IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

IA NO.31/2021 and IA NO.293/2020
IN
CP (IB) NO.325/ALD/2019

IA NO.31/2021
IN CP (IB) NO.325/ALD/2019

In the matter of
An application under Section 30(6) and 31 of IBC, 2016 read with Regulation 39(4) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

And

In the matter of

RATHI GRAPHIC TECHNOLOGIES LIMITED
THROUGH ANSHUL GUPTA, RESOLUTION PROFESSIONAL
1501, Tower 4, Spring Grove Towers,
Lokhandwala Township, Kandivali (E),
Mumbai 400101

… APPLICANT

Versus

RAJ KUMAR RATHI AND OTHERS

… RESPONDENTS

With

IA NO.293/2020
IN CP (IB) NO.325/ALD/2019

In the matter of
An application under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules.

And

In the matter of
M/S GIRIRAJ COSTED FAB PVT. LTD.
Having Registered Office at :
441 Bhera Enclave New Delhi,
West Delhi 110087

… APPLICANT

Versus

ANSHUL GUPTA (RP OF RATHI GRAPHIC TECHNOLOGIES LTD.)

… RESPONDENT NO.1

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INSOLVENCY & BANKRUPTCY BOARD OF INDIA
Through its Chairman,
7th Floor, Mayur Bhawan, Shankar Market,
Connaught Circus,
New Delhi 110001

… RESPONDENT NO.2

Order reserved on 30.03.2022
Order pronounced on 13.06.2022

Coram:
Sh. Rajasekhar V.K. : Member (Judicial)
Sh. Virendra Kumar Gupta : Member (Technical)

Appearances (via video conference) in IA No.31/2021:
For Applicant : Sh. Amitabh Agarwal, Adv.

Appearances (via video conference) in IA No.293/2020:
For Applicant : Ms. Babita Jain, Adv., Mr. Ashish Makhija, Adv.
For Resolution Professional : Sh. Amitabh Agarwal, Adv.
For CoC : Sh. Sumant Batra with Sh. Rahul Mendiratta, Advs.

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ORDER

Per: Virendra Kumar Gupta, Member (Technical)

IA NO.31 OF 2021

1. IA No.31 of 2021 has been filed by Resolution Professional (hereinafter referred to as "RP") for approval of resolution plan. In this application brief account of the processes employed in the course of conduct of CIRP as well as resolution of plan, has been given. Form H has been filed by the RP. Revised Form H has also been filed, which was required in view of certain deficiencies pointed out by this Adjudicating Authority in the course of perusal of resolution plan after conclusion of the hearing on 18.10.2021. Additional affidavit in regard to revised manner of distribution of money amongst similarly situated operational creditors has also been filed.

IA No.293/2020

2. In this application, the applicant has prayed for direction to be given to RP to place its revised resolution plan submitted on 15.11.2020 before Committee of Creditors (hereinafter referred to as "CoC") and reschedule the e-voting thereafter so that its resolution plan can be considered in the true spirit of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016"). One more relief by way of stay on e-voting conducted on 15th to 19th November, 2020 or thereafter has been sought, however, the same has become infructuous as voting has already taken place.

3. The pleas in this application have mainly been made on the ground of arbitrary, unreasonable and biased approach adopted by RP and CoC in not considering its such revised Plan resulting into less realization of value of assets of the Corporate Debtor and simultaneously causing grave prejudice to the Applicant.

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FACTS OF THE CASE AS APPLICABLE TO BOTH APPLICATIONS

4. In this case, insolvency proceedings against the Corporate Debtor commenced vide order of this Adjudicating Authority dated 03.02.2020. The Interim Resolution Professional (hereinafter referred to as "IRP") was appointed to conduct Corporate Insolvency Resolution Process (*hereinafter referred to as "CIRP"*). Subsequently, IRP was replaced by current RP vide order of this Adjudication Authority dated 10th June, 2020 on the basis of resolution passed by the CoC to this effect. Initially, Form G was published on 18.04.2020 and last date for invitation of Expression of Interest was 25.06.2020. Subsequently, another Form G was published on 24.08.2020 and last date for receipt of resolution plan was fixed as 22.09.2020. The provisional list was prepared on 18.09.2020 and final list was prepared on 03.10.2020.

5. 4th CoC meeting was held on 20.10.2020, wherein, on the basis of request made by Successful Resolution Applicant (hereinafter referred to as "SRA"), the last date for submission of resolution plan was extended up to 03.11.2020. The resolution plans were submitted by both the resolution applicants before the extended deadline fixed by the CoC i.e., 03.11.2020. 5th CoC meeting was held on 05.11.2020 wherein valuation reports were considered by the CoC.

6. From the perusal of the minutes of these CoC meetings, it is noted that the RP informed that other parties were also interested to submit the resolution plans and exclusion of 128 days was available. In the 5th CoC meeting the CoC directed the RP to carry out the due diligence. The RP informed that some clarifications were still required. It is also noteworthy that the minimum period of notice required for convening CoC meeting was reduced with the approval of the CoC.

7. 6th CoC meeting was held on 07.11.2020 wherein the revised plans submitted by both the resolution applicants were considered. It is noted that the CoC was not satisfied even with the revised offers as evident from the minutes of 6th CoC meeting. 7th CoC meeting was held on

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12.11.2020 where several discussions were held and CoC expressed its concern that the Resolution Plans submitted were far below the liquidation value. In this meeting, the RP also informed that one particular transaction of transfer of brand by the corporate debtor had also been referred to transaction audit which was also pending. In the said meeting both the PRAs, who were in the final list, were asked to submit their revised resolution plans by 07:00 PM on the same date i.e., 12.11.2020. The SRA submitted its revised plan before the said deadline. However, the applicant *herein* submitted its revised resolution plan on 15.11.2020. The said plan was not considered by the RP/ CoC as this was submitted after the time fixed for submission of such plan and for the reason that timelines for completion of CIRP were to be strictly adhered to. 8th CoC meeting was held on 20.11.2020 wherein various scenarios, which could arise, if the resolution plan submitted by the applicant *herein* on 15.11.2020 was considered for voting. Notably, this was done after pre-poned voting schedule i.e., 15.11.2020 12:00 noon to 19.11.2020 06:00 PM had already been exhausted. A suggestion was also made by the RP that both the resolution applicants may be given a further opportunity. Even it was suggested that the process for invitation of Expression of Interest (hereinafter referred to as "EoI") could be re-initiated as there were some more interested parties who could also participate. A suggestion to the effect that proposals may be invited from all resolution applicants appearing in the provisional list was also made. However, the CoC formed a view that there was no need to consider the resolution plan submitted by the applicant on 15.11.2020 and CoC also rejected other suggestions. Further, a decision was taken to extend the voting time as some of the members of CoC could not participate in voting during the period from 15.11.2020 to 19.11.2020 as internal approvals were to be taken multiple extensions of voting schedule were sought. The details of such extensions are as under: -

- ***Initial Schedule – November 15, 2020 till November 19, 2020.***

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- ***1st Extension till December 02, 2020.***
- ***2nd Extension till December 10, 2020.***
- ***3rd Extension till December 17, 2020.***

The voting finally concluded on 15.12.2020. The voting results more announced on 16.12.2020. LOI was issued to Successful Resolution Applicant (hereinafter referred to as "SRA") on 17.12.2020.

SUBMISSIONS ON BEHALF OF APPLICANT

8. The Ld. Counsel for the successful resolution applicant contended that both the RP and CoC were working in tandem and their sole objective was to oust the applicant from the process. The Ld. Counsel, thereafter, contended that the applicant *herein* had a medical emergency in other city and in spite of that attended the CoC meeting held on 12.11.2020 as applicant was seriously interested and this fact was known to both the RP and CoC. It was also contended that those were Diwali holidays and because of that staff and consultants were not available. It was further contended that the applicant was not made aware of the fact that the deadline set on 12.11.2020 was final and no further opportunity would be granted.

9. It was vehemently argued that the RP and CoC were in a tearing hurry, though there was no extreme urgency as both the RP and CoC could have availed extension/ exclusion as per the provisions of Section 12 of IBC, 2016. It was also pointed out that the voting lines were opened on Sunday (15.11.2020) during Diwali festivities and that too **after preponement**. In this regard, it was also stated that fact of such preponement was also not made known to the applicant. It was further pointed out that as per RFRP, resolution plan had to be approved before 07.12.2020 and various issues/ complexities were existing in the whole world due to pandemic situation as well as in addition to Diwali holidays. Hence, such action of RP raised many questions about integrity of the whole process.

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10. Thereafter, Ld. Counsel further pointed out that, on hand, CoC did not consider its revised plan submitted on 15.11.2020 for one of the reasons that voting lines had been opened and on the other hand CoC sought multiple extensions after the last date fixed for voting i.e., 19.11.2020. It was also strenuously argued that the revised plan of the applicant was higher than the plan submitted by the other resolution applicant, hence, non-consideration of its plan also resulted into violation of one of the prime objectives of IBC, 2016 i.e., *maximization of the value of the assets of the corporate debtor*.

11. It was vehemently argued that the principles of natural justice were applicable to IBC processes/ proceedings and any arbitrariness or biased approach would make decisions as a result thereof void particularly when grave prejudice was caused to the applicant. On this basis, it was claimed that material irregularities were committed by RP/CoC in the present case, hence, the actions of CoC were liable to be quashed.

12. It was strenuously argued that, in this case, fact of revised plan submitted by the applicant on 15.11.2020 was already in the knowledge of CoC and in spite of that internal instructions were sought by CoC members on the resolution plan submitted before 12.11.2020 only. Hence, higher competent authorities were kept in dark. Consequently, the action of members of CoC in not considering revised resolution plan submitted on 15.11.2020 was without proper internal approvals.

13. Ld. Counsel also drew our attention to the contents of various mails exchanged between the applicant *herein* and the RP in support of its various claims made herein before. The Ld. Counsel specifically drew our attention to observations in the CoC meetings held on 12.11.2020 and 20.11.2020, in support of its claims. The Ld. Counsel finally contended that the decision of the RP/ CoC in not considering the resolution plan, submitted by the applicant on 15.11.2020 was erroneous for the following reasons: -

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(i) Cut-off date as contemplated by EOI is not mandatory and can be extended.

(ii) As per legal precedents, RP/ CoC can certainly receive the Resolution Plans even after the expiry of the date of the last day of submission of EOI so long as the CIRP period has not elapsed and/or any other Resolution Plan has not already been accepted by the CoC.

(iii) Though it was submitted after the cut-off date, even without appreciating and scrutinizing the plan on its merits, the CoC did not consider the same.

(iv) That when CIRP period was extended, a chance should have been given at-least then for consideration of revised plan.

(v) That the E-voting was re-opened which is not prescribed under the law.

(vi) That Applicant was never given the details of e-voting schedule

(vii) That the COC has failed to consider the plan which offered maximum amount to the financial Creditors

(viii) That the COC abruptly decided not to consider the revised plan.

(ix) That keen and active Applicant was kept in dark about whether plan was considered or not and whether he will receive any other chance to present the revised plan.

14. Ld. Counsel also relied on the decision of Hon'ble Supreme Court in the case of ***"Kalpraj Dharamshi versus Kotak Investment Advisories Ltd. (KIAL) in Civil Appeal Nos.2943−2944 of 2020"*** for the proposition that it was well within the power of CoC to extend the period of submission of resolution plan of both the resolution applicants, particularly when the CIRP was ultimately extended at the instance of CoC members themselves.

SUBMISSIONS ON BEHALF OF COC

15. The Ld. Counsel for the CoC appeared and submitted that the approach of the CoC was free from any bias and arbitrariness as transparent

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deliberations took place at each stage. It was vehemently argued that for completing a process in time, which is the essence of IBC, 2016, it was wholly inappropriate to say that RP and CoC were in a tearing hurry for completing CIRP in time which was a rare instance in the present case, as compared to general experience in IBC matters. It was also claimed that the allegation of collusiveness had not been proved. It was contended that IBC, 2016 was a creditor driven process and various principles of natural justice were not applicable to proceedings under IBC, 2016. The Ld. Counsel emphatically argued that "principle of equity" in particular was alien to IBC, 2016. It was specifically pointed out that the words "fair and equitable" were used only once in whole IBC, 2016 i.e., in Explanation 1 to Section 30(2)(b) of IBC, 2016.

16. It was further contended that not a single provision of IBC, 2016 had been violated. It was also claimed that there was no challenge to resolution plan of SRA and such plan falls into the category of a compliant resolution plan. It was further claimed that the applicant had no vested right for consideration of its resolution plan mandatorily, and, therefore, the filing of the application was only a delaying/ dilatory tactic which had been condemned and rejected in so many cases. The Ld. Counsel further submitted that the voting had already begun on 15.11.2020 on the resolution plans received within the specified timeline, hence, the applicant cannot blame CoC for its own failing by not submitting the revised plan within such time. It was also pointed out that resolution plan of SRA submitted in time had been circulated to CoC members before applicant submitted its resolution plan on 15.11.2020, hence, fundamentals and financials being already known to CoC members, hence, for this reason also, such resolution plan was not liable to be considered. For this proposition, Ld. Counsel relied on the decision of Hon'ble NCLAT in the case of ***Kalinga Allied Industries India Pvt. Ltd. Versus Hindustan Coils Ltd. & ors. in Company Appeal (AT) (Insolvency) No. 518 of 2020.***

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17. It was also claimed that consideration of resolution plan was a commercial prerogative of CoC which had to be respected and decision of the CoC based upon its commercial wisdom was not justiciable. Therefore, for this reason alone, this application was liable to be dismissed. In this regard, Ld. Counsel placed reliance on various judicial precedents.

SUBMISSIONS ON BEHALF OF RP

18. The RP in its written submission has given the sequence of events and justified its action on the ground that the RP had a limited role to play in the said commercial decision-making process of CoC. It has been further argued that the said applicant did not submit the revised resolution plan before the timelines i.e., by 07:00 PM on 12.11.2020. Hence, CoC decided not to consider its plan and voted on the original plan which had been submitted within the timelines.

19. It has been further argued that it was incumbent upon the RP to submit the closure report by 22.11.2020. Another point on which emphasis has been made by the RP is that the applicant has not pointed out violation of any specific provisions of IBC, 2016 read with CIRP Regulations, 2016 either on the part of RP or CoC. The RP has also reiterated the submission made on behalf of CoC.

REJOINDER ON BEHALF OF APPLICANT

20. It was vehemently argued that the principles of natural justice had not been ousted explicitly and, therefore, these were applicable to IBC and regulations made thereunder. It was also contended that it was evident from the sequence of events that it was a clear-cut case of undue haste for extraneous considerations.

21. The Ld. Counsel once again submitted that principles of natural justice were applicable to IBC, 2016 and, in this regard, the Ld. Counsel placed strong reliance on the decision of the Hon'ble Kolkata High Court in the matter of **"*Sree Metaliks Limited and Another v/s Union of India and Anr in W.P. 7144 (W) OF 2017*"** wherein the Hon'ble High Court had

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held that if a statute was silent with regard to applicability of principles of natural justice, natural justice had to be read into such statute.

22. The Ld. Counsel concluded his arguments by stating that the principle of natural justice i.e., fair treatment and equitable approach were to be applied considering the text and context of the situation and in the present case higher value plan had been ignored on the ground that the voting lines had already opened, however, subsequently for convenience of CoC, such voting lines were reopened after the closure of the original schedule on 19.11.2020. He further mentioned that for the violation of principles of natural justice and not achieving one of the objects of the Code i.e., *maximization of the value of the assets of the corporate debtor,* the decision of the CoC was liable to be quashed.

FINDINGS

23. Considering the facts and circumstances of the case and contentions raised before us four broad questions arise for our adjudication which are as under: -

(i) *Whether principles of natural justice are applicable to the processes/ proceedings under IBC, 2016 read with CIRP Regulations, 2016 made thereunder?*

(ii) *Whether principles of natural justice can be considered as a law for the time being in force within the meaning of Section 30(2)(e) of IBC, 2016?*

(iii) *If the answer to question no.(i), or question no.(ii) or both in affirmative, then, whether, in the present case, principles of natural justice i.e., fair opportunity to all, unbiased approach and application of good conscience in the interests of all stakeholders etc., have been violated?*

(iv) *Whether Resolution Plan is a compliant resolution plan, which can be approved U/s 31(1) of IBC, 2016 independent of alleged violations of principles of natural justice?*

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24. Firstly, we shall deal with the question i.e., "whether principles of natural justice are applicable to the processes/ proceedings under IBC, 2016 read with CIRP Regulations, 2016 made thereunder".

25. The IBC, 2016 came into existence as a response to the failure of earlier regimes which governed the issues of restructuring of loans/ bad debts and recovery thereof. The earlier regimes failed because no timelines were specified for activities involved in the restructuring process and multiple agencies were involved. The enterprise remained belonging to the defaulter i.e., debtors in possession regime. The whole architecture of IBC, 2016 is designed on the basis of "creditors in control" as against the earlier position of "debtors in possession" and consequently, there happens divestment of control of management from the hands of existing owners to a new management headed by IRP/RP who acts under the supervision and control of CoC practically for all purposes. The framework of IBC, 2016 can be broadly outlined as under: -

26. ***IBC is divided into three processes:***

26.a. *Regulatory and legislative process.*

26.b. *Commercial process.*

26.c. *Judicial process.*

27. <u>RESPONSIBLE AUTHORITY/ ACTORS IN PLAY FOR EACH PROCESS ARE AS FOLLOWS</u>

a	*Legislative and Regulatory process*	**a.1.** Central Government; **a.2.** Insolvency & Bankruptcy Board of India (IBBI) **a.3.** Insolvency Professional Agencies **a.4.** Information utilities
b	*Commercial process*	**b.1.** Committee of Creditors (CoC); **b.2.** Insolvency Resolution Professional (IRP)/ Resolution Professional (RP), and **b.3.** Liquidator

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c.	*Judicial process*	**c.1.** Adjudicating Authority **c.2.** NCLAT **c.3.** Supreme Court **c.4.** High Court under Article 226 to Constitution of India, but in very limited circumstances.

27.a LEGISLATIVE AND REGULATORY PROCESS

*27.a.*1. *Central Government*

Central Government is primarily responsible for the legislative process and for making of amendments in the substantive provisions of law through Parliament. Further, Central Government is also empowered to make Rules u/s 239 of IBC, 2016.

27.a.2. *Insolvency & Bankruptcy Board of India (IBBI)*

IBBI has been created as a statutory authority in response to one of the objectives enshrined in the preamble of IBC, 2016. Section 188 to 198 in chapter I and chapter II of PART IV of IBC, 2016, describe the structure, powers and functions of the IBBI. Broadly, IBBI regulates Insolvency Professionals agencies and information utilities. As far as legislative power of IBBI is concerned, that is prescribed in Section 196(1)(t) read with section 240 of IBC, 2016. IBBI makes Regulations and is also empowered to issue guidelines and circulars to carry out the purposes of IBC, 2016. It is pertinent to note that such Regulations should be in compliance of substantive provisions of IBC, 2016 and Rules made by Central Government in terms of provisions of Section 240 of IBC, 2016.

27.a.3. *Insolvency Professional Agencies:*

This institution has been created to carry out functions as specified in Section 204 of IBC, 2016. The principles governing the station of Insolvency Professional Agency are contained in Section 200 of IBC, 2016 which *inter-alia* include promotion of good professional and ethical conduct amongst Insolvency Professionals.

27.a.4. *Information utilities:*

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This institution has been created to provide services as regard financial information and/or records of default. It may also provide other services as specified from time to time.

27.b COMMERCIAL PROCESS

27.b.1. *CoC*

In so far as commercial process is concerned, it can be simply defined as comprising of CIRP and liquidation proceedings of a corporate debtor in terms of scheme and object of IBC, 2016 as contained in Chapter I, II and III of PART II of IBC, 2016.

CoC is the most important institution which has been created by IBC, 2016 to administer the CIRP and also to supervise IRP/ RP in discharge of their twin responsibilities i.e., conduct of CIRP and management of the business affairs of the corporate debtor undergoing CIRP, in such a manner so that such corporate debtor can be kept as a going concern. The relationship between RP and CoC is like a relationship between CEO and Board of Directors of a Company. Some of the functions of CoC are purely of administrative nature. Further, CoC is the final authority to take a call on commercial aspects in relation to resolution of insolvency of a corporate debtor. This is termed as commercial wisdom of CoC which has not been defined in the IBC, 2016 or rules/ regulations made thereunder, hence, the same is to be understood as a prudent behavior of a businessman in a given set of business situations. Thus, this can be simply termed as business-like approach to be adopted for decision making. Further, the exercise of such commercial wisdom, in so far as the approval of resolution plan is concerned, is not justiciable.

27.b.2. *IRP/RP*

As far as CIRP is concerned, it gets triggered once a corporate debtor is admitted into insolvency. To conduct the CIRP, IRP and RP are appointed who have been given specific responsibilities, functions and authority to carry out such functions. IRP/ RP has got two broad responsibilities;

(i) ***To conduct the Corporate Insolvency Resolution Process;***

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(ii) ***To manage the affairs of the corporate debtor and to keep it as a going concern.***

RP is considered as administrator/ facilitator and do not have adjudicatory powers. IRP under the instructions of CoC and required to share information with IBBI and Adjudicating Authority. They can also approach Adjudicating Authority for directions/ orders in specific situations.

27.b.3. ***Liquidator***

The role of the Liquidator starts with the passing of an order U/s 33 of IBC, 2016 for initiation of liquidation proceedings by the Adjudicating Authority who appoints Liquidator in terms of provisions of Section 34 of IBC, 2016. The powers of the Liquidator are much wider than the IRP/ RP as Liquidator has also got adjudicating powers in respect of admission/ rejection of claims. Further, the Liquidator is authorized to take decisions in respect of conduct of liquidation process of a corporate debtor more or less independently. However, based upon the experience, as a safeguard and to keep a check on the arbitrariness approach of a Liquidator, institution of stakeholders' consultation committee has been created. Though the advice/ opinion of such committee is not binding on the Liquidator but it is a significant development and the Liquidator is supposed to keep such committee informed on all major issues. If the Liquidator wants to deviate from their opinion, he has to record reasons therefor and inform the Adjudicating Authority. He is also required to share information with IBBI and Adjudicating Authority. Like RP, the Liquidator can also approach Adjudicating Authority for orders in specific situations.

27.c. JUDICIAL PROCESS

27.c.1. Adjudicating Authority

(i) This process, at the first stage, is controlled and exercised by Adjudicating Authority which is National Company Law Tribunal (*NCLT*) as defined in Section 5(1) of IBC, 2016.

(ii) The Adjudicating Authority's jurisdiction and scope of its powers are defined in Section 60 of IBC, 2016. When it comes to approval or rejection of a resolution plan approved by CoC, scope of powers of

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Adjudicating Authority is circumscribed by the conditions laid down in Section 30 and 31 of IBC, 2016. Section 33 of IBC, 2016 empowers Adjudicating Authority to pass an order of liquidation of corporate debtor in certain circumstances. There exist other specific situations in IBC, 2016 whereby the Adjudicating Authority can pass appropriate orders as and when an application, in that regard, is filed for its consideration.

(iii) Adjudicating Authority, is also vested with Residuary jurisdiction u/s 60(5)(c) of IBC, 2016 for adjudication of issues arising out of or in relation to insolvency resolution or liquidation proceedings. However, such powers are also subject to certain limitations provided in IBC, 2016 and created by judicial decisions.

27.c.2. National Company Law Appellate Tribunal (*NCLAT*)

(i) NCLAT has also been established under the provisions of Companies Act, 2013.

(ii) The appeal against the decisions/ orders of Adjudicating Authority can be filed before the NCLAT in terms of provisions of Section 61 of IBC which also defines the scope of the powers of NCLAT while exercising its appellate jurisdiction. NCLAT is also the Appellate Authority against the decision of Adjudicating Authority and IBBI.

27.c.3. Supreme Court

(i) The appeal against order of NCLAT can be filed in terms of provisions of Section 62 of IBC, 2016 before Supreme Court. The Supreme Court has also jurisdiction under Article 32 to the Constitution of India. Special Leave Petition can also be filed against the order of NCLT in terms of provisions of Article 136 to the Constitution of India.

27.c.4.High Court

(i) Since there is a mechanism provided in IBC, 2016 for redressal of the grievances of an aggrieved party by way of appeal to NCLAT or Supreme Court, generally High Courts do not interfere in the proceedings under IBC, 2016. However, the jurisdiction of High Court

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under Article 226 to the Constitution of India can be exercised, if the situation so demands particularly when constitutional validity of any provision of IBC, 2016 or Rules/ Regulations made thereunder or actions taken by Adjudicating Authority, CoC, RP or Liquidator are alleged as violative of fundamental rights or on the ground of lack of jurisdiction or erroneous exercise of jurisdiction.

28. To sum up, it is evident that all these institutions except Central Government, Supreme Court and High Court are creation of IBC, 2016 which have been assigned the task to decide specific issues which fall for their consideration in terms of provisions of IBC, 2016, Rules and Regulations made thereunder. However, one question still remains to be seen that whether these institutions can be classified as a statutory authority who carry out the functions which lie in the public domain. In other words, can these institutions be considered as an agency or instrumentality of the State?

29. In this regard, we refer to the decision of the Hon'ble Supreme Court in the case of ***Ramana Dayaram Shetty vs The International Airport 1979 AIR 1628, 1979 SCR (3)1014,*** wherein the Hon'ble Supreme Court has given a test for determining whether a particular entity is an agency or instrumentality of the State so that it can be characterized as an authority within the meaning of Article 12. The relevant findings are as under: -

> *Now, there can be no doubt that what paragraph (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered 2nd class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1 st respondent and*

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since the 4th respondents did not satisfy this standard or norm, it was not competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. This rule was enunciated

by Mr Justice Frankfurter in Viteralli v. Seton(l) where the learned Judge said:

> ***"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a define(l procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.***

This Court accepted the rule as valid and applicable in India in A. S. Ahuwalia v. Punjab(2) and in subsequent decision given in Sukhdev v. Bhagatram,(3) Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. ***It is a rule of administrative law which has been judicially evolved***

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as a check against exercise of arbitrary power by the executive authority. *If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th edition.* ***There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. To- day with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders***

it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or (1) 359 U. S. 535: 3 Law.Ed. (Second series) 1012 (2) [1975] 3. S. C. R. 82.

(3) [1975] 3. S. C. R. 619.

exercise. *Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom' and 'Constitution of liberty" or*

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the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "democracy Equality and Freedom," "substantial agreement is in justice thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". ***It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.***

The last decision to which reference was made on behalf of the respondents was the decision in P. R. Quenin v. M. K. Tendel(1) This decision merely reiterates the principle laid down in the earlier decisions in Trilochan Mishra v. State of Orissa (supra) and State of Orissa v. Harinarayan Jaiswal (supra) and points out that a condition that the Government shall be at liberty to accept or reject any bid without assigning any reason therefor is not violative of Article 14 and that "in matters relating to contracts with the Government, the latter is not bound to accept the tender of the person who offers the highest amount". Now where does it say that such a condition

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permits the Government to act arbitrarily in accepting a tender or that under the guise or pretext of such a condition, the Government may enter into a contract with any person it likes, arbitrarily and without reason. In fact the Court pointed out at the end of the judgment that the act of the Government was not "shown to be vitiated by such arbitrariness as should call for interference by the Court", recognising clearly that if the rejection of the tender of the 1st respondent were arbitrary, the Court would have been justified in striking it down as invalid.

Now this rule, flowing as it does from Article 14, applies to every State action and since "State" is defined in Article 12 to include not only the Government of India and the Government of each of the States, but also "all local or other authorities within the territory of India or under the control of the Government of India", it must apply to action of "other authorities" and they must be held subject to the same constitutional limitation as the Government. But the question arises what are the "other

authorities" contemplated by Article 12 which fall within the definition of 'State' ? on this ques-

(1) [1974] 3 S. C. R. 64.

tion considerable light is thrown by the decision of this Court in Rajasthan Electricity Board v. Mohan Lal(1). That was a case in which this Court was called upon to consider whether the Rajasthan Electricity Board was an 'authority' within the meaning of the expression "other authorities" in Art. 12. Bhargava, J., delivering the judgment of the majority pointed out that the

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expression "other authorities" in Art. 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions the disobedience of which would be punishable as a criminal offence, that would be an indication that that authority is 'State'. Shah, J., who delivered a separate judgment, agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression "other authorities". He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression "other authorities", if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C.J., in Sukhdev v. Bhagat Ram (supra). Mathew, J., however, in the same case, propounded a broader test, namely, whether the statutory corporation or other body or authority, claimed to fall within the definition of State', is as instrumentality or agency of Government: if it is, it would fall within the meaning of the expression 'other authorities' and would be State'. Whilst accepting the test laid down in Rajasthan Electricity Board v. Mohan

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> ***Lal (supra), and followed by Ray, C. J., in Sukhdev v. Bhagat Ram (supra), we would, for reasons already discussed, prefer to adopt the test of Governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority falls within the definition of 'State'. If a statutory corporation, body or other authority is an instrumentality or agency of Government, it would be an 'authority' and therefore 'State' within the meaning of that expression in Article 12.***

30. We shall now take assistance of the decision of the Hon'ble Supreme Court in the case of ***Sukhdev Singh, Oil & Natural Gas v/s Bhagat Ram, Association of Clause,*** wherein certain observations were made in para no.33, 39, 79, 80 & 81 to 109, which are as under:

> *33. There is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A regulation framed under a statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct*

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with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and the employee with no option to vary the conditions. An ordinary individual in a case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service. and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by declaring dismissal in violation of rules and regulations be void. ***This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute.***

39. A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit. (See Halsbury's Laws of England 3rd. Ed. Vol. 30 paragraph 1317 at p.682).

79. One of the greatest sources of our strength in Constitutional law is that we adjudge only concrete cases

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and do not pronounce principles in the abstract. But there comes a moment when the process of empiric adjudication calls for more rational and realistic disposition than that the immediate case is not different from preceding cases.

80. The concept of state has undergone drastic changes in recent years. Today state cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation.

If we clearly grasp the character of the state as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service. (see Mac Iyer, "The Modern State", 183).

31. In the last, we would refer to the decision of Hon'ble Andhra Pradesh High Court in the case of ***Sri Konaseema Co-Operative ... vs N. Seetharama Raju 1991 72 CompCas 588 AP*****,** in para 26 observed as under:

26. That a co-operative society can also be an 'authority' within the meaning of Article 12 and therefore a 'State', is beyond dispute. The tests for determining whether a particular Society or Company is an agency or instrumentality of the State, so that it can be characterized as an 'authority' within the meaning of Art. 12, have been enunciated in Ramana Dayaram Shetty and affirmed in Ajay Hasia v. Khalid Mujib. They are the following (at p. 496 of AIR) :-- Sri Konaseema Co-Operative ... vs N. Seetharama Raju on 5 March, 1990 Indian Kanoon - http://indiankanoon.org/doc/1889207/ 13 "

(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way

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towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor..... whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of "deep and pervasive State control" may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government...". It is, however, emphasized that a Corporation to be characterized as an instrumentality or agency of State need not satisfy all the six tests. While it is nowhere stated that satisfaction of even one of the six tests would suffice, the Supreme Court has refused to specify how many of them should be satisfied in a given case. It is left to be determined in each case, having regard to the totality of the circumstances.

32. It is further noted that the Hon'ble Andhra Pradesh High Court has observed that it was not necessary that all or how many of them would be required to be satisfied, in a given case, to demine the status of a

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corporation to be characterized as an instrumentality or agency of the State.

33. We further find that in the same decision of the Hon'ble Andhra Pradesh High Court, in para 37 has discussed about distinction between public law and private law and the scope of power of the constitutional court to adjudicate thereupon. The Hon'ble Court also observed as to which institution could be considered as public authority. The relevant findings about these aspects in para 37 are reproduced as hereunder: -

> *37. The basic feature of mandamus and certiorari is that they are public law remedies and are not available to enforce private law rights. Though the strict technical rules governing these writs in English law are not applicable in India, yet the broad principles underlying the said writs have to be kept in mind by this Court while exercising the power under Art. 226. Not keeping the said distinction in mind would obliterate the distinction between a writ petition and a suit; there will be chaos. As pointed out by a Constitution Bench of the Supreme Court in T. C. Basappa v. T. Nagappa though the power of the High Court under Art. 226 need not be constricted by the technical rules applicable to these prerogative writs in English law, it is yet necessary to "keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law". Similarly, it was pointed out in Dwaraka v. I.T.O., that "Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be used, was designedly used by the*

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Constitution. But this does not mean that the High Court can function arbitrarily under this Article. There are some limitations implicit in the Article, and the others may be evolved to direct the Article through defined channels.....". The object behind Art. 226 was to strengthen the then existing judicial Sri Konaseema Co-Operative ... vs N. Seetharama Raju on 5 March, 1990 Indian Kanoon - http://indiankanoon.org/doc/1889207/ 20 system, to make it more effective and not to dispense with, duplicate, or replicate the existing system. It was not to supplant the existing judicial system, but to confer an additional power in the service of people and Constitution that this extraordinary power was created. It is for this reason that notwithstanding the wide language of Art. 226, Courts have been observing certain self-imposed restrictions upon this power. One of the well accepted limitations upon the exercise of this power is that it is not available to enforce the terms of a contract, i.e.. a contract which is not statutory in nature. This is so even if one of the contracting parties is the State, a Government, or other local authority. This is the principle affirmed by Supreme Court in a large number of cases, some of which are Radhakrishna Agarwal v. State of Bihar AIR 1977 SC 1496; State of Punjab v. Balbir Singh AIR 1977 SC 1717; Bihar E.G.F. Co-operative Society v. Sipahi Singh Lekhraj v. Deputy Custodian, Bombay ; Har Shankar v. Deputy E & T Commissioner. , and finally L.I.C. of India v. Escorts Ltd. . In Escort's case, an argument was urged that inasmuch as the Life Insurance Corporation was an instrumentality of the State, it is debarred by Article 14 from acting arbitrarily. It is obligatory upon the

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Corporation, it was contended, to disclose the reasons for its action complained of, viz., its requisition to call an Extraordinary General Meeting of the Company for the purpose of moving a resolution to remove some Directors and appoint others in their place. This argument was opposed by the learned Attorney-General for the State, contending that actions of the State or an instrumentality of the State which do not properly belong to the field of public law but belong to the field of private law, are not subject to judicial review. Dealing with the said contentions, the Court observed:--

"While we do find considerable force in the contention of the learned Attorney-General it may not be necessary for us to enter into any lengthy discussion of the topic, as we shall presently see. We also desire to warn ourselves against readily referring to English cases on questions of Constitutional law Administrative Law and Public Law as the law in India in these branches has forced ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English law. While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases actions uninformed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution, we do not construe Art. 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reason for such actions.

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For example, if the action of the State is political or sovereign in character, the Court will keep away from it. the Court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligation or obligations arising out of the contract the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an Sri Konaseema Co-Operative ... vs N. Seetharama Raju on 5 March, 1990 Indian Kanoon - http://indiankanoon.org/doc/1889207/ 21 instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder, there is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company, like any other shareholder.....

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"Distinction between 'public law' and 'private law': Difficult as this distinction is and incapable of precise demarcation, it is yet necessary to keep the broad distinction in mind. Lord Denning in his book "The Closing Chapter" has thi to say on the subject :

"The first thing to notice is that public law is confined to 'public authorities'. What are 'public authorities'? There is only one avenue of Approach. It is by asking, in the words of Section 31(2)(b) of the Supreme Court Act 1981 : What is the 'nature of the persons and bodies against whom relief may be granted by such orders', that is, by mandamus, prohibition or certiorari?

These are divided into two main categories:

First, the persons or bodies who have legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals. That is the formula stated by Lord Justice Atkin in R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co., (1920) Ltd, (1924) 1 KB 171/205 as broadened by Lord Diplock in O'Reitly v. Mackman (1982)3, WLR 1096/1104).

Second, the persons or bodies who are entrusted by Parliament with functions, powers and duties which involve the making of decisions of a public nature …… To which I would add the words of Lord Goddard, C.J. in R. v. National Joint Council for Dental Technicians, eparte Neate (1953) 1 QB 704/707) :

"The bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred

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statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction".

But those categories are not exhaustive. The courts can extend them to any other person of body of a public nature exercising public duties which it is desirable to control by the remedy of judicial review.

There are many cases which give guidance, but I will just give some illustrations.

Every body which is created by statute and whose powers and duties are defined by

statute is a 'public authority'. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. So are members of a statutory tribunal or inquiry, and the board of visitors of a prison. The Criminal Injuries Compensation Board is a public authority. So also, I suggest, is a university incorporated by Royal charter; and the managers of a State School. So is the Boundary Commission : and the Committee of Lloyd's.

But a limited liability company incorporated under the Companies Acts is not a 'public authority'; (see Tozer v. National Greyhound Racing Club Ltd. (1983) Times, 16 May). Nor is an unincorporated association like the Jockey Club.....".

(See pp. 122 to 124)

34. Further, in para 38, 39 & 40 also some observations have been made by the Hon'ble Andhra Pradesh High Court, which may also support the view that above institutions created under IBC carry out public functions.

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35. Para 38, 39 & 40 of the said judgment are reproduced as hereunder:

38. Sir Harry Woolf, a Lord Justice of Court of Appeal, points out the distinction in the following words:-

"I regard public law as being the system which enforces the proper performance by public bodies of the duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies. The critical distinction arises out of the fact that it is the public as a whole, or in the case of local government the public in the locality, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law.....".

(see page 221 of his Article "Public Law Private Law : Why the Divide? A personal View (published in "Public Law" Summer : (1986)").

The learned Law Lord stated further in the same Article, at page 223:

"While public law deals only with public bodies, this does not mean that the activities of public bodies are nevergoverned by private law. Like public figures, at least in theory, public bodies are entitled to have a private life. There have been suggestions that in the commercial field public bodies should adopt different and higher ethical standards than private individuals, but this is not yet required as a matter of law and in relation to purely commercial transactions the same law is applicable, whether or not a public duty is involved. Prima facie, the same is true in relation to employment.

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The servant employed by a public body ordinarily has the same private rights as any other servant.....".

The position may, however, be different pointed out the learned Law Lord if such relationship is circumscribed by a statutory provision.

39. In this context, it would be appropriate to refer to two important English decisions, where a public duty was implied even in the absence of a statutory provisions. They are R. v. Criminal Injuries Compensation Board, ex parte Lain (1967) 2 All ER 770, and R. v. Panel on take-overs (1987) 1 AH ER 564. In Criminal Injuries Compensation Board, the relevant facts are the following: In the year 1964 the Government of Great Britian announced a Scheme in both Houses of Parliament providing for compensation to victims of violence and persons injured while assisting the police. It was a non-statutory scheme under which compensation was to be paid ex gratia. The scheme was to be administered by a Board, who were to be provided with money through a grant-in-aid, out of which payment would be made when the Board was satisfied that the compensation was justified. The widow of a Police Constable who was shot in the face by a suspect whom he was about to question, and who subsequently shot himself, applied to the Board for compensation. The Board awarded compensation, but made certain deductions, which was questioned by way of certiorari. The first question before the Court was "whether the Board are a body of persons amenable to the supervisory jurisdiction of this Court?". For the Board reliance was placed upon the well-known words of Atkin, L.J., in R. v.

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Electricity Commissioners (1924) 1 KB 171, at p. 205 to the effect that the body of persons to be amenable to writ jurisdiction must have the legal authority to determine questions affecting the rights of subjects and who are under a duty to act judicially. The Court held that the said words of Atkin. L. J., were not supposed to be exhaustive of the situation where a certiorari may issue, and pointed out that the Board, though not set up under a statute, is set up by the executive Government, i.e., under the prerogative, and that its acts are no less lawful on that account. The Court observed:

"Indeed, the writ of certiorari has been issued not only to courts set up by statutes but also to courts whose authority was derived, inter alia, from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to courts, there is no reason why the remedy by way of certiorari cannot be invoked to a body of persons set up under the prerogative. Moreover, the Board, though set up under the prerogative and not by statute, had in fact the recognition of Parliament in debate and Parliament provided the money to satisfy the Board's awards....".

It was further observed :

"We have, as it seems to me, reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way, the Board in my judgment comes fairly and squarely within the jurisdiction of this Court. The Board are, as

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counsel for the Board said, "a servant of the Crown, charged by the Crown, by executive instructions, with the duty of distributing the bounty of the Crown". The Board are clearly, therefore, performing public duties. Moreover, the Board are quite clearly under a duty to act judicially".

The same idea was put forward by Diplock, L.J., in his separate opinion, where he said : "If new tribunals are established by acts of Government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based.....". Ashworth, J., justified the issue of certiorari in that case on the following basis:

"They (Board) were set up by the executive after the proposal to set them up had been debated in both Houses of Parliament, and the money needed to satisfy their awards is drawn from sums provided by Parliament. It can therefore be said that their existence and their functions have at least been recognized by Parliament, which to my mind has a twofold consequence : in the first place it negatives any notion that the Board are a private tribunal, and secondly it confers on the Board what I may call a public or official character. The number of applications for compensation and the amounts awarded by the Board alike show how greatly the general public are affected by the functioning of the Board....".

40. This decision has since been followed and applied in several English decisions. It would suffice to refer to R. v. Panel on Takeovers and Mergers, ex parte

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Datafin (1987) 1 AH ER 564. The Panel on Take-overs and Mergers was a self-regulating unincorporated association which devised and operated the City Code on Take-overs and Mergers prescribing a Code of Conduct to be observed in the take-overs of listed public companies. The panel had no direct statutory, prerogative or common law powers, nor were its powers based solely on consensus; its acts were supported and sustained by certain statutory powers and penalties introduced after the inception of the Panel. A decision of the panel was sought to be questioned by way of certiorari. One of the objections of the respondents was that the supervisory jurisdiction of the Court was confined to bodies whose power was derived solely from legislation or the exercise of the prerogative, and that the power of judicial review did not extend to a body such as the Panel on Takeovers. Overruling this objection, it was held that in determining whether the decisions of a particular body were subject to judicial review, the Court was not confined to considering the source of that body's powers and duties, but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions, the Court had jurisdiction to entertain an application for judicial review of that body's decisions. It was held -that, having regard to the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of non-compliance with the Code, the Panel on Takeovers and Mergers was performing a

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public duty when prescribing and administering the Code and its rules and was subject to public law remedies. Accordingly, it was held that an application for judicial review would lie in an appropriate case. The approach to be adopted in such cases, it was stated by Sir John Donaldson, M.R., is "to recognize the realities of executive power". This is what the learned Master of Rolls stated :--

"In fact, given its novelty, the panel fits surprisingly well into the format which this court had in mind in R. v. Criminal Injuries Compensation Board (1967-2 QB 867). It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, e.g., the members of the Stock Exchange. At least in its determination of whether there has been a breach of the Code, it has a duty to act judicially and it asserts that its raison d'etre is to do equity between one shareholder and another. Its source of power is only partly based on moral persuarion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industries and the Bank of England. In this context I should be very disappointed if the courts could not recognize the realities of executive power and allowed their vision to be clouded by the

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subtlety and sometimes complexity of the way in which it can be exerted.....".

This rule was reiterated in yet another decision of the Court of Appeal in R. v. Panel on Take-overs and Mergers, ex parte Guinness, (1989) 1 All ER 509. This was indeed the approach indicated by Mathew, J. in Sukhdev v. Bhagatram, , when the learned Judge spoke of "the governing power, wherever located" being subjected to "fundamental constitutional limitations". The learned Judge felt that "the need to subject the power centres to the control of the Constitution requires an expansion of the concept of State action". (See para 93 at p. 1352).

36. In our context, on the basis of above judicial findings, it is not difficult to hold that the aforesaid institutions of CoC, IRP, RP, Liquidator, IBBI, Insolvency Professional agencies, Information utilities are statutory/public authorities as these have been established to carry out the functions of public importance in terms of the provisions of IBC, 2016. The importance of their functions and its impact on the society as a whole can be seen from the preamble to IBC, 2016, which is reproduced as under: -

An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish and Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

37. Considering the above objects and the impact of proceedings under IBC, 2016 on the national economy and its growth, corporate world.

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MSMES, small traders' workmen and employees, Central/ State Government, Public Financial institutions etc., we have no hesitation to hold that functions of these institutions are of public importance and their functions closely resemble to governmental functions and that too in the sphere of public economic activities. Further, these institutions also pass the tests prescribed by judicial decisions to classify them as public/statutory authority for there is a deep and pervasive Government control by making necessary regulations as regard to their powers and conduct. Thus, in our view, these institutions can certainly be termed as an agency or instrumentality of State who carry out executive, administrative, commercial and in some situations, quasi-judicial functions as well.

38. Once institutions of CoC, IRP, RP, Liquidator, IBBI, Insolvency Professional agencies and Information utilities are found to be an agency or instrumentality of State, it is logical to say that they are bound to follow the **rule of law** which necessarily embodies within itself principles of natural justice subject to specific exclusions of these principles in a statute.

39. A claim, on the basis of the fact that no specific provision exists which says that principles of natural justice shall be applicable to the conduct of processes or proceedings under IBC, 2016 or Rules/ Regulations made thereunder, has been made on behalf of the CoC that principles of natural justice are not applicable to the proceedings under IBC, 2016. This legal claim compels to understand what is meant by principles of natural justice and what these principles comprise of.
For this purpose, we need to understand that the principles of natural justice have evolved over ages for the proper conduct of human life to bring into existence a civilized society because there is inherent injustice in nature. Survival of the fittest is the law of nature and nature also works on the principle of 'might is right'. This can be seen throughout the nature where lion eats the weaker animals and so as the case with

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humans as who are physically strong, powerful and wealthy, can oppress the weak. Therefore, these principles have evolved out of human conscience or with the growth of civilization so that weak can be protected and given justice in the given situations. In other words, principles of natural justice have been developed to secure justice and to prevent miscarriage of justice i.e. as measure of protection against the organized power and its excesses. These principles of natural justice also act as a check on abuse of dominant position. These principles imply fairness, reasonableness, good conscience, equity and equality. All these terms have wide connotations and carry many meanings and these can be applied to the extent each one of these is found applicable in a given set of circumstances. Further, these principles are ever evolving, hence, there cannot be any straitjacket formula for universal applications of these principles.

40. The commonly known principles of natural justice are as under:

(i) Nemo judex in causa sua (No one can be a Judge in his own case).

(ii) Audi Alteram Partem (no man should be condemned unheard).

(iii) The party is entitled to know the reasons for the decision.

(iv) Making available a copy of report/order/decision.

41. Apart from above traditional principles of natural justice, two new principles of natural justice have emerged with the growing role of State for the welfare of the people and to govern the society with the growth of technology and businesses, where financial economic interests have become very large. These principles are:

(i) **Doctrine of promissory estoppel:** This principle bars the state or a public authority to back out from its commitment made earlier particularly when on the basis of such conduct/ promise, some parties have taken action and committed themselves economically.

(ii) **Doctrine of legitimate expectation:** This doctrine is also an offshoot of the factors which have been narrated herein before. As per this doctrine, everybody has a reasonable expectation that

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public authorities will act in a neutral and fair manner to all concerned parties and also abide by Rule of Law.

42. There could also be exceptions where these Rules are excluded or their scope is curtailed or some of the Rules may not be applicable but other Rules remain applicable. Such exceptions, are generally based on account of 'doctrine of necessity', 'legislative function', 'emergency', 'confidentiality', 'impracticability', and in few other situations, such as 'waiver' or by 'necessary implication'.

43. One more aspect which needs our consideration is that before a proceeding, which is conducted in violation of the principles of natural justice, is declared null and void, it is incumbent upon a judicial forum to look whether any prejudice has been caused to the applicant or not. On the aspect of prejudice, there are two schools of thought: -

(i) First school says that violation of principles of natural justice by itself constitutes as a prejudice caused to a party where compliance of such principles is statutorily required.

(ii) The second school is of the view that unless some prejudice can be said to have been caused to the aggrieved party, violation of principles of natural justice per se would not make proceedings/ decisions made as null and void. Thus, causing of prejudice becomes significant when no statutory provision is specifically claimed to have been violated. In case, there is specific provision regarding right of appearing, fairness which is not complied with, then non-compliance of such provision would itself constitute prejudice being caused to an aggrieved party.

44. Having discussed various aspects of principles of natural justice, we find that these rules have been evolved due to judicial approach as well in addition to customs and practices of a particular society and, in that sense, these can also be termed as "Judge made rules" which have been developed as stated earlier also, to secure justice and to prevent miscarriage of justice. These principles are applicable to administrative

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and quasi-judicial proceedings. These principles are core to public policy and foundational principles of all laws. In other words, these principles run through every statute/code even though it may not be specifically mentioned that principles of natural justice are applicable. Thus, on the various aspects of principles of natural justice as well as applicability thereof in various situations, we would like to take assistance of judicial precedents.

45. This instantly takes us to the findings given by the Hon'ble Supreme Court in the case of ***Associate Builders v/s Delhi Development Authority in Civil Appeal No.10531 of 2014,*** wherein the Hon'ble Supreme Court while deciding the scope of appellate jurisdiction/ intervention of High Courts/ Supreme Court under the relevant provisions of Arbitration Act, 1996 and in particular Section 34 thereof, held as under: -

> *12. In as much as serious objections have been taken to the Division Bench judgment on the ground that it has ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objection to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.*
>
> *Section 34 of the Arbitration and Conciliation Act reads as follows-*
>
> ***"Application for setting aside arbitral award.-****(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if-*
>
> *(a) the party making the application furnishes proof that-*
>
> *(i) a party was under some incapacity; or*

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(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any

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doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

This Section in conjunction with Section 5 makes it clear that an arbitration award that is governed by part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Section 34 (2) and (3), and not otherwise. Section 5 reads as follows:

***"5. Extent of judicial intervention.-** Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial*

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authority shall intervene except where so provided in this Part."

It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also, to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

It will be seen that none of the grounds contained in sub-clause 2 (a) deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances*.*

In ***Renusagar Power Co. Ltd. v. General Electronic Co.,*** *1994 Supp (1) SCC 644, the Supreme Court construed Section 7 (1)(b) (ii) of the Foreign Award (Recognition and Enforcement) Act, 1961.*

In Renusagar Power and before Not reproduced as not relevant for our purposes.

"7. Conditions for enforcement of foreign awards.-*(1) A foreign award may not be enforced under this Act-*

(b) if the Court dealing with the case is satisfied that-

(ii) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

1. The fundamental policy of Indian law

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2. The interest of India

3. Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law.

When it came to construing the expression "the public policy of India" contained in Section 34 (2) (b) (ii) of the Arbitration Act, 1996, this Court in ONGC v. Saw Pipes, 2003 (5) SCC 705, held-

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term

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"public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

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(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

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(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

The judgment in ***ONGC v. Saw Pipes*** *has been consistently followed till date.*

In ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation,*** *(2006) 4 SCC 445, this Court held:*

"14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705] has

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made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

In ***McDermott International Inc. v. Burn Standard Co. Ltd.,*** *(2006) 11 SCC 181, this Court held:*

"58. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd.v. Saw Pipes Ltd. [(2003) 5 SCC 705] (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC [(2003) 5 SCC 705] this Court, apart from the three

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grounds stated in Renusagar [1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77].)"

In ***Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.,*** *(2006) 11 SCC 245, Sinha, J., held:*

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."

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104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77].)"

*In **DDA v. R.S. Sharma and Co.,** (2008) 13 SCC 80, the Court summarized the law thus:*

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere

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with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

***J.G. Engineers (P) Ltd. v. Union of India**, (2011) 5 SCC 758, held:*

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd.[(2003) 5 SCC 705] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

***Union of India v. Col. L.S.N. Murthy**, (2012) 1 SCC 718, held:*

"22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31)

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"31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal".

Fundamental Policy of Indian Law

Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and

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enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. <u>Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining</u>

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the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. (Emphasis supplied)

39. ***No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law****. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.*

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place

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the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2) (a) (iii) of the Arbitration and Conciliation Act. These Sections read as follows:

***"18. Equal treatment of parties.-** The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*

46. We further consider it appropriate to take guidance from the following decisions of Hon'ble Supreme Court, wherein various aspects and facets of principles of natural justice came for its consideration: -

A. D.K. Yadav vs J.M.A. Industries Ltd reported in 1993 SCR (3) 930, 1993 SCC (3) 259

7. The principle question is whether the impugned action is violative of principles of natural justice. In A.K. Kraipak and

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Ors. v. Union of India & Ors., [1969] 2 SCC 262 a Constitution bench of this court held that the distinction between quasi-judicial and administrative order has gradually become thin. Now it is totally clipsed and obliterated. The aim of the rule of the natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules operate in the area not covered by law validly made or expressly excluded as held in Col. J.N. Sinha v. Union of India & Anr. [1971] 1 SCR 791. It is settled law that certified standing orders have statutory force which do not expressly exclude the application of the principles of natural justice. Conversely the Act made exceptions for the application of principles of natural justice necessary implication from specific provisions in the Act like Ss.25F; 25FF; 25FFF; etc, the need for temporary hands to cope with sudden and temporary spurt of work demands appointment temporarily to a service of such temporary workmen to meet such exigencies and as soon as the work or service are completed, the need to dispense with the services may arise. In that situation, on compliance of the provisions of s. 25F resort could be had to retrench the employees in conformity therewith particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies.

8. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the

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authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely' the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority to act arbitrarily effecting the rights of the concerned person.

9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and be given him/ her an opportunity of putting forward his/her case.

B. Canara Bank And Ors vs Shri Debasis Das And Ors reported in (2003) 4 SCC 557

13. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

14. The expressions "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary

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technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.

15. ***The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled****. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate interrogate and adjudicate". In the celebrated case of*

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Cooper v. Wandsworth Board of Works (1963 (143) ER 414), the principle was thus stated:

"Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat". Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

16. ***Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.***

17. What is meant by the term 'principles of natural justice' is not easy to determine. Lord Summer (then Hamilton, L.J.) in Ray v. Local Government Board (1914) 1 KB 160 at p.199:83 LJKB 86) described the phrase as sadly lacking in precision. In General Council of Medical Education & Registration of U.K. v. Sanckman (1943 AC 627: (1948) 2 All ER 337), Lord Wright observed that it was not desirable to attempt 'to force it into any procusteam bed' and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give 'a full and fair opportunity' to every party of being heard.

18. Lord Wright referred to the leading cases on the subject. The most important of them is the Board of

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Education v. Rice (1911 AC 179:80 LJKB 796), where Lord Loreburn, L.C. observed as follows:

"Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not and that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial....The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari". Lord Wright also emphasized from the same decision the observation of the Lord Chancellor that the Board can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view". To the same effect are the observations of Earl of Selbourne, LO in Spackman v. Plumstead District Board of Works (1985 (10) AC 229:54 LJMC 81), where

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the learned and noble Lord Chancellor observed as follows:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice". *Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase 'justice should not only be done, but should be seen to be done'.*

19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances

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of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

C. ***Dev Dutt vs Union Of India & Ors reported in (2008) 8 SCC 725***

24. What is natural justice? The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They may, however, be summarized in one word : fairness. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context.

D. ***Thus, in A. K. Kraipak & Ors. vs. Union of India & Ors. AIR 1970 SC 150, a Constitution Bench of this Court held :***

28. "The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (Nemo debet csse judex propria causa), and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in

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good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice".

(emphasis supplied) The aforesaid decision was followed by this Court in K. I. Shephard & Ors. vs. Union of India & Ors. AIR 1988 SC 686 (vide paras 12-15). It was held in this decision that even administrative acts have to be in accordance with natural justice if they have civil consequences. It was also held that natural justice has various facets and acting fairly is one of them.

E. In Canara Bank vs. V. K. Awasthy 2005 (6) SCC 321,

***39.** this Court held that the concept of natural justice has undergone a great deal of change in recent years. As observed in para 8 of the said judgment:*

"8. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values".

18. Recently, in Canara Bank Vs. V.K. Awasthy, the concept, scope, history of development and significance of principles of natural justice have been discussed in extensor, with reference to earlier cases on the subject. Inter alia, observing that the principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative

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authority while making an order affecting those rights, the Court said :

"14. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression `civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

19. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.

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F. In Manohar s/o Manikrao Anchule v. State of Maharashtra and Another reported in (2012) 13 SCC 14, the Hon'ble Supreme Court at paragraph Nos.18, 19 and 21 held as under :

18. In the case of A.K. Kraipak & Ors. v. Union of India & Ors. [(1969) 2 SCC 262], the Court held as under :

"17. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. ***These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.*** *The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see*

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why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi- judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasijudicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. 19. In the case of Kranti Associates (P) Ltd. & Ors. v. Masood Ahmed Khan & Ors. [(2010) 9 SCC 496], the Court dealt with the question of demarcation between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The Court held as under :

"47. Summarising the above discussion, this Court holds:

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(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi- judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is

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important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or rubber-stamp reasons is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision- makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, adequate and intelligent reasons must be given for judicial decisions.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving

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reasons for the decision is of the essence and is virtually a part of due process.

21. Referring to the requirement of adherence to principles of natural justice in adjudicatory process, this Court in the case of Namit Sharma v. Union of India [2012 (8) SCALE 593], held as under:

"99. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India & Anr. [(1976) 2 SCC 981]; and Assistant Commissioner, Commrcial Tax Department Works Contract and Leasing, Kota v. Shukla & Brothers [(2010) 4 SCC 785]."

G. ***In Union of India and Others v/s Sanjay Jethi and Another reported in (2013) 16 SCC 116, the Hon'ble Supreme Court at paragraphs 34 stated thus :***

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34. The fundamental principles of natural justice are ingrained in the decision making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings as has been held in A.K. Kraipak v. Union of Indian [1969 (2) SCC 262]. It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceedings the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties and the said principle has been laid down in Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation and other [AIR 1959 SC 308], Gullapalli Nageswarrao v. State of A.P. and others [AIR 1959 SC 1376] and Dr. G. Sarana v. University of Lucknow and others [1976 (3) SCC 585].

H. Dharampal Satyapal Limited v/s Deputy Commissioner of Central Excise, Guahati and others reported in (2015) 8 SCC 519 the Hon'ble Supreme Court at paragraphs 20 to 48 held as under :

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi- judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these

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attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'.

22. Though the aforesaid principles of natural justice are known to have their origin in Common Law, even in India the principle is prevalent from ancient times, which was even invoked in Kautilya's 'Arthashastra'. This Court in the case of Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.[4] explained the Indian origin of these principles in the following words: Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam and of Kautilya's Arthashastra the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its

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application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

23. Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it 'jura naturalia', i.e. natural law.

24. ***The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.***

25. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as 'hearing the other side'. Prof. D.J. Galligan[5] attempts to provide what he calls 'a general theory of fair treatment' by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural

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fairness, by emphasizing that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham[6], who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

*"**On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved. Galligan also takes the idea of fair treatment to a second level of***

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understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject matter of fair treatment. However, that aspect need not be dilated upon.

26. Allan[7], on the other hand, justifies the procedural fairness by following the aforesaid principles of natural justice as rooted in rule of law leading to good governance. He supports Galligan in this respect and goes to the extent by saying that it is same as ensuring dignity of individuals, in respect of whom or against whom the decision is taken, in the following words:

"The instrumental value of procedures should not be underestimated; the accurate application of authoritative standards is, as Galligan clearly explains, an important aspect of treating someone with respect. But procedures also have intrinsic value in acknowledging a person's right to understand his treatment, and thereby to determine his response as a conscientious citizen, willing to make reasonable sacrifices for the public good. If obedience to law ideally entails a recognition of its morally obligatory character, there must be suitable opportunities to test its moral credentials. Procedures may also be though to have intrinsic value in so far as they constitute a fair balance between the demands of accuracy and other social needs: where the moral harm entailed by erroneous decisions is reasonably assessed and fairly distributed, procedures express society's commitment to equal concern and respect for all."

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27. It, thus, cannot be denied that principles of natural justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."

28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural jsutice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

29. De Smith [Judicial Review of Administrative Action (1980) 161] captures the essence thus:

"Where a statute authorises interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and

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founded on plainest principles of natural justice." (emphasis supplied)

30. Wade [Administrative Law (1977) 395] also emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

31. In Cooper v. Sandworth Board of Works the Court laid down that: "...although there is no positive word in the statute requiring that the party shall be heard, yet justice of common law would supply the omission of Legislature." (emphasis supplied)

32. Exhaustive commentary explaining the varied contours of this principle can be traced to the judgment of this Court in Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors., wherein the Court discussed plenty of previous case law in restating the aforesaid principle, a glimpse whereof can be found in the following passages:

20. ***The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: In A. K. Kraipak v. Union of India, (1969) 2 SCC 262 : (1970) 1 SCR 457, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi- judicial ones. An unjust decision in an administrative inquiry***

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may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.

21. In Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256, the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the

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Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

47. Having an over view of judicial approach to applicability of principles of natural justice as regard to actions of public authorities in terms of governing statute, we also consider it relevant to refer to the book written by Justice G.P. Singh, wherein it has been opined that a statute may require a liberal construction so as to give effect to its objects and purpose in real sense/substance. Such comments are reproduced as under :-

"A bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficent legislation to futility. As stated by Iyer, J. "to be literal in meaning is to see the skin and miss the soul. The judicial key to construction is the composite perception of the deha and the dehi of the provision." Even in construing enactments such as those prescribing a period of limitation for initiation of proceedings where the purpose is only to intimate the people that after lapse of a certain time from a certain event a proceeding will not be entertained and where a strict grammatical construction is normally the only safe guide, a literal and mechanical construction may have to be disregarded if it conflicts with some essential requirement of fair play and natural justice which the legislature never intended to throw overboard. Similarly, in a taxing statute provision enacted to prevent tax evasion are given a liberal construction to effectuate that purpose of suppressing tax evasion

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> ***although provisions imposing a charge are construed strictly there being no a priori liability to pay a tax and the purpose of a charging section being only to levy a charge on persons and activities brought within its clear terms. For the same reason, in a legislation relative to defence services "the considerations of the security of the State and enforcement of high degree of discipline additionally intervene and have to be assigned weightage while dealing with any expression needing to be defined or any provision needing to be interpreted."***

48. On the basis of above discussion, it can be safely concluded that all actors/ institutions associated with the conduct of CIRP are bound to follow the principles of natural justice which are enshrined in the Constitution of India as a public policy and have also been accepted by judicial forums as fundamental policy of Indian law, whether codified or not. These are to be applied necessarily in all administrative/statutory functions under IBC, 2016 unless excluded explicitly or by necessary implications.

49. Having stated so, we need to look into the architecture of IBC, 2016 to find out as to what principles of natural justice have been built therein and what principles have been excluded therefrom.

50. Firstly, we would look at exclusions of certain principles of natural justice from IBC, 2016. For this purpose, we have to take into consideration the fact that IBC, 2016 has been modelled on '*Creditors in control"* regime after giving a go by to earlier regime, wherein promoters remained in possession of their business. To take this process further, look at the institution of 'CoC' which has been created by IBC, 2016, and it is a statutory mechanism/ authority to take all decisions as far as commercial results are concerned. This committee, as the name itself suggests, comprises of financial creditors who have lent money to the corporate debtor. Such financial creditors are generally secured

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creditors. Thus, there is an apparent conflict of interests of such financial creditors with that of other stakeholders because their primary focus is realization of their dues although one of the objectives of IBC, 2016 is to balance the interests of all stakeholders. Their decisions as regard to the commercial evaluation i.e., approval of resolution plan is non-justiciable. Thus, one of the most significant principles of natural justice i.e., ***Nemo judex in causa sua (No one can be a Judge in his own case)*** has been specifically excluded by this design/composition of CoC.

51. Even when we look at the amendment made to Section 30(2) (b) of IBC, 2016 by Insolvency and Bankruptcy Code (amendment) Act, 2019 with retrospective effect from 06.06.2018 whereby **Explanation 1** has been incorporated which provides that "for the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be **fair and equitable to such creditors",** irrespective of the impact of such explanation on the amount to be distributed to the operational creditors, the incorporation of these words, in our view, by itself indicates that the legislature is conscious of the fact of applicability of principles of natural justice to the proceedings under IBC, 2016 and, thus the legislature has recognized this position by bringing such amendment. Even if one looks at this provision in other way i.e., the principle of fairness and equity has been given away in designing the mode and manner of distribution of money to the operational creditors and to dissenting financial creditors then also, it will be an instance of an exception only.

52. Except the above two situations, we have not found any other exclusion or exception either explicitly or by necessary implication. Even in case of powers of CoC with respect to approval of resolution plan, both RP/CoC are required to follow certain process as prescribed under IBC, 2016 and CIRP Regulations, 2016 although the commercial wisdom of CoC as regard to finding a best solution for resolution of Insolvency is Supreme. Thus, we cannot accept the plea made on behalf of the CoC

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that because of these two situations, principles of natural justice including the principles of fairness and equity are not applicable by necessary implication to the processes conducted under the supervision of CoC which is statutory authority and discharges public functions. As against this claim, it is a settled judicial position that compliance to principles of natural justice is implied/ necessary when any statute/ code under which an action is being taken by any administrative or statutory authority, is silent as to its application. We may also state here itself that consequence of violation of principles of natural justice is that the action taken in violation thereof may be declared void or may become voidable at the instance of aggrieved party, hence, the opportunity to remedy its grievance must be provided.

53. We are further of the view that these exceptions make it more obligatory on the part of CoC to follow the principles of natural justice in its all actions so that objects as enshrined in the preamble to the IBC, 2016 may be achieved. In other words, CoC has to act as a custodian and trustee of all stakeholders and a breach of trust, in that regard, would make its actions liable to be quashed as void.

54. The plea that the principle of fairness was not specifically included in the scheme of IBC, 2016 as commercial wisdom of CoC was absolute since it was creditor driven process and complete freedom had been given to CoC in all respects, we are of the view that the following observations in November, 2015 report of Bankruptcy Law Reforms Committee (hereinafter referred to as "BLRC") at page 30 & 31 thereof would suffice to reject this plea.

ROLE OF THE ADJUDICATOR FOCUSED ON MATTERS OF PROCEDURE

The committee recommends that the role of the Adjudicator needs to be carefully laid out so as to both minimize undue burden on the judiciary while simultaneously ensure the fairness and efficiency of insolvency resolution. *This is done through two sets of*

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recommendations from the Committee. ***The Committee recommends that the Adjudicator will focus on ensuring that all parties adhere to the process of the Code.*** *For matters of business, the Committee recommends that Adjudicator will delegate the talk of assessing viability to a regulated Insolvency Professional (Burman and Roy, 2015).* ***The Adjudicator will be more directly involved in the resolution process once it is determined that the debt is unviable and that the entity or individual is bankrupt.***

55. The report of BLRC, 2015 has been taken into consideration by higher judicial forums like Hon'ble NCLAT and Hon'ble Supreme Court in various cases and after taking assistance from the recommendations made in this report, judicial view has been formed on a particular issue. Therefore, taking cue from such recommendations, we have no doubt in our mind as regard to the applicability of principles of natural justice to the proceedings under IBC, 2016.

56. To further augment this view, we note that in the said report, in para 4.16 at page 38 and 39, to fix the accountability for the functioning of IBBI, the Regulator following elements have been prescribed.

1. *The rule of law. The establishment of sound processes for the legislative, executive and quasi-judicial functions will establish an environment of the rule of law, which creates accountability in and of itself. The formal steps required of the regulation-making process will create checks and balances and avoid the abuse of power.*

2. *Judicial review of the orders of the regulator will create checks and balances.*

3. *Reporting of statistical information, in particular about the four objectives defined in Section 4.1.3, will create accountability.*

"In performing its reporting function, the Board should periodically report to the government and to the public on suitable measures (such as the time taken for granting an approval, measurement of efficiency of internal administration systems, costs imposed on regulated entities

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*and rates of successful prosecution for violation of laws) that demonstrate the fulfilment of Regulatory objectives or the assessment of the Board's performance. To this effect, the Board will set up measurement systems for assessing its own performance. This will create greater transparency and accountability in the Board's functioning. The measurement of activities of the Board also needs to be tied with the financial resources spend by the Board to carry out those activities"***.** Thus, the code also envisages a transparent and accountable functioning of the Regulator as well.

57. Further, in para 4.4 at page 63 & 64 while describing the role and responsibilities of insolvency professionals, the committee recommended as under: -

> *Insolvency professional play a vital role in the insolvency and bankruptcy resolution process as envisaged by the Committee and as detailed in chapters 5 and 6. As mentioned in these chapters, insolvency and bankruptcy resolution under the Code will proceed in two phases, for registered entities as well as for individuals. The first phase of the insolvency and bankruptcy process is the period of insolvency resolution during which insolvency is assessed and a solution is reached within a stipulated time limit, the second phase of the process begins wherein the entity is declared bankrupt. At this point a registered entity enters into Liquidation whereas an individual enters into bankruptcy resolution.*
>
> *This entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks*

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and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.

An IP may hold any of the following roles under the Code:

1. *Resolution professional (RP) to resolve insolvency for a firm or an individual;*
2. *Bankruptcy Trustee in an individual bankruptcy process;*
3. *Liquidator in a firm liquidation process;*

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realization proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.

The role of the IPs is thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well-functioning system of resolution driven by IPs enables the adjudicator to delegate more and more powers and duties to the professionals. This creates the

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positive externality of better utilization of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn my cause inordinate delays. Consumers in a well-functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services, and recurring instances of malpractice and fraud, erode consumer trust. The following sections describe the mandates for the IPs and delineate a framework for regulating IPs.

Box 4.17: Mandates for IPs
1. An IP will act independently, objectively, and with impartiality; *2. An IP will carry outs his tasks diligently;* *3. An IP will treat the assets of the debtor with honesty, and transparency;* *4. An IP will avoid all possible conflicts of interest and if he comes to know of any such conflict, he will disclose the same immediately acquired as a result of professional relationships;* *5. An IP will maintain confidentiality of information acquired as result of professional relationships;* *6. An IP will act in a fiduciary capacity towards the debtor, and the creditors as a whole, when appointed in any capacity in an insolvency and bankruptcy resolution proceeding;* *7. An IP will not commit fraud or abuse, or exert undue influence on, or on behalf of his clients.*

58. The above recommendations also go to show the true intent and purpose of executive/legislature while enacting the IBC, 2016. It

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may not be out of place to mention that even without referring to the principles of natural justice, in so much detail, we could have allowed this application solely on the basis of recommendations of BLRC which clearly manifest the intent of legislature as regard to fairness in procedure, being an unwritten law.

59. Having stated so, we would now take cognizance of concept of fair play being part of IBC, 2016 and regulations made thereunder. We consider it relevant to refer only to the provisions relating to processes structured and prescribed in relation to resolution of insolvency through the mechanism of resolution plan as there is an allegation of arbitrariness, biased approach and unfair treatment to the Applicant by CoC/RP in this process itself. As far as substantive provisions of law are concerned, these are contained in Section 5(25), 5(26), 25(2)(h), 25(2)(i), 29, 29A, 30 and 31 of IBC, 2016.

60. The processes of approval of resolution plan starts from preparation of information memorandum as per Section 29 of IBC, 2016 r/w Regulation 36 of CIRP Regulations, 2016.

61. Thereafter, invitation for Expression of Interest is published. A prospective resolution applicant is required to submit an unconditional Expression of Interest within the time specified in the invitation (Form-G) so published. The next stage is to issue request for resolution plan. These processes are governed by Regulation 36A & 36B of the CIRP Regulations, 2016.

62. Regulation 37 of CIRP Regulations, 2016 governs as to what measures would be provided in a resolution plan for Insolvency Resolution of the Corporate Debtor and maximization of value of its assets. Regulation 38 of CIRP Regulations, 2016 provides for mandatory contents of the resolution plan.

63. Regulation 39 to 39D of CIRP Regulations, 2016 govern the processes of approval of resolution plan by CoC.

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64. Regulation 36A(10) of CIRP Regulations, 2016 requires preparation of provisional list of all eligible Prospective Resolution Applicants (hereinafter referred to as "PRA"), which is submitted by the RP to CoC and to all PRAs who submitted the EoI within time.

65. Regulation 36A(11) of CIRP Regulations, 2016 gives a right to PRA to object against its exclusion or inclusion of any other PRA in the provisional list. Such objection is to be made before the CoC as indicated in Regulation 36A (12) of CIRP Regulations, 2016.

66. The RP, as per Regulation 36A(12) of CIRP Regulations, 2016 on considering the objections, issues final list of PRAs to the CoC.

67. As per Regulation 36B(1)(b) request for resolution plan is to be made even with a PRA who had contested the decision of the RP against its non-inclusion in the provisional list. Thus, it can be observed that up to certain stage a PRA can object to the inclusion of other PRA in the provisional list. Further, every PRA who has been excluded in the provisional list and who has contested the same, remains entitled to receive RFRP. It is also noteworthy that objections are to be made before CoC in terms of Regulation 36A(12) of CIRP Regulations, 2016 as noted earlier also but in terms of provisions of Regulation 36B(1)(b), such non-inclusion can also be contested. The use of word "contested" in the said regulation and that too without any reference to CoC, indicates that such PRA can also approach Adjudicating Authority if it is not satisfied with the decision of CoC.

68. **These provisions clearly establish that concept of fair play has been in-built though it is restricted to only a person who is genuinely interested in participating in the insolvency resolution proceedings which can be evident from actions of such PRAs. Further, this mechanism also shows that one other settled principle of natural justice/legal principle that "no one should be rendered remediless" has also been institutionalized and that too when such aggrieved PRA cannot submit a resolution plan because as per the provisions**

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of Regulation 39 (1) of CIRP Regulations, 2016 only a prospective resolution applicant in final list may submit the resolution plan. This provision also demolishes the view that the actions of the CoC cannot be reviewed by Adjudicating Authority as commercial wisdom of CoC is supreme and not justiciable as well. This provision also indicates that the process of approval of resolution plan and decision of approval of resolution plan are two different aspects where first aspect can be examined/revied by Adjudicating Authority and if the action of CoC is found to be arbitrary or unreasonable then the whole process including the approved resolution plan by CoC can be set aside and if it is not so then such provision would become meaningless.

69. The Ld. Counsel for CoC has vehemently argued that the concept of equity is alien to IBC. For this purpose, first we have to understand the concept of equity. It has got many connotations which can be summarized as under: -

- *Equity will not suffer a wrong to be without a remedy*
- *Equity follows the law*
- *He who seeks equity must do equity*

  (RP ____ applicable for extension of CIRP CIRP period)
- *He who comes to equity must come with clean hands*
- *Delay defeats equity*

  (i. exceptional circumstances,

  (ii. It not extended _____
- *Equality is equity*
- *Equity looks to the intent rather than the form*
- *Equity looks on that as done which ought to have been done*
- *Equity imputes an intention to fulfill an obligation*
- *Equity acts in personam*
- *Where the equities are equal, the first in time prevails*
- *Where the equities are equal, the law prevails*

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70. For our purposes, firstly we need to understand what is meant by "equity follows the law". As per our understanding, it means that equity will not allow a remedy contrary to the law meaning thereby that application by law and equity are subservient to each other and wherever the law needs to be followed, it must be followed. Thus, in respect of the matters governed by the provisions of Section 30(2) and Section 53 of IBC, these provisions are to be given effect and any deviation from these specific provisions of law cannot be made on the ground of equity. However, wherever there is no such prescription in any provisions of law, the principle of equity remains applicable and it is the judicial forum who has to use its discretion to apply principles of equity to serve the interests of justice. Thus, this contention of the CoC is not acceptable as it cannot be said that equity is alien to IBC, 2016 altogether as the application of principle of equity has been found to be applicable in the situation as mentioned in above para 67 itself. Further, secondly, RP in its application for exclusion and extension of CIRP period u/s 12 of IBC, 2016 has himself stated that the said application was preferred in terms of equity, natural justice, good conscience and ample bona-fide to secured the tenets of justice and no prejudice whatsoever shall be caused to any party to the same was allowed. However, the same RP on the other hand, has not been able to convince the CoC as regard to right course of action to be adopted in the peculiar facts and circumstances which prevented the applicant herein to submit the resolution plan before the dead line as set by CoC. One plea which may be taken against the applicant is that delay defeats equity, however, in our view, there is no significant delay in the present case and particularly when a contrary approach has been adopted by CoC by extending the voting lines for its own convenience.

71. Apart from above discussion, we find that provisions of Section 7, 9 & 10 of IBC, 2016 prescribe specific procedure for admission/ rejection of applications filed under these sections. A right of hearing to the

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Corporate Debtor is not envisaged therein. However, the Hon'ble Supreme Court in the cases of;

i. ***M/s Innoventive Industries Ltd. v/s ICICI Bank & Anr. in Civil Appeal Nos.8337-8338 of 2017;***
ii. ***Swiss Ribbons Pvt. Ltd. vs Union of India in Writ Petition (Civil) No.99 of 2018; and***
iii. ***M/s. Surendra Trading Company v/s M/s. Juggilal Kamlapat Jute Mills Company Limited and Others in Civil Appeal No.8400 of 2017,***

By applying the principle of natural justice i.e., no one should be condemned unheard or hear the other side held that such party was required to given an opportunity of hearing. In this regard, we may also note that NCLT is bound by the principles of natural justice to discharge its functions as prescribed in Section 424 of Companies Act, 2013 and Rule 11 of NCLT Rules, 2016.

72. We further note that the principles of natural justice also require maintenance of records and recording of reasons so that the legality or otherwise of decisions arrived at by an Authority/ Institution can be examined on the basis of such records/ reasons. For this purpose, we take reference of Regulation 24(6), 24(7), 26(4), 26(5), 39(3) and 39A of CIRP Regulations, 2016 which provide for recording the proceedings, preparation of minutes and reasons/ deliberations made on a particular issue for arriving at a conclusion. In addition to fulfillment of other requirements of Section 30(2) by the RP before presenting a resolution plan for the approval of CoC, the CoC is required to deliberate on the feasibility and viability of the resolution plan. Regulation 39(3)(b) also provides for recording its deliberations on the feasibility and viability of each resolution plan and if these conditions are not satisfied, the Adjudicating Authority will be well within its power to reject the resolution plan approved by the CoC. Thus, this aspect also highlights

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those principles of natural justice are in built and applicable to IBC processes/ proceedings.

73. Before we conclude on this aspect, we consider it relevant to refer to the provisions of Section 61(1) of IBC, 2016, wherein any person aggrieved by the order of Adjudicating Authority may prefer an appeal to NCLAT. As per the provisions of Section 61(3) of IBC, 2016, an appeal against the order approving the resolution plan by the Adjudicating Authority U/s 31 of IBC, 2016 may be filed on following grounds: -

Section 61

(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.

74. Considering these two provisions, in the present case, there can be two situations: -

(i) *We may accept/reject application in IA No.293 of 2020, then such order would be appealable U/s 61(1) of IBC, 2016 in either case independently; or*

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(ii) *We reject application in IA No.293 of 2020 and approve the resolution plan if such plan complies with all requirements of law, then such order of approval would be appealable U/s 61(3) of IBC, 2016.*

75. When we compare the provision of Section 61(3) of IBC, 2016 with the provisions of Section 30(2) of IBC, 2016, we note that provisions of Section 30(2) (c) and Section 30(2)(d) are not mentioned in Section 61(3) of IBC, 2016. Further, it is most interesting to note that as per Section 61(3)(ii), the Appellate Authority is empowered specifically to reject the resolution plan if it finds that '*there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period*,' which means that the tests of fairness, equity, impartiality, bias and arbitrariness can be applied by Appellate Authority. A similar provision does not exist in Section 30(2) of IBC, 2016. Thus, the validity of CoC approved resolution plan can be examined by Adjudicating Authority on different grounds than the Appellate Authority who will also have one additional ground to examine the order of approval of resolution plan passed by this Adjudicating Authority. This position of law may create an impression that only Appellate Authority can look into aspect of violation of principles of natural justice and this power is not given to Adjudicating Authority. This impression, howsoever attractive, is also not valid for legislature intent cannot be so as an adjudicator cannot be expected to keep its eyes and ears closed, which is also not the case as evident from the expectations from Adjudicating Authority as indicated in BLRC report 2015. Secondly, the aspect of material irregularity can be examined by Adjudicating Authority under its powers U/s 60(5)(c) of IBC, 2016 and also u/s 30(2)(e) of IBC, 2016 if such material irregularity is a consequence of violation of any provision of IBC, 2016 or CIRP Regulations, 2016. At this point, we are considering the scope of applicability of provisions of Section 30(2) (e) of IBC, 2016 2016 in

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this manner only as the aspect whether principles of natural justice being law in force is examined in the later part of this order. However, as can be seen from earlier discussion that Adjudicating Authority would be well within its powers to quash the process of approval of resolution plan if such process is found to be contrary to the principles of natural justice. Thus, this legal position also negates the contentions made in this regard on behalf of CoC.

76. Having discussed the concept of fair play, reasonableness etc. and its application in various processes of IBC, 2016 r/w CIRP Regulations, 2016 including its application in the process of approval of resolution plan, we also consider it pertinent to analyze the scope and functions of IRP/RP and CoC and mechanism thereof as per various provisions of IBC, 2016 and CIRP Regulations, 2016 made thereunder.

77. This is discussed as under:

In case of Financial Creditors, it is mandatory for the Financial Creditor to propose the name of IRP in the application filed U/s 7 of IBC. In case of application filed U/s 9 of IBC, it is not obligatory, however, there is no bar that the operational creditor cannot propose the name of IRP. In case the name of IRP has been proposed, such IRP is generally appointed by the Adjudicating Authority. In case of Section 9, if the name of IRP is not proposed, the Adjudicating Authority appoints an eligible Insolvency Professional as IRP in terms of the provisions of the Code. The IRP starts functioning immediately on taking charge and makes a public announcement immediately thereafter in terms of provisions of Section 13(2) of IBC. The contents of public announcement have been prescribed U/s 15 and the manner thereof has been prescribed in Regulation 6 of CIRP Regulations, 2016. The purpose of such public announcement is to make the public in general and the parties who have some business connections with such Corporate Debtor aware so that they can participate in the CIRP process to protect their interests and enforce their entitlements. A brief

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description of the activities of IRP/ RP which concern the third parties can be summarized as under: -

(i) Receiving and collating all the claims submitted by the creditors to him pursuant to public announcement made under Section 13 and 15 of IBC.

(ii) To take control of the assets and properties of the corporate debtor and manage the operations of the corporate debtor. However, as per explanation to Section 18, the assets owned by the third parties which are in the possession of the corporate debtor under trust or under contractual arrangements cannot be considered as assets of the corporate debtor. Thus, the statute itself has put a check on the powers of IRP/ RP, so that they cannot act in arbitrary manner and deprive other parties of their rightful entitlements.

(iii) As regard to the claims, elaborate provisions have been made in Regulations 7 to 14 of CIRP Regulations, 2016. A particular reference can be made of Regulation 13 which provides for verification of claims and dissemination of information to all claimants as regard to the status of their claims as well as of all other claimants which enables the claimants to know the status of their claim and if they feel aggrieved by the decision of the IRP/ RP so that they can approach the Adjudicating Authority U/s 60(5)(b) or U/s 60(5)(c) of IBC.

(iv) Thus, proper check and balances have been provided. However, one significant point to be noted is that, everything is based on adherence to strict timelines, in case some claimants miss the bus, then they cannot ride thereafter in normal course and at all not after the approval of the Resolution Plan.

78. After giving a brief account of the duties of IRP/ RP and the mechanism therefor, we consider it more appropriate to refer to the code of conduct which an Insolvency Professional, whether acting as IRP, or RP, or

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Liquidator is required to abide. The genesis of such code of conduct emerges from Section 208(2) which is reproduced as under: -

Section 208

(2)*Every insolvency professional shall abide by the following code of conduct: —*

(a)*to take reasonable care and diligence while performing his duties;*

(b)*to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;*

(c)*to allow the insolvency professional agency to inspect his records;*

(d)*to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and*

(e)*to perform his functions in such manner and subject to such conditions as may be specified.*

79. In addition to above requirements, Regulation 7(2)(h) of IBBI (Insolvency Professional) Regulations, 2016 also prescribes that the Insolvency Professionals shall abide by the code of conduct specified in the first schedule to these regulations. The code of conduct for Insolvency Professionals as prescribed under this Regulation is reproduced hereunder: -

CODE OF CONDUCT

1. A member of the committee of creditors, while discharging its duties shall abide by the following code of conduct, as individual and jointly with other members of the committee.

2. A member of the committee shall:

a) ***maintain integrity in performing its roles and functions under the Code.***

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b) ***must not misrepresent any facts or situations and should refrain from being involved in any action that is detrimental to the objectives of the Code.***

c) ***must maintain objectivity in exercising decisions on the subject matter bestowed to the committee under the Code.***

d) ***must disclose the details of any conflict of interests to the stakeholders, whenever it comes across such conflict of interest during a process****.*

e) not acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative of the committee member to do so, without making a disclosure to the stakeholders.

f) not adopt any illegal or improper means to achieve any objective.

g) co-operate with the insolvency professional in discharging his duties under the Code.

h) ***not influence the decision or the work of committee so as to make undue gain or advantage for itself or its related parties.***

i) ***disclose the existence of any pecuniary or personal relationship with any stakeholders entitled to distribution, as soon as it becomes aware of it.***

j) ***ensure that decisions are made without any bias, favour, fear, coercion, undue influence or conflict of interest.***

k) ***maintain transparency in all activities and decision making.***

l) respect the moratorium and creditors who maintain the accounts of the CD shall not adjust the receipts of the CD during CIRP for past due in violation of moratorium.

m) become fully aware of the provisions of the Code and rules/regulations. It must have complete knowledge of the role and responsibilities assigned to it by the Code.

n) nominate representative with sufficient authorization to participate in meetings and make decisions during the process.

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o) participate actively, constructively and effectively in deliberations and decision making.

*p**) not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable**.*

q) ensure that timelines provided in the Code and Regulations are not breached.

r) facilitate the appointment of various professionals within timelines prescribed under the Code and the Regulations.

s) cooperate with the insolvency professionals in seeking various approvals from Adjudicating Authority within model timeline prescribed under the Code and Regulations.

t) ensure complete confidentiality of information that they receive or come across as part of the process at all times. It shall not share any information with any person who is not authorised to receive such information and without the consent of the relevant parties or as required by law.

u) at all times respect the privacy of any information.

v) take necessary measures to ensure that the insolvency resolution process cost is reasonable, keeping in balance the need to conduct a smooth and timely resolution process.

w) ensure that their cost associated with the process is not booked as insolvency resolution process cost.

x) not withhold release of insolvency resolution process cost, including fee of professionals.

*y) **adhere to the Code and regulations in performing their roles and functions under the Code at all times**.*

*z) **bear the collective interest of all stakeholders in mind in all activities and decision making**.*

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aa) respect the demarcation of roles and responsibilities assigned by the Code to different stakeholders and shall not, either directly or indirectly interfere with the functions of the insolvency professional.

bb) at all times endeavor to ensure that timelines prescribed in the Code and Regulations are adhered to.

cc) not contravene any provisions, of the Code, regulations, instructions, guidelines and circulars issued by the Board from time to time.

dd) endeavor to protect the CD as a running business and its assets and take necessary steps to protect the value of the assets of the CD.

ee) extend interim finance to the extent required for completion of the process.

80. A perusal of Section 208(2) along with first schedule makes it amply clear that the principles of natural justice in its various design have been applied to Insolvency Professional who conducts CIRP/ Liquidation process.

81. Thus, the RP is statutory authority and an officer appointed by this Adjudicating Authority who has to act independently, in neutral manner and without succumbing to the pressure or arbitrary approach of CoC which is his duty in terms of schemes and provisions of IBC, 2016 although he has to take approvals/ sanctions of CoC in the situations as prescribed/ specified in IBC, 2016 or CIRP Regulations, 2016. Further, the RP is to abide by the code of conduct formulated to guide RP in discharge of its duties and as can be seen from various clause of such code of conduct, such guidelines are based on the principles of natural justice only.

82. **Now, we will look at the provisions of law governing the constitution, scope of its powers and requirements of law to be fulfilled by CoC in discharge of its duties**. The CoC is generally comprised of unrelated financial creditors and has power u/s 28, 30(4) of IBC, 2016 respectively to administer CIRP and approve resolution plan. It is settled position of law that any non-compliance of

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requirements of CIRP Regulations, 2016 by CoC while approving the resolution plan would make a resolution plan violative of requirements of Section 30(2)(e) as CIRP Regulations, 2016 also come within the realm of Section 30(2)(e) of IBC, 2016. In addition to that, U/s 30(4) of IBC, 2016, the CoC has been burdened with the requirements that the resolution plan presented for its approval must be in compliance to such other requirements as may be specified by the Board. Thus, the legislature has entrusted CoC to further check whether all provisions of law within the meaning of section 30 (2) (e) and 30(2) (f) of IBC, 2016 have been complied by RP before presenting a resolution plan for its approval. This provision can also be interpreted to mean that power of CoC is also circumscribed in a sense that it should also meet the requirements as specified by the Board i.e., IBBI. The term "specified" has been defined in Section 3(32) to mean as specified by regulations made by the Board under IBC, 2016. Under section 240(2) specific instances of the subjects have been given on which IBBI can make regulations without prejudice to the generality of the provisions of Section 240(1) of IBC, 2016. Here, we can take note of Section 240(2) (wa) of IBC, 2016 which states that IBBI can make regulations as regard to other requirements U/s 30(4) of IBC, 2016. Thus, other requirements, if any, are specified by IBBI pursuant to this provision, CoC's decision must confirm to the same also in addition compliance of CIRP regulations, 2016 which, as stated earlier, come within the ambit of Section 30(2)(e) of IBC, 2016. Here, we may also add that this power has been derived by IBBI in terms of provisions of Section 30(4) of IBC, 2016, hence, such power is necessarily given to carry out the provisions of IBC, 2016. Thus, in our view, it cannot be said that CoC is not bound to observe any norms while exercising its jurisdiction as regard to approval of resolution plan.

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83. To take this discussion further, we also consider it necessary to take note of Regulation 17(1A) of CIRP Regulations, 2016 which has been introduced w.e.f. 30.09.2021 and reads as under:

[(1A) The committee and members of the committee shall discharge functions and exercise powers under the Code and these regulations in respect of corporate insolvency resolution process in compliance with the guidelines as may be issued by the Board.]

84. The above provision also reflects the intention of the legislature so as to bring the functioning of powers by CoC to be compliant of guidelines as may be issued by the Board. In this regard it is important to note that IBBI issued a discussion paper in August, 2021, which was titled as Code of Conduct for CoC. The same has not yet been made operative but it may be very useful to reproduce the same as to what the legislature intends to do as regard to nature of scope and manner of functioning of CoC.

DISCUSSION PAPER

This discussion paper solicits comments on the following issues related to a corporate insolvency resolution process (CIRP).

Part-A: Code of conduct for Committee of Creditors.

This part discusses concerns regarding the functioning of Committee of Creditors (CoC) under the Insolvency and Bankruptcy Code, 2016 (Code) and proposes a code of conduct for creditors and solicits comments on the same.

2. The Insolvency and Bankruptcy Code 2016 envisages market led solutions in the insolvency space driven by professionals and committee of creditors. For realization of optimum results, it is imperative that all the stakeholders driving the process shall be regulated and follow the rules of game threadbare. While other stakeholders i.e., insolvency professionals (IPs), Valuers and Information Utilities (IU) are regulated entities,

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***the CoC functions in an unregulated environment**. On several occasions questions have been raised in various fora about the action of CoC being detrimental to objectives of the Code; hence there is an urgent need to device an appropriate mechanism to effectively guide the CoC in its day-to-day functioning.*

3. The Code puts in place a creditor-in-control process for insolvency resolution of corporate persons. The composition of the CoC is laid down under sub-section 2 of section 21 of the Code. The CoC comprise of all financial creditors (FCs), except related parties of the CD. The FCs are assigned voting share on the basis of debt owed to them. When the CD has no financial debt or where all FCs are related parties, CoC is constituted with operational creditors. Under the Code, the creditor pursues resolution; evaluates the best resolution plan and circumvents liquidation, to the extent feasible. Creditors of a corporate debtor (CD) act collectively to form a committee which acts in the best interest of all stakeholders. Hence, the CoC is the custodian of public trust during resolution process.

*4. **The CoC has a statutory role and it discharges a sort of public function. The pain and gain emanating from resolution of the CD are to be shared by all stakeholders with fairness and equity. It must, therefore, apply the highest standard, duty of care, follow due process, be fair to all stakeholders and also act in a transparent manner in discharge of its responsibilities.** The IP who conducts the process also performs his duties under the guidance and supervision of the CoC. The role of CoC is vital for timely completion of activities and successful resolution.*

*5. **During a CIRP, the CoC is vested with a duty of trust and care.** CoC has to take important decisions on several matters*

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impacting CD and associated stakeholders. The CoC has powers commensurate with its responsibilities. It can decide a haircut of any magnitude to any or all stakeholders required for rescuing the firm; and to seek and choose the best resolution plan from the market, unlike other avenues that allow creditors to find a resolution only from existing promoters. The resolution plan can entail a change of management, technology, or product portfolio or combination of all; acquisition or disposal of assets, businesses, or undertakings; restructuring of organisation, business model, ownership, or balance sheet; strategy of turnaround, buy-out, merger, amalgamation, acquisition, or takeover; and so on, as may be necessary to resolve the stress of the firm. Value maximisation with sustained resolution requires strategies much beyond restructuring of liabilities. This requires tremendous commercial dexterity and acumen on the part of members of the CoC.

6. Judicial pronouncements have clarified the role and responsibilities of the CoC and established the primacy of 'commercial wisdom of CoC' in deciding the fate of the CD undergoing corporate insolvency resolution process (CIRP).

6.1 The supremacy of the commercial wisdom of the CoC in financial decisions under the Code is well recognised by the Hon'ble Supreme Court in Re Swiss Ribbons. Commercial decisions of the CoC are left to its collective wisdom.

6.2 The Hon'ble Supreme Court in CoC of Essar Steel India Vs. Satish Kumar Gupta (CA No. 8766-67/2019 & others) has observed that the CoC has to take a business decision based on ground realities by a majority which then binds all stakeholders, including dissenting creditors. The Code envisages an exalted status for the CoC in commercial decision making strictly based on the ground realities and even the

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Adjudicating Authority (AA) has limited role in approving the resolution plans approved by CoC.

7. The CoC as a body is a new institution and is still evolving to understand its role in the context of value maximization and balancing the interest of all the creditors in market driven insolvency resolution process. ***In some cases, concerns have been raised by the AA regarding the capacity and conduct of the CoC. Some instances where the conduct of the CoC or some FCs have been under question are given below:***

(i) In the matter of M/s. Andhra Bank Vs. Sterling Biotech Ltd. and Ors., absconding and section 29A ineligible promoters attempted to take over the company in the guise of OneTime Settlement with approval of 90.32% vote share of CoC. The NCLT observed: "This also raises doubt about the functionality of the CoC. Such an act of CoC can never be treated as an act of commercial wisdom."

(ii) In the matter of Bank of Baroda, Vs. Mr. Sisir Kumar Appikatla, & Ors. the AA rejected the resolution plan approved by the CoC on the grounds that the Resolution Plan of resolution applicant was only used as a ploy to gain control of the CD by the very person who had pushed the CD into insolvency. While rejecting an appeal by an FC in the matter the NCLAT observed: "This in itself raises eyebrows. This is further compounded by approval of the Restructuring Plan camouflaged as Resolution Plan emanating from an ineligible person which renders the role of the Committee of Creditors questionable. Such circumstances justify raising of inference of complicity."

(iii) In the CIRP of Bhushan Power & Steel Ltd., the Resolution Professional paid a fee of about Rs.12 crore for the services of lender's legal counsel, rendered prior to CIRP and during

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CIRP. It was recorded in the minutes of the CoC that if the IBBI objects to inclusion of such expenses in insolvency resolution process cost, this amount would be reimbursed by the FCs on a pro-rata basis. Such an arrangement was clearly in contravention of the IBBI's circular, dated 12.6.2018, which clearly states that IRPC shall not include any legal fee paid to legal counsel of the lenders/creditors. Clearly the RP and CoC deliberately planned for contravening a law.

(iv) In the CIRP of Varrsana Ispat Limited, the lead FC recovered debt during moratorium from the company's account it was maintaining. In liquidation, even when the company 3 was a going concern and a scheme under section 230 of the Companies Act, 2013 was under consideration, and despite instruction to contrary from the NCLT, the liquidator distributed Rs.26 crore to FCs under their pressure.

(v) Before commencement of CIRP of Gitanjali Gems Limited, an FC decided to engage an entity for services during CIRP. It proposed the name of an IP for appointment as IRP in the application, after having an understanding with him that on his appointment as the IRP, he shall appoint that entity. The IRP appointed the said entity on the date of commencement of CIRP. The fee of entity was 20 times of the fee of the IRP/RP.

(vi) In the case of K. Shashidhar, MD, Kamineni Steel & Power India Ltd. Vs Kamineni Steel & Power India Ltd. and others (Banks), the AA taking note of delaying tactics by the members of CoC in finalizing/approving resolution plans observed that "functioning of these three banks prima facie do not adhere to the preamble of IBC……., therefore functioning of these three Banks in resolving bad loans deserves to be scrutinised by the RBI which is the regulatory authority of the Banks."

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(vii) In this matter of Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Private Limited, there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of IRP as RP since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. The AA observed: "We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated to the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations."

(viii) In the matter of SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd., AA observed that "... An unenviable situation has been created by the conduct of the Members of the CoC. Despite the fact that the Resolution Professional apprised the CoC that the period of 180 days is to expire on 12.02.2018 and sanction be granted for moving an application before the Adjudicating Authority for extension of the period. The CoC has behaved the way we have recorded in the preceding paras.". It further observed: "A strange phenomenon has developed in so far as the functioning of the CoC is concerned. In a number of cases, it has now been seen that Members of the CoC are nominated by Financial Creditors like Banks without conferring upon them the authority to take decision on the spot which acts as a block in the time bound process contemplated by the Insolvency and Bankruptcy Code, 2016. Such like speed

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breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal of the CIR process."

(ix) In the matter of Rajnish Jain Vs. Anupam Tiwari RP & others, NCLAT observed that "...it appears that the Resolution Professional has failed to perform his obligation/duty to observe the Code, the Rules and Regulations as enumerated in the Code and CIRP Regulations while conducting CIRP for the reason of taking up such an Agenda of Meeting and leading to illegal Resolution of ousting the BVN Traders from the 'Committee of Creditors'. Therefore, we are of the considered opinion that the Committee of Creditors was not empowered to adjudicate the issue that has cropped up in the present case, i.e., M/s BVN Traders' is a 'Financial' or 'Operational' Creditor. Such adjudication is beyond the scope of consideration of the Committee of Creditors. Further, the Resolution Professional erred to reclassifying the status of a creditor from 'Financial' to 'Operational Creditor', based on the alleged expert opinion despite that the Adjudicating Authority took a contrary view."

(x) The AA in the matter of STCI Finance Ltd. through Subash Chandra Modi Vs. Parinee Developers Private Limited, while dismissing the application of RP for withdrawal of CIRP, made observations against CoC for their conduct in postponing the issuance of EOI, Form-G continuously 10 times without obtaining approval for the same from the AA. Further observed that CoC had taken law in to its hands and not complied with applicable provisions of the Code and CIRP Regulations.

(xi) In the matter of INCAB Industries, NCLAT observed that "85... Constitution of the Committee of Creditors violates the proviso to Section 21 (2) of the I & B code 2016 read with 12(3) of CIRP Regulations. Therefore, the Constitution of the creditors' committee is a nullity in the eye of law that vitiates

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the entire CIRP. Liquidation is like a death knell for the corporate entity/corporate person. Liquidation based on the resolution of the CoC, which consists of related party Financial Creditors having 77.20 % vote share, is a matter of grave concern. Hon'ble Supreme Court in the case of Phoenix ARC (supra) has described the entering of such related party Financial Creditors in the Committee of Creditors as an act of commercial contrivances through which these entities sought to enter the COC which could affect the other independent Financial Creditors. An order for liquidation of corporate debtor based on the sole decision of related parties Financial Creditors could be fatal for the existence of the corporate debtor, cannot be sustained. It is also pertinent to mention that when the Constitution of the Committee of Creditors itself is found to be tainted, then the decision of that COC cannot be validated on the pretext of exercise of commercial wisdom."

8. ***Presently, the conduct and decision making of the CoC is not subject to any regulations, instructions, guidelines etc. Many stakeholders have expressed the need of a code of conduct for the CoC. The thirty second report of the Parliamentary Standing Committee on finance has also recommended the same stating that, "there is an urgent need to have a professional code of conduct for the CoC, which will define and circumscribe their decisions, as these have larger implications for the efficacy of the Code"***

9. The institution of CoC is key to successful conduct and resolution of companies through the Code. It decides the fate of the CD and its commercial wisdom is supreme. The Code has empowered the CoC to choose the best possible resolution from the market and provide for any measure as part of such plan to ensure sustained life of the company. ***The responsibility comes***

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with accountability. *Since the decisions of the CoC impact the life of the firm and consequently its stakeholders, it needs to be fair and transparent in its decisions.* ***However, as discussed above, there have been several issues and apprehensions regarding the conduct of members of the CoC observed.*** *A key step in taking these efforts forward would be to put in place a code of conduct as guidelines for the benefit of participating members in a CoC.*

10. ***International experience***

It is observed that internationally there are precedents, whereby, the CoC with the CD are subject to certain rules and regulations for their conduct in the process. In UK, there exist elaborate guidance issued by the Association of Business Recovery Professionals, in conjunction with the Recognized Professional Bodies, on what might be expected of CoC. Similarly, in USA, creditors and other stakeholders play an important role in acting as a watchdog over a debtor's conduct, and the section 1102 of the US Code places responsibility of interest of those represented by the committee, but not appointed on it, on the members of the committee.

11. ***Economic Analysis***

Since the decisions of the CoC impact the life of the firm and consequently its stakeholders, ***it needs to be fair and transparent in its decisions.*** *Such power should come with accountability.* ***Specifying a code of conduct will promote transparent working of the CoC and make participating members accountable for their actions during the process. Any attempt by members of CoC to make favourable decision in the interest of any particular (group of) stakeholder(s) would be avoided, thereby ensuring that the principle of fairness is met. It shall also promote higher responsibility to***

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make decisions in the interest of all stakeholders instead of their own selfinterests. *It will strengthen collective action, which is a fundamental principle underlying the Code.*

12. ***The Board proposes to put in place a code of conduct for CoC that shall elevate accountability and responsibility of CoC to ensure transparency in the functioning of a CoC****. A draft is presented in the* ***Annexure****. The practice of insolvency and restructuring is complex and varied. It may be difficult to conceptualise and codify every possible situation or scenario. Accordingly, the proposed code of conduct establishes broad principles that can be applied to every situation. It also draws from the ethical norms on which a CoC is expected to function and shall act as the guiding light for the CoC while conducting itself.*

13. ***Public Comments***

The Board accordingly solicits comments on the following:

a. *Whether a code of conduct should be specified by the Board?*
b. *Any item of the draft code of conduct placed at Annexure, that should be omitted or modified.*
c. *Any item that is not part of the draft code of conduct placed at Annexure but should be included.*

PROPOSED CODE OF CONDUCT FOR CoC

While there is no doubt that all stakeholders are vital, during the CIRP where the prime objective is revival/rehabilitation of a financially distressed company, the FCs play a very significant role as they have larger stakes involved, are equipped with the ability to decide on matters relating to commercial viability of the CD and display their willingness to take the risk of restructuring their debts in order to keep the CD a going concern. It may also be argued successfully that the

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FCs with 'skin in the game', like banks and financial institutions, are better placed to assess the feasibility and viability of a resolution plan for the successful continuance of a CD as a going concern. And if a CD revives successfully, it can as well be reasonably assumed that other stakeholders like OCs would also equally benefit from the revival.

The law in India has recognised the above and relies on the CoC to run CIRP and looks to them to set highest levels of standards in conduct and performance. The NCLTs in some cases have also recognised the diligence and roles played by the CoC. For example, in the matter of Ashika Commercial Private Ltd.26, NCLT, Kolkata Bench observed;

> *This is a case in which the COC has judiciously distributed the financial bids to the stakeholders according to their full entitlements. There is nothing in the plan, so as to disapprove it. The COC has very well deliberated with the two plans and decided the viability, feasibility and financial matrix of each plan and approved one……*

Similarly, in the matter of Pawan Impex Pvt. Ltd.27, NCLT, Principal Bench at New Delhi observed that '…the decision of the COC is a reasoned and self-speaking one as required under provisions of regulation 39(3) of CIRP Regulations, 2016.'

Having emerged as the most appropriate body to attempt to revive and rehabilitate distressed CDs in a commercially prudent manner, it may be worthwhile to consider steps that could be taken to further strengthen the framework of CoC under the Code. A possible way to achieve this objective could be to consider adopting a code of conduct along the similar lines of the SIP in the UK, which would set out the guiding principles for the conduct of the CoC and ensure that its

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commercial wisdom is largely confined to within the four walls of these guiding principles, with any deviations requiring proper justification or attracting incidental consequences.

Some of the guiding principles could include intent statements on the following areas:

(a) demonstrable transparency in the conduct of the CoC especially with regard to conflict-of interest issues;

(b) all decisions of the CoC to be backed by fair reasoning and to be recorded;

(c) ***maintain arm's length with RPs in respect of jurisdiction and responsibilities, especially in respect of engagement of professionals and in the area of treatment of avoidance transactions;***

(d) requirement for better due diligence of the RA as well as the CD;

(e) mechanism for resolution of deadlocks on matters where the CoC is unable to take decisions due to lack of requisite majority;

(f) mandatory disclosure of all information to the RP for assisting the RP in conducting the business of the CD such as technical reports, forecasts, etc.;

(g) ***appropriate penalties or disciplinary action for a CoC member on account of misconduct or malfeasance while being on the CoC of another CD, subject to carve out of decisions taken in good faith applying business judgement rule****;*

(h) strict adherence to timelines stipulated in the Code and the regulations made thereunder;

(i) ***commercial wisdom of CoC to be supported by suitable and reasoned back up information and data;***

(j) minimum stipulated professional and empowered competency of the members representing the creditors in the CoC meetings;

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(k) in respect of large resolutions, the CoC to be encouraged to have a heterogeneous composition such as involving experts from different areas of specialisation such as compliance, credit, risk, investment banking, legal and also suggest minimum thresholds of representation for such experts to encourage more diverse and multi-faceted discussions;

(l) encouraging entrepreneurial and business initiative by the CoC while exercising its commercial wisdom along with requisite immunities to protect them against unfavourable outcomes as an outcome of exercising such commercial wisdom.

85. As evident from the discussion paper, numerous instances of arbitrariness, unjust and non-transparent approach of CoC have been noticed. Further, due to the mode and manner of functioning of CoC, in the light of large haircuts being undertaken by them, and the CoC's contribution in a substantial manner for non-compliance to the timelines, being essence of the Code and other instances of arbitrary and adhoc approach came to fore and attracted a great deal of criticism. Therefore, legislature has swung into action which is supported by the fact that there have been amendments in Regulation 36A(4A), 36B (5) and Regulation 39(1A) and 39(1B) have been inserted w.e.f 30.09.2021. Introduction of these provisions clearly indicate that delay at the level of CoC in conducting the CIRP of a corporate debtor must be put into check and be made close ended. **The only aspect which still requires specific regulation is that there should be specified timelines for voting and such timelines should not be open ended. Further, such timelines cannot be extended without specific reasons and that too only once on the analogy of above Regulations**.

86. Further, in the case of Swiss Ribbons Pvt. Ltd. and another vs. Union of India and others [(2019) SCC Online SC 73], the Hon'ble Supreme Court held that in case of arbitrary action of CoC while rejecting a just settlement and/or withdrawal claim, the NCLT could interfere and set

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aside such decision u/s 60 of IBC, 2016. Thus, it is noteworthy that as per this view of Hon'ble Supreme Court in spite of such decision being taken by CoC with the requisite percentage of voting still such action can be set aside if such exercise/ decision is found to be arbitrary**.** Thus, this decision strongly supports our view that the Adjudicating Authority, in the situation where CoC acts in violation of principles of natural justice, can intervene when some prejudice is caused to a party because of such approach of CoC. For the ready reference, the findings of the Hon'ble Supreme Court in Para 80 are reproduced hereunder:

> "The main thrust against the provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report(supra). Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. **If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12A also passes constitutional muster." (Emphasis supplied)**

87. Thus, on the basis of provisions of law governing the conduct of RP and CoC (already in existence), BLRC report, 2015, code of

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conduct as applicable to RP and as proposed for CoC, the judicial approach as regards the applicability of principles of natural justice including the view expressed by Hon'ble Supreme Court in the case of Swiss Ribbons(supra), it can safely be concluded that principles of natural justice have been made part of IBC, 2016 and CIRP Regulations, 2016 subject to only two exceptions. As a result, thereof, we have no hesitation in holding that both RP and CoC are bound to follow these principles in discharge of their duties.

88. Now, we shall deal with the second question i.e., "whether principles of natural justice can be considered as a law for the time being in force within the meaning of section 30(2)(e) of IBC, 2016?" For this purpose, we need to understand the meaning of the term "Law".

88.1 The broadly accepted concept of Law is

(i) *That all the Rules of conduct established and enforced by the legislation, authority (administrative, judicial and quasi-judicial) or in accordance with the established custom and practices of a state, social community. It is also appropriate to state here that anyone of above Rules may constitute law in itself or as combination.*

(ii) *That law also means collection Rules imposed by an authority through legal document governing a specific activity.*

87.2 Concept of Law in jurisprudence

(i) ***Austin -*** *Law is the command of sovereign enforceable by sanctions.*

(ii) ***Salmond -*** *Law is body of principles recognized by State and applied by it in administration of justice.*

(iii) ***Roscoe Pound -*** *It is a tool of social engineering.*

87.3 Kinds of Law

Based upon the historical developments and considering both the definition given above. Law means: -

(i) *Codified & uncodified;*

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(ii) *Civil and criminal;*

(iii) *Substantive and procedural;*

There can be other types of law also but we restrict ourselves to above three categories.

89. Now, we take a helicopter view of sources of law as under: -

(i) ***Legislation –*** *Constitution, Statutes, Rules etc.*

(ii) ***Custom –*** *Practice (s) passed on by one generation to the next-ancient, certain, uniform, not opposed to public policy & continuous.*

(iii) ***Precedent –*** *authoritative & persuasive-ratio decidendi & obiter dicta*

90. This process takes us further to understand as what are the general principles of law. These can be summarized as under: -

a. ***Rule of Law***

b. ***Separation of Powers***

c. ***Ubi jus ibi remedium (no person can be rendered remedy less)***

d. ***Ignorantia facti excusat-ignorantia juris non excusat (ignorance of law is not an excuse)***

e. ***Volenti non fit injuria (damage suffered by consent is not a cause of action)***

f. ***Res ipsa loquitur (the thing speaks for itself).***

g. ***Actus non facit reum nisi mens sit rea (the intent and the act both concur to constitute the crime)***

h. ***Nemo debet bis vexari pro una et eadem causa (it is a rule of law that a man shall not be twice vexed for one and the same)***

i. ***"FIAT JUASTITIA RUAT COELUM" – let justice be done, though the heaven should fall.***

j. PRINCIPLES OF NATURAL JUSTICE

Thus, from the above discussion, it is apparent that the principles of natural justice are also considered as principles of law.

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91. This discussion further takes us to an important aspect i.e., whether principles of natural justice can be considered as "law for the time being enforce" within the meaning of provisions of Section 30(2)(e) and, therefore, any contravention thereof by the RP/ CoC can entitle this Adjudicating Authority to reject the Resolution Plan as compliance of law has to be given overriding effect over the commercial wisdom of CoC. To put it differently, principles of natural justice, being a law in force need to be complied by CoC also and its power to approve the resolution plan U/s 30(4) of IBC, 2016, is also circumscribed by Section 30(2) as RP U/s 30(3) presents to the CoC for its approval only such plans which confirm to the conditions mentioned in Section 30(2) of IBC, 2016.

92. In search of answer to the question as to whether principles of natural justice can be considered as law in force, we need to look at Article 13 to the Constitution of India which reads as under: -

13. Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires, -

(a) "law" includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

(b) "Laws in force" includes laws passed or made by Legislature or other competent authority in the territory of

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India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

93. From the perusal of this Article, it is noted that the terms "Law" and "Laws in force" have been defined in clause (3) of the aforesaid Article. Clause (3)(a) appears to be wider in terms as it includes custom or usage as well having in the territory of India **the force of law**. From the discussion made earlier *herein* before, it has been noted that the custom or usage are source of law along with principles of natural justice which are also considered as a source of law in the legal jurisprudence. It is also pertinent to mention here that the customs or usages are also genesis of principles of natural justice. It may not be out of context to mention that principles of natural justice have been considered as uncodified law which are codified in different statute in various formats. For example, if we go behind the spirit and soul of CPC, we would find that this is purely based on principles of natural justice i.e., no one should be condemned unheard, fair opportunity to all, reasoned order be passed and no one should be a Judge in his own case etc.

94. The question regarding right of pre-emption, based on custom, whether could be considered as "Laws in force" and any infringement of fundamental rights on account of such custom and usage, would render such custom as void, arose before Hon'ble Supreme Court in case of **Sant Ram and Ors. v/s Labh Singh and Ors. 1965 AIR 166, 1964 SCR (7) 745.** The five judges Bench of Hon'ble Supreme Court held as under:-

It is hardly necessary to go into ancient law to discover the sources of the law of pre-emption whether customary or the result of contract or statute. In so far as statute law is

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concerned Bhau Ram's case(2) decides that a law of pre-emption based on vicinage is void. The reasons given by this Court to hold statute law void apply equally to a custom. The only question thus is whether custom as such is affected by Part III dealing with fundamental rights and particularly Art. 19(1)(f). Mr. Misra ingeniously points out in this connection that Art. 13(1) deals with "all laws in force" and custom is not included in the definition of the phrase "laws in force" in clause (3)(b) of Art. 13. It is convenient to read Art. 13 at this stage:

The argument of Mr. Misra is that the definition of "law" in Art. 13(3)(a) cannot be used for purposes of the first clause, because it is intended to define the word "law" in the second clause. According to him, the phrase "laws in force" which is used in clause (1) is defined in (3)(b) and that definition alone governs the first clause, and as that definition takes no account of customs or usage, the law of pre-emption based on custom is unaffected by Art. 19(1)(f). In our judgment, the definition of the term "law" must be read with the first clause. If the definition of the phrase "laws in force" had not been given, it is quite clear that the definition of the word "law" would have been read with the first clause. The question is whether by defining the composite phrase "laws in force" the intention is to exclude the first definition. The definition of the phrase "laws in force" is an inclusive definition and is intended to include laws passed or made by a Legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. in other words, laws, which were not in operation, though on the statute book, were included

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in the phrase "laws in force". But the second definition does not in any way restrict the ambit of the word "law" in the first clause as extended by the definition of that word. It merely seeks to amplify it by including something which, but for the second definition, would not be included by the first definition. There are two compelling reasons why custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force". Firstly, to hold otherwise, would restrict the operation of the first clause in such ways that none of the things mentioned in the, first definition would be affected by the fundamental rights. Secondly, it is to be seen that the second clause speaks of "laws" made by the State and custom or usage is not made by the State. If the first definition governs only cl. (2) then the words "custom or usage", would apply neither to cl. (1) nor to cl. (2) and this could hardly have been intended. It is obvious that both the definitions control the meaning of the first clause of the Article. The argument cannot, therefore, be accepted. It follows that respondent No. 1 cannot now sustain the decree in view of the prescriptions of the Constitution and the determination of this Court in Bhau Ram's case(1). The appeal will be allowed but in the circumstances of the case parties will bear their costs throughout. Appeal allowed.

95. Thus, considering the fact that any law to remain constitutionally valid, in our humble view, must confirm to the principles of natural justice in both the situations i.e., whether codified or uncodified. The violations of principles of natural justice results in arbitrariness, therefore violation of principles of natural justice is a violation of equality clause of Article 14. Further, the concept of substantive and procedural due process as incorporated in Article 21, the fairness of approach/ activity which is

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one of the most significant principles of natural justice, is also made part of Article 21. Thus, any foul play or unfair approach would also result into violation of Article 21. Apart from this, it has also been held in a catena of decisions that principles of natural justice have also got independent existence and applicability in addition to what is stated in Article 14, 19, 20, 21 & 22 to the Constitution of India. Some of the major functions and purposes of law are include delivery of justice, resolution of conflicts bringing orderly change through law and social reforms and these objectives are also part of IBC, 2016 and principles of natural justice are used to fill the gaps which may exist in statute as the legislature cannot be expected to provide for all situations which may arise in future. As we know that Insolvency and Bankruptcy Code has been recently brought in and several experimentations are happening because many issues which were not anticipated or could not be foreseen arise on day to day basis. In this background it becomes more imperative to be guided by the principles of natural justice in achieving the aims and objects of IBC, 2016. The standing committee of finance of parliament in its 32nd report has also taken note of the fact of arbitrary exercise of powers by CoC due to lack of specific regulations/ guidelines within which CoC has to act. Thus, the intent of the standing committee of finance of parliament is very clear that except principle of ***Nemo judex in causa sua*** in the constitution of CoC and specific provisions for distribution of assets/ money amongst various stakeholders, uncodified principles of natural justice are inherently applicable to all such proceedings and there is a need of codification of such principles. Thus, in our view, what is otherwise applicable to proceedings under IBC, 2016 as per judicially accepted/ applicable rules of conduct of a statutory body like CoC may now be made part of statute itself. We may further say that even if, for any reason, such code of conduct is not made part of IBC, 2016, even then principles of natural justice remain applicable on the basis of scheme of the IBC, 2016,

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recommendations made by BLRC in 2015 as part of public policy and being fundamental policy of Indian Law. It may not be out of place to mention here that we could have decided the aspect of applicability of principles of natural justice merely on the basis of such report, discussion paper and scheme of IBC, 2016 itself still we thought it fit to discuss various aspects of principles of natural justice and judicial view thereon to dispel the doubts in the minds of members of CoC that this institution is not subject to any scrutiny on the mistaken belief that their commercial wisdom is supreme in all situations irrespective of its arbitrary or unreasonable approach. This was never a position and that is why the Hon'ble Supreme Court in para 46 in the case of ***"Committee of Creditors of Essar Steel India Limited through Authorized Signatory v/s Satish Kumar Gupta & Ors. in Civil Appeal No.8766-67 of 2019",*** held that the preamble to the IBC was a guiding force for the conduct of CoC and the Adjudicating Authority had the power of limited judicial review to see that the principles/objects of IBC, 2016 as enshrined in preamble to the IBC, 2016 are complied with. Thus, such objects have been considered as law in force. It is further noted that such objects are based upon principles of natural justice i.e., fair play, unbiased approach, good conscience etc. Thus, taking cue from these observations, we have no hesitation in stating that principles of natural justice have to be considered as having force of law within the meaning of Section 30(2)(e) of IBC and any violation thereof the process/procedure adopted while approving the resolution plan, then such resolution plan can be rejected or sent back for reconsideration by CoC in accordance with the provisions of law. For ready reference, such findings/ observations of the Hon'ble Supreme Court are reproduced as under: -

> ***46.*** *"This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders,*

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including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximize the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. ***There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximizing the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in***

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force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

96. Thus, in view of above discussion, we are of the view that principles of natural justice are laws in force, and, therefore, these rules fall within the realm of Section 30(2) (e) of IBC, 2016. Thus, any violation thereof by RP/CoC may render a CoC approved resolution plan liable to be rejected in terms of provisions of Section 31(2) of IBC, 2016.

97. We shall now, deal with the third question i.e., "if the answer to question no.(i), or question no.(ii) or both in affirmative, then, whether in the present case there exist circumstances of violation of

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principles of natural justice i.e., fair opportunity to all, unbiased approach and non-application or good conscience in the interests of all stakeholders etc."

98. For this purpose, we would consider the facts of the case: -

99. The invitation for EoI and date of submission of resolution plan which was originally fixed has been revised.

100. The last date for submission of resolution plan has also been extended beyond the scheduled date of 23.10.2020 at the request of **SRA** to 03.11.2020. Thus, it is not the case that CoC has not extended the last date of submission of resolution plan. However, it has not been done at the request of the Applicant herein.

101. After the submission of resolution plan by the applicant as well as SRA negotiations took place and they were asked to submit the final resolution plans by 12.11.2020. In this regard it is to be noted that this was Diwali period and in addition to that, the applicant *herein* had informed the RP as well as CoC that the Applicant's representative was having some medical emergency.

102. It is noted that the voting lines were pre-poned. No material has been brought on record to show that why voting lines were pre-poned as against the original scheduled particularly during the festive period of Diwali, Padva and Bhai Dooj which are celebrated throughout the country and staff remain on leave. The pre-poned voting line was opened on Sunday immediately after festive period and it is one of the reasons for non-consideration of revised plan submitted by the applicant on 15.11.2020.

103. We have also noted that there is over emphasis on the part of RP/CoC on completion of CIRP within timelines in spite of having reasonably more time considering the pandemic situations wherein even the IBBI had brought Regulation 40C of CIRP Regulations, 2016 whereby timelines were relaxed and such timelines, ultimately, have not been followed due to the action solely attributable to CoC as multiple

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extensions have been taken after 19.11.2020 and the voting finally concluded on 15.12.2020.

104. The Bank of Baroda in its email dated 16.11.2020 agreed to consider the revised plan submitted on 15.11.2020 and put it to voting subject to consideration of legal issue which could arise. Further, in the same email, the fact of festive season and low availability of staff in almost all places was considered to be a genuine ground to accept the same.

105. The State Bank of India, however, opposed this proposal on the ground that timeline to be strictly adhered to as discussed in their meeting held on 12.11.2020.

106. EIK Investment and trading limited having only 0.07% of voting also held that delay in approval/ implementation of resolution plan will hamper the entire resolution process and may result into destruction of value. Hence, the RP should go with the plan already received by RP within the timeline as stipulated during the meeting held on 12.11.2020.

107. Though there is no email of Bank of Maharashtra on record in this regard, however, from the minutes of CoC meeting held on 20.11.2020, it appears that the representative of Bank of Maharashtra also took a view that the original plan submitted within the stipulated timelines only be considered and a shorter extension be sought for submission of application for approval of resolution plan.

108. As stated earlier that the voting was to close on 19.11.2020, however, the request for extension of such voting lines was made just before the expiry of scheduled time. Surprisingly, in the CoC meeting held on 20.11.2020, no discussion appears from the minutes of meeting as to what was the ultimate outcome of scheduled voting, and how many members of CoC actually voted.

109. Apart from this, from perusal of the minutes of meeting dated 20.11.2020 it is noted that different scenarios were discussed by CoC as regard to non-consideration of resolution plan submitted by the applicant on 15.11.2020. It was also decided to seek legal opinion as to

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the future course of action; however, no such report has been brought on record. Here, we may add that it is within the competence of CoC to extend or not to extend the timelines but considering the facts stated as above, it is evident that CoC have chosen one yardstick for themselves and another yardstick for the applicant as the reasons for extension of voting lines as appear from records is that the majority voting rights holders did not have requisite internal approvals, hence, in the absence of any cogent reasons/materials being brought on record, we can reach to only one logical conclusion that voting lines were preponed only to oust the Applicant herein from the race.

110. Another fact is that Letter of Intent was issued to the SRA on 17.12.2020 and ten days' time was granted to provide performance security in terms of the provisions of Section 36B(4) of IBC, 2016. However, application for approval of resolution plan with this Authority has been filed on 22.12.2020 without obtaining such performance security and this fact is also evident from Form H submitted by the RP. Even till date no material has been brought on record and during the course of hearing also it has not been stated that such performance security has been obtained subsequently. This is a flagrant violation of provisions of Regulation 39(4) of CIRP Regulations, 2016. This fact not only strengthen the claims of the applicant but also demolishes the claim made by the RP as well as on behalf of CoC that there is no violation of any provisions of law because as per this regulation the application for approval of resolution plan can be filed with this Adjudicating Authority only after receipt of performance security and furnishing of evidence of receipt of such performance security along with such application is mandatory.

111. Another point which can be considered that the RP informed CoC on a few occasions including that on 20.11.2020 that the CIRP period could be extended by filing an appropriate application which would enable few more parties who had shown their interest to participate and,

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therefore, more value could be fetched. The CoC has not accepted this proposal of the RP and went ahead with voting and consumed almost a month in this process which shows the adamant approach of CoC. This also amounts to abuse of dominant position in the garb of supremacy of its commercial wisdom.

112. Another fact which needs consideration that there is an application filed U/s 43/ 45 of IBC seeking annulment of a transaction relating to the transfer of brand owned by the corporate debtor. The RP has focused on timely completion of CIRP, but the said application has been filed beyond the timelines prescribed under IBC, 2016 read with relevant CIRP Regulations, if Regulation 40C is not applied to both aspects i.e., timely completion of CIRP and filing of such application. Hence, this approach of the RP is also self-contradictory, which lends credence to the claim of the applicant that arbitrary approach was adopted to oust the applicant from the process.

113. From the communications exchanged between the applicant herein and RP, it is noted that the applicant herein on its e-mail dated 18th November, 2020 asked the RP to provide minutes of all CoC meetings where the applicant herein had participated. It was also required by the applicant to confirm whether the revised Resolution Plan submitted by the applicant on 15.11.2020 was put to vote or not and also to provide e-voting results of the CoC meetings where the applicant had participated.

114. The response to this email was given by the RP on 24th November, 2020 wherein the Resolution Professional having regard to the provisions of Regulation 24(5) of CIRP Regulations, 2016 held that since the applicant herein was invited to attend a specific/relevant portion of the meeting. Hence, he could not be considered as participant in the meeting, and, therefore he was not entitled to get minutes of such meeting of CoC.

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115. In this regard, before we arrive at any conclusion, we consider it necessary to take note of relevant provisions of law.

116. It is an undisputed legal position that Resolution Professional is required to convene and attend all meetings of the CoC in terms of provisions of Section 25(2)(f) of IBC, 2016. The RP in terms of provisions of Regulation 24(1) of CIRP, Regulations, 2016 acts as the chairperson of the meeting of the CoC and as per the provisions of Section 24(2) of IBC, 2016, all meetings of the CoC are conducted by the Resolution Professional.

117. Apart from members of the CoC, directors, partners and one representatives of operational creditors may also attend the meetings of CoC without having any right to vote in such meetings.

118. Further, in respect of class of creditors, authorized representative may be appointed who will attend the meetings as a representative of all financial creditors in class.

119. Section 24(8) of IBC, 2016 prescribes that meeting of CoC shall be conducted in such manner as may be specified. IBBI has specified the manner in which such meetings will be conducted. We need not to go in detail in this regard except the manner of conduct of meeting as provided in Regulation 24 of CIRP Regulations, 2016.

120. Before that, it is important for us to note Regulation 2(1)(l) of CIRP Regulations, 2016 which defines that who could be a participant. For the sake of ready reference this provision is reproduced as under: -

> *(1) In these Regulations, unless the context otherwise requires-*
>
> *(l) "participant" means a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting;*

121. As per this Regulation, participant means a person entitled to attend a meeting of the committee under Section 24 of IBC, 2016 or any other

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person authorized by committee to attend the meeting. Thus, this regulation extends the category of persons who can participate in CoC meetings in addition to the persons specified in Section 24 of IBC, 2016. However, the condition precedent is that such person be authorized by the CoC to attend the meeting. Thus, it is evident that RP has got no role or say as far as the authorization of a participant in a CoC meeting is concerned as it is solely based upon the decision of the CoC.

122. Accordingly, we do not find any substance in the claim made by the RP that in terms of provisions of Regulation 24(5), it shall be the RP who will decide the presence of participant in a CoC meeting and up to what time. In fact, if we simply glance at Regulation 24(5) of CIRP Regulations, 2016, any person other than the participants whose presence is required by the RP may be given access with the permission of RP. Thus, valuation professional or legal counsel or team members of RP may fall in that category, and, therefore, such persons may remain present at the discretion of the RP and may not be entitled to receive the meetings because they do not fall into the category of "participant".

123. Further, Regulation 24(7) of CRIP Regulations, 2016 requires that the Resolution Professional shall circulate the minutes of the meeting to "all participants" within 48 hours of the conclusion of the said meeting. In the present case, admittedly, it has not been done so by the RP as evident from the reply of RP.

124. Another contention which has been made on behalf of CoC is that the PRA has no vested right to get its plan approved. Here the applicant is not claiming that his resolution plan be approved, what he is challenging is that, his revised plan should have been considered in the facts and circumstances of the case where the conduct of RP and CoC itself is materially arbitrary and unreasonable and the discretion vested in CoC has been utilized by the CoC with the sole objective just to oust the applicant. Thus, viewed from this angle, this contention made on behalf of CoC is not applicable to the present case. Having stated so, we still

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consider it necessary to refer to the relevant provisions of 36A(10), 36A(11) and 36A(12) of CIRP Regulations, 2016, whereby a prospective resolution applicant has not only be given a right to object against its exclusion but also against inclusion of other prospective resolution applicants.

125. Further, as per the provisions of Regulation 36B(1)(b) of CIRP Regulations, 2016, a resolution applicant whose name has not been included in the provisional list and who has contested such decision of the RP, is also entitled to receive request for resolution plans. These changes have been made in these regulations w.e.f. 03.07.2018. Hence, decisions rendered in the different legal background, in our humble opinion, may not be applicable to the extent as contested on behalf of the CoC.

126. We are further of the view that a prospective resolution applicant whose name has been included in the final list and who has submitted a resolution plan also certainly stands on a better and firm footing as compared to prospective resolution applicant who has not been included in the provisional list itself and, therefore, such resolution applicant can raise its grievance against non-consideration of its resolution plan which is submitted after the last date of submission of plan, in the peculiar circumstances like the present case and particularly when delay is only of just 3 days and CIRP is also progressing well within timelines. As regard to this contention, we can also not ignore Regulation 37 of CIRP Regulations, 2016 which states that the resolution plan should provide for the measures for maximization of value of its assets. In our view considering this aspect Regulation 39(1A) has also been introduced which provides for use a challenge mechanism to enable resolution applicants to improve their plans which was not existing earlier, though there were decisions by NCLT to that effect and there was no bar/legal prohibition against such mechanism. Assuming for a moment, if challenge mechanism, in the present case, would have been used by the

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CoC then the applicant *herein* could have improved its bid in respect of the final plan submitted before the dead line and there should have been a fair competition. Further, no litigation would have arisen and CIRP must have been completed by now. We are further of the view that this mechanism has been brought on statute with the intent to avoid the litigation as regard to a right of PRA to get its resolution plan considered. However, this is still optional. In our view, this mechanism be made a default option and other option can be exercised in exceptional circumstances such as when there is only one resolution plan. Accordingly, we reject this contention made on behalf of the CoC.

127. Another aspect which has been harped upon by the RP and CoC as regard to adherence to the timelines within a period of 180 days after considering exclusion, though the same has not been adhered to by the CoC itself. In this regard, we take note of CIRP Regulation 39(4), which is reproduced as under: -

39. Approval of resolution plan

"(4) The resolution professional shall submit the resolution plan approved by the committee to the Adjudicating Authority, at least fifteen days before the expiry of the maximum period permitted under section 12 for the completion of the corporate insolvency resolution process, with the certification that:

(a) the contents of the resolution plan meet all the requirements of the Code and the Regulations; and

(b) the resolution plan has been approved by the committee."

128. The said regulation was amended w.e.f. 03.07.2018 and, therefore, it is applicable to the present case. From the perusal of above regulation, it is clear that the RP shall endeavour to submit the resolution plan before the **"*maximum period for completion of CIRP U/s 12*"**, hence, it also shows the intent of the legislature that in real life working situations, it may not be possible in every case to complete CIRP by strictly adhering to the timelines. Hence, this regulation also contradicts the claims made

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by RP and CoC. We have highlighted this position of law just to show that in the guise of adherence to timeline, an arbitrary or unreasonable approach in the conduct of CIRP, like in the present case, should not get validation. We further make it clear that it is always desired that CIRP should be conducted within the timelines to the maximum extent.

129. Thus, in view of discussion, we are of the view that the process adopted by RP and CoC is in complete disregard to the scheme object and specific provisions of law. The principles of natural justice have been violated and an apparently, arbitrary, biased and unreasonable approach of CoC is evident. Hence, this position makes its absolutely clear that both RP and CoC were bent upon to approve the Resolution Plan submitted by the SRA. We further hold that the facts narrated herein before are sufficient to justify the allegation of collusiveness between RP and CoC made by the Applicant in IA No. 293 of 2020.

130. In view of the above discussion, we hold that a serious prejudice has been caused not only to the applicant but also to the interest of other stakeholders as well.

131. At this point, we may also consider to observe that CoC was fully aware that this approach would cause litigation in one or the other way and in spite of that they conducted themselves in this manner. The result is before us and even if the resolution plan is approved or rejected as the aggrieved party may take their cause before the Appellate Authority or Hon'ble Supreme Court. Hence, the purpose of insolvency resolution of the corporate debtor in timely manner has also been defeated because of such conduct of CoC.

132. Accordingly, we reject the plea made by the Ld. Counsel for the CoC as well as RP that they were never in a tearing hurry to oust the applicant *herein* from the process and to approve the resolution plan of successful resolution applicant, as they were focused on timely completion of CIRP as facts narrated herein above show other picture and substantiate the claim of undue haste made by the applicant *herein*. Thus, in the present

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case, we hold that principles of natural justice have been grossly violated. Consequently, the actions of RP/CoC can be declared as void.

133. Now, we shall deal with the fourth question i.e., "whether Resolution Plan is a compliant plan, which can be approved U/s 31(1) of IBC, 2016, independent of alleged violations of principles of natural justice?".

134. A claim has been made that the resolution plan has been approved strictly in accordance with the provisions of law and there is no violation of any provision of law i.e., IBC, 2016 read with CIRP Regulations, 2016. We are, however, of the view that it is a wrong statement for the following reasons: -

(i) In the back ground various allegations made by the applicant in IA No. 293/2020, we also consider it necessary to look at the credentials of both resolution applicants just to give a glimpse about the suitability of both resolution applicants though we are fully conscious of the fact that this squarely lies within the domain of CoC and we also do not wish to enter into that.

(ii) From the resolution plan submitted by the Applicant, it is noted that the applicant has submitted jointly i.e., M/s Giriraj Coated Fab Private Limited along with Mr. Sanjay Garg. The turnover of the M/s Giriraj Coated Fab Private Limited in financial year 31.03.2018 and 31.03.2019 is 95.8 crores and 113 crores respectively. It is further noted that this company is engaged in the manufacturing activities. In so far as the credentials of Mr. Sanjay Garg is concerned, he is a qualified Cost & Management Accountant and have more than 25 years of experience in financial market and management. He is further having experience of insolvency resolution as he is also a promoter of one Insolvency Professional agency and has also got experience of assisting in assignments of restructuring debt to the tune of Rs.5500 crores.

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Further, he is also having an experience of handling IBC matters including managing CIRP and Liquidation assignments.

(iii) As far as SRA is concerned, they are having experience of trading in construction materials. Incidentally, they are the distributors of steel products of Brand **"Rathi Tor"** in the region of Northern India.

(iv) First deliberation on the resolution plans took place in the 5th CoC meeting held on 05.11.2020. From the minutes of the meeting, it is noted that certain queries were made and few clarifications and documents were sought which were to be provided by November, 6th 2020. The comparative analysis of both resolution plans has been done but the sole focus is only on as to how the funds would be received and distributed amongst the lenders and other stakeholders.

(v) Thereafter, in the 6th CoC meeting held on 7th November, 2020, it is noted that Mr. Sanjay Garg appeared on behalf of the applicant who was put a question regarding their capabilities to maintain the corporate debtor as a going concern with the same business activities. In response to this query, Mr. Sanjay Garg gave his background and categorically stated that the corporate debtor had a great potential of revival and even they could consider expansion of the manufacturing capacities of the corporate debtor.

135. Thereafter, the discussion was held with Mr. Nikunj Daga, wherein his business background was asked to which he replied that they were into the trading activities. It was also enquired that whether there were any synergies between the present businesses of the resolution applicants and the business of the corporate debtor to which he fairly admitted that current businesses were also different from the business of the corporate debtor but submitted that all are different in nature from each other. It was further stated that the corporate debtor could be easily revived by addition of few machineries and a good business opportunity existed.

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The RP asked a query that the business of corporate debtor required technical expertise on that he replied that the professionals were available to manage all kind of businesses and, therefore, lack of technical knowledge would not be an issue to run the business of the corporate debtor in a profitable manner.

136. As per Section 30(4), it is incumbent upon CoC to examine the viability and feasibility of the resolution plan. This is an additional check being brought in by the legislature, although at the first stage the RP itself sees that the resolution plan is compliant in respect of all provisions of law and particularly of Section 25(2)(h) and evaluation matrix designed with the prior approval of CoC. The provisions of Regulation 38(3) also provides that the resolution plan should demonstrate that it is feasible and has provisions for its effective implementation. The RP, thereafter, submits the resolution plan for approval of CoC and the CoC, then, evaluates such resolution plan as per evaluation matrix and applies its own mind on the feasibility and viability of the resolution plan. Here we consider it pertinent to point out that even in 5th and 6th CoC meeting apart from discussion about credentials and capability of both RAs, there is no categorical finding that their resolution plans were found to compliant of provisions of Regulation 39(3)(a) and 39(3)(b) of CIRP Regulations which is a mandatory requirement. Further, from the perusal of the minutes of CoC meeting held on 12.11.2020, it is noted that there is no whisper or discussion on these crucial aspects by CoC wherein the revised resolution plans were considered and timeline to submit the final plan was set at 07:00 PM on that very date. Thereafter, no CoC meeting has been held and voting lines have been opened on 15.11.2020. Thus, the meeting held on 12.11.2020 is the final meeting of CoC. We have further checked the minutes of meeting held on 20.11.2020, wherein the extension of voting lines was sought and even in that meeting, there is no discussion on the aspect whether the

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resolution plans submitted by both the parties were compliant resolution plans.

137. Another fact which needs serious consideration is that the CoC meeting held on 12.11.2020 commenced at 11.15am and was concluded on 02.40pm as evident from the minutes of meetings thereof. In the said meeting, a decision was taken by the CoC to give a time by 07.00 pm of the same date to submit final Resolution Plan was given. It is also noted that the resolution professional has sent email to both resolution applicants to submit the resolution plans as per the specified schedule after conclusion of said meeting. For the ready reference, the relevant minutes of meetings are reproduced hereunder: -

> "*Thus, it was decided in the CoC meeting that by 7 pm on November 12, 2020 the revised plan updating the changes mentioned above will be submitted by the Resolution Applicant.*
>
> *It was discussed in the CoC that for the sake of clanty and an apple to apple comparison, the offer of Giriaj Coated is for Rs. 800 lakhs over a period of 1 year while Nikunj is offering Rs. 804 lakhs(Rs. 775 lakhs+Rs. 29lakhs of estimated CIRP costs). Further, the distribution in case of Nikunj Udyog is clear but the same is not yet clear in case of Giriraj Coated. The Resolution Professional mentioned that he will prepare a comparison sheet on these very clears, which would enable CoC members to take an informed decision.*
>
> *Bank of Maharashtra enquired that how are RAs aware about the bifurcation of claims of Secured and Unsecured creditors to which RP replied that the said information is already been part of information memorandum shared with the Resolution Applicant.*

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The CoC members discussed in detail on the distribution of the Resolution Plan amount amongst the Secured and Unsecured Financial Creditors.

Bank of Maharashtra and Bank of Baroda mentioned that the amount which has been increased today during the negotiations, be apportioned to the Financial Creditors in the CoC voting percentage to which SBI replied that they need to take the approval from their internal authority for the same.

Further, BOM and BOB also mentioned that they also need to go their competent authority and take approvals on the same. SBI requested the other CoC members to consider the ground reality before coming to any conclusion.

Further, Resolution Professional mentioned that both the Plans will be put for Voting, once the same is received from the resolution applicants and the resolution professional is satisfied with the compliance requirements of the same. The Voting window will start on November, 15th 2020 at 12pm and end on November 19th, 2020 at 6 pm.

The meeting concluded with vot of thanks at 2.40pm.

Resolution Professional thanked all the CoC members for their valuable time and it puts during the entire process.

138. Thus, even the final resolution plan submitted of the SRA has not been perused/analyzed in a CoC meeting which should have been held to do the same after taking into consideration the requirements of Regulation 39(3) and, only thereafter such resolution plan could have been put to vote. Thus, the resolution plan so approved is in violation of provisions

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of Section 30(4) of IBC, 2016 read with Regulation 39(3) of CIRP Regulations, 2016.

139. In this regard, it is also worth noting that even such resolution plan has not been placed before the consideration of members of CoC via any other mode as no material has been placed on record to this effect. Further, there is no mail by RP or sany member of CoC that such resolution plan was found to be in compliance with the requirements of law. Similar is the situation with the resolution plan submitted by the applicant herein before the original dead line set by the CoC.

140. Further, no material has been placed on record to show that any meeting of the CoC, in-fact, took place between 12th November, 2020 and 15th November, 2020 before the voting lines were opened.

141. Thus, the above aspects go to show that apart from the resolution plan being approved in flagrant violations of the provisions of law that CoC members were in a tearing hurry to approve the resolution plan of the SRA though they had sufficient time in their hands to complete the CIRP in a reasonable time i.e., within 90 days from the expiry of the CIRP period.

142. Before we part with this aspect, in our view, for approval of resolution plan, a CoC meeting either in physical mode or in virtual mode is necessary because all the conditions of law need to be satisfied and that cannot be done just by sending the resolution plan through email to all members of CoC. Further, RP is also required to submit its report before such plans can be considered by CoC. Hence, any approval even if sought through e-mail would not meet the requirements of law.

143. From the minutes of 12.11.2020, it is noted that the RP was of the opinion that the resolution plan filed by the Applicant in IA 293/2020 was of discriminatory nature among similarly situated creditors whereas manner of distribution of money amongst various stakeholders in the resolution plan submitted by SRA met the requirements of law.

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However, the factual position is contrary to this. Application filed for approval of resolution plan along with this application was reserved for order on 18.10.2021. During the process of passing an order for approval of resolution plan, it was noted that there was an unfair/unequal treatment between operational creditors and the Government department, being operational creditors. Therefore, this matter was fixed for clarification and additional affidavit has been filed by the RP after rectifying such vital mistake.

144. One more fact which needs our consideration is that the voting as per the extended schedule was concluded on 15.12.2020. Scrutinizer's report has been obtained on 16.12.2020. Letter of Intent has been issued on 17.12.2020. No material has been placed on record to show that any meeting of CoC was held to record these proceedings. We leave it as it is for now, however, the significant point to note is that the RP has sent an email to CoC members on December 19, 2020 wherein it is mentioned that the RP had circulated the details of estimated liquidation expanses for consideration of CoC held on 22nd November, 2020 (copy of minutes of meeting not placed on record) which were required to be approved by the CoC Members as per Regulation 39(B) of CIRP Regulations, 2016 which requires that while approving the resolution plan under Section 30(4) the Committee may make a best estimate of the amount required to make the liquidation cost. The resolution to this effect was not approved by CoC even during extended voting period and, therefore, this email has been written by RP to CoC members to show that RP can file an application for approval of the resolution plan before this Adjudicating Authority.

145. Apart from above short comings/non-compliance of provisions of law, there are several provisions in the resolution plan which make it non-compliant to the provisions of law or conditional and for this reason also, the resolution plan cannot be approved. Such deficiencies/ violations are noted as under: -

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Page 11 of the Resolution Plan and this clause is also repeated at page 69 of the Resolution Plan

- *That in case any of the waivers as mentioned in this Resolution Plan is not allowed by this Tribunal, the Resolution Applicant shall not back out or adversely change any terms or conditions of the plan provided that it should not adversely impact viability plan of the Corporate Debtor; should not tantamount to additional financial obligations over and above the resolution plan amount; should not result in hindrance in acquisition process of CD by the RA.*

Page 34 of the Resolution Plan

- *In case there is any delay/ default from the Resolution Applicant for making payments the applicability of default clause will be acceptable, subject to any delay/ default occurring due to circumstances which are beyond the control of management or promoters.*

Page 56 of the Resolution Plan

- *We hereby agree to infuse the funds as proposed in the Financial Proposal. We understand that the RP and/or the COC have further right to renegotiate the terms of this Resolution Proposal and the decision of the RP and/or the COC in selection of the Selected Applicant and /or the Successful Applicant shall be final and binding on us. Capitalized terms used by not defined herein shall have meaning given to the term I the RFRP.*

Page 58 of the Resolution Plan

- *Upon implementation, as an integral part of this Resolution Plan, the entire Existing Equity Share Capital of the CD shall stand cancelled, extinguished and annulled to the extent of 1,62,74,610 shares on or before the Plan Effective Date and be regarded as reduction of share capital of the CD to 99% and 58.66% shares of the reduced share capital shall be transferred to RA and balance 41.34% shares of the reduced share capital shall remain with public. Further COC has to*

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ensure for transfer of 58.66% shares of the reduced share capital to the RA.

The aforesaid clause is against the provisions amended by SEBI and notified by IBBI whereby a listed company, undergoing CIRP, has to maintain public shareholding at minimum 5%.

146. We have also taken note of the compliance certificate in Form H, wherein the last date of submission of resolution plan has been mentioned as 23.10.2020 though it was revised to 03.11.2020. Further in clause no.12 thereof, the RP has stated that the resolution plan is not subject to any contingency, however, as noted herein before the resolution plan has been found to be conditional or contingent. Hence, this statement is also not correct.

CONCLUSION

147. Thus, considering the above aspects, we hold that the Resolution Plan so approved by CoC is liable to be rejected. Section 31(2) of IBC, 2016 gives a discretion to this Adjudicating Authority, as the word 'may' has been used therein, either to pass the order of initiation of liquidation process of Corporate Debtor or re-initiate the process of approval of resolution plan.

148. In the present case, we prefer the second option and set aside the decision of CoC and direct the RP/ CoC to make a fresh publication of Invitation of Expression of Interest from the prospective resolution applicants in accordance with the relevant provisions of CIRP Regulations, 2016. On completion of the process, the RP may make an appropriate application before this Adjudicating Authority for its consideration in accordance with the provisions of law.

149. **Thus, IA No.31/2021 stands disposed of in terms indicated above**.

150. **The action of CoC in not considering the revised plan submitted on 15.11.2020 is declared null and void for the reasons mentioned herein above. We further hold that the Applicant herein would be given an opportunity afresh to participate in the process of**

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submission of resolution plan. In the result IA No. 293/2020 stands disposed of in above terms.

151. Before parting, we may again emphasize that a statutory institution like CoC which is in most of the cases represented by public financial institutions is expected to act in a fair and neutral manner so that the objects of IBC, 2016 can be achieved for the benefit of all. This can be put in other words i.e., every person/ entity associated with the processes/ proceedings under IBC, 2016 has a legitimate expectation that CoC will act fairly and would take into consideration the broader objectives of IBC, 2016 over its narrow interest of realization of its own dues which are mostly secured otherwise also. Another aspect which needs to be highlighted is that a resolution applicant is required to demonstrate in the resolution plan that it can address the cause of default whereas this should be the responsibility of CoC as Members of CoC are assumed to be knowing the corporate debtor since beginning as they lend money on the basis of business plans/projections given by a corporate debtor. In the end, we have no hesitation in stating that every inappropriate act or omission by CoC cannot be accepted in the garb of supremacy and non-justiciability of commercial wisdom of CoC.

152. This case was heard and reserved for order on 30.03.2022. On perusal of the records, the necessity for clarification was also found. However, considering the aspect that it involved consideration of a resolution plan and is pending for quite long, hence, we proceeded to decide the matter on the basis of contentions already made and material on record. As evident that this matter involved complex issues which were of general public importance, Hence, it required a lot of efforts and it could not be disposed of within the reasonable time, which is the norm of this Bench. Further, it could also not be done so because of the fact that both the

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Members of this Bench were sitting in two Benches during the period of April, 2022.

OUR EXPERIENCE AND EXPECTATIONS

153. This matter made us to ponder as regard to the relevancy to creditor driven process which has replaced the earlier regime of debtors in control. In our view, we have travelled from one extreme to another extreme i.e., where in earlier situation there was no timely resolution and no threat to the errant promotors to act in a disciplined manner following business ethics and moralities. Now, the time taken for resolution of Insolvency/Liquidation is around 450 days as per published statistics as against 330 days prescribed in the IBC, 2016 but still it is much lesser than the time consumed in earlier regimes. However, it is at what cost? The present structure of IBC, 2016 has given unbridled power to the creditors. They have taken large haircuts which was a great controversy in recent past. IBBI in its discussion paper for bringing a code of conduct for CoC has also brought out several other instances wherein the functioning of the CoC was found to be below par. It may not be wrong to say that the present case would add one more matter to that list. Further, the CoC is very much responsible for delays in completion of CIRP. The under valuation of the assets of the corporate debtor is also an issue which needs a serious re-look and methodology prescribed in the present Code/Regulations needs to be changed. The plight of operational creditors including statutory authorities as a consequence of approval of resolution plan or liquidation proceedings in terms of provisions of Section 53 has made the case worst. Thus, it may not be a theoretical statement to state that in this process we have departed from socialistic approach to capitalistic approach. Even the judiciary has adopted a hands-off approach based upon foreign jurisprudence qua economic legislation. In our view, there

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is urgent necessity to adopt a middle path i.e., somewhere between the creditors driven process and debtors in control process to really take care of interests of all stake-holders which include society at large. From the recent developments which have been taken note of in our order, we hope that it will happen sooner.

—Sd—

Virendra Kumar Gupta
Member (Technical)

—Sd—

Rajasekhar V.K.
Member (Judicial)

Shubham kr. Singh
(Private Secretary)

Kavya Prakash Srivastava
(Stenographer)