9.16. It is now trite law that the whole idea of the Code is to put the Corporate Debtor back on its feet for the larger benefit of all the stakeholders, not just the creditors. We must not forget that the Corporate Debtor is a fully functional enterprise and is generating value for the economy, apart from providing employment to a sizeable number of people. The present applications will have to be seen in the larger context of the objectives sought to be achieved. A bird in hand is worth two in the bush.

9.17. If there is anything that the Code emphasis, it is the oft-forgotten adage that time is money. On an overall conspectus, we would urge, hope and expect that time being wasted in this manner in unnecessary litigation should now stop. Therefore, rather than the mathematically projected liquidation value being more than the value offered by the SRA, it would be better to look at the value addition that a running enterprise would bring over the long term to the economy and various stakeholders. Time and again, we see that liquidation does not necessarily satisfy the projected liquidation value, and the liquidator has had to reduce the reserve bid in order to find buyers. Therefore, at least in the present compendium of facts it is a mirage that is best not pursued.

10. *Orders*

10.1. The SRA has pointed out, during the course of hearing on 09 February 2022 that a sum of approximately ₹322 crore, which represents the entire resolution amount, has been parked in a separate account and can be transferred to the Corporate Debtor's account without any further delay. Therefore, we hereby direct as follows:

(a) The full resolution plan amount now parked in a separate account, be transferred to the account of the Corporate Debtor without further ado, and in any case, no later than five days from the date of this Order.

(b) The said amount be distributed in accordance with the approved Resolution Plan immediately upon receipt. The entire process be completed within a period of one month from today.

(c) The management of the Corporate Debtor be transferred to the Successful Resolution Applicant shortly thereafter.

10.2. With these directions, we hope that the CIRP of the Corporate Debtor, which began with an order of admission dated 08 January 2018, will now find closure after four years and a quarter. We are convinced that the above directions will lead to a rapid and efficient resolution of the Corporate Debtor.

10.3. All three applications, *viz.*, IA (IB) No.538/KB/2021, IA (IB) No.628/KB/2021 and IA (IB) No.635/KB/ 2021 in CP (IB) No.349/KB/2017 shall stand disposed of with the above directions.

10.4. The Registry is directed to communicate a copy of this order to the counsel on record for each of the parties.

10.5. Urgent certified copies of this order, if applied for, be made available subject to the usual formalities.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)
07 April 2022

Safura A.[LRA]