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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

\+ **W.P.(C) 10599/2021 and CM APPLs. 32697/2021, 25107/2023, 61523/2023 and 62100/2023**

Between: -

MR. KUNWER SACHDEV
APARTMENT NO. 1625
25TH & 26TH FLOOR
TOWER-16, THE MAGNOLIAS
GOLF COURSE ROAD, DLF CITY PHASE- V
GURGAON - 122001 ..... PETITIONER

(Through: Mr.Sudhir Nandrajog, Mr. Siddharth Yadav Sr. Advocates with Mr. Apoorv Agarwal, Ms. Prachi Darji, Ms. Divya Verma and Ms. Kanishka Lunia, Advocates.)

AND

1. IDBI BANK
VIDEOCON TOWER,
E-1 JHANDEWALAN EXTENSION,
NEW DELHI- 110055

2. BANK OF BARODA
CORPORATE FINANCIAL SERVICES BRANCH,
1ST FLOOR, BANK OF BARODA BUILDING,
16 PARLIAMENT STREET,
NEW DELHI- 110001

3. UNION BANK
(ERSTWHILE CORPORATION BANK)
M- 34, OLD DLF COLONY
SECTOR-14, GURGAON – 122001

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4. INDUSIND BANK
INDUSIND BANK, DR. GOPAL DAS BHAWAN
28 BARAKHAMBA ROAD
NEW DELHI 110001

5. AXIS BANK
AXIS HOUSE,
STRESSED ASSETS DEPT.
PLOT NO. 114, TOWER- 1, IV FLOOR,
SECTOR - 128, NOIDA - 201304

6. ICICI BANK
ICICI TOWERS, NBCC PLACE,
BHISHMAH PITAMAH MARG,
NEW DELHI - 110003

7. STATE BANK OF INDIA
STRESSED ASSET MANAGEMENT BRANCH-I
12TH FLOOR, JAWAHAR VYAPAR BHAWAN (STC BUILDING)
1, TOLSTOY MARG JANPATH NEW DELHI - 110001

8. BANK OF MAHARASHTRA
NEAR SUSHANT LOK PHASE 1
SECTOR 43, GURUGRAM 122009

9. DCB BANK
AMBADEEP BUILDING,
15 G, BARAKHAMBA RD,
CONNAUGHT PLACE,
NEW DELHI - 110001

10. HDFC BANK
NO 8 A, MILAP NIKETAN,
BSZ MARG, ITO
NEW DELHI- 110002

11. HERO FINCORP
34, COMMUNITY CENTRE,

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NEAR HOLY ANGELS HOSPITAL BASANT LOK,
VASANT VIHAR,
NEW DELHI - 110057

12. MR. RAJIV CHAKRABORTY
RESOLUTION PROFESSIONAL FOR SU-KAM POWER SYSTEM LTD.
REGISTRATION NO. (IBBI/IPA-001/IP-P00602/2017-2018/11053)
12 SUKHDEV VIHAR, 1ST FLOOR
NEW DELHI- 110025

13. MR. RAJ KUMAR RALHAN
LIQUIDATOR FOR SU-KAM POWER SYSTEM LTD.
REGISTRATION NO. (IBBI/IPA-001/IP-P00981/2017-2018/ 1 1614)
PLOT N0. 54, SECTOR 37, PHASE VI
UDYOG VIHAR, GURUGRAM- 122001

14. IBBI
7TH FLOOR, MAYUR BHAWAN
SHANKAR MARKET, CONNAUGHT CIRCUS
NEW DELHI 110001

15. RESERVE BANK OF INDIA
6 SANSAD MARG
NEW DELHI 110001

16. INDIAN BANKS ASSOCIATION
6TH FLOOR, CENTRE 1 BUILDING
WORLD TRADE CENTRE COMPLEX,
CUFF PARADE, MUMBAI

17. DEPARTMENT OF FINANCIAL SERVICES
(MINISTRY OF FINANCE)
3RD FLOOR, IEEVAN DEEP BUILDING
SANSAD MARG
NEW DELHI 110001 ..... RESPONDENTS

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(Through: Mr. Siddhartha Barua and Mr. Praful Jindal, Advocates for R-1 and 7.
Mr. Ateev Mathur, Advocate for R-5.
Mr. V. K Gupta and Ms. Kaushiki Kashyap, Advocates for R-8.
Mr. Yajur Sharma, Advocate for R-12.)

% Pronounced on: 12.02.2024

J U D G M E N T

1. The petitioner has filed the instant petition seeking the following reliefs:-

> *"(a) Any Writ/order/direction may kindly be issued to IBBI, RBI and IBA to work in tandem and develop a framework or set of guidelines to ensure effective monitoring and functioning of the Committee of Creditors wherein some measure of recourse against CoC may be made available to other stakeholders in the insolvency process in cases of negligence by the CoC;*
> *(b) A Writ of Mandamus and/ or any other Writ, order and /or direction in the nature thereof may kindly be issued in the matter, thereby quashing all the proceedings initiated by the Respondents under Section 19 of the RDDBFI Act, 1993 against the Petitioner by Respondent No. 1 to 6 before the Hon'ble DRT for recovery through personal guarantees;*
> *(c) A Writ of Mandamus and/ or any other Writ, order and/or direction in the nature thereof may kindly be issued in the matter, thereby barring initiation of any proceedings by the Respondents under the RDDBFI Act 1993 or IBC 2016, against the Petitioner;*
> *(d) A Writ of Mandamus and/ or any other Writ, order and/or direction in the nature thereof may kindly be issued in the matter, thereby ordering that the name of the Petitioner be expunged from the proceedings initiated by the Respondents No. 1 for recovery of amounts due under vendor bill discounting facilities extended by the Respondent No. 1 to various vendors; and*

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> *(e) any other Writ/order/direction and further orders, as this Hon'ble Court may deem fit and proper, under the facts and circumstances of the case."*

2. It is noted that *vide* order dated 20.09.2021, this court recorded that the petitioner is the ex-Director of *Su-Kam Power Systems Limited* (hereinafter 'Company'). The said Company already went into the Corporate Insolvency Resolution Process (hereinafter 'CIRP') in 2018 and Interim Resolution Professional (hereinafter 'IRP') under the provisions of Insolvency and Bankruptcy Code, 2016 (hereinafter 'IBC' or the 'Code') had already been appointed.

3. It was further noted in the order dated 20.09.2021 that there were certain grievances against the functioning of the Committee of Creditors (hereinafter 'CoC') and accordingly, with respect to prayers (b), (c) and (d), it was observed that the same were related to proceedings initiated against the petitioner in respect of the personal guarantees issued by him. Since no orders were passed by the Debt Recovery Tribunal (hereinafter 'DRT') by that time, therefore, it was left open to the petitioner to take remedy of appeal to the Debt Recovery Appellate Tribunal (hereinafter 'DRAT') in case, adverse orders are passed against the petitioner; the prayers (b), (c) and (d) were declined to be granted at that stage. Paragraph nos.3 to 5 of the order dated 20.09.2021 read as under:-

> *"3. The petitioner has arrayed 11 banks and financial institutions which are stated to be members of the consortium of lenders ["the Consortium"] of the Company. Notice at this stage be issued to the respondent No. 1-IDBI Bank Ltd., which is the lead bank of the Consortium and the respondent No. 7-State Bank of India ["SBI"], at whose instance the proceedings under the IBC, 2016 were initiated, as well as to the respondent Nos. 12,*

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> *13, 14, 15, 16 and 17. Mr. Akshit Kapur, learned counsel, accepts notice on behalf of the SBI. Mr. Devesh Dubey, learned counsel, accepts notice on behalf of the respondent No. 17. Notice upon the rest of the abovementioned respondents be served through all permissible modes.*
>
> *4. Mr. Sudhir Nandrajog, learned Senior Counsel for the petitioner, submits that when the Company went into Corporate Insolvency Resolution Proceedings ["CIRP"] in 2018, an Interim Resolution Professional ["IRP"] was appointed. According to him, the value of the Company's assets diminished considerably during the period they were in the custody of the Committee of Creditors ["CoC"] and/or the IRP. To this extent, Mr. Nandrajog's submission [which is disputed by learned counsel appearing for the respondents on advance notice] is that the petitioner would have had no recourse to any other authority, including the National Company Law Tribunal ["NCLT"], at that stage. Although the framing of the guidelines contemplated by prayer (a) appears prima facie to be in the realm of a policy decision, the respondents are directed to place on record the mechanism in place with regard to any grievances regarding the functioning of the CoC or the IRP.*
>
> *5. As far as prayers (b), (c) and (d) are concerned, they relate to proceedings initiated against the petitioner in respect of personal guarantees issued by him. No orders have yet been passed by the Debts Recovery Tribunal in this regard. If any such orders are passed, the petitioner will have the remedy of appeal to the Debt Recovery Appellate Tribunal. No relief of the nature contemplated in prayers (b), (c) and (d)can be granted at this stage."*

4. With respect to prayer (a), this court was of the *prima facie* opinion that the said prayer is in the realm of a policy and therefore, the respondents were directed to place on record the mechanism for dealing with grievances, if any, regarding the functioning of the CoC and the IRP. It is thus, seen that the instant petition requires adjudication only in the context of prayer (a).

5. *Mr. Sudhir Nandrajog* and *Mr. Siddharth Yadav*, learned senior counsel, assisted by *Mr. Apoorv Agarwal, Ms. Prachi Darji, Ms. Divya Verma and Ms. Kanishka Lunia* appearing on behalf of the petitioner

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submitted that the company was valued at Rs.300 crores and CoC diminished the value of the company to an extent that respondents 1-12 only received a meagre amount of about Rs.10 crores from the sale of the company. While drawing the attention of this court to the balance sheet dated 31.08.2018 of the company, learned senior counsel submitted that the value of the assets of the company was at least over Rs.274 crores.

6. The Resolution Professional ('respondent-12') had proposed before the CoC that interim finance be raised to keep the company as a going concern. However, the said proposal was not accepted by the CoC, without any rhyme or reason. The denial of an opportunity to the company to operate as a going concern had drastically reduced the fair value of the company. Even the petitioner was not allowed to bring investors in order to settle the outstanding dues owned by the company.

7. The brand value of the company was valued at Rs.179 crores as per the valuation report dated 30.12.2017 by the valuer, namely, *VGrow Advisors Pvt Ltd.* It is pointed out that had the actual value of the company been the same as it was sold out for, the said company, immediately after acquisition, could not have been allowed to extend a corporate guarantee of Rs.150 crores. The same company also availed a loan of Rs.90 crores from HDFC Bank and a charge of Rs.90 crores was created by the bank on the assets of the company on 08.08.2022.

8. In furtherance of this, a CIRP cost of Rs.40 crores was incurred. Even the acts of Resolution Professional and Liquidator ('respondent-13') have been found to be in contravention of the provisions of the

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Code and therefore, an action was taken by the Insolvency and Bankruptcy Board of India (hereinafter 'IBBI') against respondents-12 & 13.

9. It is, therefore, submitted by learned senior counsel that the present matter is a startling case and a glaring example of misuse of power/non-exercise of power by the CoC, causing immense prejudice to the petitioner. He, therefore, submitted that appropriate mechanisms should be made available for raising grievances against the conduct of the CoC for the effective implementation of the provisions of the IBC.

10. Learned senior counsel also submitted that, to a great extent, the grievance raised by the petitioner in the instant petition has been supported by the stand of respondent 14-IBBI. Learned senior counsel have extensively read over the discussion paper, annexed with the reply of respondent 14-IBBI and they submitted that there are grey areas which ought to be filled up and should not be left to the discretion of the CoC merely because of the reason that the CoC happens to be the best judge to take commercial decision with respect to the Corporate Debtor. He submitted that merely on the ground that the commercial wisdom of the CoC is unassailable, the constitutional court is not bereft of the power to issue an appropriate writ directing for framing appropriate guidelines to fill up the voids. Supporting his stand, he placed reliance on the decisions of the Hon'ble Supreme Court in the case of ***Vishaka v. State of Rajasthan***[1] and ***Anoop Baranwal v. Union of India [Election Commission Appointments]***[2]**.**

[1] (1997) 6 SCC 241.
[2] (2023) 6 SCC 161.

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11. The submissions made by learned senior counsel have been strongly opposed by learned counsel appearing for the respective respondents.

12. The learned counsel appearing on behalf of IDBI Bank (hereinafter 'respondent-1') and State Bank of India (hereinafter 'respondent-7'), *Mr. Siddhartha Barua* and *Mr. Praful Jindal*, respectively, vehemently opposed the submissions advanced by the petitioner on the ground that the petitioner has no case before this court under Article 226 of the Constitution of India to take recourse under the extraordinary writ jurisdiction and the petitioner has already availed the alternate remedy available before the National Company Law Tribunal (hereinafter 'Adjudicating Authority').

13. He submitted that the prayers sought in the writ petition are in the realm of policy matters and not amenable to writ jurisdiction. Therefore, he emphasized that when there is a valid law requiring the answering respondents as members of the CoC to act in a particular manner, this court ought not to pass any direction which may be in digression with law or pass any direction which is the prerogative of the legislature.

14. He further submitted that in catena of decisions, the Hon'ble Supreme Court has held that it is beyond the jurisdiction of courts and/or tribunal to scrutinize the opinion expressed by the CoC or transactions approved by the CoC, when it has been voted by a majority share. Hence, the ratio laid down by the Hon'ble Supreme Court applies to the facts of this case as well as the CoC of the Corporate Debtor has, by a majority vote, rejected to raise any 'Interim

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Funds' and such commercial decision of the CoC cannot be subjected to judicial scrutiny/ review by this court in exercise of its extraordinary jurisdiction. Therefore, there is no cause of action to file this writ petition because certain decisions of the CoC have allegedly had an adverse impact on the petitioner.

15. He further submitted that the petitioner's grievance that the valuation of the company was reduced to a meagre sum of money as compared to the original valuation, would not advance the petitioner's case as the petitioner was himself responsible for the devaluation. During the pendency of CIRP, the petitioner filed numerous suits before different forums which led to further deterioration in the valuation of the company.

16. He submitted that during the CIRP of the Corporate Debtor, the petitioner attempted to claim the ownership of the brand name 'SU-KAM' i.e., one of the most valuable assets of the Corporate Debtor and the substratum of the business of the Corporate Debtor, by including the brand in his net worth certificate submitted along with the Expression of Interest (hereinafter 'EOI').

17. He submitted that due to the aforesaid attempts of the petitioner to usurp the brand name of the Corporate Debtor, the Resolution Professional was unable to get prospective resolution applications. Accordingly, in October 2018, the Resolution Professional was constrained to approach this court to protect and preserve the most valuable asset of the Corporate Debtor and this court *vide* order dated 30.10.2019 in C.S. (Comm.) No. 1155/2018 permanently restrained the petitioner from using the brand name. According to him, it is due to

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these acts of the petitioner and the frivolous litigations agitated by the petitioner, the value of the Corporate Debtor diminished.

18. *Mr. Amol Sharma*, learned counsel appearing for Reserve Bank of India (hereinafter 'respondent-5') also supported the contentions raised by respondent-1 and respondent-7.

19. *Mr. V.K. Gupta* and *Ms. Kaushiki Kashyap*, learned counsel appearing on behalf of Bank of Maharashtra (hereinafter 'respondent-8') submit that the present writ petition is not maintainable in view of the Section 28 of the Indian Contract Act, 1872 and further reliefs claimed by the petitioner will have the effect of discharging the petitioner from the contractual obligations of repaying the bank dues.

20. *Mr. Dhruv Gupta*, learned counsel, appearing on behalf of the HDFC bank (hereinafter 'respondent-10') has also supported the contentions raised by respondent-1 and respondent-7 and submitted that it has only the minimal voting share of 0.14% in the CoC during the subsistence of the CIRP and was never afforded any significant decision-making power within the CoC. Furthermore, he submitted that the 'commercial wisdom' of the CoC is sacrosanct and is not subject to the judicial review.

21. *Mr. Yajur Sharma*, learned counsel appearing on behalf of respondent-12 i.e., erstwhile Resolution Professional of the Corporate Debtor has also opposed the submissions advanced by the petitioner. He submitted that respondent-12 acted as a mere facilitator in the CIRP as per the scheme envisioned in the IBC. The role of a Resolution Professional is to moderate all the stages of the CIRP and to ensure that the process runs as smoothly and timely as possible. He

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submitted that it is crucial to note and distinguish that the Resolution Professional's area of operation is heavily dependent on and influenced by the intent and approvals of the CoC.

22. He further submitted that respondent-12 has been mindful of his duties towards the Corporate Debtor from the very onset of the CIRP and the same can be inferred from the minutes of the CoC. He submits that respondent-12 discharged its duties in line with Section 25 of the IBC and under the supervision of the CoC, which can be verified from the minutes of the CoC.

23. *Mr. Puneet Jain and Ms. Lisha Bhati*, learned counsel appearing on behalf of respondent-14 i.e., Insolvency and Bankruptcy Board of India (hereinafter 'IBBI') submits that IBC offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals. One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms which facilitate a formal and time-bound insolvency resolution process and liquidation. The Resolution Professional identifies the financial creditors and constitutes a CoC. Operational creditors above a certain threshold are allowed to attend meetings of the CoC but do not have voting power. Most of the decisions of the CoC require 66% majority of votes. Decisions of the CoC are binding on the Corporate Debtor and all its creditors. The CoC considers proposals for the revival of the debtor and must decide

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whether to proceed with a revival plan or liquidation within a period of 180 days (subject to a one-time extension of 90 days).

24. He further submitted that Section 196(1)(q) of the IBC empowers IBBI to specify a mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities. Accordingly, the IBBI has framed the Insolvency and Bankruptcy Board of India (Grievance and Complaint Handling Procedure) Regulations, 2017 ("Complaint Regulations"). The Complaint Regulations lay down a comprehensive mechanism in consonance with the mandate of the IBC for consideration and disposal of grievances against the insolvency professionals etc.

25. He further submitted that the Section 218 of the Code also confers discretion on the IBBI, wherein, it can order inspection/investigation when it has 'reasonable ground to believe' that the insolvency professional has contravened any of the provisions of the Code or the rules or regulations or the directions issued by the IBBI. It is submitted that in all cases where a complaint has been made, the IBBI is not required to order an inspection/investigation. An inspection/ investigation can be ordered only where the IBBI comes to a *prima facie* opinion that there has been a violation which necessitates a further inspection/investigation.

26. I have heard the learned counsel appearing on behalf of the parties and have carefully examined the record placed before the court.

27. The entire fulcrum of the dispute before this court emanates from the insolvency process of the company called 'SU-KAM' which was initiated by the Adjudicating Authority *vide* its order dated

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05.04.2018. Thereafter, an advertisement inviting EOI was published by the Resolution Professional on 04.06.2018. Further, the Resolution Professional also issued the request for resolution plans on 19.07.2018, pursuant to which resolution plans were invited in respect of the Corporate Debtor. Thereafter, various disputes arose in the CIRP of the Corporate Debtor like the trademark dispute of brand name 'SUKAM', ineligibility of the petitioner's resolution plan as per Section 29A(h) of the Code etc. As no eligible resolution plan could be evolved, the CoC in its meeting held on 23.01.2019, decided to make another attempt to obtain a resolution plan for the Corporate Debtor, with 28.02.2019 being the last date for the submission of the plans.

28. On 19.03.2019, at a meeting of the CoC, the Resolution Professional apprised the CoC of the financial position of the Corporate Debtor. At this meeting, the CoC was also informed by the Resolution Professional that since no compliant resolution plan had been received, the Resolution Professional would be filing an application seeking liquidation of the Corporate Debtor before the Adjudicating Authority on or at the expiry of the Corporate Debtor's CIRP. Accordingly, in view of the absence of any compliant resolution plan, the Resolution Professional filed an application seeking for the liquidation of the Corporate Debtor under Section 33(1)(a) of the IBC before the Adjudicating Authority on 27.03.2019 and the Adjudicating Authority approved the liquidation of the Corporate Debtor.

29. It is pertinent to note that this court *vide* order dated 20.09.2021 has *prima facie* held that what remains to be adjudicated is only with

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respect to the prayer (a) of the instant writ petition, as already reproduced above.

30. Before embarking on the moot question, this court finds it appropriate to go down the memory lane and understand the fundamental features of the Insolvency and Bankruptcy Code, 2016. Considering the compelling need for a robust insolvency regime, the IBC is enacted with the objective to not drive companies into liquidation but to revive the companies from the debt trap.

Legislative intent behind IBC

31. The IBC, which came into force on 28.05.2016, has consolidated the insolvency and bankruptcy laws in India in a uniform regime with an objective to streamline the process of insolvency in India. At this juncture, it is pertinent to mention about the prologue to the IBC which led to the enactment of this Code. The Bankruptcy Law Reforms Committee ("BLRC") in its report dated 04.11.2015 observed as under:-

> *"The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts. Given the conflicts between creditors and debtors in the resolution of insolvency as described in Section 3.2.2, the chances for consistency and efficiency in resolution are low when rights are separately defined. It is problematic that these different laws are implemented in different judicial fora. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there*

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must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome.

The uncertainty that these problems give rise to shows up in case law on matters of insolvency and bankruptcy in India. Judicial precedent is set by "case law" which helps flesh out the statutory laws. These may also, in some cases, pronounce new substantive law where the statute and precedent are silent.

(Ravi, 2015) reviews judgments of the High Courts on BIFR cases, the DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. The judgments reviewed are those after June 2002 when the SARFAESI Act came into effect. It is illustrative of both debtor and creditor led process of corporate insolvency, and reveals a matrix of fragmented and contrary outcomes, rather than coherent and consistent, being set as precedents.

In such an environment of legislative and judicial uncertainty, the outcomes on insolvency and bankruptcy are poor. World Bank (2014) reports that the average time to resolve insolvency is four years in India, compared to 0.8 years in Singapore and 1 year in London. Sengupta and Sharma, 2015 compare the number of new cases that file for corporate insolvency in the U.K., which has a robust insolvency law, to the status of cases registered at the BIFR under SICA, 1985, as well as those filed for liquidation under Companies Act, 1956. They compare this with the number of cases files in the UK, and find a significantly higher turnover in the cases that are filed and cleared through the insolvency process in the UK. If we are to bring financing patterns back on track with the global norm, we must create a legal framework to make debt contracts credible channels of financing.

This calls for a deeper redesign of the entire resolution process, rather than working on strengthening any single piece of it. India is not unusual in requiring this. In all countries, bankruptcy laws undergo significant changes over the period of two decades or more. For example, the insolvency resolution framework in the UK is the Insolvency Act of 1986, which was substantially modified with the Insolvency Act of 2000, and the Enterprise Act

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of 2002. The first Act for bankruptcy resolution in the US that lasted for a significant time was the Bankruptcy Act of 1889. This was followed by the Act of 1938, the Reform Act of 1978, the Act of 1984, the Act of 1994, a related consumer protection Act of 2005. Singapore proposed a bankruptcy reform in 2013, while there are significant changes that are being proposed in the US and the Italian bankruptcy framework this year in 2015. Several of these are structural reforms with fundamental implications on resolving insolvency....

The BLRC went on to state:[.....] India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India.

***

Speed is of essence for the working of the bankruptcy code, for two reasons.

First, while the 'calm period' can help keep an organization afloat, without the full clarity of ownership and control, significant decisions cannot be made.

Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's (Financial Sector Legislative Reforms Commission) treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

[Emphasis supplied]

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32. At this stage, it is also crucial to point out that while placing the Code before the Parliament, the then Finance Minister, laid emphasis on the fundamental objective that the Code strives to achieve and stated that:–

> *"SHRI ARUN JAITLEY: One of the differences between your Chapter 11 and this is that in Chapter 11, the debtor continues to be in possession. Here the creditors will be in possession. Now, the SICA is being phased out, and I will tell you one of the reasons why SICA didn't function.*
> *Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments were passed. Now since they were challenged before the Supreme Court, it didn't come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place.*
> *But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that became more non-performing investment non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created."*

33. As a matter of abundant caution, this court considers it apposite to note that the speeches given by members of the legislature are *per se* not binding for the interpretation of a statute. For, they are considered as external aids of interpretation. However, reliance can be placed upon the decisions of the Hon'ble Supreme Court in the cases of ***State***

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of Travancore-Cochin v. Bombay Co. Ltd.[3] and ***K.S. Paripoornan v. State of Kerala***[4], wherein, it was held that the speech delivered by the mover of the Bill could be considered as an accepted canon of interpretation as for the purpose of understanding the *bonafide* objective of the legislation. The speech of a mover of the Bill, undeniably, lends perspective and this court has referred to the same in that limited context.

34. Furthermore, a bare perusal of the Preamble of the Code would reveal that the intention of the legislature is to consolidate the law regarding reorganization and insolvency resolution of corporate persons, partnership firms and individuals keeping in mind the interests of all the stakeholders. The Preamble of the Code states as follows:-

> *"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 an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."*

35. Thus, the epilogue of the legislation i.e., Preamble of the Code clearly elucidates that the intention of the legislature was always to set free the Corporate Debtor from the clutches of the debt trap and at the same time, without causing prejudice to the interests of all other stakeholders like financial creditors, operational creditors etc. Reliance

[3] (1952) 2 SCC 142.
[4] (1994) 5 SCC 593.

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can also be placed upon the decision of the Hon'ble Supreme Court in the case of ***Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta***[5]**,** wherein, the Hon'ble Supreme Court emphasized on the importance of the maximisation of the assets of the Corporate Debtor as compared to driving the Corporate Debtor into the liquidation. The relevant paragraph of the said decision is being reproduced herein for reference:-

> *"11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions.* ***Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy.*** *What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3]."*

[5] (2019) 2 SCC 1.

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36. At this point, it is pertinent to place reliance on the case of ***Swiss Ribbons & Ors. v. Union of India & Ors.***[6]**,** wherein, the constitutional validity of various provisions of the IBC was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court while upholding the constitutional validity of various provisions of the IBC reiterated the primary goal of the legislation and observed as under:-

> *"12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation.* ***The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management.***
> *Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends"*
>
> *[Emphasis supplied]*

37. In paragraph no.27 of ***Swiss Ribbons (supra)***, the Hon'ble Supreme Court reiterated that the Code was beneficial legislation to put the Corporate Debtor on its feet and not merely recovery legislation for the creditors. The court also discussed the importance of the Code in stabilising the economy by contributing to the

[6] (2019) 4 SCC 17.

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development of credit markets. Paragraph nos.27 and 28 of the said decision read as under:-

> *"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions.* ***Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta : (2019) 2 SCC 1]***
> *28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in*

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management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests….."

[Emphasis supplied]

38. Thus, from the foregoing discussion, it is crystal clear that the sacrosanct intention behind this Code is to revive the Corporate Debtor from the shackles of the debt trap by protecting the Corporate Debtor from its own management and from a corporate death by liquidation.

Scheme of IBC

39. In view of the legislative intent behind this Code, at this juncture, it is pertinent to understand the scheme of the IBC, which is divided into different parts. Part I of the IBC deals with preliminary matters, such as its application and definitions. Part II deals with insolvency resolution and liquidation for corporate persons. Part III deals with insolvency resolution and bankruptcy for individuals and partnership firms. Part IV provides for the regulation of insolvency professionals, agencies and information utilities. Part V contains miscellaneous provisions.

40. The process of the CIRP kickstarts with the application before the Adjudicating Authority. Section 7 of IBC lays down the procedure for the initiation of the CIRP by the financial creditor or any other person or more financial creditors jointly. The financial creditor may file an application before the Adjudicating Authority along with the proof of default and the name of a Resolution Professional proposed to act as the IRP in respect of the Corporate Debtor. Once the Adjudicating Authority is satisfied, as to the extent of the default and has ensured that the application is complete and no disciplinary

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proceedings are pending against the proposed Resolution Professional, it shall admit the application.

41. Section 8 of the IBC provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed.

42. Section 9 of the IBC stipulates that after the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the operational creditor does not receive payment from the Corporate Debtor or notice of the dispute under sub-Section (2) of Section 8 is given, it would be open for the operational creditor to file an application before the Adjudicating Authority for initiating a CIRP.

Protagonist of the CIRP – CoC and its 'commercial wisdom'

43. The CoC, which is constituted under the provisions of Section 21 of the Code, is at the helm of affairs of the entire CIRP. Section 21 of the IBC is reproduced herein for reference:-

> *"21. Committee of creditors. - (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.*
> ***(2) The committee of creditors shall comprise all financial creditors of the corporate debtor: Provided that a [financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors: [Provided further that the first proviso shall not apply to a financial***

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creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares [or completion of such transactions as may be prescribed], prior to the insolvency commencement date.]

(3) [Subject to sub-sections (6) and (6A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor, - (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor; (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility 3 [***] provide for a single trustee or agent to act for all financial creditors, each financial creditor may- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share; (b) represent himself in the committee of creditors to the extent of his voting share; (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

[(6A) Where a financial debt— (a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an

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application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6B) The remuneration payable to the authorised representative-

under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6A) shall be as specified which shall be form part of the insolvency resolution process costs.]

[(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors: Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.]

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

44. The CoC is the pivotal body under the Code which is responsible for making decisions on various aspects i.e., whether a resolution plan should be adopted or not, whether the resolution plan should be adopted in the same form as presented to it or in a modified

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form and whether the attempt for the revival of the Corporate Debtor is made or not. The final decision on a resolution plan is taken by the CoC and for approval, a resolution plan is required to be voted in favour by not less than 66% of the voting share of the financial creditors, as per Section 30(4) of the Code. It is also relevant to point out that though the Resolution Professional is obligated to run the business of the Corporate Debtor as a going concern during the CIRP but as per Section 28(3) of the Code, he cannot take certain decisions relating to the management of the Corporate Debtor without prior approval of the CoC by a vote of at least 66% of the voting share.

45. Reference is also made to the decision of the Hon'ble Supreme Court in the case of ***Jaypee Kingston Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors.***[7]**,** wherein, the significance of the CoC in the CIRP process was discussed. It was held as under:-

> *"97.1. It is, therefore, evident that corporate insolvency resolution, with approval of the plan of resolution, is ultimately in the exclusive domain of the Committee of Creditors. Even during the resolution process, major decisions as regards management and finances of the corporate debtor are in the control of the Committee of Creditors. As per the composition delineated in Section 21 of the Code, the Committee of Creditors is comprised of all financial creditors of the corporate debtor; and the frame of Section 21 puts it beyond doubt that the voting share of each financial creditor is determined on the basis of financial debt owed to it. It is also clear from Section 30(4) as also Section 28(3) that the major decisions of approval are to be taken by the Committee of Creditors by a vote of at least 66% of the voting share of the financial creditors and not by a simple majority.*
> ***The reasons and purpose for assigning such a unique and decisive role in corporate insolvency resolution to the Committee***

[7] (2022) 1 SCC 401.

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of Creditors and for that matter, to a substantial block of not less than 2/3 of voting share of the financial creditors, were extensively delineated in the report of the Bankruptcy Law Reforms Committee of November 2015 while remarking on the essential theme that the "appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it".

97.2. In K. Sashidhar, while setting out the relevant extracts from the said Report, this Court exposited on the primacy of the commercial wisdom of the Committee of Creditors in the corporate insolvency resolution process in the following terms : (SCC pp. 183- 84, paras 52-53)

> *"52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business*

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decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

53. In the report of the Bankruptcy Law Reforms Committee of November 2015, primacy has been given to CoC to evaluate the various possibilities and make a decision. It has been observed thus:

*"**The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.***

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

97.3. In Essar Steel, a three-Judge Bench of this Court surveyed almost all the relevant provisions concerning corporate insolvency resolution process; and, as noticed above, explained the assignments of different role players in this process. In that context, this Court again explained the primacy endowed on the commercial wisdom of the Committee of Creditors and reasons therefor, with a further detailed reference to the aforesaid report of the Bankruptcy Law Reforms Committee of November 2015. Apart from the passage from the said report that was noticed in K. Sashidhar (reproduced hereinabove), the Court noticed various other passages from this report in Essar Steel; and one part thereof, which further underscores the rationale for only financial creditors handling the process of resolution, could be usefully reproduced as under (part of para 56 at pp. 578-79 of SCC):

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"56. … 5.3.1. Steps at the start of the IRP

***

4. Creation of the creditors committee

The creditors committee will have the power to decide the final solution by majority vote in the negotiations. The majority vote requires more than or equal to 75% of the creditors committee by weight of the total financial liabilities. The majority vote will also involve a cram down option on any dissenting creditors once the majority vote is obtained. …

The Committee deliberated on who should be on the creditorscommittee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations.

Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors."

(emphasis in italics is in original)

97.4. In Essar Steel, the Court referred to the above-quoted and other passages from the judgment in K. Sashidhar (supra) and explained the decisive role of the commercial wisdom of the Committee of Creditors, inter alia, in the following passages:

"54. Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion.

…

***

59. Even though it is the resolution professional who is to run the business of the corporate debtor as a going concern during the intermediate period, yet, such resolution professional cannot take certain decisions relating to management of the

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corporate debtor without the prior approval of at least 66% of the votes of the Committee of Creditors….

*60**. Thus, it is clear that since corporate resolution is ultimately in the hands of the majority vote of the Committee of Creditors, nothing can be done qua the management of the corporate debtor by the resolution professional which impacts major decisions to be made in the interregnum between the taking over of management of the corporate debtor and corporate resolution by the acceptance of a resolution plan by the requisite majority of the Committee of Creditors. Most importantly, under Section 30(4), the Committee of Creditors may approve a resolution plan by a vote of not less than 66% of the voting share of the financial creditors, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.***

***

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

97.5. In Maharashtra Seamless Ltd. (supra), again, a three-Judge Bench of this Court referred extensively to the enunciations in Essar Steel and reiterated the primacy assigned to the commercial

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wisdom of the Committee of Creditors in the matter of corporate insolvency resolution."

[Emphasis supplied]

46. In light of the judicial pronouncements discussed herein above, it is crystallized that the entire CIRP is aimed at bringing the Corporate Debtor back on its feet and it is acknowledged that the appropriate disposition of a defaulting Corporate Debtor and the choice of solution, to keep the Corporate Debtor as a going concern or to liquidate it, is to be made by the financial creditors, who could assess the viability and may take decisions in terms of the existing liabilities. In other words, the decision as to whether the Corporate Debtor be resurrected or not, by acceptance of a particular resolution plan, is essentially a business decision and hence, is left to the committee consisting of the financial creditors i.e., the CoC but, with the requirement that the resolution plan, for its approval, ought to muster not less than 66% votes of the voting share of the financial creditors.

47. At this point, it is pertinent to make a reference to the decision in the case of ***Kalpraj Dharamshi and Anr. v. Kotak Investment Advisors Ltd. & Anr.***[8]**,** wherein, the Hon'ble Supreme Court once again emphasized on the importance of the 'commercial wisdom' of the CoC and upheld the sanctity of the CoC while recognising the legislative intent of the Code. Paragraph no.142 of the said decision is reproduced hereunder:-

"142. ***This Court has held, that it is not open to the Adjudicating Authority or Appellate Authority to reckon any other factor other than specified in Sections 30(2) or 61(3) of the I&B Code.***

[8] (2021) 10 SCC 401.

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> ***It has further been held, that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.*** *This Court thus, in unequivocal terms, held, that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan.* ***They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It has been held, that the opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. It has been held, that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the Adjudicating Authority and that the decision of CoC's 'commercial wisdom' is made non-justiciable.*** *"*

48. Furthermore, the Hon'ble Supreme Court in the case of ***Committee of Creditors of Essar Steel India Ltd. thr. Authorised Signatory v. Satish Kumar Gupta***[9]**,** observed as under:-

> *"67...Thus,* ***it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2)of the Code****, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar"*

49. Additionally, it is relevant to mention that the Hon'ble Supreme Court in the case of ***Ramkrishna Forgings Ltd. v. Ravindra Loonka***[10]**,** held that the courts cannot qualitatively examine the commercial wisdom of the CoC which is at the helm of affairs of Corporate Debtor

[9] 2019 SCC OnLine SC 1478.
[10] 2023 INSC 1013.

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throughout the entire CIRP. Paragraph no.27 of the said decision is reproduced herein for reference:-

> ***"27.*** *Having considered the matter in depth, the court is unable to uphold the decisions rendered by the Adjudicating Authority-National Company Law Tribunal as also the National Company Law Appellate Tribunal. The moot question involved is the extent of the jurisdiction and powers of the Adjudicating Authority to go on the issue of revaluation in the background of the admitted and undisputed factual position that no objection was raised by any quarter with regard to any deficiency/irregularity, either by the resolution professional or the appellant or the committee of creditors, in finally approving the resolution plan which was sent to the Adjudicating Authority-National Company Law Tribunal for approval. Further, the statutory requirement of the resolution professional involving two approved valuers for giving reports apropos fair market value and liquidation value was duly complied with and the figures in both reports were not at great variance.* ***Significantly, the same were then put up before the committee of creditors, which is the decision-maker and in the driver's seat, so to say, of the corporate debtor. K. Sashidhar v. Indian Overseas Bank [(2019) 213 Comp Cas 356 (SC); (2019) 12 SCC 150.] and Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta [(2020) 219 Comp Cas 97 (SC); (2020) 8 SCC 531.] are clear authorities that the committee of creditors's decision is not to be subjected to unnecessary judicial scrutiny and intervention. This came to be reiterated in Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh [(2020) 9 Comp Cas-OL 683 (SC); (2020) 11 SCC 467] , which also emphasised that the committee of creditors's commercial analysis ought not to be qualitatively examined and the direction therein of the National Company Law Appellate Tribunal to direct the successful resolution applicant to enhance its fund flow was disapproved of by this court.*** *Thus, if the committee of creditors, including the financial creditors to whom money is due from the corporate debtor, had undertaken repeated negotiations with the appellant with regard to the resolution plan and thereafter, with a majority of 88.56 per cent. votes, approved the final negotiated resolution plan of the appellant, which the resolution professional, in turn, presented to the Adjudicating Authority-National Company Law Tribunal for approval, unless the same was failing the tests of the provisions of the Code, especially sections 30 and 31, no interference was warranted.*

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> *In Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. [(2021) 225 Comp Cas 565 (SC); (2021) 10 SCC 401.] , the court concluded that [See page 643 of 225 Comp Cas.] :"…* ***in view of the paramount importance given to the decision of committee of creditors, which is to be taken on the basis of 'commercial wisdom', the National Company Law Appellate Tribunal was not correct in law in interfering with the commercial decision taken by the committee of creditors by a thumping majority of 84.36 per cent."***
>
> *[Emphasis supplied]*

50. Thus, considering the aforesaid, it is undoubtedly clear that in this saga of the entire CIRP procedure, the protagonist is the CoC and the 'commercial wisdom' of the CoC acts like the 'North Star' for the resolution process and its participants. The 'commercial wisdom' of the CoC is the guiding light to every decision-making of the CoC in pursuance of the financial distress faced by the Corporate Debtor. The underlying idea behind this concept is to acknowledge the business acumen of the CoC as well as its keenness to arrive at a mutually satisfactory resolution since their own interests are entangled with the resolution process.

51. In view of the foregoing discussion, this court shall now examine the need for a code of conduct for the efficient functioning of the CoC in the entire CIRP in light of the legislative mandate and *bonafide* objectives of the Code.

Code of Conduct for the CoC

52. The resolution process contemplated under the IBC is duly regulated by a legal regime, constituting the Code and extant rules. In a system committed to the rule of law, CoC, which is a pivotal body under the regime of CIRP, cannot be devoid of any code of conduct for

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its functioning and discharging obligations under the provisions of the Code.

53. The demand for an extensive code of conduct for the CoC has been time and again raised by various concerned stakeholders. It is pertinent to mention that the Insolvency Law Committee in its report dated 20th February, 2020 has also recommended a standard code of conduct for the functioning of the CoC. The relevant extracts of the report is reproduced herein for reference:-

> *"12.3. However, given the importance of the CoC in the scheme of the CIRP, the Committee agreed that institutional financial creditors should take necessary steps to ensure that their representatives are capable of discharging their duties in a timely and efficient manner. In this regard, the Committee took the view that:*
>
> - *Financial institutions should build strong verticals for stressed asset management, with personnel that has adequate training and expertise. Mechanisms for the periodic review of the performance of these verticals should also be put in place.*
> - *The personnel that represents financial creditors in meetings of the CoC should be sufficiently empowered to take decisions on the spot, and discharge their duties consistent with the letter and spirit of the Code.*
> - ***There is a need to develop guidance to help members of CoCs discharge their duties consistent with the letter and spirit of the Code. This may be developed in the form of Best Practices, by industry bodies such as the IBA.***
>
> *12.4. The Committee also agreed that any training delivered or guidance developed per paragraph 12.3 above should ensure that members of the CoC are duly cognizant of their role vis-à-vis insolvency professionals. The resolution professional is accountable to all stakeholders of the corporate debtor, including the CoC which is responsible for proposing her appointment, fixing the terms of her remuneration and giving approvals before she can take certain actions. The Committee agreed that the resolution professional on "which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process," should be*

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> *accountable for effective discharge of their functions to these stakeholders, including the CoC. The CoC is also uniquely placed to assist and facilitate the resolution professional's discharge of her duties. Members of the CoC should assist the resolution professional in maximising the value of the corporate debtor's assets by discharging their own duties with alacrity. They should also cooperate with the resolution professional at all times, by providing requisite information and assistance as sought by the resolution professional.*
> *12.5. At the same time, the CoC should be vigilant to see that the credibility of and confidence in the insolvency profession is maintained. Insolvency professionals are duty-bound to act in the interests of all the stakeholders of the corporate debtor, for which they must stay independent of specific stakeholders, including specific members of the CoC. Through their own actions, members of the CoC must ensure that any conflict of interest is avoided, and where required they should take recourse to the "standardised and structured" disciplinary and grievance redressal mechanisms set up by insolvency professional agencies and IBBI, to pursue any relief against insolvency professionals."*

54. Regulation 17(1A) of the CIRP Regulations, 2021 also provided that the members of the CoC are bound by the provisions of the Code and shall discharge the functions in compliance with the said CIRP regulations. The Regulation 17(1A) is reproduced herein:-

> *"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."*

55. Also, considering the need for an effective code of conduct for CoC members, the Insolvency Law Committee in its report dated 20th May, 2022 has again raised the said issue. The committee, *inter alia*, recommended that:–

> *"2.62. The Committee took note of the above and discussed that the recommendations made in its last report have not resulted in a change in the conduct of financial creditors in the CoC. It felt that since the CoC drives the CIRP and is given wide powers to utilise*

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its commercial wisdom, such powers should be balanced with adequate accountability. Since the decisions of the CoC impact the life of the corporate debtor, and consequently its stakeholders, it needs to be fair and transparent in its decisions. ***Therefore, the Committee agreed that it would be suitable for the IBBI to issue guidelines providing the standard of conduct of the CoC while acting under the provisions governing the corporate insolvency resolution process, pre-packaged insolvency resolution process and fast track insolvency resolution process. This may be in the form of guidance that provides a normative framework for conducting these processes.*** *In order to empower the IBBI to issue such guidelines, the Committee recommended that appropriate amendments may be made to Section 196 of the Code. Further, the* ***Committee discussed that the MCA may consult with relevant financial sector regulators such as SEBI and RBI, to frame an appropriate enforcement mechanism for the standard of conduct. Several members of the Committee agreed that the IBBI may be most suitable to carry out such enforcement.*** *A discussion paper addressing the standard of conduct has already been issued by the IBBI pursuant to the discussion of the Committee.*

2.63. The Committee also discussed the scope of the standard of conduct. It noted that the standard of conduct should lay down the rules of procedural fairness and efficiency that the CoC is required to abide by. However, the Committee cautioned that the standard of conduct should not be utilised to expand or limit the substantive powers of the CoC and should not provide guidance that diminishes its commercial wisdom. Additionally, such a standard of conduct should elucidate the role of the CoC vis-à-vis insolvency professionals, in line with the discussion in the 2020 Report of this Committee."

56. The sacrosanct value of the commercial wisdom of the CoC and the scope of limited judicial review by the Adjudicating Authority and appellate authority (hereinafter National Company Law Tribunal i.e., 'NCLAT') have already been discussed in the case of ***Essar steel (supra).*** The contours of the commercial wisdom of CoC have also been discussed in the case of ***K. Sashidhar (supra),*** wherein, the Hon'ble Supreme Court held that:–

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"33……The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC muchless to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

……. Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

39. ***In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors…….***

44. ……. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting*……."*

[Emphasis supplied]

57. However, it is reiterated that CoC, while discharging the crucial decisions under the Code, shall be bound by a certain code of conduct

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for the effective delivery of its duty as per the legislative intent of the IBC. The CoC, which effectively comes into the picture during the CIRP of the Corporate Debtor, cannot act *dehors* the *bonafide* objectives which the Code strives to achieve.

58. A key element envisaged in the code of conduct for the CoC is adherence to the due process in decision-making. The concept of procedural due process involves various elements and one of the most fundamental ones is the Wednesbury principles of reasonableness. It is to be noted that in the case of ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation***[11]**,** Lord Greene observed as under:-

> *"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. ... In another, it is taking into consideration extraneous matters. "it must be proved to be unreasonable in the sense that the court considers it a decision that no reasonable body can. It is not what the court considers unreasonable."*

59. Placing further reliance on ***All India Railway Recruitment Board v. K. Shyam Kumar***[12]**,** wherein, the Hon'ble Supreme Court observed as under:-

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[11] [1948] 1 KB 223.
[12] (2010) 6 SCC 614.

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> *"36. Wednesbury principle applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to "assess the balance or equation" struck by the decisionmaker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalise or lay down a straitjacket formula and to say that Wednesbury has met with its death knell is too tall a statement." "**Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere." "Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in everyday terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision**."*
>
> *[Emphasis supplied]*

60. The Wednesbury principles of reasonableness and proportionality are a substantial part of any executive action taken by the authority. The fiduciary responsibility vested in the CoC to impart the effective function under the IBC is quintessential, which assumes

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that the CoC shall base its decision on the principle of reasonableness and proportionality. After all, fairness in the process of decision-making is the most important factor which lends credibility to the outcome of the decision.

61. This court has also had an occasion to traverse beyond the Indian jurisprudence to look for the effective delivery of the responsibility of the institutions under the insolvency regime. It is pertinent to look at the insolvency regime in the United Kingdom (UK) which is extensively covered by the Insolvency Act, 1986 and Enterprise Act, 2002. In the UK, insolvency is governed by the administration procedure which is to provide a company, limited liability partnership or partnership with a breathing space to allow a rescue package or more advantageous realisation of assets to be put in place. The aim of administration proceedings is to rescue and rehabilitate insolvent but potentially viable companies. An Administrator is a person or persons appointed under Schedule B1 of the Insolvency Act, 1986 to manage the company's affairs, business and property. On appointment, an Administrator becomes an officer of the court. The Administrator must generally perform his/her functions in the interests of the creditors as a whole. The Administrator is duty bound to follow the Statements of Insolvency Practice (SIP) which is a set of guidance notes issued to insolvency practitioners with a view to maintain standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency. The purpose of SIPs is to outline basic principles and essential procedures with which insolvency practitioners are required to comply.

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Analysis

62. Considering the case in hand, the dispute revolving around the CIRP of the company and the 'commercial wisdom' of the CoC of the Corporate Debtor has travelled through numerous judicial forums. It is undoubtedly clear that the decision to sell Corporate Debtor as a going concern has been upheld by the NCLAT *vide* order dated 03.02.2023, wherein, the NCLAT held that:–

> *"24. In view of what has been said above, we are of the view that Adjudicating Authority did not commit any error in passing the Order dated 11th May, 2022 approving the Auction of Corporate Debtor as a going concern in favour of Respondent Nos. 5 to 8. The Adjudicating Authority also did not commit any error in rejecting the Application filed by the Appellant praying for appointment of 'Independent Forensic Auditor' for conducting a forensic audit. The said application has rightly been rejected by the Adjudicating Authority. Valuation having already been done and auction sale notice have been issued and auction sale conducted identifying the Successful Auction Bidder, there was no occasion for directing any appointment of forensic auditor at the instance of the appellant.*
> *25. We thus are of the view that no grounds have been made to interfere with the impugned order dated 11th May, 2022 in this Appeal. There is no merit in the Appeal, the Appeal is dismissed."*

63. Furthermore, the Hon'ble Supreme Court *vide* its judgement dated 07.08.2023, in Civil Appeal (Diary) No. 13873/2023 upheld the decision of the NCLAT and held that:-

> *"2 We find no reason to interfere with the impugned order of the National Company Law Appellate Tribunal dated 03 February 2023 in Company Appeal (AT) (INS) No 673 of 2022 since no substantial question of law is involved in the appeal.*

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3 The Civil Appeal is accordingly dismissed."

64. Additionally, when the petitioner raised the grievance against respondent-12 regarding the mismanagement of the affairs of the company, then the Disciplinary Committee of respondent-IBBI in its order dated 31.03.2022, recognized that the respondent-12 has failed to perform his duties as per the objectives of the Code and barred him to take any other assignment for a period of one year. Subsequently, when the petitioner raised the grievance against respondent-13, the Disciplinary Committee of respondent-IBBI *vide* its order dated 13.06.2023 addressed the grievance and held that respondent-13 contravened provisions of the Code in respect of incurring unreasonable cost during liquidation and barred him to work as an insolvency professional for a period of two years. Thus, it is crystallised that majority of the grievances raised by the petitioner have already been addressed by the appropriate forums available to him.

65. Furthermore, it is pertinent to refer to Section 63 of the Code which excludes the jurisdiction of any civil court with respect to a matter where the Adjudicating Authority would have jurisdiction. Section 63 of the Code is reproduced herein for the reference -

> *"63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which the National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction."*

66. Thus, the Adjudicating Authority has the sole authority to decide any question of law or facts arising out of pending insolvency

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proceedings– including any alleged mismanagement of assets done by the CoC or any other wrongdoing. The Adjudicating Authority is the main adjudicating body which ensures that the resolution process is carried out in a time-bound manner following the principles of fairness, reasonableness and transparency. It also ensures that all the key players in the resolution process have acted in accordance with their responsibilities and law.

67. The Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd (supra)*** has held:-

> *"73...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 have been taken care of..."*

68. Therefore, the Adjudicating Authority has the authority to regulate the conduct of the CoC through powers of judicial review as formulated aforesaid to ensure that it is functioning as per the role and responsibilities delineated under the Code. The Adjudicating Authority maintains a supervisory role over the entire CIRP and is empowered under Section 60 of the Code to take action in any question relating to the insolvency proceedings.

69. Recently, the Hon'ble Supreme Court in the case of ***M.K. Rajagopalan v. Periasamy Palani Gounder***[13], laid emphasis on the primacy of the commercial wisdom of the CoC and its non-justiciable

[13] (2024) 1 SCC 42.

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character as envisaged in the objectives of the Code. The relevant paragraph of the aforesaid decision reads as under:-

> *"160. As noticed hereinbefore, commercial wisdom of CoC is given such a status of primacy that the same is considered rather a matter non-justiciable in any adjudicatory process, be it by the adjudicating authority or even by this Court.* ***However, the commercial wisdom of CoC means a considered decision taken by CoC with reference to the commercial interests and the interest of revival of the corporate debtor and maximisation of value of its assets. This wisdom is not a matter of rhetoric but is denoting a well-considered decision by the protagonist of CIRP i.e. CoC****. As observed by this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , the financial creditors forming CoC "act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision." This Court also observed in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] that "[t]here is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan."*
>
> *[Emphasis supplied]*

70. It is relevant to point out that the CoC is entrusted with fiduciary duties as per the legislative mandate of the IBC. The functions entrusted to the CoC are wide in nature and in order to effectively deliver the duties entrusted upon it, a code of conduct is of pertinent value.

71. It is widely said that, '*with great power comes great responsibility'*. One of the foremost functions of law is to circumscribe power with responsibility. The CoC, being entrusted with the fiduciary duty to bring back the Corporate Debtor from the vicious cycle of debt trap and revive the company, must be saddled with the responsibility

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of ensuring that the decisions taken by it in the exercise of its 'commercial wisdom' shall be in tune with the *bonafide* objectives of the Code. In order to facilitate an effective and responsible functioning of the CoC, an elaborate, determinative and efficient code of conduct for the functioning of CoC assumes great relevance.

72. Thus, there is an urgent need for an effective code of conduct for the functioning of the CoC. It be noted that the code of conduct is not intended to question the justness of the decision, as the wisdom of the CoC is to be upheld. Even the Adjudicatory Authority is not empowered to do so, as the interference of the Adjudicatory Authority is also limited to the manner set forth in the Code. A code of conduct shall be subservient to the Code and not in excess of it. However, the process of decision-making must reflect fairness, reasonableness and objectivity, irrespective of the outcome.

73. The code of conduct shall be effectively based on the principles of integrity, objectivity, professional competence, due care and confidentiality. Furthermore, the code of conduct must also reflect the fundamental features of the Wednesbury principles of fairness and proportionality in order to give true meaning to the legislative intent of the IBC. Moreover, it should also reflect the principles of natural justice to be followed by the CoC while taking any measure with respect to any stakeholder during the subsistence of the entire CIRP.

74. Most recently, in ***Dilip B. Jiwrajka v. Union of India***[14], the Hon'ble Supreme Court decided and upheld the constitutionality of

[14] 2023 SCC OnLine SC 1530.

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Sections 95 to 100 of the IBC. One of the foremost challenges in the said case was in the absence of the principles of natural justice, especially the opportunity of hearing, at the stage of examination of the application by the IRP and consideration of the application - *admission* or *rejection* – by the Adjudicating Authority. The Hon'ble Supreme Court upheld the constitutional validity of the provisions, however, the contention regarding the applicability of the principles of natural justice was duly acknowledged by the court. It was observed that the principles of natural justice have an application not only on administrative action, but also on judicial and quasi-judicial action. Paragraph no.63 of the said decision in this regard reads as under:-

> *"63. The principles of natural justice have also been expanded to require that a reasoned order be passed against an individual who is liable to be affected. Though, at one stage, in the evolution of law, a distinction was sought to be drawn between administrative action, on one hand, and judicial or quasi-judicial, on the other, as the law has progressed, that distinction has been substantially watered down, if not obliterated. In other words, the requirement to observe the principles of natural justice arises both in the context of purely judicial or quasi-judicial action as well as administrative action which has an adverse impact on the individual or entity against which action is initiated."*

75. Further, it was held that the principles of natural justice cannot be applied in a straight-jacket manner and the extent of application is to be seen in specific circumstances of the case. From a full-fledged hearing to a bare minimum opportunity, the range is wide. Paragraph no.64 in this regard reads thus:-

> *"64. At the same time, it needs to be noted that the principles of natural justice are not to be construed in a straitjacket. The nature of natural justice is liable to vary with the exigencies of the*

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> *situation. In a given situation, it may extend to a fully-fledged evidentiary hearing while, on the other hand, the principles of natural justice may require that a bare minimum opportunity should be given to an individual who is liable to be affected by an action, to furnish an explanation to the allegations or the nature of the enquiry."*

76. A careful parameter to decide the true import of the principles of natural justice in a case depends upon the legislative scheme of the legislation in question. In ***Dilip B. Jiwrajka (supra)***, the Hon'ble Supreme Court observed that at the time of examination of the application by the IRP, the debtor is not deprived of an opportunity to participate in the process. Simultaneously, when the application is considered by the Adjudicating Authority for the purpose of admission or rejection thereof, the authority must observe the principles of natural justice by giving an opportunity to the debtor. A key takeaway from this decision is the acknowledgement of the court towards the observance of the principles of natural justice in the CIRP so as to ensure that any decision affecting a party is not made without providing an opportunity for hearing to the same. Therefore, the code of conduct, as envisaged, must reflect due observance and regard for the principles of natural justice. A commitment to these fundamental jurisprudential principles shall make the decisions of the CoC more just and credible.

77. However, it is undoubtedly clear that the constitutional courts are not entrusted with the responsibility of framing legislation and policies as it is the exclusive domain of the legislature. The Constitution of India is based on the principle of separation of powers, which is *sine qua non* for the effective functioning of a vibrant

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democracy. Reference can be made to the decision of the ***State of Himachal Pradesh and Ors. v. Satpal Saini***[15]**,** wherein, it was held as under:-

> *"6... A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature... "*

78. Reference is also made to the decision of this court in the case of ***Rahul Bhardwaj and Anr. v. State and Ors.***[16] and the decision of the Hon'ble Supreme Court in the case of ***Ashwini Kumar v. Union of India***[17]**,** wherein, it was categorically held that it is a settled law that framing policies is the domain of the legislature.

79. At this juncture, it is pertinent to look at the Section 196 of the Code which delineates the functions of the IBBI and empowers the

[15] (2017) 11 SCC 42.
[16] 2022 SCC OnLine Del 189.
[17] (2020) 13 SCC 585.

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IBBI to frame guidelines. Section 196 is reproduced herein for the reference:-

> *" 196. Powers and functions of Board. –*
> *(1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely: -*
>
> *(a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations; 1 [(aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code;]*
> *(b) specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities;*
> *(c) levy fee or other charges 2 [for carrying out the purposes of this Code, including fee for registration and renewal] of insolvency professional agencies, insolvency professionals and information utilities;*
> *(d) specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities;*
> *(e) lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;*
> *(f) carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder;*
> *(g) monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder;*
> *(h) call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities;*
> *(i) publish such information, data, research studies and other information as may be specified by regulations;*

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(j) specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data;

(k) collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases;

(l) constitute such committees as may be required including in particular the committees laid down in section 197;

(m) ***promote transparency and best practices in its governance;***

(n) maintain websites and such other universally accessible repositories of electronic information as may be necessary;

(o) enter into memorandum of understanding with any other statutory authorities; (p) issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities;

(q) specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder;

(r) conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board;

(s)specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations;

(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and

(u) ***perform such other functions as may be prescribed.***

(2) The Board may make model bye-laws to be to adopted by insolvency professional agencies which may provide for –

(a) the minimum standards of professional competence of the members of insolvency professional agencies;

(b) the standards for professional and ethical conduct of the members of insolvency professional agencies;

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(c) requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory;

Explanation. - For the purposes of this clause, the term "non-discriminatory" means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified;

(d) the manner of granting membership;

(e) setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board;

(f) the information required to be submitted by members including the form and the time for submitting such information;

(g) the specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members;

(h) the grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof;

(i) a fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies;

(j) the grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies;

(k) the quantum of fee and the manner of collecting fee for inducting persons as its members;

(l) the procedure for enrolment of persons as members of insolvency professional agency;

(m) the manner of conducting examination for enrolment of insolvency professionals;

(n) the manner of monitoring and reviewing the working of insolvency professional who are members;

(o) the duties and other activities to be performed by members;

(p) the manner of conducting disciplinary proceedings against its members and imposing penalties;

(q) the manner of utilising the amount received as penalty imposed against any insolvency professional.

(3) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under this Code, the Board shall have the same powers as are vested in a civil

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court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely: –

(i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person at any place;

(iv) issuing of commissions for the examination of witnesses or documents."

80. The aforesaid provision duly indicates that the IBBI is entrusted with a wide set of powers and functions to regulate the exercise of insolvency resolution. It is relevant to take a cue from the latin maxim *"Quando lex aliquid alicut camadit, concedere videtur id sine quo ipsaesse"* which translates as– when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist. Even otherwise also, the aforesaid provision contains a residuary clause to enable the IBBI to "perform such other functions as may be prescribed". The IBBI, under the provisions of the IBC, is marked with the responsibility to further the speedy resolution and to provide an effective grievance redressal mechanism.

81. It is thus clear that as per the mandate of the IBC, the IBBI is entrusted with the responsibility of framing guidelines with respect to the insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code. Section 196(1)(u) of the IBC also gives the mandate to the IBBI to perform any other function as may be prescribed, as noted above.

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82. It is relevant to point out that the respondent-IBBI has submitted that the IBBI notified a Discussion Paper on 27.08.2021 on various issues involving CIRP, including the code of conduct for the CoC. Comments were invited on that Discussion Paper and the IBBI is still in the process of framing guidelines. However, till date, there exists no code of conduct or guidelines framed by the IBBI for the effective functioning of the CoC.

Conclusion

83. In light of the abovementioned judicial pronouncements and discussion, it is vividly seen that the CoC takes the driver's seat in this entire voyage of CIRP of Corporate Debtor and the 'commercial wisdom' of the CoC functions in the same way as the Global Positioning System (GPS) works for the driver in any journey, leading the way to the intended destination. The commercial wisdom of the CoC is placed on the highest pedestal in a sense that even the Adjudicating Authority is not empowered to lift the veil on the merits of the decision.

84. Considering the significant role which the CoC plays in the entire CIRP and the sanctity of the 'commercial wisdom' of the CoC which is protected by the legislative mandate from unnecessary interference, there is a compelling need for the code of conduct/guidelines for the effective working of the CoC in order to fulfil the *bonafide* objectives of the Code. The need for a code of conduct assumes greater importance in light of the fact that once a decision is taken by the CoC, the aggrieved party is deprived of the legal remedies, except to a limited extent. Therefore, what attains

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significance is that the decision-making process should itself be infused with sufficient safeguards of reasonableness, fair-play, proportionality and adherence to the principles of natural justice.

85. Accordingly, this court is inclined to partly allow the instant petition with respect to prayer (a). The IBBI is directed to frame/finalise a code of conduct/guidelines in accordance with its stand set out in the instant case, principles mentioned hereinabove and as per other relevant considerations, within a reasonable period of time, preferably, within three months from the date of the passing of this judgment, for the effective functioning of the CoC, without diluting the sanctity of the 'commercial wisdom' of the CoC and the legislative intent of the IBC.

86. The petition is disposed of in the aforesaid terms alongwith the pending applications.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

FEBRUARY 12, 2024/MJ/am

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